Photo by the crew and officers of the NOAA ship *Fairweather*.

Chapter 8

ADMINISTRATIVE AND LEGAL CONSIDERATIONS

Shawn Larson and M. Tim Tinker

Sea otters (*Enhydra lutris*) once occupied the Oregon coast but have been absent from Oregon's nearshore for more than 100 years. The Elakha Alliance and others are actively working toward and anticipating the return of Oregon's sea otters. This work is not only to restore sea otter populations into previously occupied habitat to increase the connectivity of existing sea otter populations in northern California and southern Washington but also to restore Oregon's nearshore coastal ecosystem functioning. However, reintroducing a marine mammal protected by international, federal, state, and tribal laws is not a trivial task, and many statutory and regulatory processes would apply to such an effort. We present a summary of the related laws and processes in this chapter, with the caveat that any future reintroduction effort will ultimately fall within the jurisdiction of the relevant management authorities and be subject to the laws in place at that time. A more detailed description of federal legal requirements and procedures has been compiled by the U.S. Fish and Wildlife Service (USFWS; Zwartjes 2020) and should also be consulted. All relevant regulations must be followed, and approvals must be obtained from the relevant agencies before any actual sea otter reintroduction to the Oregon coast.

We restrict our attention here to laws and regulations that pertain to wild populations and the translocation and reintroduction of sea otters. We do not address here a related issue, the management and care of sea otters in captivity, consideration of which would be required prior to engaging in the transport of wild otters or rehabilitation of stranded juveniles. The topic of animals' captive care is addressed in Chapter 10: We emphasize that there are multiple legal requirements and considerations associated with captive care, such as those identified by the federal Animal Welfare Act and Animal Welfare Regulations (APHIS [Animal and Plant Health Inspection Service] 2020). Legal oversight of captive care for wild animals in the United States is typically provided by the Institutional Animal Care and Use Committee associated with the relevant institution (e.g., Aquarium or University), and this committee would ensure that all necessary procedures are in place and legal permissions obtained.

INTERNATIONAL PROTECTIONS

Sea otter populations have varying levels of protection, triggering different legal considerations. At the international level, the sea otter is listed as endangered by the International Union for Conservation of Nature (IUCN) due to decreasing populations in portions of its range and the unknown effects of climate change (Doroff et al. 2021). The purpose of the IUCN Red List (IUCN 2020) is "to provide information and analyses on the status, trends, and threats to species in order to inform and catalyze action for biodiversity conservation." Sea otters are also managed internationally by the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), which specifies requirements for permits for international trade.

Sea otters are classified taxonomically into three subspecies based on skull morphometric variation: the Russian sea otter (*E. l. lutris*) found in Japan and Russia; the

Table 8.1. International and federal protections of recognized sea otter subspecies and stocks.

Common name	Subspecies	Stock (MMPA) or DPS (ESA)	CITES	MMPA	ESA
Russian sea otter	*Enhydra lutris lutris*	NA	Appendix II [a]	Protected	--
Northern sea otter	*E. l. kenyoni*	↓	Appendix II [a]	Protected	--
		Southwest Alaska stock/DPS		Protected/ strategic stock	Threatened DPS
		South-Central Alaska stock		Protected/ nonstrategic stock	--
		Southeast Alaska stock		Protected/ nonstrategic stock	--
Southern sea otter	*E. l. nereis*	Southern sea otter	Appendix I [b]	Protected/ strategic stock	Threatened subspecies

Note. MMPA = Marine Mammal Protection Act of 1972. DPS = Distinct Population Segment. ESA = U.S. Endangered Species Act of 1973. CITES = Convention on International Trade of Endangered Species of Wild Fauna and Flora. NA = not applicable.
[a] Appendix II – International trade is controlled.
[b] Appendix I – International trade is prohibited unless under certain circumstances for research.

northern sea otter (*E. l. kenyoni*) found throughout Alaska, British Columbia, and Washington; and the southern sea otter (*E. l. nereis*) found in California (Wilson et al. 1991). There are no behavioral or ecological differences between the subspecies, nor is there genetic data (to date) supporting these specific subspecies designations, and genetic differences between and within these identified subspecies are complex (Cronin et al. 1996; Larson, unpublished data). However, there are three distinct genetic stocks in Alaska recognized under the Marine Mammal Protection Act of 1972 (MMPA): a Southwest (SW) stock includes the Aleutian Islands, the Alaska Peninsula, the Katmai Peninsula, and Kodiak Island; a South-Central (SC) stock includes Prince William Sound, the Kenai Peninsula, and Cordova; and a Southeast (SE) stock includes the Alexander Archipelago (USFWS 2013; see Table 8.1).

The southern sea otter is listed in CITES Appendix I, which lists the most endangered species among CITES-listed animals and plants.[1] Species on the CITES Appendix I list are described as "threatened with extinction," and CITES prohibits international trade in specimens of Appendix I species, except when the purpose of the import is not commercial, including for scientific research. In the case of research, international trade may take place provided it is authorized by the granting of both an import permit and an export permit.[2]

The northern sea otter and the Russian sea otter are included on the Appendix II list, which concerns species "not threatened with extinction now but that may become so unless trade is closely controlled." International trade in specimens of Appendix II species may be authorized by the granting of an export permit with no import permit required. Permits or certificates are only granted if the relevant authorities are satisfied that certain conditions are met—above all, that trade will not be detrimental to the survival of the species in the wild.

A CITES permit would only be required if the founders for an Oregon reintroduction were internationally sourced from outside of the United States (for example, if animals were proposed for translocation from Canada to Oregon). CITES would not apply if sea otters were moved between states (Alaska, Washington, Oregon, and California), although other permits and authorities would apply, as described below.

1 Interpretations of Appendix I through Appendix III are available from the following CITES web page, where you may also download a PDF version of the interpretations: https://cites.org/eng/app/appendices.php.
2 Learn more about CITES import and export permits on this web page: https://cites.org/eng/app/index.php.

FEDERAL MANAGEMENT AND PROTECTIONS

Sea otters are managed in the United States at the federal level by the USFWS, along with the other nearshore marine mammals such as polar bears, walruses, manatees, and dugongs. The more pelagic marine mammals, such as seals and sea lions (pinnipeds) and all whales and dolphins (cetaceans), are federally managed by the National Oceanic and Atmospheric Association (NOAA). The MMPA protects all sea otters on the high seas and in waters or on lands under the jurisdiction of the United States. In addition, under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et seq. of the U.S. Code), protections apply to the southern sea otter subspecies in California (listed as threatened under the ESA in 1977; 42 FR 2965 of the Federal Register) and to the SW Alaskan Distinct Population Segment (DPS) of the northern sea otter in SW Alaska (SW stock listed as threatened under the ESA in 2005; 70 FR 46366). Further details about the listing status for each of these threatened populations or stocks of sea otters can be found in the recovery plan documents for the southern sea otter (USFWS 2003) and the SW Alaska stock (USFWS 2013).

The MMPA applies to all marine mammals. Its protections remain regardless of whether the animal is listed under the ESA. Any species of marine mammal listed under the ESA has the protections of that statute in addition to those provided by the MMPA, but those ESA protections remain in place only if the stock is listed. In considering the reintroduction of sea otters to Oregon, the ESA would come into play only if an ESA-listed subspecies or DPS (southern sea otter or SW Alaska stock of sea otters) were to be involved as a possible source population, as described below.

Marine Mammal Protection Act (MMPA)

The MMPA prohibits, with certain exceptions, the *take* of marine mammals by any person, vessel, or other conveyance on the high seas, or in waters or on lands under the jurisdiction of the United States, and the importation of marine mammals and marine mammal products into the United States. The MMPA defines *take* as follows: "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."

Take that is incidental to an otherwise lawful activity (*incidental take*) may be allowable in certain situations provided that the MMPA's requirements are met. For example, section 118 of the MMPA governs the taking of most marine mammal species incidental to commercial fishing operations. However, sections 101(a)(5)THE(vi) and 118(a)(4) of the MMPA specifically prohibit the incidental taking of southern sea otters for the purpose of commercial fishing, regardless of where those otters occur or their listing status. Under the current MMPA provisions, if southern sea otters were translocated to Oregon, there would be no exemption for *incidental take* through commercial fishing operations. States may not enact or enforce any law that attempts to override the protection of marine mammals under the MMPA within the state (16 U.S.C. 1379: "(a) State enforcement of State laws or regulations prohibited without transfer to State of management authority by Secretary").

Finally, a permit would be required under the MMPA to *take* sea otters out of the wild, or to handle, transport, and reintroduce sea otters, regardless of origin (e.g., from a rehabilitation facility; MMPA 3-200-43). The reintroduction of sea otters to the Oregon coast could be eligible for a permit if it would "enhance the survival or recovery of a species," in accordance with subsection 104the of the MMPA. The USFWS Division of Management Authority issues these permits.

One of the goals of the MMPA is to ensure that stocks of marine mammals occurring in waters under the jurisdiction of the United States do not have a level of human-caused mortality and serious injury that is likely to cause the stock to be reduced below its optimum sustainable population (see Chapter 3). Section 117 of the MMPA provides for the development of stock assessment reports, which are used to evaluate the progress of commercial fisheries toward achieving the goal of zero mortality and serious injury to marine mammals. There are four recognized stocks of sea otters under the jurisdiction of the USFWS: the southern sea otter and three stocks of northern sea otter (see Table 8.1). If a stock is listed under the ESA, it is also considered a *depleted stock*, as well as a *strategic stock* under the MMPA (16 U.S.C. 1362, Definitions, sec. 1 and sec 19).

National Environmental Policy Act (NEPA)

Any permit issued by a federal agency requires an evaluation under the National Environmental Policy Act of 1969 (NEPA). NEPA requires that federal agencies assess the environmental effects of their proposed actions before making decisions, and an assessment under NEPA is required for any federal action that has the potential to significantly affect the quality of the human environment ("human environment" is interpreted very broadly). In some cases, such permits are covered under a standard *categorical exclusion* provision because they are routine and not likely to result in any significant effects. In those cases, the issuance of a USFWS permit for reintroducing sea otters under the MMPA (and possibly the ESA as well) would trigger a more rigorous evaluation under NEPA. The USFWS would prepare either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) under NEPA due to the potentially significant effects of the action on the environment. These effects include ecosystem changes that co-occur with a healthy and sustainable sea otter population (Chapter 5) based on scientific knowledge from past sea otter population expansions and reintroductions (Chapter 2). The EA or EIS would evaluate the environmental and related social and economic effects of a reintroduction of sea otters into Oregon (e.g., Chapter 7) and provide opportunities for public involvement.[3]

Endangered Species Act (ESA)

The selection of an ESA-listed population as a source of individuals for a reintroduction would involve some additional legal considerations. One requirement that would come with the ESA is a recovery and interstate commerce permit issued by the USFWS under section 10(a)(1)(A) of the ESA. (This permit allows for *take* as part of activities intended to foster the recovery of listed species and allows for the transport of listed species across state lines.) This permit would be required for the capture, handling, and transport of any individuals of a listed species during the translocation and any follow-up veterinary care or monitoring.

Section 7(a)(2) of the ESA requires federal agencies to consult with the USFWS and/or NOAA's National Marine Fisheries Service (NMFS) to ensure any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of an ESA-listed species or result in the destruction or adverse modification of designated critical habitat. For example, USFWS issuance of any permits would be authorizing an action and would thus be subject to Section 7 consultation requirements. In this case, the USFWS would have to determine whether reintroducing sea otters into a specific area would affect other listed species or critical habitat, and if so, whether it would jeopardize the continued existence of those species or adversely affect critical habitat. In cases where it is determined that an adverse effect is likely, a biological opinion would be required under section 7(a)(2) of the ESA before any action. If an ESA-listed population of sea otters were under consideration as a source for reintroductions, then this consultation requirement would apply to that population as well. (The USFWS would have to complete an intra-Service consultation to ensure that removing individuals from that listed population would not jeopardize its continued existence.)

If a reintroduction of sea otters to Oregon involved a source population listed under the ESA (e.g., southern sea otters), public apprehension about any regulatory restrictions that might come along with such an action could be addressed through the designation of the newly established population as a "nonessential, experimental" population. This designation requires a regulatory rulemaking, which would begin with a proposed rule to establish an experimental population of sea otters under section 10(j) of the ESA. Section 10(j) of the ESA provides that the USFWS may authorize the release of an endangered species or a threatened species outside its current range, but within its historical range, upon a finding that the release will further the conservation of the species. The experimental population must be wholly separate geographically from nonexperimental populations of the same species. The establishment of an experimental, nonessential population means that there is added flexibility for *take* prohibitions, which can be tailored to the conservation needs of the population. In most cases, such rules provide that legal incidental (accidental) *take* of the species would not be considered a violation of the ESA.

3 The NEPA process involves several steps: (1) Scoping identifies the issues to be addressed in the review and can be accomplished through a public comment period and/or public information meetings or hearings. (2) An EA or EIS is drafted and followed by public comment. (3) The final EA or EIS is then issued and followed by a Record of Decision. If significant changes are made between the draft and final stages, a supplemental EA or EIS may be required.

NEPA compliance is also required to establish an experimental population under section 10(j) of the ESA, as it is a federal action with the potential to significantly affect the quality of the human environment. If listed animals are contemplated as part of the reintroduction, a single NEPA process, as described above, can include consideration of both the reintroduction and the establishment of a nonessential experimental population. A NEPA assessment will also need to take into account potential impacts on the source populations.

Coastal Zone Management Act (CZMA)

Finally, at the federal level, there is the Coastal Zone Management Act of 1972 (CZMA; 16 U.S.C. 1451). The CZMA states that it is the national policy to preserve, protect, develop, and where possible, restore or enhance the resources of the nation's coastal zone for this and succeeding generations. The CZMA also provides for coastal states to prepare coastal zone management plans. Section 307 of the CZMA calls for consistency between federal activities and state management programs and requires that each federal agency activity within or outside the coastal zone that affects any land or water use or natural resources of the coastal zone be carried out in a manner consistent, to the maximum extent practicable, with the enforceable policies of approved state management programs. The federal agency must provide a *consistency determination* to the relevant state agency in the form of a certification that the proposed action is consistent with any such enforceable policies. This requirement applies to any applicant for a required federal permit or license that may affect any land or water use or natural resource of the coastal zone (e.g., an application for a permit under the MMPA). The certification is made available for public notice and comment, and the state must notify the federal agency if it concurs with or objects to the applicant's certification.

STATE MANAGEMENT AND PROTECTIONS

Three states in the United States have sea otter populations that could be used as source populations for the Oregon translocation: Alaska, Washington, and California. Each has different management considerations.

Alaska

All sea otter pups brought into rehabilitation facilities from the wild are immediately deemed non-releasable by USFWS, as there is no facility in Alaska that currently has the capability to rear and release stranded pups; thus, they cannot be considered as a potential source for reintroductions. Permission to capture and transport adult sea otters from SE Alaska, which supports a large and rapidly growing sea otter population (the largest in the United States), would be required via a USFWS permit, as discussed above. Strictly speaking, the State of Alaska does not have management authority over sea otters, but the USFWS and the state would likely work together to coordinate any potential removal of sea otters from Alaska.

Other sea otter populations, such as those in Prince William Sound and the Katmai and Kenai Peninsulas, could also be potential sources for translocations. However, their populations are not as large as that in SE Alaska, and a translocation might cause a greater impact on the source population (see Chapter 3). As discussed above, the SW Alaska stock of northern sea otters is listed as threatened under the ESA and continues to experience severe declines. Thus, it is unlikely to serve as a viable source of animals for translocation.

Washington

Washington has a growing translocated population that spans the central and northern portions of the outer coast. The population is co-managed by USFWS and the state and is not federally listed under the ESA. However, it is listed as threatened by the State of Washington. The population growth rate has averaged approximately 9% per year (Jeffries et al. 2017) and is thought to be mixing genetically with the Vancouver, British Columbia population (Larson et al. 2021). However, the Washington population is still believed to be well below its potential carrying capacity (Hale et al. 2022), and there are large areas of unoccupied habitat in the southern Washington coast. Thus, the demographic impacts of removing animals from this population would need to be considered carefully (Chapter 3).

California

There are two potential ways that California sea otters could be utilized as a source for an Oregon reintroduction. The first is that wild animals could be captured from the mainland population, as was done for the San Nicolas translocation (Rathbun et al. 2000). However, since this population is listed as threatened under the ESA, capturing animals from the mainland would entail some additional administrative hurdles (as described above) and could negatively impact the source population (but see Chapter 3).

The second way California could serve as a source population is via surrogate-raised juveniles (i.e., live-stranded pups raised by captive females), as those animals are deemed releasable, and their use would not affect the wild population. However, using stranded juveniles from California would still entail ESA permits/restrictions, although employment of section 10(j) of the ESA (establishing an experimental population, as described above) could relax some of these restrictions. Sea otters in California are also listed as a Fully Protected Species under state law; thus, consultation with the California Department of Fish and Wildlife would also be required.

Oregon

The Oregon Department of Agriculture's Animal Health Unit would require an entry permit for any sea otter brought into Oregon's waters: Specifically, a health certificate would be a prerequisite for each animal (Oregon Administrative Rules 603-011-0382). Under current state law (Oregon Administrative Rules 635-062-0020), the rehabilitation of marine mammals is expressly prohibited (unless specifically authorized by the USFWS or NOAA NMFS). Thus, the rehabilitation of stranded sea otters would be technically prohibited under state law. This prohibition could be addressed by either changing the language of Division 62 of the Oregon Administrative Rules, creating a special exception for sea otters, or pursuing the avenue of "specific authorization" under the existing law. The sea otter is listed as threatened under the Oregon State Endangered Species Act (Oregon Revised Statutes 496.171-496.192), although sea otters do not currently occur on the Oregon coast.

TRIBAL LAW CONSIDERATIONS

Each tribal government within the range of a potential reintroduced population should be consulted as to their specific laws or policies governing the reintroduction and management of sea otters in and adjacent to tribal lands and waters.

CONCLUSIONS

Reintroducing a marine mammal protected by international, federal, state, and tribal laws requires careful consideration, planning, and the documentation of legislation, including the acquisition of multiple permits. Internationally, there are CITES permits required for trade between countries. In the United States, sea otters are managed at the federal level by the USFWS and are protected under the MMPA. The southern sea otter subspecies and the SW stock of the northern sea otter subspecies are listed as threatened under the ESA and thus are further protected, requiring more federal permits and regulations. Reintroducing sea otters from non-ESA-listed U.S. stocks, such as sea otters in SE Alaska or Washington, would require the least regulatory oversight and legal/permitting complexities; however, even for these non-ESA-listed source populations, a reintroduction would require extensive documentation and permits under federal law, as well as careful adherence to state laws and regulations, local ordinances, and tribal laws. Thus, any future reintroduction proposal should factor in the necessary effort and time required for consultation and permit acquisition.

INFORMATION RESOURCES

Convention on International Trade in Threatened and Endangered Species of Wild Fauna and Flora (CITES) — http://www.cites.org/

Endangered and Threatened Wildlife and Plants; Termination of the Southern Sea Otter Translocation Program; Final Rule (USFWS) — https://www.fws.gov/species-publication-action/endangered-and-threatened-wildlife-and-plants-termination-southern-sea

Endangered Species Act of 1973 (provided by USFWS) — https://www.fws.gov/sites/default/files/documents/endangered-species-act-accessible.pdf

Marine Mammal Protection Act of 1972 (provided by NOAA) — https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act

Marine Mammal Protection Act – Permits
— https://www.fws.gov/law/marine-mammal-protection-act
— https://www.fisheries.noaa.gov/insight/understanding-permits-and-authorizations-protected-species

National Environmental Policy Act flowcharts (provided by the U.S. Department of the Interior's Bureau of Reclamation) — https://www.usbr.gov/gp/nkao/ainsworth/flowcharts.pdf

Oregon Administrative Rules 635-062-0020 – concerning the prohibition on rehabilitating marine mammals — https://oregon.public.law/rules/oar_635-062-0020

Oregon Coastal Zone Management Plan – enforceable policies — https://www.oregon.gov/lcd/ocmp/pages/enforceable-policies.aspx?utm_source=LCD&utm_medium=egov_redirect&utm_campaign=https%3A%2F%2Foregon.gov%2Flcd%2Focmp%2Fpages%2Focmp_enforceable-policies.aspx

Oregon Department of Agriculture, the Animal Health Unit's import and export information — https://www.oregon.gov/ODA/programs/AnimalHealthFeedsLivestockID/Pages/AnimalImportExport.aspx

Permits for Native Endangered and Threatened Species (USFWS) — https://www.fws.gov/library/collections/permits-native-endangered-and-threatened-species

Public Law 99-625 – about the translocation of southern sea otters — https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3500.pdf

Secretarial Order No. 3355 – from the Secretary of the U.S. Department of the Interior, an order concerning NEPA streamlining — https://www.doi.gov/sites/doi.gov/files/uploads/3355_-_streamlining_national_environmental_policy_reviews_and_implementatio.pdf

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