Billing Code 4333-15

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2018–N091; FF01EWFW00–FXES111601M000]

Marine Mammal Protection Act; Stock Assessment Report for the Northern Sea Otter in Washington

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; response to comments.

SUMMARY: In accordance with the Marine Mammal Protection Act of 1972, as amended, we, the U.S. Fish and Wildlife Service, have revised our stock assessment report for the northern sea otter stock in the State of Washington. We now make the final revised stock assessment report available to the public.

ADDRESSES: *Document Availability:* You may obtain a copy of the stock assessment report from our website at *https://www.fws.gov/wafwo*. Alternatively, you may contact the Washington Fish and Wildlife Office, 510 Desmond Dr., Suite 102, Lacey, WA 98503; telephone: (360) 753–9440.

FOR FURTHER INFORMATION CONTACT: Deanna Lynch, at the above street address, by telephone (360) 753–9545), or by email (deanna_lynch@fws.gov). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: We announce the availability of the final revised stock assessment report (SAR) for the northern sea otter (*Enhydra lutris kenyoni*) stock in the

State of Washington.

Background

Under the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.), and its implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 18, the U.S. Fish and Wildlife Service (Service) regulates the taking; import; and, under certain conditions, possession; transportation; purchasing; selling; and offering for sale, purchase, or export, of marine mammals. One of the goals of the MMPA is to ensure that stocks of marine mammals occurring in waters under U.S. jurisdiction do not experience a level of human-caused mortality and serious injury that is likely to cause the stock to be reduced below its *optimum sustainable population* (OSP) level. OSP is defined under the MMPA as "the number of animals which 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" (16 U.S.C. 1362(9)).

To help accomplish the goal of maintaining marine mammal stocks at their OSPs, section 117 of the MMPA requires the Service and the National Marine Fisheries Service (NMFS) to prepare a SAR for each marine mammal stock that occurs in waters under U.S. jurisdiction. A SAR must be based on the best scientific information available; therefore, we prepare it in consultation with established regional scientific review groups established under 117(d) of the MMPA. Each SAR must include:

1. A description of the stock and its geographic range;
2. A minimum population estimate, current and maximum net productivity rate, and current population trend;

3. An estimate of the annual human-caused mortality and serious injury by source and, for a strategic stock, other factors that may be causing a decline or impeding recovery of the stock;
4. A description of commercial fishery interactions;
5. A categorization of the status of the stock; and
6. An estimate of the *potential biological removal* (PBR) level.

The MMPA defines the PBR as "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its [OSP]" (16 U.S.C. 1362(20)). The PBR is the product of the minimum population estimate of the stock (N_{min}); one-half the maximum theoretical or estimated net productivity rate of the stock at a small population size (R_{max}); and a recovery factor (F_r) of between 0.1 and 1.0, which is intended to compensate for uncertainty and unknown estimation errors. This can be written as:

PBR = (N_{min})(½ of the R_{max})(F_r)

Section 117 of the MMPA also requires the Service and NMFS to review the SARs (a) at least annually for stocks that are specified as strategic stocks, (b) at least annually for stocks for which significant new information is available, and (c) at least once every 3 years for all other stocks. If our review of the status of a stock indicates that it has changed or may be more accurately determined, then the SAR must be revised accordingly.

A *strategic stock* is defined in the MMPA as a marine mammal stock "(A) for which the level of direct human-caused mortality exceeds the [PBR] level; (B) which, based on the best available scientific information, is declining and is likely to be listed as a threatened species

under the Endangered Species Act of 1973, [as amended] (16 U.S.C. 1531 et seq.) [ESA], within the foreseeable future; or (C) which is listed as a threatened species or endangered species under the [ESA], or is designated as depleted under [the MMPA]" 16 U.S.C. 1362(19).

Stock Assessment Report History for the Northern Sea Otter in Washington

The Washington sea otter SAR was last revised in August 2008. The Washington sea otter is not a strategic stock, thus the Service is required to review the stock assessment at least once every 3 years. The Service reviewed the Washington sea otter SAR in 2011 and concluded that a revision was not warranted because the status of the stock had not changed, nor could it be more accurately determined. However, upon review in 2016, the Service determined that revision was warranted because of changes in population estimates and distribution.

Before releasing our draft SAR for public review and comment, we submitted it for technical review internally and for scientific review by the Pacific Regional Scientific Review Group, which was established under the MMPA (16 U.S.C. 1386(d)). In a January 17, 2018 (83 FR 2461), *Federal Register* notice, we made our draft SAR available for the MMPA-required 90-day public review and comment period. Following the close of the comment period, we revised the SAR based on public comments we received (see **Response to Public Comments**) and prepared the final revised SAR.

Summary of Final Revised Stock Assessment Report for the Northern Sea Otter in the State of Washington

The following table summarizes some of the information contained in the final revised SAR for northern sea otters in Washington State, which includes the stock's N_{min}, R_{max}, F_r, PBR, annual estimated human-caused mortality and serious injury, and status.

SUMMARY—FINAL STOCK ASSESSMENT REPORT FOR THE NORTHERN SEA OTTER IN WAHINGTON STATE

Stock	N_{MIN}	R_{MAX}	F_R	PBR	Annual estimated human-caused mortality and serious injury	Stock status
Northern Sea Otter (Washington State)	1,806	0.20	0.1	18	Figures by specific source, where known, are provided in the SAR.	Non-Strategic

Response to Public Comments

We received comments on the draft revised SAR from the Marine Mammal Commission (Commission) and the Makah Tribe. We present substantive issues raised in those comments that are pertinent to the SAR, edited for brevity, along with our responses below.

Comment 1: The Service should conduct annual reviews of this SAR, given the rapid population increase. In addition, the annual reviews and OSP analysis should be reviewed by, and input incorporated from, the Pacific Scientific Review Group (PSRG) before the revised SAR is made available for public review and comment, as required by section 117 of the MMPA.

Response: As required in section 117(c) of the MMPA, the Service strives to meet its statutory requirement of reviewing the SAR for this non-strategic stock every 3 years. If our review indicates the status of the stock has changed or can be more accurately determined, the Service revises the SAR in accordance with section 117(b), which includes providing an opportunity for public review and consideration of advice offered by the PSRG. However, prior to public notification of the availability of a draft revised SAR, the Service seeks input from the PSRG to ensure it accurately reflects the best scientific information available at the time of

preparation. In addition, the Service updates the PSRG on any new information and ongoing studies during the PSRG's annual meetings.

The Service considers the ongoing population increase of 9 percent per year to be the population trajectory for almost three decades and, as such, does not represent significant new information that would warrant a review or revision on an annual basis. We appreciate the commenter's concern over the time it takes for review and, if warranted, subsequent revision of the SAR but balance that concern with the need to ensure our SAR accurately reflects the best available science and is subject to the public comment process.

Comment 2: The Service should develop methods for estimating total abundance of sea otters and associated uncertainty to inform an Optimum Sustainable Population (OSP) analysis so that more accurate comparisons with carrying capacity estimates can be made.

Response: Although the Service has provided funds to the Washington Department of Fish and Wildlife (WDFW) for conducting the annual summer census (which at least provides a minimum population estimate for estimating the PBR), the Service does not currently have the resources to develop and implement a survey method that would accurately estimate the total abundance and associated uncertainty for the Washington sea otter stock. Such a survey would most likely be cost-prohibitive because it would require considerably more flight and staff time in order to cover the full extent of the range where otters may occur. Although a statistically rigorous analysis to develop an estimate of uncertainty could potentially be developed, it would also require a significant investment of resources because development of a detection function requires observer verification. A detection function based on past survey data would likely not be appropriate for the following reasons: (a) the number of ground stations throughout the range

in different habitat types is not sufficient; (b) the ground observers miss otters that are observed by the aerial observer, and aerial photo counts often are higher than ground observer counts, further complicating the ability to calculate the error; and (c) since 1989, there has been one consistent aerial observer, thus any confidence interval developed for past data may not be applicable to surveys post-2019 when the current observer will be retiring.

At this time, the Service does not have a reliable estimate of carrying capacity, and therefore, the Service has not identified the OSP for the Washington stock of northern sea otters. The Service is aware of a PhD student out of the University of Washington who is currently working on an updated estimate of carrying capacity for northern otters in Washington, which may assist the Service in determining a more appropriate lower end of the OSP range (i.e., approximately 60 percent of carrying capacity). This will allow the Service to provide a more accurate determination of the stock's status relative to OSP; however, because the population continues to increase at 9 percent per year, we consider it unlikely that the stock is at OSP. Also, see response to *Comment 5*.

Comment 3: The Service should revise the discussion of fisheries information to indicate more precisely the nature of the Makah fishery, including the target species, where it is active, and whether it is a commercial fishery.

Response: NMFS (under the Secretary of Commerce) has the responsibility under MMPA section 118 for development of the List of Fisheries. NMFS's regulations at 50 CFR 229.1(d) state that those regulations do not apply "to Northwest treaty Indian tribal members exercising treaty fishing rights." Therefore, NMFS does not include the commercial fisheries operated by Northwest treaty Indian Tribes in the List of Fisheries. For example, in the 2016

List of Fisheries (81 FR 20550, April 8, 2016), Treaty Indian fishing is specifically excluded from the Washington Puget Sound region and Washington Grays Harbor salmon drift gillnet fisheries, which are commercial fisheries in which Tribes participate. The Makah Tribe's marine set-gillnet fishery is a commercial treaty fishery and is included in the Washington northern sea otter SAR in that category accordingly. The fishing areas where the fishery is active are also included in this SAR, specifically Catch Areas 4/4A/4B/5/6A/6C. The Service does not have access to the number of vessels participating in this fishery. Landing information for fisheries in these Catch Areas has been provided to the Service for ESA consultations with NMFS, but it does not break down the information by Tribe or fishery (i.e., includes both drift and set gill nets), nor does it include number of vessels.

We have reached out to NMFS to obtain reports of incidental taking of sea otters and have received no reports. Per NMFS' regulations, as mentioned above, fisheries operated by Northwest treaty Indian Tribal members exercising treaty fishing rights are exempt and are thus not subject to the reporting requirements of MMPA section 118(e). Unless a Tribe has their own regulations that require reporting and those reports are provided to NMFS and the Service, we are not privy to any incidental take. The Makah Tribe has provided incidental take information directly to the Service, per their regulations. Other Tribes may have similar self-reporting regulations regarding incidental catch of marine mammals, but we have not received reports from any other Tribe.

Comment 4: The Service should consult with NMFS, Tribal authorities, and other relevant groups to arrange for the placement of observers aboard trap and gillnet fishing vessels that may pose a significant risk of incidentally taking sea otters within their range in Washington

State.

Response: Under the MMPA, only Category I and II fisheries are required to accommodate an observer on board their vessel(s). Category III fisheries are generally not required to accommodate observers aboard vessels due to the remote likelihood of mortality and serious injury of marine mammals. Any request to place an observer on board a vessel must originate from NMFS. The Service does not have the authority to request observers be placed aboard fishing vessels. The fisheries that may result in mortality or serious injury of sea otters are either Tribal or Category III fisheries, except for the Washington coast Dungeness crab pot fishery, which is a Category II fishery. In addition, the pots are set and left and most of these vessels are small and cannot accommodate an observer on board. While an observer program may increase our opportunity to detect bycatch, analyses indicate that high levels of observer effort would be required to avoid false-negative conclusions, even if the rate of bycatch mortality is substantial enough to reduce the population growth rate (Hatfield et al. 2011). The Service will continue to work with the WDFW, NMFS, and Tribes to explore options for assessing sea otter bycatch, subject to funding availability.

Comment 5: The commenter asserted the recovery factor should be 0.75 or higher for the following reasons: (a) The SAR does not follow NMFS guidelines, (b) a State listing status cannot be used in the rationale for a recovery factor, (c) the WDFW proposed to change the State's status from endangered to threatened in February 2018, and (d) the current (2017) estimate indicates the population is approaching carrying capacity and has attained OSP.

Response: The Service appreciates and supports the efforts of NMFS in developing their Office of Protected Species Technical Memorandum and the 2016 Guidelines for Preparing

Stock Assessment Reports. However, these NMFS guidelines have not been adopted by the Service, and, while we consider the information contained within them to the extent applicable, they are not binding on the Service.

The WDFW's proposed change in status (Sato 2018) was not available at the time the SAR was developed nor before the SAR was made available for public comment, thus could not be considered in this SAR. Regardless, the recovery factor of 0.1 was not entirely based on the State listing status. As was recommended to the Service by the PSRG, we relied on the Taylor et al. (2003) factor for a small population (consisting of between 1,500 and 7,500 individuals) that has an increasing trend, but is considered vulnerable, regardless of listing status. The Washington sea otter stock is within the range considered to be a small population (whether or not a newer population estimate is used) and is considered to be vulnerable because of their restricted range making more than 50 percent of the stock vulnerable to a potential catastrophe, such as an oil spill, at any point in time. Therefore, the Service continues to agree with the recommendation made by the PSRG to use a recovery factor of 0.1.

A carrying capacity estimate was produced by Laidre et al. (2011); however, the Service does not consider this to be a viable estimate for the full range of this stock for the following reasons:

(1) This carrying capacity estimate relied on population density estimates associated with rocky habitat in Washington where the population has continued to grow at about 5 percent per year.

(2) Laidre et al. (2011) relied upon density estimates developed for southern sea otters for the mixed and sandy habitat in Washington. This is not an appropriate density estimate to apply

because southern sea otters are food limited, whereas Washington sea otters are not. An appropriate carrying capacity estimate for Washington sea otters needs to be based on food availability within the different habitat types that occur in Washington.

(3) Some areas that Laidre et al. (2011) delineated as rocky habitat should have been delineated as mixed or sandy, within which a more appropriate density estimate should be applied.

(4) Subsequent to the data relied upon by Laidre et al. (2011), exponential population growth has occurred within the areas that are primarily mixed and sandy habitat types. This type of population growth is not an indicator that a population is approaching carrying capacity.

(5) Because there is evidence that Washington sea otters move around within their range more than otters in other stocks, basing a density estimate on a population estimate taken only once per year may not provide a realistic evaluation of the use of the habitat. Although Laidre et al. (2011) provided a total carrying capacity estimate of 1,854 sea otters for this stock, this is not a good representation of the number of otters the habitat in Washington is capable of supporting. In addition, the rate at which the Washington sea otter population is increasing (i.e., average rate of 9 percent per year 1989 to 2016) indicates the stock has not reached it's carrying capacity. Without an updated estimate of carrying capacity, the status of the Washington sea otter stock relative to OSP cannot be determined at this time; however, because the population is increasing at such a significant rate, it is unlikely to be at OSP.

Thus, the Service has retained the recovery factor of 0.1 in the revised SAR. As new information becomes available, the Service may reevaluate our recovery factor in future revisions.

Comment 6: Table 1 should reflect the most recent data available. In addition, the specific references to the Makah Tribe should be removed and all Tribal information be referred to as "treaty tribal fisheries."

Response: The SAR covers the time period of 2011–2015/2016, which includes data available at the time the SAR was revised. As indicated in response to *Comment 1*, the process for review and revision of a SAR can take a considerable amount of time even before making it available for public comment. If the Service were to update the SAR to include data outside the time period provided in the draft revised SAR, the changes would be significant enough to require republication of a new draft revised SAR and, thus, the process would begin again. This could perpetually delay finalization of the SAR. Instead, the next revision of the SAR will include the more recent data.

Per section 117(a)(4) of the MMPA, the Service is required to describe the commercial fisheries that interact with the stock. The Northern Washington Marine Set Gillnet Fishery is a commercial fishery that reported sea otter takes during the time period included in the SAR and, therefore, must be included in Table 1. We have changed reference to the fishery being a "Makah fishery" to a "Tribal fishery" and have removed line 1 referencing Areas 4/4A from the table as there was no active fishery in these areas during the time period of this SAR.

Comment 7: Speculation about the possibility that sea otters could be trapped in crab fishing pots should be removed from the SAR. There is no direct evidence of mortality in Washington, and any mortalities would have been documented in social media. Circumstantial evidence indicates that, if any mortality is occurring, it is very minor and is not impacting the population.

Response: As discussed in the SAR, the data we relied upon was not based on experimental efforts. There is direct evidence of sea otters in California and Alaska being trapped and drowned in crab pot gear that is identical to gear used within the range of the sea otter in Washington, and we cannot be sure that all otters that become trapped and subsequently die will be reported via social media. The assumption that the population would not be growing at its current rate if it was experiencing mortality in the crab fishery is not necessarily accurate. While it appears that the population is growing at 20 percent in the southern portion of the range, the population as a whole is growing at 9 percent. A significant number of pups continues to be documented in the northern portion of the range, and it is more likely that the growth in the south is being supplemented by births in the northern portion. Finally, both the PSRG and Commission have recommended that we include the information regarding the unknowns in the SAR.

Comment 8: The section on "Harvest by Northwest treaty Indian Tribes" does not belong in the SAR and should be removed as it does not follow NMFS guidelines.

Response: As stated in our response to *Comment 5,* the NMFS guidelines have not been adopted and are not binding on the Service. Section 117 of the MMPA provides the essential elements that should be addressed in a SAR; however, the Service is not precluded from including other items as it sees fit. As this stock is subject to potential harvest by Tribes that the Service does not consider exempt under MMPA, the Service believes it is necessary to include this statement in our document.

Comment 9: The mortality rate information in the SAR does not reflect the best available science and is inconsistent with the SAR guidelines developed by NMFS. In particular, the SAR

does not provide a conclusion on whether the total fishery mortality and serious injury rate is approaching a zero mortality and serious injury rate.

Response: Section 117(a)(3) requires that the Service provide an estimate of all human-caused mortality and serious injury. While our data are limited due to lack of observer coverage and uncertainties, we have based our estimate on the best data available, including beach-cast carcasses that represent other sources of human-caused mortality. We clearly indicate that the minimum level of all human caused mortality and serious injury is at least one sea otter per year and may be higher. Although the known human-caused mortality and serious injury is less than PBR, we are unable to definitively state that the total mortality and serious injury of sea otters due to human-caused mortalities and serious injuries is insignificant and approaching a zero mortality and serious injury rate because of the lack of observer data for commercial fisheries that may interact with sea otters.

Authority

The authority for this action is the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 et seq.)

Dated: April 3, 2019.

Margaret E. Everson
Principal Deputy Director,
U.S. Fish and Wildlife Service
Exercising the Authority of the Director
for the U.S. Fish and Wildlife Service.
[FR Doc. 2019-08056 Filed: 4/19/2019 8:45 am; Publication Date: 4/22/2019]