



Via Electronic and Certified Mail

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Re: Notice of violation of the Endangered Species Act regarding the impacts of the Coast Guard’s routing measures near Los Angeles/Long Beach and San Francisco on endangered and threatened whales and sea turtles

Secretary Noem and Admiral Lunday,

This letter provides the U.S. Coast Guard (“Coast Guard”) with notice, pursuant to section 11(g) of the Endangered Species Act (“ESA”), that the Center for Biological Diversity and Friends of the Earth intend to sue the agency for violating its obligations under the ESA. The Coast Guard designates access routes for vessels entering and leaving U.S. ports, relying on its authority under the Ports and Waterways Safety Act (“PWSA”).¹ To do so, the Coast Guard changes the location of shipping lanes, creates new shipping lanes and fairways, and creates or alters the boundaries of areas off limits to shipping, such as Areas to be Avoided (collectively, “routing measures”). These Coast Guard actions have concentrated vessel traffic within areas of high whale and sea turtle densities near the ports of Los Angeles/Long Beach and San Francisco.

Routing vessel traffic through these important habitat areas causes deadly ship strikes. Indeed, ship strikes of large whales in the approaches to California’s ports have been documented for decades. These ship strikes not only harm individual animals, but they are also impeding the recovery of these imperiled species. Ship strikes are the number one killer of blue and fin whales and the second greatest cause of death for humpback whales along the U.S. West Coast. Concentrating vessel traffic in important whale habitat also causes harmful noise pollution that interferes with the essential behaviors of whales. For example, noise disturbance from vessel traffic can impair the critically endangered Southern Resident killer whale’s ability to locate food, which leads to physiological stress and reproductive loss.

Yet the Coast Guard has never properly studied the impacts of its routing measures on endangered whales and other species. The Coast Guard is violating section 7 of the ESA by failing to ensure that its routing measures for the approaches to Los Angeles/Long Beach and

¹ 46 U.S.C. § 70003.

San Francisco region ports are not jeopardizing the continued existence of endangered blue whales, fin whales, humpback whales, and Pacific leatherback sea turtles. Additionally, the Coast Guard's actions designating, implementing, and adjusting or amending the routing measures is causing ship strikes that kill, wound, and otherwise "take" these animals in violation of section 9 of the ESA.

In 2022, a federal court vacated the 2017 biological opinion prepared by the National Marine Fisheries Service ("NMFS") regarding the Coast Guard's codification of the traffic separation schemes ("TSS").² The court held that NMFS's determination that there was no incidental take of endangered species resulting from the Coast Guard's action "defies logic particularly when it is undisputed that the impacted, protected species are harmed by TSS lanes."³ The court also held that the Coast Guard was violating the ESA by relying on the legally flawed biological opinion.⁴

Because the 2022 decision vacated the deficient biological opinion, there is currently no valid ESA consultation covering the Coast Guard's designation and codification of shipping lanes near Los Angeles/Long Beach and San Francisco. As a result, the Coast Guard has continued to manage and rely on these routing measures without having completed a new section 7 consultation, as required by law. This failure to reinstate and complete consultation continues the agency's ESA violations and leaves endangered whales and sea turtles exposed to unmitigated threats from vessel strikes and noise pollution. And despite lacking a valid consultation, the Coast Guard has continued to make changes to and take steps to implement its shipping lane schemes.

The Coast Guard's designation and amendment of routing measures at the ports of Los Angeles/Long Beach and San Francisco violate sections 7 and 9 of the ESA. To the extent the Coast Guard does not remedy these violations within the next 60 days, including by completing consultation, the Center for Biological Diversity and Friends of the Earth intend to file suit in federal court.

I. Legal Background

A. Endangered Species Act

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."⁵ Its fundamental purposes are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species"⁶

² NMFS, Biological Opinion for the regulatory codification of Traffic Separation Schemes ("TSS") for the approaches to the Los Angeles/Long Beach and San Francisco Bay region ports (February 23, 2017).

³ *Ctr. for Biological Diversity v. NOAA Fisheries*, 644 F. Supp. 3d 574, 589 (N.D. Cal. 2022).

⁴ *Id.*

⁵ 16 U.S.C. §§ 1531-1544; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁶ 16 U.S.C. § 1531(b).

To achieve these objectives, the ESA directs the Secretary of Commerce, through NMFS, to determine whether imperiled marine species are “threatened” and “endangered” and place them on the list of protected species.⁷ An “endangered” or “threatened” species is one “in danger of extinction throughout all or a significant portion of its range,” or “likely to become endangered in the near future throughout all or a significant portion of its range,” respectively.⁸

Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but its ultimate recovery, including the designation of critical habitat, the preparation and implementation of recovery plans, the prohibition against the “taking” of an endangered species, and the requirement for interagency consultation.⁹ The term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁰

Additionally, section 7, described as the “heart of the ESA,”¹¹ prohibits agency actions that: (1) jeopardize the continued existence of listed species; or (2) destroy or adversely modify their designated critical habitat.¹² An agency action is broadly defined as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.”¹³ This definition is broad. An “agency action” is present whenever “a federal agency affirmatively authorized, funded, or carried out the underlying activity” and “the agency had some discretion to influence or change the activity for the benefit of a protected species.”¹⁴

To satisfy this substantive mandate, agencies must comply with section 7’s procedural requirements by consulting with NMFS when their actions “may affect” listed species or their critical habitat. The “may affect” standard is a “relatively low” bar for triggering consultation.¹⁵ In fact, consultation can be avoided only if the agency affirmatively determines that the action “will have no effect” on protected species of habitat.¹⁶ “*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.”¹⁷

⁷ *Id.* § 1533.

⁸ *Id.* § 1532(6), (20).

⁹ *Id.* §§ 1533(a)(3), 1533(f), 1536, 1538. While section 9 of the Endangered Species Act prohibits the take of endangered species, NMFS has extended these take prohibitions by regulation to certain threatened species, including the Mexico distinct population segment of humpback whales. See 50 C.F.R. § 223.213 (applying all prohibitions in 50 C.F.R. § 224.104). As a result, take of Mexico distinct population segment of humpback whales is also prohibited under the ESA unless otherwise authorized.

¹⁰ *Id.* § 1532(19).

¹¹ *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

¹² NMFS’ regulations (joint regulations prepared with U.S. Fish and Wildlife Service, which is responsible for administering the Act with respect to imperiled terrestrial species) define an agency “action” to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.

¹³ 50 C.F.R. § 402.02.

¹⁴ See *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1021–22 (9th Cir. 2012) (en banc).

¹⁵ *Id.* at 1027 (quoting *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)).

¹⁶ *Id.* (quotations omitted).

¹⁷ *Id.* (quotations omitted, emphasis in original).

Federal agencies must “use the best scientific and commercial data available” throughout the consultation process.¹⁸ In a “formal” section 7 consultation, the consulting branch of NMFS prepares a “biological opinion” as to whether the action is likely to jeopardize the species or destroy or adversely modify critical habitat and, if so, suggests “reasonable and prudent alternatives” to avoid that result.¹⁹ ESA regulations define “[j]eopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”²⁰

A jeopardy analysis requires NMFS to consider the “environmental baseline” in determining the effects of the agency action. The environmental baseline “includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation process.”²¹ In addition, “ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline.”²² NMFS must assess all of these factors in context of the current status of the species and its habitat.²³ NMFS may only issue a no-jeopardy opinion where it considers all of these elements and concludes that the aggregate impact does not threaten a species’ survival and recovery.²⁴

If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, NMFS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the species and any “reasonable and prudent measures” that NMFS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the action agency to implement those measures.²⁵ A take in compliance with a valid incidental take statement is not prohibited by section 9.²⁶

The action and consulting agencies’ ESA duties do not end with the completion of the initial consultation. Agencies must reinitiate consultation on agency actions over which the action agency retains, or is authorized to exercise, discretionary involvement or control, if: (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) new

¹⁸ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

¹⁹ *Id.* § 402.14; 16 U.S.C. § 1536(b)(3)(A).

²⁰ 50 C.F.R. § 402.02.

²¹ *Id.*

²² *Id.*

²³ *Id.* § 402.14(g)(4) (“Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service’s opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.”).

²⁴ *Am. Rivers & Ala. Rivers Alliance v. FERC*, 895 F.3d 32, 47 (D.C. Cir. 2018) (“attributing ongoing project impacts to the ‘baseline’ and excluding those impacts from the jeopardy analysis does not provide an adequate jeopardy analysis.”).

²⁵ 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

²⁶ 16 U.S.C. § 1536(o).

information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (d) a new species is listed or critical habitat designated that may be affected by the identified action.²⁷ After the initiation or reinitiation of section 7 consultation, the action agency is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action.²⁸

B. Ports and Waterways Safety Act

The Coast Guard relied on its authority pursuant to the Ports and Waterways Safety Act to change the shipping lanes for the approaches to, and departures from, the Los Angeles/Long Beach ports and San Francisco Bay ports (including San Francisco, Oakland, and Richmond).²⁹ Congress passed the PWSA in 1967 in reaction to the grounding of the oil supertanker *Torrey Canyon* in the English Channel. The wreck of the *Torrey Canyon* “had a catastrophic impact on the environment,” and “brought to the world’s attention, essentially for the first time, the enormous sizes to which tankers had evolved, and the potential for their cargoes for damaging the marine environment.”³⁰

Accordingly, the PWSA emphasizes protection of “marine environment” from its first provision.³¹ The PWSA expansively defines “marine environment” to include “the navigable waters of the United States and the land and resources within and under those waters,” fishery resources, “and the recreational, economic, and scenic values of such waters and resources.”³²

The PWSA directs the Coast Guard to “provide safe access routes” for large vessels through the establishment of traffic separation schemes (“TSS”).³³ Like lanes on a paved road, TSSs are “aimed at the separation of opposing streams of traffic.”³⁴ Before establishing the TSS, the PWSA requires that the Coast Guard “undertake a study of the potential traffic density and need for safe access routes.”³⁵ The PWSA mandates that this “port access route study” (“PARS”) consider nine specific factors, including environmental, and requires that the Coast Guard “consult with and receive and consider the views” of various stakeholders, including “representatives of environmental groups.”³⁶ The PWSA also provides the Coast Guard with the general authority to “establish[] vessel size, speed, or draft limitations and vessel operating conditions” when necessary to address “hazardous circumstances.”³⁷

²⁷ 50 C.F.R. § 402.16(a)(1)-(4).

²⁸ 16 U.S.C. § 1536(d).

²⁹ 46 U.S.C. §§ 70001-70036.

³⁰ Jeffrey A. Weiss, *Maritime disasters through the ages*, 32 J. Mar. L. & Com. 215, 234 (April 2001).

³¹ 46 U.S.C. § 70001.

³² *Id.* § 70031(1)(A)-(D).

³³ *Id.* § 70003(a)33.

³⁴ 33 C.F.R. § 167.5(b).

³⁵ 46 U.S.C. § 70003 (c)(1)(A).

³⁶ *Id.* § 70004 (1)-(A)-(I).

³⁷ *Id.* § 70001(a)(4)(C).

II. Factual Background

A. Vessel Traffic Impacts On Endangered Whales and Sea Turtles

Vessels cause injury and death to large whales by striking them but also cause noise pollution that can mask whales' communications and interfere with behaviors such as feeding. From 2018 to 2022, NMFS documented 57 large whales that were struck by vessels on the U.S. West Coast, including blue whales, fin whales, gray whales and humpback whales.³⁸ These documented cases vastly underestimate the actual vessel strikes. Scientists estimate that *annually* vessel strikes cause:

- 18 endangered blue whale deaths;
- 43 endangered fin whale deaths; and
- 22 deaths of endangered Central America humpback whales and threatened Mexico humpback whales.³⁹

In other words, vessel strikes cause over 80 deaths of ESA-listed large whales each year. These estimates include only the period from July to November, and recent aerial surveys indicate that high numbers of endangered and threatened humpback, fin, and blue whales “are concentrating in areas of the Santa Barbara Channel that are not included in current predicted density models based on data from ship-based research surveys,” which means that even these are underestimates.⁴⁰ Aerial surveys documented the highest number of blue whales in June, “a month not reflected in the seasonal limits of large-scale models.”⁴¹ Fin and humpback whales also use months not incorporated in the large-scale models.⁴² The aerial surveys provide evidence that current estimates of large whale deaths by vessel strike should be considered minimum estimates.

Routing measures can reduce disturbance, injury, and death of whales. According to scientists, the aerial survey data can help “create effective conservation and management measures including adjusting shipping lanes; establishing Areas To Be Avoided, future offshore shipping fairways” and speed reduction zones.⁴³ An assessment tool developed to protect whales on the East Coast showed that a 10 kt speed restriction was necessary for reducing risk of vessel

³⁸ Carretta, James V. et al., Sources of Human-Related Injury and Mortality for U.S. Pacific West Coast Marine Mammal Stock Assessments, 2018-2022, 2024

³⁹ Rockwood, R. Cotton, John Calambokidis, and Jaime Jahncke, High Mortality of Blue, Humpback and Fin Whales from Modeling of Vessel Collisions on the U.S. West Coast Suggests Population Impacts and Insufficient Protection, 12 *PLOS ONE* 8 (2017); Carretta, James V., et al. 2024. U.S. Pacific marine mammal stock assessments: 2023. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-704. <https://doi.org/10.25923/aqdn-f357>

⁴⁰ Kunz, Anastasia et al., Aerial Monitoring of Endangered Whales in the Santa Barbara Channel to Enhance and Inform Whale Conservation, 85 *Western North American Naturalist* 2 (2025)

⁴¹ Kunz et al., 2025

⁴² Kunz et al., 2025

⁴³ Kunz et al., 2025

strike, and that protecting whale habitat specifically was almost as protective as slowing vessels in all East Coast waters.⁴⁴

Vessel traffic also causes noise pollution that disturbs whales, especially when that traffic is concentrated in a particular area. This is especially important for Southern Resident killer whales, which have designated critical habitat near San Francisco⁴⁵ and are at their lowest population numbers in decades, with just 73 remaining.⁴⁶ Vessel noise levels coincide with the frequency bands that Southern Resident killer whales use for social communication.⁴⁷

For the large baleen whales in southern California, scientists simulating various ways to reduce ship noise pollution in endangered whales' habitat evaluated a single-route approach on the southern side of the Channel Islands, a multi-route approach with a buffer zone between the shipping lanes and habitat, reducing the speed of all ships, solely slowing cargo ships, and retrofitting ships to increase fuel efficiency and incidentally reduce noise.⁴⁸ This simulated framework allows “efficient exploration and assessment of noise reduction strategies across time and space,” in other words can inform the Coast Guard’s designation of routing measures.⁴⁹ Some of those routing measures were not proposed in past Coast Guard port access route studies (2023). For example, the removal of the Santa Barbara Channel traffic separation scheme “resulted in the most significant reduction in [sound pressure levels] and excess noise area,”⁵⁰ which could potentially greatly benefit the whales.

Changes in the environment are exacerbating the risk of overlap with vessels and the risk of harm to endangered whales, underscoring the urgency of mitigating vessels’ threats. For example, humpback whales have begun to use San Francisco Bay and adjacent waters to a greater extent than observed before, risking increased overlap with vessel traffic.⁵¹ A recent study shows that West Coast large whale deaths from human activities are correlated with harmful algal blooms, which are naturally occurring events involving toxic components that have been increasingly occurring in the past two decades.⁵² The authors posited that large whales’ exposure to sub-lethal concentrations increased vulnerability to ship strikes and commercial fishing gear entanglements.⁵³

⁴⁴ Redfern, Jessica V. et al., Estimating Reductions in the Risk of Vessels Striking Whales Achieved by Management Strategies, 290 *Biological Conservation* (2024)

⁴⁵ 50 C.F.R. § 226.206.

⁴⁶ https://www.orcanetwork.org/Main/index.php?categories_file=Births%20and%20Deaths

⁴⁷ Veirs, S., V. Veirs, J. D. Wood. Ship noise extends to frequencies used for echolocation by endangered killer whales, 1657 (2016).

⁴⁸ ZoBell, Vanessa M., John A. Hildebrand, and Kaitlin E. Frasier, Assessing Approaches for Ship Noise Reduction within Critical Whale Habitat, 156 *The Journal of the Acoustical Society of America* 5 (2024)

⁴⁹ ZoBell, Hildebrand, and Frasier, 2024

⁵⁰ ZoBell, Hildebrand, and Frasier, 2024

⁵¹ Markowitz, Tim M. et al., New Urban Habitat for Endangered Humpback Whales: San Francisco Bay, 34 *Aquatic Conservation: Marine and Freshwater Ecosystems* 3 (2024)

⁵² Silber, Gregory K. and Katy M. Silber, Co-Occurrence of Harmful Algal Blooms and Whale Deaths, 11 *Frontiers in Marine Science* (2024)

⁵³ Silber and Silber, 2024

Plus, recent research shows that humpback whales are vulnerable to warming waters, which makes their recovery from industrial whaling more tenuous and the current vessel traffic threats more dire. If present-day social, economic, and technological trends continue, by the end of the 21st century 35 percent of humpback whale breeding areas will experience sea surface temperatures above or within 1 degree Celsius of the climatic envelope that humpback whales prefer.⁵⁴ This breeding-area habitat loss increases to 67 percent under the scenario describing rapid economic growth in carbon-intensive industries.⁵⁵

Sea turtles are vulnerable to ship strikes on the West Coast too; between 2014 and 2023 there were 68 cases of boat collisions with sea turtles in California.⁵⁶ The vast majority of these resulted in death. Species affected in these cases include loggerhead sea turtles, green sea turtles, and olive ridley sea turtles.⁵⁷ Leatherback sea turtles are vulnerable as well to ship strikes, as there were 12 cases of vessel strikes between 1989 and 2014.⁵⁸ Like for whales, the documented sea turtle deaths due to boat collisions is likely a small fraction of the actual incidents.

Additional information on the impact of vessel traffic on ESA-listed whales and sea turtles is in the attached two notice letters and Coast Guard reinitiation letter sent in 2020.⁵⁹

B. The Coast Guard Amended Routing Measures Off California

The Coast Guard has amended routing measures for the approaches to Los Angeles/Long Beach and San Francisco in 2013 and 2023. These changes are described below.

Changes for the approaches to Los Angeles/Long Beach and San Francisco, 2013

Acting pursuant to the PWSA, the Coast Guard completed Port Access Route Studies for the approaches to the Los Angeles/Long Beach and San Francisco Bay ports in 2011.⁶⁰ In these

⁵⁴ Hammerstein, Hannah von et al., High-Resolution Projections of Global Sea Surface Temperatures Reveal Critical Warming in Humpback Whale Breeding Grounds, 9 *Frontiers in Marine Science* (2022)

⁵⁵ von Hammerstein et al., 2022

⁵⁶ Final FOIA Response from Ellen Sebastian, NMFS, to Ann Brown, Center for Biological Diversity (FOIA Request No. DOC-NOAA-2024-000371) (May 21, 2024).

⁵⁷ *Id.*

⁵⁸ NMFS, Biological Opinion for the regulatory codification of Traffic Separation Schemes (“TSS”) for the approaches to the Los Angeles/Long Beach and San Francisco Bay region ports (February 23, 2017).

⁵⁹ Letter from Center for Biological Diversity to Wilbur Ross, Secretary of Commerce, et al., regarding *Sixty-day Notice of Intent to Sue for Violations of Endangered Species Act Related to February 23, 2017 Section 7 Biological Opinion for the Regulatory Codification of Traffic Separation Schemes Near the Ports of Los Angeles/Long Beach and San Francisco/Oakland*, dated March 2, 2020; Letter from Center for Biological Diversity, regarding *Supplement to Sixty-day Notice of Intent to Sue for Violations of Endangered Species Act Related to February 23, 2017 Section 7 Biological Opinion for the Regulatory Codification of Traffic Separation Schemes Near the Ports of Los Angeles/Long Beach and San Francisco/Oakland*, dated August 12, 2020; Letter from Coast Guard to Barry Thom, National Marine Fisheries Service, regarding *CBD NOI and Reinitiation*, dated April 29, 2020.

⁶⁰ Port Access Route Study: The Approaches to San Francisco, Docket USCG-2009-0576 (February 2011) (“San Francisco Bay PARS”); Port Access Route Study: Approaches to Los Angeles-Long Beach and in the Santa Barbara Channel, Docket USCG-2009-0765 (September 2001)

studies the Coast Guard evaluated the continued applicability of and the potential need for modifications to the traffic separation schemes. This led the Coast Guard to amend the TSSs and to submit the amendments to the International Maritime Organization.⁶¹

The Coast Guard, in changing the routes, recognized the potential to harm to whales from vessel traffic. For example, the study for approaches to Los Angeles-Long Beach and in the Santa Barbara Channel covered an area where vessel traffic had increased. The studies' goal was to improve traffic efficiency and reduce congestion by having vessels follow predictable and charted routing measures.⁶² The shipping lanes through Santa Barbara Channel cut through known whale concentrations, and the proposed changes adjusted them northward but did not reroute the increased vessel traffic away from whale habitat.⁶³

Changes for the approaches to Los Angeles/Long Beach and San Francisco, 2023

The Coast Guard completed the Port Access Route Study—The Pacific Coast from Washington to California (“PAC PARS”) in May 2023.⁶⁴ The PAC PARS focused on vessel traffic and navigation mitigation techniques, and aimed to reconcile navigation within designated routes with other waterway uses like aquaculture and energy generation.⁶⁵ Similar to the study in 2013, this study aimed to increase the efficiency of vessel traffic. Among the routing measure changes recommended, several were relevant to the approaches and departure to Los Angeles/Long Beach and San Francisco. These include:

1. The Santa Barbara TSS Extension and Point Mugu Fairway

In the final PAC PARS, the Coast Guard connected the Santa Barbara TSS and the Point Mugu Fairway to the main Offshore Fairway.⁶⁶ This modification incorporated the 13 nautical mile extension near the Channel Islands that the Coast Guard submitted to the International

(“Los Angeles/Long Beach PARS”); *Port Access Route Study: The Approaches to San Francisco, Notice of Availability of Study Results*, 76 Fed. Reg. 35805 (June 20, 2011); *Port Access Route Study: In the Approaches to Los Angeles-Long Beach and in the Santa Barbara Channel, Notice of Availability of Study Results*, 76 Fed. Reg. 67395 (Nov. 1, 2011).

⁶¹ NAV 58-3-16 - Amendment of the Traffic Separation Scheme In the Santa Barbara Channel (United States), April 27, 2012; NAV 58-3-17 - Amendment of the Traffic Separation Scheme Off San Francisco (United States), April 27, 2012; NAV 58-3-18 - Amendment of the Traffic Separation Scheme In the Approaches to Los Angeles - Long Beach (United States), April 27, 2012; NAV 58-INF.8 - Ship Strikes of Endangered Whales in the Santa Barbara Channel (United States), April 27, 2012.

⁶² 76 Fed. Reg. at 67395–96; 76 Fed. Reg. 35805.

⁶³ NAV 58-INF.8, figs. 1, 2.

⁶⁴ Pacific Coast Port Access Route Study Final Report (“PAC PARS”), Docket Number USCG-2021-0345 (May 2023); *Port Access Route Study: The Pacific Coast From Washington to California, Notice of Availability of Study*, 88 Fed. Reg. 36607 (June 5, 2023).

⁶⁵ 88 Fed. Reg. at 36607.

⁶⁶ PAC PARS at 35.

Maritime Organization in 2022.⁶⁷ The 13 nautical mile Santa Barbara TSS extension supports vessel traffic management near the Channel Islands.⁶⁸

The Coast Guard also recommended the Point Mugu Fairway in the PAC PARS, which provides an alternative southern route around the Channel Islands to/from the Santa Barbara TSS, which runs along the north side of the Channel Islands.⁶⁹ This 5 nautical mile wide alternate route runs south of the Area to Be Avoided that the Coast Guard submitted to the International Maritime Organization in 2022.⁷⁰ The Coast Guard developed the route in collaboration with Department of Defense representatives and the NOAA Office of National Marine Sanctuaries to help organize commercial vessel traffic through the Point Mugu Sea Range and around the Channel Islands.⁷¹

2. San Diego and Southern Los Angeles/Long Beach and San Francisco Fairways

The Coast Guard recommended two routes to approach/depart from San Diego and Southern Los Angeles/Long Beach harbors. The two fairways provide defined north and south angled routes, each with a 5 nautical mile width.⁷² In San Francisco, three TSS routes exist. The Coast Guard incorporated a larger, funnel-shaped fairway to provide a transition from the east-west TSS—being the primarily used route—to the main Offshore Fairway,⁷³ and rejected comments asking for an extension of the current San Francisco western TSS in order to consolidate traffic and reduce the fanning of ships over the continental shelf break where whales feed.⁷⁴ The Coast Guard also refused to move the fairways further offshore, beyond the continental shelf break where whales feed.⁷⁵

III. Past Litigation Over Coast Guard’s Violations of the Endangered Species Act

On January 14, 2021, the Center for Biological Diversity and Friends of the Earth filed a lawsuit seeking declaratory and injunctive relief that the 2017 biological opinion was unlawful and NMFS and the Coast Guard were in violation of the ESA. The Coast Guard had initiated consultation with NMFS October 24, 2013, for the regulatory codification of changes to the TSS near the ports of Los Angeles/Long Beach and San Francisco/Oakland. The completed consultation was signed on February 23, 2017. NMFS and the Coast Guard had not previously engaged in consultation on the lanes as they existed prior to these changes.

⁶⁷ NCSR 9/3/4 – Amendment of the traffic separation scheme in the Santa Barbara Channel (United States), March 18, 2022.

⁶⁸ PAC PARS at 9.

⁶⁹ *Id.* at 36.

⁷⁰ NCSR 9/3/3 – Amendment of the area to be avoided in the region of San Miguel, Santa Rosa, Santa Cruz and Anacapa Islands off the coast of southern California (United States), March 18, 2022.

⁷¹ PAC PARS at 36.

⁷² *Id.* at 35–36.

⁷³ *Id.* at 35.

⁷⁴ PAC PARS at 28-29.

⁷⁵ *Id.* at 28.

On December 7, 2022, the court granted the Center for Biological Diversity and Friends of the Earth’s motion for summary judgment and denied Defendants’ motion for summary judgment, holding that the absence of an incidental take statement rendered the biological opinion arbitrary and capricious and the Coast Guard’s reliance on the unlawful biological opinion was arbitrary and capricious. The court vacated and set aside the 2017 biological opinion.

IV. Violations of the Endangered Species Act

A. The Coast Guard’s Designation of Routing Measures Is an “Agency Action” Under the ESA

The Coast Guard’s designation and amendment of routing measures constitute “agency action” under the Endangered Species Act because they involve the exercise of discretionary federal authority to affirmatively manage vessel traffic in U.S. waters. To exercise its authority under the PWSA to “provide safe access routes” for vessels, the Coast Guard takes a series of actions that carry out its aim.⁷⁶ Before establishing or amending a TSS, the Coast Guard conducts a PARS to evaluate navigational safety, environmental impacts, and routing alternatives, then submits proposed measures to the International Maritime Organization for adoption and codifies them through federal rulemaking. This satisfies the first prong of the Ninth Circuit’s agency action test; the Coast Guard has “affirmatively authorized . . . or carried out” the underlying activity—routing large commercial vessels through designated lanes along the U.S. West Coast.⁷⁷

The Coast Guard’s actions also meet the second prong of the *Karuk Tribe* test because the agency exercises discretion when developing and approving routing measures and has the authority to modify those measures to reduce harm to endangered species. The discretion is written into the PWSA, with its amendment provision stating that the Secretary “may, from time to time, as necessary, adjust the location” of these routes.⁷⁸ In practice, the Coast Guard has considered options to reroute or eliminate shipping lanes in areas with high whale densities, demonstrating that it has discretion to alter vessel routing for conservation purposes. Accordingly, the Coast Guard’s designation and continued implementation of routing measures plainly qualify as agency actions subject to the procedural and substantive requirements of the ESA.

B. The Coast Guard Is Violating Section 9 Take Prohibitions

The Coast Guard is violating section 9 of the ESA by causing the take of a listed species to be committed and failing to regulate ship traffic in a way that avoids take of listed species. Take includes both direct and indirect harm, and it need not be purposeful.⁷⁹ The take prohibition applies to any “person,” including federal agencies and/or officials in their official capacity.⁸⁰

⁷⁶ 46 U.S.C. § 70003.

⁷⁷ *Karuk Tribe*, 681 F.3d at 1021.

⁷⁸ 46 U.S.C. § 70003(e)(3).

⁷⁹ 16 U.S.C. § 1538.

⁸⁰ *Id.*

The ESA further makes it unlawful for any person, including federal agencies and/or federal officials in their official capacity, to “cause to be committed” the take of a listed species. Similarly, the failure to regulate in a way that avoids take of listed species can also constitute a prohibited section 9 take.⁸¹

Here, the Coast Guard’s designation and amendment of routing measures—including changes to TSSs, ATBAs, and fairways published in the San Francisco Bay PARS, Los Angeles/Long Beach PARS, and the PAC PARS—result in ongoing take of blue whales, fin whales, humpback whales, and sea turtles, and future activities are reasonably likely to result in take of these ESA-protected animals. In the absence of completed consultation that includes a valid incidental take statement authorizing and minimizing the impact of such take on listed species, each of these takes is a violation of the ESA.

C. The Coast Guard Is Violating Section 7(a)(2) By Failing To Ensure Against Jeopardy

The Coast Guard is violating ESA section 7(a)(2) by failing to ensure its designation and amendment of routing measures does not cause jeopardy to threatened and endangered species. Indeed, the court decision holding unlawful and setting aside the 2017 biological opinion means the Coast Guard has never validly consulted on the effects of its designation and amendment of routing measures.

The best available scientific data overwhelmingly shows that dozens of blue whales, fin whales, and humpback whales are killed each year by vessel strikes and that changes to routing measures could prevent some vessel strikes and noise impacts to endangered whales. Documented boat collisions with endangered sea turtles show the risk is ongoing. An adequate analysis of the aggregate impacts of the Coast Guard’s actions in relation to the environmental baseline should result in mandatory mitigation measures. As discussed above, recent scientific publications have developed frameworks to evaluate routing measures’ impacts on risk of vessel strikes to large whales and contributions to noise pollution near large whales. These papers offer ideas for mitigation. Without this analysis and subsequent mitigation measures, the Coast Guard is failing to ensure that its actions do not cause jeopardy to endangered blue whales, endangered fin whales, and humpback whales that are endangered (Central America distinct population segment) or threatened (Mexico distinct population segment).

In the alternative, the Coast Guard is violating Section 7(a)(2) of the ESA by failing to reinitiate consultation in light of new information and changed circumstances. The vacatur of the 2017 biological opinion nullified the only existing consultation covering the Coast Guard’s routing measures near Los Angeles/Long Beach and San Francisco. This vacatur, in 2022, combined with significant new scientific data on vessel strikes, whale habitat use, and noise impacts, constitutes new information revealing effects not previously considered. Under 50 C.F.R. § 402.16(a), such developments trigger a duty to reinitiate consultation. By continuing to operate these routing measures without undertaking a new consultation, the Coast Guard has failed to ensure that its actions are not likely to jeopardize the continued existence of ESA-listed species or destroy or adversely modify their critical habitat, in direct violation of section 7(a)(2).

⁸¹ *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).

D. The Coast Guard Is Violating Section 7(d)

Given the Coast Guard previously initiated ESA consultation (that led to the now-vacated 2017 biological opinion), the Coast Guard has an obligation to ensure compliance with ESA section 7(d), which prohibits “any irretrievable or irreversible 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).”⁸² The effect of the vacatur was to set aside the unlawful 2017 biological opinion as if it had not existed. The Coast Guard’s initiation of consultation prior to the 2017 biological opinion was not vacated, and thus the section 7(d) obligation applies until consultation is complete. Please inform us of any measures the Coast Guard has taken to comply with section 7(d).

V. Conclusion

For the foregoing reasons, the Coast Guard is violating the ESA. If the Coast Guard does not remedy these violations within the next 60 days, the Center for Biological Diversity and Friends of the Earth intend to file suit in federal court. We urge the agencies to contact us regarding this letter to discuss options for avoiding litigation over these claims or to provide us with any information we may not have that is relevant to the agencies’ ESA consultation duties. Thank you for your prompt attention to this matter.

Sincerely,

s/ David Derrick

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⁸² 16 U.S.C. §1536(d).