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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' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

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APA	Administrative Procedure Act
CBD	Center for Biological Diversity
ESA	Endangered Species Act
FERC	Federal Energy Regulatory Commission
FWS	United States Fish & Wildlife Service
IMO	International Maritime Organization
LRMP	Land and Resource Management Plan
NMFS	National Marine Fisheries Service
PG&E	Pacific Gas & Electric
PWSA	Port and Waterways Safety Act
TSS	Traffic Separation Scheme
VMC	Vessel Movement Center
VMRS	Vessel Movement Reporting Sytem
VTS	Vessel Traffic Service

INTRODUCTION

"The ESA and the applicable regulations . . . mandate consultation with NMFS only before an agency takes some affirmative agency action, such as issuing a license." California Sportfishing Prot. Alliance v. FERC, 472 F.3d 593, 595 (9th Cir. 2006). In its initial brief, CBD presented evidence of five Coast Guard actions that allegedly triggered a duty to consult: the issuance of three regulations in 2000 that made minor amendments to the voluntary TSSs off the California coast and the issuance of two weekly bulletins warning mariners of the possible presence of blue whales in the Santa Barbara Channel. CBD Mem. (Dkt. #7) at 12-13.

In our initial brief, we demonstrated that CBD's challenge to the 2000 regulations is barred by the statute of limitations and the doctrine of waiver, and that the regulations did not trigger a duty to consult in any event. Defs.' Mem. (Dkt. #22) at 12-16. Coast Guard advisory bulletins also do not trigger the consultation requirements. Id. at 16-18; Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074-75 (9th Cir. 1996). Finally, we demonstrated that the Coast Guard's 2000 amendment to the Santa Barbara Channel TSS does not give rise to a new duty to consult based on alleged "new information" because, among other reasons, the 2000 amendment is not "ongoing agency action." Defs.' Mem. at 19-21; California Sportfishing, 472 F.3d at 595-98.

In reply, CBD asserts that our arguments are "superfluous" because CBD is not challenging the five actions identified above. CBD Reply (Dkt. #27) at 3, 6, 7. CBD states that it is challenging the sum total of all "day-to-day" activities allegedly undertaken by the Coast Guard that relate to ship traffic off the California coast. Id. at 1-2. CBD labels this indeterminate mass of alleged but unidentified activities "the Coast Guard's ongoing management of ship traffic." Id. at 2. CBD seeks an order directing the Coast Guard to consult with NFMS over the alleged effects of these unidentified "ongoing shipping traffic management actions." Id. at 7.

As demonstrated below, CBD's efforts to repackage its lawsuit as a programmatic challenge to alleged but unidentified "shipping traffic management actions" fails for two reasons. First, under the ESA's citizen suit provision, the Court possesses jurisdiction only to the extent that CBD has identified a specific ESA violation in its 60-day notice of intent to sue. Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520-22 (9th Cir. 1998).

CBD's notice identifies *one* perceived violation: "the Coast Guard's continued implementation of the Santa Barbara Channel TSS without undertaking ESA Section 7 consultation with NMFS violates the ESA." Cummings Decl. (Dkt. #9), Ex. C at 9. As a result, the Court does not possess jurisdiction to entertain CBD's improper, generic challenge to all other alleged but unidentified "shipping traffic management actions" supposedly undertaken by the Coast Guard.

Second, while CBD's reply brief is replete with conclusory assertions regarding the Coast Guard's purported day-to-day activities, such assertions do not pass legal muster at summary judgment. CBD, as the party bearing the burden of proof, must set forth, through evidence from the administrative record, specific facts establishing that the Coast Guard has undertaken one or more particular actions, each of which triggered a duty to consult. Soremekun v. Thrifty Payless, Inc. 509 F.3d 978, 984 (9th Cir. 2007). Except for the five Coast Guard actions identified above, CBD has presented no such evidence. Moreover, CBD has abandoned its challenge to the five identified actions and, in any event, CBD has no viable Section 7 claim with respect to those actions. Therefore, summary judgment should be entered for the Coast Guard.

ARGUMENT

A. The Court Does Not Possess Jurisdiction To Entertain CBD's Challenge To Allegedly Unlawful Activities Not Identified In CBD's 60-Day Notice.

The ESA's citizen suit provision states that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A). No action may be commenced "prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." Id. § 1540(g)(2)(A)(i) (emphasis added). "This sixty-day notice requirement is jurisdictional." Southwest Ctr., 143 F.3d at 520. "A failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA." Id. As a waiver of sovereign immunity, the citizen suit provision must "be strictly construed . . . in favor of the sovereign," Lane v. Pena, 518 U.S. 187, 192 (1996), and not "enlarged . . . beyond what the language requires." Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983); Hallstrom v. Tillamook County, 493 U.S. 20, 26-28 (1989).

The purpose of the notice requirement is "to put the agencies on notice of *a perceived violation* of the statute and an intent to sue. When given notice, the agencies have an opportunity to review their actions and take corrective measures if warranted." Southwest Ctr., 143 F.3d at 520 (emphasis added). The notice must provide sufficient detail about each perceived violation "so that the Secretary or [alleged violator] *could identify* and attempt to abate the violation." Id. at 522 (emphasis added). If, and only if, sufficient notice of a specific violation is provided, and the parties are unable to abate the violation within 60 days, a suit "may be brought in the judicial district *in which the violation occurs*." 16 U.S.C. § 1540(g)(3)(A) (emphasis added).

As the plain language of the citizen suit provision indicates, the Court possesses jurisdiction in this case only to the extent that CBD specifically identified a perceived violation of the ESA in its initial 60-day notice of intent to sue. As the Ninth Circuit recently held, "[w]e have sometimes been slightly forgiving to plaintiffs in this area, but even at our most lenient we have never abandoned the requirement that there be a true notice that tells a target precisely what it allegedly did wrong, and when." CBD v. Marina Point Dev. Co., 535 F.3d 1026, 1032 (9th Cir. 2008). Thus, "when a notice [tells] the defendant that it had committed one specific violation, the defendant [is] not 'required to speculate as to all possible attacks . . . that might be added to a citizen suit' at a later time." Id. (quoting ONRC Action v. Columbia Plywood, Inc., 286 F.3d 1137, 1143 (9th Cir. 2002)); Southwest Ctr., 143 F.3d at 520-22 (holding that notice was deficient because it did not identify particular violation alleged in complaint).[1/]

The ESA's strict jurisdictional requirements bar programmatic challenges to an agency's alleged day-to-day activities not clearly identified and described in the initial 60-day notice. In this respect, the ESA is consistent with the Administrative Procedure Act ("APA"), which limits

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[1/] See also Common Sense Salmon Recovery v. Evans, 329 F. Supp. 2d 96, 104 (D.D.C. 2004) (ESA notice deficient because it did not identify "claim set forth in plaintiffs' third cause of action"); South Yuba River Citizens League v. NMFS, No. CIV. S-06-2845 LKK/JFM, 2007 WL 3034887, *8-*9 (E.D. Cal. Oct. 16, 2007) (court lacked jurisdiction over claim that agency violated ESA by relying on faulty 2002 and 2007 biological opinions where notice identified only the 2002 biological opinion); Pulaski v. Chrisman, 352 F. Supp. 2d 1105, 1115-1116 (C.D. Cal.) (notice deficient because it did not identify species allegedly taken in violation of ESA), aff'd,127 Fed. Appx. 993 (9th Cir. 2005); California Native Plant Society v. EPA, No. C06-03604 MJJ, 2006 WL 3289203, *9 (N.D. Cal. Nov. 3, 2006).

the availability of judicial review to claims challenging discrete and identifiable "final agency action." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990). "Under the terms of the APA, the respondent must direct its attack against some particular 'agency action' that causes it harm." Id. The APA bars "general judicial review of [an agency's] day-to-day operations." Id. at 899. These limitations are "motivated by institutional limits on courts which constrain [their] review to narrow and concrete actual controversies." Sierra Club v. Peterson, 228 F.3d 559, 566 (5th Cir. 2000); Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 64-67 (2004).

The same institutional concerns underlying the APA's programmatic challenge bar apply with equal force in the ESA context. For example, in Western Watersheds Project v. Matejko, 468 F.3d 1099 (9th Cir. 2006), the plaintiffs brought an action under the ESA to compel the Bureau of Land Management ("BLM") to initiate Section 7 consultation on private water rights-of-way on public lands. The Ninth Circuit held that the lawsuit could not "be a suit challenging BLM's general policies on when and how to regulate . . . rights-of-way because such a 'programmatic challenge' to agency policy is improper." Id. at 1110. In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court rejected a broad interpretation of the ESA citizen suit provision that would "effect a wholesale abrogation of the APA's 'final agency action' requirement." Id. at 174. Similarly, in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Court held in the ESA context that a systemic challenge to agency activities is "rarely if ever appropriate for federal-court adjudication." Id. at 568; cf. Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996) (holding that Article III standing "is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of . . . administration before the courts for review. That is of course not the law.").[2/]

In this case, CBD's 60-day notice identifies *one* perceived violation: "the Coast Guard's continued implementation of the Santa Barbara Channel TSS without undertaking ESA Section 7

[2/] At summary judgment, Article III standing requires proof that a plaintiff has suffered a concrete and particularized "injury in fact" that is "fairly trace[able] to the *challenged action* of the defendant." Defenders of Wildlife, 504 U.S. at 560 (emphasis added). CBD cannot make the requisite showing for alleged Coast Guard actions that have not even been identified.

consultation with NMFS violates the ESA." Cummings Decl., Ex. C at 9. Contrary to CBD's assertions, the notice does not identify any other allegedly unlawful Coast Guard "activities." CBD Reply at 5-6. Consequently, the Court possesses jurisdiction only to the extent that CBD is challenging the Coast Guard's alleged "implementation of the Santa Barbara Channel TSS" in violation of Section 7. Consistent with the plain language of the ESA citizen suit provision and basic principles of administrative law, the Court does not possess jurisdiction to entertain CBD's improper programmatic challenge to all other alleged but unidentified "shipping traffic management actions" supposedly undertaken by the Coast Guard.

B. CBD's Programmatic Challenge Fails For Lack of Proof

Even if CBD had given sufficient notice under the ESA, CBD's programmatic challenge would still fail for lack of proof. As stated above, "[t]he ESA and the applicable regulations . . . mandate consultation with NMFS only before an agency takes some affirmative agency action, such as issuing a license." California Sportfishing, 472 F.3d at 595. There can be no violation of ESA section 7(a)(2) until an agency has "authorized, funded, or carried out" a particular "action" that "may affect" listed species or their critical habitat, without the benefit of consultation. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02 (defining "action").

Because this case is at summary judgment under the deferential standards and narrow APA scope of review, Western Watersheds, 468 F.3d at 1107, CBD must set forth, through record evidence, specific facts establishing that the Coast Guard has taken one or more "actions," each of which trigger a duty to consult. "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." Soremekun, 509 F.3d at 984; Nat'l Wildlife Fed'n, 497 U.S. at 888-89; Fed. R. Civ. P. 56(e)(1). Moreover, because CBD bears the burden of proof on the merits, the Coast Guard can prevail "merely by pointing out that there is an absence of evidence to support [CBD's] case." Soremekun, 509 F.3d at 984; Miller v. Glenn Miller Prods., 454 F.3d 975, 987-88 (9th Cir. 2006); Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001).

Although CBD's reply brief is replete with inaccurate and unsubstantiated assertions that the Coast Guard engages in unidentified "vessel traffic management activities" triggering a duty

to consult, there is an "absence of evidence" supporting these assertions; indeed, *none* of the conclusory assertions that appear throughout CBD's reply brief is supported by admissible evidence as required by Fed. R. Civ. P. 56(e)(1).[3] CBD's filings contain evidence of only five specific actions that could possibly trigger a duty to consult: the Coast Guard's promulgation of three regulations in 2000 making minor amendments to the California TSSs and the issuance of two weekly bulletins warning mariners to use caution when transiting the Santa Barbara Channel due to the possible presence of blue whales. CBD Mem. at 9-13; Treece Dec. (Dkt. #10), Exs. H-I; Cummings Decl., Ex. B.[4] Incredibly, CBD now asserts that it is not challenging these five actions. CBD states that it "does *not* challenge the validity or substance of the 2000 TSS decisions." CBD Reply at 3:12-13, 5:14-6:4 & n.4. CBD also "does not contend in this case that the mariners notices themselves trigger particular ESA obligations." Id. at 7:1-6.

Because CBD is not challenging the five Coast Guard actions that CBD has actually identified, and because CBD has not presented any record evidence establishing that the Coast Guard has undertaken any other "actions" within the meaning of the ESA that triggered a duty to consult, CBD has not met its evidentiary burden at summary judgment. The Coast Guard is therefore entitled to summary judgment in its favor as a matter of law.

C. CBD's Challenge To The 2000 Regulations Is Time-Barred

Even if CBD had not abandoned its challenge to the Coast Guard's 2000 TSS decisions, the challenge would be barred by the statute of limitations. 28 U.S.C. § 2401(a); Defs.' Mem. at 12-13. While stating on the one hand that it is not challenging the 2000 regulations, CBD asserts on the other that the statute of limitations begins anew each day the Coast Guard fails to enter into

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[3] See, e.g., CBD Reply at 1:24 (unsupported reference to alleged "day-to-day discretionary management of shipping activity"), 2:6-7 (same), 2:15-21 (same), 7:3-4 (same), 7:6-8 (same), 8:7-8 (same), 6 n.5 (same), 11:7-9 (same).

[4] CBD also cites the Vessel Traffic Service ("VTS") San Francisco User's Manual. CBD Reply at 4; Treece Decl., Ex. G. VTS San Francisco was established in 1973 to coordinate the safe, secure, and efficient transit of vessels in San Francisco Bay. Treece Decl., Ex. G at 1. CBD has not identified any affirmative action undertaken by VTS San Francisco that supposedly triggered a duty to consult. To the extent CBD is claiming that the issuance of the User's Manual itself requires consultation (a claim for which there is no evidence), the Court lacks jurisdiction because no such claim appears in CBD's 60-day notice. Cummings Decl., Ex. C.

consultation regarding the alleged effects of the regulations. CBD Reply at 4-5. CBD's assertion lacks merit, however, because it is based on inapposite case law involving an agency's *failure to act*, not allegedly unlawful *affirmative action*, such as the issuance of regulations.[5/]

CBD cannot have it both ways. If CBD is challenging the Coast Guard's purported failure to impose restrictions on commercial ship traffic for the benefit of listed species, then there is no duty to consult because the consultation requirement is triggered only by affirmative agency action. Western Watersheds, 468 F.3d at 1108. If, on the other hand, CBD is alleging that the Coast Guard issued the 2000 regulations in violation of the ESA, then under controlling Ninth Circuit precedent, CBD's cause of action accrued on the date the regulations were promulgated and CBD's claims are time-barred. 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); Coos County Bd. of County Comm'rs v. Kempthorne, 531 F.3d 792, 812 n.16 (9th Cir. 2008); Defs.' Mem. at 12-13. CBD cannot evade the statute of limitations by disingenuously characterizing the issuance of allegedly unlawful regulations as a failure to act. "[C]ourts are inhospitable to claims of a 'failure to act' that are, in truth, merely 'complaints about the sufficiency of an agency's action 'dressed up as an agency's failure to act.'" CBD v. Abraham, 218 F. Supp. 2d 1143, 1157 (N.D. Cal. 2002) (quoting Ecology Center v. U.S. Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999)); Public Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105, 1108 (D.C. Cir. 1988).

CBD's assertion that "imposing" the statute of limitations would improperly "repeal" Section 7 of the ESA is also baseless. CBD Reply at 5 n.2. Indeed, the same argument could be

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[5/] See S. Appalachian Biodiversity Project v. U.S. Fish & Wildlife Serv. ("FWS"), 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001) (challenge to FWS's failure to promulgate regulation designating critical habitat for listed species by with mandatory statutory deadline); Institute for Wildlife Prot. v. FWS, No. 07-CV-358-PK, 2007 WL 4117978, at *6 (D. Or. Nov. 16, 2007) (same); Wilderness Soc'y v. Norton, 434 F.3d 584, 589 (D.C. Cir. 2006) (stating in *dicta* that statute of limitations probably did not apply to action seeking to compel agency to take specific actions mandated by statute); Natural Res. Def. Council v. Fox, 909 F. Supp. 153, 159 (S.D.N.Y. 1995) (challenge to EPA's failure to perform non-discretionary statutory duty to promulgate water quality based pollution limits). But see CBD v. Hamilton, 453 F.3d 1331, 1334-36 (11th Cir. 2006) (FWS's failure to designate critical habitat by statutory deadline gave rise to "a single violation that accrues on the day following the deadline," and lawsuit brought more than six years after the statutory deadline was barred by 28 U.S.C. § 2401(a)).

made any time the statute of limitations is invoked to bar an untimely challenge to allegedly unlawful agency action. Accepting the argument would effectively repeal 28 U.S.C. § 2401(a). Further, if CBD believes that the 2000 regulations violate some substantive provision of the ESA, CBD is not without recourse. CBD may petition the Coast Guard to rescind or amend the regulations, and the Coast Guard's decision on the petition may give rise to a new cause of action within the limitations period. See Northwest Envtl. Advocates v. EPA., 537 F.3d 1006, 1019 (9th Cir. 2008); Defs.' Mem. at 12-13. For whatever reason, CBD has chosen not to submit such a petition. Therefore, CBD's claims remain barred by the statute of limitations.

Finally, under controlling Ninth Circuit precedent, CBD cannot evade the statute of limitations by purporting to challenge the Coast Guard's *implementation* of the 2000 regulations. "[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 Mining Corp. v. United States, 906 F.2d 1362, 1362 (9th Cir. 1990)); 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"). Therefore, to the extent CBD has not abandoned its challenge to the 2000 TSS regulations, the challenge is barred by the statute of limitations.

D. CBD Has Not Demonstrated That A New Section 7 Claim Relating To The Santa Barbara Channel TSS Accrued Within The Limitations Period.

In its initial brief, CBD attempted to evade the statute of limitations with respect to the Coast Guard's 2000 regulation amending the Santa Barbara Channel TSS by arguing that "new information" regarding blue whale mortalities in the Santa Barbara Channel triggered a new duty to consult. CBD Mem. 6-7, 16.[6/] In our initial brief, we demonstrated that CBD's argument fails

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[6/] CBD makes no similar argument for the San Francisco Bay and Los Angeles-Long Beach TSSs. Moreover, the Coast Guard's 2000 amendments to these TSSs were trivial and did not trigger a duty to consult. Defs.' Mem. at 7-10, 14-16. CBD cites no contrary evidence as required by Fed. R. Civ. P. 56(e)(1). See CBD Reply at 6 n.4 (unsupported assertion that threshold for consultation "is obviously satisfied here"). CBD's 60-day notice also does not allege any perceived ESA violation relating to these TSSs. Cummins Decl., Ex. C. Therefore, to the extent CBD is advancing a Section 7 claim relating to the San Francisco Bay and Los Angeles-Long Beach TSSs, the Coast Guard is entitled to summary judgment as a matter of law.

for three reasons. First, the conditions that led to the blue whale mortalities in 2007 were temporary, they no longer exist, and they had nothing to do with the Coast Guard's 18-mile extension of the Santa Barbara Channel TSS.[7] Because the mortalities do not constitute "new information reveal[ing] effects *of the [agency] action*," 50 C.F.R. § 402.16(b) (emphasis added), they do not trigger a new duty to consult. Defs.' Mem. at 19. Once again, CBD has not cited any contrary evidence as required by Fed. R. Civ. P. 56(e)(1). CBD's claim fails on this basis alone.

Second, even if the blue whale mortalities in 2007 were related to the Coast Guard's 18-mile extension of the Santa Barbara Channel TSS – a proposition for which there is not one shred of evidence – consultation still would not be required because the TSS amendment is not "ongoing agency action" within the meaning of Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994). As an initial matter, Pacific Rivers did not, as CBD wrongly implies, involve a programmatic challenge to an agency's alleged day-to-day regulatory activities. The case involved a challenge to two specific land and resources management plans ("LRMPs") issued by the Forest Service that had been clearly identified in the plaintiffs' 60-day notice of intent to sue. Id. at 1051-53. The plaintiffs argued that NMFS's recent decision to list a salmon species as threatened obligated the Forest Service to initiate Section 7 consultation because the LRMPs adversely affected the species. The Ninth Circuit agreed that consultation was required because the LRMPs constituted "ongoing agency action" that indisputably affected the newly-listed species. Id. at 1056. The Court based its decision on the following factors:

- "The LRMPs are important programmatic documents that set out guidelines for resource management in the forests involved in this case." 30 F.3d at 1051.
- "These LRMPs establish forest-wide and area-specific standards and guidelines to which all projects must adhere for up to 15 years. The LRMPs identify lands

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[7] The Santa Barbara Channel TSS was adopted by the International Maritime Organization ("IMO") in 1969, before the ESA and PWSA were enacted. Defs.' Mem. at 7-10, 15-16. The ESA is not retroactive and the IMO's adoption of the TSS is not an affirmative action of the Coast Guard in any event. See id. CBD cites no contrary authority. In 2000, the Coast Guard amended the TSS by extending the northwest end 18 miles and published a description of the TSS, as amended, in the Code of Federal Regulations ("CFR"). Defs.' Mem. at 7-9, 15-16. The Coast Guard's minor amendment did not increase, authorize, fund, or carry out any commercial ship traffic and did not trigger any duty to consult. Id. CBD cites no contrary evidence as required by Rule 56(e)(1). See CBD Reply at 6 n.4.

suitable for timber production and other uses, and establish an allowable sale quantity of timber and production targets and schedules for forage, road construction, and other economic commodities" Id. at 1052.

- "Every resource plan, permit, contract, or any other document pertaining to the use of the forest must be consistent with the LRMP." Id.
- Over 1,400 ongoing federal projects governed by the LRMPs, including timber sales, road construction projects, range activities, and grazing permits, were found to have at least some effect on the newly-listed salmon species. Id. at 1052-53.
- "The LRMPs are comprehensive management plans governing a multitude of individual projects. Indeed, every individual project planned in both 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." Id. at 1053.

The Coast Guard's 2000 regulation amending the Santa Barbara Channel TSS bears no resemblance to the LRMPs at issue in Pacific Rivers. The regulation extends the northern end of voluntary shipping lanes established 40 years ago and puts a description of the TSS, as amended, in the CFR. 65 Fed. Reg. 46603 (July 31, 2000); 33 C.F.R. §§ 167.450-167.452. The regulation consists of two parts. The first provides the coordinates of the TSS as adopted by the IMO in 1969, id. § 167.451, and the second provides the coordinates of the 18-mile extension adopted by the Coast Guard in 2000. Id. § 167.452. The regulation is not a "programmatic document"; it does not set guidelines for resource management on public lands; it does not set ocean-wide or area specific standards and guidelines to which all future federal projects must adhere; it does not set allowable quantities for resource extraction from the Santa Barbara Channel; and it does not govern any ongoing federal projects (let alone 1,400 projects) akin to timber sales or road construction activities on public lands. The regulation is not a "comprehensive management plan[] governing a multitude of individual projects." Therefore, Pacific Rivers is inapposite.

The Coast Guard's 2000 regulation is more akin to the FERC license at issue in California Sportfishing. The regulation simply describes the boundaries of an 18-mile extension of an existing, voluntary TSS. 33 C.F.R. §§ 167.450-167.452. As the Ninth Circuit's holding in California Sportfishing makes clear, the fact that commercial vessels may choose to use the TSS does not transform the Coast Guard's 2000 amendment into ongoing agency action. "[T]he ESA imposes no duty to consult" about activities conducted by third parties pursuant to a license or regulation previously issued by a federal agency. California Sportfishing, 472 F.3d at 595. "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; see also Western Watersheds, 468 F.3d at 1108 n.6 (rejecting contention that private water diversions on federal lands constituted agency "action" under the ESA); Defs.' Mem. 19-21.

If commercial vessels choose to use the TSS, they must comply with Rule 10 of the International Regulations for Preventing Collisions at Sea, which requires that vessels proceed in the appropriate traffic lane, follow the general flow for that lane, and not enter a separation zone or cross a separation line. Defs.' Mem. 6. However, the mere fact that the Coast Guard may review and monitor the TSS or enforce compliance with Rule 10 (Compl. ¶ 40; Answer ¶ 40) does not transform the Coast Guard's 2000 regulation into "ongoing agency action." FERC obviously monitored and enforced the terms of the license to PG&E, yet the Ninth Circuit held that the license did not constitute ongoing agency action. See California Sportfishing, 472 F.3d at 595-99.[8/] Moreover, CBD has not identified any alleged "implementing actions" that even remotely resemble the 1,400 ongoing Forest Service timber sales, road construction projects, grazing permits, and other activities implementing the LRMPs at issue in Pacific Rivers. That is because there are no such "implementing actions" with respect to a TSS, which essentially consists of lines on a map. Defs.' Mem. 19. Although the Coast Guard's 2000 regulation amending the TSS remains in effect and on the books, that is not "action" as defined in the ESA. See California Sportfishing, 472 F.3d at 598 ("The action was concluded in 1980 when FERC issued the license to PG& E"); Forest Guardians v. Forsgren, 478 F.3d 1149, 1159 (10th Cir. 2007) ("Of course, the very definition of 'action' in § 402.02 tells us that the '*promulgation* of regulations,' not the regulations themselves, constitutes 'action.'") (quoting 50 C.F.R. § 402.02).

[8/] See also Montana Snowmobile Ass'n v. Wildes, 103 F. Supp. 2d 1239, 1242-43 (D. Mont. 2000) (agency's enforcement of forest plan adopted in 1986 was not new agency action for statute of limitations purposes); Cloud Foundation v. Kempthorne, No. CV 06-111-BLG-RFC, 2007 WL 1876486, *8 (D. Mont. June 27, 2007) (no ongoing agency action where challenged forest plan was adopted in 1987, the plan did not govern future projects as in Pacific Rivers, and the only "ongoing activity of the USFS is simply management of its lands pursuant to the plan"); 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 annual dam operating plan was agency action where operating criteria were set by prior agency decision).

Finally, even if the Coast Guard's 2000 regulation were "ongoing agency action" (which it is not), consultation would not be required because the Coast Guard does not possess discretion to impose speed limits or other restrictions on commercial vessels operating in the TSS for the benefit of listed species. Defs.' Mem. 22-24. In reply, CBD argues that the PWSA authorizes the Coast Guard to consider the environment when issuing TSS regulations. CBD Reply 3-4, 11-14.[9/] This argument misses the mark.

The issue is not, as CBD mistakenly assumes, whether the Coast Guard possesses "broad discretion" under the PWSA to issue new TSS regulations imposing speed limits or other restrictions on vessel traffic that would benefit listed species.[10/] Rather, the issue is whether, even assuming (without conceding) that the Coast Guard possessed such discretion under the PWSA, the Coast Guard *specifically retained* it when it issued the TSS regulation challenged in this case.

[9/] CBD also cites regulations giving VTS centers authority to take action to protect the environment from vessel or structure damage. CBD Reply 12:23-13:8; 33 C.F.R. §§ 161.1, 161.10-161.11. These regulations are irrelevant. A VTS center's authority applies only within its designated VTS area. Id. § 160.5(d). The Santa Barbara Channel TSS is not a VTS area. Id. § 161.12(c) (table listing VTS areas). An insignificant portion of the southern end of the TSS (approximately four nautical miles) falls within a Vessel Movement Reporting System (VMRS) Area encompassing the navigable waters within 25 nautical miles of Point Fermin lighthouse. Id. A VMRS area is monitored by a Vessel Movement Center (VMC), which is "a shore-based facility that operates the vessel tracking system for a [VMRS] area or sector within such an area. The VMC does not necessarily have the capability or qualified personnel to interact with marine traffic, nor does it necessarily respond to traffic situations developing in the area, as does a Vessel Traffic Service (VTS)." Id. §§ 161.2, 161.15(a). A VMC also does not have authority to amend a TSS. As discussed below, absent an emergency, any amendment to the TSS, including the insignificant portion falling within the VMRS Area, must be implemented through rulemaking pursuant to the PWSA and APA. Id. § 167.15(a); 33 U.S.C. § 1231(a).

[10/] Although the issue is immaterial for the reasons stated below, the PWSA does not give the Coast Guard authority to promulgate regulations imposing speed limits or other restrictions for the benefit of listed species. The PWSA authorizes the Coast Guard to enact measures "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) (emphasis added); Defs.' Mem. 4-5. As CBD well knows, the authority to promulgate regulations imposing vessel speed limits to protect listed species, if it exists at all, lies with NMFS. See 73 Fed. Reg. 60173 (Oct. 10, 2008) (NMFS regulation establishing vessel speed limits in North Atlantic right whale habitat); Cummins Decl., Ex. A (CBD's rulemaking petition to NMFS seeking similar regulations in Santa Barbara Channel).

For example, in Western Watersheds, the plaintiffs sought an order directing BLM to consult under ESA Section 7(a)(2) regarding private water diversions on BLM land. In 1986, BLM adopted a regulation restricting its ability to impose conditions on the diversions except where there was a "substantial deviation in either location or intended use." 468 F.3d at 1107. The district court held that consultation was required because the 1986 regulation was "a continuing agency action — a decision not to impose conditions on diversions," and BLM retained statutory discretion to change the regulation and impose such conditions. Id. at 1106-07. The Ninth Circuit reversed. The Court held that even assuming BLM had statutory authority "to regulate the diversions (beyond a 'substantial deviation'), the existence of such discretion without more is not an 'action' triggering a consultation duty." Id. at 1108, 1110 & n.8. "[T]here is no 'ongoing agency action' where the agency has acted earlier but specifically did not *retain* authority or was otherwise constrained by statute, rule, or contract." Id. at 1109; see also Environmental Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1081 (9th Cir. 2001) (FWS did not have duty to consult over permit issued to logging company, even though company's 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") (emphasis added); Grand Canyon Trust, 2008 WL 4417227, *11-*16 (detailed discussion of relevant Ninth Circuit case law).

In this case, the Coast Guard's 2000 regulation amending the Santa Barbara Channel TSS does not give the agency ongoing discretion to impose speed limits or other restrictions on vessel traffic operating in the TSS for the benefit of listed species. 65 Fed. Reg. 46603; 33 C.F.R. §§ 167.450-167.452. Moreover, under the PWSA, the Coast Guard's discretion with respect to the TSS is limited to (a) enforcing Rule 10 of the International Regulations for Preventing Collisions at Sea, 33 U.S.C. § 1223(c)(5); 33 C.F.R. § 167.10; and (b) temporarily adjusting a portion of the TSS boundaries in the event of an emergency or if there is need to conduct temporary operations that would pose an undue hazard for vessels – neither of which exists in this case. 33 C.F.R. § 167.15(b). Any other TSS modification can only be implemented through a new rulemaking pursuant to the procedures set forth in the PWSA. 33 C.F.R. § 167.15(a); 33 U.S.C. § 1231(a); 64

Fed. Reg. 32451, 32452 (June 17, 1999); Defs.' Mem. 5-6.[11/] As the Ninth Circuit has made clear, unexercised statutory authority to promulgate new regulations does not constitute "ongoing discretion" that could give rise to a duty to consult. Western Watersheds, 468 F.3d at 1107-11.

CBD nevertheless asserts that a settlement agreement in another lawsuit, Defenders of Wildlife v. Gutierrez, No. 1:05-cv-02191-PLF (D.D.C. filed Nov. 9, 2005), "indicates that the Coast Guard does have ample discretion to alter its actions for the benefit of threatened and endangered species." CBR Reply at 14. This assertion is baseless. First, a settlement agreement is not admissible evidence as required by Fed. R. Civ. P. 56(e)(1). See Paul Harris Stores, Inc. v. Pricewaterhouse Coopers, LLP, No. 1:02-cv-1014-LJM-VSS, 2006 WL 2644935, *6 (S.D. Ind. Sept. 14, 2006); Hudspeth v. Commissioner of Internal Revenue Service, 914 F.2d 1207, 1213 (9th Cir. 1990); Green v. Baca, 226 F.R.D. 624, 640 (C.D. Cal. 2005). Therefore, CBD's reliance on the settlement is improper and relevant portion of CBD's brief should be stricken.

Second, even if the Court were to consider the settlement, it does not support CBD's position in this case. Defenders of Wildlife involved a challenge to seven east coast TSSs. Only three were addressed in the settlement. Supp. McArdle Decl., ¶¶ 8-9. Three of the other TSSs were amended or designated more than six years before the plaintiffs' amended complaint was filed. Id. Those TSSs were excluded from the settlement because the plaintiffs' claims – like CBD's claims here – were barred by the statute of limitations. Id., Ex. 3 at 12-14, Ex. 5 at 17-20.

The agreement also contains no "indication" that the Coast Guard has ongoing discretion to modify a TSS for the benefit of listed species. The agreement states that if a modification is required as a result of consultation, the Coast Guard will implement the modification by rulemaking as required by the PWSA and APA. Supp. McArdle Decl., Ex. 6 ¶ 2.D. An agency's

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[11/] Thus, CBD's assertion that the Coast Guard has discretion to continuously adjust the boundaries of the TSS to "steer ships away from the protected whales," CBD Reply at 13-14, is incorrect. CBD itself does not even believe that such an infeasible proposal (whales move) would be effective. CBD's position is that "the only effective mechanism to reduce the risk to large whales from ship strikes is to institute mandatory vessel speed limits." Cummins Decl., Ex. A at 1; CBD Mem. at 16. As discussed, the Coast Guard does not possess ongoing discretion to impose speed limits on vessels operating in the TSS for the benefit of listed species.

authority to issue new regulations does not constitute "ongoing discretion." Western Watersheds, 468 F.3d at 1107-11. CBD ultimately admits this and states that it "is not asking this Court to order the Coast Guard to issue new regulations." CBD Reply at 11 n.8. Thus, the settlement lends no support to CBD's position here. On the contrary, the agreement simply underscores the fatal defects in CBD's case that require the entry of summary judgment for Defendants.

CONCLUSION

For the reasons stated above and in our initial brief, CBD's motion for summary judgment should be denied and Defendants' cross-motion should be granted.

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Respectfully submitted,

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