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Whale of an opportunity

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Whale of an Opportunity: Coast Guard Study of Los Angeles/Long Beach Port Access Routes Holds Great Potential for Reducing Ship Strikes within Santa Barbara Channel

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INTRODUCTION

As global whale populations slowly recover from historic hunting that brought numerous species to the brink of extinction, the increasing number of whales killed by collisions with ships threatens to slow or even reverse this recovery in some areas. Along the west coast of the United States, this conflict is most clearly evident in the Santa Barbara Channel, which not only provides essential habitat for numerous whales, including the densest seasonal population of blue whales on the planet, but also serves as the primary formal shipping lane for traffic into and out of the nation's busiest port complex at the Los Angeles and Long Beach Harbors (LA/LB). While ship strikes have been implicated in the deaths of blue whales off the California coast since as early as 1980, the incidence of strikes has steadily risen, and in 2007 an unprecedented five blue whales were struck and killed in the Santa Barbara Channel.¹

Despite the protections provided to whales under international treaties and domestic statutes including the Endangered Species Act

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1. See LESLIE ABRAMSON, SHIVA POLEFKA, SEAN HASTINGS & KRISTEN BOR, CHANNEL ISLANDS NATIONAL MARINE SANCTUARY ADVISORY COUNCIL, REDUCING THE THREAT OF SHIP STRIKES ON LARGE CETACEANS IN THE SANTA BARBARA CHANNEL REGION AND CHANNEL ISLANDS NATIONAL MARINE SANCTUARY: RECOMMENDATIONS AND CASE STUDIES (2009).

(ESA)² and Marine Mammal Protection Act (MMPA),³ compelling federal agencies to take protective action in the wake of the 2007 ship strike mortalities has proven difficult. However, an unanticipated sequence of events, involving the California Air Resources Board's (CARB) July 2009 low-sulfur fuel rule for ocean going vessels, prompted the U.S. Coast Guard (USCG) to initiate a new Port Access Route Study (PARS) for LA/LB. The PARS process may serve as an unexpected catalyst for instituting the protections necessary to eliminate or reduce whale ship strike mortalities.

Under the Ports and Waterways Safety Act (PWSA), the PARS must be conducted in a transparent public process with broad stakeholder involvement. Once completed, it will provide the basis by which the USCG may propose modifications to the existing Santa Barbara Channel shipping lanes, as well as additional regulatory measures such as ship speed limits.⁴ The PWSA further requires the USCG to ensure that its ultimate designation of shipping lanes provides for both safe access routes and protection of the marine environment.⁵ This article addresses how the PARS process thus provides a key opportunity to designate shipping lanes into LA/LB that minimize the risk of ship strikes to blue whales and other large cetaceans (whales).

THE SANTA BARBARA CHANNEL AND SHIPPING TRAFFIC INTO LA/LB

Even in a state as renowned for its natural resources as California, the Santa Barbara Channel stands out for its exceptional beauty and extraordinary biological diversity. The channel is an arm of the Pacific Ocean separating Santa Barbara, Ventura, and other coastal communities from the northern Channel Islands. Cool, subarctic waters converge with warmer, equatorial waters in the channel, fostering a rich diversity of marine and other wildlife, including whales, porpoises, dolphins, pinnipeds, the southern sea otter, and hundreds of species of birds, fishes, and invertebrates. Reflecting the environmental importance of the area, the Channel Islands National Park (encompassing Santa Barbara, Anacapa, Santa Cruz, Santa Rosa, and San Miguel Islands) and Channel Islands National Marine Sanctuary (encompassing a 1252 square-nautical-mile area around the islands) were established in 1980.

Despite the channel's environmental significance, two mile-wide shipping lanes run through the Santa Barbara Channel, one for southbound ships approaching LA/LB, and one for northbound ships leaving LA/LB. The two adjacent harbors of LA/LB form the nation's

2. 16 U.S.C. § 1531 (2006).

3. 16 U.S.C. § 1361 (2006).

4. *See* 33 U.S.C. § 1223 (2006).

5. *See* 33 U.S.C. § 1224 (2006).

largest port complex and one of its main transportation arteries of consumer goods.⁶ The fortunes of both ports have soared during the past 40 years, reflecting the ascendancy of China and corresponding shift in international shipping trade from the Atlantic to the Pacific Ocean. Indeed, in a span of little more than three decades between 1970 and 2002, China increased its share of U.S. imports from 8 to 40 percent.⁷ The bulk of this trade—dominated by high-value goods including furniture, apparel, automobiles, and electronics—is shipped into the LA/LB ports, where it is then transferred to a network of southern California warehouses.⁸ From there, roughly half of the cargo is sent outside the state for consumption.⁹

As a result of this rapid increase in shipping trade at LA/LB, the Santa Barbara Channel today experiences some of the heaviest levels of commercial maritime trade in the world. In 2006, it is estimated that there were more than seven thousand ocean-going vessel (OGV) transits along Santa Barbara County's coastline.¹⁰ Although these levels have declined in the wake of the global recession, levels of shipping traffic are expected to double over the next fifteen years.¹¹

WHALES AND SHIP STRIKES IN THE SANTA BARBARA CHANNEL

The increased shipping through the Santa Barbara Channel has unfortunately come at a high price for local whale populations, most notably the blue whale, which was hunted to the brink of extinction but now appears to be slowly increasing its population numbers and expanding into historic habitats. Believed to be the largest animal ever to have existed on earth, the blue whale has developed a particular affinity for the channel and its dense populations of krill, the species' primary food source.

It is estimated that 380,000 blue whales were killed by whalers in the twentieth century—largely for the manufacture of soap and margarine—resulting in extirpation within some populations and reduction of others by more than 99 percent.¹² The carnage was especially devastating in the Southern (Antarctic) Ocean, where it is estimated that whalers killed 999

6. See Jon Haveman & David Hummels, *California's Global Gateways: Trends and Issues*, available at http://www.ppic.org/content/pubs/report/R_404JHR.pdf; U.S. DEPARTMENT OF TRANSPORTATION, AMERICA'S CONTAINER PORTS 1-2 (2009).

7. See Haveman & Hummels, *supra* note 6, at vi.

8. See World Port Source, <http://www.worldportsource.com>.

9. See Haveman & Hummels, *supra* note 6, at 19.

10. See Terry Dressler, Tom Murphy & Anthony Fournier, Next Challenge on the Horizon: Air Pollution Emissions from Ships 3 (2006), available at <http://www.sbcapcd.org/itg/download/8-06-em-article.pdf>.

11. See *id.*

12. See DAN BORTOLOTTI, WILD BLUE: A NATURAL HISTORY OF THE WORLD'S LARGEST ANIMAL 12-13, 34 (2008).

out of every 1000 blue whales in a span of less than seventy years.¹³ By 1960, the blue whale was perched on the brink of extinction, a victim of what author Dan Bortolotti describes as “[what] may have been the greatest war humans have ever waged against an animal.”¹⁴

In 1966, the International Whaling Commission finally prohibited blue whale hunting—although by this late date, the species was essentially commercially extinct—and subsequently enacted a moratorium on commercial hunting of all whale species that became effective in 1985.¹⁵ On the domestic level, the blue whale and several other large whale species have been listed as endangered since enactment of the ESA. As recognized by the Supreme Court, “the plain intent of Congress [in enacting the ESA] was to halt and reverse the trend towards extinction, whatever the cost.”¹⁶ Accordingly, the listing of a species as threatened or endangered under the ESA triggers a host of procedural and substantive protections. These protections include a prohibition on “take” and a requirement that government agencies ensure that their actions do not jeopardize the species’ continued existence.¹⁷ The MMPA, enacted in order to preserve and replenish marine mammal populations, establishes a layer of “take” protections separate from those provided by the ESA.¹⁸ These international and domestic protections have allowed many whale populations to slowly recover.

The beginnings of this recovery have been evident in California generally and the Santa Barbara Channel in particular. Sightings of blue, humpback, and other whales were considered very rare prior to the hunting bans, and when large groups of blues and humpbacks started showing up in the Santa Barbara Channel in the early 1990s, even seasoned whale researchers considered the opportunity to view the species a “once in a lifetime experience.”¹⁹ Today, whale watchers departing from Santa Barbara or Ventura Harbor during summer months are essentially guaranteed to see several blues and humpbacks, as well as the occasional fin whale (the *second* largest animal to have ever lived). As many locals will attest with considerable pride, the Santa Barbara Channel now boasts the world’s densest seasonal congregation of the blues.²⁰

13. See *id.* at 13.

14. *Id.* at 44.

15. See *id.* at 81–82. For background on the IWC and its formation, see Japan Whaling Ass’n v. American Cetacean Soc’y, 478 U.S. 221 (1986).

16. TVA v. Hill, 437 U.S. 153, 184 (1978).

17. See 16 U.S.C. § 1538(a) (2006).

18. See 16 U.S.C. §§ 1361(2), 1371(a) (2006).

19. Pete Thomas, *Out of the Blue, Humpbacks and Other Endangered Whale Species Making Rare Appearances off Santa Barbara Coast*, L.A. TIMES, July 29, 1992.

20. <http://condorcruises.blogspot.com/> provides daily updates on whale sightings and abundance during the whale watching seasons.

Unfortunately, in the mid-2000s, it became clear that the channel's importance for shipping and its importance for whales were literally on a collision course. By this time, ship strikes had already been recognized as an emerging threat to the blue whale and other large whale species for more than a decade. One study documented 292 confirmed or possible ship strikes in North American waters between 1975 and 2002.²¹ In the 1998 Blue Whale Recovery Plan prepared by the National Marine Fisheries Service (NMFS) under the ESA, the agency identified ship strikes as a primary threat and directed itself to identify and implement measures to reduce such strikes.²² In 2007, these concerns came to a tragic head when blue whales lingered in the Santa Barbara Channel longer than previous years, and within the space of three weeks in October, at least four blue whales washed ashore as confirmed victims of ship strikes.

In the wake of these deaths, conservation organizations used various avenues to request that federal wildlife officials institute protective mechanisms including mandatory ship speed limits and adjustments to the established shipping lanes.²³ Frustrated at the lack of meaningful response, the Environmental Defense Center on behalf of itself and the Center for Biological Diversity, Friends of the Earth, and Pacific Environment, served NMFS in August 2009 with a formal notice of intent to sue under the ESA for the agency's failure to implement various recovery plan provisions relating to ship strikes and other threats.²⁴

THE CARB OCEAN GOING VESSEL RULE AND UNINTENDED CONSEQUENCES

While these legal efforts are still pending, efforts by the State of California to better regulate air pollution from the shipping industry have unexpectedly shifted vessel traffic outside of the channel's designated shipping lanes. This unintended shift in vessel traffic has forced the federal government to carefully reexamine the regulation of shipping traffic into LA/LB.

OGVs typically utilize diesel engines that burn bunker fuel, which is comprised of residual heavy materials that are left over after lighter materials such as gasoline and diesel are distilled out from crude petroleum. These bunker fuels contain extremely high levels of sulfur oxides (SOx) and other pollutants known to cause cancer, respiratory illnesses, and increased risk of heart disease. Reflecting the intensity of

21. See Aleria S. Jensen & Gregory K. Silber, U.S. Department of Commerce, Large Whale Ship Strike Database: NOAA Technical Memorandum NMFS-OPR-25 (2004).

22. See RANDALL R. REEVES ET AL., NATIONAL MARINE FISHERIES SERVICE, RECOVERY PLAN FOR THE BLUE WHALE (*BALAENOPTERA MUSCULUS*) (1998).

23. See, e.g., CENTER FOR BIOLOGICAL DIVERSITY, PETITION FOR EMERGENCY RULEMAKING TO REDUCE THE RISK OF UNLAWFUL TAKE OF ENDANGERED SPECIES (2007).

24. Available at http://edcnet.org/learn/current_cases/save_the_whales/index.html.

this pollution, more than 40 percent of the nitrogen oxides (NO_x) emissions in Santa Barbara County arise from OGVs transiting the Santa Barbara Channel.²⁵

In an effort to reduce the public's exposure to SO_x, NO_x, diesel particulate matter (PM), and secondarily formed PM from OGVs, CARB issued a regulation known as the OGV Low Sulfur Fuel Rule on July 1, 2009. This rule is a central facet of a larger CARB initiative intended to reduce cancer and other health risks to communities near maritime ports, known as the Diesel Risk Reduction Plan and Goods Movement Emission Reduction Plan. Culminating more than a decade of work, the CARB rule mandates that OGVs, including container vessels, tankers, bulk carriers, and car carriers, must utilize cleaner-burning, lower-sulfur distillate fuels within twenty-four nautical miles (nm) of the California coast.²⁶

The low sulfur distillate fuels mandated by CARB, not surprisingly, are considerably more expensive than the heavy bunker fuels long utilized by the shipping industry. Unfortunately, only a year after CARB's rule was finalized, it is clear that the large majority of OGVs have altered their routes into and out of LA/LB in an effort to minimize their time spent within the twenty-four nm regulatory zone during which they must burn these cleaner but more expensive fuels. Instead of approaching the port via the designated shipping lanes within the Santa Barbara Channel, most OGV traffic into LA/LB is now entering through a gap between the northern and southern Channel Islands, known as the "western approach."²⁷

This new and unregulated western approach is outside of all designated shipping lanes and is squarely within the U.S. Navy's Point Mugu Sea Range, where the military conducts extensive weapons, maritime, and ballistic missile defense tests, as well as special operations and joint forces training. Consequently, between October and December 2009, more than fifty-five ships transiting the western approach were

25. See Santa Barbara County Air Pollution Control District. *Comments on U.S. Coast Guard Port Access Route Study: Approaches to Los Angeles-Long Beach and in the Santa Barbara Channel*. June 2, 2010. Available at: <http://regulations.gov> (Docket ID # USCG-2009-0765-0001).

26. See 13 CAL. CODE REGS. § 2299.2 (2010) (Standards for Fuels for Nonvehicular Sources); 17 CAL. CODE REGS. § 93118.2 (2010) (Airborne Toxic Control Measures). The regulation is being implemented in two phases: on July 1, 2009, OGVs were required to use marine gas oil with a sulfur content of no more than 1.5 percent and marine diesel oil with a sulfur content of no more than 0.5 percent; beginning on January 1, 2012, the sulfur limits are lowered to 0.1 percent for both marine gas oil and marine diesel oil.

27. Captain Dick McKenna, Executive Director, Marine Exchange of Southern California, Presentation to the Channel Islands National Marine Sanctuary (CINMS) Advisory Council (SAC) (March 19, 2010) (on file with author).

either diverted or asked to come to a complete stop because of conflicts with naval training.²⁸

THE PORTS AND WATERWAYS SAFETY ACT AND THE
COAST GUARD PORT ACCESS ROUTE STUDY PROCESS

In response to the public safety and national security issues raised by this new, unregulated approach, the USCG initiated a new PARS for the LA/LB ports in April 2010. This serves as the first step in establishing new or revised shipping lanes under the PWSA.²⁹

Congress passed the PWSA in 1967 in reaction to the disastrous grounding of the oil supertanker *Torrey Canyon* in the English Channel. Although the USCG often refers to the PWSA as primarily a public safety statute, from its first provision the law places equal and repeated emphasis on protection of the “marine natural environment.” The PWSA expansively defines “marine natural environment” to include the navigable waters of the United States and the land and resources within and under those waters, including the seabed and subsoil of the Outer Continental Shelf, fishery resources, “and the recreational, economic, and scenic values of such waters and resources.”³⁰

The heart of the PWSA is its mandate that USCG “provide safe access routes” through the establishment of shipping lanes, dubbed “Traffic Separation Schemes” (TSS).³¹ Like lanes on a paved road, TSSs are “aimed at the separation of opposing streams of traffic.”³² Before establishing the TSS, the PWSA requires that the USCG “undertake a study of the potential traffic density and need for safe access routes.”³³ This study, the PARS, must ensure that “the need for safe access routes” is reconciled “with the needs of all other reasonable uses of the area,” including the operation of marine sanctuaries.³⁴ The PWSA also mandates that the USCG consider nine specific factors “concerning

28. See John Ugoretz, Naval Marine Biologist, Presentation to the Channel Islands National Marine Sanctuary (CINMS) Advisory Council (SAC) (March 19, 2010) (on file with author). Although the current shipping lanes are also within the Sea Range, the vast majority of training exercises are conducted on the seaward side of the Channel Islands.

29. See Notice of Study on the Approaches to Los Angeles-Long Beach and in the Santa Barbara Channel and Request for Comments, 75 Fed. Reg. 17,562 (April 7, 2010).

30. 33 U.S.C. § 1222(1) (2006); see also *id.* § 1221(a) (finding “that navigation and vessel safety, protection of the environment, and safety and security of United States ports and waterways are matters of major national importance”); *id.* § 1221(b) (finding “that increased vessel traffic in the Nation’s ports and waterways creates substantial hazard to life, property, and the marine environment”); *id.* § 1221(c) (finding “that increased supervision of vessel and port operations is necessary in order to reduce the possibility of vessel or cargo loss, or damage to life, property, or the marine environment”).

31. 33 U.S.C. § 1223(c)(1).

32. 33 C.F.R. § 167.5(b) (2010).

33. 33 U.S.C. § 1223(c)(3)(A) (2006).

34. *Id.* § 1223(c)(3)(B)–(C).

navigation and vessel safety and protection of the marine environment,” including “environmental factors,” as part of the PARS process.³⁵

Additionally, the PWSA mandates that the PARS be conducted under a transparent process that involves a broad range of stakeholders, including the Secretaries of State, Commerce, the Interior, and the Army, and the governors of the affected states.³⁶ The PWSA also specifically requires that USCG “consult with and receive and consider the views of . . . representatives of environmental groups.”³⁷

ENSURING WHALE CONSERVATION IN THE LOS ANGELES AND LONG BEACH PARS PROCESS

With its requirements of transparency, broad stakeholder involvement, and protection of the marine environment, the PARS process provides an important opportunity to ensure the conservation of large whales and other wildlife in relation to shipping traffic within and in the vicinity of the Santa Barbara Channel. USCG and NMFS recently illustrated this potential with their cooperative PARS for the vicinity of the Boston Harbor. In an effort to protect the critically endangered North Atlantic right whale, the agencies amended shipping lanes and instituted mandatory speed limits—the first time in U.S. history that shipping lanes were altered to protect wildlife.³⁸ Measures adopted by USCG/NMFS included narrowing and shifting the TSSs for both the northern and southern approaches to the Boston Harbor, requiring ships to avoid seasonal use areas, and instituting a seasonal speed limit of ten knots in key areas of right whale habitat along the eastern seaboard.³⁹

As a testament to its inherent but largely unfulfilled potential, the PARS process has been identified as an appropriate vehicle for achieving the goals of the Interagency Ocean Policy Task Force created by President Obama in 2009—specifically the concept of coastal and marine spatial planning (CMSP).⁴⁰ The Task Force identifies numerous benefits to implementing a CMSP approach that overlaps with the PWSA PARS requirements, including moving towards comprehensive decision making; bringing federal, state, and tribal partners together; emphasizing stakeholder and public participation; and placing science-based

35. *Id.* § 1224(a)(1)–(9).

36. *See id.* § 1223(c)(3)(B).

37. *Id.* § 1224(b)(1)–(9).

38. *See* Allison Winter, *NOAA Shifts Mass. Shipping Lanes to Aid Right Whales*, GREENWIRE, May 29, 2009.

39. *See* Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales, 73 Fed. Reg. 60,173 (Oct. 10, 2008); Port Access Route Study of Potential Routing Measures to Reduce Vessel Strikes of North Atlantic Right Whales, 72 Fed. Reg. 64,968 (Nov. 19, 2007).

40. *See* COUNCIL ON ENVIRONMENTAL QUALITY, INTERIM REPORT OF THE INTERAGENCY OCEAN POLICY TASK FORCE (2009).

information at the heart of decision making.⁴¹ Recognizing this overlap, the Task Force has highlighted the Boston Harbor PARS as a model of CMSP. In doing so, it noted that the PARS process enabled NMFS, USCG, and other agencies to “examine shipping needs, proposed deepwater liquefied natural gas port locations, and endangered whale distribution in a successful effort to reconfigure the Boston [TSS],” resulting in a greatly reduced risk of ship strikes with minimal effects on shipping and other industries.⁴²

The current LA/LB PARS process provides a similar opportunity to carefully review the location of shipping lanes in order to improve whale conservation within, and in the vicinity of, the Santa Barbara Channel. For example, a recent study by leading blue whale biologists argues that minor shifts in the location of existing lanes away from shelf edge habitats used by blue whales in the central and eastern Santa Barbara Channel would reduce the probability of ship strikes.⁴³ In addition, under the PWSA, the USCG has the authority to institute shipping speed limits similar to those instituted by NMFS on the East Coast. As an agency dedicated to science-based conservation, NMFS’ active participation in the LA/LB PARS process will be critical to ensuring that the best available science concerning whale conservation measures are incorporated into USCG’s decision making. Moreover, such participation will be necessary for NMFS to fulfill its responsibility under the ESA and MMPA for protecting marine mammals, as well as its mandate under the Blue Whale Recovery Plan to identify and implement measures to reduce ship strikes.

In a recent court decision providing significant guidance on the scope of the USCG’s duties under the PWSA, the D.C. Circuit held that several PARS and subsequent TSS designations conducted on the East Coast were subject to the ESA’s section 7 requirements.⁴⁴ The court reasoned that “by giving the Coast Guard authority to promulgate traffic separation schemes, Congress intended to make the Coast Guard accountable for them.”⁴⁵ As confirmed by the court in *Defenders*, this accountability includes taking into account “all relevant factors concerning . . . protection of the marine environment, . . . including but not limited to . . . environmental factors,” such as the presence of large

41. *See id.*

42. COUNCIL ON ENVIRONMENTAL QUALITY, INTERIM FRAMEWORK FOR EFFECTIVE COASTAL AND MARINE SPATIAL PLANNING (2009).

43. *See* John Calambokidis, Erin M. Oleson & Megan F. McKenna, *Examination of blue whale occurrence, behavior, and reaction to ships in and around shipping lanes and insights into ship strikes, 2007-2009*, 19 (2010) (*in draft*).

44. *See* *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 926 (D.C. Cir. 2008).

45. *Id.*

whales and other sensitive or imperiled marine wildlife or natural resources, and therefore section 7 consultation was required.⁴⁶

Realizing the potential of the PARS process will ultimately depend significantly on the USCG's approach to implementing it. It remains unclear, however, whether the USCG and cooperating agencies such as NMFS will embrace this opportunity and fulfill their legal responsibility to fully incorporate whale conservation into the Los Angeles and Long Beach PARS process. For example, the agency's Federal Register announcement noticeably neglected to mention ship strikes or any other environmental issues, and did not reference the numerous provisions of the PWSA mandating that environmental considerations be central to its analysis. Organizations with an interest in whale conservation as it relates to the shipping industry will need to remain vigilant in order to ensure that the ultimate configuration of shipping lanes and associated rules, such as speed limits, provide for the overdue protection of large whales from ship strikes in the Santa Barbara Channel.

46. *Id.* at 925 (citing PWSA, 33 U.S.C. §§ 1224(a), 1223(a)(1), 1223(c)(3)).