September 21, 2023

Sent via U.S. Certified Mail, Return Receipt Requested, and Email to:

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Re: Violations of the Endangered Species Act Regarding the Designation of the M-11 Marine Highway Route (Alaska)

Dear Sirs/Madams:

This letter provides notice to the U.S. Department of Transportation Maritime Administration (“MARAD”) of violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), in connection with the agency’s failure to undertake programmatic ESA Section 7 consultation on the designation of the M-11 Marine Highway Route in Alaska as part of the America’s Marine Highway Program to ensure that listed species will not be jeopardized and critical habitat will not be adversely modified in violation of the ESA.¹ The designation of this new Marine Highway targets the area for increased vessel traffic, which implicates several imperiled species, particularly cetaceans such as humpback whales, which are known to be adversely affected by vessel traffic.

1. Introduction

The America’s Marine Highway Program (“AMHP”) is specifically intended to expand the use of America’s navigable waterways. MARAD does so by offering a set of tools for the development and expansion of marine highway services, including grants to purchase materials, equipment, facilities, and vessels such as barges, and conducting studies to increase the viability and use of marine highways for commercial transportation. Designating a Marine Highway Route makes that route eligible for MARAD to take further action to increase vessel traffic on such waterways, including through grants.

In August of this year, MARAD designated a new Marine Highway Route – the M-11 Marine Highway in Alaska. The route includes both the coastal area circumnavigating Alaska along the Aleutian Islands and through the Bering and Chukchi seas, as well as several interior river systems. As discussed further below, these areas provide habitat for several species protected under the ESA, many of which are known to be susceptible to ship strikes and other harm from vessels. Thus, MARAD’s designation of this area as a new Marine Highway Route increases the risks to these imperiled species, and is thus clearly an agency action that “may affect” listed species requiring Section 7 consultation on the decision to include the M-11 Route as part of the AMHP.

Programmatic level ESA consultation is vital for ensuring that MARAD fully considers the impacts to imperiled wildlife from embarking on a program to increase vessel traffic along the M-11 route. Programmatic consultation would allow MARAD—before it funds projects or takes other actions to increase vessel traffic on M-11—to establish standards, guidelines, and governing criteria to avoid or minimize the effects of increasing vessel traffic in habitat for listed species by taking a holistic view of the M-11 area and instituting protocols to track and respond to the collective impacts of actions taken pursuant to the program on that Marine Highway Route. Indeed, for programmatic agency actions, such as the designation of the M-11 Route, programmatic review “provides the only way to avoid piecemeal destruction of species and habitat.” That is because the aggregate impacts of the program can be analyzed and meaningfully addressed only through programmatic review, which would help ensure the effects of the program as a whole do not jeopardize listed species through death by a thousand small cuts.

However, on information and belief, MARAD has failed to initiate and complete ESA Section 7 consultation on the designation of the M-11 Marine Highway Route to guide the implementation of the AMHP for that route.

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2 See 50 C.F.R. § 402.02 (defining programmatic consultation); see also 80 Fed. Reg. 26,832, 26,836 (May 11, 2015) (Service regulations specifying that programmatic consultations should assess how the program will track impacts – particularly cumulative impacts – to prevent jeopardy).

The Center therefore urges MARAD to take appropriate, timely action to ensure that it is in compliance with the ESA by initiating formal, programmatic consultation on the M-11 Route with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (together, the "Services") as soon as possible. Unless the violations described in this letter are remedied within the sixty-day statutory noticing period, the Center intends to bring suit and will seek declaratory and injunctive relief as well as reasonable litigation costs and attorneys’ fees for MARAD’s violations of the ESA.

2. Legal Background

ESA Section 7 is a vital safeguard that requires each federal agency, in consultation with FWS and/or NMFS, to “insure”—at the “earliest possible time”—that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat.4 Section 7 also requires agencies to “carry[] out programs for the conservation of endangered species and threatened species.”5

The Services’ implementing regulations establish a detailed consultation process that agencies must follow to prevent jeopardy to listed species. Pursuant to that process, an agency must engage in consultation with the Services for every agency action—including “all activities or programs of any kind authorized, funded, or carried out,” by an agency, that “may affect” a federally listed species or critical habitat in any manner.6

The Services’ regulations recognize that federal programs, such as the Marine Highway Program, may require not only project-specific consultations for actions taken pursuant to the program, but programmatic consultation to “address[] an agency’s multiple actions on a program, region, or other basis.”7 Such programmatic consultations allow for “a broad-scale examination of a program’s potential impacts on a listed species and its designated critical habitat—an examination that is not as readily conducted when the later, action-specific consultation occurs on a subsequent action developed under the program framework.”8 This enables the Services “to determine whether a program and its set of measures intended to

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6 50 C.F.R. § 402.02 (emphasis added); 50 C.F.R. § 402.14(a), (g). See also W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 496 (9th Cir. 2011) (“The minimum threshold for an agency action to trigger consultation” is “low” (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))).
7 Id. § 402.02. Programmatic consultations do not provide for incidental take of listed species. Rather, any such take must be authorized through a subsequent project-specific consultation. See 50 C.F.R. § 402.14(c)(4) (project-specific consultation “does not relieve the Federal agency of the requirements for considering the effects of the action as a whole”); see also 84 Fed. Reg. 44,976, 44,997 (Aug. 27, 2019) (confirming the ESA requires programmatic consultation even if specific projects developed in the future are subject to site-specific consultation).
minimize impacts or conserve listed species are adequately protective.” Thus, for broad federal programs such as the AMHP, the Services’ regulations contemplate a 2-step approach that includes programmatic review of programmatic actions, such as the designation of Marine Highway Routes, followed by subsequent project-specific consultations as necessary for actions taken to increase vessel traffic on those routes.

3. **Factual Background**

MARAD’s purpose is to increase the utilization of domestic freight or passenger transportation on marine highway routes between U.S. ports. Indeed, MARAD states that it has “one major goal: expand the use of America’s navigable waters.” MARAD achieves this goal through the AMHP, under the auspices of which it promulgates regulations through rulemakings, designates specific Marine Highway Routes, and funds designated projects across the country through grants that expand the use of the marine highway system.

On August 16, 2023, MARAD designated the M-11 as a new Marine Highway Route in Alaska. The M-11 Route adds over 6,500 miles to the marine highway system, and includes coastal and river ports in southwestern and northern Alaska from the Aleutian Islands to the Canadian border. The Route includes the waterways of the Bering Sea, Bristol Bay, the Arctic Ocean, and the Yukon-Kuskokwim River Delta. ESA-listed species within the M-11 route include humpback whale, North Pacific right whale, bowhead whale, fin whale, ringed seal, bearded seal, polar bear, and Steller’s eider, among others.

There can be no doubt that vessel traffic on the M-11 Route “may affect,” and is “likely to adversely affect,” these listed species. Increasing vessel traffic heightens the likelihood and risk of ship strikes, strandings, and spills of fuel, oil cargo, or chemicals, intensifies vessel noise, and...

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9 *Id.* Other federal programs—including the Army Corps’ Nationwide Permit program and the Office of Surface Mining, Reclamation and Enforcement’s SMCRA program—have undertaken similar programmatic consultations with the Services to guide implementation of the program and ensure that listed species will not be jeopardized by the aggregate impacts of activities authorized or funded by the program.
10 *See* 50 C.F.R. §§ 402.02, 402.14(c), 402.14(i)(6).
14 *See* 46 C.F.R. § 393.2 (Marine Highway Routes).
15 *Id.* at § 393.3 (Marine Highway Projects).
may adversely affect prey abundance. The Arctic Council’s 2009 Arctic Marine Shipping Assessment states that, “the migration corridors used by marine mammals and birds correspond broadly with the main shipping routes into and out of the Arctic,” and that “migration corridors are particularly sensitive and vulnerable areas to oil spills, ship strikes and disturbances, and could be a time of vulnerability for marine mammals and birds.”

The Services have extensively documented the primary current and future threat marine shipping poses to listed species in the areas of the M-11 route. Cetaceans are particularly at risk. For example, NMFS has recognized that one of the primary threats to humpback whales is vessel strikes, and that “the risk is much higher in coastal areas with heavier ship traffic.” The M-11 route goes through habitat for humpbacks, including designated critical habitat, and studies have shown that a majority of ship strikes in Alaskan waters involve humpback whales. Likewise, NMFS has acknowledged that the North Pacific right whale—whose critical habitat is also intersected by the M-11 route— is susceptible to ship strikes, and that the severity of the threat from strikes is “potentially high...with the potential to increase given the possibility for increased ship traffic in the region due to melting sea ice in the Arctic.” Other whales are similarly at risk from increased vessel traffic, such as the fin whale, which NMFS has found to be “probably the most vulnerable species to ship strikes after the North Atlantic right whale.” Indeed, NMFS has stated that “[t]he projected increase in ship traffic arising from the opening of trans-polar shipping routes (as arctic sea ice continues to decline) will increase the risk of vessel strike and also increase ambient noise and pollution,” thereby threatening this highly endangered species.

Birds protected under the ESA like the Steller’s eider will also increasingly experience threats from marine shipping. The Service acknowledges that as shipping activities in the Arctic are “predicted to increase up to 500% of 2013 levels by 2025,” and “increased vessel traffic increases both the risk of hydrocarbon spills in marine environments, and the risk of collisions between Steller’s eiders and marine vessels.” And petroleum spills can adversely affect other species, such as the bearded seal, as well. In fact, when designating critical habitat for the

23 Id.
Beringia DPS of the bearded seal, NMFS found that “the maritime shipping industry transports various types of petroleum products, both as fuel and cargo. In particular, if increased shipping involves the tanker transport of crude oil or oil products, there would be an increased risk of spills,” which NMFS states is a “significant threat.”

For ice dependent species like polar bears, the increased use of icebreaker ships, “could disturb polar bears feeding and other behaviors…and potentially alter optimal polar bear sea ice habitat…adding additional energetic stresses.” Increased vessel discharges from “normal operations, including sewage, grey water, and oily wastes,” along with “greater levels of underwater noise,” have the potential for behavioral and other effects on the primary prey of both Arctic ringed seals and bearded seals.

On information and belief, MARAD has not initiated ESA Section 7 consultation on the designation of the M-11 Marine Highway Route to ensure that the implementation of the AMHP for that route, as a whole, will not jeopardize the continued existence of listed species or adversely modify designated critical habitat, in violation of the ESA.

4. Violations

**MARAD’s failure to initiate and complete programmatic consultation on the Designation of the M-11 Marine Highway Route**

MARAD itself has acknowledged that it has “one major goal: expand the use of America’s navigable waters.” It achieves this goal through the America’s Marine Highway Program, which promotes and funds the expansion of the marine highway system. Designating a route as a Marine Highway targets that area for increased vessel traffic, and makes funding through MARAD grants available to accomplish the goals of the AMHP. Thus, there can be no doubt that the designation of the new M-11 Marine Highway Route and MARAD’s plans to increase vessel traffic on the Route “may affect” listed species that rely on those waters, including through vessel collisions, fish strandings, and spills of fuel or chemicals, as discussed above.

And since several listed species are within the M-11 Route and the intended increase in vessel traffic along the route implicates increased harm to such protected wildlife, there can be no doubt that Section 7 consultation is required. While project-specific consultations would still be required for individual MARAD grants/projects along the M-11 route, such consultations are insufficient to ensure that the AMHP “as a whole” along the M-11 Route will not jeopardize species. Programmatic consultation implements the ESA’s goal of preventing jeopardy by allowing the agency and the Services to analyze the aggregate impacts of multiple projects under

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27 See Ringed Seal Critical Habitat Designation, 87 Fed Reg 19243 (2022); see also Bearded Seal Critical Habitat Designation, 87 Fed Reg 19191 (2022).
29 See 50 C.F.R. § 402.14(c)(4) (project-specific consultation “does not relieve the Federal agency of the requirements for considering the effects of the action as a whole”).
a program and to ensure that appropriate program-wide criteria and safeguards are in place for tracking, avoiding, minimizing, and mitigating such impacts. Deferring all consultation on a programmatic action to project-specific reviews would fail to guarantee that the program as a whole will not jeopardize listed species or destroy critical habitat, as the ESA requires. See Lane Cnty. Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992); Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994); Conner v. Burford, 848 F.2d 1441, 1453-58 (9th Cir. 1988); cf. Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1082 (9th Cir. 2015).

Because MARAD implements its national policy of expanding vessel traffic on marine highways through the designation of Marine Highway Routes that allow for multiple similar actions in particular geographic areas (i.e., funding projects on designated marine highways), programmatic consultation on the designation of a new Marine Highway Route such as the M-11 is necessary to establish standards, guidelines, or governing criteria to avoid, minimize, or offset the effects of the program on listed species and critical habitat, and to establish protocols to track and respond to the collective impacts of actions taken pursuant to the program.30 MARAD’s failure to initiate and complete Section 7 consultation on the designation of the M-11 Marine Highway Route is a glaring violation of the ESA.

5. Conclusion

For the foregoing reasons, MARAD must ensure through ESA Section 7 consultation that the implementation of the AMHP on the M-11 Route will not jeopardize the continued existence of listed species, and/or destroy or adversely modify designated critical habitat, in violation of the ESA. MARAD must initiate and complete programmatic consultation on the designation of the M-11 Route to consider the direct and cumulative impacts that the program will have on listed species along the Route and ensure that the AMHP incorporates sufficient data keeping, monitoring, and corrective actions to mitigate impacts and prevent jeopardy to such species.

Please do not hesitate to contact the undersigned if we can provide additional information or otherwise assist in this matter. We look forward to your prompt response.

Sincerely,

/s/ Jared M. Margolis
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30 See 50 C.F.R. § 402.02 (defining programmatic consultation); see also 80 Fed. Reg. 26,832, 26,836 (May 11, 2015) (Service regulations specifying that programmatic consultations should assess how the program will track impacts – particularly cumulative impacts – to prevent jeopardy).