

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Date 10/10/2008

Department of Commerce
National Oceanic and Atmospheric Administration
FOR CERTIFYING OFFICIAL: Suzanne Hilding
FOR CLEARANCE OFFICER: Diana Hynek

In accordance with the Paperwork Reduction Act, OMB has taken action on your request received 10/10/2008

ACTION REQUESTED: Revision of a currently approved collection
TYPE OF REVIEW REQUESTED: Regular
ICR REFERENCE NUMBER: 200810-0648-003
AGENCY ICR TRACKING NUMBER:
TITLE: Reporting Requirements for Sea Otter Interactions with the Pacific Sardine Fishery; Coastal Pelagic Species Fishery Management Plan
LIST OF INFORMATION COLLECTIONS: See next page

OMB ACTION: Approved without change
OMB CONTROL NUMBER: 0648-0566
The agency is required to display the OMB Control Number and inform respondents of its legal significance in accordance with 5 CFR 1320.5(b).

EXPIRATION DATE: 08/31/2010 DISCONTINUE DATE:

BURDEN:	RESPONSES	HOURS	COSTS
Previous	0	0	0
New	2	1	10
Difference			
Change due to New Statute	0	0	0
Change due to Agency Discretion	2	1	10
Change due to Agency Adjustment	0	0	0
Change Due to Potential Violation of the PRA	0	0	0

TERMS OF CLEARANCE:

OMB Authorizing Official: Kevin F. Neyland
Deputy Administrator,
Office Of Information And Regulatory Affairs

List of ICs

IC Title	Form No.	Form Name	CFR Citation
Report of sea otter interaction			50 CFR 660.61

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

1. Agency/Subagency originating request	2. OMB control number b. <input type="checkbox"/> None a. _____ - _____
3. Type of information collection (<i>check one</i>) a. <input type="checkbox"/> New Collection b. <input type="checkbox"/> Revision of a currently approved collection c. <input type="checkbox"/> Extension of a currently approved collection d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired f. <input type="checkbox"/> Existing collection in use without an OMB control number For b-f, note Item A2 of Supporting Statement instructions	4. Type of review requested (<i>check one</i>) a. <input type="checkbox"/> Regular submission b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____ c. <input type="checkbox"/> Delegated
7. Title	5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No
8. Agency form number(s) (<i>if applicable</i>)	6. Requested expiration date a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____
9. Keywords	10. Abstract
11. Affected public (<i>Mark primary with "P" and all others that apply with "x"</i>) a. ___ Individuals or households d. ___ Farms b. ___ Business or other for-profit e. ___ Federal Government c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government	12. Obligation to respond (<i>check one</i>) a. <input type="checkbox"/> Voluntary b. <input type="checkbox"/> Required to obtain or retain benefits c. <input type="checkbox"/> Mandatory
13. Annual recordkeeping and reporting burden a. Number of respondents _____ b. Total annual responses _____ 1. Percentage of these responses collected electronically _____ % c. Total annual hours requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____	14. Annual reporting and recordkeeping cost burden (<i>in thousands of dollars</i>) a. Total annualized capital/startup costs _____ b. Total annual costs (O&M) _____ c. Total annualized cost requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____
15. Purpose of information collection (<i>Mark primary with "P" and all others that apply with "X"</i>) a. ___ Application for benefits e. ___ Program planning or management b. ___ Program evaluation f. ___ Research c. ___ General purpose statistics g. ___ Regulatory or compliance d. ___ Audit	16. Frequency of recordkeeping or reporting (<i>check all that apply</i>) a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure c. <input type="checkbox"/> Reporting 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly 4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually 7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____
17. Statistical methods Does this information collection employ statistical methods <input type="checkbox"/> Yes <input type="checkbox"/> No	18. Agency Contact (person who can best answer questions regarding the content of this submission) Name: _____ Phone: _____

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
 - (i) Why the information is being collected;
 - (ii) Use of information;
 - (iii) Burden estimate;
 - (iv) Nature of response (voluntary, required for a benefit, mandatory);
 - (v) Nature and extent of confidentiality; and
 - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator, Deputy Assistant Administrator, Line Office Chief Information Officer, head of MB staff for L.O.s, or of the Director of a Program or StaffOffice)

Signature

Date

Signature of NOAA Clearance Officer

Signature

Date

**SUPPORTING STATEMENT
REPORTING AND CONSERVATION MEASURES FOR SEA OTTER INTERACTIONS
WITH THE PACIFIC SARDINE FISHERY; COASTAL PELAGIC SPECIES
FISHERY MANAGEMENT PLAN
OMB CONTROL NO.: 0648-xxxx**

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

In accordance with the regulations implementing the Endangered Species Act ([ESA](#)), NOAA Fisheries (NMFS) initiated an ESA section 7 consultation with the U.S. Fish and Wildlife Service (USFWS) regarding the possible effects of implementing Amendment 11 (71 FR 36999) to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). USFWS determined that formal consultation was necessary on the possible effects to the threatened southern sea otter. USFWS completed a biological opinion (BO) for this action and although it was concluded that fishing activities were not likely to jeopardize the continued existence of the southern sea otter there remained the potential to incidentally take southern sea otters. USFWS determined that certain measures should be put in place to ensure the continued protection of the species. The reporting requirements and conservation measures put forth in this action stem from this BO and are an attempt to provide further conservation efforts for southern sea otters. The reporting requirements include:

1. If a southern sea otter is entangled in a net, regardless of whether the animal is injured or killed, such an occurrence must be reported within 24 hours to the Regional Administrator, NMFS Southwest Region.
2. While fishing for CPS, vessel operators must record all observations of otter interactions (defined as otters within encircled nets or coming into contact with nets or vessels, including but not limited to entanglement) with their purse seine net(s) or vessel(s). With the exception of an entanglement, which will be initially reported as described in #2 above, all other observations must be reported within 20 days to the Regional Administrator.

When contacting NMFS after an interaction, fishermen would be required to provide information regarding the location (latitude and longitude) of the interaction and a description of the interaction itself.

Do to low number of documented interactions (two) and the small overlap between the fishery and the distribution of southern sea otters it is believed that cases as described above are extremely rare. However, there is currently no legal requirement for fishermen to report such interactions under the current regulations and with low observer coverage within this fishery, the true frequency and type of interactions occurring is unknown. The data gathered from this collection-of-information will prove extremely valuable in determining whether interactions are as rare as believed or whether stronger mitigation is necessary to ensure protection for the threatened southern sea otter. This information could prove valuable to both fishermen and/or the conservation of sea otters as it will establish a record of the presence or absence of sea otter interactions.

2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.

The information gathered from this collection will be used by NMFS and the U.S. Fish and Wildlife Service to determine whether further measures will need to be implemented to ensure the continued protection of the southern sea otter. Sea otter interactions that are reported to NMFS immediately, e.g. when an otter is caught in a net, will be examined at that time by NMFS and USFWS; all other observations will be reviewed on an annual basis.

As explained in the preceding paragraphs, the information gathered has utility. NOAA Fisheries will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response #10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Although the information collected is not expected to be disseminated directly to the public, results may be used in scientific, management, technical or general informational publications. Should NOAA Fisheries Service decide to disseminate the information, it will be subject to the quality control measures and pre-dissemination review pursuant to Section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

Information may be submitted via mail (in instances not involving capture of an otter in a net), telephone, fax or email.

4. Describe efforts to identify duplication.

No reporting requirements or other collections are currently gathering the same or similar information.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

This collection of information will involve small businesses and/or other small entities. The only cost involved with this collection of information should be the cost involved in contacting NMFS. In order to minimize the burden, acceptable methods of submission will be mail, phone, fax, or email.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

This collection is required to meet the terms and conditions put forth by the U.S. Fish and

Wildlife Service, and are necessary for the fishery to continue in its current state. If this collection is not conducted or is conducted less frequently there may be risk to the threatened southern sea otter.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

NA

8. Provide a copy of the PRA Federal Register notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Public comments were solicited on this information collection during the proposed rule stage of the action (RIN 0648-AU72). Only one comment was received that spoke in part to the collection of information requirements. The commenter stated that the requirement to report entanglement incidents within the 24 hour timeframe by providing the latitude and longitude and description of the occurrence, seemed “straight forward and useful to confirm the extreme infrequency of interactions.” However, the commenter also suggests that the requirement to report non-entanglement interactions is “unclear and unnecessary”. In response to this comment, the final rule clarifies that with regards to the reporting of non-entanglement interactions, it is not the intent of the regulations to require fishermen to report casual observations of sea otters. This action only requires fishermen to report when sea otters occur within encircled nets or come into contact with fishing gear or the vessel. This information could prove valuable to both fishermen and/or the conservation of sea otters as it will establish a record of the presence or absence of sea otter interactions.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

Neither payments nor gifts have been offered.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

No assurance of confidentiality is provided.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

No sensitive questions will be asked.

12. Provide an estimate in hours of the burden of the collection of information.

The total number of respondents expected annually is 2 or less.

The frequency of response will be once per year.

The average response time per respondent is expected to be 15 minutes or less.

The total annual response time will be 30 minutes or less.

This collection of information is a precautionary approach. To date only one such other interaction has occurred in the fishery that under these new requirements would require a response. Therefore we predict that interactions that require a response are unlikely and there will not be many responses.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in #12 above).

The only expected cost to the respondents is the cost associated with contacting NMFS, through mail, phone, fax, or email. At a maximum cost of \$5 per response, the annual cost would be \$10.

14. Provide estimates of annualized cost to the Federal government.

The only estimated cost to the Federal government is the original mailing of notice to the fleet informing them of new requirements.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB 83-I.

This is a new program.

16. For collections whose results will be published, outline the plans for tabulation and publication.

There are no plans to publish the results of this collection.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

NA.

18. Explain each exception to the certification statement identified in Item 19 of the OMB 83-I.

There are no exceptions.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

The collection will not employ statistical methods.

amount equal to five percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under section 3 of the Act of September 2, 1937, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

INTERAGENCY COOPERATION

SEC. 7. [16 U.S.C. 1536] (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required;

(II) the information that is required to complete the consultation; and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972; the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) **BIOLOGICAL ASSESSMENT.**—(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as in mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) **LIMITATION ON COMMITMENT OF RESOURCES.**—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).

(e)(1) **ESTABLISHMENT OF COMMITTEE.**—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with sub-

section (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this action for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

- (A) The Secretary of Agriculture.
- (B) The Secretary of the Army.
- (C) The Chairman of the Council of Economic Advisors.
- (D) The Administrator of the Environmental Protection Agency. Agency.¹
- (E) The Secretary of the Interior.
- (F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code¹

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

¹So in law. At the end of section 7(e)(3)(D) of the Endangered Species Act of 1973, the second "Agency." should had been stricken.

¹So in law. At the end of section 7(e)(4)(B) of the Endangered Species Act of 1973, the period at end of the paragraph was omitted.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or

license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as in mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability and reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species of the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4), and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as

are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhance-

ment measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW.—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28, United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.—Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 101 and 102 of the Marine Mammal Protection Act of 1972, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

INTERNATIONAL COOPERATION

SEC. 8. [16 U.S.C. 1537] (a) FINANCIAL ASSISTANCE.—As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1415 of the Supplemental Appropriation Act, 1953 (31 U.S.C. 724), use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act.

(b) ENCOURAGEMENT OF FOREIGN PROGRAMS.—In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

SEC. 303. CONTENTS OF FISHERY MANAGEMENT PLANS 16 U.S.C. 1853

95-354, 99-659, 101-627, 104-297

(a) **REQUIRED PROVISIONS.**—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall—

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are—

(A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interest in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify—

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

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(5) specify the pertinent data which shall be submitted to the Secretary with respect to commercial, recreational, charter fishing, and fish processing in the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, economic information necessary to meet the requirements of this Act, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors;

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 304(a) (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan;

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(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and analyze the likely effects, if any, including the cumulative conservation, economic, and social impacts, of the conservation and management measures on, and possible mitigation measures for—

(A) participants in the fisheries and fishing communities affected by the plan or amendment;

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants; and

(C) the safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery;

(10) specify objective and measurable criteria for identifying when the fishery to which the plan applies is overfished (with an analysis of how the criteria were determined and the relationship of the criteria to the reproductive potential of stocks of fish in that fishery) and, in the case of a fishery which the Council or the Secretary has determined is approaching an overfished condition or is overfished, contain conservation and management measures to prevent overfishing or end overfishing and rebuild the fishery;

(11) establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority—

(A) minimize bycatch; and

(B) minimize the mortality of bycatch which cannot be avoided;

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(12) assess the type and amount of fish caught and released alive during recreational fishing under catch and release fishery management programs and the mortality of such fish, and include conservation and management measures that, to the extent practicable, minimize mortality and ensure the extended survival of such fish;

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(13) include a description of the commercial, recreational, and charter fishing sectors which participate in the fishery, including its economic impact, and, to the extent practicable, quantify trends in landings of the managed fishery resource by the commercial, recreational, and charter fishing sectors;

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(14) to the extent that rebuilding plans or other conservation and management measures which reduce the overall harvest in a fishery are necessary, allocate, taking into consideration the economic impact of the harvest restrictions or recovery benefits on the fishery participants in each sector, any harvest restrictions or recovery benefits fairly and equitably among the commercial, recreational, and charter fishing sectors in the fishery and;

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(15) establish a mechanism for specifying annual catch limits in the plan (including a multiyear plan), implementing regulations, or annual specifications, at a level such that overfishing does not occur in the fishery, including measures to ensure accountability.

97-453, 99-659, 101-627, 102-251, 104-297

(b) DISCRETIONARY PROVISIONS.—Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may—

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to—

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone [or special areas,]* or for anadromous species or Continental Shelf fishery resources beyond such zone [or areas]*;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

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(2)(A) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(B) designate such zones in areas where deep sea corals are identified under section 408, to protect deep sea corals from physical damage from fishing gear or to prevent loss or damage to such fishing gear from interactions with deep sea corals, after considering long-term sustainable uses of fishery resources in such areas; and

(C) with respect to any closure of an area under this Act that prohibits all fishing, ensure that such closure—

- (i) is based on the best scientific information available;
- (ii) includes criteria to assess the conservation benefit of the closed area;
- (iii) establishes a timetable for review of the closed area's performance that is consistent with the purposes of the closed area; and
- (iv) is based on an assessment of the benefits and impacts of the closure, including its size, in relation to other management measures (either alone or in combination with such measures), including the benefits and impacts of limiting access to: users of the area, overall fishing activity, fishery science, and fishery and marine conservation;

(3) establish specified limitations which are necessary and appropriate for the conservation and management of the fishery on the—

- (A) catch of fish (based on area, species, size, number, weight, sex, bycatch, total biomass, or other factors);
- (B) sale of fish caught during commercial, recreational, or charter fishing, consistent with any applicable Federal and State safety and quality requirements; and
- (C) transshipment or transportation of fish or fish products under permits issued pursuant to section 204;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this Act;

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(5) incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery and take into account the different circumstances affecting fisheries from different States and ports, including distances to fishing grounds and proximity to time and area closures;

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(6) establish a limited access system for the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account—

- (A) present participation in the fishery;
- (B) historical fishing practices in, and dependence on, the fishery;
- (C) the economics of the fishery;
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries;
- (E) the cultural and social framework relevant to the fishery and any affected fishing communities;
- (F) the fair and equitable distribution of access privileges in the fishery; and
- (G) any other relevant considerations;

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(7) require fish processors who first receive fish that are subject to the plan to submit data which are necessary for the conservation and management of the fishery;

(8) require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region;

(10) include, consistent with the other provisions of this Act, conservation and management measures that provide harvest incentives for participants within each gear group to employ fishing practices that result in lower levels of bycatch or in lower levels of the mortality of bycatch;

(11) reserve a portion of the allowable biological catch of the fishery for use in scientific research;

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(12) include management measures in the plan to conserve target and non-target species and habitats, considering the variety of ecological factors affecting fishery populations; and

(14)[sic]¹⁵ prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

97-453, 104-297

(c) PROPOSED REGULATIONS.—Proposed regulations which the Council deems necessary or appropriate for the purposes of—

(1) implementing a fishery management plan or plan amendment shall be submitted to the Secretary simultaneously with the plan or amendment under section 304; and

(2) making modifications to regulations implementing a fishery management plan or plan amendment may be submitted to the Secretary at any time after the plan or amendment is approved under section 304.

¹⁵ So in original.

P.L. 109-479, sec. 104(b), MSA § 303 note

16 U.S.C. 1853 note

EFFECTIVE DATES; APPLICATION TO CERTAIN SPECIES.—The amendment made by subsection (a)(10)¹⁶—

(1) shall, unless otherwise provided for under an international agreement in which the United States participates, take effect—

(A) in fishing year 2010 for fisheries determined by the Secretary to be subject to overfishing; and

(B) in fishing year 2011 for all other fisheries; and

(2) shall not apply to a fishery for species that have a life cycle of approximately 1 year unless the Secretary has determined the fishery is subject to overfishing of that species; and

(3) shall not limit or otherwise affect the requirements of section 301(a)(1) or 304(e) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851(a)(1) or 1854(e), respectively).

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SEC. 303A. LIMITED ACCESS PRIVILEGE PROGRAMS.

16 U.S.C. 1853a

(a) **IN GENERAL.**—After the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, a Council may submit, and the Secretary may approve, for a fishery that is managed under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section.

(b) **NO CREATION OF RIGHT, TITLE, OR INTEREST.**—Limited access privilege, quota share, or other limited access system authorization established, implemented, or managed under this Act—

(1) shall be considered a permit for the purposes of sections 307, 308, and 309;

(2) may be revoked, limited, or modified at any time in accordance with this Act, including revocation if the system is found to have jeopardized the sustainability of the stock or the safety of fishermen;

(3) shall not confer any right of compensation to the holder of such limited access privilege, quota share, or other such limited access system authorization if it is revoked, limited, or modified;

(4) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested by the holder; and

(5) shall be considered a grant of permission to the holder of the limited access privilege or quota share to engage in activities permitted by such limited access privilege or quota share.

¹⁶ Section 104(a)(10) of P.L. 109-479 added section 303(a)(15).

(c) REQUIREMENTS FOR LIMITED ACCESS PRIVILEGES.—

(1) IN GENERAL.—Any limited access privilege program to harvest fish submitted by a Council or approved by the Secretary under this section shall—

(A) if established in a fishery that is overfished or subject to a rebuilding plan, assist in its rebuilding;

(B) if established in a fishery that is determined by the Secretary or the Council to have over-capacity, contribute to reducing capacity;

(C) promote—

(i) fishing safety;

(ii) fishery conservation and management; and

(iii) social and economic benefits;

(D) prohibit any person other than a United States citizen, a corporation, partnership, or other entity established under the laws of the United States or any State, or a permanent resident alien, that meets the eligibility and participation requirements established in the program from acquiring a privilege to harvest fish, including any person that acquires a limited access privilege solely for the purpose of perfecting or realizing on a security interest in such privilege;

(E) require that all fish harvested under a limited access privilege program be processed on vessels of the United States or on United States soil (including any territory of the United States);

(F) specify the goals of the program;

(G) include provisions for the regular monitoring and review by the Council and the Secretary of the operations of the program, including determining progress in meeting the goals of the program and this Act, and any necessary modification of the program to meet those goals, with a formal and detailed review 5 years after the implementation of the program and thereafter to coincide with scheduled Council review of the relevant fishery management plan (but no less frequently than once every 7 years);

(H) include an effective system for enforcement, monitoring, and management of the program, including the use of observers or electronic monitoring systems;

(I) include an appeals process for administrative review of the Secretary's decisions regarding initial allocation of limited access privileges;

(J) provide for the establishment by the Secretary, in consultation with appropriate Federal agencies, for an information collection and review process to provide any additional information needed to determine whether any illegal acts of anti-competition, anti-trust, price collusion, or price fixing have occurred among regional fishery associations or persons receiving limited access privileges under the program; and

(K) provide for the revocation by the Secretary of limited access privileges held by any person found to have violated the antitrust laws of the United States.

(2) WAIVER.—The Secretary may waive the requirement of paragraph (1)(E) if the Secretary determines that—

- (A) the fishery has historically processed the fish outside of the United States; and
- (B) the United States has a seafood safety equivalency agreement with the country where processing will occur.

(3) FISHING COMMUNITIES.—

(A) IN GENERAL.—

(i) ELIGIBILITY.—To be eligible to participate in a limited access privilege program to harvest fish, a fishing community shall—

- (I) be located within the management area of the relevant Council;
- (II) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;
- (III) consist of residents who conduct commercial or recreational fishing, processing, or fishery-dependent support businesses within the Council's management area; and
- (IV) develop and submit a community sustainability plan to the Council and the Secretary that demonstrates how the plan will address the social and economic development needs of coastal communities, including those that have not historically had the resources to participate in the fishery, for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(ii) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section for any person who fails to comply with the requirements of the community sustainability plan. Any limited access privileges denied or revoked under this section may be reallocated to other eligible members of the fishing community.

- (B) PARTICIPATION CRITERIA.—In developing participation criteria for eligible communities under this paragraph, a Council shall consider—
- (i) traditional fishing or processing practices in, and dependence on, the fishery;
 - (ii) the cultural and social framework relevant to the fishery;
 - (iii) economic barriers to access to fishery;
 - (iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;
 - (v) the expected effectiveness, operational transparency, and equitability of the community sustainability plan; and
 - (vi) the potential for improving economic conditions in remote coastal communities lacking resources to participate in harvesting or processing activities in the fishery.

(4) REGIONAL FISHERY ASSOCIATIONS.—

(A) IN GENERAL.—To be eligible to participate in a limited access privilege program to harvest fish, a regional fishery association shall—

- (i) be located within the management area of the relevant Council;
- (ii) meet criteria developed by the relevant Council, approved by the Secretary, and published in the Federal Register;
- (iii) be a voluntary association with established by-laws and operating procedures;
- (iv) consist of participants in the fishery who hold quota share that are designated for use in the specific region or subregion covered by the regional fishery association, including commercial or recreational fishing, processing, fishery-dependent support businesses, or fishing communities;
- (v) not be eligible to receive an initial allocation of a limited access privilege but may acquire such privileges after the initial allocation, and may hold the annual fishing privileges of any limited access privileges it holds or the annual fishing privileges that is [sic]¹⁷ members contribute; and
- (vi) develop and submit a regional fishery association plan to the Council and the Secretary for approval based on criteria developed by the Council that have been approved by the Secretary and published in the Federal Register.

(B) FAILURE TO COMPLY WITH PLAN.—The Secretary shall deny or revoke limited access privileges granted under this section to any person participating in a regional fishery association who fails to comply with the requirements of the regional fishery association plan.

¹⁷ So in original.

(C) PARTICIPATION CRITERIA.—In developing participation criteria for eligible regional fishery associations under this paragraph, a Council shall consider—

- (i) traditional fishing or processing practices in, and dependence on, the fishery;
- (ii) the cultural and social framework relevant to the fishery;
- (iii) economic barriers to access to fishery;
- (iv) the existence and severity of projected economic and social impacts associated with implementation of limited access privilege programs on harvesters, captains, crew, processors, and other businesses substantially dependent upon the fishery in the region or subregion;
- (v) the administrative and fiduciary soundness of the association; and
- (vi) the expected effectiveness, operational transparency, and equitability of the fishery association plan.

(5) ALLOCATION.—In developing a limited access privilege program to harvest fish a Council or the Secretary shall—

(A) establish procedures to ensure fair and equitable initial allocations, including consideration of—

- (i) current and historical harvests;
- (ii) employment in the harvesting and processing sectors;
- (iii) investments in, and dependence upon, the fishery; and
- (iv) the current and historical participation of fishing communities;

(B) consider the basic cultural and social framework of the fishery, especially through—

- (i) the development of policies to promote the sustained participation of small owner-operated fishing vessels and fishing communities that depend on the fisheries, including regional or port-specific landing or delivery requirements; and
- (ii) procedures to address concerns over excessive geographic or other consolidation in the harvesting or processing sectors of the fishery;

(C) include measures to assist, when necessary and appropriate, entry-level and small vessel owner-operators, captains, crew, and fishing communities through set-asides of harvesting allocations, including providing privileges, which may include set-asides or allocations of harvesting privileges, or economic assistance in the purchase of limited access privileges;

(D) ensure that limited access privilege holders do not acquire an excessive share of the total limited access privileges in the program by—

- (i) establishing a maximum share, expressed as a percentage of the total limited access privileges, that a limited access privilege holder is permitted to hold, acquire, or use; and
- (ii) establishing any other limitations or measures necessary to prevent an inequitable concentration of limited access privileges; and

(E) authorize limited access privileges to harvest fish to be held, acquired, used by, or issued under the system to persons who substantially participate in the fishery, including in a specific sector of such fishery, as specified by the Council.

(6) PROGRAM INITIATION.—

(A) LIMITATION.—Except as provided in subparagraph (D), a Council may initiate a fishery management plan or amendment to establish a limited access privilege program to harvest fish on its own initiative or if the Secretary has certified an appropriate petition.

(B) PETITION.—A group of fishermen constituting more than 50 percent of the permit holders, or holding more than 50 percent of the allocation, in the fishery for which a limited access privilege program to harvest fish is sought, may submit a petition to the Secretary requesting that the relevant Council or Councils with authority over the fishery be authorized to initiate the development of the program. Any such petition shall clearly state the fishery to which the limited access privilege program would apply. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the limited access program shall be eligible to sign a petition for such a program and shall serve as the basis for determining the percentage described in the first sentence of this subparagraph.

(C) CERTIFICATION BY SECRETARY.—Upon the receipt of any such petition, the Secretary shall review all of the signatures on the petition and, if the Secretary determines that the signatures on the petition represent more than 50 percent of the permit holders, or holders of more than 50 percent of the allocation in the fishery, as described by subparagraph (B), the Secretary shall certify the petition to the appropriate Council or Councils.

(D) NEW ENGLAND AND GULF REFERENDUM.—

(i) Except as provided in clause (iii) for the Gulf of Mexico commercial red snapper fishery, the New England and Gulf Councils may not submit, and the Secretary may not approve or implement, a fishery management plan or amendment that creates an individual fishing quota program, including a Secretarial plan, unless such a system, as ultimately developed, has been approved by more than 2/3 of those voting in a referendum among eligible permit holders, or other persons described in clause (v), with respect to the New England Council, and by a majority of those voting in the referendum among eligible permit holders with respect to the Gulf Council. For multispecies permits in the Gulf of Mexico, only those participants who have substantially fished the species proposed to be included in the individual fishing quota program shall be eligible to vote in such a referendum. If an individual fishing quota program fails to be approved by the requisite number of those voting, it may be revised and submitted for approval in a subsequent referendum.

(ii) The Secretary shall conduct a referendum under this subparagraph, including notifying all persons eligible to participate in the referendum and making available to them information concerning the schedule, procedures, and eligibility requirements for the referendum process and the proposed individual fishing quota program. Within 1 year after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, the Secretary shall publish guidelines and procedures to determine procedures and voting eligibility requirements for referenda and to conduct such referenda in a fair and equitable manner.

(iii) The provisions of section 407(c) of this Act shall apply in lieu of this subparagraph for an individual fishing quota program for the Gulf of Mexico commercial red snapper fishery.

(iv) Chapter 35 of title 44, United States Code, (commonly known as the Paperwork Reduction Act) does not apply to the referenda conducted under this subparagraph.

(v) The Secretary shall promulgate criteria for determining whether additional fishery participants are eligible to vote in the New England referendum described in clause (i) in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum.

(vi) In this subparagraph, the term ‘individual fishing quota’ does not include a sector allocation.

(7) TRANSFERABILITY.—In establishing a limited access privilege program, a Council shall—

(A) establish a policy and criteria for the transferability of limited access privileges (through sale or lease), that is consistent with the policies adopted by the Council for the fishery under paragraph (5); and

(B) establish, in coordination with the Secretary, a process for monitoring of transfers (including sales and leases) of limited access privileges.

(8) PREPARATION AND IMPLEMENTATION OF SECRETARIAL PLANS.—This subsection also applies to a plan prepared and implemented by the Secretary under section 304(c) or 304(g).

(9) ANTITRUST SAVINGS CLAUSE.—Nothing in this Act shall be construed to modify, impair, or supersede the operation of any of the antitrust laws. For purposes of the preceding sentence, the term ‘antitrust laws’ has the meaning given such term in subsection (a) of the first section of the Clayton Act, except that such term includes section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.

16 U.S.C. 1853a
MSA § 303A

(d) AUCTION AND OTHER PROGRAMS.—In establishing a limited access privilege program, a Council shall consider, and may provide, if appropriate, an auction system or other program to collect royalties for the initial, or any subsequent, distribution of allocations in a limited access privilege program if—

(1) the system or program is administered in such a way that the resulting distribution of limited access privilege shares meets the program requirements of this section; and

(2) revenues generated through such a royalty program are deposited in the Limited Access System Administration Fund established by section 305(h)(5)(B) and available subject to annual appropriations.

(e) COST RECOVERY.—In establishing a limited access privilege program, a Council shall—

(1) develop a methodology and the means to identify and assess the management, data collection and analysis, and enforcement programs that are directly related to and in support of the program; and

(2) provide, under section 304(d)(2), for a program of fees paid by limited access privilege holders that will cover the costs of management, data collection and analysis, and enforcement activities.

(f) CHARACTERISTICS.—A limited access privilege established after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 is a permit issued for a period of not more than 10 years that—

(1) will be renewed before the end of that period, unless it has been revoked, limited, or modified as provided in this subsection;

(2) will be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have failed to comply with any term of the plan identified in the plan as cause for revocation, limitation, or modification of a permit, which may include conservation requirements established under the plan;

(3) may be revoked, limited, or modified if the holder is found by the Secretary, after notice and an opportunity for a hearing under section 554 of title 5, United States Code, to have committed an act prohibited by section 307 of this Act; and

(4) may be acquired, or reacquired, by participants in the program under a mechanism established by the Council if it has been revoked, limited, or modified under paragraph (2) or (3).

(g) LIMITED ACCESS PRIVILEGE ASSISTED PURCHASE PROGRAM.—

(1) IN GENERAL.—A Council may submit, and the Secretary may approve and implement, a program which reserves up to 25 percent of any fees collected from a fishery under section 304(d)(2) to be used, pursuant to section 53706(a)(7) of title 46, United States Code, to issue obligations that aid in financing—

(A) the purchase of limited access privileges in that fishery by fishermen who fish from small vessels; and

(B) the first-time purchase of limited access privileges in that fishery by entry level fishermen.

(2) ELIGIBILITY CRITERIA.—A Council making a submission under paragraph (1) shall recommend criteria, consistent with the provisions of this Act, that a fisherman must meet to qualify for guarantees under subparagraphs (A) and (B) of paragraph (1) and the portion of funds to be allocated for guarantees under each subparagraph.

(h) EFFECT ON CERTAIN EXISTING SHARES AND PROGRAMS.—Nothing in this Act, or the amendments made by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, shall be construed to require a reallocation or a reevaluation of individual quota shares, processor quota shares, cooperative programs, or other quota programs, including sector allocation in effect before the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006.

(i) TRANSITION RULES.—

(1) IN GENERAL.—The requirements of this section shall not apply to any quota program, including any individual quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, except that—

(A) the requirements of section 303(d) of this Act in effect on the day before the date of enactment of that Act shall apply to any such program;

(B) the program shall be subject to review under subsection (c)(1)(G) of this section not later than 5 years after the program implementation; and

(C) nothing in this subsection precludes a Council from incorporating criteria contained in this section into any such plans.

(2) PACIFIC GROUND FISH PROPOSALS.—The requirements of this section, other than subparagraphs (A) and (B) of subsection (c)(1) and subparagraphs (A), (B), and (C) of paragraph (1) of this subsection, shall not apply to any proposal authorized under section 302(f) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 that is submitted within the timeframe prescribed by that section.

16 U.S.C. 1853a note, 1854
MSA §§ 303A note, 304

P.L. 109-479, sec. 106(e), MSA § 303A note

16 U.S.C. 1853a note

APPLICATION WITH AMERICAN FISHERIES ACT.—Nothing in section 303A of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.), as added by subsection (a) [P.L. 109-479], shall be construed to modify or supersede any provision of the American Fisheries Act (46 U.S.C. 12102 note; 16 U.S.C. 1851 note; et alia).

P.L. 104-297, sec. 108(i), MSA § 303 note

EXISTING QUOTA PLANS.—Nothing in this Act [P.L.104-297] or the amendments made by this Act shall be construed to require a reallocation of individual fishing quotas under any individual fishing quota program approved by the Secretary before January 4, 1995.

SEC. 304. ACTION BY THE SECRETARY

16 U.S.C. 1854

104-297

(a) REVIEW OF PLANS.—

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall—

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall—

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify—

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.



United States Department of the Interior

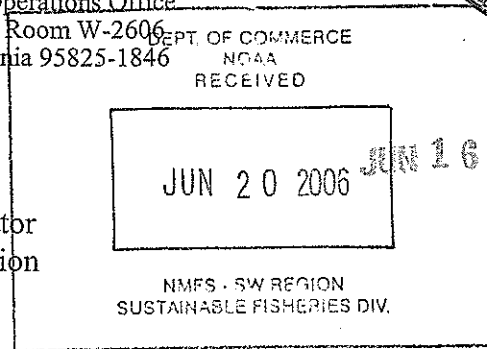


FISH AND WILDLIFE SERVICE

California/Nevada Operations Office
2800 Cottage Way, Room W-2606
Sacramento, California 95825-1846

In reply refer to:
CNO-ES

Mark Helvey, Acting Deputy Regional Administrator
National Marine Fisheries Service, Southwest Region
501 West Ocean Boulevard, Suite 4200
Long Beach, California 90802-4213



Subject: Biological Opinion on the Allocation of the Pacific Sardine Harvest Guideline - Amendment 11 under the Coastal Pelagic Fishery Management Plan (1-8-F-06-24)

This document transmits the U.S. Fish and Wildlife Service's (Service) biological opinion based on our review of the proposed Amendment 11 under the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP) (Allocation of the Pacific Sardine Harvest Guideline (Amendment 11)) and its effects on the federally endangered southern sea otter (*Enhydra lutris nereis*, otter), in accordance with section 7 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 et seq.). Your request for formal consultation was received on March 30, 2006.

This biological opinion is based on information which accompanied your October 26, 2005, request for informal consultation, including your biological assessment of the *Allocation of the Pacific Sardine Harvest Guideline - Amendment 11 under the Coastal Pelagic Fishery Management Plan* (NMFS 2005; updated on March 30, 2006), personal communications with National Marine Fisheries Service (NMFS) staff and otter experts, and information from our files.

CONSULTATION HISTORY

On September 14, 2005, in response to your August 4, 2005, request, we provided you with a list of endangered, threatened, proposed, and candidate species, and their designated or proposed critical habitat in accordance with section 7 of the Endangered Species Act, for implementation of Amendment 11 under the CPS FMP.

On October 28, 2005, we received NMFS' October 26, 2005, request for our concurrence, in accordance with section 7 of the Act, for implementation of Amendment 11 under the CPS FMP.

On November 30, 2005, we received additional information regarding the Pacific sardine (*Sardinops sagax*, sardine) Fishery, including sections of the CPS FMP and the June 2005 Stock Assessment and Fishery Evaluation, and an original description of a June 29, 2005, otter interaction that occurred within the CPS fishery.

On December 2, 2005, we provided to you our letter of concurrence for the endangered tidewater goby (*Eucyclogobius newberryi*), threatened western snowy plover (*Charadrius alexandrinus nivosus*) and Santa Ana sucker (*Catostomus santaanae*), and designated critical habitat for all three species

On March 23, 2006, we received new information that effectively expanded the action area to include coastal maritime waters of California.

On March 30, 2006, we replied (via email) to the March 23, 2006, email from your staff indicating that changes in the project description would require formal consultation on the otter. This email effectively initiated formal consultation on the proposed action.

On April 26, 2006, we provided your staff (via email) a draft timeline for completion of the subject biological opinion.

On May, 30, 2006, we provided you our letter of concurrence for the endangered short-tailed albatross, California brown pelican, and California least-tern; the threatened marbled murrelet, bald eagle, and the bull trout; bull trout critical habitat; and the candidate Xantus's murrelet.

BIOLOGICAL OPINION

DESCRIPTION OF THE PROPOSED ACTION

The sardine fishery (Fishery) in the Economic Exclusion Zone (EEZ) (3+ miles) off the coasts of Washington, Oregon, and California is managed by the NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. The Pacific Fisheries Management Council (FMC) sets standards and restrictions for west coast fisheries. The proposed action, implementation of Amendment 11 of the FMP, will set such standards and restrictions for the Fishery. The NMFS is responsible for implementation of the FMC decisions.

The Federal rules apply to both Federal (EEZ) and State (0 – 3 nautical miles (nm)) waters. Washington prohibits the Fishery from operating in State waters, while Oregon allows the Fishery, but with added restrictions (e.g., vessel hold grates) to protect salmonids. California also allows the Fishery to operate within State waters. The Fishery activities in State waters are interrelated with the Federal standards because the FMC has oversight responsibilities in State waters. The States each run their own programs in a manner consistent with the Federal plan. The current managed Fishery and associated bycatch monitoring program began operating in Washington and Oregon in 2000, and operated from about 35 nm south of the Columbia River, in Oregon, north to about Grays Harbor, Washington. The Fishery in California is historic and has operated entirely south of Monterey Bay. This Fishery operates at night and is typically completed in the predawn hours.

The FMP establishes an environmentally-based harvest guideline for sardines. This is accomplished by means of a formula that, after overall biomass is determined, takes into account forage and ecosystem-related goals and objectives when determining the guideline number. The

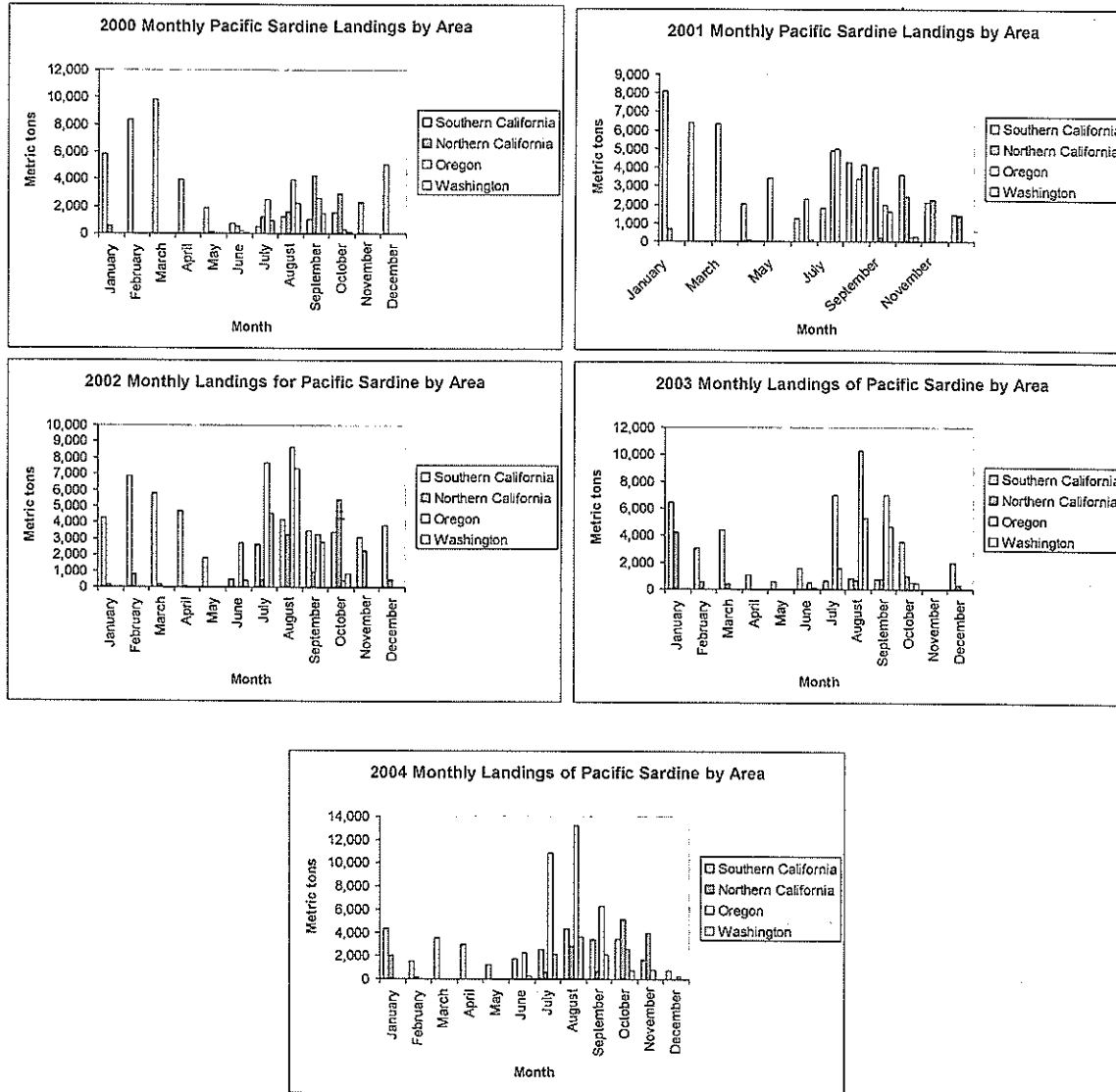
sardine is an important source of forage for a large number of birds, marine mammals, and fish not managed by the FMP. The harvest guideline formula provides adequate forage for these dependent species by subtracting a “cutoff” number from the overall biomass number. This “cutoff” number is established in the FMP as 150,000 metric tons (mt) and represents the lowest level of biomass at which a directed harvest is allowed. The formula also takes into account what is known as the “harvest fraction.” This is the percentage of the biomass above 150,000 mt that may be harvested. This fraction varies between 5% and 15% and is based on current ocean temperatures. The higher fraction is allotted for harvest when ocean temperatures are warmer and sardine production is greater, while the lower fraction is used when ocean temperatures are cooler and sardine production is decreased.

Amendment 11 will revise the allocation framework for apportioning the annual sardine harvest guideline, as described below. Amendment 11 will not affect the guideline determination process, as described above.

Amendment 11 to the CPS FMP divides the Fishery into a federally managed limited entry Fishery, which occurs south of 39 degrees North latitude (Southern subarea), and an open access Fishery, which occurs north of 39 degrees North latitude (Northern subarea) (this Fishery actually operates north of 45 degrees North latitude). The latter is managed by the individual states of Oregon and Washington. From 2003 to 2005, the harvest guideline had been allocated one-third for Northern subarea, and two-thirds for Southern subarea beginning on January 1. On September 1 of each year, the remaining harvest guideline had been pooled and reallocated to 80% for the Southern subarea and 20% for the Northern subarea. On December 1, all unharvested sardine that remain are reallocated to a coast-wide harvest guideline until the fishing season ends on December 31.

The two management subareas (Northern & Southern) that make up the Fishery have different temporal characteristics. Sardine landings in the Southern subarea occur throughout the year with a majority of the Fishery operations occurring in the winter months (Figure 1). A majority of the sardine landed in the Northern subarea occur from June-September. The Northern subarea Fishery operates in an area approximately 45 nm north and 30 nm south of the Columbia River and extends approximately 35 nm offshore. Fishing depths range from 7 fathoms (approx. 42 feet) to over 400 fathoms (approx. 2,400 feet). No specific data is available to characterize the geographic range of the Southern subarea Fishery except that the majority of sardine is landed in the Southern California area (Figure 1.).

Figure 1. Monthly landings of Pacific sardine by area for 2000-2004. Note: Data were taken from Pacific Fisheries Information Network (PacFIN) for years 2000-2003, and from the NMFS-Southwest Region for the year 2004 (NMFS 2005).



The new allocation scheme detailed in Amendment 11 to the FMP will begin with implementation of the 2006 Fishery on January 1, 2006. At their June 2005 meeting in Foster City, California, the FMC adopted a preferred option for the allocation of sardine that creates a seasonal, coastwide allocation scheme, which provides the following allocation formula for the non-tribal share of the harvest guideline:

Coastwide Allocation in Three Periods

Season: January 1–December 31

Initial allocation: On January 1, 35% of the harvest guideline is allocated coastwide.

Reallocation: On July 1, 40% of the harvest guideline (plus any unharvested portion from the initial allocation) is allocated coastwide.

Second reallocation: On September 15, 25% of the harvest guideline (plus any unharvested portion from the first reallocation) is reallocated coastwide.

Purse Seine Fishing Operations

The gear traditionally used in the CPS fishery is a purse seine. A typical purse seine net measures 185 fathoms long (1,110 feet), 22-28 fathoms deep (132-167 feet) (Lutz and Pendleton, 2000, as cited in NMFS 2005). Purse seines are large nets that encircle the target species. Depending on the size of vessels, nets generally vary from 1/4 mile to one mile in circumference. During deployment of gear, the net forms a circular wall of webbing around the school of fish. The net must be deep enough to reduce the likelihood of fish escaping underneath, and the encircling must be done rapidly enough to prevent the fish from escaping before the bottom is secured ("pursed") shut.

A set is initiated when a skiff is released from the stern of the purse seiner, anchoring one end of the seine. The targeted fish are contained in a vertical cylinder of webbing after the seine vessel encircles the targeted school and rejoins the skiff. The bottom of the net is then pursed by hauling the cable that is threaded through rings on the bottom of the net. After the net is pursed, it is retrieved until the diameter of the net compass and the volume of water inside the net decreases to a point when, in both space and time, fish are sufficiently concentrated that they can be hydraulically scooped ("brailed") into wells onboard the vessel.

Current Management Measures in Place to Reduce Bycatch and Protected Species Interactions

The Fishery has current management measures in place to reduce interactions with protected species. This is principally a monitoring program, although Oregon requires additional measures on sardine fishing vessels to reduce bycatch.

The NMFS Southwest Region started a pilot observer program in the Southern subarea of the CPS fishery (all species, not just sardine) in July of 2004. The pilot observer program was put in place to document the type and amount of bycatch, and to validate bycatch rates provided by California Department of Fish and Game (CDFG) dockside sampling. The state of Oregon allows fishing in state waters but requires fisher logbooks and grates to be placed over fish holds to minimize the take of incidentally caught species. Additionally, during the first two years (2000 & 2001) Oregon Department of Fish and Wildlife (ODFW) placed observers on the vessels, but after 2001 the observer program was halted due to a lack of funding. Observer coverage was between 4% and 7% for the state of Oregon (Table 1).

Unlike California and Oregon, the State of Washington does not allow fishing in state waters. Washington implemented a no fishing zone within state waters to minimize bycatch of salmon and to minimize the interaction between the Fishery and recreational salmon fishers. The State of Washington had an observer program in place continuously from January 1, 2000, until December 31, 2004. Observer coverage in the Washington Fishery has ranged from 24% to 27%

(Table 1.). Additionally, in 2000 and 2001, Washington monitored dockside landings for bycatch - in particular, they were looking for incidental catch of juvenile salmon. After two years of dockside sampling, the Washington Department of Fish and Game (WDFG) ceased dockside monitoring because of a low incidence of general bycatch and they specifically never observed bycatch of juvenile salmon (Culver, pers. comm., 2005, as cited in NMFS 2005). WDFG also has a mandatory logbook program.

Table 1. Summary of observer coverage in the Pacific sardine fishery off Oregon and Washington (Culver & Henry, 2004, McCrae, 2001, and McCrae, 2002, as cited in NMFS 2005), shown as a percent of trips observed of the total trips that landed Pacific sardine.

Year	Percent of Observer Coverage In Oregon	Percent of Observer Coverage In Washington
2000	7%	24%
2001	4%	24%
2002	no observer program	24%
2003	no observer program	27%
2004	no observer program	27%
2005	no observer program	no observer program

STATUS OF THE SPECIES

The otter was listed as threatened in 1977 (42 *Federal Register* 2965); critical habitat has not been designated for the species. The factors leading to the listing included increasing tanker traffic and oil spills, municipal pollution, and increasing harassment caused by use of near-shore areas for a variety of human activities (e.g., fishing, recreation).

Unless otherwise noted, the following information on the otter is from Riedman and Estes (1990).

Distribution and Population Size

Otters occupy nearshore waters along the mainland coastline of California from just southeast of Point Conception, Santa Barbara County, north to about Half Moon Bay, San Mateo County. A small experimental population of otters also exists at San Nicolas Island, Ventura County as a result of translocation efforts initiated in 1987.

Historically, otters ranged from Punta Abreojos, Baja California, Mexico to northern California (Wilson *et al.* 1991) or Oregon, or possibly as far north as Prince William Sound, Alaska (Riedman and Estes 1990). Historically, the number of otters was estimated at 14,000 individuals. During the 1700s and 1800s, the killing of otters for their pelts extirpated the

subspecies throughout most of its range. A small population of otters survived near Bixby Creek in Monterey County, California, numbering an estimated 50 animals in 1914 (Bryant 1915). Since receiving protection under the International Fur Seal Treaty in 1911, those 50 otters have increased in number and gradually expanded northward and southward along the central California coast. The current population is still well below the estimated carrying capacity of California of approximately 16,000 animals (Laidre *et al.* 2001). Otters currently inhabit shallow waters along the coast of California in San Mateo, Santa Cruz, Monterey, San Luis Obispo, and Santa Barbara counties and at San Nicolas Island in Ventura County.

Natural History

Unlike most other marine mammals, otters have little subcutaneous fat; they depend on their clean, dense, water-resistant fur for insulation against the cold. Otters also maintain a high level of internal heat production to compensate for the lack of blubber. Consequently, their energetic requirements are high and they are estimated to consume an amount of food equivalent to 23 to 33 percent of their body weight per day.

Most otters remain within 1.2 miles (2 kilometers) of shore. They generally forage in both rocky and soft-sediment communities in water depths of 80 feet or less, although individuals occasionally will move into deeper water. Rocky habitats that are topographically heterogeneous and support kelp forests are likely to support the greatest diversity and abundance of otter food resources, which include abalone, rock crabs, sea urchins, kelp crabs, clams, turban snails, mussels, octopus, barnacles, scallops, sea stars, and chitons. Fish are not an important component of the otter's diet in California.

Male otters have larger home ranges than females. Compared to males, most female otters are rather sedentary. Occasionally, females travel long distances; 3 tagged adult females routinely moved between Monterey and Santa Cruz, a distance of 25 to 30 miles, for over 4 years. Juvenile males move further from natal groups than juvenile females; aggressive behavior exhibited towards the juvenile males by older males may be partially responsible for their more extensive travels. Most male otters leave the central portion of the range and travel to its southern end during the pupping season, which occurs in the winter and spring (Riedman and Estes 1990).

The northern and southern portions of the population seem to exhibit different mating peaks. A peak period of pupping occurs from January to March; a secondary pupping season occurs in late summer and early fall. Pupping is seasonally uniform in the Monterey Bay area (Riedman *et al.* 1994). Parental care is provided solely by the female.

Mortality Factors

The USGS Biological Research Division (BRD) has analyzed the number of carcasses found to determine whether relative mortality patterns varied during periods of population increase and decline. BRD found that mortality was roughly constant at 5 percent per year during periods of population increase but was "somewhat" higher during periods of decline. Periods of increased

mortality and decline include the early 1980s and 1995 to 1999. Prior to 1980, data from otters found stranded on beaches were not being analyzed.

Between 1968 and 1989, the cause of death could not be determined for 56 percent of the 1,680 otter carcasses examined. Between 1982 and 1985, 29 otters were known to have drowned in gill and trammel nets; however, because only a small portion of the nets were sampled, the actual number of individuals that drowned was possibly larger. Eleven otters (0.7 percent of 1,680 carcasses) are known to have drowned as a result of being tangled in fishing lines. Drowning is nearly impossible to detect in necropsies; all or nearly all of the carcasses for which drowning was attributed as the cause of death were either taken from nets or had net fragments attached to them.

The live finfish trap Fishery expanded in central California during the mid-1990s; in 1999, the trap fishing effort in the southern half of the range of the otters decreased, possibly as a result of new regulations enacted by the CDFG (Hatfield and Estes 2000). Experiments conducted at the Monterey Bay Aquarium demonstrated that otters will enter fish traps and can become trapped in them (Hatfield and Estes 2000). However, reports of mortality of otters in fish traps are unconfirmed.

Forney *et al.* (in press) estimated that set gillnets in the Monterey Bay area killed between 17 and 125 otters from 1995 through 1998. Forney *et al.* attribute the elevated mortality estimates to the increased use of set gillnets in the Monterey Bay area and the documented use of deeper waters by otters during the late 1990s. Although no take of otters resulting from entanglement in set gillnets was documented during the period from 1995 through 1998, no monitoring of potential otter/gillnet entanglement was undertaken during this period. Forney *et al.* notes that the highest estimate of 125 individuals taken is likely an overestimate because the maximum number of nets that can be set per day are usually not used. Since April 1999, one otter is known to have died in set gillnets in Monterey Bay (NMFS 1999, as cited in NMFS 2005).

In 1998, three dead otters were found with wounds that were caused by the propellers of boats; one additional individual had wounds that may have been caused by a propeller. Three of these individuals were found in the vicinity of Elkhorn Slough in Monterey County and the other was near Morro Strand in San Luis Obispo County. No such wounds were observed in 1999. We have no additional information to indicate whether mortality from collisions with boats is a substantial cause of mortality.

Great white sharks, killer whales, and bald eagles are known to kill otters. In California, among these species, only great white sharks are known, from evidence of bite marks and scrapings on bones, to attack otters. Between 1968 and 1989, 195 of 1,680 deaths (11.6 percent) of otters were likely due to shark attacks. Shooting was known or suspected to be the mortality factor in 77 of 1,680 carcasses (4.6 percent) during this same time period.

When discussing the factors that may affect the size of the population of the otter, Estes *et al.* (1986, in Riedman and Estes 1990) believed that starvation was not an issue in California because: (1) the amount of time that otters spent foraging was equivalent to that observed in

below-equilibrium densities elsewhere; (2) unoccupied habitat occurred at both ends of the range; and (3) the mortality caused by set-nets was estimated at 7 or 8 percent of the total population each year (Wendall *et al.* 1985, *in* Riedman and Estes 1990). Ralls and Siniff (1988, *in* Riedman and Estes 1990) disagreed with this conclusion because they observed that Ajuvenile females in the central part of the range spent more time foraging and experienced higher mortality than other age and sex classes, with the exception of adult males, which experienced the lowest rates of survival. Riedman and Estes (1990) speculated that density-independent factors may be more important at the northern and southern limits of the range where entanglement in set-nets, shark attacks, and shooting are more common than in the central portion of the range.

The BRD concludes that the incidence of infectious disease may have been high throughout this century and that disease could be the responsible agent for the otter's relatively slow rate of population growth. The BRD has found that the rate of infectious disease has not increased since 1992, except for the incidence of acanthocephalan parasites. However, the general rate of infection seems to be greater than would be expected in a wild population and it may account for the slower growth rate of the otter population in relation to populations elsewhere. The source or cause of the high infection rate is not known.

An examination of the environmental baseline for the otter must also consider the potential effects of environmental contaminants on the status of the species. Sources of potential environmental contaminants may be natural or anthropogenic. Riedman and Estes (1990) conducted a review of the presence of contaminants in the environment and their effects on otters; they note that adverse effects of environmental contaminants had not been documented although various types of materials occur in tissue samples taken from otters. Otters consume as much as 33 percent of their body weight per day. This high forage rate leaves them potentially vulnerable to contaminant loading through the intake of food. Because they forage close to the coast the otter is at risk of dietary exposure to contaminants that may originate on the mainland.

The synergistic effects of these chemicals, even those found at concentrations sufficiently low that they alone would not cause concern, and parasites must also be considered. Kannan *et al.* (1998) and Nakata *et al.* (1998) report that otters that died from infectious diseases and other causes, such as neoplasia, emaciation, and esophageal impaction, contained greater concentrations of polychlorinated biphenyls (PCBs) and dichlorodiphenyltrichloroethane (DDT). Absolute correlations among various pollutants and diseases and mortality have not been developed; however, the widespread presence of a variety of contaminants in otters and the increasing prevalence of infectious disease warrant further examination and consideration in evaluating the status of the taxon.

ENVIRONMENTAL BASELINE

The action area for this consultation encompasses the entire range of the otter. It follows the mainland coastline of California from just southeast of Point Conception, Santa Barbara County, north to about Half Moon Bay, San Mateo County. It also includes the experimental population of otters at San Nicolas Island, Ventura County.

Data on the population size of the otter have been gathered for more than 50 years. In 1982, a standardized survey technique was adopted to ensure that subsequent counts were comparable (Estes and Jameson 1988). This survey method involves shore-based censuses of approximately 60 percent of the range, with the remainder surveyed from the air. These surveys are conducted twice each year (in spring and fall). Based on the 2004 spring survey, the minimum size of the otter population is 2,825 individuals, excluding the experimental population at San Nicolas Island (U.S. Geological Survey unpub. data). The San Nicolas Island colony numbers about 30 animals (U.S. Geological Survey unpub. data).

Three-year running averages are used to characterize population trends to dampen the effects of anomalous counts in any given year (U.S. Fish and Wildlife Service 2003). Based on three-year running averages of the annual spring counts, the otter population has increased gradually by about 1 percent per year from 1998 to 2002 (U.S. Geological Survey unpub. data). Until the mid-1990s, the number of otters along the central coast of California had been generally increasing at a rate of approximately 4 to 6 percent per year.

EFFECTS OF THE ACTION

Competition for forage fish is not a concern for otters. The species feeds primarily on invertebrates it collects in fairly shallow water (80 feet or less, although some otters have been known to dive deeper).

Of concern for the otter is the possibility of entanglement in nets. Researchers report some mortality of otters in other nets; however, the types of net in which these mortalities have occurred are not the purse seine type used by the Fishery. Otters have died in set gill nets and become entangled in fishing lines and mortalities are suspected for other types of set traps (e.g., set live finfish traps) but are not confirmed.

The likelihood that an otter would become entangled in a purse seine net is small; however, such events are most likely to occur within Monterey Bay due to the strong overlap of the Fishery and otters due to the combination of suitable depth and habitat for the otter and the availability of target species for the Fishery. From July 2004 through January 2006, 52 purse seine nets were set in Monterey Bay to catch squid, anchovy, and sardine (26 nets were set for squid and 26 for anchovy and Sardine). One of these included an incident of two otters entering and leaving a purse seine net unharmed (NMFS 2005). Of the 26 purse seine nets set for anchovy and sardine, 15 were located more than 2 miles offshore, while 19 were more than 1 mile offshore. Seven of the nets were set within 1 mile offshore. The conclusion is that the majority of the nets (approx. 73 percent) were set beyond the distance offshore where otters normally occur (1.2 miles). A similar pattern is expected in the future.

The Fishery would generally occur in waters deeper than the 80 feet or less used by otters (purse seine nets used are more than 130 feet deep and would not be deployed in shallower waters). We examined charts within the range of the otter and found most depths within the sardine fishing area of the FMP were deeper than that typically used by otters, except for portions of Monterey Bay (as discussed above). The small mesh size (1 ¼ inches) and rapid deployment of the purse

seines further minimizes the chances that otters would be caught within the nets. Although there is a potential for otters to become entangled in purse seine nets used by the Fishery, such instances are expected to be very rare because, to date, no such entanglements have been recorded in the action area. For that reason, otters are not likely to become entangled.

A capture event that results in otters needing human assistance in escaping a net, while rare due to limited overlap between the Fishery and otters, is expected to occur in the action area. While we have no records of capture in the action area, the single known incident reported above did indicate that initial escape attempts through the net were unsuccessful until the otters apparently realized they could simply jump over the net. Those two otters were able to escape without assistance. However, had the net been closed or nearly-closed during this event, the otters likely would have needed human assistance to escape. Therefore, we anticipate the eventual capture of up to two otters in a single event is likely to occur given the ongoing nature of the proposed action.

Collision with boat propellers is also cited as a cause of injury and mortality in otters. As many as four such occurrences are recorded since records on otter mortality have been kept. Due to the scarcity of deaths or injury due to boat propellers, and the fact that it would be nearly impossible to attribute such an injury specifically to a sardine fishing vessel, we do not consider this effect to be likely to occur.

CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

We have no information on future non-Federal actions within the action area that could affect otters. Ongoing actions that could be having an effect on otters include recreational and commercial fishing, boating, shipping, scuba diving, safety and rescue operations, and other ocean-oriented activities; however, we have no indication that these activities are having more than a minimal effect on the species. Other activities that have contributed to the slow recovery of otters (e.g., oil spills, outfall from treatment facilities) are subject to Federal oversight and are not part of the cumulative effects analysis.

CONCLUSION

After reviewing the current status of the otter, the environmental baseline for the action area, the effects of the proposed Amendment 11 to the CPS FMP, and the cumulative effects, it is the Service's biological opinion that the amendment, as proposed, is not likely to jeopardize the continued existence of the otter. We reach this conclusion because:

1. The likelihood of an otter becoming entangled in a purse seine net used in the Fishery is very low due to the minimal overlap of the Fishery and the distribution of the otter.

2. The purse seine nets used in the Fishery are deployed rapidly and have a small mesh which further discounts the potential for entanglement of otters.
3. Boat propeller injuries are generally rare and have not been specifically attributed to the Fishery, therefore, we anticipate such injuries are unlikely to occur.
4. Otter capture due to the Fishery is not likely to cause significant impacts to the otter population because the otters would presumably be released unharmed and such occurrences would be rare.

No critical habitat has been designated for this species; therefore, none will be affected.

INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. 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. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed species by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be undertaken by the NMFS so that they become binding conditions of any grant or permit issued to the (applicant), as appropriate, for the exemption in section 7(o)(2) to apply. The NMFS has a continuing duty to regulate the activity covered by this incidental take statement. If the NMFS (1) fails to assume and implement the terms and conditions or (2) fails to require the Sardine fishers to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to any permit or authorization, the protective coverage of section 7(o)(2) may lapse. To monitor the impact of incidental take, the NMFS must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. [50 CFR '402.14(i)(3)]

We anticipate the following level of take may result from the proposed activities:

The Service anticipates that no more than two (2) otters will be taken in the form of capture in deployed purse seine nets in a single event as a result of this proposed action. For the purposes of this biological opinion, capture is defined as any incident in which an otter is encircled by a purse seine net and is unable to escape without assistance.

This incidental take statement does not exempt any activity from the prohibitions against take contained in section 9 of the Act that is not incidental to the action as described in this biological opinion. Otters may be taken only within the defined boundaries of the action area as described in the Environmental Baseline section of this biological opinion.

REASONABLE AND PRUDENT MEASURES

The Service believes the following reasonable and prudent measures are necessary and appropriate to minimize take of otters:

1. The NMFS must require sardine fishers to implement measures to minimize the potential that otters will be trapped in a purse seine net.
2. The NMFS must ensure that take will be reduced through education, monitoring, and reporting.

TERMS AND CONDITIONS

To be exempt from the prohibitions of section 9 of the Act, the NMFS must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline reporting and monitoring requirements. These terms and conditions are non-discretionary.

The following terms and conditions implement reasonable and prudent measure 1:

- a. If one (1) otter is captured (as defined in the Incidental Take Statement above) in a net being operated for sardine fishing, the NMFS must contact the Ventura Fish and Wildlife Office, Ventura, California, within 48 hours so we can review the project activities to determine if additional protective measures are needed. Project activities may continue during this review period, provided that all protective measures proposed by the NMFS and the terms and conditions of this biological opinion have been and continue to be implemented. Any injury or mortality resulting from such incidents must be reported within 24 hours to the Service's California/Nevada Operations Office, Sacramento, California, and to the appropriate Law Enforcement Office of the Service.
- b. Sardine fishing boat operators must be advised not to deploy their nets if an otter is observed within the area where a purse seine would be opened. Only upon when the otter is out of harm's way should the net be deployed.

The following terms and conditions implement reasonable and prudent measure 2:

- a. With the inception of the subject Fishery amendment, the NMFS must provide education and instructions to sardine vessel operators in California that at minimum includes: identification of an otter; a description of the regulations

protecting otters; the requirements of both the CPS FMP and this biological opinion to minimize and avoid adverse affects to the otter; the consequences of not implementing these requirements; any precautions that the NMFS can impose on the vessel operators to prevent capture of otters in the nets; and monitoring and reporting requirements. This educational program can be a formal presentation or published material, or both. The Service will be provided the subject educational materials upon finalization.

- b. The NMFS must require sardine fishers to look for and record otter observations if any interaction (defined as otters within encircled nets or coming into contact with nets or vessels, including but not limited to capture events) with the purse seine net(s) or vessel(s) is noted. With the exception of a capture event, which will be initially reported as described in term and condition 1.a. above, observations made pursuant to this term and condition will be reported by NMFS to the Service's California/Nevada Operations Office, Sacramento, California, by March 30 of each year. Reporting of casual observation of otters is not necessary.
- c. The NMFS will provide an annual report (by March 30 each year) to the Service's California/Nevada Operations Office, Sacramento, California, on data submitted by vessels (in addition to the initial reports as described in term and condition 1.a., above) regarding their interactions with otters, and including any available information regarding dockside or other bycatch reporting efforts. Reporting requirements are summarized below.

REPORTING REQUIREMENTS

The NMFS must require any sardine fishing vessels to report instances where interactions (as described in term and condition 2.b. above) with otters have occurred, regardless of whether incidental take results. Interactions resulting in take (i.e., capture) must be reported to the Service's Ventura Fish and Wildlife Office, Ventura, California, within 48 hours (as described in term and condition 1.a. above). Any injury or mortality resulting from such incidents must be reported within 24 hours to the Service's California/Nevada Operations Office, Sacramento, California, and to the appropriate Law Enforcement Office of the Service.

The NMFS will also report to the Service's California/Nevada Operations Office, Sacramento, California, by March 30 of each year the proposed Amendment 11 is in effect, the following: (1) the number of sardine fishing vessels that operated within the action area; (2) locations where the vessels operated, including maps if possible; (3) any observations of otters recorded pursuant to the terms and conditions above; (4) along with the otter annual report NMFS will include a summary of any incidents involving sardine fishing vessels and other listed species (e.g., brown pelican, etc.), if it is known/available; (5) a summary of the manner in which any protective measures were implemented and their effectiveness; and (6) provide recommendations for other protective measures that could be implemented, such as the Conservation Recommendations below.

DISPOSITION OF INJURED OR DEAD SOUTHERN SEA OTTERS

If any otter is injured or killed, the vessel operator must record the location, date, time, and cause of death or injury, if known, and immediately notify the Ventura Fish and Wildlife Office (805-644-1766) and the appropriate U.S. Fish and Wildlife Service Law Enforcement Office. This information must remain with the animal, whether injured or killed, until final disposition.

You must ensure that injured otters are handled with care and provided effective treatment. Injured animals must be transported to a qualified veterinarian. Should any treated otter survive, the Service must be contacted regarding the final disposition of the animal.

You must ensure that dead animals are preserved in the best possible state. You must endeavor to place the remains of the intact otters with educational or research institutions holding the appropriate State and Federal permits per their instructions. If such institutions are not available or the skin has been damaged, the information noted above must be obtained and the carcass left in place. You must make arrangements regarding proper disposition of potential museum specimens with the institutions as soon as possible.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the Act directs Federal agencies to use their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. The Service recommends that NMFS implement the following actions:

1. The NMFS should develop a CPS wide assessment of potential impacts to fish and wildlife resources in an effort to address the CPS programmatically.
2. The NMFS should work with the CDFG to establish a consistent monitoring program to evaluate bycatch, including otters and other non-fish species. The data provided by on board monitoring is the best source of such information, which is critical to the maintenance of the marine ecosystem in the face of increasing harvest pressure.
3. The NMFS should work with CDFG to limit the Fishery to the Federal EEZ (3-12 nm offshore), and outside of the state waters (0-3 nm offshore). Most of the conflict with otters could be avoided by limiting the Fishery to distances offshore beyond which otters normally occur.

The Service requests notification of the implementation of any conservation recommendations so we may be kept informed of actions minimizing or avoiding adverse effects or benefiting listed species or their habitats.

REINITIATION NOTICE

This concludes formal consultation on the action outlined in your consultation package (NMFS 2005). As provided in 50 CFR '402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

If you have any questions regarding this biological opinion, please contact Daniel Brown at the Pacific Regional Office (503) 231-6281, or Rick Farris at the Ventura Fish and Wildlife Office (805) 644-1766 ext. 316.

Sincerely,



Paul Henson, Assistant Manager
Ecological Services

cc: Field Supervisor, Ventura Fish and Wildlife Office (Attn: Rick Farris)
Assistant Regional Director-ES, Pacific Regional Office, Portland, Oregon
(Attn: Daniel Brown)

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