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15 **UNITED STATES DISTRICT COURT**
 16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 17

18 **SAN FRANCISCO DIVISION**
 19

20 CENTER FOR BIOLOGICAL DIVERSITY,) Case No. 3:08-cv-02999 MMC
 a non-profit corporation,)
 21 Plaintiff,) **PLAINTIFF'S COMBINED**
) **OPPOSITION TO DEFENDANTS'**
 v.) **CROSS-MOTION FOR SUMMARY**
) **AND REPLY IN SUPPORT OF**
) **PLAINTIFF'S MOTION FOR**
) **SUMMARY JUDGMENT**
 22 MICHAEL CHERTOFF, in his official capacity) Hearing Date: January 23, 2009
 as Secretary of the U.S. Department of) Time: 9:00 a. m.
 Homeland Security, REAR ADMIRAL PAUL) Judge: Hon. Maxine Chesney
 23 F. ZUKUNFT, in his official capacity as) Courtroom: 7 (19th Floor)
 Commander of U.S. Coast Guard District)
 24 Eleven, and UNITED STATES COAST)
 GUARD,)
 25 Defendants.)

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I. INTRODUCTION

This case involves the Coast Guard’s failure to satisfy its mandatory duty under the Endangered Species Act (“ESA”) to ensure that its ongoing management of ship traffic along the California coast does not jeopardize endangered species. As Plaintiff Center for Biological Diversity (“Center”) explained in its opening brief, the Coast Guard retains ongoing discretion to implement traffic separation schemes (“TSSs”) and other vessel traffic control measures pursuant to its authority under the Ports and Waterways Safety Act (“PWSA”), 33 U.S.C. § 1221 *et seq.*, for the continuing benefit of both navigation and the environment. In their Opposition and Cross Motion for Summary Judgment (“Defendants’ Brief”), Defendants concede that the commercial ship traffic they direct and manage off California has resulted in injuries and deaths of endangered marine mammals. *See* Defendants’ Brief at 26 (“[T]he risk of collisions between large vessels and blue whales in the Santa Barbara [sic], while unfortunate, is not ‘new information.’ . . . Ship strikes of blue whales have occasionally occurred off the California coast for decades.”). Accordingly, the Coast Guard has an ongoing nondiscretionary duty under Section 7 of the ESA to “insure that any action authorized, funded, or carried out by [the Coast Guard] is not likely to jeopardize the continued existence of any endangered species or threatened species . . .” 16 U.S.C. § 1536(a)(2). Despite this continuing obligation, the Coast Guard has never undertaken formal consultation with the National Marine Fisheries Service (“NMFS”), as required by Section 7, on the impacts of its ongoing vessel traffic management activities off the California coast.

Defendants' arguments in opposition to summary judgment largely fail to respond to Plaintiff's claim. Defendants try to deflect judicial scrutiny by mischaracterizing this case as a challenge to the Coast Guard's 2000 regulations amending various California coast TSSs. But Plaintiff actually asserts a different argument – that the Coast Guard's day-to-day discretionary management of shipping activity along the California coast pursuant to the PWSA imposes ongoing ESA obligations. Adoption, revision, and ongoing implementation of the TSSs is but one example of the discretion conferred on and exercised by the Coast Guard under the PWSA. For this reason, Defendants' affirmative defenses that this case is barred by the statute of

1 limitations and by waiver are simply irrelevant, as is their contention that the 2000 TSS
 2 amendments themselves did not trigger consultation. Defendants' Brief at 12-16.

3 Defendants' only real substantive argument – that the Coast Guard does not retain the
 4 requisite ongoing discretion under the PWSA to trigger Section 7 consultation – is likewise
 5 unavailing; it is premised on both a fundamental misapplication of the relevant ESA case law
 6 and a tortured interpretation of the PWSA's plain language. The Coast Guard's day-to-day
 7 oversight and direction of shipping traffic along the California coast, combined with the
 8 undisputed fact that such traffic is adversely affecting listed species, requires that the Coast
 9 Guard comply with the ESA by formally consulting the expert wildlife agency regarding
 10 mitigation strategies necessary to protect imperiled marine mammals currently at grave risk from
 11 vessel strikes.

12 **II. ARGUMENT¹**

13 Defendants mischaracterize the issue raised by this case by focusing much of their
 14 argument on a single event – the Coast Guard's 2000 amendments to various TSSs for California
 15 coastal waters. The essence of Plaintiff's claim, however, is that the Coast Guard's ongoing
 16 management of ship traffic along the California coast, as authorized and required by the PWSA,
 17 is agency action requiring consultation with NMFS. The periodic revision of TSSs is only one
 18 among many actions that the Coast Guard may and does undertake to fulfill its statutory
 19 obligation to manage shipping lanes and vessel traffic off the California coast. Where, as here,
 20 an agency possesses ongoing discretion to manage activities that may affect endangered species
 21 and to alter those activities to benefit such species, it has a continuing obligation to comply with

22
 23 ¹ Defendants erroneously contend that this Court should apply the "narrow" scope of an
 24 "arbitrary and capricious" review, "limited to the administrative record before the agency at the
 25 time it made the challenged decision." Defendants' Brief at 11. The "arbitrary and capricious"
 26 standard does not apply here because there is no agency decision or record to review. Instead,
 27 Plaintiff contends that Defendants failed to comply with the ESA's nondiscretionary consultation
 28 requirement, a claim that is properly cognizable and adjudicated as a matter of law by the Court
 under the citizen suit provisions of the ESA, 16 U.S.C. § 1540(g)(1). *Wash. Toxics Coal. v.*
EPA, 413 F.3d 1024, 1034 (9th Cir. 2005); *see also Turtle Island Restoration Network v. NMFS*,
 340 F.3d 969 (9th Cir. 2003) (finding as a matter of law, after de novo review, that statute
 governing agency permitting authority conferred sufficient discretion to trigger ESA Section 7
 consultation).

1 Section 7 of the ESA. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053-55 (9th Cir. 1994);
 2 *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 977 (9th Cir. 2003). Thus,
 3 Defendants' nearly exclusive focus on the 2000 amendments to California's TSSs misses the
 4 mark entirely and renders many of their arguments superfluous.

5 **A. Defendants' Various Procedural Defenses Are Misplaced and Unavailing Because
 6 the Coast Guard's Ongoing Failure to Act, Not Any Prior TSS Decision, Is the Basis
 for Plaintiff's Claim.**

7 **1. The Doctrines of Statute of Limitations and Waiver Are Inapplicable to
 8 Plaintiff's Actual Claim in this Case.**

9 Defendants attempt to evade judicial scrutiny of their ongoing agency action and failure
 10 to comply with the law by invoking the six-year federal default statute of limitations and the
 11 doctrine of waiver, both in connection with the Coast Guard's TSS decisions in 2000.
 12 Defendants' Brief at 12-14. These arguments are misplaced, however, because Plaintiff does *not*
 13 challenge the validity or substance of the 2000 TSS decisions. Those decisions are but an
 14 illustration of how the Coast Guard can and does utilize its authority under the PWSA to manage
 15 ship traffic and shipping lanes.

16 In addition to establishing and enforcing TSSs, 33 U.S.C. § 1223(c), the PWSA gives the
 17 Coast Guard broad discretion to, among other things:

18 (1) . . . construct, operate, maintain, improve, or expand vessel traffic services, consisting
 19 of measures for controlling or supervising vessel traffic or for protecting navigation and
 the marine environment [including but not limited to] reporting and operating
 requirements, surveillance and communications systems, routing systems, and fairways;

20 (2) [] require appropriate vessels which operate in an area of a vessel traffic service to
 utilize or comply with that service;

22 (3) [] require vessels to install and use specified navigation equipment, communications
 23 equipment, electronic relative motion analyzer equipment, or any electronic or other
 device necessary to comply with a vessel traffic service or which is necessary in the
 24 interests of vessel safety . . . ; [and]

25 (4) [] control vessel traffic in areas subject to the jurisdiction of the United States which
 the Secretary determines to be hazardous, or under conditions of reduced visibility,
 26 adverse weather, vessel congestion, or other hazardous circumstances by—
 (A) specifying times of entry, movement, or departure;

(B) establishing vessel traffic routing schemes;

(C) establishing vessel size, speed, draft limitations and vessel operating
 27 conditions; and

1 (D) restricting operation, in any hazardous area or under hazardous conditions, to
 2 vessels which have particular operating characteristics or capabilities which the
 3 Secretary considers necessary for safe operation under the circumstances. . .

33 U.S.C. § 1223(a). *See also Beveridge v. Lewis*, 939 F.2d 859, 864 (9th Cir. 1991) (holding
 that under section 1223 of the PWSA, “the Secretary of Transportation has extensive authority to
 regulate the anchoring, mooring, and movement of vessels, . . . and that power is
 discretionary”).

As Plaintiff explained in its opening brief and supporting declarations, the Coast Guard
 exercises this discretionary authority in a number of ways, including but not limited to the
 promulgation and enforcement of traffic control regulations, the issuance of regular broadcast
 notices to mariners and warnings to commercial vessels, and conduct of various ongoing
 surveying and monitoring activity. Plaintiff’s Brief at 9-11; Declaration of Andrea A. Treece at
 Exhibits G-1; Declaration of Brendan Cummings at Exhibits B and D.

The Coast Guard’s failure to undertake Section 7 consultation in connection with its
 ongoing management of vessel traffic along the California coast “logically can only be construed
 as a continuing violation of [the ESA]. The statute of limitations commences to run anew each
 and every day that the [agency] does not fulfill the affirmative duty required of it. In short, the
 statute of limitations has never commenced to run.” *S. Appalachian Biodiversity Project v. U.S.*
Fish & Wildlife Servs., 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001). *See also Wilderness Soc’y*
v. Norton, 434 F.3d 584, 589 (D.C. Cir. 2006) (holding that the statute of limitations under 28
 U.S.C. § 2401(a) does not apply where the challenge is not “about what the agency has done but
 rather about what the agency has yet to do” in order to comply with its binding statutory duty);
Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Servs., 2007 WL 4117978 at *6 (D. Or. 2007)
 (holding that statute of limitations under 28 U.S.C. § 2401(a) did not bar an ESA citizen suit
 challenging the Fish and Wildlife Service’s (“FWS”) continuing failure to fulfill its ongoing,
 binding statutory duty to designate critical habitat and perform a status report regarding a
 protected species); *Natural Res. Def. Council v. Fox*, 909 F. Supp. 153, 159 (S.D.N.Y. 1995)
 (holding that 28 U.S.C. § 2401 does not apply to mandatory duties under the Clean Water Act

1 because “where there is only one body charged with a duty by Congress, and that body cannot be
 2 forced by the Court to carry out its duty because of a statute of limitations, the practical result is
 3 a repeal of the mandatory duty itself”).² Here, the Coast Guard has failed to satisfy its ESA duty
 4 to consult with NMFS regarding whether its management of ship traffic off the California coast
 5 jeopardizes protected species, and every day that Defendants continue to ignore their statutory
 6 obligation effectively retriggers the statute of limitations.³

7 For the same reason, Defendants’ argument that the Center “waived” its claim in this
 8 case by failing to raise it at the time of the TSS revisions is wholly without merit. Waiver, much
 9 like the requirement to exhaust administrative remedies, is governed here by the terms of the
 10 ESA’s citizen suit provision, which requires nothing more than advance notice to a defendant of
 11 the statutory violation. *Oceana, Inc. v. Evans*, 389 F. Supp. 2d 4, 10 (D. D.C. 2005) (finding that
 12 a NGO did not waive its objections by failing to participate in the rulemaking which undid
 13 habitat closure areas because the NGO was challenging the action as “contrary to the agency’s
 14 statutory authority, and not as a procedural violation.”). Here, as explained in its sixty-day
 15 notice letter, its complaint, and its motion for summary judgment, the Center challenges the

16

17 ² As the court in *Natural Res. Def. Council* aptly explained, “[t]he practical effect of imposing a
 18 statute of limitations in a suit such as this is to repeal the mandatory duties established by
 19 Congress and the President without the constitutionally prescribed scheme for altering a statute
 20 of the United States. The Administrator has a clear, non-discretionary duty to review and
 supplement state actions under the Clean Water Act, and it would be perverse to excuse that duty
 after sustained nonfeasance.” 909 F. Supp. at 159.

21 ³ In its argument on this point, Defendants cite a single district court case, from Kentucky,
 22 where the statute of limitations was used to bar an action alleged to be “ongoing” under *Pacific*
Rivers. Defendants’ Brief at 13, citing *Kentucky Heartwood Inc. v. Worthington*, 20 F. Supp. 2d
 23 1076, 1093 (E.D.Ky. 1998). But the discussion in *Kentucky Heartwood* does not reflect whether
 24 the court considered, as Plaintiff argues here, that ongoing action continuously retriggers the
 25 statute of limitations until the breach of the duty to consult is remedied or the ongoing action
 26 requiring consultation is terminated. The other cases cited by Defendants do not squarely
 27 address the issue; indeed Defendants’ citation to these cases is misleading. See, e.g., *Coos*
County Bd. of County Comm’rs v. Kempthorne, 531 F.3d 792, 812 n.16 (9th Cir. 2008) (cited by
 28 Defendant at 13 for the proposition that substantive ESA claims were time barred, when in fact
 the Court dismissed the action on entirely different grounds and never even considered the
 claims that were time barred because they had not been briefed to the lower court).

1 Coast Guard's failure to comply with the ESA consultation requirements in connection with
 2 ongoing vessel management activities, not the 2000 TSS amendments. It is thus irrelevant
 3 whether the Center's concerns were raised during the rulemaking process for the 2000
 4 amendments.⁴

5 **2. For the Same Reason, Defendants' Argument that Mariner's Notices Are
 6 Merely Advisory Is Inapposite.**

7 Defendants similarly veer off course in arguing that the Coast Guard's regular notices to
 8 mariners do not, by themselves, require consultation. They incorrectly analogize these notices to
 9 the advice letter at issue in *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996), and then
 10 claim that the advisory nature of the notices is not sufficient to require ESA consultation.⁵

11

12 ⁴ Defendants also suggest that "Section 7 consultation was not required" regarding the 2000 TSS
 13 amendments, arguing that these amendments "had no effect on any threatened or endangered
 14 species," Defendants' Brief at 2, 14-16. Because Plaintiff is challenging the Coast Guard's
 15 ongoing vessel management, it is simply irrelevant whether the 2000 amendments themselves
 16 triggered the consultation requirement, although it is clear that they did. The threshold question
 17 in determining whether a particular agency action "may affect" a listed species is whether "an
 18 endangered or threatened species may be present in the area of the proposed action." *City of
 19 Sausalito v. O'Neill*, 386 F.3d 1186, 1215 (9th Cir. 2004) (citing 16 U.S.C. § 1536(c)(1)
 20 (regarding the biological assessment that precedes or accompanies consultation)). That
 21 threshold is obviously satisfied here. In any case, the Coast Guard has a duty to initiate
 22 consultation regarding its ongoing vessel-traffic management off the coast of California. As
 23 noted in Plaintiff's moving papers, had Defendants actually complied with its obligation to
 24 consult at any time in the many years since it began implementing shipping regulations off
 25 California, the new information learned last fall would surely have triggered the re-initiation of
 26 consultation provision of the ESA. Plaintiff's Opening Brief at 3, 16. Finally, exhaustion
 27 requirements do not apply, where as here, plaintiffs filed a sixty day notice letter pursuant to the
 28 statutory citizen suit provision. *Silver v. Babbitt*, 924 F. Supp. 976, 987 (D. Ariz. 1995).

22 ⁵ Even if the Center were alleging in this action that the notices to mariners alone required
 23 consultation, *Marbled Murrelet* does not provide authority that they do not. In *Marbled
 24 Murrelet*, private lumber companies asked the U.S. Fish and Wildlife Service for advice on how
 25 to comply with the ESA to avoid a take of endangered species in their logging activities. 83 F.3d
 26 at 1074-75. Significant to the court's decision was the fact that the Service did not have any
 27 ongoing regulatory authority over the logging activity in question. By contrast here, the Coast
 28 Guard explicitly retained authority over the TSSs and implements them on an ongoing basis, for
 example, by telling ships where to go each day and by broadcasting notices to mariners
 describing general shipping conditions. While *Marbled Murrelet* deals with an agency giving
 legal advice when it has no affirmative regulatory role in the matter, the Coast Guard's advice in

Again, this argument misses the point completely. Plaintiff does not contend in this case that the mariners' notices themselves trigger particular ESA obligations. Rather, like the TSSs, these notices are merely illustrative of the Coast Guard's continuous and routine management of shipping traffic along the coastline; they demonstrate but one of the ways in which the agency chooses to exercise its broad ongoing PWSA management discretion. Plaintiff is not asking that the Coast Guard engage in consultation every time it issues a weekly notice to mariners – only that it consult with NFMS at least once over the effects of its ongoing shipping traffic management actions off the California coast, something it has never yet done.⁶

B. The Coast Guard's Oversight of Shipping Lanes and Management of Vessel Traffic Are Ongoing Discretionary Actions that Affect Listed Species and, Therefore, Require ESA Consultation.

Defendants' arguments on the merits fare no better than their procedural defenses. They mischaracterize the Coast Guard's statutory authority and continuing obligations under the PWSA, misconstrue applicable Ninth Circuit case law interpreting the ESA, and misapply Tenth

this case is an affirmative management action. *Karuk Tribe v. U.S. Forest Serv.* 379 F. Supp. 2d 1071, 1102 (N.D. Cal. 2005), cited at page 18 of Defendants' Brief, is inapplicable for the same reason. Defendants also incorrectly characterize *California Native Plant Society v. EPA*, Case No. C06-03604 MJJ, 2007 WL 2021796, at *20 (N.D. Cal. July 10, 2007), as "holding" that a conservation strategy document was an "advice document [that] does not trigger the consultation requirements of the ESA." The order at issue there is a preliminary injunction issued on a separate claim, and the language they cited constituted mere *dicta* regarding the ultimate merits of plaintiffs' claims. In fact, the judge went on to allow plaintiffs to conduct discovery in order to investigate whether the strategy was indeed a "final action" under the ESA that would trigger consultation. This discovery is currently in progress, although the case has been stayed to allow the federal agencies time to complete an EIS, and possibility complete consultation under the ESA. Counsel for Plaintiff in this case are also counsel of record in *California Native Plant Society*.

⁶ Defendants mischaracterize the holding of *Grand Canyon Trust v. U.S. Bureau of Reclamation*, No. CV-07-8164 PCT-DGC, 2008 WL 4417227 (D. Ariz. Sept. 26, 2008), which did *not* decide the issue of whether daily decisions to increase or decrease flow from the dam would require consultation. As the court explained, "Plaintiff has not suggested that every daily decision to increase or decrease flow from the Dam requires consultation with FWS. Plaintiff's true complaint is with the Bureau's use of the MLFF system, a decision made in the ROD and Operating Criteria, not in the AOP." *Id.* at *15.

1 Circuit case law when there is Ninth Circuit binding precedent directly on point. For these
 2 reasons, Defendants' substantive arguments should be soundly rejected.

3 **1. Under Clear Ninth Circuit Precedent, the Coast Guard's Management of
 4 Ship Traffic Constitutes Ongoing "Agency Action" Under the ESA.**

5 Defendants argue that "ship traffic in the Santa Barbara Channel is not 'agency action'"
 6 within the meaning of the ESA." Defendants' Brief at 29. This argument misses the point.
 7 While it is true that the actual operation of private vessels is not "agency action," the Coast
 8 Guard's ongoing oversight of shipping lanes and its direction of vessel traffic within those lanes
 9 is unquestionably a federal agency action that affects endangered species. The PWSA confers
 10 broad federal authority on the Coast Guard to implement "measures for controlling or
 11 supervising vessel traffic or for protecting navigation and the marine environment." 33 U.S.C. §
 12 1223(a)(1). And as Defendants concede, the Coast Guard exercises its PWSA discretion through
 13 "continuously reviewing [TSSs], advising vessel traffic of their location and constraints,
 14 monitoring and coordinating vessel traffic, and carrying out enforcement activities with respect
 15 to vessel traffic." Compl. ¶ 40; First Am. Answer ¶ 40.

16 The facts underlying this case are, therefore, closely analogous to the facts of *Pacific*
 17 *Rivers Council*. In that case, the Ninth Circuit held that the U.S. Forest Service must consult
 18 under ESA Section 7 regarding the effects of its Land and Resource Management Plans
 19 ("LRMPs") on Chinook salmon, even though the LRMPs had been adopted before the species
 20 was listed as threatened. *Pac. Rivers Council*, 30 F.3d at 1053. Much as Defendants argue here,
 21 the Forest Service argued that "the LRMPs are not ongoing agency action throughout their
 22 duration, but only when they were adopted in 1990 or if they are revised or amended in the
 23 future." *Id.* at 1053. The Ninth Circuit, however, found otherwise:

24 This argument is incorrect. The LRMPs are comprehensive management plans governing
 25 a multitude of individual projects. Indeed, every individual project planned in both
 26 national forests involved in this case is implemented according to the LRMPs. Thus,
 because the LRMPs have an ongoing and long-lasting effect even after adoption, we hold
 that the LRMPs represent ongoing agency action.

1 *Id.* The court further explained that “the LRMPs are actions that ‘may affect’ the protected
 2 salmon because the plans set forth criteria for harvesting resources within the salmon’s habitat.”
 3 *Id.* at 1055.

4 The challenged actions here – the Coast Guard’s implementation of TSSs and other
 5 vessel traffic control measures to protect both navigation and the environment – are very similar
 6 to the agency’s LRMP implementation in *Pacific Rivers Council*. Vessel control measures, like
 7 LRMPs, govern a “multitude” of individual actions, including the Coast Guard’s actions to
 8 regulate, monitor and guide ship traffic, and they “have ongoing effects extending beyond their
 9 mere approval.” *Id.* at 1055. Like LRMPs, the TSSs “set criteria” for the use of a natural
 10 resource shared by endangered species that may be affected – in *Pacific Rivers* it was forest
 11 management, here it is use of coastal waters. The TSSs and other discretionary vessel control
 12 measures establish limits and rules for vessel traffic, and the Coast Guard takes an active role in
 13 managing that traffic according to those guidelines. The Coast Guard does not simply create a
 14 TSS and then leave it alone, any more than a state constructs a road and then neglects to
 15 maintain it or enforce traffic rules. As the Court stated in its *Pacific Rivers Council* opinion,
 16 “there is little doubt that Congress intended to enact a broad definition of agency action in the
 17 ESA, and therefore that the LRMPs are continuing agency action.” *Id.* at 1054; *see also Turtle*
 18 *Island Restoration Network*, 340 F.3d at 977 (holding that like LRMPs, “the issuance of the
 19 Compliance Act permits has an ongoing and lasting effect and constitutes ongoing agency
 20 activity, which is likely to adversely affect listed species”); *Natural Res. Def. Council v.*
 21 *Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998) (holding that “[t]he term ‘agency action’ has been
 22 defined broadly”). Likewise here, the Coast Guard’s oversight and management of ship traffic
 23 off the California coast is ongoing agency action that falls within this broad definition.

24 **2. Contrary Authority Cited by Defendants Is Inapposite.**

25 Defendants unsuccessfully attempt to distinguish the instant case from *Pacific Rivers*
 26 *Council* by relying principally on *California Sportfishing Protection Alliance v. FERC*, 472 F.3d
 27 593 (9th Cir. 2006). Defendants’ Brief at 19-21. At issue in that case was PG&E’s operation of
 28

1 a power plant under a thirty-year permit granted by the Federal Energy Regulatory Commission
 2 (“FERC”). *Cal. Sportfishing Prot. Alliance*, 472 F.3d 593 at 594. After that single permit was
 3 issued, the Chinook salmon was listed as endangered. The Ninth Circuit declined to require
 4 consultation under ESA Section 7 regarding the impacts of the previously issued single permit
 5 on the newly listed species because the only ongoing action was that of a private party (PG&E)
 6 rather than a federal agency. *Id.* at 599 (“[T]he continued operation of the project by PG&E . . .
 7 is not a federal agency action.”). In contrast, the operation of the TSSs and other shipping
 8 controls at issue here are carried out on an ongoing basis by the Coast Guard. After establishing
 9 the TSSs, the Coast Guard continues to enforce, implement, and maintain them, along with
 10 controls on a day-to-day basis, in part by monitoring ship traffic and marine hazards and
 11 providing guidance to ship captains when appropriate. Like the Forest Service in *Pacific Rivers*
 12 *Council*, but unlike FERC in *California Sportfishing*, the Coast Guard here exercises continuing
 13 authority over the use of public resources (our coastal waters) that may affect listed species.

14 The other authority cited by Defendants is similarly distinguishable. For instance, in
 15 *Western Watersheds v. Matejko*, 468 F.3d 1099 (9th Cir. 2006), the court found that consultation
 16 was not required where the Bureau of Land Management (“BLM”) declined to regulate the
 17 vested water rights of private parties on federal lands. 468 F.3d at 1107. These water rights of
 18 these private parties, mostly vested in 1866, were established independent of BLM’s regulatory
 19 jurisdiction, and the federal agency had never been involved with the private exercise of those
 20 rights. *Id.* at 1108-09. In contrast, the current case differs in that private ships are operating
 21 under schemes affirmatively implemented by the Coast Guard. It is the Coast Guard’s
 22 implementation of the TSSs and management of vessel traffic that require consultation under the
 23 ESA.

24 Defendants’ reliance on *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007),
 25 is entirely misplaced. Faced with the same legal question at issue in *Pacific Rivers Council*, the
 26 Tenth Circuit expressly declined to follow the Ninth Circuit’s analysis. *Forest Guardians*, 478
 27 F.3d at 1158-59 (“. . . *Pacific Rivers* does not persuade us. . . . Contrary to *Pacific Rivers*, our
 28

1 analysis makes painfully apparent that [an LMRP does] not constitute ‘action’ requiring
 2 consultation”). This Court, of course, does not have that option.⁷

3 The question for the Court is not whether the vessels are privately operated – virtually all
 4 of the on-the-ground activity at issue in cases like *Pacific Rivers Council* and *Turtle Island*
 5 *Restoration Network* also was to be undertaken by private actors – but whether the federal
 6 agency has an ongoing role in managing or controlling that private activity. The clear answer in
 7 this case is that the Coast Guard has a statutory mandate and broad discretion under the PWSA
 8 to oversee and direct vessel traffic along the California coast, and it does so through a variety of
 9 regulations, guidance, notices, and enforcement mechanisms.

10 **3. The Coast Guard Retains Ongoing Discretion and Control to Adopt
 11 Protective Measures that Inure to the Benefit of Listed Species.**

12 Finally, Defendants erroneously contend that “the Coast Guard does not possess ongoing
 13 discretion to impose speed limits or other restrictions on ship traffic in the TSS for the benefit of
 14 endangered species” and has not retained sufficient discretionary control to adopt measures that
 15 benefit listed species, as required by *Environmental Protection Information Center v. Simpson*
 16 *Timber Company*, 255 F.3d 1073, 1080 (9th Cir. 2001), quoting *Sierra Club v. Babbitt*, 65 F.3d
 17 1502, 1509 (9th Cir. 1995).⁸ Defendants’ Brief at 2, 22. These statements find no support in the
 18 language of the PWSA, its regulations, applicable case law, or Defendants’ own actions.

19 Defendants conveniently read the PWSA’s broadly discretionary language to mean that
 20 the Coast Guard’s “ongoing authority under the PWSA and its implementing regulations is
 21 limited” to two powers – enforcing an international rule regarding collisions at sea and

22
 23 ⁷ *Wilderness Society v. Kane County, Utah*, Case No. 2:05CV00854 TC, 2007 WL 3124956 (D.
 24 Utah Oct. 22, 2007), is similarly inapplicable because it relies, without analysis, on *Forsgren*.

25 ⁸ To the extent that Defendants suggest that Plaintiff wants the Coast Guard to promulgate new
 26 regulations under the agency’s “unexercised authority” to protect species, Defendants have yet
 27 again misconstrued the Center’s concerns and cause of action. Defendants’ Brief at 23. The
 28 Center is not asking this Court to order the Coast Guard to issue new regulations. Rather,
 Plaintiff merely established, as it is required to do by Ninth Circuit case law, that the statute
 authorizing the Coast Guard’s action provides discretion to protect the environment. See
 Plaintiff’s Opening Brief at 14-15.

1 temporarily adjusting TSSs to address “undue hazards for vessels.” Defendants’ Brief at 22
 2 (citing 33 U.S.C. § 1223(c)(5); 33 C.F.R. §§ 167.10, 167.15(b); 64 Fed. Reg. at 32452). But the
 3 statutory and regulatory provisions cited by Defendants belie their contention that the agency’s
 4 authority is so limited. Indeed, the PWSA provides ample retained discretion to protect the
 5 marine environment, and Congress expressly intended that the Coast Guard exercise its PWSA
 6 authority to protect marine resources. *See, e.g.*, 33 U.S.C. § 1221 (findings by Congress that
 7 protection of marine resources is a matter of national importance, that vessel traffic creates a
 8 substantial hazard to the marine environment, and that increased Coast Guard supervision of
 9 vessel and port operations will reduce the possibility of damage to the marine environment);
 10 *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 925, 927 (D.C. Cir. 2008) (discussing
 11 significant discretion exercised by Coast Guard in designating and implementing TSSs).
 12 Congress also noted the importance of developing and implementing “adequate protective
 13 measures” for the marine environment in consultation with other federal agencies. 33 U.S.C. §
 14 1221.

15 The statute’s broad directive to consider and protect the marine environment provides
 16 more than ample evidence of the Coast Guard’s discretion to comply with ESA requirements.
 17 *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (statute at issue need not
 18 use environmental terminology to confer agency discretion to comply with ESA requirements)
 19 citing *In re: Operation of Mo. Rivers Sys. Litig. (Am. Rivers, Inc. v. U. S. Army Corps of
 20 Eng’rs.)*, 421 F.3d 618 (8th Cir. 2005) *cert. denied*, 547 U.S. 1097 (2006) (finding sufficient
 21 agency discretion in administration of Flood Control Act of 1994, which required consideration
 22 of flood control and navigation, primarily, in agency’s construction of a dam and reservoir
 23 system).⁹ For instance, the statute expressly directs the Coast Guard to “construct, operate,
 24 maintain, improve, or expand” vessel traffic services (TSSs are a form of vessel traffic services)

25
 26 ⁹ Contrary to Defendants’ intimation, nothing in the language of the PWSA restricts the Coast
 27 Guard’s authority to prevent harm to the “marine environment” or “marine resources” to
 28 addressing oil spills. As a statute concerned both with the marine environment and resources
 and preventing collisions, the PWSA plainly encompasses authority to prevent ships from
 colliding with threatened and endangered whales.

1 for “protecting navigation and the marine environment.” 33 U.S.C. 1223(a)(1). The Coast Guard
 2 implements these vessel traffic services to “improve the safety and efficiency of vessel traffic
 3 and to protect the environment.” 33 C.F.R. § 161.2. The agency also may control vessel traffic
 4 as necessary to reduce hazardous circumstances by, among other things, establishing routing
 5 schemes, establishing speed limits, and restricting vessel operation to avoid hazardous
 6 conditions. 33 U.S.C. § 1223(a)(4). By its own regulations, the agency “may issue directions to
 7 control the movement of vessels in order to minimize the risk of collision between vessels, or
 8 damage to property or the environment.” 33 C.F.R. § 161.1(b). Within the Coast Guard’s broad
 9 discretion under the PWSA, therefore, it has the power to impose, implement, and enforce vessel
 10 traffic services that direct traffic flow and speed to protect migrating and feeding whales from
 11 ship strikes.¹⁰

12 In carrying out these duties and responsibilities, the Coast Guard “shall take into account
 13 all relevant factors concerning navigation and vessel safety, protection of the marine
 14 environment, and the safety and security of United States ports and waterways,” including
 15 specifically “the proximity of fishing grounds . . . or any other potential or actual conflicting
 16 activity” and relevant “environmental factors.” 33 U.S.C. § 1224. Thus, for example, the Coast
 17 Guard could adjust the California coast TSSs to steer ships away from the protected whales. 33
 18 U.S.C. § 1223(c)(5)(C) (providing agency with the discretion to “adjust the location or limits of
 19 designated [TSSs] to accommodate the needs of other uses which cannot be reasonably
 20 accommodated otherwise”); Traffic Separation Schemes and Shipping Safety Fairways Off the
 21 Coast for California, 54 Fed. Reg. 18,258, 18,261 (Apr. 27, 1989) (acknowledging, in discussion
 22 of proposed rule, that Coast Guard retained discretion to adjust TSS limits). As the agency itself
 23 has noted:

24 The Coast Guard is aware of the multiple use conflicts which may arise in the future due
 25 to the restrictions and regulations governing shipping safety fairways and TSSs. The
 26 PWSA provides discretion for adjusting designating [sic] routing measures to
 27 accommodate other needs, if the need cannot be reasonably accommodated otherwise.

28 ¹⁰ The ESA itself also supports the Coast Guard’s authority to adjust its actions to benefit
 threatened and endangered species. ESA Section 11 specifically authorizes the Coast Guard “to
 promulgate such regulations as may be appropriate to enforce” the ESA. 16 U.S.C. § 1540(f).

54 Fed. Reg. at 18,261. Protecting the feeding and migratory habitat of endangered species falls within this discretion to accommodate future needs.

Indeed, the Coast Guard recently entered into a settlement with another conservation group wherein the Coast Guard agreed to initiate ESA Section 7 consultation with respect to the effects of ship traffic management on Northern right whales in several existing TSSs on the East Coast, as well as to engage in Section 7 consultation regarding the effects of future TSSs or amendments to existing TSSs. Settlement Agreement and Proposed Order (Doc. 62), *Defenders of Wildlife v. Gutierrez*, Case No. 1:05-cv-02191-PLF (D.D.C., filed Dec. 9, 2008) (attached hereto as Exhibit A). While the settlement agreement disclaims any concessions of law or fact, at a minimum this agreement indicates that the Coast Guard does have ample discretion to alter its actions for the benefit of threatened and endangered species. Because the Coast Guard has such discretion and the ESA requires that the Coast Guard exercise such discretion to protect listed species, the Coast Guard's failure to consult with regard to the effects of West Coast TSSs and other vessel control measures violates the ESA.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Plaintiff's Opening Brief, the Center respectfully requests that this Court grant its motion for summary judgment, deny Defendants' cross-motion for summary judgment, and order the Defendants to initiate formal consultation pursuant to ESA Section 7(a)(2) immediately.

Dated: December 12, 2008

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC Mills Legal Clinic at Stanford Law School

By: _____

Deborah A. Siv
Leah J. Russin
Carolyn Bills

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**FILED****DEC - 9 2008**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Defenders of Wildlife, <u>et al.</u>)	No. 05-2191 (PLF)
)	
Plaintiffs,)	
)	
v.)	
Carlos Gutierrez, <u>et al.</u>))
Defendants.)	
)	

SETTLEMENT AGREEMENT AND PROPOSED ORDER

1. Claim Two of Plaintiffs' Amended Complaint alleges that the United States Coast Guard is violating 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 ("NMFS") concerning the impacts of Traffic Separation Schemes ("TSS") on the North Atlantic right whale and its critical habitat.

2. In light of the D.C. Circuit's ruling reversing the dismissal of this Claim and remanding to the District Court for further proceedings, see Defenders of Wildlife v. Gutierrez, 532 F.3d 913 (D.C. Cir. 2008), the parties have negotiated a good faith resolution of the Claim in order to avoid further litigation. Accordingly, without making any concessions of law or fact, the Plaintiffs and the United States Coast Guard (hereinafter the "parties"), by and through their undersigned counsel, hereby agree, subject to the Court's approval, to the following:

A. Pursuant to the ESA and implementing regulations, the Coast Guard will enter into and complete Section 7(a)(2) consultation concerning the effects of the following TSSs on the North Atlantic right whale and its critical habitat: Delaware Bay, Chesapeake Bay, and Cape Fear (Beaufort). The Coast Guard will submit a complete consultation package – including a

Biological Assessment pursuant to 50 C.F.R. § 402.12 – for each of these consultations, the first no later than April 1, 2009; the second no later than October 1, 2009; and the third no later than April 1, 2010. The Coast Guard will promptly provide to plaintiffs' counsel (a) the consultation packages, after they are submitted to NMFS, and (b) any draft Biological Opinions, after they are received from NMFS. The Coast Guard will also coordinate with NMFS in advance of these dates to ensure that consultation can be initiated on these dates, and the consultation(s) will be completed in accordance with 50 C.F.R. § 402.14.

B. Although the Coast Guard expects that it will be able to meet the deadlines provided in this Settlement, in the event that unexpected circumstances make those deadlines impracticable, it shall promptly advise Plaintiffs and propose a new deadline. Plaintiffs will not unreasonably withhold their consent to a Stipulation revising any such deadline. In the unlikely event that the parties are unable to agree on such a Stipulation, the Coast Guard reserves the right to seek a modification of any deadline, which shall be granted for good cause. Each party will bear its own costs, expenses, and attorneys fees associated with carrying out this paragraph.

C. Pursuant to the ESA and its implementing regulations, the Coast Guard will complete Section 7(a)(2) consultation concerning any future TSSs, or modifications to other existing TSSs, in occupied North Atlantic right whale habitat or designated critical habitat, before the United States implements any new or modified TSSs in North Atlantic right whale habitat. Temporary suspension or modification of existing TSSs in North Atlantic right whale habitat which are necessary to address emergency navigation safety concerns are excluded from this paragraph. However, should it be necessary to convert such a temporary suspension or

modification to a permanent modification of the affected TSS, the Coast Guard will commence the consultation process in accordance with this paragraph.

D. Pursuant to the Ports and Waterways Safety Act (“PWSA”), 33 U.S.C. § 1231(a) and the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, the Coast Guard will engage in the appropriate rulemaking process and publish each of the TSSs in occupied North Atlantic right whale habitat or designated critical habitat in the Code of Federal Regulations (C.F.R.). For each of the TSSs identified in paragraph 2.A. above, the consultation will be completed before a new final rule is published. The Coast Guard will complete the rulemaking for each existing TSS no later than the end of 2010, subject to the provisions of Paragraph 2.B above.

E. Without making any concession of law or fact, with respect to any TSS approved by the IMO prior to the date of this Agreement, but not yet codified in the C.F.R., the plaintiffs waive any argument that they might otherwise assert that codification of the TSS triggers the consultation requirement under ESA Section 7(a)(2). Nothing in this paragraph relieves the Coast Guard of any obligation it may otherwise have to appropriately consider the impacts of these TSSs as part of any other ESA Section 7(a)(2) consultation conducted for North Atlantic right whales.

F. Nothing in this agreement shall be interpreted as, or shall constitute, a commitment or requirement that the federal defendants obligate or pay funds, or take any other action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

G. This civil action is dismissed with prejudice.

H. This written agreement contains all of the agreements between the parties, and is intended to be the final and sole agreement between the parties. The parties agree that any prior or contemporaneous representations or understanding not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect.

I. The undersigned representatives of each party certify that they are authorized by the party or parties they represent to execute this Settlement Agreement.

J. Nothing in this Agreement will or can be construed as precluding any plaintiff from challenging (a) the outcome of any Section 7(a)(2) consultation, (b) any decision of the Coast Guard to modify or establish any TSS in the future; and/or (c) any failure of the Coast Guard to modify existing TSSs in light of the outcome of the consultations required by Section 2.A. above. Nothing in this Agreement will or can be construed as a waiver by the federal government of any defenses, claims, or arguments that may be asserted in response to such challenges.

K. This Settlement Agreement is effective as of the date it is approved by, and made an order of, the Court.

L. Defendants agree to pay the plaintiffs reasonable attorneys' fees and costs for this litigation, in the amount of \$320,000. Payment will be made by electronic transfer to Meyer Glitzenstein & Crystal. Defendants' counsel will submit the paperwork requesting payment within ten (10) days of the Court's approval of this Agreement.

M. The Court will retain jurisdiction solely to enforce the terms of this Agreement.

Dated: December 5, 2008

Respectfully submitted,

/s/ Howard M. Crystal
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Attorneys for Defendants

It is so Ordered:


U.S. District Judge Date 12/9/08