RONALD J. TENPAS
Assistant Attorney General

KEVIN W. McARDLE, Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Wildlife & Marine Resources Section
601 D Street, NW, Third Floor
Washington, DC 20004
Tele: (202) 305-0219
Fax: (202) 305-0275
kevin.mcardle@usdoj.gov

Attorneys for the Federal Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. MICHAEL CHERTOFF, in his official capacity as Secretary of the U.S. Department of Homeland Security, REAR ADMIRAL PAUL F. ZUKUNFT, in his official capacity as Commander of U.S. Coast Guard District Eleven, and UNITED STATES COAST GUARD, Defendants.	No. 3:08-cv-02999-MMC **DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on Friday, January 23, 2009, at 9:30 a.m., or as soon thereafter as counsel may be heard, Defendants (collectively the "Coast Guard") will bring for hearing their Cross-Motion for Summary Judgment before the Honorable Maxine M. Chesney, United States District Judge, in Courtroom 7, 19th Floor, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102.

Pursuant to Fed. R. Civ. P. 56 and Local Civil Rules 7.2 and 7.4, Defendants, by and through counsel, hereby respectfully cross-move the Court for summary judgment in their favor because there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. Plaintiff alleges that the Defendants violated Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. 1536(a)(2), by failing to consult with the National Marine Fisheries Service, an agency within the National Oceanic and Atmospheric Administration of the Department of Commerce, regarding the alleged effects of ship traffic operating in traffic separation schemes amended by Coast Guard regulations promulgated in 2000. Defendants are entitled to summary judgment because: (1) Plaintiff's challenge to the regulations is barred by the statute of limitations; (2) Plaintiff is barred from raising claims not presented to the Coast Guard during the rulemaking process; (3) Plaintiff has not met its burden of demonstrating that the regulations triggered any duty to consult; (4) weekly bulletins issued by the Coast Guard do not trigger the consultation requirements; and (5) commercial shipping operations in the Santa Barbara Channel do not constitute an "ongoing agency action" triggering a new duty to consult. Therefore, Defendants' Cross-Motion for Summary Judgment should be granted.

In support of this Cross-Motion, Defendants rely upon the accompanying Memorandum of Points And Authorities, the concurrently-filed Declaration of Kevin W. McArdle and attachments, the concurrently-filed Proposed Order, the pleadings and other documents on file in this action, and such other oral and documentary evidence as may be received by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

FEDERAL REGULATIONS

INTRODUCTION

The Center for Biological Diversity ("CBD") brings this action in an effort to remedy the asserted harm to endangered whales caused by collisions with ship traffic in the Santa Barbara Channel and elsewhere off the California coast. CBD believes that the "only effective mechanism to reduce the risk to large whales from ship strikes is to institute mandatory vessel speed limits in the areas and at times when whales and commercial vessels overlap." Cummings Decl. Ex. A.

CBD previously petitioned the National Marine Fisheries Service ("NMFS"), a subagency of the National Oceanic and Atmospheric Administration ("NOAA") within the Department of Commerce, to promulgate regulations imposing vessel speed restrictions in the Santa Barbara Channel. NMFS is the federal agency responsible for implementing the Marine Mammal Protection Act and the Endangered Species Act ("ESA") as it pertains to endangered whale species. NMFS denied CBD's petition in January 2008. Cummings Decl. Ex. D. To the best of our knowledge, CBD has not challenged NMFS's decision. Instead, CBD now brings this action against the United States Coast Guard, alleging that the Coast Guard has violated the ESA by not consulting with NMFS pursuant to ESA Section 7(a)(2) "regarding the effects of *ship traffic* on blue whales and other endangered and threatened species." Compl. ¶ 5 (emphasis added). CBD seeks consultation as a means of obtaining speed limits and other restrictions on ship traffic that allegedly would benefit endangered whales. CBD Mem. at 16.

Section 7(a)(2) of the ESA provides that each agency shall insure, in consultation with NMFS, that a proposed *agency action* will not jeopardize the continued existence of a threatened or endangered species. 16 U.S.C. § 1536(a)(2). The fundamental problem with CBD's lawsuit is that "ship traffic" is not an *agency action* triggering the consultation requirements. "The ESA and the applicable regulations . . . mandate consultation with NMFS only before an agency takes some *affirmative action*, such as issuing a license." California Sportfishing Prot. Alliance v. FERC, 472 F.3d 593, 595 (9th Cir. 2006). The only *affirmative agency action* CBD has identified is the Coast Guard's promulgation of regulations in 2000 amending long-established "Traffic Separation Schemes" off the California coast. A traffic separation scheme ("TSS") is a recommendatory ship routing measure, similar to the markings on divided highways, used to

minimize the risk of ship collisions by separating vessels into opposing "lanes" of traffic. Because the challenged regulations were promulgated in 2000, nearly eight years before this lawsuit was filed, CBD's claims are barred by the statute of limitations. 28 U.S.C. § 2401(a); Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991). In addition, because CBD did not present its arguments to the Coast Guard during the rulemaking process, CBD is barred from raising those arguments now, eight years after the fact. Universal Health Servs. v. Thompson, 363 F.3d 1013, 1019-20 (9th Cir. 2004). Finally, because the regulations had no effect on any threatened or endangered species, Section 7 consultation was not required.

CBD nevertheless asserts that "new information" regarding ship strikes in the Santa Barbara Channel during 2007 gives rise to a new duty to consult within the six-year statute of limitations. This argument suffers from several fatal defects. Most fundamentally, there is no "ongoing agency action" within the meaning of the ESA that could possibly require Section 7 consultation in light of alleged "new information." The only conceivably relevant *agency action* is the Coast Guard's promulgation of a regulation in 2000 amending the Santa Barbara Channel TSS. That "action" was completed on July 31, 2000, when the regulation was promulgated. The mere fact that the regulation remains on the books is not "ongoing agency action" within the meaning of the ESA. Forest Guardians v. Forsgren, 478 F.3d 1149, 1159 (10th Cir. 2007). Ship traffic operating in the amended TSS is also not "ongoing agency action." California Sportfishing, 472 F.3d at 596-99. Finally, even if ship traffic were an ongoing action of the Coast Guard (which it is not), consultation would not be required because the Coast Guard does not possess ongoing discretion to impose speed limits or other restrictions on ship traffic in the TSS for the benefit of endangered species. See Environmental Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1080 (9th Cir. 2001); Western Watersheds Project v. Matejko, 468 F.3d 1099, 1109-11 (9th Cir. 2006). Therefore, CBD has no viable Section 7 claim against the Coast Guard.

This does not mean CBD has no recourse. Other provisions of the ESA (particularly the "take" prohibition in ESA Section 9, 16 U.S.C. § 1538) directly address the danger that private conduct will cause harm to listed species. To the extent CBD believes that shipping companies are threatening endangered whales with imminent harm, CBD may bring an action under Section

9 to enjoin the companies' activities. Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995). To the extent CBD seeks a broader regulatory response imposing speed limits or other restrictions on ship traffic, CBD may submit a new rulemaking petition to NMFS, the agency that implements the Marine Mammal Protection Act and the ESA with respect to endangered whales, or bring an action under the Administrative Procedure Act ("APA") challenging NMFS's denial of CBD's prior petition. However, because CBD has no viable cause of action against the Coast Guard, Defendants are entitled to summary judgment in this case as a matter of law.

I. BACKGROUND

A. Statutory And Regulatory Background

1. The Endangered Species Act

The ESA was enacted "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." 16 U.S.C. § 1531(b). Congress assigned responsibility for implementing the ESA to the Secretaries of the Department of Commerce and the Department of the Interior. Id. § 1533. Generally, the Secretary of Commerce ("Secretary") has responsibility for endangered and threatened marine species and administers the ESA through the NMFS. See id. § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b).

The ESA directs the Secretary to publish lists of endangered and threatened species in the Federal Register and to designate their critical habitat. See 16 U.S.C. § 1533. The ESA protects listed species in several ways. The broadest provision is Section 9, which prohibits "any person subject to the jurisdiction of the United States" from "tak[ing] any such species within the United States." Id. § 1538(1)(B). The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. § 1532 (19). The ESA's citizen suit provision allows private plaintiffs to bring an action to enjoin private activities that are reasonably certain to "take" a listed species. Id. § 1540(g).

Section 7 of the ESA has a narrower focus than Section 9; it applies only to the actions of federal agencies. Section 7(a)(2) provides that each federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out

by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species" or adversly modify critical habitat for any listed species. 16 U.S.C. § 1536(a)(2). The term "action" is defined by regulation as:

> [A]ll 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. Examples include, but are not limited to:
>
> (a) actions intended to conserve listed species or their habitat;
>
> (b) the promulgation of regulations;
>
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
>
> (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02. Section 7 applies to "all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03.

If an agency determines that a proposed action "may affect" listed species or critical habitat, it must pursue either informal or formal consultation with the consulting agency (in this case NMFS). Id. §§ 402.13-402.14. Unless the action agency determines, with NMFS's written concurrence, that the proposed action is "not likely to adversely affect" a listed species or critical habitat, the action agency must engage in "formal consultation." 50 C.F.R. § 402.14(a)- (b). At the conclusion of formal consultation, NMFS issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of any listed species or adversely modify critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If NMFS concludes that jeopardy or adverse modification is likely, NMFS must suggest any reasonable and prudent alternatives that would avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A).

2. The Ports And Waterways Safety Act

"The maritime oil transport industry presents ever-present, all too real dangers of oil spills from tanker ships, spills which could be catastrophes for the marine environment." United States v. Locke, 529 U.S. 89, 94 (2000). After the supertanker Torrey Canyon spilled its cargo of 120,000 tons of crude oil off the coast of England in 1967, Congress responded by enacting the Ports and Waterways Safety Act of 1972 ("PWSA"). Id. at 101. The PWSA, as amended by the Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471, "contains two Titles

representing somewhat overlapping provisions designed to insure vessel safety and the protection of the navigable waters, their resources, and shore areas from tanker cargo spillage." Ray v. Atlantic Richfield Co., 435 U.S. 151, 161 (1978). Title I addresses traffic control at local ports; Title II addresses tanker design and construction. Id. "The Senate Report compares Title I to 'providing safer surface highways and traffic controls for automobiles,' while Title II is likened to 'providing safer automobiles to transit those highways.'" Id. at 161 n.9 (quoting S. Rep. No. 92-724, at 9-10 (1972), reprinted in 1972 U.S.C.C.A.N. 2766, 2769).

Title I authorizes the Coast Guard to enact measures for controlling vessel traffic "[i]n order to prevent damage to vessels, structures, and shore areas, as well as environmental harm to navigable waters and the resources therein that might result from vessel or structure damage." Ray, 435 U.S. at 169. In relevant part, the PWSA authorizes the Coast Guard to establish "traffic separation schemes" to provide "safe access routes" for vessels proceeding to or from United States ports. 33 U.S.C. § 1223(c)(1); 33 C.F.R. § 167.1. As discussed above, a TSS is a recommendatory ship routing measure, similar to the markings on divided highways, that is used to minimize the risk of collision by separating vessels into opposing streams or "lanes" of traffic that are kept a safe distance apart by separation zones. 64 Fed. Reg. 32451, 32452 (June 17, 1999); 33 C.F.R. § 167.5(b). A TSS may also include a "precautionary area," which is an area within defined limits where ships must navigate with particular caution, and within which the direction of traffic flow may be recommended.. 33 C.F.R. §§ 167.1, 167.5(e).

The PWSA establishes a detailed process the Coast Guard must follow prior to designating a TSS:

> Prior to designating a traffic separation scheme, the Coast Guard must, *inter alia*, (1) undertake a study, which the Coast Guard calls a port access route study ("PARS"), and publish notice of it in the Federal Register, id. § 1223(c)(3)(A); (2) "take into account all other uses of the area under consideration," in consultation with the Secretary of Commerce and others, id. § 1223(c)(3)(B); and (3) "to the extent practicable, reconcile the need for safe access routes with the needs of all other reasonable uses of the area involved," id. § 1223(c)(3)(C). After completing the above tasks, the Coast Guard must issue a notice of proposed rulemaking of the contemplated route, or lack thereof, in the Federal Register, and state its reasons for the decision. Id. § 1223(4).

Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 922 (D.C. Cir. 2008) (quoting 33 U.S.C. § 1223). The Coast Guard must follow the same process prior to modifying a TSS. 33 C.F.R. §

167.15(a); 33 U.S.C. § 1231(a); see, e.g., 64 Fed. Reg. at 32452. The only exception is in the event of an emergency or if the need arises to conduct operations within a TSS that would create an undue hazard for vessels, and there is no reasonable alternative means of conducting the operations. In those limited circumstances, the Coast Guard may temporarily adjust a TSS by publishing notice in the Federal Register until the emergency has ended or the operations have been completed. 33 C.F.R. § 167.15(b). The designation (or modification) of a TSS shall recognize the right of navigation as paramount over all other uses. 33 U.S.C. § 1223(c)(1).

The International Maritime Organization ("IMO") must adopt a TSS for it to be internationally recognized. 64 Fed. Reg. at 32452; see 33 U.S.C. § 1223(c)(5)(D). The IMO is a specialized agency of the United Nations composed of representatives of all major shipping nations. McArdle Decl. Ex. 2 at 19. In order to conform to the requirements of the PWSA, and gain the international shipping community's recognition and adoption of ship routing measures, the United States submits proposed routing measures to the IMO for consideration. The IMO will approve, adopt, and implement a proposal only if the proposal complies with IMO principles and guidelines on ship routing. See 64 Fed. Reg. at 32452.

All TSSs off the coast of the United States, including the California TSSs at issue in this case, have been adopted by the IMO, and are voluntary. Vessels are not required to use the TSSs, but if they do, the vessels must comply with Rule 10 of the International Regulations for Preventing Collisions at Sea, 1972, as amended. 64 Fed. Reg. at 32452; 33 U.S.C. § 1223(c)(5); 33 C.F.R. § 167.10. Rule 10 requires vessels using an IMO-adopted TSS to proceed in the appropriate traffic lane, follow the general traffic flow for that lane, and not enter a separation zone or cross a separation line. 64 Fed. Reg. at 32452; see http://www.navcen.uscg.gov/mwv/navrules/rules/Rule10.htm (last visited Nov. 10, 2008).

The Coast Guard may also designate, through rulemaking, "Regulated Navigation Areas." 33 C.F.R. §§ 165.1, 165.5, 165.10. A Regulated Navigation Area ("RNA") is an area in which the Coast Guard may impose specific vessel operating requirements because of the existence of hazardous conditions. See 65 Fed. Reg. at 62292; 33 C.F.R. §§ 165.10-165.11. The Coast Guard may establish an RNA to address hazardous conditions only within the territorial sea of the

United States, which (generally speaking) extends to a seaward limit of 12 nautical miles from the coast. 33 U.S.C. § 1223(a)(4); 33 C.F.R. § 165.9(b); see, e.g., 73 Fed. Reg. 14181 (March 17, 2008) (establishing temporary RNA to protect maritime public from hazards associated with bridge maintenance project); 70 Fed. Reg. 49490 (Aug. 24, 2005) (establishing RNA because of physical conditions "present[ing] significant hazards to vessels carrying oil or hazardous material as cargo"). Vessels operating in an RNA must comply with the operating requirements established by the Coast Guard. 33 C.F.R. § 165.13(a).

B. Factual Background

1. The San Francisco And Santa Barbara Channel TSSs

In 1968, before the PWSA and the ESA were enacted, the IMO adopted a TSS in the approaches to San Francisco Bay designed to organize a vessel's approach and reduce the risk of collisions by distributing vessel traffic into three approaches and separating opposing streams of traffic in each approach into separate lanes. McArdle Decl. Ex. 2 at 10, 35; 64 Fed. Reg. at 32452. In 1990, the IMO adopted an amendment to the San Francisco TSS that rotated the southern approach westward to encourage vessels to transit farther offshore when entering San Francisco Bay from the south or departing to the south. 64 Fed. Reg. at 32452.

In 1969, the IMO adopted a TSS through the Santa Barbara Channel, beginning roughly in the waters off Point Vicente to the south and ending in the waters off Point Conception to the north. 64 Fed. Reg. at 32452; McArdle Decl. Ex. 2 at 12, 37. The Santa Barbara Channel TSS consists of an eastbound and westbound lane, each of which is one nautical mile wide and separated by a two nautical mile separation zone. McArdle Decl. Ex. 2 at 12. In 1985, the IMO adopted an 18-mile westward extension of the northwest end of the TSS in the Santa Barbara Channel, extending the TSS roughly from Point Conception to Point Arguello. 64 Fed. Reg. at 32452. The extension was designed to increase safety of transit through oil exploration and development zones and encourage transits along the coast at greater distances from shore, reducing the risk of allisions and groundings. Id. There is no TSS off the coast of California between the San Francisco and Santa Barbara Channel TSSs. McArdle Decl. Ex. 2 at 10-12.

The United States requested that the IMO delay implementation of the above amendments pending completion of a tanker movement study and the designation of the Monterey Bay National Marine Sanctuary ("MBNMS") in 1992. McArdle Decl. Ex. 12; 64 Fed. Reg. at 32453. The MBNMS is the largest marine protected area in the United States, covering over 5,000 square miles off the central California coast from Cambria to the Marin Headlands. McArdle Decl. Ex. 2 at iii, 1. Vessel traffic within the MBNMS was a major issue of concern during the MBNMS designation process. Id. Congress directed the Secretaries of Commerce (through NOAA) and Transportation (through the Coast Guard) to evaluate potential threats to MBNMS resources from ship traffic and ways to reduce those threats. Id.

NOAA and Coast Guard convened the MBNMS Advisory Council, consisting of representatives of various state and federal agencies, environmental groups, and others, to recommend a vessel traffic management system that maximized protection of MBNMS resources while allowing for the continuation of safe, efficient, and environmentally sound transportation. McArdle Decl. Ex. 2 at 2-3. The Council met regularly over an 18-month period, and in October 1998, the Coast Guard and NOAA jointly published a report containing the Council's findings and recommendations. Id. One of the Council's key recommendations for enhancing the protection of the MBNMS was that the Coast Guard immediately promulgate regulations implementing the IMO's 1985 and 1990 amendments to the Santa Barbara Channel and San Francisco TSSs described above. Id. at iv, 21-24, 28. The Coast Guard also separately conducted a port access route study that validated the IMO amendments. 64 Fed. Reg. at 32453.

On June 17, 1999, the Coast Guard published notice in the Federal Register of its proposal to implement the IMO-adopted amendments to the San Francisco and Santa Barbara Channel TSSs and to incorporate descriptions of the TSSs, as amended, into the Code of Federal Regulations. 64 Fed. Reg. at 32451. The Coast Guard explained that "[t]he modifications . . . would encourage vessels to transit further offshore when entering or departing the southern approach lanes of the TSS off San Francisco or the northwestern end of the TSS in the Santa Barbara Channel." Id. at 32453. "Once implemented, the amended TSSs would route

commercial vessels farther offshore, providing an extra margin of safety and environmental protection in the [MBNMS]." Id. at 32451; McArdle Decl. Ex. 1.

The Coast Guard reviewed the potential environmental effects of the proposed amendments and determined that they would not result in any substantial change to existing environmental conditions or result in any inconsistency with any federal or state laws relating to the environment. McArdle Decl. Ex. 9 at 1. "This rule proposes adjusting two existing traffic separation schemes. These adjustments would enhance safety in the [MBNMS] and adjacent waters by allowing additional response time for a vessel that is adrift thus preventing groundings, and by routing vessels away from sensitive areas." 64 Fed. Reg. at 32455.

The Coast Guard received six comments on the proposed rule. With one minor exception not relevant here, all of comments strongly supported the Coast Guard's proposal. 65 Fed. Reg. 46603 (July 31, 2000); McArdle Decl. Exs. 3-8. On March 3, 2000, the United States, through the Coast Guard, informed the IMO that the United States intended to implement the two TSS amendments and requested that its decision be brought to the attention of member governments by appropriate circular. McArdle Decl. Ex. 12. On July 31, 2000, the Coast Guard promulgated a final rule adopting the two amendments without change and incorporating descriptions of the TSSs, as amended, into the Code of Federal Regulations. 65 Fed. Reg. 46603; McArlde Decl. Ex. 10; 33 C.F.R. §§ 167.400-167.404 (San Francisco TSS); 33 C.F.R. §§ 167.450-167.452 (Santa Barbara Channel TSS); see McArdle Decl. Ex. 11 (maps and descriptions of California TSSs, as amended); http://montereybay.noaa.gov/ intro/maps/ship_tracks_lg.jpg (map showing 2000 TSS amendments in relation to the MBNMS) (last visited Nov. 13, 2008).

2. The Los Angeles-Long Beach TSS

In 1975, the IMO adopted a TSS in the approaches to the ports of Los Angeles-Long Beach. The TSS consists of a southern approach, a western approach connecting with the southern end of the Santa Barbara Channel TSS, and a Precautionary Area in the center where the two approaches meet. 65 Fed. Reg. 46378, 46379 (July 28, 2000); McArdle Decl. Ex. 11. On July 28, 2000, after conducting the requisite PARS, the Coast Guard published notice in the Federal Register of a proposal to make certain adjustments to the TSS as a result of several port

improvement projects. 65 Fed. Reg. 46378. The Coast Guard proposed to expand the existing Precautionary Area 2.2 nautical miles to the south; shift the western approach approximately 2.2 miles to the south; and shift the southern approach approximately 3 miles to the west. 65 Fed. Reg. at 46380. The Coast Guard explained that these adjustments were necessary to enhance navigational safety in light of the port improvement projects. 65 Fed. Reg. at 46380-81. The Coast Guard received no comments, and on September 6, 2000, the Coast Guard issued a final rule amending the TSS and incorporating a description of the TSS, as amended, into the Code of Federal Regulations. 65 Fed. Reg. 53911 (Sept. 6, 2000); 33 C.F.R §§ 167.500-503.

In a related rulemaking, the Coast Guard enlarged the existing RNA in the approaches to Los Angeles-Long Beach to make it geographically coextensive with the enlarged Precautionary Area. The Coast Guard also made certain changes to the operating requirements within the RNA. 65 Fed. Reg. 62292, 62293 (Oct. 18, 2000). The Coast Guard published notice of the proposed adjustments on July 21, 2000, explaining that they were necessary because hazardous conditions required specific vessel operating requirements that could only be enforced by making the area an RNA. 65 Fed. Reg. 45328 (July 21, 2000). The Coast Guard received no comments and issued the final rule on October 18, 2000. 65 Fed. Reg. 62292; 33 C.F.R. § 165.1152.

3. CBD's Rulemaking Petition To NMFS

Blue whales, an endangered species under the ESA, are common in waters off California. Cummings Decl. Ex. D at 1-2. Unfortunately, over at least the past several decades, vessels operating off the California coast have occasionally collided with whales, sometimes causing injury and death. Id. at 2, 35; Treece Decl. Ex. D at 15, Ex. B at 179. In the fall of 2007, an unusually high number of blue whales occurred in the Santa Barbara Channel, likely responding to prey aggregations near the Channel Islands. Cummings Decl. Ex. D at 2. Three blue whales were killed, most likely as a result of collisions with large vessels. Id.

On September 25, 2007, CBD petitioned NMFS to promulgate regulations imposing a seasonal speed limit on large vessels transiting the Santa Barbara Channel south of Point Conception. Cummings Decl. Ex. A at 6-7. CBD asserted that "the only effective mechanism to reduce the risk to large whales from ship strikes is to institute mandatory vessel speed limits in

the areas and at times when whales and commercial vessels overlap." Id. at 1. CBD contended that the ESA and the Marine Mammal Protection Act gave NMFS the authority and duty "to promulgate all necessary regulations to protect the blue whale from ship strikes." Id. at 4.

NMFS denied CBD's petition on January 8, 2008, finding that the three blue whale deaths during a very short period of time, while clearly a concern, was not substantially greater than annual ship strike-related mortality and injury rates. Cummings Decl. Ex. D at 3. NMFS also determined that permanent vessel regulations were unwarranted because the 2007 event was "an aberration linked to an unusual distribution pattern, likely caused by an unusually high concentration of prey in and around the [Santa Barbara Channel]," and there was no indication that the unusual conditions were likely to recur. Id. at 3-4. NMFS stated that "[i]f circumstances similar to those occurring in 2007 recur, or if there are an equal or greater number of blue whale deaths in the future, we will reassess the situation in light of available information and make a decision whether a regulatory response is appropriate." Id. at 4.

II. STANDARD OF REVIEW

Judicial review of administrative decisions under the ESA is governed by the APA. Western Watersheds, 468 F.3d at 1107. Under the APA, agency action must be upheld unless found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court "may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). Judicial review is limited to the administrative record before the agency at the time it made the challenged decision. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). "'[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did'" based on the administrative record. City & County of San Francisco v. United States, 130 F.3d 873, 877 (9th Cir. 1997) (quoting Occidental Eng'g v. INS, 753 F.2d 766, 770 (9th Cir. 1985)). Summary judgment is appropriate if "there is no genuine issue

as to any material fact and . . . the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. ARGUMENT

A. CBD's Challenge To The 2000 Regulations Is Barred By The Statute Of Limitations

Because the ESA does not contain its own statute of limitation, the six-year statue of limitations in 28 U.S.C. § 2401(a) applies. Wind River, 946 F.2d at 713; Center For Biological Diversity v. Hamilton, 453 F.3d 1331, 1334 (11th Cir. 2006); Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154, 1160 (D. Or. 2001). Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). "Because 28 U.S.C. § 2401 is a condition of the [Government's] waiver of sovereign immunity, courts are reluctant to interpret the statute of limitations in a manner that extends the waiver beyond that which Congress clearly intended." Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990). "The words 'every civil action' must be interpreted to mean what they say." Nesovic v. United States, 71 F.3d 776, 778 (9th Cir. 1995). Thus, Section 2401(a) "'applies to all civil actions whether legal, equitable or mixed.'" Id. (quoting Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987)). Section 2401(a) is a "condition attached to the government's waiver of sovereign immunity and, as such must be strictly construed." Spannaus, 824 F.2d at 55.

A challenge to agency regulations "first accrues" within the meaning of 28 U.S.C. § 2401(a) on the date the regulations are published in the Federal Register. See Cedars-Sinai Med. Ctr. v. Shalala, 177 F.3d 1126, 1129 (9th Cir. 1999); Sierra Club v. Penfold, 857 F.2d 1307, 1315-16 (9th Cir. 1988). "After the six-year limitations period has expired, a challenge to the validity of an agency's rule can only be attacked in two ways: (1) through an 'as applied' challenge requesting judicial review of the agency's adverse application of the rule to the particular challenger, or (2) by petitioning the agency for amendment or rescission of the rule and then appealing the agency's decision." Oksner v. Blakey, No. C07-2273-SBA, 2007 WL 3238659, at *6 (N.D. Cal. Oct. 31, 2007); Wind River, 946 F.2d at 715-16; P&V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1026-27 (D.C. Cir. 2008); see, e.g., Northwest Envtl. Advocates v.

EPA., 537 F.3d 1006, 1019 (9th Cir. 2008) (substantive challenge to 1979 regulations not time barred because "EPA's denial of the Petition for Rulemaking in 2003 was . . . an 'adverse application' of [the regulation] within the meaning of Wind River"). These decisions "do not create an exception from the general rule that the limitations period begins to run from the date of publication in the Federal Register. They merely stand for the proposition that an agency's application of a rule to a party creates a new, six-year cause of action to challenge to the agency's constitutional or statutory authority." Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997). "[T]he claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit." Id.

The Coast Guard promulgated the regulations at issue in this case in 2000. CBD filed its Complaint on June 18, 2008, nearly eight years later, alleging that the Coast Guard issued the regulations in violation of the procedural requirements of ESA Section 7(a)(2). Compl. ¶¶ 2, 5, 43. Such a procedural challenge is time barred. See Cedars-Sinai, 177 F.3d at 1129; Penfold, 857 F.2d at 1315-16. Moreover, even if CBD's Complaint could be construed as a substantive challenge to the regulations (which it is not), CBD has not: (1) identified any final agency action taken by the Coast Guard within the last six years applying the regulations specifically to CBD; or (2) petitioned the Coast Guard to repeal or amend the regulations. Thus, regardless of whether CBD has brought a substantive or procedural challenge to the regulations, the challenge is barred by the statute of limitations. See Coos County Bd. of County Comm'rs v. Kempthorne, 531 F.3d 792, 812 n.16 (9th Cir. 2008) (substantive challenge to regulations not brought within six years of promulgation date time barred); Dunn-McCampbell, 112 F.3d at 1287-88 (same); P &V Enters., 516 F.3d at 1026-27 (same); Oksner, 2007 WL 3238659, at *6 (same).[1/]

[1/] See Sierra Club v. EPA, 162 F. Supp. 2d 406, 422 n.26 (D. Md. 2001) (ESA Section 7 claim not brought within six years of agency action time barred); Broadened Horizons Riverkeepers v. U.S. Army Corps of Eng'rs, 8 F. Supp. 2d 730, 736 n.9 (E.D. Tenn. 1998) (same); Kentucky Heartwood v. Worthington, 20 F. Supp. 2d 1076, 1093 (E.D. Ky. 1998) (same).

B. CBD Waived Its Arguments By Not Presenting Them To The Coast Guard During The Rulemaking Process

Even if CBD could overcome the statute of limitations, CBD's claims are barred because they were not presented to the Coast Guard during the rulemaking process. The Ninth Circuit has made clear that "a party's failure to make an argument before the administrative agency in comments on a proposed rule bar[s] it from raising that argument on judicial review." Universal Health Servs. v. Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004). This rule is "consistent with the decisions of every other circuit to have addressed the issue of waiver in notice-and-comment rulemaking." Id. at 1020. "Indeed, there is a near absolute bar against raising new issues – factual or legal – on appeal in the administrative context." National Wildlife Fed'n v. EPA, 286 F.3d 554, 562 (D.C. Cir. 2002). "The waiver rule protects the agency's prerogative to apply its expertise, to correct its own errors, and to create a record for [the Court's] review." Portland Gen. Elec. Co. v. Bonneville Power Admin., 501 F.3d 1009, 1024 (9th Cir. 2007).

The Coast Guard published notice in the Federal Register of each of the proposed rules at issue in this case and solicited comments from the public. See 64 Fed. Reg. 32451; 65 Fed. Reg. 46378; 65 Fed. Reg. 45328. "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." Friends of Sierra R.R. v. I.C.C., 881 F.2d 663, 667-68 (9th Cir. 1989); Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364 (9th Cir. 1990). CBD did not submit any comments on any of the proposed rules. Nor did any other party raise any issues regarding any purported adverse effects on threatened or endangered species or any alleged requirement that the Coast Guard engage in ESA Section 7 consultation prior to implementing the relatively minor TSS amendments contained in the regulations. CBD is therefore barred from raising such issues now, eight years after the fact. See Universal Health, 363 F.3d at 1019-20.

C. CBD Has Not Demonstrated That The 2000 Amendments Triggered The Consultation Requirement

Even if CBD could overcome the statute of limitations and the waiver doctrine, CBD has not demonstrated that the 2000 TSS amendments triggered ESA Section 7's consultation requirement. "The purpose of ESA § 7(a)(2) is to ensure that the federal government does not

undertake actions, such as building a dam or highway, that incidentally jeopardize the existence of endangered or threatened species." Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984). Consultation is required only if a proposed federal action "may affect" a threatened or endangered species. 50 C.F.R. § 402.14(a). Thus, consultation is not required if the proposed action will have no effect on listed species, Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996), or if "the likelihood of jeopardy is too remote." Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1092 (9th Cir. 2004).

CBD has not shown that the Coast Guard's 2000 TSS amendments had any effect on any threatened or endangered species. As a threshold matter, it is undisputed that the IMO adopted the San Francisco and Santa Barbara Channel TSSs in 1968 and 1969, before the ESA and the PWSA were enacted. 64 Fed. Reg. at 32451-52; CBD Mem. at 9. The actions of the IMO are not actions of the Coast Guard, and even if they were, the ESA is not retroactive and does not require consultation on agency actions taken prior to its enactment in 1973. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 187 (1978); Sierra Club v. Babbitt, 65 F.3d at 1510.

The Coast Guard's 2000 regulation amended the San Francisco and Santa Barbara Channel TSSs in two limited respects: (1) it extended the northern end of the Santa Barbara Channel TSS 18 miles westward from Point Conception to Point Arguello; and (2) it rotated the southern approach lane of the TSS off San Francisco westward and further offshore. 65 Fed. Reg. at 46603-04. The two amendments did not increase, authorize, fund, or carry out any ship traffic. The purpose of the amendments was to "encourage vessels to transit further offshore when entering or departing the southern approach lanes of the TSS off San Francisco or the northwestern end of the TSS in the Santa Barbara Channel." 64 Fed. Reg. at 32453. By encouraging vessels to transit further offshore, the primary effect of the amendments was reduce the risk of ship collisions and oil spills within the MBNMS. Id. at 3245. As a result, the amendments were strongly endorsed by the MBNMS Advisory Council, which included representatives of NOAA, the U.S. Fish and Wildlife Service, the California Coastal Commission, environmental groups, and others. McArdle Decl. Ex. 4; see id. Exs. 2-3, 5-7. The Coast Guard

reviewed the potential environmental effects and determined that the amendments would not result in any substantial change to existing environmental conditions or any inconsistency with any federal or state laws relating to the environment. Id. at 46605; McArdle Decl. Ex. 9. CBD has not demonstrated that the Coast Guard's determination was arbitrary or capricious. Nor has CBD otherwise demonstrated that two amendments had any potential effect on any listed species that would trigger a duty to consult.

The 2000 amendments to the Los Angeles-Long Beach TSS were even less significant. The IMO adopted the Los Angeles-Long Beach TSS in 1975. In 2000, the Coast Guard simply expanded the existing Precautionary Area 2.2 nautical miles to the south; expanded the existing RNA so that it was geographically coextensive with the enlarged Precautionary Area; shifted the western TSS approach 2.2 miles to the south; and shifted the southern TSS approach 3 miles to the west. 65 Fed. Reg. at 46380, 62292-93. CBD has not cited a shred of evidence demonstrating that these minor adjustments had any potential impact on any threatened or endangered species. Accordingly, the CBD has not demonstrated that the Coast Guard was required to engage in Section 7 consultation prior to promulgating the 2000 regulations.

D. Coast Guard Advisory Bulletins Do Not Trigger The Consultation Requirement

Lacking any viable challenge to the Coast Guard's *promulgation* of the 2000 regulations, CBD asserts that it is challenging the agency's *administration* of the regulations. See Compl. ¶¶ 40, 43; CBD Mem. at 13-14. This argument fails for two reasons. First, the Ninth Circuit has rejected the argument that a plaintiff can circumvent the statute of limitations by purporting to challenge the agency's administration of a regulation. "[A]llowing suit whenever a regulation was administered by a federal agency 'would virtually nullify the statute of limitations for challenges to agency orders.'" Cedars-Sinai, 177 F.3d at 1129 (quoting Shiny Rock, 906 F.2d at 1362); see Penfold, 857 F.2d at 1316 (rejecting argument that would allow a claimant to "challenge regulations at a much later time, e.g., when administered by the federal agency, rather than when adopted"); Montana Snowmobile Ass'n v. Wildes, 103 F. Supp. 2d 1239, 1242-43 (D. Mont. 2000) (agency's enforcement of Forest Plan adopted more than six years before the suit did not give rise to new claim for statute of limitations purposes); Grand Canyon Trust v. U.S. Bureau

of Reclamation, No. CV-07-8164 PCT-DGC, 2008 WL 4417227, at *15 (D. Ariz. Sept. 26, 2008) (rejecting argument that "every daily decision to increase or decrease flow from the Dam requires consultation with FWS" where plaintiff's true complaint lies with prior agency decision establishing dam operating criteria).

Second, CBD has not identified any discrete administrative action taken by the Coast Guard within the last six years that itself could have triggered Section 7's consultation requirements. CBD notes that on two occasions, the Coast Guard issued a weekly "Local Notice to Mariners" advising caution due to the presence of blue whales in the Santa Barbara Channel and reminding mariners that blue whales are protected under Federal law. CBD Mem. at 10; Treece Decl. Exs. H-I. The Ninth Circuit has been clear that such advisory notices do not trigger any duty to consult under the ESA. See Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074-75 (9th Cir. 1996). In Marbled Murrelet, the United States Fish and Wildlife Service advised a timber company how it could conduct its operations without taking listed species in violation of ESA Section 9. The Ninth Circuit held that such "advisory activity" does not trigger any duty to consult – for obvious reasons:

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loath to contact the USFWS for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled, and protection of threatened and endangered species would suffer.

Id. at 1074-75; see also California Native Plant Soc'y v. EPA, No. C06-03604 MJJ, 2007 WL 2021796, at *20 (N.D. Cal. July 10, 2007) (holding that EPA's conservation strategy was an "advice document [that] does not trigger the consultation requirements of the ESA"); Karuk Tribe v. U.S. Forest Serv., 379 F. Supp. 2d 1071, 1102 (N.D. Cal. 2005) (Forest Service's interactive process with miners that "involved a discussion of the types of activities that would be considered a significant disturbance of surface resources . . . is most properly considered the type of 'advisory' conduct that does not trigger the ESA").

The same logic applies here. Any requirement that the Coast Guard undertake ESA Section 7 consultation prior to issuing a weekly bulletin advising mariners to use caution due to the presence of whales would effectively mean that no such bulletins are ever issued, which would be contrary to the goals of the ESA and CBD's own stated interest in protecting marine life. Accordingly, CBD's assertion that the Coast Guard's weekly bulletins triggered the consultation requirement lacks merit.[2/]

E. Commercial Shipping Operations In The Santa Barbara Channel Do Not Trigger A Continuing Duty To Consult

CBD argues that the "new information" about "increased incidence of blue whale mortalities during the fall of 2007" in the Santa Barbara Channel triggers a new duty to consult – and thus a new cause of action within the six-year statute of limitations – because the Coast Guard's regulation of ship traffic is "ongoing," and the Coast Guard "has the discretion under the PWSA to alter its regulation of ship traffic in order to protect [listed] species from further harm." CBD Mem. at 11, 13-17. According to CBD, "[i]In 2007 alone, *ship collisions* are known to have killed at least three blue whales in the Santa Barbara Channel." CBD Mem. at 1 (emphasis added). CBD states that "[t]he alarming number of blue whales killed in the Santa Barbara Channel in 2007 . . . amply demonstrates the significant effect that *ship traffic* has on this and other endangered species." Id. at 5-6 (emphasis added). CBD argues that in light of this new information, the Coast Guard must fulfill its "non-discretionary duty under the ESA to ensure that *ship traffic* does not jeopardize the blue whale or any other endangered whale species." CBD Mem. at 2 (emphasis added). CBD relies on the ESA regulations providing that an agency must "reinitiate" Section 7 consultation if "new information reveals effects of the action that may affect

---

[2/] CBD also makes a fleeting reference to an emergency rule issued by the Coast Guard in 2002 establishing a temporary safety zone around a sunken freight vessel. See 67 Fed. Reg. 49578 (July 31, 2002); CBD Mem. at 10. The rule expired on September 30, 2002. 67 Fed. Reg. at 49578. CBD lacks Article III standing to challenge a rule that expired over five years before the Complaint was filed. See Gros Ventre Tribe v. United States, 469 F.3d 801, 814 (9th Cir. 2006); Rattlesnake Coal. v. EPA, 509 F.3d 1095, 1102-03 (9th Cir. 2007). CBD also did not give 60 days' notice of its intent to challenge the rule, which is a jurisdictional prerequisite. See 16 U.S.C. § 1540(g)(2)(A)(i); Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520-22 (9th Cir. 1998); Cummings Decl. Ex. C. Thus, to the extent CBD is challenging the 2002 rule, the challenge should be dismissed for lack of jurisdiction.

listed species or critical habitat in a manner or to an extent not previously considered," and the agency retains "discretionary Federal involvement or control over the action." 50 C.F.R. § 402.16(b). As demonstrated below, CBD's arguments suffer from several fatal defects.

1. The 2007 Ship Strikes Do Not Constitute New Information Revealing The Effects Of Any Coast Guard Action

First, the risk of collisions between large vessels and blue whales in the Santa Barbara, while unfortunate, is not "new information." 50 C.F.R. § 402.16(b). Ship strikes of blue whales have occasionally occurred off the California coast for decades. Treece Decl. Ex. B at 179, Ex. D at 15; Cummings Decl. Ex. D at 35. The 2007 ship strikes occurred during a concentrated period and do not suggest any increase in annual ship strike-related mortality and injury rates. Cummings Decl. Ex. D at 3.

The 2007 ship strikes also do not reveal any "effects of the *action*." 50 C.F.R. § 402.16(b) (emphasis added). The term "action" in the regulations refers to *federal* action, not commercial ship traffic, as CBD mistakenly assumes. See 50 C.F.R. § 402.02. The only conceivably relevant federal "action" is the Coast Guard's 2000 regulation extending the northern end of Santa Barbara Channel TSS by 18 miles northwest of Point Conception. 65 Fed. Reg. at 46603; McArdle Decl. Ex. 11; http://montereybay.noaa.gov/intro/maps/ship_tracks_lg.jpg (showing 2000 TSS extension) (last visited Nov. 13, 2008). The 2007 ship strikes reveal no "effects" of this action because the ship strikes had nothing to do with the TSS amendment. The 2007 ship strikes were "an aberration linked to an unusual [blue whale] distribution pattern, likely caused by an unusually high concentration of prey in and around the [Santa Barbara Channel]." Id. Ex. D at 3. This "aberration" ended in the fall of 2007, and there is no evidence that it has recurred or ever will recur. Id. at 3-4. Because the 2007 ship strikes do not constitute "new information" revealing any "effects of the action," they cannot give rise to a claim under 50 C.F.R.§ 402.16(b) that accrued within the six-year statute of limitations.

2. Ship Traffic In The Santa Barbara Channel Is Not "Agency Action" Within the Meaning Of The ESA

More fundamentally, the Ninth Circuit's decision in California Sportfishing forecloses any argument that "ship traffic" in the Santa Barbara Channel TSS is "ongoing agency action" that

could trigger a duty to consult, even if there were "new information." In California Sportfishing, FERC issued a 30-year license in 1980 to Pacific Gas and Electric ("PG&E") for the operation of a hydroelectric project. In 1999, Chinook Salmon were listed as a threatened species under the ESA. This listing of a new species that may be affected by ongoing agency action triggers a duty to reinitiate Section 7 consultation if the agency retains discretionary involvement or control. 50 C.F.R. § 402.16(d). In 2002 and 2003, many fish died in the vicinity of the project. California Sportfishing petitioned FERC to consult with NMFS under ESA Section 7 to address the continuing effects of PG&E's project on listed salmon. FERC denied the petition, and California Sportfishing petitioned the Ninth Circuit for review. California Sportfishing, 472 F.3d at 594-95.

The Ninth Circuit denied the petition. The Court made clear that the ESA "mandate[s] consultation with NMFS only before an agency takes some affirmative agency action, such as issuing a license," id. at 595, and held that "the ESA imposes no duty to consult about activities conducted by PG&E pursuant to a previously issued, valid license from FERC." Id. Relying on the regulatory definition of "action," 50 C.F.R. § 402.02, the Court ruled that "*the granting of the license to PG&E in 1980 was* a federal agency action," but "the continued operation of the project by PG&E in 1999, when the Chinook Salmon was declared threatened, is not a federal agency action." Id. at 599. "The regulations promulgated pursuant to the ESA make it clear that the operation of a project pursuant to a permit is not a federal agency action." Id. at 598.

The Ninth Circuit also distinguished its prior decision in Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), which CBD relies on heavily in this case:

> Pacific Rivers involved certain Land and Resource Management Plans ("LRMPs") governing thousands of different projects in two national forests. After the Forest Service adopted the LRMPs, the Chinook was listed as a threatened species. We held that the Forest Service had to initiate formal consultation on the LRMPs because they affected each future project planned in the forests. We observed that "every individual project planned in both national forests . . . is implemented according to the LRMPs." Because they continued to apply to new projects, we concluded that "the LRMPs have an ongoing and long-lasting effect even after adoption," and represented "on-going agency action."
>
> Unlike Pacific Rivers, this case involves no such long-lasting effects on new permits. The action was concluded in 1980 when FERC issued the license to PG & E.

California Sportfishing, 472 F.3d at 598 (internal citations omitted). The Court thus held that "[t]here is no ongoing government action within the meaning of the ESA." Id. at 599.

This case is materially the same as California Sportfishing. Under the Ninth Circuit's analysis, the Coast Guard's "promulgation of regulations" in 2000 was agency "action" within the meaning of 50 C.F.R. § 402.02. However, the continued operation of "cargo ships laden with imports" and "[o]il tankers," CBD Mem. at 9, in a TSS that was adopted by the IMO in 1969 and amended by the Coast Guard in 2000 is not "ongoing agency action within the meaning of the ESA." California Sportfishing, 472 F.3d at 599; see also Western Watersheds, 468 F.3d at 1109 (where private parties, and not the government, were diverting water, there was no agency action triggering a duty to consult); Wilderness Soc'y v. Kane County, Utah, No. 2:05CV00854 TC, 2007 WL 3124956, at *1 (D. Utah Oct. 22, 2007) ("Plaintiffs' allegations concerning third party acts cannot trigger a Section 7 duty because [third party's] unilateral actions [on federal land] are not affirmative actions of the federal agency").

The Coast Guard's 2000 regulation amending the Santa Barbara Channel TSS also bears no resemblance to the LRMPs at issue in Pacific Rivers. The regulation does not govern future federal projects similar to "logging, grazing and road-building activities" on federal lands. Pacific Rivers, 30 F.3d at 1055. The regulation was a one-off action amending a TSS, and the "action" was concluded on July 31, 2000, when the regulation was promulgated. "Of course, the very definition of 'action' in § 402.02 tells us that the '*promulgation* of regulations,' not the regulations themselves, constitutes 'action.'" Forsgren, 478 F.3d at 1159 (quoting 50 C.F.R. § 402.02); California Sportfishing, 472 F.3d at 598 ("The action was concluded in 1980 when FERC issued the license to PG & E"). Pacific Rivers is inapposite, and here, as in California Sportfishing, there is no "ongoing agency action."[3/]

[3/] For the same reasons, CBD's reliance on Turtle Island Restoration Network v. NMFS, 340 F.3d 969 (9th Cir. 2003), is misplaced. Turtle Island "involved an ongoing government program to issue permits for fishing . . . . It is significant for purposes of this case that permits issued in the past were not affected." California Sportfishing, 472 F.3d at 598. CBD is "not challenging an ongoing program of issuing new permits that underlay [the Ninth Circuit's] decision in Turtle Island." California Sportfishing, 472 F.3d at 598. Thus, Turtle Island is inapposite.

3. The Coast Guard Has No Discretion To Restrict Ship Traffic In The Santa Barbara Channel TSS To Protect Listed Species

Finally, even if there were "new information" revealing effects of the Coast Guard's 2000 amendment to the Santa Barbara Channel TSS, and even if continued operation of commercial ship traffic in the TSS were "ongoing agency action," Section 7 consultation still would not be required because the Coast Guard has not "retained sufficient discretionary involvement or control over [the activity] 'to implement measures that inure to the benefit of the' [listed species]." Simpson Timber, 255 F.3d at 1080. If an agency has not retained ongoing discretion as part of the agency "action" to restrict or modify private activity for the benefit of listed species, consultation would serve no purpose and is not required. See Simpson Timber, 255 F.3d at 1081 (agency did not have duty to reinitiate consultation over permit issued to lumber company authorizing take during logging operations, even though operations would affect newly-listed species, because "nowhere in the various permit documents did the [agency] retain discretionary control to make new requirements to protect species that subsequently might be listed"); Sierra Club, 65 F.3d at 1509 (right-of-way agreement between agency and timber company allowing road construction on federal land did not give rise to ongoing duty to consult, even though agency retained limited discretion over project, because agency's discretion was "unrelated to the protection of a protected species").

In this case, the challenged regulation plainly does not give the Coast Guard ongoing discretion to impose speed limits or other restrictions on ship traffic in the Santa Barbara Channel TSS specifically for the protection of threatened or endangered species. See 65 Fed. Reg. 46603. Moreover, with respect to ship traffic operating in the Santa Barbara Channel TSS, the Coast Guard's ongoing authority under the PWSA and its implementing regulations is limited to: (a) enforcing Rule 10 of the International Regulations for Preventing Collisions at Sea, which directs vessels to proceed in the appropriate traffic lane, follow the general traffic flow for that lane, and not enter a separation zone or cross a separation line, 33 U.S.C. § 1223(c)(5); 33 C.F.R. § 167.10; 64 Fed. Reg. at 32452; and (b) temporarily adjusting a TSS in the event of an emergency or if there is need to conduct operations in the TSS that would pose an undue hazard for vessels, and there is no reasonable alternative means of conducting the operations. 33 C.F.R. § 167.15(b); see,

e.g., 49 Fed. Reg. 32847 (Aug. 17, 1984) (establishing temporary precautionary area in the TSS approaching Galveston, Texas to facilitate salvage operations to recover a sunken vessel and to survey the area for other hazards).

Furthermore, even if the Coast Guard did possess discretion to modify or restrict ship traffic specifically for the protection of listed species, such discretion still would not be sufficient to trigger a duty to consult. In California Sportfishing, FERC's license included provisions that expressly allowed the agency to require PG&E to make changes to its operations for the protection of fish and wildlife. 472 F.3d at 572. The Ninth Circuit held that these "re-opener" provisions "do no more than give the agency discretion to decide whether to exercise discretion, subject to the requirements of notice and hearing. The reopener provisions in and of themselves are not sufficient to constitute any discretionary agency 'involvement or control' that might mandate consultation by FERC." Id. at 599 (quoting 50 C.F.R. § 402.03). Here, CBD has not even identified any statutory or regulatory provision which gives the Coast Guard "discretion to decide whether to exercise discretion" to impose measures on ship traffic in the Santa Barbara Channel TSS specifically for the protection of threatened or endangered species. Accordingly, there is no discretionary agency "involvement or control" in this case that might mandate consultation. California Sportfishing; 472 F.3d at 572; Simpson Timber, 255 F.3d at 1081; Sierra Club, 65 F.3d at 1509.

Finally, to the extent CBD is arguing that the Coast Guard must consult because it has authority under the PWSA to promulgate *new* regulations restricting ship traffic for the benefit of listed species, the argument lacks merit. Even if the PWSA conferred such authority on the Coast Guard (which it does not), the Ninth Circuit has made clear unexercised regulatory authority is not an affirmative agency "action" triggering a duty to consult. See Western Watersheds, 468 F.3d at 1108 (even assuming agency possessed statutory authority to regulate private water diversions on federal lands, "the existence of such discretion without more is not an 'action' triggering a consultation duty"); Marbled Murrelet, 83 F.3d at 1074 (agency's unexercised statutory authority to prevent lumber company from "taking" listed species "is not enough to trigger 'federal action' under section 7"). Section 7(a)(2) consultation "stems from 'affirmative'

actions only." Western Watersheds, 468 F.3d at 1108. "'[I]naction' is not 'action' for section 7(a)(2) purposes." Id.

F. CBD Is Not Without A Remedy

Although CBD has no viable Section 7 claim against the Coast Guard, CBD is not without recourse. CBD's filings make clear that it is not truly concerned with the Coast Guard's 18-mile extension of the Santa Barbara Channel TSS or any other affirmative action undertaken by the Coast Guard. Instead, CBD is concerned with the asserted harm to endangered whales caused by commercial ship traffic in the Santa Barbara Channel. CBD Mem. at 6-11. Section 9 of the ESA, not Section 7, directly addresses the danger that private conduct will cause harm to listed species. Thus, to the extent CBD believes that shipping companies are threatening listed whales with imminent harm, CBD may bring an action under Section 9 to enjoin the companies' activities. See 16 U.S.C. § 1538; Sierra Club, 65 F.3d at 1512; Simpson Timber, 255 F.3d at 1082-83. "[T]hese statutory provisions and the structure of the Act further demonstrate that [CBD]'s present action is misplaced." Sierra Club, 65 F.3d at 1512.

To the extent CBD seeks a broader regulatory response imposing speed limits or other restrictions on ship traffic, CBD may submit a new rulemaking petition to NMFS, the agency responsible for implementing the Marine Mammal Protection Act and the ESA with respect to threatened and endangered marine species. See Cummings Decl. Ex. A at 4-6; 5 U.S.C. § 553. Alternatively, CBD may bring an action under the APA challenging NMFS's denial of CBD's prior rulemaking petition (subject to whatever defenses NMFS may have). See 5 U.S.C. §§ 704, 706. However, because CBD has not advanced any viable Section 7 claim against the Coast Guard, Defendants are entitled to summary judgment in this case as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be denied and Defendants' Cross-Motion for Summary Judgment should be granted.

DATED: November 14, 2008

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General
/s/ Kevin W. McArdle
KEVIN W. McARDLE, Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife and Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Tele: (202) 305-0219
Fax: (202) 305-0275
kevin.mcardle@usdoj.gov

Attorneys for Federal Defendants