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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 Marine Highway Program

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 America’s Marine Highway Program, and project-specific consultation on projects funded by the agency under that 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 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. MARAD recently announced that it

¹ 16 U.S.C. § 1536(a)(2).

is making an additional \$10,819,000 available for grants to fund the AMHP, applications for which were due June 25, 2021.²

The creation and expansion of a nationwide network of marine highway under MARAD's AMHP, and the associated increase in vessel traffic on marine highways, certainly "may affect" listed species that rely on those waterways—the low threshold for requiring Section 7 consultation. Indeed, several of the projects funded by MARAD over the past few years and/or that have applied for funding under the 2021 grants (discussed below) clearly meet that threshold, and further indicate that the Marine Highway Program as a whole likely adversely affects protected species.

However, MARAD has failed to initiate and complete ESA Section 7 consultation on the marine highway projects it has funded that "may affect" listed species, and has failed to undertake programmatic consultation to guide the implementation of the AMHP.³

Programmatic ESA consultation is vital for ensuring that MARAD fully considers the impacts to imperiled wildlife when administering the AMHP. Programmatic consultation would allow MARAD—*before* it funds projects or takes other actions to increase vessel traffic where listed species would be affected—to establish standards, guidelines, and governing criteria to avoid or minimize the effects of the AMHP by taking a holistic view of the program and instituting protocols to track and respond to the collective impacts of actions taken pursuant to the program.⁴ Indeed, for programmatic agency actions that are implemented across the country, such as the AMHP, programmatic review "provides the only way to avoid piecemeal destruction of species and habitat."⁵ 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.

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 AMHP with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (together, the "Services") as soon as possible.

² MARAD Press Release: Maritime Administration Announces Notice of Funding Opportunity for America's Marine Highway Program (May 24, 2021). *Available at* <https://www.maritime.dot.gov/newsroom/press-releases/maritime-administration-announces-notice-funding-opportunity-americas>.

³ See 50 C.F.R. § 402.02.

⁴ 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).

⁵ *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers*, 454 F. Supp 3d 990-994 (D. Mont., Apr. 15, 2020).

1. 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.⁶ Section 7 also requires agencies to “carry[] out programs for the conservation of endangered species and threatened species.”⁷

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.⁸

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.”⁹ 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.”¹⁰ This enables the Services “to determine whether a program and its set of measures intended to minimize impacts or conserve listed species are adequately protective.”¹¹ Thus, for broad federal programs such as the AMHP, the Services’ regulations contemplate a 2-step approach that

⁶ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

⁷ 16 U.S.C. § 1536(a)(1).

⁸ 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))).

⁹ *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).

¹⁰ 80 Fed. Reg. 26,832, 26,836 (May 11, 2015).

¹¹ *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.

includes programmatic review followed by subsequent project-specific consultations as necessary.¹²

2. Factual Background

The Marine Highway System includes 26 “Marine Highway Routes” (shown below) that have been designated by the Secretary of Transportation:



These marine highways are used as an alternative to “landside” shipping and transportation options for people and bulk commodities, including things like grain, steel, coal, and oil.

MARAD’s purpose is to increase the utilization and efficiency of domestic freight or passenger transportation on marine highway routes between U.S. ports.¹³ Indeed, MARAD states that it has “one major goal: expand the use of America’s navigable waters.”¹⁴ MARAD achieves this goal through the AMHP, under the auspices of which it promulgates regulations through rulemakings,¹⁵ designates specific Marine Highway Routes,¹⁶ and funds designated projects across the country through grants that expand the use of the marine highway system.¹⁷

¹² See 50 C.F.R. §§ 402.02, 402.14(c), 402.14(i)(6).

¹³ See <https://www.maritime.dot.gov/grants/marine-highways/marine-highway>.

¹⁴ See Program Overview, <https://cms.marad.dot.gov/grants/marine-highways/marine-highway>.

¹⁵ See 46 C.F.R. Part 393 (providing the provisions for “America’s Marine Highway Program”); 75 Fed. Reg. 18095 (Apr. 9, 2010) (Final Rule establishing regulations for the AMHP).

¹⁶ See 46 C.F.R. § 393.2 (Marine Highway Routes).

¹⁷ *Id.* at § 393.3 (Marine Highway Projects).

A review of the information available from the Services shows that the MARAD-designated marine highway routes provide habitat—including designated critical habitat—for many listed species. This includes, for example, North Atlantic right whales and loggerhead sea turtles along the M-95 corridor; Atlantic and shortnose sturgeon in the Hudson River; Atlantic sturgeon in the James River; imperiled freshwater mussels in the Tennessee Tombigbee Waterway, Black Warrior & Tombigbee Rivers, and Ohio River; steelhead, chinook salmon, chum salmon and bull trout in the Columbia River and Snake River; humpback whales, blue whales, fin whales, sperm whales, and leatherback sea turtles along the Pacific coast; longfin and delta smelt, steelhead, and green sturgeon in the San Francisco Bay, San Pablo Bay, Carquinez Strait and San Joaquin River; humpback whales and stellar sea lions in the Gulf of Alaska; and pallid sturgeon in the Mississippi River and Missouri River.

Therefore, there can be no doubt that the Marine Highway Program “may affect,” and is “likely to adversely affect,” listed species. The program is specifically intended to expand the use of rivers, bays, channels, and coastal zones by investing in infrastructure—including vessels, such as barges, and other expanded service—thereby increasing the use of waterways that are relied upon by listed species. The escalation of vessel traffic directly attributable to MARAD’s AMHP and the grants awarded under that program undoubtedly increases the risk of harm to imperiled species that rely on affected waterways by increasing the risk of ship strikes, entrainment, and spills of contaminants such as oil and gas.

Indeed, several of the specific marine highway projects that have been funded by MARAD grants over the past several years clearly indicate that AMHP meets the ESA’s low “may affect” threshold for ESA Section 7 consultation. These include the following:

- Port of Morrow Barge Service Expansion: Grants were awarded in 2019 (\$1,623,200) and 2020 (\$3,200,000) for the expansion of barge services on the Columbia River (M-84). Those projects were intended to increase barge capacity on the Columbia River, in areas that are designated critical habitat for several listed species, including Lower and Middle Columbia River DPS Steelhead, Lower Columbia River DPS Chinook Salmon; Columbia River DPS Chum Salmon; and Bull Trout. These species are known to be adversely affected by wake stranding from large vessel traffic. Indeed, USGS has analyzed models to assess such wake stranding, and acknowledged that long period wake waves from deep draft vessels have been shown to strand small fish, particularly juvenile salmon, in the lower Columbia River.¹⁸ A study from the Pacific Northwest Laboratory prepared for the U.S. Army Corps likewise found that ship wakes produced by deep-draft vessels transiting the lower Columbia River have been observed to cause stranding of juvenile salmon.¹⁹ And, in its 2016 5-Year Review: Summary & Evaluation of Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, Lower Columbia

¹⁸ See USGS (2013) Review of a Model to Assess Stranding of Juvenile Salmon by Ship Wakes along the Lower Columbia River, Oregon and Washington. Open-File Report 2013–1229. (available at <https://pubs.usgs.gov/of/2013/1229/pdf/ofr20131229.pdf>).

¹⁹ W.H. Pearson, et. al., A Study of Stranding of Juvenile Salmon by Ship Wakes Along the Lower Columbia River Using a Before-and-After Design. Pacific Northwest Laboratory (Feb. 2006).

River Coho Salmon, and Lower Columbia River Steelhead, NMFS acknowledged that ship wake stranding “continues to be a significant regulatory concern in the lower Columbia River that needs to be addressed.”²⁰ The increase in barge capacity also increases vessel strike risk for endangered whales and leatherback sea turtles that feed at the mouth of the Columbia River.²¹ The expansion of barge services in the Columbia River from the MARAD grants therefore clearly meets the “may affect” threshold for ESA Section 7.

- James River Container Expansion: In 2018, MARAD awarded a grant of \$1,822,093 to the James River Barge Line (Sponsored by Virginia Port Authority) to acquire a barge to expand service in the James River (M-64) and to initiate a new container shuttle service in the Hampton Roads area. This project has applied to MARAD for additional funding under this year’s round of AMHP grants. The James River is designated critical habitat for the Chesapeake Bay DPS of Atlantic sturgeon.²² These endangered fish are highly susceptible to ship strikes, particularly in the James River. Indeed, this issue has been the subject of several studies, including a 2012 analysis entitled “The Potential For Vessel Interactions With Adult Atlantic Sturgeon In The James River, Virginia,” published in the North American Journal of Fisheries Management.²³ That analysis documented dozens of Atlantic sturgeon ship strikes in the James River that caused direct mortalities, concluding that “[t]he threat of vessel strike in riverine habitat could compromise Atlantic sturgeon recovery efforts by removing spawning adults from the population.” Likewise, in its 2007 Status Review of Atlantic sturgeon, the NMFS Atlantic Sturgeon Status Review Team acknowledged that with an increase in boat traffic, “the potential for sturgeon to be struck by boats is greater, and this seems to happen commonly.”²⁴ The 2007 Status Review notes that commercial vessels routinely strike sturgeon in the James River, which is “more prone to ship strikes” because it has “large ports and [a] relatively narrow waterway,” and that in these small subpopulations “the loss of any spawning adults could have a substantial impact on recovery.”²⁵ The Status Team concluded that

²⁰ NMFS, 2016 5-Year Review: Summary & Evaluation of Lower Columbia River Chinook Salmon, Columbia River Chum Salmon, Lower Columbia River Coho Salmon, Lower Columbia River Steelhead. *Available at* <https://repository.library.noaa.gov/view/noaa/17021>.

²¹ See NMFS, Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation, Kalama Manufacturing and Marine Export Facility Kalama, Washington, dated October 10, 2017. WCR-2015-3594 (finding that vessel traffic to a terminal on the Columbia River was likely to adversely affect blue whale, fin whale, humpback whale, sperm whale, and leatherback sea turtle).

²² 82 Fed. Reg. 39160 (Aug. 17, 2017).

²³ Matthew T. Balazik, Kevin J. Reine, Albert J. Spells, Charles A. Fredrickson, Michael L. Fine, Greg C. Garman & Stephen P. McNinch (2012): The Potential for Vessel Interactions with Adult Atlantic Sturgeon in the James River, Virginia, North American Journal of Fisheries Management, 32:6, 1062-1069.

²⁴ NMFS, Status Review of Atlantic Sturgeon at 91 (Feb. 23, 2007). *Available at* <https://repository.library.noaa.gov/view/noaa/16197>.

²⁵ *Id.*

ship strikes in the James River are “considered to be a major threat” to the subpopulation.²⁶ The increase in boat traffic in the James River from the MARAD grant therefore clearly meets the ESA’s “may affect” threshold for ESA Section 7.

- New York Harbor Container and Trailer-on-Barge Service: A \$308,000 grant was awarded in 2020 to the U.S. Coastal Service, Inc. (sponsored by the New York City Economic Development Corporation) for planning, permitting, and engineering studies intended to start and/or expand Trailer-on-Barge operations in the New York City area – particularly in the Hudson River (M-95). This project has applied to MARAD for additional funding under this year’s round of AMHP grants. The Hudson River is designated critical habitat for Atlantic sturgeon, as well as home to endangered shortnose sturgeon. As discussed above, sturgeon are known to be susceptible to ship strikes, which can adversely affect their recovery and continued existence. Furthermore, according to NMFS’ Species Directory for Atlantic sturgeon, “[t]he risk of injury and mortality can be high in areas with high ship traffic, *including the Hudson*.”²⁷ Therefore, the increase in boat traffic attributable to the MARAD grant clearly meets the ESA’s low “may affect” threshold for triggering the ESA Section 7 consultation requirement.
- St. Louis area Container-on-Barge service: In 2020, MARAD awarded a \$1,268,800 grant to America’s Central Port District to purchase equipment necessary to support and expand the container on barge service in the St. Louis area of the Mississippi River (M-55). According to the FWS’ 2014 Revised Recovery Plan for Pallid Sturgeon, the species can be found “downstream from Gavins Point Dam to St. Louis, Missouri.”²⁸ Barges pose a significant threat to pallid sturgeon in the Mississippi River. The Recovery Plan acknowledges that threats to pallid sturgeon include vessel propellers, which “can entrain and harm Pallid Sturgeon,” though it notes that further analysis is necessary to fully understand the risk vessels pose to the species.²⁹ However, other research has documented the risk of entrainment to pallid sturgeon, including not only scientific articles,³⁰ but USGS studies—including one entitled “A Conceptual Life-History Model for Pallid and Shovelnose Sturgeon,” which states that human activities, including boating and entrainment, are contributing to the direct mortality of the species.³¹ The

²⁶ *Id.* at 96.

²⁷ Available at <https://www.fisheries.noaa.gov/species/atlantic-sturgeon#overview> (emphasis added).

²⁸ USFWS, Revised Recovery Plan for the Pallid Sturgeon at 3 (Jan. 2014). Available at http://www.pallidsturgeon.org/wp-content/uploads/2012/11/Pallid-Sturgeon-Recovery-Plan-First-Revision-signed-version-012914_3.pdf.

²⁹ *Id.* at 30.

³⁰ See e.g., Hoover, J. J., Boysen, K. A., Beard, J. A., and Smith, H. 2011. Assessing the risk of entrainment by cutterhead dredges to juvenile lake sturgeon (*Acipenser fulvescens*) and juvenile pallid sturgeon (*Scaphirhynchus albus*). *Journal of Applied Ichthyology*, 27: 369–375.

³¹ Wildhaber, M.L., et. al., 2007, A conceptual life-history model for pallid and shovelnose sturgeon: U.S. Geological Survey Circular 1315, 18 p. Available at https://pubs.usgs.gov/circ/2007/1315/pdf/circ_1315.pdf.

increase in boat traffic attributable to the MARAD grant therefore meets the ESA's "may affect" threshold for triggering the ESA Section 7 consultation requirement.

- Baton Rouge-New Orleans Shuttle: MARAD awarded a \$3,155,622 grant in 2018 and a \$1,040,000 grant in 2019 to SEACOR AMH (sponsored by the Port of New Orleans and the Port of Greater Baton Rouge, respectively) for the purchase of vessels, including barges and towboats to transport containers, for service on the Mississippi River (M-55). This project has applied to MARAD for additional funding under this year's round of AMHP grants. The 2014 Pallid Sturgeon Recovery Plan states that "the contemporary downstream extent of Pallid Sturgeon ends near New Orleans, Louisiana,"³² indicating that pallid sturgeon may be adversely affected by vessel traffic in the New Orleans area of the Mississippi River. As set forth above, NMFS has acknowledged that one of the threats to the recovery of the endangered pallid sturgeon is ship strikes and entrainment from vessels. Therefore, these MARAD grants meet the ESA's "may affect" threshold for triggering the ESA Section 7 consultation requirement.
- Barge Service in the Ports of Cincinnati, Northern Kentucky, and Beyond: In 2020, MARAD awarded \$545,136 to the Ports of Indiana to construct a new storage facility and support expansion of service between Ghent, KY and the Port of Indiana-Jeffersonville, IN on the Ohio River (M-70), and this project has applied to MARAD for additional funding under this year's round of AMHP grants. MARAD has noted that this project has "great potential to attract shippers to use the expanded service."³³ The affected stretch of the Ohio River contains ESA-listed freshwater mussels, including threatened rabbitsfoot and endangered pink mucket pearlymussel. When listing the rabbitsfoot as threatened, FWS noted that "[t]he habitats of freshwater mussels are vulnerable to water quality degradation and habitat modification from a number of activities associated with modern civilization."³⁴ Threats to the species include increased siltation, industrial effluents, heavy metals, and modification of stream channels.³⁵ FWS has recognized that siltation from construction projects along waterways, like the storage facility on the Ohio River MARAD funded, has severely affected freshwater mussels, including the pink mucket pearlymussel and rabbitsfoot.³⁶ Furthermore, the increase in vessel traffic attributable to the MARAD grant increases the potential for contaminants to be introduced into the Ohio River, including heavy metals and fuel/oil that can harm these listed mussels. Therefore, this MARAD grant meets the ESA's "may affect" threshold for triggering the ESA Section 7 consultation requirement.

³² Revised Recovery Plan for the Pallid Sturgeon at 3.

³³ See Marine Highway Project Descriptions at 30, *available at* <https://cms.marad.dot.gov/sites/marad.dot.gov/files/202105/AMH%20Project%20Designations%20Jan%202021.pdf>.

³⁴ 78 Fed. Reg. 57076, 57081 (Sep. 17, 2013).

³⁵ *Id.*

³⁶ See e.g., FWS Recovery Plan for Pink Mucket Pearlymussel (1985), *available at* https://ecos.fws.gov/docs/recovery_plan/pink%20mucket%20rp.pdf.

On May 24, 2021, MARAD announced a new round of funding, with nearly \$11 million available for AMHP grants. Applicants for the 2021 AMHP MARAD grants include projects (besides those noted above) that “may affect” listed species, such as:

- Expanded Container-on-Barge Service in North Carolina: This project seeks to expand barge services between Edenton, NC, and locations within the Port of Virginia.³⁷ Container on barge services along the M-95 and M-65 marine highway routes pose a significant risk to Atlantic sturgeon in the Roanoke River and James River. As set forth above, sturgeon are known to be adversely affected by boat traffic. Therefore, increasing barge services in this area certainly “may affect” this listed species, requiring ESA consultation.
- Chambers County Houston Container on Barge Expansion Service: This project would expand cargo-by-barge services in the Houston Ship Channel, between Chambers County and the Port of Houston, using the M-146 and M-10 marine highway routes.³⁸ This would increase vessel traffic in areas that are designated critical habitat for loggerhead sea turtles. The 2009 Status Review for this species notes that “Loggerhead sea turtles may be killed or injured from collisions with boat hulls and propellers,” and that such collisions are a common threat, concluding that “[a]s the number of vessels increases, in concert with increased coastal development, especially in nearshore waters, propeller and vessel collision injuries are also expected to rise.”³⁹ Expanding barge services in this area certainly “may affect” listed sea turtles, requiring ESA consultation.
- Fernandina Express M-95 Container on Barge Service: This container on barge service, out of the Port of Fernandina in Florida, is intended to “service all coastal seaports located along the Atlantic seaboard,” including the port of Savannah, which is termed a “mega-hub” since it is a major connection point for various vessel traffic.⁴⁰ This project implicates listed species along the Atlantic coast, including critical habitat for endangered North Atlantic right whales. NOAA acknowledges on its “species directory” website that “[v]essel strikes are a major threat to right whales. Their habitat and migration routes are close to major ports along the Atlantic coastline and often overlap with shipping lanes, making right whales vulnerable to collisions with vessels.”⁴¹ Indeed, the Recovery Plan for the North Atlantic right whale states that “[t]he greatest known current cause of right whale mortality in the western North Atlantic is collision

³⁷ See Marine Highway Project Descriptions at 36.

³⁸ *Id.* at 8.

³⁹ Conant, T.A., et. al. 2009. Loggerhead sea turtle (*Caretta caretta*) 2009 status review under the U.S. Endangered Species Act. Report of the Loggerhead Biological Review Team to the National Marine Fisheries Service, August 2009. 222 pages. Available at <https://repository.library.noaa.gov/view/noaa/16204>.

⁴⁰ See Marine Highway Project Descriptions at 14.

⁴¹ See <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#conservation-management>.

with ships.”⁴² Therefore, expanding barge services along the Atlantic seaboard certainly “may affect” this protected species.

- Mid Atlantic Barge Service Project: This project would expand barge services between Hampton Roads, VA, Baltimore, MD, and Philadelphia, PA, in areas that are critical habitat for Atlantic sturgeon. As set forth above, sturgeon are known to be adversely affected by boat traffic; therefore, increasing barge services in this area certainly “may affect” this listed species, requiring ESA consultation.

In addition, MARAD’s Marine Highway Program is contributing to the global climate crisis by subsidizing the use of marine highway routes through grants that expand service for fossil fuel transport. MARAD has recognized that “[t]ransporting freight by water has traditionally been used for the movement of bulk commodities such as *coal*, *petroleum*, grain, and lumber,” as well as container cargo.⁴³ MARAD’s grants therefore are used not only to expand vessel traffic that may harm listed species through collisions, entrainment, and spills and leaks of dangerous chemicals as discussed above, but they allow for increased transport of fossil fuels—including dirty coal—that are contributing to the decline of imperiled wildlife by altering the ecosystems on which they depend.⁴⁴ While MARAD suggests that the AMHP *may* reduce greenhouse gas emissions per ton-mile of freight (by using large vessels rather than trucks), it ignores that MARAD is funding the expansion of a transport system used for fossil fuels, thereby increasing greenhouse gasses in our atmosphere that have been shown to harm listed species. This must be fully considered in a programmatic ESA Section 7 consultation with the Services to ensure that MARAD’s Marine Highway Program complies with the ESA, and incorporates sufficient data keeping, monitoring, and corrective actions to mitigate impacts and prevent jeopardy.

On information and belief, MARAD has not initiated ESA Section 7 consultation on any of these or other such projects funded through the Marine Highway Program that affect listed species, nor has the agency undertaken programmatic consultation to ensure that the AMHP, as a whole, will not jeopardize the continued existence of listed species or adversely modify designated critical habitat, in violation of the ESA.

⁴² National Marine Fisheries Service. 2005. Recovery Plan for the North Atlantic Right Whale (*Eubalaena glacialis*). National Marine Fisheries Service, Silver Spring, MD. Available at <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale#conservation-management>.

⁴³ 73 Fed. Reg. 59530, 59531 (Oct. 9, 2008) (emphasis added).

⁴⁴ See e.g. *Colo. River Cutthroat Trout v. Salazar*, 898 F. Supp. 2d 191, 207 (D.D.C. 2012) (“As scientific assessments increasingly incorporate in-depth analyses of climate change effects, explicit consideration of climate change-related threats may become a necessary component of the status review.”); NMFS, Revised Guidance for Treatment of Climate Change in NMFS Endangered Species Act Decisions (2016) (“[C]limate change has become a key lens through which resource management decisions must be evaluated and addressed.”). See also James Ming Chen, *The Fragile Menagerie: Biodiversity Loss, Climate Change, and the Law*, 93 IND. L.J. 303, 304-310 (2018).

3. Violations

a. MARAD's failure to initiate and complete programmatic consultation on the America's Marine Highway Program

MARAD itself has acknowledged that it has “one major goal: expand the use of America’s navigable waters.”⁴⁵ It achieves this goal through the America’s Marine Highway Program, which promotes and funds the expansion of the marine highway system. There can be no doubt that this national-scale program intended to increase the utilization of domestic freight and passenger transportation on Marine Highway Routes “may affect” listed species that rely on those waters, including through vessel collisions, fish strandings, spills of fuel or chemicals, and expanded transport of fossil fuels, as discussed above.

MARAD has announced that nearly \$11 million has been made available for additional AMHP grants in 2021. Since grants awarded through the AMHP “may affect” listed species across the country, MARAD must ensure—through consultation undertaken at the “earliest possible time”⁴⁶—that the program will not jeopardize such species or adversely modify critical habitat by engaging in programmatic ESA Section 7 consultation with the Services.⁴⁷

Project-specific consultations, while still required, are insufficient to ensure that the AMHP “as a whole” will not jeopardize species.⁴⁸ 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 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. *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 Env’tl. 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 a national program that includes multiple similar actions in particular geographic areas (i.e., funding projects on designated marine highways), programmatic consultation is necessary to establish standards, guidelines, or governing criteria to avoid, minimize, or offset the effects of

⁴⁵ *See* Program Overview, <https://cms.marad.dot.gov/grants/marine-highways/marine-highway>.

⁴⁶ 50 C.F.R. § 402.14.

⁴⁷ Undertaking programmatic ESA consultation would be consistent with MARAD’s programmatic approach to NEPA review. *See* 79 Fed. Reg. 40838 (July 14, 2014) (discussing preparation of a Programmatic Environmental Assessment on the AMHP).

⁴⁸ *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”).

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.⁴⁹

b. MARAD's failure to initiate and complete project-specific consultation on actions funded by the Marine Highway program

MARAD has a clear duty under the ESA to ensure that its actions—which includes activities it funds through grants—are not likely to jeopardize listed species or result in the adverse modification of critical habitat.⁵⁰ To comply with this duty, the Services' regulations require MARAD to consult with the Services at the “earliest possible time” for any actions funded by the agency that “may affect” listed species.⁵¹

As set forth above, the Center is aware of several grants that MARAD has awarded (or is currently considering) for projects that are likely to adversely affect listed species, yet the agency has failed to undertake the required ESA Section 7 consultation to ensure that listed species and critical habitat will not be jeopardized by these actions. The failure to consult on these and any other such Marine Highway Program projects that “may affect” listed species—including projects that have not been made public or are currently being considered for funding—is a clear violation of the ESA.

4. Conclusion

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

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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⁴⁹ 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).

⁵⁰ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

⁵¹ 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14.