

MILITARY READINESS AND SOUTHERN SEA OTTER
CONSERVATION ACT

—————
JULY 17, 2012.—Ordered to be printed
—————

Mr. HASTINGS of Washington, from the Committee on Natural
Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4043]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 4043) to amend title 10, United States Code, to direct the Secretary of Defense to establish Southern Sea Otter Military Readiness Areas for national defense purposes, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Military Readiness and Southern Sea Otter Conservation Act”.

SEC. 2. SOUTHERN SEA OTTER MILITARY READINESS AREAS.

(a) ESTABLISHMENT OF THE SOUTHERN SEA OTTER MILITARY READINESS AREAS.—Chapter 136 of title 10, United States Code, is amended by adding at the end the following new section:

“§ 2283. Establishment of the Southern Sea Otter Military Readiness Areas

“(a) ESTABLISHMENT.—The Secretary of Defense shall establish Southern Sea Otter Military Readiness Areas for national defense purposes, consisting of—

“(1) the area that includes Naval Base Ventura County San Nicolas Island and Begg Rock, and the adjacent and surrounding waters within the following coordinates:

“N. Latitude/W. Longitude

“33°27.8’/119°34.3’

“33°20.5’/119°15.5’

“33°13.5/119°11.8’
 “33°06.5/119°15.3’
 “33°02.8/119°26.8’
 “33°08.8/119°46.3’
 “33°17.2/119°56.9’
 “33°30.9/119°54.2’;

“(2) that area that includes Naval Base Coronado San Clemente Island and the adjacent and surrounding waters running parallel to shore to 3 nautical miles from the high tide line designated by 33 C.F.R. part 165 on May 20, 2010, as the San Clemente Island 3NM Safety Zone; and

“(3) that area that includes Marine Corps Base Camp Pendleton and the adjacent waters within the following coordinates:

“Latitude/W. Longitude
 “33°26.6/117°38.9’
 “33°21.3/117°45.8’
 “33°56.2/117°39.7’
 “33°6.5/117°28.5’
 “33°10.2/117°23.7’
 “33°11.8/117°23.2’
 “33°26.6/117°38.9’.

“(b) ACTIVITIES WITHIN THE SOUTHERN SEA OTTER MILITARY READINESS AREAS.—

“(1) INCIDENTAL TAKINGS UNDER ENDANGERED SPECIES ACT OF 1973.—Sections 4 and 9 of the Endangered Species Act of 1973 (16 U.S.C. 1533, 1538) shall not apply with respect to the incidental taking of any southern sea otter in the Southern Sea Otter Military Readiness Areas in the course of conducting a military readiness activity.

“(2) INCIDENTAL TAKINGS UNDER MARINE MAMMAL PROTECTION ACT OF 1972.—Sections 101 and 102 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371, 1372) shall not apply with respect to the incidental taking of any southern sea otter in the Southern Sea Otter Military Readiness Areas in the course of conducting military readiness activities.

“(3) TREATMENT AS SPECIES PROPOSED TO BE LISTED.—For purposes of any military readiness activity, any southern sea otter while within the Southern Sea Otter Military Readiness Areas shall be treated for the purposes of section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) as a member of a species that is proposed to be listed as an endangered species or a threatened species under section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533).

“(c) REMOVAL.—Nothing in this section or any other Federal law shall be construed to require that any southern sea otter located within the Southern Sea Otter Military Readiness Areas as of the effective date of this section or thereafter be removed from the Areas.

“(d) REVISION OR TERMINATION OF EXCEPTIONS.—The Secretary of the Interior may revise or terminate the application of subsection (b) if the Secretary, in consultation with, and with the concurrence of, the Secretary of the Navy, determines that military activities occurring in the Southern Sea Otter Military Readiness Areas are substantially impeding southern sea otter conservation or the return of southern sea otters to optimum sustainable population levels.

“(e) MONITORING.—

“(1) IN GENERAL.—The Secretary of the Navy, in consultation and in cooperation with the Secretary of the Interior, shall monitor the Southern Sea Otter Military Readiness Areas not less than every year to evaluate the status of the southern sea otter population.

“(2) REPORTS.—Within 18 months after the effective date of this section and every three years thereafter, the Secretaries of the Navy and the Interior shall jointly report to Congress and the public on monitoring undertaken pursuant to paragraph (1).

“(f) RELATIONSHIP TO OTHER FEDERAL LAW.—Except as provided in subsections (a) and (b), nothing in this section shall be construed as repealing, superseding, or modifying any provision of Federal law.

“(g) DEFINITIONS.—In this section:

“(1) INCIDENTAL TAKING.—The term ‘incidental taking’ means any take of a southern sea otter that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

“(2) OPTIMUM SUSTAINABLE POPULATION.—The term ‘optimum sustainable population’ means, with respect to any population stock, the number of animals that will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

“(3) SOUTHERN SEA OTTER.—The term ‘southern sea otter’ means any member of the subspecies *Enhydra lutris nereis*.

“(4) TAKE.—The term ‘take’—

“(A) when used in reference to activities subject to regulation by the Endangered Species Act of 1973 (16 U.S.C. 1531–1544) shall have the meaning given such term in that statute; and

“(B) when used in reference to activities subject to regulation by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1423h), shall have the meaning given such term in that statute.

“(5) MILITARY READINESS ACTIVITY.—The term ‘military readiness activity’ has the meaning given that term in section 315(f) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107–314; 116 Stat. 2509; 16 U.S.C. 703 note), and includes all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following:

“2283. Establishment of the Southern Sea Otter Military Readiness Areas.”.

(c) CONSERVATION AND MANAGEMENT ACTIONS.—Section 1 of Public Law 99–625 (16 U.S.C. 1536 note) is amended by adding at the end the following:

“(g) CONSERVATION AND MANAGEMENT ACTIONS.—If the Secretary issues a final rule ending the management plan authorized under subsection (b) through the termination of the regulations implementing such plan—

“(1) the Secretary, in planning and implementing recovery and conservation measures under the Act to allow for the expansion of the range of the population of the sea otter, shall coordinate and cooperate with—

“(A) the Secretary of the Navy;

“(B) the Secretary of Commerce regarding recovery efforts for species listed under the Act; and

“(C) the State of California to assist the State in continuing viable commercial harvest of State fisheries; and

“(2) interaction with sea otters in the course of engaging in fishing in any State fishery south of Point Conception, California, under an authorization issued by the State of California, shall not be treated as a violation of section 9 of the Act for incidental take or of the Marine Mammal Protection Act of 1972.”.

PURPOSE OF THE BILL

The purpose of H.R. 4043, as ordered reported, is to amend title 10, United States Code, to direct the Secretary of Defense to establish Southern Sea Otter Military Readiness Areas for national defense purposes.

BACKGROUND AND NEED FOR LEGISLATION

The California or Southern sea otter was listed as threatened under the Endangered Species Act (ESA) in 1977. The threatened listing made the sea otter a depleted species under the Marine Mammal Protection Act (MMPA). At the time of the listing, the sea otter population was located north of Point Conception along the central portion of the California coast. Concerns were raised that the concentrated population could be at risk of extinction from a catastrophic event, such as an oil spill. To assist the sea otter in its recovery, the sea otter recovery team recommended the creation of an experimental population and the establishment of translocation and management zones in its 1982 recovery plan. The recommendation would allow for the expansion of the experimental population and the continuance of commercial fishing and military activities. The recovery plan had the support of the Navy and fishing interests, since their activities would be protected under the plan. Legislation was needed to implement the recovery plan ac-

tions since the MMPA did not allow for the creation of an experimental population.

Public Law 99-625, enacted in 1986, allowed the Secretary of the Interior to develop and implement, through regulations, a plan for the relocation of an experimental population of California sea otters and the creation of translocation and management zones. The Act provided that if the translocation plan was established, sea otters in each zone would be treated as candidate species. Military activities in the translocation zone would not be in violation of the incidental take provisions of the ESA and fishing activities in the management zone would not be in violation of the incidental take provisions of the ESA and the MMPA. In addition, the U.S. Fish and Wildlife Service (FWS) was required to move sea otters in the management zone back to the translocation area to protect existing commercial fisheries.

Beginning in 1987, FWS captured and relocated 140 southern sea otters from the parent population to the translocation zone located around San Nicolas Island. In 1991, translocation efforts were halted due to issues with the translocated animals either swimming back to the parent population or not surviving the transfer. Between 1987 and 1993, 24 sea otters were removed from the management zone, located south of Point Conception, and returned to the parent population. In 1993, removals of sea otters from the management zone were also halted. In 2010, 46 independent southern sea otters were counted at San Nicolas Island.

On April 3, 2003, FWS issued a Final Revised Recovery Plan for the southern sea otter which updated the 1982 recovery plan. The 2003 recovery plan reflected recovery team recommendations that the translocation program was not the best way to accomplish the objective to increase the range and sea otter population numbers. The plan recommended FWS declare the translocation program a failure and instead allow for the natural expansion of the population.

In October 2005, FWS issued a draft Supplemental Environmental Impact Statement (SEIS) on the translocation program. The preferred alternative of the draft SEIS is to terminate the southern sea otter translocation and management zones and allow the sea otters in those areas to remain. In 2009, FWS was sued by two environmental organizations under the Administrative Procedure Act alleging an unreasonably delayed decision on the translocation program.

As part of a November 2010 settlement agreement of the lawsuit, FWS issued a proposed rule and a revised draft SEIS on August 26, 2011. The rule proposes to declare the translocation program a failure. The rule, if finalized, would override the regulations that establish and govern the implementation of the translocation program and the provisions of Public Law 99-625 that allow military and fishing activities to not be in violation of incidental take provisions of the ESA and MMPA.

H.R. 4043, the Military Readiness and Southern Sea Otter Conservation Act, will retain the candidate species status for military activities occurring in the translocation zone. Specifically, the bill would create Southern Sea Otter Military Readiness Areas in these areas: Naval Base Ventura County San Nicolas Island and Begg Rock and specified surrounding waters designated by certain co-

ordinates; Naval Base Coronado San Clemente Island and adjacent and surrounding waters running parallel to shore to 3 nautical miles designated as the San Clemente Island 3 NM Safety Zone; and Marine Corps Base Camp Pendleton and adjacent waters specified by certain coordinates.

Within the military readiness areas, the California sea otter would be treated as a candidate species under the ESA and the requirement for permits under the incidental take sections of the ESA (sections 4 and 9) and the MMPA (sections 101 and 102) would not apply to military activities within the designated areas. The bill would not require the removal of sea otters from the military readiness areas.

The Secretary of the Interior would be authorized to revise or terminate the military readiness areas, in consultation and with the concurrence of the Secretary of the Navy, if the Secretary of the Interior determines the military activities are substantially impeding southern sea otter conservation or the population's growth to optimum sustainable population levels.

The bill would require the Secretary of the Navy to monitor the military readiness areas, not less than every three years, to measure the growth or decline of the sea otter population. Within 24 months after the effective date of the bill, and every three years after, the Navy would report to Congress on its monitoring activities.

FWS and the National Marine Fisheries Service, in cooperation with the Marine Mammal Commission, would be required to develop an ecosystem management plan for waters off the California coast to ensure the recovery of southern sea otters, the recovery of endangered black and white abalone, and continue commercial harvest of shellfish fisheries at levels approximating current harvests.

In addition, the bill would require FWS to assess the carrying capacity of the habitat for the southern sea otters, including impacts of water quality on the carrying capacity and the causes of water quality degradation. FWS would also be required to continue implementing the relocation and management plan for the southern sea otter as authorized in Public Law 99-625, until the ecosystem management plans and assessments are completed.

At a Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs hearing, the Navy and FWS testified in support of the military readiness areas. FWS also testified that it opposed a provision in the bill pertaining to the development of the described "Ecosystem Management Plan" due in part to concerns that none of the agencies can "ensure" the recovery of a species as required in the introduced bill.

To address concerns raised, during Full Committee consideration of the bill, the Committee adopted an amendment offered by Congressman John Fleming (R-LA) to strike the provision requiring an ecosystem management plan, carrying capacity provisions and continued implementation of the translocation plan. The amendment substituted language that would be triggered only if FWS issues a final rule to end the translocation program. The Fleming amendment would require FWS, when planning and implementing ESA recovery and conservation actions for the southern sea otter, to coordinate and cooperate with the Navy, the Secretary of Commerce and the State of California. The amendment would also retain ex-

isting exemptions for state fisheries south of Point Conception. While the sea otter would be allowed to naturally expand its range, state fisheries south of Point Conception would not be in violation of incidental take provisions in the ESA and MMPA. If state fisheries were to take a sea otter, the State of California has authority under state law to close them. Lastly, the amendment would modify the monitoring section to include the Secretary of the Interior, to require annual monitoring, and to require the first report in 18 months of the bill's enactment.

COMMITTEE ACTION

H.R. 4043 was introduced on February 15, 2012, by Congressman Elton Gallegly (R-CA). The bill was referred primarily to the Committee on Armed Services, and in addition to the Committee on Natural Resources. Within the Natural Resources Committee, the bill was referred to the Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs. On April 19, 2012, the Subcommittee held a hearing on the bill. On May 16, 2012, the Full Natural Resources Committee met to consider the bill. The Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs was discharged by unanimous consent. Congressman John Fleming (R-LA) offered amendment designated .001 to the bill. Congressman Gregorio Sablan (D-MP) offered amendment designated .001 to the Fleming amendment; the Sablan amendment was not adopted by voice vote. The amendment offered by Congressman Fleming was adopted by a roll call vote of 19 to 12, as follows:

Committee on Natural Resources
U.S. House of Representatives
112th Congress

Date: May 16, 2012

Recorded Vote #: 1

Meeting on / Amendment: **HR 4043** – An amendment offered by Mr. Fleming.001 was **AGREED TO** by a roll call vote of 19 yeas and 12 nays.

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Hastings, WA Chairman	X			<i>Mr. Heinrich, NM</i>		X	
<i>Mr. Markey, MA Ranking</i>		X		Mr. Benishek, MI	X		
Mr. Young, AK				<i>Mr. Lujan, NM</i>		X	
<i>Mr. Kildee, MI</i>				Mr. Rivera, FL			
Mr. Duncan of TN	X			<i>Ms. Sutton, OH</i>		X	
<i>Mr. DeFazio, OR</i>		X		Mr. Duncan of SC	X		
Mr. Gohmert, TX				<i>Ms. Tsongas, MA</i>		X	
<i>Mr. Faleomavaega, AS</i>				Mr. Tipton, CO	X		
Mr. Bishop, UT	X			<i>Mr. Pierluisi, PR</i>		X	
<i>Mr. Pallone, NJ</i>				Mr. Gosar, AZ	X		
Mr. Lamborn, CO	X			<i>Mr. Garamendi, CA</i>			
<i>Mrs. Napolitano, CA</i>		X		Mr. Labrador, ID			
Mr. Wittman, VA				<i>Ms. Hanabusa, HI</i>		X	
<i>Mr. Holt, NJ</i>		X		Ms. Noem, SD	X		
Mr. Broun, GA	X			<i>Mr. Tonko, NY</i>			
<i>Mr. Grijalva, AZ</i>		X		Mr. Southerland, FL	X		
Mr. Fleming, LA	X			Mr. Flores, TX	X		
<i>Ms. Bordallo, GU</i>				Mr. Harris, MD	X		
Mr. Coffman, CO	X			Mr. Landry, LA			
<i>Mr. Costa, CA</i>				Mr. Runyan, NJ	X		
Mr. McClintock, CA				Mr. Johnson, OH	X		
<i>Mr. Boren, OK</i>		X		Mr. Amodei, NV	X		
Mr. Thompson, PA	X						
<i>Mr. Sablan, CNMI</i>							
Mr. Denham, CA							
				TOTALS	19	12	

The bill, as amended, was then adopted and ordered favorably reported to the House of Representatives by a bipartisan roll call vote of 24 to 13, as follows:

Committee on Natural Resources
U.S. House of Representatives
112th Congress

Date: May 16, 2012

Recorded Vote #: 2

Meeting on / Amendment: **HR 4043** – Adopted and favorably reported to the House of Representatives, as amended, by a roll call vote of 24 yeas and 13 nays.

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Hastings, WA Chairman	X			<i>Mr. Heinrich, NM</i>		X	
<i>Mr. Markey, MA Ranking</i>		X		Mr. Benishek, MI	X		
Mr. Young, AK				<i>Mr. Lujan, NM</i>		X	
<i>Mr. Kildee, MI</i>				Mr. Rivera, FL			
Mr. Duncan of TN	X			<i>Ms. Sutton, OH</i>		X	
<i>Mr. DeFazio, OR</i>		X		Mr. Duncan of SC	X		
Mr. Gohmert, TX				<i>Ms. Tsongas, MA</i>		X	
<i>Mr. Faleomavaega, AS</i>				Mr. Tipton, CO	X		
Mr. Bishop, UT	X			<i>Mr. Pierluisi, PR</i>		X	
<i>Mr. Pallone, NJ</i>		X		Mr. Gosar, AZ	X		
Mr. Lamborn, CO	X			<i>Mr. Garamendi, CA</i>		X	
<i>Mrs. Napolitano, CA</i>		X		Mr. Labrador, ID			
Mr. Wittman, VA				<i>Ms. Hanabusa, HI</i>		X	
<i>Mr. Holt, NJ</i>		X		Ms. Noem, SD	X		
Mr. Broun, GA	X			<i>Mr. Tonko, NY</i>			
<i>Mr. Grijalva, AZ</i>		X		Mr. Southerland, FL	X		
Mr. Fleming, LA	X			Mr. Flores, TX	X		
<i>Ms. Bordallo, GU</i>				Mr. Harris, MD	X		
Mr. Coffman, CO	X			Mr. Landry, LA	X		
<i>Mr. Costa, CA</i>	X			Mr. Runyan, NJ	X		
Mr. McClintock, CA	X			Mr. Johnson, OH	X		
<i>Mr. Boren, OK</i>	X			Mr. Amodei, NV	X		
Mr. Thompson, PA	X						
<i>Mr. Sablan, CNMI</i>							
Mr. Denham, CA	X						
				TOTALS	24	13	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 4043—Military Readiness and Southern Sea Otter Conservation Act

H.R. 4043 would establish three areas off the coast of southern California to accommodate certain training needs of the Navy and Marine Corps. Since 1987, the U.S. Fish and Wildlife Service (FWS) has conducted an experiment to relocate southern sea otters to those areas in an effort to increase the otter population. That program has not succeeded and FWS plans to terminate it. While the program was in effect, naval operations in those areas were exempt from compliance with the incidental takings provisions of the Endangered Species Act and the Marine Mammal Protection Act as they applied to the southern sea otter. (An incidental taking refers to the harming or killing of an endangered species that results from an otherwise lawful activity.) When the program is ended, the Department of the Navy will have to conduct certain environmental studies and obtain incidental takings permits for southern sea otters before it operates in those training areas.

H.R. 4043 would exempt the department from those incidental takings provisions, reducing administrative efforts and compliance costs. The bill would require the Navy to annually monitor the otter population in the established zones and to report to the Congress every third year, the results of that monitoring. Navy monitoring of the otter population would supplant similar efforts currently conducted by the U.S. Geological Survey, albeit on a less frequent basis. Based on information from the Department of the Navy, CBO estimates that implementing the bill would have no significant impact on the federal budget.

Enacting H.R. 4043 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4043 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is David Newman. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. Based on information from the Department of the Navy, CBO estimates that implementing the bill would have no significant impact on the federal budget.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill, as ordered reported, is to amend title 10, United States Code, to direct the Secretary of Defense to establish Southern Sea Otter Military Readiness Areas for national defense purposes.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 10, UNITED STATES CODE

* * * * *

SUBTITLE A—GENERAL MILITARY LAW

* * * * *

**PART IV—SERVICE, SUPPLY, AND
PROCUREMENT**

* * * * *

**CHAPTER 136—PROVISIONS RELATING TO SPECIFIC
PROGRAMS**

Sec.
 2281. Global Positioning System.
 * * * * * *
 2283. *Establishment of the Southern Sea Otter Military Readiness Areas.*
 * * * * * *

§2283. *Establishment of the Southern Sea Otter Military Readiness Areas*

(a) *ESTABLISHMENT.*—The Secretary of Defense shall establish Southern Sea Otter Military Readiness Areas for national defense purposes, consisting of—

(1) *the area that includes Naval Base Ventura County San Nicolas Island and Begg Rock, and the adjacent and surrounding waters within the following coordinates:*

- N. Latitude/W. Longitude*
- 33°27.8'/119°34.3'*
- 33°20.5'/119°15.5'*
- 33°13.5'/119°11.8'*
- 33°06.5'/119°15.3'*
- 33°02.8'/119°26.8'*
- 33°08.8'/119°46.3'*
- 33°17.2'/119°56.9'*
- 33°30.9'/119°54.2';*

(2) *that area that includes Naval Base Coronado San Clemente Island and the adjacent and surrounding waters running parallel to shore to 3 nautical miles from the high tide line designated by 33 C.F.R. part 165 on May 20, 2010, as the San Clemente Island 3NM Safety Zone; and*

(3) *that area that includes Marine Corps Base Camp Pendleton and the adjacent waters within the following coordinates:*

- Latitude/W. Longitude*
- 33°26.6'/117°38.9'*
- 33°21.3'/117°45.8'*
- 33°56.2'/117°39.7'*
- 33°6.5'/117°28.5'*
- 33°10.2'/117°23.7'*
- 33°11.8'/117°23.2'*
- 33°26.6'/117°38.9'.*

(b) *ACTIVITIES WITHIN THE SOUTHERN SEA OTTER MILITARY READINESS AREAS.*—

(1) *INCIDENTAL TAKINGS UNDER ENDANGERED SPECIES ACT OF 1973.*—Sections 4 and 9 of the Endangered Species Act of 1973 (16 U.S.C. 1533, 1538) shall not apply with respect to the incidental taking of any southern sea otter in the Southern Sea Otter Military Readiness Areas in the course of conducting a military readiness activity.

(2) *INCIDENTAL TAKINGS UNDER MARINE MAMMAL PROTECTION ACT OF 1972.*—Sections 101 and 102 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371, 1372) shall not apply with respect to the incidental taking of any southern sea otter in the Southern Sea Otter Military Readiness Areas in the course of conducting military readiness activities.

(3) *TREATMENT AS SPECIES PROPOSED TO BE LISTED.*—For purposes of any military readiness activity, any southern sea

otter while within the Southern Sea Otter Military Readiness Areas shall be treated for the purposes of section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536) as a member of a species that is proposed to be listed as an endangered species or a threatened species under section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533).

(c) *REMOVAL.*—Nothing in this section or any other Federal law shall be construed to require that any southern sea otter located within the Southern Sea Otter Military Readiness Areas as of the effective date of this section or thereafter be removed from the Areas.

(d) *REVISION OR TERMINATION OF EXCEPTIONS.*—The Secretary of the Interior may revise or terminate the application of subsection (b) if the Secretary, in consultation with, and with the concurrence of, the Secretary of the Navy, determines that military activities occurring in the Southern Sea Otter Military Readiness Areas are substantially impeding southern sea otter conservation or the return of southern sea otters to optimum sustainable population levels.

(e) *MONITORING.*—

(1) *IN GENERAL.*—The Secretary of the Navy, in consultation and in cooperation with the Secretary of the Interior, shall monitor the Southern Sea Otter Military Readiness Areas not less than every year to evaluate the status of the southern sea otter population.

(2) *REPORTS.*—Within 18 months after the effective date of this section and every three years thereafter, the Secretaries of the Navy and the Interior shall jointly report to Congress and the public on monitoring undertaken pursuant to paragraph (1).

(f) *RELATIONSHIP TO OTHER FEDERAL LAW.*—Except as provided in subsections (a) and (b), nothing in this section shall be construed as repealing, superseding, or modifying any provision of Federal law.

(g) *DEFINITIONS.*—In this section:

(1) *INCIDENTAL TAKING.*—The term “incidental taking” means any take of a southern sea otter that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2) *OPTIMUM SUSTAINABLE POPULATION.*—The term “optimum sustainable population” means, with respect to any population stock, the number of animals that will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

(3) *SOUTHERN SEA OTTER.*—The term “southern sea otter” means any member of the subspecies *Enhydra lutris nereis*.

(4) *TAKE.*—The term “take”—

(A) when used in reference to activities subject to regulation by the Endangered Species Act of 1973 (16 U.S.C. 1531–1544) shall have the meaning given such term in that statute; and

(B) when used in reference to activities subject to regulation by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1423h), shall have the meaning given such term in that statute.

(5) *MILITARY READINESS ACTIVITY.*—The term “military readiness activity” has the meaning given that term in section 315(f)

of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314; 116 Stat. 2509; 16 U.S.C. 703 note), and includes all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use.

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SECTION 1 OF PUBLIC LAW 99-625

AN ACT To improve the operation of certain fish and wildlife programs.

SECTION 1. TRANSLOCATION OF CALIFORNIA SEA OTTERS.

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(g) CONSERVATION AND MANAGEMENT ACTIONS.—If the Secretary issues a final rule ending the management plan authorized under subsection (b) through the termination of the regulations implementing such plan—

(1) the Secretary, in planning and implementing recovery and conservation measures under the Act to allow for the expansion of the range of the population of the sea otter, shall coordinate and cooperate with—

(A) the Secretary of the Navy;

(B) the Secretary of Commerce regarding recovery efforts for species listed under the Act; and

(C) the State of California to assist the State in continuing viable commercial harvest of State fisheries; and

(2) interaction with sea otters in the course of engaging in fishing in any State fishery south of Point Conception, California, under an authorization issued by the State of California, shall not be treated as a violation of section 9 of the Act for incidental take or of the Marine Mammal Protection Act of 1972.

DISSENTING VIEWS

Southern sea otters originally ranged from Baja California, Mexico to Northern California or Oregon. During the 1700s and 1800s they were nearly driven to extinction by the fur trade, which was more damaging to the southern population, leaving only a small surviving unit in Monterey California with 50 individuals in 1914.

In 1977, the southern sea otter was listed under the Endangered Species Act primarily because of its reduced range and small population size. The U.S. Fish and Wildlife Service (FWS) implemented a plan to create a buffer population outside the present range to protect the species in the event of such a disaster. The law required the designation of a translocation zone, where sea otters would be introduced, and a management zone, which would surround the translocation zone and would be maintained “otter-free” by means of non-lethal removals. Incidental take restrictions pursuant to the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) were not to be applied in the management zone. The Service established the Southern Sea Otter Translocation Plan in 1987, selecting San Nicolas Island as the preferred reintroduction site. This established a “no-otter” management zone south of Point Conception California. Otters that swam south of San Nicolas Island into this zone were returned to the northern location.

H.R. 4043 would continue incidental take exemptions for southern sea otters from the ESA and MMPA for military activities within established military readiness areas to facilitate training. This will continue exemptions that are currently in place under the Southern Sea Otter Translocation Plan around San Nicolas Island and would additionally include waters farther south where recovering sea otter populations are expected to expand their range. The FWS has testified in support of these exemptions.

In 1993, the FWS discontinued the capture and relocation of otters under the Southern Sea Otter Translocation Plan because of concerns about impacts to individual animals and the population as a whole. A 2000 biological opinion confirmed the translocation program to be harmful to sea otters and the FWS formally declared that it would no longer relocate otters in 2001.

In 2005, the FWS issued a Draft Supplemental Environmental Impact Statement (DSEIS) which included a draft evaluation of the program indicating it was a failure and an opinion that the program had direct and indirect adverse effects on the survival and recovery of the southern sea otter. Alternatives studied in the DSEIS included ending sea otter management in the management zone and leaving the translocated individuals on San Nicolas Island. The public widely supported this alternative. In 2009, The Otter Project and the Environmental Defense Center of Santa Barbara filed suit against the Service over its failure to issue a final rule concerning sea otter management in the “no-otter” zone. This case

was settled in November, 2010 and required the Service to prepare a Draft Environmental Impact Statement and failure determination. These have been published and the FWS has issued a draft failure determination for the program based on pre-established criteria. Under the settlement, the Service must publish a proposed rule (which they have done) that terminates the program, and publish a final Environmental Impact Statement and failure determination by December, 2012.

As amended by Chairman Fleming, this bill would give fishermen working south of Point Conception, California incidental take exemptions from the ESA and the MMPA indefinitely upon the termination of the otter translocation program. This would remove any ability of the Fish and Wildlife Service or any other agency to address problems that may arise with otter recovery as a result of interaction with fisheries. Although sea otter range expansion could have effects on commercial fisheries, otters are not currently interacting with these fisheries and scientists predict this expansion will take place over a period of decades.

Ranking Member Sablan offered an amendment that would remove the misguided fisheries provisions while preserving the exemptions that are critical to the Navy's operations. This amendment was defeated, with the Majority voting in opposition.

H.R. 4043 would not put into place any meaningful actions for southern sea otter conservation and, in fact, would harm efforts to recover this species. For these reasons, we oppose H.R. 4043 as reported.

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