

Attachment List for State of Alaska's Motion in the District Court for a Stay Pending Appeal of the Partial Vacatur of the Incidental Take Statement:

1. State of Alaska's motion for a stay of partial vacatur pending appeal (Doc. 172)
2. Alaska Trollers Association's response joining motion for a stay pending appeal (Doc. 173)
3. NMFS's response in support of the motion for a stay pending appeal (Doc. 181) and declaration of NMFS Alaska Region Sustainable Fisheries Assistant Regional Administrator Gretchen Harrington (Doc. 184)
4. Plaintiff WFC's opposition to the motion for a stay pending appeal (Doc. 179)
5. District court order denying State of Alaska's motion for a stay pending appeal (Doc. 193)

Honorable Richard A. Jones
Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, in his official capacity as
Acting Regional Administrator for the National
Marine Fisheries Service, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

CASE NO: 2:20-cv-00417-RAJ-MLP

**MOTION FOR PARTIAL STAY
PENDING APPEAL**

NOTE ON MOTION CALENDAR:
May 26, 2023

The Court should stay pending appeal the portion of its May 2, 2023 Order that vacates the 2019 SEAK BiOp’s incidental take statement and effectively closes the upcoming summer and winter seasons of the Southeast Alaska Chinook salmon troll fishery. Given the immediate and irreparable harm to the troll fleet and Southeast Alaskan communities if the upcoming summer and winter seasons are closed, the Court should grant this stay to give Alaska an

1 opportunity to seek appellate review.

2 Along with this motion, Alaska has filed a notice of appeal. Alaska respectfully requests
3 that the Court rule on this Motion no later than **May 26, 2023**, because, absent relief, Alaska will
4 need to seek a stay pending appeal from the court of appeals and will need relief from the court
5 of appeals by June 23, 2023, in advance of the July 1, 2023 opening of the fishery.

6 The State has conferred with counsel for the other parties regarding the stay pending
7 appeal. Plaintiff opposes, the Federal Defendants take no position, and the Alaska Trollers
8 Association support the motion.

9 STANDARD

10 Courts apply a standard like that used to review a motion for a preliminary injunction
11 when considering a request for a stay pending appeal. *Lair v. Bullock*, 697 F.3d 1200, 1202, 1203
12 n.2 (9th Cir. 2012). The relevant factors are:

13 (1) whether the stay applicant has made a strong showing that he is likely to succeed
14 on the merits; (2) whether the applicant will be irreparably injured absent a stay;
15 (3) whether issuance of the stay will substantially injure the other parties interested
in the proceeding; and (4) where the public interest lies.

16 *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418,
17 434 (2009)). Alaska, as the party requesting the stay, bears the burden of showing that the
18 circumstances warrant such a request. *Id.*

19 ARGUMENT

20 Alaska can satisfy each of the four factors warranting a stay.

21 *First*, Alaska is likely to prevail on its appeal. The Court erred by not giving adequate
22 consideration to the consequences of vacating part of the incidental take statement, not only on
23 the trolling fleet, but also on the communities that it supports. In adopting the report and
24 recommendation, the Court erred by focusing on the potential environmental harm while failing
25 to account for the certain economic, cultural, and social harm such a closure will cause to the
26 troll fleet and the Southeast Alaskan communities that are dependent on these fisheries. Dkt. 144
27 at 28. The Ninth Circuit has said that “[a] flawed rule need not be vacated.” *Cal. Comm Against*

1 *Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). “[W]hen equity demands, the regulation can
2 be left in place while the agency follows the necessary procedures’ to correct its action.” *Id.*
3 (quoting *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)). And equity
4 requires courts to consider the “delay and trouble vacatur would cause,” including the
5 “economically disastrous” consequences. *Id.* at 994; *see also Am. Water Works Ass’n v. EPA*, 40
6 F.3d 1266, 1273 (D.C. Cir. 1994) (stating that the court may also consider “disrupt[ion] to the
7 [affected] industries”).

8 *Second and third*, the equities here sharply tip in Alaska’s favor. Based on the data
9 offered by Plaintiff, the Court has no way to determine how much, if any, additional prey will
10 reach the SRKW population if the fishery is closed. Dkt. 144 at 29 (recognizing that “there is
11 uncertainty as to how much prey would ultimately reach the SRKW”). Moreover, Plaintiff
12 admits that this additional increase in prey will not immediately impact the population.
13 According to Dr. Lacy, if the fishery is closed, it is *possible* that the SRKW population will see
14 an increase of 4.8% in Chinook availability and that this would “allow the population to stabilize
15 — that is, the projected *long-term* mean population growth rate would be 0.00%.” Dkt. 127-2 ¶¶
16 8-9 (emphasis added). Dr. Lacy gives no indication what will happen to the whale population if
17 the 2023 summer and winter seasons proceed while NFMS considers a new BiOp on remand.

18 Not only is Plaintiff’s data speculative and uncertain, but it is also contested. The State
19 asked for an evidentiary hearing on the causes that are harming the SRKW, which the magistrate
20 denied. Dkt. 141. And to the extent the Court accepts the proposition that prey diminution from
21 the SEAK troll fishery is one of the many causes of the SRKW’s decline, the mitigation program
22 has increased prey to offset that diminution.

23 The Court failed to weigh the mitigating benefits of the prey increase program in its
24 analysis of what remedy is appropriate, even though the Court recognized that the program has
25 been “providing prey the past three years.” Dkt. 144 at 26-30, 31. The Court concluded there was
26 an ESA violation because whether the mitigation plan would be funded and whether it would
27 work was “uncertain and indefinite.” *Id.* at 31. But when considering the remedy for this
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1 violation, the Court failed to consider that “the mitigation is no longer ‘uncertain and
2 indefinite.’” Dkt. 162 at 6. Moreover, as outlined by Alaska’s congressional delegation, the
3 continuation of the Southeast Alaska salmon troll fishery is “vital to the success of the [Pacific
4 Salmon] Treaty’s negotiated approach to management.” *Id.* at 2. As the delegation explained,
5 “the Treaty controls harvest limits for SEAK fisheries and [] Congress has reviewed and still
6 continues to fully fund the prey increase program.” *Id.* at 6. The Court’s decision to vacate
7 “undermine[s] Congress’s complementary objectives under the Treaty, which distinguishes this
8 case from any other case on which the R&R relies.” *Id.* at 8.

9 In comparison to the uncertain harms to the SRKW population from closing the SEAK
10 troll fishery, harms for which Congress has already independently mitigated in order to keep the
11 SEAK troll fishery open, if the summer and winter troll fishery seasons are closed, this will have
12 a direct, immediate, and irreparable impact on the economic, cultural, and social fabric of
13 Southeast Alaska. “On average, Chinook salmon harvested in winter and summer fisheries alone
14 compromise over a third (\$11.7 million), and in some years close to half, of the overall exvessel
15 value of the troll fishery.” Dkt. 136 ¶ 3. A loss of this value would have devastating impacts on
16 the many small communities in Southeast Alaska that rely on the troll fishery to support their
17 economy, communities such as Craig, Elfin Cove, Meyers Chuck, Pelican, Point Baker, Port
18 Alexander, Tenakee and Yakutat. *Id.* ¶ 4.

19 *Fourth*, a stay of the Court’s vacatur order would also be in the public interest. The Ninth
20 Circuit has previously recognized the broad harm a reduction in harvest causes to communities.
21 Not only does it limit a community member’s ability to earn a living by fishing, but it also causes
22 “cultural and social harm” to the communities as a whole. *See United States v. Washington*, 853
23 F.3d 946, 961 (9th Cir. 2017). Alaska outlined the harm these closures would cause in the
24 Second Declaration of Commissioner Vincent-Lang:

25 Processing facilities may have to close resulting in more job loss. Families may
26 have to relocate to make a living. Less families means less children of school age.
27 In Alaska, when school enrollment dips below a threshold of 10 students, the
28 schools lose state funding typically resulting in closure.

1 Dkt. 136 ¶ 4. This may seem like an unreasonable concern for a Court sitting in Seattle,
2 Washington, but for communities like Craig (population 1,036), Elfin Cove (population 24), and
3 Port Alexander (population 78) this is a real and substantial concern.¹

4 A stay pending appeal is therefore in the public's interest. *See Ctr. For Biological*
5 *Diversity v. Raimondo*, No. 18-cv-112-JEB, 2022 WL 17039193, at *2 (D.D.C. Nov. 17, 2022)
6 (holding vacatur of BiOp in abeyance to "allow the federal lobster fishery some stability to keep
7 operating, while all stakeholders continue their shared work of implementing corrective
8 measures to secure the future of the right whale in the long term").

9 10 CONCLUSION

11 For these reasons, and the other reasons provided in Alaska's briefing on this issue, this
12 Court should grant a stay pending appeal.

13 Dated: May 8, 2023

14 NOSSAMAN LLP

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27 ¹ See U.S. Census Bureau, available at <https://data.census.gov/>.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Brian Ferrasci-O'Malley
Brian Ferrasci-O'Malley

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Honorable Richard A. Jones
Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, in his official capacity as
Acting Regional Administrator for the National
Marine Fisheries Service, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

CASE NO: 2:20-cv-00417-RAJ-MLP

**[PROPOSED] ORDER GRANTING
MOTION FOR PARTIAL STAY
PENDING APPEAL**

THIS MATTER having come before the Court on Defendant-Intervenor State of
Alaska’s Motion for Partial Stay Pending Appeal, and the Court having considered all relevant
pleadings on file with the Court, the Defendant-Intervenor’s Motion, the response pleadings,
Defendant-Intervenor’s reply, and the Court being fully advised of all relevant matters, it is
hereby:

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ORDERED that Defendant-Intervenor State of Alaska’s Motion is GRANTED.

Dated this ____ day of _____, 2023

The Honorable Richard A. Jones
United States District Judge

1 Presented by:

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Brian Ferrasci-O'Malley
Brian Ferrasci-O'Malley

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HONORABLE RICHARD A. JONES
HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, *et al.*,

Defendants.

And

ALASKA TROLLERS ASSOCIATION,
and STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ-MLP

DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION’S JOINDER IN
DEFENDANT-INTERVENOR STATE OF
ALASKA’S MOTION FOR PARTIAL STAY
PENDING APPEAL

DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION’S JOINDER IN
DEFENDANT-INTERVENOR STATE OF
ALASKA’S MOTION FOR PARTIAL STAY
PENDING APPEAL -- 1

NORTHWEST RESOURCE LAW PLLC
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1 Defendant-Intervenor Alaska Trollers Association (the “ATA”) hereby joins in
2 Defendant-Intervenor State of Alaska’s Motion for Partial Stay Pending Appeal (the “Motion,”
3 ECF No. 172). The ATA adopts and incorporates by reference the arguments presented therein.
4 Further, the ATA reserves the right to reply in support of the Motion, pursuant to the existing
5 briefing schedule, as the ATA deems necessary.
6

7 DATED this 9th day of May, 2023.
8

9 NORTHWEST RESOURCE LAW PLLC

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DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION’S JOINDER IN
DEFENDANT-INTERVENOR STATE OF
ALASKA’S MOTION FOR PARTIAL STAY
PENDING APPEAL -- 2

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Western District of Washington using the CM/ECF system. Participants who are registered with CM/ECF will be served by the CM/ECF system.

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DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION'S JOINDER IN
DEFENDANT-INTERVENOR STATE OF
ALASKA'S MOTION FOR PARTIAL STAY
PENDING APPEAL -- 3

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I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge.

DATED May 9, 2023, in Seattle, Washington.

/s/ Douglas J. Steding
 Douglas J. Steding, Attorney for Defendant-
 Intervenor Alaska Trollers Association

4829-5255-8303, v. 1

HONORABLE RICHARD A. JONES
HONORABLE MICHELLE L. PETERSON

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**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

WILD FISH CONSERVANCY,

Plaintiff,

v.

JENNIFER QUAN, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION,

Defendant-Intervenor,

and

STATE OF ALASKA,

Defendant-Intervenor.

Case No. 2:20-cv-417-RAJ-MLP

DEFENDANTS' RESPONSE TO
DEFENDANT-INTERVENOR'S
MOTION FOR PARTIAL STAY
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ESA	Endangered Species Act
ITS	Incidental Take Statement
NMFS	National Marine Fisheries Service
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whales

INTRODUCTION

Defendant-Intervenor State of Alaska moved for a partial stay pending appeal. Dkt. # 172 (Mot.). Specifically, the State of Alaska requested that the Court stay the decision to vacate in large part the incidental take statement (ITS) that applies to the Chinook commercial troll fishery in Southeast Alaska (SEAK). *Id.* at 1. Defendant-Intervenor Alaska Trollers Association joined that motion. Dkt. # 173. Defendants file this response in support of the motion.

STANDARD OF REVIEW

When deciding whether to issue a stay, courts consider the four factors established in *Nken v. Holder*, 129 S. Ct. 1749 (2009): “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019) (citations omitted). In applying this four-factor test, the first two “are the most critical.” *Id.* (citation omitted). “The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party.” *Nken*, 129 S. Ct. at 1753.

ARGUMENT

A stay is warranted and appropriate here because success on the merits of the State of Alaska’s appeal of the district court’s remedy order is likely, irreparable harm will result absent a stay pending appeal, and the public interest favors a stay. The Ninth Circuit is likely to find that the Court abused its discretion when it vacated the portion of the ITS as it applies to the winter and summer seasons of the Chinook commercial troll fishery. As an initial matter, the Court erroneously assumed that it should presumptively vacate an agency’s action when that action violates the Administrative Procedure Act. Vacatur remains an equitable remedy and therefore should not be granted unless the relevant equitable considerations tip in favor of relief. *See Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Cal. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam). To the extent the

1 court put a thumb on the scale in favor of vacatur, rather than fairly weighing the specific facts
2 before it, that was error.

3 And when balancing the seriousness of the agency's errors with the disruptive
4 consequences of vacatur, the Court inappropriately elevated the small and largely speculative
5 impacts to Southern Resident Killer Whales (SRKW) resulting from operation of the
6 commercial Chinook troll fishery over the significant and very real harm that will occur in
7 SEAK fishing communities. In reaching its decision on vacatur of the ITS, the Court stated that
8 "no party here suggests that there would not be at least some benefit to the SRKW from
9 additional prey availability." Dkt. # 144 at 34. But the rub lies in the scope of "some benefit."
10 The National Marine Fisheries Service (NMFS) estimated that *all* the SEAK fisheries would
11 reduce SRKW prey availability by an average of 0.5% in coastal waters during the winter and
12 by an average of 1.8% in inland waters during the summer, Fourth Barre Decl. ¶ 11, which
13 means that the reductions in prey expected from a part of those fisheries—the winter and
14 summer seasons of commercial troll fishing—would necessarily be lower. Thus, the benefit of
15 effectively closing those fisheries would be even smaller.

16 The Court compounded this mismeasurement because it did not consider the actual
17 benefits flowing from the prey increase program, which its decision left in place. The record
18 evidence shows the prey increase program has been funded and implemented since 2020 and is
19 more than compensating for the summer and winter Chinook fishery. *Id.* ¶¶ 7, 15. More
20 specifically, the program has already produced fish that will serve as additional prey for
21 SRKW as adults in 2023, 2024, and beyond. Fourth Purcell Decl. Att. 1. The years 2023 and
22 2024 are particularly important because NMFS is on track to complete its remand no later than
23 November 2024. Dkt. # 150 ¶ 5. This means that prey from the program will be available to
24 SRKW during the pendency of this remand. The Court acknowledged that "a certain and
25 definite increase in prey is available to the SRKW," Dkt. # 144 at 31, but erroneously did not
26 take this information into account when evaluating the disruptive consequences of vacating the
27 ITS.

1 NMFS's implementation of the prey increase program also means that with the passage
2 of time, one of the primary errors the Court identified (that NMFS relied on mitigation that was
3 too uncertain) has been effectively remedied. NMFS has also been ensuring that each hatchery
4 program receiving funds under the program is covered by site-specific analyses under both the
5 Endangered Species Act (ESA) and the National Environmental Policy Act, which means that
6 the agency has been considering the impacts of hatchery fish on wild fish. Fourth Purcell Decl.
7 ¶¶ 9-11. This analysis suggests that NMFS will be able to offer better reasoning on remand in
8 support of its decision in the 2019 Biological Opinion and adopt the same decision.

9 The agency's relatively minor procedural deficiencies and the minimal benefit to
10 SRKW pale in comparison to the impacts of closing the lifeblood of the small Alaska fishing
11 communities and the attendant harm. In assessing the disruptive consequences, the Court
12 discounted the economic impacts of vacatur, which NMFS estimates will be approximately \$29
13 million *per year*, if those engaged in commercial troll fishing in the winter and summer do not
14 fish in the absence of the "take" coverage provided by the ITS.¹ Harrington Decl. ¶ 40. In
15 *California Communities Against Toxics*, the court decided not to vacate in part because
16 stopping construction of a "much needed power plant" employing 350 workers would be
17 "economically disastrous." 688 F.3d at 993-94. Here, too, the impacts of vacating the ITS
18 would be economically disastrous. There are over 1,000 active permit holders who participate
19 in the troll fisheries annually, and many of the participants are small-scale participants who
20 rely heavily on income from the troll fisheries. Harrington Decl. ¶¶ 32, 41. The troll fisheries
21 support over 23 SEAK communities, most of which are small and isolated, some of which are
22 Alaska Native communities, and some of which are heavily dependent on the commercial troll
23 fishery. *Id.* ¶ 41.

24 The economic impact includes ex-vessel prices, which represents the value of the
25 commercial landings of fish. *Id.* ¶ 33. NMFS has estimated that the average annual ex-vessel
26 value of the Chinook salmon fishery is \$11,462,827.60 and represents, on average, 10.91% of
27

28 ¹ The State of Alaska has indicated that "[v]acatur of the ITS would result in closure of the winter and summer
Chinook troll fishery." Dkt. # 134 at 7; *see* Dkt. # 94 at 24.

1 the total annual ex-vessel value of all SEAK salmon fisheries. *Id.* ¶¶ 34, 35. There are
2 additional economic factors, such as skipper and crew income, and the secondary spending of
3 that income. *Id.* ¶ 36. These economic impacts will affect individual people and the rural
4 fishing communities that are dependent on the troll fleet, which in SEAK harvests 67% of all
5 Chinook salmon, the highest value salmon. *Id.* ¶¶ 26, 32.

6 For the same reasons that this Court abused its discretion in concluding that vacatur
7 would not be overly disruptive, the State of Alaska can demonstrate that irreparable harm will
8 result absent a stay and that the public interest weighs in favor of a stay pending appeal. As
9 explained above, there is no indication that economic disruptions to those engaged in SEAK
10 fishing could be repaired, and the impacts to SRKW prey abundance will be minimal. A stay is
11 also in the public interest because, without it, the complex regulatory framework for managing
12 fisheries and broader efforts to promote the recovery of ESA-listed species will be frustrated.
13 Within that framework, NMFS works with its regional partners, including the States of
14 Washington, Oregon, Alaska, and Tribes with treaty fishing rights, to manage fisheries and
15 mitigate the effects of the fisheries and to establish a suite of restoration and recovery actions
16 that benefit species such as endangered SRKW and threatened Chinook salmon. Vacating the
17 ITS would interfere with this regulatory framework and would not engender public support for
18 SRKW recovery efforts. NMFS, with its regional partners, has worked very hard to promote
19 actions that will recover SRKW, and this remedy will frustrate those efforts by creating tension
20 between SRKW and fishing communities. Pitting an endangered species against unnecessary
21 economic dislocation harms NMFS, and more importantly, SRKW.

22 CONCLUSION

23 Defendants agree with the State of Alaska that a stay pending appeal is warranted
24 because the Court gave undue weight to any conservation benefits from the cessation of the
25 commercial troll Chinook salmon fishery in SEAK, ignored the increased prey now available
26 to SRKW through the prey increase program, and underestimated the severe economic
27 consequences of vacatur.

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Dated: May 22, 2023

Respectfully submitted,

TODD KIM
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S. JAY GOVINDAN
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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on May 22, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Washington by using the CM/ECF system, which will serve a copy of the same on the counsel of record.

I hereby certify that this response contains 1,488 words, in compliance with the Local Civil Rules.

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Attorney for Defendants

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON
3 AT SEATTLE

4	_____)	
5)	
6	WILD FISH CONSERVANCY,)	Case No. 2:20-cv-417-RAJ-MLP
7	Plaintiff,)	DECLARATION OF
8	v.)	GRETCHEN HARRINGTON
9	JENNIFER QUAN, <i>et al.</i> ,)	
10	Defendants,)	
11	and)	
12	ALASKA TROLLERS ASSOCIATION,)	
13	Defendant-Intervenor,)	
14	and)	
15	STATE OF ALASKA,)	
16	Defendant-Intervenor.)	
17	_____)	

19
20 I, Gretchen Harrington, declare:

21
22 1. I am the Assistant Regional Administrator of the Sustainable Fisheries Division,
23 National Marine Fisheries Service (“NMFS”) Alaska Region, which is an operating unit
24 within the National Oceanic and Atmospheric Administration (“NOAA”), a component of the
25 United States Department of Commerce (“DOC”). I have occupied this position since
26 December 5, 2022. My duties generally include managing the Sustainable Fisheries Division,
27
28

1 providing technical and policy advice, and assisting in the preparation and review of
2 regulatory documents. Prior to my current position, I served as the Assistant Regional
3 Administrator for the Habitat Conservation Division, the National Environmental Policy Act
4 Coordinator for Alaska Region, and the Fishery Management Plan Coordinator, including the
5 Salmon Fishery Management Plan, for the Sustainable Fisheries Division. I have worked for
6 NMFS Alaska Region since 1998, primarily in the Sustainable Fisheries Division, where I
7 worked on developing and implementing the regulatory programs covering federal fisheries in
8 Alaska.
9

10
11 2. As part of my official duties, I assist the Alaska Region in carrying out duties
12 delegated by the Secretary of Commerce, Gina M. Raimondo (“Secretary”). This includes
13 carrying out the Secretary’s responsibilities for complying with the Magnuson-Stevens
14 Fishery Conservation and Management Act (“Magnuson-Stevens Act”), as that statute applies
15 to the implementation of fishery management plans (“FMPs”) and FMP amendments for
16 fisheries in the exclusive economic zone (“EEZ”) off Alaska. I assist with coordinating the
17 development and implementation of policies governing the management of Federal fisheries
18 off Alaska, including the salmon fisheries off Alaska under the “Fishery Management Plan for
19 the Salmon Fisheries in the EEZ Off Alaska” (“Salmon FMP”). I also serve on the North
20 Pacific Fishery Management Council (“Council”) as the voting alternate for NMFS Alaska
21 Region. I am familiar with the Salmon FMP, its amendments, and its implementing
22 regulations.
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1 3. I am familiar with the issues in this litigation, and I have read nearly all of the parties'
2 briefing on their motions for summary judgment and their motions for a post-judgment stay
3 and injunction.

4
5 4. In the following paragraphs, I affirm and update the statements that my predecessor,
6 Josh Keaton, had provided, including: (1) a brief history of the Salmon FMP; (2) an
7 explanation of the Salmon FMP's delegation of management of fishing in federal waters (the
8 EEZ off Southeast Alaska) to the State of Alaska; (3) an overview of the Southeast Alaska
9 Chinook salmon commercial troll fishery; and (4) an overview of the economic value of the
10 Southeast Alaska Chinook salmon commercial troll fishery.
11

12 **Brief History of the Salmon FMP**

13
14 5. The State of Alaska has managed Southeast Alaska salmon fisheries inside and outside
15 of state waters since statehood in 1959.
16

17 6. In 1976, Congress passed the Magnuson-Stevens Act, which established federal
18 fishery management authority over the exclusive economic zone, 16 U.S.C. § 1811, which in
19 Alaska generally includes waters from 3 to 200 nautical miles offshore. The State of Alaska
20 manages fisheries that occur in waters up to 3 nautical miles offshore.
21

22 7. The Secretary of Commerce approved and implemented the original Salmon FMP in
23 1979. The 1979 Salmon FMP established the Council's and NMFS's authority over the
24 commercial and sport salmon fisheries occurring in the EEZ, or federal waters, off Alaska and
25 divided the EEZ into two areas – an East Area and a West Area – at the longitude of Cape
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1 Suckling. 50 C.F.R. § 679.2 (defining the East Area as the area of the EEZ in the Gulf of
2 Alaska east of the longitude of Cape Suckling (143° 53.6' W)).

3
4 8. In the East Area, the 1979 Salmon FMP authorized commercial fishing for salmon
5 with hand troll or power troll gear and prohibited commercial fishing for salmon with any
6 other gear type. The FMP also authorized sport fishing for salmon in the East Area. The
7 1979 Salmon FMP's primary function was to limit entry in the commercial troll fishery; the
8 Council intended the rest of the Salmon FMP management measures for the sport fishery and
9 the commercial troll fishery in the East Area to be complementary with State of Alaska
10 regulations for the salmon fisheries in adjacent state waters. The 1979 Salmon FMP adopted
11 the State of Alaska's harvest restrictions and management measures.
12

13
14 9. In 1990, the Council comprehensively revised the Salmon FMP with Amendment 3.
15 In recommending and approving Amendment 3, the Council and NMFS reaffirmed that
16 existing and future salmon fisheries occurring in the EEZ require varying degrees of Federal
17 management and oversight. Under Amendment 3, the 1990 Salmon FMP continued to
18 authorize sport fishing and commercial hand troll and power troll gear fishing in the East Area
19 and to limit entry in the commercial troll fishery. However, in order to address the
20 inefficiencies and management delays inherent with the federal system duplicating the State
21 of Alaska's harvest restrictions and management measures for state waters, Amendment 3
22 delegated management authority to the State of Alaska to regulate the sport and commercial
23 troll fisheries in the East Area.
24

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26
27 10. Pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1856(a)(3)(B), NMFS may
28 delegate management of a fishery in the EEZ to a state. In making this delegation, the

1 Salmon FMP was amended to include a chapter governing Council and NMFS oversight of
2 the State's exercise of delegated authority.

3
4 11. In 2012, NMFS approved Amendment 12 to the Salmon FMP. With regard to the
5 East Area, Amendment 12 updated the Salmon FMP to include several provisions that
6 addressed new requirements arising from revisions to the Magnuson-Stevens Act; these
7 provisions included annual catch limits and accountability measures. Amendment 12 also
8 reaffirmed the existing delegation of management authority for the sport and commercial troll
9 salmon fisheries in the East Area to the State of Alaska, as well as the prohibition on net
10 fishing in the East Area.¹

11
12
13 **Delegation of Management Authority in the East Area to the State of Alaska**

14
15 12. The Salmon FMP sets forth the Council's management policy and objectives for the
16 salmon fisheries in the EEZ off Alaska (Chapter 3 of the Salmon FMP). The Salmon FMP
17 establishes the management areas and the salmon fisheries to be managed by the FMP
18 (Chapter 2 of the Salmon FMP). The Salmon FMP also specifies the commercial gear types
19 authorized (Chapter 5), the status determination criteria applicable to salmon fisheries in the
20 East Area (Section 6.1), and identifies and describes essential fish habitat and habitat areas of
21 particular concern for the salmon stocks managed by the FMP (Chapter 7). However, the
22

23
24 ¹ Since Amendment 12, the Council and NMFS have amended the FMP three times. The 2018 FMP amendment
25 (Amendment 13 to the Salmon FMP) updated the description and identification of essential fish habitat for salmon
26 species, *see* 83 Fed. Reg. 31,340 (July 5, 2018). The 2021 FMP amendment (Amendment 15 to the Salmon FMP)
27 updated the FMP to clearly and accurately explain bycatch reporting consistent with requirements to establish
28 standardized bycatch reporting methodology in FMPs, *see* 86 Fed. Reg. 51,833 (Sept. 17, 2021). Another 2021
FMP amendment (Amendment 14 to the Salmon FMP) addressed management of salmon fishing in Cook Inlet, in
the West Area, *see* 86 Fed. Reg. 60,568 (Nov. 3, 2021). There is ongoing litigation over management in the West
Area, but that does not implicate the provisions of the FMP that apply to the East Area. The 2018 and 2021 FMP
amendments do not alter the Council's and NMFS's delegation of management of the commercial troll and sport
fisheries in the East Area to the State of Alaska.

1 Salmon FMP delegates all other management and regulation of the commercial troll and sport
2 salmon fisheries in the East Area to the State of Alaska pursuant to 16 U.S.C. § 1856(a)(3)(B)
3 of the Magnuson-Stevens Act.

4
5 13. Chapter 4 of the Salmon FMP describes the roles of the various agencies in
6 implementing the FMP. Section 4.3.2 describes the role of the Alaska Department of Fish
7 and Game (“ADF&G”). Under the Salmon FMP, the Council and NMFS delegated
8 regulation of the commercial troll and sport salmon fisheries in the East Area to the State of
9 Alaska. In general, these fisheries are controlled by State of Alaska regulations prescribing
10 limits on harvests, fishing periods and areas, types and amounts of fishing gear, commercial
11 fishing effort, minimum length for Chinook salmon, and reporting requirements. State
12 regulations apply to all fishing vessels participating in these fisheries regardless of whether
13 the vessel is registered under the laws of the State of Alaska.

14
15
16 14. ADF&G manages the fisheries during the fishing season (e.g., inseason) and issues
17 emergency regulations to achieve conservation objectives and to implement allocation
18 policies established by the Alaska Board of Fisheries. ADF&G also monitors the fisheries,
19 collects data on the stocks and the performance of the fisheries, and provides annual reports
20 on stocks and fisheries for each of the State of Alaska’s management areas.

21
22
23 15. Although the Salmon FMP delegates to the State of Alaska much of the day-to-day
24 management of the sport and commercial troll salmon fisheries occurring in the East Area,
25 State of Alaska management measures applicable to the sport and commercial troll salmon
26 fisheries in the East Area must be consistent with the Salmon FMP, the Magnuson-Stevens
27 Act, and other applicable federal law. Chapter 9 of the Salmon FMP states that the Council
28

1 and NMFS stay apprised of state management measures and ensure that the delegation of
2 fishery management authority to the State is carried out in a manner consistent with the
3 Salmon FMP, the Magnuson-Stevens Act, and other applicable federal law.
4

5 **The Southeast Alaska Chinook Salmon Commercial Troll Fishery**

6
7 16. The following paragraphs are based on my review of publicly-available reports and
8 information provided by ADF&G and the Pacific Salmon Commission's Chinook Technical
9 Committee, and my review of a publicly-available report published by the McDowell Group
10 on the Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet.
11

12 17. Under management provisions of the Pacific Salmon Treaty, ADF&G announces
13 annual all-gear catch limits for treaty Chinook salmon. The all-gear catch limit for Southeast
14 Alaska is based on a forecast of the aggregate abundance of Pacific Coast Chinook salmon
15 stocks subject to management under the Pacific Salmon Treaty.
16

17 18. The Southeast Alaska Chinook salmon all-gear catch limit is allocated among sport
18 and commercial fisheries under management plans specified by the Alaska Board of Fisheries.
19 Under the current plans, the commercial purse seine, commercial drift gillnet, and commercial
20 set gillnet are first allocated their limit, as follows: commercial purse seine, 4.3 percent of the
21 all-gear catch limit; commercial drift gillnet, 2.9 percent of the all-gear catch limit; and
22 commercial set gillnet, 1,000 Chinook salmon. After subtraction of the net gear limits, the
23 remainder of the all-gear catch limit is allocated as follows: commercial troll, 80 percent;
24 sport, 20 percent.
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1 19. Over the previous five years (2018 to 2022), I estimate that the three net gear fisheries
2 were allocated on average 7.78 percent of the annual all-gear Chinook catch limit, the sport
3 fishery was allocated on average 18.44 percent of the annual all-gear Chinook catch limit, and
4 the troll fishery was allocated on average 73.78 percent of the annual all-gear Chinook catch
5 limit. The annual allocation to the troll fishery is therefore a significant portion of the overall
6 treaty Chinook limit for the State of Alaska, with the sport fishery receiving the second
7 highest portion of the overall treaty Chinook limit for the State of Alaska.
8

9
10 20. The spring fishery occurs in May and June and mostly targets Alaska hatchery-
11 produced Chinook salmon. Non-Alaska hatchery fish are counted towards Alaska's annual
12 catch limit of Chinook salmon under the Pacific Salmon Treaty. In 2021, the trollers
13 harvested 12,952 treaty Chinook in the spring season. I estimate the commercial troll spring
14 fishery harvested an average of 10,833 treaty Chinook salmon, and 13,865 total Chinook
15 salmon, per year from 2017 through 2021, based on the Pacific Salmon Commission, Joint
16 Chinook Technical Committee's Annual Reports of Catch and Escapement.
17

18
19 21. The winter season is currently October 11 to March 15. The State-established
20 guideline harvest level (GHL) for the winter fishery is 45,000 non-Alaska hatchery-produced
21 Chinook salmon (meaning, treaty Chinook subject to the Pacific Salmon Treaty). Any treaty
22 Chinook salmon not harvested during the winter fishery are available for harvest in the spring
23 and summer commercial troll fisheries. Based on ADF&G's Regional Information Report
24 No. 1J21-14, the troll fleet has not harvested the entire GHL since 2016. In the 2020/2021
25 winter fishery, a total of 268 permits were fished, and the five-year average number of permits
26 fished per year was 353 permits. The trollers harvested 14,013 treaty Chinook salmon in the
27
28

1 winter season in 2021. I estimate the commercial troll winter fishery harvested an average of
2 18,745 treaty Chinook salmon per year from 2017 through 2021 (of the total annual average
3 of 19,811 Chinook salmon per year, an average of 8.8 percent were of Alaska hatchery
4 origin), based on the Pacific Salmon Commission, Joint Chinook Technical Committee's
5 Annual Reports of Catch and Escapement.
6

7 22. The summer season is July 1 through September 30. Most of the Chinook salmon
8 harvested in the summer fishery are non-Alaska hatchery origin (meaning, treaty Chinook
9 subject to the Pacific Salmon Treaty). The summer fishery targets the number of treaty
10 Chinook salmon remaining on the annual troll allocation after the winter and spring troll
11 treaty Chinook harvests are subtracted. The State of Alaska manages the summer troll fishery
12 to achieve the remaining catch limit of treaty fish available for the troll fleet, with an
13 additional harvest of Chinook salmon produced in Alaska hatcheries. The trollers harvested
14 128,626 treaty Chinook salmon in the summer season in 2021. I estimate the commercial troll
15 summer fishery harvested an average of 100,200 treaty Chinook salmon per year from 2017
16 through 2021 (of the total annual average of 102,254 Chinook salmon per year, an average of
17 3 percent were of Alaska hatchery origin), based on the Pacific Salmon Commission, Joint
18 Chinook Technical Committee's Annual Reports of Catch and Escapement.
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22 23. For the winter and summer seasons, I estimate the commercial troll fleet harvested an
23 average of 118,945 treaty Chinook salmon per year from 2017 through 2021. For all three
24 seasons, I estimate the commercial troll fleet harvested an average of 129,802 treaty Chinook
25 salmon per year from 2017 through 2021 (and 135,930 total Chinook salmon per year).
26 During this same time period, all Southeast Alaska salmon fisheries (net, troll, and sport)
27
28

1 harvested an average of 170,627 treaty Chinook salmon (and 204,362 total Chinook salmon
2 per year). Troll harvest therefore constituted on average 76 percent of the harvest of the
3 Southeast Alaska all-gear catch limit for treaty Chinook salmon, and on average 67 percent of
4 the harvest of all Chinook salmon in Southeast Alaska.
5

6 24. The estimated most recent five-year average catch of 129,802 treaty Chinook salmon
7 and 135,930 total Chinook salmon in the troll fishery appears to be a marked decline
8 considering the 2011-2020 average of 201,718 Chinook salmon per year, and the 1962-2020
9 average of 243,435 Chinook salmon per year, as reported by ADF&G (Fishery Management
10 Report No. 22-05). While catch increased in 2020 and 2021, troll harvests were quite low in
11 2017 through 2019, with the lowest troll catch since 1962 reported in 2018.
12

13
14 25. The commercial troll fleet uses two fishing methods: hand trolling and power trolling.
15

16 26. Chinook salmon are the highest value per pound of the five salmon species harvested
17 in Southeast Alaska, and Chinook salmon caught in the troll fishery have the highest value per
18 pound for all gear types harvesting Chinook salmon. For example, in 2021, the average ex
19 vessel price per pound for troll-caught Chinook salmon was \$7.50 per pound, while the net
20 fisheries per pound price ranged from \$4.00 to \$5.60 per pound. By comparison, the second
21 highest value species are coho salmon: in 2021, price per pound of coho salmon caught in the
22 troll fishery was \$2.97 per pound, while the net fisheries per pound price ranged from \$0.75 to
23 \$1.73 per pound.
24

25
26 27. The Southeast Alaska troll fishery operates in both federal and State of Alaska waters,
27 although the majority of the catch and effort occurs in state waters. The commercial troll
28

1 fishery operates in both federal and state waters in only the summer season. The spring and
2 winter commercial troll fisheries and all net fisheries (the commercial purse seine, drift
3 gillnet, and set gillnet) occur in state waters.
4

5 28. The State of Alaska relies on information reported on state Fish Tickets to estimate the
6 proportion of fish harvested in state waters and federal waters. Over the 2011-2019 period,
7 we have estimated that, on average, 14 percent (28,915 fish) of the total troll fishery Chinook
8 salmon harvest occurred in federal waters each year. Both the amount and the proportion of
9 Chinook salmon harvested in federal waters has varied over this time period (2011-2019).
10 The proportion of Chinook salmon harvested in federal waters each year can vary depending
11 on oceanographic conditions, weather, or other factors, and commercial fishing vessels
12 targeting Chinook salmon independently decide where to fish, depending on each vessel's
13 operating decisions. Overall the proportion of Chinook salmon harvested in federal waters
14 each year generally represents a small proportion (14 percent average) of total Chinook
15 salmon harvested by the commercial troll fishery. *See* Merrill Decl. ¶¶ 22-23 (Doc. 43-2).
16
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19 29. Most of the Chinook salmon harvested in Southeast Alaska are of non-Alaska origin,
20 caught consistent with the terms of the Pacific Salmon Treaty. The non-Alaska component of
21 the harvest is made up of both hatchery and wild stocks emanating from British Columbia and
22 the Pacific Northwest. For example, for the winter troll fishery, ADF&G estimates the
23 coastwide hatchery contribution of fish caught in the winter troll fishery, which includes
24 hatchery fish from Alaska, British Columbia, Idaho, Oregon, and Washington. For the 2020-
25 2021 fishery, the coastwide hatchery contribution was 42 percent of catch, with Alaska
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1 hatchery fish comprising 11 percent. For the 2021-2022 fishery, the coastwide hatchery
2 contribution was 35 percent of catch, with Alaska hatchery fish comprising 7 percent.

3
4 30. If the troll fishery did not operate, only a portion of the fish allocated to the State of
5 Alaska under the Pacific Salmon Treaty would return to rivers and hatchery facilities in
6 British Columbia and the Pacific Northwest due to natural mortality and harvest in other
7 fisheries (for example, Canadian and southern U.S. fisheries). In addition, Chinook salmon
8 return to spawn at various ages (from ages two to seven), and not all of the fish caught in the
9 fishery would return in the same year to spawn. The fishery catches fish of all ages.
10

11 **Economic Value of the Southeast Alaska Chinook Salmon Commercial Troll Fishery**

12
13 31. If the incidental take statement (ITS) were vacated as to the Chinook salmon troll
14 fishery, the Southeast Alaska troll fleet would no longer have incidental take coverage under
15 the Endangered Species Act (ESA) for the take of listed species. Vacatur of the ITS could
16 have significant disruptive consequences for the prosecution of the Chinook salmon troll
17 fishery, as trollers would be forced to decide between fishing without ESA incidental take
18 coverage and risking liability under the ESA or halting fishing activities to avoid liability
19 under the ESA and therefore foregoing economic revenue. If the trollers did not operate in
20 the winter and summer seasons, however, it is not certain that the reduction in harvest in
21 Southeast Alaska would mean that all their unharvested treaty fish would be available to
22 Southern Resident killer whales in their habitat. Recent average catches in the troll winter
23 and summer seasons have totaled 118,945 treaty Chinook salmon from 2017 through 2021
24 (see ¶ 23). Not all of those treaty fish (meaning non-Alaska wild and hatchery fish that are
25 returning to rivers and hatchery facilities in British Columbia and the Pacific Northwest)
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1 would return to Southern Resident killer whale habitat due to natural mortality and harvest in
2 other fisheries. To estimate economic impacts to the Chinook troll fleet if that fleet was
3 unable to fish for Chinook salmon, I looked at the number of troll permits issued and the ex-
4 vessel value of the Chinook troll fleet, information that is publicly available on ADF&G's
5 website. I also looked at a report on the total economic impact from the entire troll fleet. I
6 referenced these outside reports because they are the best information available to NMFS.
7

8
9 32. ADF&G reports the number of permits that are issued and fished each year. In 2021,
10 the hand troll fleet had 902 issued permits, with 202 permit holders reporting salmon
11 landings. ADF&G reports an annual average (2011-2020) of 971 issued permits and 295
12 fished permits for hand troll. In 2021, the power troll fleet had 957 issued permits, with 629
13 permit holders reporting salmon landings. ADF&G reports an annual average (2011-2020) of
14 961 issued permits and 715 fished permits for power troll. Based on these reports, on average
15 from 2011 to 2020, there were over 1,000 annual active permittee holders (combined for
16 power and hand troll permittees). While all troll permit holders might not target Chinook
17 salmon, trollers harvest 76 percent of Southeast Alaska's total Pacific Salmon Treaty Chinook
18 harvest, on average (and 67 percent of all Chinook salmon harvest in Southeast Alaska, on
19 average) (see ¶ 23). Based on my professional understanding of the commercial fisheries in
20 Southeast Alaska, there are several Southeast Alaska communities that are dependent on the
21 Chinook troll fishery (to process fish, and/or provide services like fuel) and therefore could be
22 disproportionately affected if the Chinook troll fleet did not operate.
23
24

25
26 33. ADF&G reports the ex-vessel value of the commercial salmon fisheries. Ex-vessel
27 value measures the dollar value of commercial landings and is usually calculated by
28

1 considering the price per pound at the first purchase multiplied by the total pounds landed.
2 Based on ADF&G's annual overviews of the Southeast Alaska salmon fisheries, ADF&G
3 calculates ex-vessel value by multiplying the number of salmon caught by the average weight
4 by the average price per pound.
5

6 34. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel
7 value of the entire troll fishery (including all species of salmon) was \$32,218,063, with the
8 ex-vessel value of the troll fishery for Chinook salmon totaling \$13,560,260. Based on
9 ADF&G's annual overviews of the fishing seasons from 2017 through 2021 (Fishery
10 Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate the five-year
11 annual average of the ex-vessel value of the entire troll fishery is \$28,128,983.20, with a five-
12 year annual average of the ex-vessel value of the Chinook troll fishery of \$11,462,827.60. I
13 also estimate that the ex-vessel value of the Chinook troll fishery is on average 41.56 percent
14 of the total ex-vessel value of the entire troll fishery.
15
16

17 35. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel
18 value of all Southeast Alaska salmon fisheries (all gear types, all salmon species) was
19 \$142,949,849, and I estimate that the Chinook troll fishery constituted 9.49 percent of that
20 total ex-vessel value. Based on the ADF&G's annual overviews of the fishery seasons from
21 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-
22 01), I estimate that the ex-vessel value of the Chinook troll fishery is on average 10.91 percent
23 of the total ex-vessel value of all Southeast Alaska salmon fisheries (2017-2021), but can be
24 as high as 20.81 percent of total ex-vessel value of all Southeast Alaska salmon fisheries, as
25 was the case in 2020.
26
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1 36. Ex-vessel value is one measurement of the value of a fishery, but it does not account
2 for additional value created by, for example, wages, processing, and tax revenue. A report
3 prepared the McDowell Group on the Economic Impact of the Pacific Salmon Treaty on the
4 Alaska Troll Fleet examined the following impacts of the troll fleet: direct (skipper and crew
5 income), indirect (jobs and wages generated by the purchase of goods and services in support
6 of troll fishing operations), and induced (jobs and wages generated when skippers and crew
7 spend their fishing income in support of their households) impacts. The McDowell Group
8 report was based on five-year averages from 2014 to 2018, and included the following
9 information on the economic output of the fleet:
10

- 11 • Ex-vessel earnings averaged \$32.9 million.
- 12 • An average of 729 permits were fished, and approximately 1,400 fishermen earn
13 income directly from the fishery, including skippers (permit holders) and crew.
- 14 • Total direct, indirect, and induced employment is estimated at 735 jobs.
- 15 • Direct labor income (the amount skippers and crew take home) is estimated at
16 \$20.4 million.
- 17 • Total direct, indirect, and induced labor income is estimated at \$28.5 million.
- 18 • Total annual output is estimated at \$44.1 million. Output is a measure of total
19 spending related to the commercial troll fleet. It includes the total amount trollers
20 are paid for their catch plus all the secondary spending in Southeast Alaska that
21 occurs as fishermen purchase goods and services. It does not include effects of
22 processing troll-caught fish.
- 23 • Processors add value to the troll catch, generating total average annual first
24 wholesale value of the troll harvest totaling about \$70 million (based on statewide
25 relationship between ex-vessel and first wholesale values for species harvested by
26 trollers).
- 27 • Though it is difficult to attribute specific seafood processing jobs to the troll catch
28 (as employees process fish from other commercial fisheries at the same time),
approximately one-third of the added value is the cost of labor, or about \$12
million annually.
- Including fishing, processing, and all related multiplier effects, the entire troll fleet
(all species of salmon) has a total annual economic impact of approximately \$85
million, as measured in terms of total output.

- 1 • Chinook accounted for about 44 percent of the power troll fleet's total ex-vessel
2 value over the 2014 to 2018 period. All other factors held equal, Chinook account
3 for approximately \$37 million in annual economic output in Southeast Alaska.
- 4 • Total ex-vessel value of the hand troll harvest averaged \$1.6 million, with an
5 average of 285 permits fished. The hand troll fleet's total regional economic
6 impact, as measured in terms of total output, is approximately \$3.3 million
7 annually.

8 37. Looking at the most recent five years of data (2017 to 2021) from ADF&G's Fishery
9 Management Reports (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-
10 01), I estimate that the average annual ex-vessel value of the entire troll fleet declined to
11 \$28,128,983.20, a \$4,771,016.80 (or 14.50 percent) reduction from the annual ex-vessel value
12 in the McDowell Group report of \$32,900,000. I assume a 14.50 percent reduction in the ex-
13 vessel value would correspond to similar reductions in economic impacts used to estimate the
14 total annual economic output of the troll fleet, and therefore reduce the estimate by the
15 McDowell Group of \$85,000,000 by 14.50 percent. This results in an estimate of the total
16 annual economic impacts of the entire troll fleet of \$72,675,000. These reductions in value
17 seem consistent with the decline in catch numbers of Chinook salmon (see ¶ 24) and the
18 reductions in catch agreed to under the 2019 Pacific Salmon Treaty Agreement, which in most
19 years imposes a 7.5 percent reduction in Chinook salmon harvest levels in Southeast Alaska.

20
21 38. Over the most recent time period (2017 to 2021), the ex-vessel value of Chinook
22 caught by the troll fleet constituted a slightly smaller percentage of the ex-vessel value of all
23 salmon species caught by the troll fleet (41.56 percent compared to 44 percent used by the
24 McDowell Group). I used this updated percentage to estimate the annual economic output of
25 the Chinook salmon commercial troll fishery (for all three seasons) at \$30,203,730.
26
27
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1 39. Finally, I account for the ex-vessel value of the spring fishery. Based on the annual
2 overviews published by ADF&G of the fishery seasons from 2017 through 2021 (Fishery
3 Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the average
4 annual ex-vessel value (2017 to 2021) of the spring Chinook salmon commercial troll fleet is
5 \$1,054,893.66.
6

7 40. Based on the McDowell Group report and my review of the most recent ADF&G data
8 on the ex-vessel value of the troll fleet (including, specifically the Chinook troll fleet), I
9 therefore estimate the total annual economic output of the Chinook salmon commercial troll
10 fleet, for the winter and summer seasons specifically, to be approximately \$29 million
11 (\$29,148,836.34).
12

13 41. While troll fishing vessels are small, their economic impacts are far reaching,
14 especially in Southeast Alaska, where nearly every community includes individuals who earn
15 their living by trolling for salmon. The salmon troll fisheries support over 23 communities
16 around Southeast Alaska. Further, a number of the communities where troll fishermen work
17 and live are Alaska Native communities. Notably, the Southeast Alaska commercial salmon
18 troll fisheries have an 85 percent Alaska residency rate, the highest level of local ownership of
19 any major Alaska fishery, with about one in every 50 people in Southeast Alaska working on
20 a trolling boat. The small, rural, isolated Southeast Alaska communities that are dependent on
21 the Chinook salmon troll fishery (to homeport, to process fish, and/or to provide services like
22 fuel), including Alaska Native communities, would be disproportionately affected if the
23 Chinook troll fleet did not operate during the summer and winter seasons. A loss of troll
24 fishing income would be devastating to these small coastal communities.
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1 42. In sum, if the ITS for the Chinook salmon commercial troll fishery in the winter and
2 summer seasons were to remain vacated, there will likely be significant consequences to the
3 Chinook troll fleet and fishing communities in Southeast Alaska if the troll fleet was unable to
4 fish for Chinook salmon in the absence of ESA take coverage. In addition to the disruptive
5 and hard to quantify impacts described above, I find:

- 6
7 • Based on my review of reports from ADF&G, the ex-vessel value of the Chinook
8 salmon commercial troll fishery totaled \$13,560,260 in 2021, with an estimated five-
9 year annual average of \$11,462,827.60. Excluding the estimated five-year annual
10 average ex-vessel value of the spring season, I estimate the annual average ex-vessel
11 of the Chinook salmon commercial troll fishery in the winter and summer seasons to
12 be \$10,407,933.94.
- 13
14 • Based on my review of reports from ADF&G and a report from the McDowell Group,
15 and accounting for recent declines in ex-vessel value and the estimated ex-vessel value
16 of the spring fishery, I estimate the total annual economic output of the Chinook
17 salmon commercial troll fishery in the winter and summer seasons to be
18 approximately \$29 million.
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1 Pursuant to 28 U.S.C. § 1746, I swear under penalty of perjury that the foregoing is
2 true and correct.

3
4 HARRINGTON.GRETCHEN.N.ANNE.1365893833
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HARRINGTON.GRETCHEN.ANNE.1365893833
Date: 2023.05.22 13:12:11 -08'00'

6 GRETCHEN HARRINGTON
7 Assistant Regional Administrator,
8 Sustainable Fisheries Division, Alaska Region
9 National Marine Fisheries Service

10 May 22, 2023
11 DATE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,)
)
Plaintiff,)
)
v.)
)
JENNIFER QUAN, in her official capacity)
as Regional Administrator for the National)
Marine Fisheries Service, *et al.*,)
)
Defendants,)
)
and)
)
ALASKA TROLLERS ASSOCIATION,)
and STATE OF ALASKA,)
)
Defendant-Intervenors.)
_____)

Case No. 2:20-cv-00417-RAJ-MLP

PLAINTIFF’S RESPONSE TO
DEFENDANT-INTERVENOR
ALASKA’S MOTION FOR STAY
PENDING APPEAL

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APA	Administrative Procedure Act
BiOp	Biological Opinion
ESA	Endangered Species Act
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
PST	Pacific Salmon Treaty
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whale

1 Plaintiff Wild Fish Conservancy (“Conservancy”) hereby responds to Defendant-
2 Intervenor State of Alaska’s (“Alaska”) Motion for Partial Stay Pending Appeal (“Motion”), Dkt.
3 172, and respectfully requests that the Court deny the relief requested therein.

4 **I. INTRODUCTION.**

5 The Court should deny Alaska’s Motion to stay the Court’s order partially vacating the
6 National Marine Fisheries Service’s (“NMFS”) incidental take statement (“ITS”) in the 2019
7 biological opinion (“BiOp”) for Southeast Alaska salmon fisheries (“2019 SEAK BiOp”), which
8 authorizes “take” of endangered Southern Resident Killer Whales (“SRKW”) and threatened
9 Chinook salmon caused by salmon harvests in Southeast Alaska. Alaska has failed to make any
10 of the showings necessary for such a stay and the Court’s partial vacatur is needed to protect
11 SRKWs and Chinook salmon from the significant risks and harms posed by the illegal ITS.
12

13 To prevail on its Motion, Alaska must make a “strong showing” that it is likely to
14 succeed on its appeal. To succeed on appeal, Alaska would need to establish that the Court
15 abused its discretion in fashioning relief. Under the Administrative Procedure Act (“APA”),
16 there is a strong presumption that the Court should vacate the entire unlawful ITS for salmon
17 fisheries in Southeast Alaska and such a remedy may be withheld only in limited or rare
18 circumstances. The Court withheld that presumptive remedy here, issuing instead a partial
19 vacatur that leaves the illegal ITS in place for the vast majority of fisheries covered thereby,
20 while vacating authorization only for those harvests that are most harmful to endangered SRKWs
21 and threatened Chinook salmon. That is not an abuse of discretion. *See Coal. to Protect Puget*
22 *Sound Habitat v. U.S. Army Corps of Eng’rs*, 843 F. App’x 77, 80 (9th Cir. 2021) (holding that
23 the Court did not abuse its discretion where, instead of issuing the “ordinary remedy” of “[f]ull
24 vacatur,” it “crafted a hybrid remedy [in the form of partial vacatur] that reasonably balanced the
25 competing risks or environmental and economic harms”). The Motion should be denied because
26 Alaska cannot make a strong showing that it is likely to prevail on appeal.
27

28 Further, while Alaska has failed to show that it will be irreparably injured absent the
29 requested stay, the stay would harm endangered SRKWs and threatened Chinook salmon,

1 thereby significantly injuring the Conservancy's interests. Finally, the requested stay is not in the
2 public interest. Each of these deficiencies is, by itself, a dispositive ground for denial of the
3 Motion.

4 **II. STANDARD OF REVIEW.**

5 A stay pending appeal "is not a matter of right, even if irreparable injury might otherwise
6 result," and the "party requesting a stay bears the burden of showing that the circumstances
7 justify an exercise of [judicial] discretion." *Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020)
8 (citations omitted); *see also Nken v. Holder*, 556 U.S. 418, 433–34 (2009). The Court considers
9 four factors in evaluating these stays: "(1) whether the stay applicant has made a strong showing
10 that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured
11 absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested
12 in the proceeding; and (4) where the public interest lies." *See Lado*, 952 F.3d at 1006–07
13 (citation omitted). The first two factors "are the most critical." *Id.* at 1007 (citation omitted).

15 **III. ARGUMENT.**

16 **A. Alaska Has Not Made a Strong Showing that It Will Succeed on the Merits.**

17 "An applicant for a stay pending appeal must make 'a strong showing that he is likely to
18 succeed on the merits.'" *Lado*, 952 F.3d at 1010 (quoting *Nken*, 556 U.S. at 434). Alaska falls far
19 short of this standard. The Court applied the correct legal standard for vacatur under the APA
20 and carefully exercised its equitable discretion in ordering only a partial vacatur of the ITS. The
21 Court did not abuse its discretion in issuing this relief and Alaska has certainly not made a
22 "strong showing" that it is likely to succeed in arguing otherwise on appeal. Accordingly,
23 Alaska's Motion for a stay pending appeal should be denied.

24 Alaska's appeal focuses on the Court's partial vacatur of the ITS. *See* Dkt. 172 at 2. Such
25 equitable remedies are reviewed for an abuse of discretion. *See Coal. to Protect Puget Sound*,
26 843 F. App'x at 80; *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032,
27 1051 (D.C. Cir. 2021). A district court abuses its discretion if the decision is based on an
28 incorrect legal standard or on clearly erroneous factual findings. *Lands Council v. McNair*, 537
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1 F.3d 981, 986 (9th Cir. 2008). Conclusions of law are reviewed de novo and factual findings are
2 reviewed for clear error. *Id.* at 986–87. “Under this standard, ‘as long as the district court got the
3 law right, it will not be reversed simply because the appellate court would have arrived at a
4 different result if it had applied the law to the facts of the case.’” *Id.* (citation omitted). Alaska
5 cannot make a strong showing that the Court abused its discretion in fashioning partial vacatur.

6
7 **1. The Court applied the correct legal standards for vacatur.**

8 The Court provided a thorough description of the standards for vacatur of unlawful
9 agency actions under the APA, and it applied these standards. *See* Dkt. 144 at 13–15, 25–37.
10 Alaska does not appear to suggest that the Court applied an incorrect legal standard. *See* Dkt.
11 172.

12 The APA’s “presumptive remedy” for NMFS’s violations is “full vacatur” of the 2019
13 SEAK BiOp. *See Coal. to Protect Puget Sound*, 843 F. App’x at 80. It is Defendants’ burden to
14 overcome that presumption. *See All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105,
15 1121–22 (9th Cir. 2018); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng’rs*,
16 466 F. Supp. 3d 1217, 1219, 1226 (W.D. Wash. 2020), *aff’d* 843 F. App’x 77. In considering
17 their request, the Court weighs the seriousness of the errors against the disruptive consequences
18 posed by vacatur. *Cal. Cmty. Against Toxics v. U.S. Env’t Prot. Agency*, 688 F.3d 989, 992 (9th
19 Cir. 2012).

20 However, there is a strong presumption that unlawful agency decisions should be
21 vacated, and remand without vacatur is therefore rarely appropriate. *See Pollinator Stewardship*
22 *Council v. U.S. Env’t Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015) (“only in ‘limited
23 circumstances’”) (citation omitted); *Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7
24 (9th Cir. 2010) (“[i]n rare circumstances”). “The cases in which remand without vacatur was
25 deemed appropriate ‘highlight the **significant disparity** between the agencies’ relatively minor
26 errors, on the one hand, and the damage that vacatur could cause the very purpose of the
27 underlying statutes, on the other.’” *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018
28 U.S. Dist. LEXIS 199358, at *16–17 (W.D. Wash. Nov. 26, 2018) (citation omitted, emphasis
29

1 added); *see also Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109
2 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015). Moreover, courts tip the scale in favor of protecting
3 imperiled species when considering vacatur because Congress intended such species to be
4 prioritized over other objectives when it enacted the ESA. *E.g., Klamath-Siskiyou*, 109 F. Supp.
5 3d at 1242.

6 **2. The Court correctly found NMFS's violations to be serious.**

7 The Court correctly found that NMFS's errors are "sufficiently serious . . . as they clearly
8 undermine central congressional objectives of the ESA and [the National Environmental Policy
9 Act]." Dkt. 144 at 26–28.

10 NMFS violated the ESA by issuing the ITS to authorize fisheries that harm imperiled
11 SRKWs and Chinook salmon in reliance on poorly defined and uncertain mitigation. Dkt. 111 at
12 25–31. Further, one mitigation component—the prey increase program—was implemented in
13 violation of the ESA and the National Environmental Policy Act ("NEPA") and may be altered
14 or terminated when reviewed under those statutes. *See id.* at 31–33, 37–38. These deficiencies
15 undermine NMFS's approval of the fisheries because, at best, it is uncertain whether harm to the
16 species will be sufficiently offset by mitigation. NMFS also violated NEPA by issuing the ITS
17 for the fisheries without first providing **any** of the required NEPA processes or reviews. *Id.* at
18 34–37. Courts have found far less NEPA errors to be serious. *E.g., Wild Fish Conservancy v.*
19 *Nat'l Park Serv.*, No. C12-5109-BHS, 2014 U.S. Dist. LEXIS 105689, at *7–8 (W.D. Wash. July
20 31, 2014) (failed to consider a reasonable alternative); *W. Watersheds Project v. Zinke*, 441 F.
21 Supp. 3d 1042, 1087 (D. Idaho 2020) (failed to provide for adequate public involvement).

22 **3. The Court correctly concluded that the disruptive consequences do**
23 **not outweigh the seriousness of the violations.**

24 The Court found that there would be some economic consequences to the commercial
25 fishing industry and to some communities in Southeast Alaska, which the Court indicated that it
26 "does not take . . . lightly." Dkt. 144 at 30. However, the Court concluded that such economic
27 impacts do not outweigh the seriousness of the violations, particularly given the environmental
28

1 consequences of leaving the ITS in place. *Id.* at 29–30, 33–34, 37. This was not an abuse of
2 discretion.

3 When considering the consequences of vacatur, the primary focus is environmental
4 impacts. *See* Dkt. 144 at 28; *N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 460 F. Supp.
5 3d 1030, 1038 (D. Mont. 2020). Indeed, the Ninth Circuit recently held that, where “[t]he
6 agency’s errors . . . are significant and vacatur will not cause an environmental harm . . . [,] the
7 presumption of vacatur is not overcome.” *See Neighbors of the Mogollon Rim, Inc. v. U.S. Forest*
8 *Serv.*, No. 22-15259, 2023 U.S. App. LEXIS 11031, at *10 (9th Cir. May 5, 2023).

9
10 In considering environmental consequences, the Court correctly noted that vacatur of the
11 ITS would not result in any environmental damage and would instead benefit SRKWs. Dkt. 144
12 at 29, 33–34 (“The risk of environmental harm to the SRKW from leaving the ITS in place, and
13 by otherwise not allowing for an increased amount of prey to benefit SRKW, therefore counsels
14 in favor of vacatur of the ITS.”). The fisheries authorized by the unlawful ITS harm endangered
15 SRKW and threatened Chinook salmon—species that are in precarious and generally declining
16 conditions. *See, e.g.*, AR 01741–42, 01747, 15905, 15911, 15988–89, 47276, 47319, 47439–40,
17 47502; Dkt. 127-2 ¶ 5. Alaska’s data show that most Chinook salmon caught in the fishery are
18 high priority prey for SRKWs, which includes ESA-listed Lower Columbia River and Puget
19 Sound Chinook salmon. *See* Dkt. 135-1 at 5–6. The 2019 SEAK BiOp explained that, while
20 some reductions in harvest levels were made in the 2019 Pacific Salmon Treaty, “more would be
21 required” to conserve SRKWs and Puget Sound Chinook salmon. AR 47201–02.

22 An increase in SRKW prey is urgently needed. The current condition of the species is
23 “unprecedented,” with more than a fifth of the population likely in a vulnerable state due to
24 emaciated body conditions. Dkt. 127-1 ¶¶ 11, 14. Thus, “an immediate increase in the abundance
25 of Chinook [salmon] . . . [is needed] to avoid functional extinction.” *Id.* ¶ 18. The Court’s partial
26 vacatur would alleviate some of the harm caused by the unlawful ITS while NMFS evaluates the
27 fisheries under the ESA and NEPA to remedy its violations. Dr. Lacy’s modeling shows that this
28 relief may stop the decline of the SRKW. Dkt. 127-2 ¶¶ 8–9. As the Court concluded, “[t]hough
29

1 there is uncertainty as to how much prey would ultimately reach the SRKW, the record before
2 the Court suggests that closure of the fisheries meaningfully improves prey available to SRKW,
3 as well as SRKW population stability and growth, under any scenario.” Dkt. 144 at 29.

4 The Court should reject Alaska’s contention that concerns over harm to SRKWs from the
5 fisheries have subsided because the prey increase program is supposedly operating. *See* Dkt. 172
6 at 3. A primary concern with this program is that NMFS failed to develop specific plans with
7 deadlines that show how and when the increased hatchery production will be implemented in a
8 manner that mitigates impacts to SRKWs from the fisheries. *See* Dkt. 111 at 28–30 (“NMFS
9 failed to create a binding mitigation measure that described ‘in detail the action agency’s plan to
10 offset the environmental damage caused by the project’”; “the 2019 SEAK BiOp does not
11 include any specific deadlines for implementing the proposed mitigation, nor does it include
12 specific requirements by which to confirm that the mitigation is being implemented in the
13 manner and on a schedule needed to avoid extinction of the SRKW.”) (citation omitted). That
14 deficiency persists today, as NMFS has yet to produce a scientifically or legally defensible
15 mitigation plan to show how the mitigation will be implemented to avoid extinction of SRKWs.

16 Further, NMFS is not fully implementing the prey increase program as Alaska suggests.
17 *See* Dkt. 172 at 3–4. The 2019 SEAK BiOp contemplated that the program would release 20
18 million hatchery smolts annually. AR 47203, 47506. NMFS’s own records show that the
19 program released 597,242 smolts in 2020, approximately 6.3 million smolts in 2021, and
20 approximately 8 million smolts in 2022. Dkt. 133-3 at 24 (this document uses “PST,” for Pacific
21 Salmon Treaty, to refer to hatchery releases under the prey increase program). This program is
22 therefore releasing **less than half** the smolts contemplated. In an effort to mask this deficiency,
23 NMFS includes smolt releases funded by Washington State under an entirely different program.
24 *See id.* ¶ 3, p. 24. Washington’s program does not compensate for NMFS’s failure to implement
25 the prey increase program; notably, NMFS has insisted that the prey increase program is needed
26 as mitigation despite Washington’s ongoing separate efforts. *See* Dkt. 43-5 ¶ 12; Dkt. 133-2 ¶ 23.
27 Moreover, Washington’s smolt releases occurred under annual budgets passed by the state
28
29

1 legislature—there is no legal obligation or binding plan for them to continue and there is no basis
2 to assume they will. *See* Dkt. 133-3 at 11; Dkt. 43-5 ¶ 12. Washington’s efforts therefore cannot
3 be relied upon as mitigation to offset harm to ESA-listed species resulting from the salmon
4 fisheries. *See Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020).
5 Accordingly, there is no basis to assume that sufficient mitigation is being implemented to offset
6 harm from the fisheries in a manner needed to avoid extinction of the SRKW.

7
8 Additionally, the Court’s partial vacatur is needed to reduce harm to threatened Chinook
9 salmon. The 2019 SEAK BiOp explained that mitigation was needed to address fishery impacts
10 on Puget Sound Chinook salmon. *See* AR 47201–02. NMFS was therefore supposed to fund
11 habitat restoration projects and conservation hatchery programs focused on four Puget Sound
12 Chinook salmon populations. *See* AR 47202. As with the prey increase program for SRKWs, the
13 Court found that this mitigation was too vague and uncertain to be relied upon under the ESA to
14 offset harm to Chinook salmon. *See* Dkt. 111 at 30–31 (“NMFS . . . cannot confirm additional
15 fish will be produced by the funding” for conservation hatchery programs). The deficiencies
16 remain. Notably, NMFS was supposed to fund the development of a new conservation hatchery
17 program in Hood Canal as part of this mitigation, but there is no indication that this was ever
18 accomplished. *See* AR 47202, 47420.

19
20 There will be some economic consequences from vacatur of the ITS. However, the
21 impacts are substantially mitigated by the Court’s partial vacatur in lieu of “the ordinary remedy”
22 of “[f]ull vacatur” of the unlawful ITS. *See Coal. to Protect Puget Sound*, 843 F. App’x at 80.
23 The ITS applies broadly to authorize “take” of four ESA-listed species (i.e., SRKWs, Chinook
24 salmon, Mexico humpback whales, and Western Steller sea lions) resulting from salmon harvests
25 throughout Southeast Alaska; it covers all gear types (i.e., troll, set and drift gillnet, and purse
26 seine fisheries); it applies to commercial, sport/recreational, and subsistence fisheries; and it
27 applies irrespective of the salmon species targeted by the fisheries (i.e., Chinook, chum, coho,
28 pink, and sockeye salmon). *See* AR 47457–79, 47518 (ITS covers “expected take in the SEAK
29 salmon fishery”). The Court’s vacatur affects only commercial harvests of Chinook salmon in

1 two seasons of the troll fishery—a small portion of the fisheries covered by the ITS. For
2 example, the total harvest value of the commercial salmon fisheries in Southeast Alaska in 2020
3 was \$55.2 million; Chinook salmon accounted for around 21 percent (\$11.5 million) of that
4 value. Dkt. 127-4 ¶¶ 15–16 tbl. 3. These figures do not account for the substantial sport and
5 subsistence fisheries that are also unaffected by the Court’s vacatur. *See* Dkt. 127-4 ¶ 11.a.

6 Contrary to Alaska’s contentions, the Court did not fail to “giv[e] adequate
7 consideration” to these economic impacts. *See* Dkt. 172 at 2. The Court acknowledged the
8 economic impacts and explained that the Court “does not take . . . [them] lightly.” Dkt. 144 at 30.
9 However, the Court explained that the economic impacts “do not overcome the seriousness of
10 NMFS’s violations given the presumption of vacatur, the harm posed to the SRKW by leaving
11 the ITS in place and the Court’s mandate to protect endangered species.” *Id.* This was a correct
12 application of the law and was certainly not an abuse of discretion. *See, e.g., Nat’l Family Farm*
13 *Coal. v. U.S. Env’t Prot. Agency*, 960 F.3d 1120, 1144–45 (9th Cir. 2020) (vacating despite
14 significant economic impact on farmers across the country); *Neighbors of the Mogollon Rim,*
15 *Inc.*, 2023 U.S. App. LEXIS 11031, at *10 (holding that, where “[t]he agency’s errors . . . are
16 significant and vacatur will not cause an environmental harm . . . [,] the presumption of vacatur
17 is not overcome”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 194 (1978) (explaining that
18 Congress intended for courts to prioritize the protection of ESA-listed species over other
19 interests through a policy of “institutionalized caution”).
20

21 For these reasons, Alaska has not a strong showing that it will succeed on appeal. The
22 Motion to stay the Court’s partial vacatur of the ITS pending appeal should therefore be denied.
23 *See Lado*, 952 F.3d at 1010.

24 **B. Alaska Has Not Shown that It Will Be Irreparably Injured Absent a Stay.**

25 While it is undisputed that vacatur will have some economic consequences on the
26 commercial fishing industry in Southeast Alaska, Alaska has not demonstrated that such impacts
27 constitute irreparable injury. This Court should therefore deny the Motion.
28

29 “An applicant for a stay pending appeal must show that a stay is necessary to avoid likely

1 irreparable injury to the applicant while the appeal is pending[;] . . . ‘[s]imply showing some
2 possibility of irreparable injury’ is insufficient.” *Lado*, 952 F.3d at 1007 (quoting *Nken*, 556 U.S.
3 at 434). “[T]he temporary loss of income, ultimately to be recovered, does not usually constitute
4 irreparable injury.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974). “The key word in this
5 consideration is *irreparable*. Mere injuries, however substantial, in terms of money are not
6 enough. The possibility that adequate compensatory or other corrective relief will be available at
7 a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable
8 harm.” *Id.* (citation omitted).

9
10 As discussed above, the Court substantially mitigated the economic impact to the
11 commercial salmon industry in Southeast Alaska by issuing a partial vacatur that does not have
12 any impact on the vast majority of harvests covered by the unlawful ITS. Further, the Magnuson-
13 Stevens Fishery Conservation and Management Act authorizes the use of federal relief funding
14 for fishery disasters, including those resulting from “judicial action.” *See* 16 U.S.C. §§ 1861a(a)
15 (authorizing fisheries disaster relief), 1864(b)(1) (authorizing funds “[s]ubject to the availability
16 of appropriations”), 1864(d) (defining catastrophic regional fishery disaster). Alaska fails to
17 acknowledge the availability of this relief. There is at least a “possibility,” and maybe a
18 likelihood, that federal funding will be provided to mitigate economic impacts from the Court’s
19 vacatur order. This undermines Alaska’s assertion of “irreparable harm.” *See Sampson*, 415 U.S.
20 at 90.

21 **C. The Conservancy’s Interests Would Be Substantially Injured by the Stay.**

22 Alaska’s Motion should also be denied because the requested stay of the Court’s partial
23 vacatur of the ITS would substantially injure the Conservancy’s interests. *See Lado*, 952 F.3d at
24 1006–07. Specifically, the stay would harm endangered SRKWs and threatened Chinook salmon.

25
26 The Court’s vacatur order is needed to provide immediate and meaningful benefits to
27 SRKWs, despite Alaska’s contentions to the contrary. Dr. Giles explains that the current
28 condition of SRKWs is “unprecedented,” with more than a fifth of the population likely
29 vulnerable with emaciated body conditions, and “an immediate increase in the abundance of

1 Chinook [salmon] . . . [is therefore needed] to avoid functional extinction.” Dkt. 127-1 ¶¶ 11, 14,
2 18. The 2019 SEAK BiOp found that the Southeast Alaska salmon fisheries reduce SRKW’s
3 prey availability by 0.1% to 12.9% and, critically, reduce the larger Chinook salmon preferred by
4 SRKWs from the whale’s critical habitat by up to 2.5%. AR 47283, 47439–40, 47507. These
5 harvest levels are insufficient to conserve SRKWs and Puget Sound Chinook salmon. *See* AR
6 47201–02.

7 The speculative mitigation relied upon by NMFS to offset harm from the fisheries still
8 lacks a definite plan demonstrating that impacts will be sufficiently mitigated to avoid
9 jeopardizing SRKWs and Chinook salmon. While NMFS has disbursed funds for the prey
10 increase program, it is releasing less than half of the hatchery smolts envisioned in the 2019
11 SEAK BiOp and NMFS has not demonstrated that those releases actually benefit SRKWs. *See*
12 AR 47203, 47506; Dkt. 133-3 at 24.

13 The Court’s partial vacatur of the unlawful ITS will provide rapid increases in SRKW
14 prey; notably, Alaska’s own data show that nearly all Chinook salmon caught in Southeast
15 Alaska are from stocks consumed by SRKWs and more than half are from stocks deemed a “high
16 priority” for SRKWs. *See* Dkt. 135-1 p. 6. The Court therefore correctly found that, despite
17 “uncertainty as to how much prey would ultimately reach the SRKW, the record before the Court
18 suggests that closure of the fisheries meaningfully improves prey available to SRKWs, as well as
19 SRKW population stability and growth, under any scenario.” Dkt. 144 at 29; *see also* Dkt. 127-2
20 ¶¶ 8–11. Given Alaska’s own data, it cannot show that the Court’s findings in this regard were
21 “clear error.” *See Lands Council*, 537 F.3d at 986–87.

22 Alaska’s request to stay the Court’s partial vacatur would enable harvest levels that risk
23 “functional extinction” of the SRKW, especially given the ongoing deficiencies on the
24 mitigation. *See* Dkt. 127-1 ¶ 18. Accordingly, Alaska has failed to meet its burden in showing
25 that the requested stay would not cause substantial injury to the Conservancy’s interests.
26
27
28
29

1 **D. The Equities and the Public Interests Do Not Favor the Stay Because It**
2 **Would Harm Endangered SRKWs and Threatened Chinook Salmon.**

3 Contrary to Alaska’s contentions, the equities and public interests strongly favor
4 implementation of the Court’s partial vacatur of the ITS and disfavor Alaska’s requested stay.

5 In enacting the ESA, “Congress viewed the value of endangered species as
6 ‘incalculable’” and therefore sought to “halt and reverse the trend toward species extinction,
7 **whatever the cost.**” *Hill*, 437 U.S. at 184, 187 (emphasis added). The ESA’s mandate to
8 “insure” that actions are likely to jeopardize species “admits of no exception.” *Id.* at 173.
9 “Congress [thereby] intended endangered species to be afforded the highest of priorities” under a
10 policy of “institutionalized caution” and, as the Supreme Court explained, “courts . . . [should]
11 enforce [such Congressional priorities] when enforcement is sought.” *See id.* at 174, 194.
12 “Accordingly, courts ‘may not use equity’s scales to strike a different balance,’” as “‘the balance
13 of hardships always tips sharply in favor of endangered and threatened species.’” *Nat’l Wildlife*
14 *Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (quoting *Marbled*
15 *Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996)). The Court should therefore reject
16 Alaska’s effort to prioritize economic considerations over imperiled species.

17 Instead, the equities and the public interest favor relief that ensures the continued survival
18 of SRKWs and threatened Chinook salmon. *See Marbled Murrelet*, 83 F.3d at 1073. This is
19 especially true here where the Court substantially mitigated economic impacts by issuing a
20 partial vacatur in lieu of the presumptive vacatur of the entire ITS and where Alaska has not even
21 addressed the availability of federal relief funds to compensate for the economic impacts. *See* 16
22 U.S.C. §§ 1861a(a), 1864(b)(1), 1864(d). The Court should deny the Motion because Alaska has
23 failed to demonstrate that the requested stay is in the public interest. *See Lado*, 952 F.3d at 1006–
24 07.

25
26 **IV. CONCLUSION.**

27 For the foregoing reasons, the Conservancy respectfully requests that the Court’s deny
28 Alaska’s Motion to stay the Court’s partial vacatur pending the appeal.

1 **LCR 7(e) Certification:** I certify that this memorandum contains 4,132 words, in
2 compliance with the Local Civil Rules.

3 Respectfully submitted this 22nd day of May 2023.

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

JENNIFER QUAN, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ

**ORDER DENYING THE
PARTIES' MOTIONS TO STAY**

I. INTRODUCTION

This matter comes before the Court on the parties' motions for a stay pending appeal of this Court's May 2, 2023 Order. (Dkt. ## 172, 177.) Having carefully considered the written arguments on both sides, and the record in this action, the Court **DENIES** the motions for the reasons set forth below.

II. BACKGROUND

The background of this case is detailed extensively in the Reports & Recommendations issued by Magistrate Judge Michelle L. Peterson dated September 27,

1 2021 and December 13, 2022. (*See* Dkt. # 111 at 2-14; Dkt. # 144 at 3-12.) The Court
2 will provide a brief summary of the issues for purposes of the current motions.

3 The Court determined that the 2019 biological opinion for southeast Alaska
4 salmon fisheries (“2019 BiOp”) violated the Endangered Species Act because (1) it relied
5 on uncertain mitigation to find no jeopardy to the Southern Resident Killer Whales
6 (“SRKW”) and (2) it failed to evaluate whether the prey increase program would
7 jeopardize the Chinook salmon. (Dkt. # 111 at 34.) The Court also found violations of the
8 National Environmental Policy Act (“NEPA”) because the National Marine Fisheries
9 Service issued and adopted the 2019 BiOp without conducting proper NEPA procedures.
10 (*Id.* at 38.) On May 2, 2023, the Court adopted several recommendations, including that
11 (1) the 2019 BiOp be remanded to the National Marine Fisheries Service and (2) the
12 portions of the 2019 BiOp authorizing “take” of SRKW and Chinook salmon during the
13 winter and summer seasons be vacated. (Dkt. # 165.) The Court further adopted the
14 recommendation that the prey increase program for the SRKW be remanded without
15 vacatur. (*Id.*) Thereafter, the parties filed notices of appeal with the Ninth Circuit along
16 with current motions to stay the May 2, 2023 Order pending appeal. (Dkt. ## 170, 171,
17 172, 177.)

18 III. DISCUSSION

19 The State of Alaska, one of the Intervenor Defendants, asks the Court to stay the
20 portion of its May 2, 2023 Order that vacates the 2019 SEAK BiOp’s incidental take
21 statement pending appeal. (Dkt. # 172.) Plaintiff Wild Fish Conservancy
22 (“Conservancy”) also seeks a stay but asks the Court to stay the portion of the Order
23 regarding the prey increase program. (Dkt. # 177.)

24 A stay pending appeal is not a matter of right, but rather “an exercise of judicial
25 discretion” that depends upon “the circumstances of the particular case.” *Nken v. Holder*,
26 556 U.S. 418, 433 (2009). The question of whether a stay pending appeal is warranted
27 requires consideration of four factors: “(1) whether the stay applicant has made a strong

1 showing that he is likely to succeed on the merits; (2) whether the applicant will be
2 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure
3 the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at
4 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The party requesting a
5 stay bears the burden of showing that the circumstances justify an exercise of [this
6 Court’s] discretion.” *Id.* at 433-34.

7 **A. Intervenor Defendant Alaska’s Motion for a Stay**

8 The State of Alaska argues that the Court erred by not considering the
9 consequences of vacating part of the incidental take statement. (Dkt. # 172 at 2.)
10 Specifically, Alaska claims that the Court erred by focusing on the potential
11 environmental harm while failing to account for the certain economic, cultural, and social
12 harm to the troll fleet and the Southeast Alaskan communities that are dependent on these
13 fisheries. (*Id.*) Alaska adds that any additional increases in wild Chinook salmon will not
14 immediately impact the SRKW population and that staying any reduction in harvest
15 benefits the public interest. (*Id.*)

16 As this Court and other district courts have noted, “the Ninth Circuit has only
17 found remand without vacatur warranted by equity concerns in limited circumstances,
18 namely serious irreparable environmental injury.” *Ctr. for Food Safety v. Vilsack*, 734 F.
19 Supp. 2d 948, 953 (N.D. Cal. 2010). Nonetheless, the Court undertook an extensive
20 analysis of the economic consequences raised by Defendants and did not take those
21 economic consequences lightly in adopting vacatur as the remedy. (*See* Dkt. # 144 at 30.)
22 Ultimately, the Court concluded those consequences did not overcome the seriousness of
23 National Marine Fisheries Service’s violations given the presumption of vacatur, the
24 harm posed to the SRKW by leaving the incidental take statement in place, and the
25 Court’s mandate to protect the endangered species. (*Id.*) Accordingly, the Court finds that
26 Alaska will not succeed on the merits. Alaska has also failed to show the other factors
27 warrant a stay. As the Report and Recommendation notes, and as Defendants have

1 conceded, vacatur of the incidental take statement does not result in a prohibition on
2 fishing in and of itself in federal or state waters; rather, it means there is no exemption
3 from liability under Section 9 of the Endangered Species Act in the event that take
4 occurs. (Dkt. # 144 at 30 n. 17.) For these reasons, the Court denies Alaska's motion to
5 stay.

6 **B. The Conservancy's Motion to Stay**

7 The Conservancy argues for a stay on the ground that the presumption of vacatur
8 has not been overcome with respect to prey increase program. (Dkt. # 177 at 8.) In
9 support of its motion, the Conservancy claims that withholding vacatur will result in
10 significant adverse ecological impacts, threatening the survival and recovery of Chinook
11 salmon. (*Id.* at 15.) The Conservancy claims that the requested stay would reduce harm to
12 threatened Chinook salmon without risking harm to SRKWs. (*Id.* at 16.)

13 For several reasons, the Court finds that the Conservancy has not made the
14 required showing for a stay. First, the Conservancy's argument contradicts the findings
15 made by both parties that a significant interruption of the prey increase program would
16 result in a certain environmental harm to the SRKW by eliminating a targeted source of
17 prey. (Dkt. # 144 at 30-31.) The Conservancy's own expert stated that under existing
18 conditions, SRKW are not getting enough Chinook salmon and require a rapid increase to
19 avoid functional extinction. (Dkt. # 127-1, ¶ 18.) The potential extinction of an animal
20 species—an irreparable environmental injury—has been sufficient for courts to order
21 remand without vacatur. *See Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392,
22 1405 (9th Cir. 1995). The Court has also considered the setback to any future resumption
23 of the prey increase program while National Marine Fisheries Service attempts to cure
24 the violations with the 2019 BiOp as exacerbating environmental harm. (Dkt. # 144 at 30-
25 31.)

26 The Court also found that enjoining the prey increase program would likely have
27 further cascading impacts to commercial and recreational fisheries off the coast of

1 Washington, in Puget Sound and other areas. (*See* Dkt. # 144 at 33.) Thus, vacatur of the
2 prey increase program would increase the prospect that Chinook salmon abundances
3 would fall below thresholds specified in other BiOps authorizing fisheries not at issue in
4 this action. (*Id.* at 32.) And while hatchery production poses some risk to wild salmon
5 populations, the Court determined that those risks can be mitigated to minimize negative
6 effects on the threatened Chinook salmon. (*Id.* at 35.) For these reasons, the Court finds
7 that the Conservancy is unlikely to show a likelihood of success on the merits, irreparable
8 injury absent a stay, or that a stay is in the public interest.

9 IV. CONCLUSION

10 For the reasons above, the Court **DENIES** the parties' motions to stay. (Dkt. ##
11 172, 177.) Nothing in this Order precludes the parties from applying to the Ninth Circuit
12 for a stay of the May 2, 2023 Order. *See* Fed. R. App. P. 8(a)(2).

13
14 DATED this 26th day of May, 2023.

15
16 

17 The Honorable Richard A. Jones
18 United States District Judge