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15 UNITED STATES DISTRICT COURT

16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 CENTER FOR BIOLOGICAL DIVERSITY, )

18 )  
19 Plaintiff, )

20 v. )

21 MICHAEL CHERTOFF, in his official capacity as )  
22 Secretary of the U.S. Department of Homeland )  
23 Security, REAR ADMIRAL CRAIG E. BONE, in his )  
24 official capacity as Commander of U.S. Coast Guard )  
25 District Eleven, and UNITED STATES COAST )  
26 GUARD, )

27 )  
28 Defendants. )

Case No.

**COMPLAINT FOR  
DECLARATORY  
JUDGMENT AND  
INJUNCTIVE RELIEF**

## I. INTRODUCTION

1  
2 1. All too often, endangered whales are killed by collisions with ship traffic off the  
3 California coast without any account of how these deaths may affect the species as a whole. The  
4 area's ecological richness and its proximity to major ports make it a magnet for whales and ship  
5 traffic alike. Whales rely on these waters to provide critical food sources and migratory corridors.  
6 For instance, blue whales, the largest mammals on earth and some of the most imperiled,  
7 congregate off the coast in the summer and fall to feed on concentrated swarms of krill. Humpback,  
8 sei, sperm, and the nearly extinct North Pacific right whale also use these waters. In increasing  
9 numbers, ships use the same area en route to discharge their cargo at major West Coast ports.  
10 Unfortunately, the combination has proven deadly for too many whales. Whales that are near the  
11 surface while breathing, feeding, resting, or simply transiting the area are vulnerable to massive,  
12 fast-moving commercial ships that may not even be aware of their presence. Unable to escape the  
13 path of those giant vessels, whales are struck, injured, and killed.

14 2. As the federal agency that regulates and directs the considerable vessel traffic off the  
15 California coast, the United States Coast Guard ("Coast Guard") must insure through consultation  
16 with the National Marine Fisheries Service ("NMFS") that its actions will not jeopardize blue  
17 whales and other protected species as required by the Endangered Species Act ("ESA"). Yet the  
18 Coast Guard has never consulted with NMFS regarding the effects of ship traffic on whales and  
19 other listed species in the waters off of California.

20 3. The unprecedented number of endangered blue whales killed by collisions with ships  
21 (also known as "ship strikes") in the Santa Barbara Channel in 2007 presents a vivid example of the  
22 harm wrought by the Coast Guard's failure to comply with its duties under the ESA. Ship traffic in  
23 the Santa Barbara Channel, which leads to two of the busiest ports in the world, poses a known  
24 threat to the survival and recovery of a number of endangered whale species. In 2007 alone, ship  
25 collisions killed at least three blue whales in the Santa Barbara Channel, and it is likely that even  
26 more blue whales were injured or killed by ship strikes in this channel but were not detected. These  
27 whales belonged to a population so imperiled that the death of just one of them is sufficient to  
28

1 prevent the population's recovery. If ships continue to kill blue whales at the rate observed in 2007,  
2 the species' survival and recovery will be at even greater risk.

3 4. Despite this threat, the Coast Guard has failed to fulfill its non-discretionary duty  
4 under the ESA to ensure that ship traffic does not jeopardize the blue whale or any other endangered  
5 whale species. Until the Coast Guard completes consultation with NMFS and undertakes actions  
6 necessary to avoid jeopardy to the species, ships will continue to strike and kill endangered whales  
7 in the Santa Barbara Channel.

8 5. Plaintiff Center for Biological Diversity seeks an order compelling the Coast Guard  
9 to consult with NMFS regarding the effects of ship traffic on blue whales and other endangered and  
10 threatened species inhabiting the waters off the California coast, including the Santa Barbara  
11 Channel. Plaintiff further seeks an order requiring such action as is necessary to protect blue whales  
12 and other species until the Coast Guard completes formal consultation as required by the ESA.  
13 Such relief is necessary to prevent illegal agency action and forestall irreparable injury to protected  
14 species.

## 15 II. JURISDICTION AND VENUE

16 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), § 2201  
17 (declaratory relief), and § 2202 (injunctive relief), and 16 U.S.C. §§ 1540(c), (g) (action arising  
18 under the ESA and citizen suit provision).

19 7. This action arises under 16 U.S.C. § 1540(g) and alleges violations of the ESA, 16  
20 U.S.C. § 1531 *et seq.* Pursuant to the ESA, 16 U.S.C. § 1540(g), Plaintiff provided written notice to  
21 the Coast Guard, the Secretaries of Homeland Security and Commerce, and the Assistant  
22 Administrator for Fisheries of the violations alleged in this Complaint more than 60 days ago. The  
23 Coast Guard has not remedied the violations.

24 8. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because the  
25 Coast Guard Eleventh District and Pacific Area headquarters, which coordinate vessel traffic and  
26 implement a number of traffic separation schemes off the California coast, including those in Santa  
27 Barbara Channel, approaching Los Angeles and Long Beach, and off San Francisco, are located  
28 within the jurisdiction of this Court, on Coast Guard Island in Alameda, California, and the office of

1 Rear Admiral Craig E. Bone is located at the Coast Guard Eleventh District headquarters on Coast  
2 Guard Island. Furthermore, no real property is involved in this action.

3 9. Pursuant to Civil Local Rule 3-2(c)-(d), the appropriate intradistrict assignment of  
4 this case is to the San Francisco or Oakland Division.

### 5 III. PARTIES

6 10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit  
7 corporation dedicated to the preservation, protection and restoration of biodiversity, native species,  
8 ecosystems, and public lands. The Center has over 40,000 members, many of whom reside in  
9 California. The Center maintains offices in San Francisco, Los Angeles, San Diego, and Joshua  
10 Tree, California, as well as in Arizona, New Mexico, Oregon, Vermont, and Washington, D.C. The  
11 Center’s members and staff regularly use waters of the Pacific Ocean off the coast of California for  
12 observation, research, aesthetic enjoyment, and other recreational, scientific and educational  
13 activities. The Center’s members and staff have researched, studied, observed and sought  
14 protection for many federally-listed threatened and endangered species that inhabit the Pacific,  
15 including the blue whale. The Center’s members and staff have visited and observed each of the  
16 species at issue in this suit in the waters off California or elsewhere in the Pacific. The Center’s  
17 members and staff intend to continue to visit and observe, or attempt to visit and observe, these  
18 species in the future. The Center’s members and staff derive scientific, recreational, conservation,  
19 and aesthetic benefits from these rare species’ existence in the wild. The Center brings this action  
20 on behalf of itself and its adversely affected members.

21 11. Plaintiff’s members and staff rely on the Coast Guard to comply with the ESA,  
22 especially Section 7 consultation requirements, 16 U.S.C. § 1536, which assure that federal  
23 agencies incorporate concerns for threatened and endangered species into all agency actions. In this  
24 regard, Plaintiff’s members and staff derive scientific, recreational, health, conservation, spiritual,  
25 and aesthetic benefits from the preservation and protection of threatened and endangered species  
26 under the ESA. Plaintiff’s members and staff have been, and are now, adversely affected and  
27 injured by the Coast Guard’s failure to comply with the ESA. Plaintiff’s members and staff will  
28 continue to be adversely affected and injured unless relief is granted.



1 NMFS (regarding most marine species) or the U.S. Fish and Wildlife Service (regarding most  
2 terrestrial species), insure “that any action authorized, funded, or carried out by such agency . . . is  
3 not likely to jeopardize the continued existence of any endangered species or threatened species.”  
4 16 U.S.C. § 1536(a)(2) (Section 7 consultation requirement). Pursuant to section 7(a)(2) of the  
5 ESA, the Coast Guard is required to consult with NMFS prior to undertaking any activity or  
6 program that may affect endangered or threatened marine species in the Santa Barbara Channel and  
7 other shipping lanes. NMFS must then advise the Coast Guard whether the action would jeopardize  
8 the survival and recovery of the species. NMFS may also impose restrictions or require mitigation  
9 to minimize the impacts of the action on the species and habitat.

10 **B. The Coast Guard’s Authority to Regulate Ship Traffic in the Santa Barbara**  
11 **Channel and Other Shipping Lanes Off the California Coast.**

12 18. The Ports and Waterways Safety Act (“PWSA”) gives the Coast Guard the authority  
13 to regulate navigation within the jurisdiction of the United States, including the Santa Barbara  
14 Channel and other designated shipping lanes, and the responsibility to protect the marine  
15 environment while doing so. 33 U.S.C. § 1221 *et seq.* (“navigation and vessel safety, [and]  
16 protection of the marine environment . . . are matters of major national importance,” “increased  
17 vessel traffic in the Nation’s ports and waterways creates substantial hazards to life, property and  
18 the marine environment,”).

19 19. The Coast Guard is authorized to: (1) designate necessary fairways and traffic  
20 separation schemes for vessels; (2) operate and maintain “vessel traffic services” which consist of  
21 “measures for controlling or supervising vessel traffic or for protecting navigation and the marine  
22 environment”; and (3) control vessel traffic in hazardous areas by establishing traffic routing  
23 schemes, vessel speed and size limitations, and vessel operating conditions; and (4) and restrict  
24 operations in hazardous areas. 33 U.S.C. § 1223. These measures include routing systems and  
25 fairways such as the traffic separation scheme in the Santa Barbara Channel.

26 20. In undertaking each of these actions, the PWSA requires that the Coast Guard “take  
27 into account all relevant factors concerning navigation and vessel safety, [and] protection of the  
28

1 marine environment,” including “any other potential or actual conflicting activity” and  
2 “environmental factors.” 33 U.S.C. § 1224(a).

3 21. After traffic and vessel services or other measures have been established, the PWSA  
4 further authorizes the Coast Guard to adjust the location or limits of a traffic separation scheme, “in  
5 order to accommodate the needs of other uses which cannot be reasonably accommodated otherwise  
6 . . . .” 33 U.S.C. § 1223(c)(5)(C). The statute also directs that the Coast Guard “shall issue, and  
7 may from time to time amend or repeal, regulations necessary to implement this Act.” 33 U.S.C. §  
8 1231(a).

9 22. Accordingly, the Coast Guard retains ongoing discretionary authority to adjust vessel  
10 traffic patterns and speed in shipping lanes such as the Santa Barbara Channel in order to protect  
11 endangered species. The Coast Guard has implemented its authority in the Santa Barbara Channel,  
12 the approaches to the ports of Los Angeles and Long Beach, and off San Francisco by: (1)  
13 establishing traffic separation schemes in these areas; (2) amending the traffic separation schemes;  
14 (3) advising vessels of the location of the traffic separation schemes through vessel traffic services,  
15 navigational aids, and notices to mariners; and (4) monitoring the location and conditions within the  
16 traffic separation schemes and adjusting them as needed. It has, however, failed to adjust  
17 conditions to protect the blue whale and other species from vessel traffic in the Santa Barbara  
18 Channel and elsewhere. It has also failed to consult with NMFS regarding how to maintain traffic  
19 separation schemes off the California coast, including in the Santa Barbara Channel, to avoid harm  
20 to endangered species in these areas.

## 21 **V. FACTUAL BACKGROUND**

### 22 **A. Endangered Whales Occurring Off the California Coast**

23 23. The Ports of Los Angeles and Long Beach are the most active of the U.S. ports, with  
24 thousands of large vessels arriving each year. These vessels travel through the Santa Barbara  
25 Channel and the abutting approach to Los Angeles-Long Beach using the traffic separation schemes  
26 implemented by the Coast Guard. As a consequence, the northbound and southbound shipping  
27 lanes in the Santa Barbara Channel and the Los Angeles-Long Beach approach are among the  
28 busiest in the world.

1           24.     Similarly, numerous vessels travel to the ports of San Francisco and Oakland using  
2 the traffic separation schemes off San Francisco implemented by the Coast Guard.

3           25.     The shipping lanes off the coast of California provide essential habitat for a number  
4 of endangered whales. The overlap of these shipping lanes with the foraging habitat and migratory  
5 routes of whales puts these endangered species at great risk. These whales, which are protected  
6 under the ESA, are threatened by ships within the channels. In recent years, numerous whales have  
7 been killed in the waters off the coast of California.

### 8                   1.   **The Blue Whale**

9           26.     The largest animal known to have ever lived on earth, the blue whale (*Balaenoptera*  
10 *musculus*) has been listed as “endangered” under the ESA since 1970. Once numbering over  
11 300,000, the global blue whale population has been reduced by commercial whaling to likely fewer  
12 than 10,000 individuals. Blue whales off California are part of the Eastern North Pacific Stock, one  
13 of two North Pacific stocks identified by distinct, stereotypic calls. According to NMFS, the  
14 current best estimate for the Eastern North Pacific Stock is 1,186 animals.

15           27.     In 1998, NMFS approved a final recovery plan for the blue whale. The recovery  
16 plan identifies ship strikes as one of the primary threats to the species in the Pacific. The recovery  
17 plan also recommends that appropriate agencies “[i]dentify areas where ship collisions with blue  
18 whales might occur, and areas where concentrations of blue whales coincide with significant levels  
19 of maritime traffic or pollution,” and “[i]dentify and implement methods to reduce ship collisions  
20 with blue whales.” NMFS Final Recovery Plan for the Blue Whale, *Balaenoptera musculus*, at 24  
21 (1998). The recovery plan concludes that “implementation of appropriate measures designed to  
22 reduce or eliminate such problems are essential to recovery.” *Id.*

23           28.     NMFS has determined that the Eastern North Pacific Stock can only incur one non-  
24 natural death (e.g., death resulting from a collision with a ship) per year in U.S. waters while still  
25 reaching or maintaining its optimal sustainable population. In recent years, blue whales in  
26 particular appear to be dying non-natural deaths in increasing numbers in the Santa Barbara  
27 Channel. Ships are known to have killed and injured blue whales in 1980, 1986, 1987, 1993, 2002,  
28 2003, 2004, and 2007.



1           29.     In 2007, an unprecedented number of whales were killed and injured as a result of  
2 collisions with ships. Between September 8 and September 19, 2007, there were at least five  
3 sightings of blue whale carcasses in the area extending from Santa Cruz Island to just north of San  
4 Diego. Additionally, the carcasses of an adult female and a very young animal were observed  
5 washed ashore on San Miguel Island on November 29, 2007. Complete necropsies were performed  
6 on two blue whale carcasses and a third carcass was examined; in each case, the injuries observed  
7 were consistent with wounds sustained from collisions with ships. Additional blue whale  
8 mortalities from ships have likely occurred without being reported.

## 9                   **2. Other Threatened and Endangered Species Off the California Coast**

10           30.     Humpback whales (*Megaptera novaeangliae*) have been listed as “endangered”  
11 under the ESA since 1970. The whales affected by the Coast Guard’s activities in the shipping  
12 lanes off the coast of California are part of the Eastern North Pacific stock, which has an estimated  
13 population of just over 1,300. NMFS has determined that the most non-natural deaths that the stock  
14 can withstand while still reaching its optimal sustainable population is 2.3 animals per year in U.S.  
15 waters. As NMFS acknowledged in its 2005 Stock Assessment Report, humpback whales are likely  
16 killed or injured in collisions with ships that go unreported.

17           31.     Humpback whales regularly travel through and near the shipping lanes, putting them  
18 at risk. The humpback’s tendency to inhabit coastal waters makes it the second most common  
19 species to be injured or killed in collisions with ships. Humpbacks use this area for feeding as well  
20 as migrating to and from their calving grounds along the west coast of Mexico and Central America.  
21 Traffic within shipping lanes therefore poses a particular danger to migrating reproductive females.

22           32.     The sei whale (*Balaenoptera borealis*) is listed under the ESA as “endangered.” Its  
23 range includes the coast of California, including the shipping lanes. NMFS estimates the population  
24 of the Eastern North Pacific Stock of sei whales to be as low as 35 animals, meaning that this  
25 population can survive no more than one non-natural death every *ten years* in U.S. waters while  
26 reaching its optimum sustainable population.

27           33.     The sperm whale (*Physeter macrocephalus*) is listed under the ESA as  
28 “endangered.” The population of the California/Oregon/Washington stock of the sperm whale is

1 estimated to be as low as 885 individuals. This stock cannot sustain more than 1.8 non-natural  
2 deaths per year in U.S. waters while reaching its optimum sustainable population.

3 34. The North Pacific right whale (*Eubalaena japonica*) is listed as “endangered” under  
4 the ESA. It is nearly extinct, numbering as few as a dozen animals in the North Pacific. Its range  
5 includes the waters along the coast of California, including shipping lanes.

6 35. In addition to the identified blue whale and humpback whale ship strike mortalities  
7 in the Santa Barbara Channel, numerous reported but unidentified whales have been killed in  
8 collisions with ships off the coast of California in recent years.

9 36. Other threatened and endangered species, such as southern resident killer whales and  
10 leatherback and loggerhead sea turtles, also occur in the waters off the California coast, including  
11 the Santa Barbara Channel, Los Angeles-Long Beach approach, and approach to San Francisco. All  
12 of these species may be affected by ship traffic in these areas.

13 **C. The Coast Guard’s Actions Related to the Santa Barbara Channel and Other**  
14 **Shipping Lanes Off the California Coast**

15 37. Despite the documented ship strikes and the recommendations of the blue whale  
16 recovery plan, the Coast Guard has never consulted with NMFS regarding its actions under the  
17 PWSA related to the waters off the California coast, which include the implementation of the Santa  
18 Barbara Channel traffic separation scheme in the Santa Barbara Channel, in the approaches to Los  
19 Angeles-Long Beach, and off San Francisco, as required by the section 7 of the ESA. 16 U.S.C. §  
20 1536(a)(2).

21 38. The Coast Guard first implemented a traffic separation scheme in the Santa Barbara  
22 Channel in 1969, before enactment of the ESA. The Coast Guard has also implemented traffic  
23 separation schemes in the approaches to Los Angeles-Long Beach, which abut the Santa Barbara  
24 Channel, and off San Francisco. Over the years, the Coast Guard has proposed amendments to  
25 these traffic separation schemes which have been adopted by the International Maritime  
26 Organization. After their adoption by the International Maritime Organization, the Coast Guard  
27 exercised its authority to promulgate the amendments in regulations.  
28



1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff respectfully requests that this Court enter judgment providing the  
3 following relief:

4 1) A declaration that the Coast Guard is violating section 7(a)(2) of the ESA, 16  
5 U.S.C. § 1536(a)(2), and its implementing regulations by failing to insure through consultation that  
6 the designation, codification, and continued implementation of the traffic separation schemes in the  
7 Santa Barbara Channel and other shipping lanes off the California coast will not jeopardize the  
8 continued existence of whales and other threatened and endangered species;

9 2) An order requiring the Coast Guard to initiate consultation with NMFS on the  
10 impacts of the designation, codification, and continued implementation of the traffic separation  
11 schemes off the California coast, including the scheme in the Santa Barbara Channel, and other  
12 vessel routing activities under the PWSA on threatened and endangered species;

13 3) An order requiring the Coast Guard to impose such measures as necessary and  
14 proper to prevent harm to endangered and threatened species in the Santa Barbara Channel and  
15 other shipping lanes off the California coast until the Coast Guard has completed consultation with  
16 NMFS to insure that its actions will not jeopardize the continued existence of such endangered and  
17 threatened species;

18 4) An order awarding Plaintiff its costs of litigation, including reasonable attorneys'  
19 fees, pursuant to 16 U.S.C. § 1540(g)(4); and

20 5) Such other relief as the Court deems just and proper.

21 Dated: June 18, 2008

22 Respectfully submitted,

23 

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