UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910
THE DIRECTOR

Catherine Kilduff, Senior Attorney
Center for Biological Diversity
1212 Broadway, St. #800
Oakland, CA 94612

Dear Ms. Kilduff:

We are responding to your April 28, 2021, petition to the Secretary of Commerce, the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS) Office of Protected Resources Acting Director, and NMFS' West Coast Regional Administrator requesting that we promulgate a rule to prevent deaths and injuries of endangered blue, humpback, and fin whales from vessel strikes off California's coast. NMFS appreciates your summary of the information available, copies of your references, and your perspective on the need for regulatory action at this time. This letter serves as a full and final response to your petition. After careful consideration, we are denying the petition.

You requested that NMFS utilize its authorities under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) for three actions:

· Implement a year-round mandatory 10-knot speed limit in NOAA's current voluntary vessel speed reduction zones in the San Francisco Bay Region and the Southern California Region for vessels greater than or equal to 40 feet in length.

· Establish shipping routes or vessel tracks for all commercial shipping vessels transiting between ports in Southern California and San Francisco Bay Area at least 24 nautical miles from shore.

· Identify areas of seasonal importance for blue whales, humpback whales, and fin whales, and set a vessel traffic threshold above which additional management measures will be triggered. The measures considered must include a ban on nighttime traffic.

The large whale populations off the California coast continue to increase or remain stable despite the ongoing effects of vessel strikes. Humpback whale populations have been increasing at a rate of approximately 7 to 8 percent and recent abundance estimates indicate a total west coast population of ~4,800 humpback whales (Calambokidis and Barlow 2020; Carretta et al. 2020). Fin whale populations off the U.S. West Coast number approximately 8,000 animals and have

been increasing over the last several decades at rates similar to humpback whales (Carretta et al. 2021). The 2019 stock assessment of the Eastern North Pacific blue whale population evaluated a population of approximately 1,000 animals and noted that some researchers had posited that the population may be near carrying capacity in this area (Carretta et al. 2020). Based on the best available information, a default growth rate of 4 percent for this stock was assumed. More recent abundance estimates using NMFS survey data through 2018 indicate the population of blue whales along the west coast is approximately 1,800 animals (Calambokidis and Barlow 2020).

Your petition notes that estimated vessel strike levels exceed the Potential Biological Removal (PBR) levels established for the stocks of these large whales that occur off the U.S. West Coast, and therefore claims that recovery of these species is impeded. Several aspects of this claim bear clarification in relation to both the ESA and the MMPA. NMFS assesses and protects large whale populations under both statutes, but the units of management and the requirements of both statutes differ.

First, the units of management under the MMPA are stocks. The term "population stock" or "stock" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature. 16 U.S.C. 1362, Sec. 3(11). PBR is estimated for three stocks of large whales off of the U.S. West Coast pertinent to this petition - the California/Oregon/Washington stock of humpback whales, the Eastern North Pacific stock of blue whales, and the California/Oregon/Washington stock of fin whales. These stocks differ from the species that are protected under the ESA, which are the globally-listed species of fin and blue whales and the two Distinct Population Segments of Central America and Mexico humpback whales. The stocks are generally a subset of the ESA-listed species and findings made for a stock are not necessarily indicative of a similar finding for the larger ESA-listed unit. PBR is specific to MMPA stocks and not applicable under the ESA's statutory standards for listed species.

Second, under the MMPA, PBR is neither the level of vessel strike mortality nor the maximum amount of mortality or serious injury of animals within a stock beyond which no recovery to an optimum sustainable population (OSP) is possible. PBR is a conservative estimate of the level of mortality and serious injury that would allow a stock to reach OSP with a high probability of certainty. Given the way PBR is calculated in practice, a stock can still achieve or maintain OSP even with mortality and serious injury levels that exceed PBR. In limited circumstances, exceedance of PBR can trigger action under the MMPA. Specifically, if the level of direct human-caused mortality and serious injury is greater than PBR, a stock becomes "strategic" (per MMPA Sec 3(19)); although in this instance, these stocks of large whales are already "strategic" by virtue of their ESA-listed status.

A "strategic" status under the MMPA allows for:

- Conservation or management measures to alleviate impacts on rookeries, mating grounds, or other areas of similar ecological significance that may be causing decline or impeding recovery. (MMPA Section 112(e))
- Take Reduction Plans to reduce incidental take in commercial fisheries. (MMPA Section 118)
- Annual reviews of Stock Assessment Reports (MMPA Section 117)
- Higher prioritization of monitoring in commercial fisheries that have incidental mortality or serious injury of marine mammals from strategic stocks. (MMPA Section 118(d)(4)(B))

As noted above, recent stock assessments of the blue, fin, and humpback whale stocks off the U.S. West Coast do not support an assertion that the level of estimated vessel strikes are impeding the recovery of these stocks, nor that specific action to address the level of estimated strikes is required under the MMPA or ESA.

If NMFS determines there is a need to reduce vessel strikes to meet the goals of the MMPA and/or ESA, we can do so under MMPA section 112(a) (16 U.S.C. 1382(a)),[1] and ESA section 11(f) (16 U.S.C. 1540(f)).[2] As you are aware, NMFS has taken regulatory action in other geographic areas and for other species of large whales when it was determined to be necessary and appropriate for the conservation of the species or stock. However, at this time, it is not necessary and appropriate to regulate vessel speeds in the manner requested in the petition for the conservation of the ESA-listed species or MMPA stocks of blue, fin or humpback whales. NMFS, NOAA's Office of National Marine Sanctuaries, and the U.S Coast Guard (USCG) continue to encourage vessel speed reductions via seasonal voluntary measures in areas around the primary port complexes in California.

Your petition also requests that NMFS establish vessel lanes between San Francisco and Southern California at least 24 nautical miles from shore. It is not necessary or appropriate to modify or create new vessel lanes since, as mentioned above, vessel strikes are not impeding recovery of any of these three stocks. NMFS cannot unilaterally establish vessel lanes or tracks absent coordination and collaboration with other Federal partners such as the USCG. Further, the establishment of such lanes would require proposals to and approval by the International Maritime Organization (IMO) for tracks applicable to the commercial shipping industry. For example, the IMO approved recommended vessel routes within the Monterey Bay National Marine Sanctuary in May 2000.[3] As you may know, the USCG has announced the Pacific Coast

[1] The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title.
[2] The Secretary [is] authorized to promulgate such regulations as may be appropriate to enforce this Act.
[3] https://nmsmontereybay.blob.core.windows.net/montereybay-prod/media/materials/maps/vessel_lanes1_full.jpg

Port Access Routing Study (PAC-PARS)[4] and comments may be submitted to the USCG for recommendations for their consideration. In addition, NMFS will be coordinating and collaborating with the USCG on the PAC-PARS within our authorities and jurisdiction.

Finally, your petition requests the implementation of measures designed to establish vessel traffic thresholds to trigger additional measures related to vessel strikes, including a ban on nighttime traffic. As noted above, NMFS has not determined that vessel speed regulation is necessary and appropriate; therefore, further measures, including additional lanes and nighttime measures, are also not necessary and appropriate at this time. Absent a conservation need such as that identified for the conservation of North Atlantic right whales, we decline to exercise our authority under the ESA and MMPA to establish vessel speed regulations or establish area-specific or general additional measures.

Going Forward

NMFS acknowledges that vessel strikes of large whales occur as a result of a wide range of vessel types and activities. As noted above, we have been collaborating for many years with partners within and external to NOAA on measures designed to reduce the risk of vessel strikes within the traffic separation schemes off of the ports of San Francisco/Oakland and Los Angeles/Long Beach. As a result of efforts to expand awareness of the issue and encourage voluntary cooperation with vessel speed reduction requests and notifications to all mariners regarding the presence of large whales in the waters off of southern and central California, cooperation with these speed reduction requests has been steadily increasing (Rockwood et al, 2020, and see below).

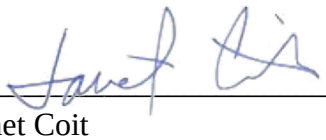
NMFS notes that cooperation levels with our West Coast vessel speed reduction requests continue to increase every year. Based on information provided to NMFS by the staff of Whale Safe,[5] from May 15 - December 15, 2020, there were 941 vessels that transited a total of 634,366 nautical miles in the Southern California Vessel Speed Reduction Zone with an overall cooperation rate of 54.26 percent with the 10 knots or less request. In addition, another 18.99 percent of transit distance occurred at speeds of 12 knots or less. In other words, nearly 75 percent of the traveled nautical miles occurred at speeds less than 12 knots. In 2021, from May 15 - December 15, there were 1,159 vessels that transited a total of 714,749 nautical miles in the Vessel Speed Reduction Zone with an overall cooperation rate of 58.83 percent. In addition, another 16.31 percent of transit distance occurred at speeds of 12 knots or less. Similar to 2020, nearly 75 percent of the traveled nautical miles occurred at speeds less than 12 knots. NMFS intends to continue existing efforts to expand awareness and encourage vessel slowdowns.

[4] https://www.regulations.gov/document/USCG-2021-0345-0001
[5] https://whalesafe.com/

In addition, NMFS intends to continue the long-standing partnerships and efforts to provide guidance and recommendations to the shipping industry and other mariners to avoid or minimize the risk of vessel strikes. This includes annual notices of voluntary vessel speed reduction requests and provision of information to mariners and other interested parties of the presence and likelihood of large whales in certain areas. These include support of efforts like WhaleAlert[6] and WhaleWatch.[7]

NMFS will also continue to provide support to our NOAA National Marine Sanctuaries via their Sanctuary Advisory Councils and working groups and in support of joint NOAA proposals to the IMO for revisions to existing shipping lanes. As you are also aware, NMFS is working with the USCG on the reinitiation of the ESA section 7(a)(2) consultation on the codification of the current IMO-approved Traffic Separation Schemes off San Francisco and Los Angeles. Finally, NMFS will be engaged in the PAC-PARS effort with our partners at the USCG to provide input on vessel traffic effects on our NOAA trust resources and commercial fisheries.

In conclusion, NMFS appreciates your concern for the welfare of these animals and the survival of these species and we hope you will remain partners with us in future efforts to reduce the risk and severity of vessel strikes. However, based on the best available information, we are denying your petition because vessel strikes do not appear to be preventing or impeding the recovery of blue, fin, or humpback whales off the U.S West Coast, and other measures to address vessel strikes show signs of success. Therefore, we do not deem it either necessary or appropriate, under MMPA section 112(a), or as may be appropriate, under ESA section 11(f), to regulate vessel speeds and locations in the manner requested in your petition at this time. This letter serves as a full and final response to your petition.



04/07/22

Janet Coit
Assistant Administrator for Fisheries,
National Marine Fisheries Service

Date

[6] http://www.whalealert.org/
[7] https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/whalewatch

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