

**Litigation Update for the
October 2021 Meeting of the North Pacific Fishery Management Council:
Wild Fish Conservancy v. Thom, 2:20-cv-00417-RAJ-MLP
(Western District of Washington)**

Parties:

Plaintiff: Wild Fish Conservancy.

Federal Defendants: Barry Thom, Regional Administrator, National Marine Fisheries Service West Coast Region; Janet Coit, Assistant Administrator for Fisheries of the National Marine Fisheries Service; National Marine Fisheries Service; Department of Commerce; and Secretary of Commerce Gina Raimondo.

Defendant-Intervenors: The State of Alaska and Alaska Trollers Association.

Case:

This case involves a challenge to a biological opinion the National Marine Fisheries Service issued in April 2019 that considered the effects on species listed under the Endangered Species Act (ESA) from three actions—delegation of management authority over salmon fisheries in federal waters off of Southeast Alaska to the State of Alaska, the funding of grants to the State of Alaska, and federal funding for a conservation program for habitat improvement and hatchery production to benefit Puget Sound Chinook salmon and Southern Resident Killer Whales.

Current Case Activity:

As reported at the June 2021 Council meeting, the parties in this case filed motions for summary judgment (the parties' summary judgment briefs are available on the June 2021 Agenda, under B3 NOAA General Counsel Report, [B3 NOAA GC Report- Litigation Update](#)). The magistrate judge heard oral argument on those motions on July 27, 2021. On September 27, 2021, the magistrate judge issued a report and recommendation to the district court judge, who then considers whether to adopt, adopt in part, or reject that recommendation. The magistrate judge recommends granting Plaintiff Wild Fish Conservancy's motion for summary judgment, and denying Defendants' and Defendant-Intervenors' motions for summary judgment, on the grounds that the National Marine Fisheries Service violated the National Environmental Policy Act (NEPA) and section 7(a)(2) of the Endangered Species Act (ESA). The parties have until October 12, 2021, to submit objections to the report and recommendation, and 14 days after that to submit responses to the other side's objections. After responses are submitted, the district court will consider the magistrate judge's recommendation and the parties' filings and will reach a final determination on the parties' motions for summary judgment.

Attachment:

The magistrate judge's report and recommendation is attached.

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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 WILD FISH CONSERVANCY,

9 Plaintiff,

10 v.

11 BARRY THOM, *et al.*,

12 Defendants,

13 and

14 ALASKA TROLLERS ASSOCIATION and
15 STATE OF ALASKA,

16 Defendant-Intervenors.

Case No. C20-417-RAJ-MLP

REPORT AND RECOMMENDATION

17 **I. INTRODUCTION**

18 This matter is before the Court on Plaintiff Wild Fish Conservancy’s (“WFC”) motion for
19 summary judgment (“Plaintiff’s Motion”). (Pl.’s Mot. (Dkt. # 91).) WFC seeks summary
20 judgment on its claims that: (1) the National Marine Fisheries Services’ (“NMFS”) 2019
21 Southeast Alaska Biological Opinion (“2019 SEAK BiOp”) is not in accordance with law under
22 the Administrative Procedure Act (“APA”); (2) NMFS is in violation of section 7(a)(2) of the
23 Endangered Species Act (“ESA”) because the 2019 SEAK BiOp fails to ensure “no jeopardy” to

1 the Southern Resident Killer Whale (“SRKW”) and certain Chinook salmon evolutionary
2 significant units (“ESUs”); and (3) NMFS violated the National Environmental Policy Act
3 (“NEPA”) by issuing and adopting the 2019 SEAK BiOp without conducting proper NEPA
4 procedures. (Pl.’s Mot. at 12.) WFC requests that the Court vacate the 2019 SEAK BiOp and
5 enjoin NMFS’s implementation of increased salmon hatchery production until NMFS complies
6 with the ESA and NEPA. (*Id.*)

7 NMFS, NMFS Regional Administrator Barry Thom, NMFS Assistant Administrator
8 Chris Oliver, Secretary of the United States Department of Commerce Wilbur Ross, Jr., and the
9 United States Department of Commerce (“Government Defendants”) filed a response and
10 cross-motion for summary judgment (“Government Defendants’ Cross-Motion”). (Defs.’ Mot.
11 (Dkt. # 93).) In addition, Defendant-Intervenor Alaska Trollers Association (“ATA”) filed a
12 response and cross-motion for summary judgment (“ATA’s Cross-Motion”) (ATA’s Mot. (dkt.
13 # 92)) and Defendant-Intervenor State of Alaska filed a separate response and cross-motion for
14 summary judgment (“Alaska’s Cross-Motion”) (AK’s Mot. (dkt. # 94)).

15 Having considered the parties’ submissions, oral argument, the balance of the record, and
16 the applicable law, the Court recommends that Plaintiff’s Motion (dkt. # 91) be GRANTED, and
17 that Government Defendants’ Cross-Motion (dkt. # 93), Defendant-Intervenor ATA’s
18 Cross-Motion (dkt. # 92), and Defendant-Intervenor State of Alaska’s Cross-Motion (dkt. # 94)
19 all be DENIED, as further explained below.

20 II. BACKGROUND

21 A. Procedural History

22 On March 18, 2020, WFC filed its complaint in this action. (Compl. (Dkt. # 1).) WFC’s
23 complaint alleges that Government Defendants failed to ensure that its management and

1 authorization of commercial salmon fisheries within the federal waters off the coast of Southeast
2 Alaska was not likely to jeopardize the SRKW and certain Chinook salmon ESUs, or result in
3 adverse modification and destruction of SRKW habitat under Section 7(a)(2) of the ESA. (*Id.* at
4 ¶¶ 13, 114-115.) WFC’s complaint additionally raises claims alleging that Government
5 Defendants violated the APA by failing to comply with the ESA and NEPA because NMFS’s
6 issuance of the 2019 SEAK BiOp was arbitrary, capricious, and not in accordance with law.
7 (Compl. at ¶¶ 13, 116-120.)

8 On April 16, 2020, WFC filed a motion for preliminary injunction to stay NMFS’s
9 authorization of the subject commercial Chinook salmon fisheries. (Pl.’s Inj. Mot. (Dkt. # 14).)
10 On April 23, 2020, ATA filed an unopposed motion to intervene and was joined to the case as
11 Defendant-Intervenor. (Dkt. ## 19, 25.) On April 28, 2020, ATA filed its answer, and on May
12 22, 2020, Government Defendants filed their answer. (Dkt. ## 29, 45.)

13 On June 9, 2020, this Court issued a report and recommendation finding that the judicial
14 review provision of the Magnuson-Stevens Act, 16 U.S.C. § 1855(f), barred WFC’s request for a
15 preliminary injunction. (Dkt. # 51.) This Court’s report and recommendation was adopted by the
16 Honorable Richard A. Jones on March 1, 2021. (Dkt. # 69.) On March 9, 2021, the State of
17 Alaska filed a motion to intervene and was joined as a Defendant-Intervenor on March 30, 2021.
18 (Dkt. ## 75, 88.) On March 31, 2021, the State of Alaska filed its answer. (Dkt. # 90.)

19 On May 5, 2021, WFC filed its Motion. (Pl.’s Mot.) On May 26, 2021, Government
20 Defendants, in addition to Defendant-Intervenors ATA and the State of Alaska, each filed a
21 Cross-Motion. (Dkt. ## 92-94.) Government Defendants’ Cross-Motion generally contends that
22 NMFS’s issuance of the 2019 SEAK BiOp fully complied with the ESA and NEPA and that
23 WFC’s challenge to increased salmon hatchery production hatchery fails because it is a

1 “programmatically action that approves a framework for site-specific actions.” (Gov. Defs.’ Mot. at
2 1.) Defendant-Intervenor ATA’s Cross-Motion, which was joined by the State of Alaska,
3 primarily alleges that WFC does not have standing to bring its substantive claim that NMFS’s no
4 jeopardy determination in the 2019 SEAK BiOp violated the ESA. (ATA’s Mot. at 1, 8-13.)
5 Defendant-Intervenor State of Alaska’s Cross-Motion joins Government Defendants’ arguments
6 regarding the ESA and NEPA claims, and ATA’s arguments regarding standing, but separately
7 contends that vacatur of the 2019 SEAK BiOp would be an inappropriate remedy in this case.
8 (AK’s Mot. at 1-2, 14.) Defendant-Intervenor State of Alaska’s Cross-Motion also seeks a final
9 judgment dismissing any claims by Plaintiff that are premised upon the delegation of
10 management of the Southeast Alaska salmon fishery to the State of Alaska under the
11 Magnuson-Stevens Act. (*Id.*)

12 On June 9, 2021, WFC filed a combined response and reply to Government Defendants’
13 and Defendant-Intervenors’ Cross-Motions (“Plaintiff’s Reply”).¹ (Pl.’s Reply (Dkt. # 96).) On
14 June 16, 2021, Government Defendants filed a reply (“Government Defendants’ Reply”) (Gov.
15 Defs.’ Reply (dkt. # 99)), Defendant-Intervenors ATA filed a reply (ATA’s Reply (dkt. # 98)),
16 and the State of Alaska filed a reply (AK’s Reply (dkt. # 97)). On July 27, 2021, this Court held
17 oral argument on Plaintiff’s Motion and Government Defendants’ and Defendant-Intervenors
18 Cross-Motions. (Dkt. # 103.) This matter is now ripe for the Court’s review.

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¹ In its combined response and reply, WFC requests that the Court strike portions of Government
Defendants’ Cross-Motion that relied on extra-record material to defend the 2019 SEAK BiOp from
WFC’s ESA claims. (Pl.’s Reply at 10.) A BiOp is a final agency action that shall be reviewed on “the
whole record” before the federal agency at the time of its decision. 5 U.S.C. § 706; *see Ariz. Cattle
Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1245 (9th Cir. 2001). But as noted by WFC
at oral argument and in its responsive briefing, the Court may properly consider extra-record evidence in
considering WFC’s NEPA claim, which does not challenge a final agency decision, and in fashioning
relief. (Dkt. # 110 at 35-39; Pl.’s Reply at 10 n.1.) As such, the Court declines to strike Government
Defendants’ references to extra-record evidence in its cross-motion.

1 **B. Statutory Background**

2 *i. Endangered Species Act*

3 The ESA was enacted by Congress to conserve endangered species and to protect the
4 ecosystems they depend on. 16 U.S.C. §§ 1531(b). The ESA assigns implementation
5 responsibilities to the Secretary of Commerce and the Secretary of the Interior, who have
6 delegated such duties to NMFS and the United States Fish and Wildlife Services (“FWS”). *See*
7 50 C.F.R. § 402.01(b). NMFS retains ESA authority for marine and anadromous species, while
8 FWS has jurisdiction over terrestrial and freshwater species. *See* 50 C.F.R §§ 17.11, 223.102,
9 224.101.

10 Section 7 of the ESA imposes substantive and procedural requirements on federal
11 agencies. *See* 50 C.F.R. § 402.03. At issue in this case, Section 7(a)(2) of the ESA substantively
12 requires federal agencies to “insure that any action authorized, funded or carried out by such
13 agency . . . is not likely to jeopardize the continued existence of any endangered species or
14 threatened species or result in the destruction or adverse modification” of critical habitat. 16
15 U.S.C. § 1536(a)(2). In addition, Section 7 of the ESA procedurally requires that any federal
16 agency that proposes an action must first determine whether the action “may affect” a listed
17 species or critical habitat. 50 C.F.R. § 402.14(a). If the federal agency determines the action
18 “may affect” a listed species, it must consult with NMFS, FWS, or both agencies. 50 C.F.R.
19 §§ 402.03, 402.13, 402.14.

20 Formal consultation results in the consulting agency’s issuance of a biological opinion
21 (“BiOp”). 50 C.F.R. § 402.14(h)(1). A BiOp includes the consulting agency’s opinion on
22 whether a proposed action is likely to jeopardize listed species or adversely modify critical
23 habitat. 50 C.F.R. § 402.14(h)(3). If the consulting agency determines an action is likely to

1 jeopardize species or adversely modify critical habitat, the BiOp will suggest “reasonable and
2 prudent alternatives” to avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); *see*
3 *also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 634 (9th Cir. 2014). The
4 implementing regulations for the ESA define “action” as “all activities or programs of any kind
5 authorized, funded, or carried out . . . by Federal agencies.” 50 C.F.R. § 402.02.

6 Section 9 of the ESA prohibits “take” of a listed species. 16 U.S.C. § 1538(a)(1)(B); 50
7 C.F.R. § 223.203(a). “Take” is defined to include harming, harassing, or killing listed species. 16
8 U.S.C. § 1532(19). Harm is defined to include “significant habitat modification” which “kills or
9 injures fish or wildlife by significantly impairing essential behavioral patterns, including,
10 breeding, spawning, . . . [or] feeding” 50 C.F.R. § 222.102.

11 If the consulting agency determines a proposed action is not likely to jeopardize the
12 species, or if reasonable and prudent alternatives are identified to avoid jeopardy and adverse
13 modification but will likely result in the incidental “take” of some individual members of a listed
14 species, the agency provides an “incidental take statement” (“ITS”) along with the BiOp for the
15 proposed action. *See* 16 U.S.C. § 1536(b)(4)(c)(i)-(iv); 50 C.F.R. § 402.14(i)(1)(i). Any “take” in
16 compliance with an ITS does not violate Section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 50
17 C.F.R. § 402.14(i)(5).

18 *ii. National Environmental Policy Act*

19 NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”)
20 for any “major Federal actions significantly affecting the quality of the human environment.” 42
21 U.S.C. § 4332(2)(C)(i). An EIS ensures that a federal agency will consider information on
22 environmental impacts when reaching decisions and that the information will be made available
23 to the larger audience who may play a role in the decision-making process. *Robertson v. Methow*

1 *Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires that “relevant environmental
2 information be identified and considered early in the process in order to ensure informed
3 decision making by Federal agencies.” 40 C.F.R. § 1500.1(b).

4 NEPA regulations direct federal agencies to prepare an Environmental Assessment
5 (“EA”) to determine whether an EIS is necessary if the proposed action is neither one that
6 normally requires an EIS nor one that is excluded from NEPA review. *Hale v. Norton*, 476 F.3d
7 694, 700 (9th Cir. 2007); *see* 40 C.F.R. § 1501.4(a)-(b). If it is determined no significant impact
8 will occur after completing an EA, the federal agency must issue a “finding of no significant
9 impact (‘FONSI’) and then execute the action.” *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th
10 Cir. 1995); *see* 40 C.F.R. §§ 1501.4(e), 1508.13. However, if the EA shows that the proposed
11 action will have a significant impact, the federal agency must prepare an EIS before proceeding
12 with the proposed action. 42 U.S.C. § 4332(2)(C); *Ramsey v. Kantor*, 96 F.3d 434, 443 (9th Cir.
13 1996).

14 *iii. Magnuson-Stevens Act*

15 The Magnuson-Stevens Act establishes exclusive federal management over fisheries
16 within the federal waters of the United States, which extends from the seaward boundary of each
17 coastal state to 200 nautical miles from the coastline. 16 U.S.C. §§ 1802(11), 1811(a). The
18 Secretary of Commerce is charged with implementing the Magnuson-Stevens Act but has
19 delegated this responsibility to NMFS. 16 U.S.C. §§ 1854, 1855(d).

20 **C. Factual Background**

21 WFC is a membership-based 501(c)(3) nonprofit organization in the State of Washington,
22 with its principal place of business in Duvall, Washington. (Compl. at ¶ 14.) WFC brings this
23

1 action on behalf of its members who it asserts regularly spend time in areas in and around the
2 waters occupied by the SRKW and subject Chinook salmon ESUs. (*Id.* at ¶ 15.)

3 *i. The SRKW and Chinook Salmon*

4 In 2005, NMFS listed the SRKW as endangered under the ESA. 50 C.F.R. § 224.101(h);
5 *see also* Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903 (Nov. 18,
6 2005). As of December 2018, the SRKW population was 74. AR at 47276. In early 2019, there
7 were 26 reproductive age females, with only 14 having successfully reproduced in the prior 10
8 years, and there had been no viable calves since the beginning of 2016. *Id.* at 47434.

9 A primary limiting factor for the SRKW population is prey availability, which has
10 contributed to premature mortality and reduced fertility. AR at 47276, 47282, 47286-87, 47434.
11 While the SRKW consume a wide variety of fish species, 80 to 90 percent of the SRKW's diet
12 consists of older and larger Chinook salmon. *Id.* at 47282-83. Overall, the major threats that have
13 led to SRKW population decline are: (1) the worsening availability of salmon prey; (2) noise and
14 vessel impacts; and (3) habitat destruction and pollution, including the presence of toxins in the
15 environment and in their food. *Id.* at 29604, 47276, 47282, 47286-90, 47433-34.

16 NMFS listed the Snake River fall-run Chinook salmon ESU as a threatened species under
17 the ESA in 1992. 50 C.F.R. § 223.012(e); *see also* Threatened Status for Snake River
18 Spring/Summer Chinook Salmon, Threatened Status for Snake River Fall Chinook Salmon, 57
19 Fed. Reg. 14,653 (Apr. 22, 1992). The Puget Sound, the Lower Columbia River, and the Upper
20 Willamette River Chinook salmon ESUs were all listed as threatened species in 1999. 50 C.F.R.
21 § 223.102(e); *see also* Threatened Status for Three Chinook Salmon ESUs in Washington and
22 Oregon, and Endangered Status for One Chinook Salmon ESU in Washington, 64 Fed. Reg.
23 14,308 (Mar. 24, 1999). The primary limiting factors for the Chinook salmon ESUs' decline

1 include harvests, loss of habitat, and hatcheries. *See* AR at 1729, 14492, 15761, 15891,
2 47422-24.

3 As the 2019 SEAK BiOp notes, NMFS has performed numerous consultations on the
4 effects of Southeast Alaska fisheries on both the SRKW and the Chinook Salmon populations
5 under the ESA since 1992. AR at 47195-97. In the 2019 SEAK BiOp, NMFS determined that its
6 proposed actions were likely to adversely affect the SRKW and the Snake River-fall run, Puget
7 Sound, Lower Columbia River, and Upper Willamette River Chinook salmon ESUs. *Id.* at
8 47173, 47175, 47221-90.

9 *ii. The Pacific Salmon Treaty*

10 Due to migratory patterns, Chinook salmon regularly travel across the boundary between
11 the United States and Canadian waters. AR at 523. As a result, fish originating in one country are
12 often “intercepted” by individuals fishing in the other country. *Id.*; *see id.* at 47194-95. To resolve
13 this issue, the United States and Canada ratified the Pacific Salmon Treaty (“PST”). *Id.*
14 Beginning in 1985, the PST established a framework for the management of Pacific salmon
15 fisheries in the federal waters off the coast of the United States and Canada that fall within the
16 treaty’s geographical boundaries. *Id.*

17 In both 1999 and 2009, the United States and Canada entered into 10-year agreements
18 that comprehensively updated the PST. AR at 47194-95. Both countries entered into the most
19 recent agreement in 2019, which set the current upper harvest limits of Chinook salmon. *Id.*
20 Chapter 3 of Annex IV to the 2019 PST defines the current management regime for the Chinook
21 salmon fisheries within the PST geographical region, including Southeast Alaska, and is in effect
22 from 2019 through 2028. *Id.* at 515, 517, 47194-95.

1 iii. *The Salmon Fishery Management Plan*

2 NMFS delegated its authority over the Southeast Alaska salmon fisheries in federal
3 waters to Alaska. 50 C.F.R. § 679.3(f). Pursuant to the Magnuson-Stevens Act, the North Pacific
4 Fishery Management Council (“NPFMC”) has “authority over the fisheries in the Arctic Ocean,
5 Bering Sea, and Pacific Ocean seaward of Alaska.” 16 U.S.C. § 1852(a)(1)(G); *see* AR at 502.
6 The NPFMC has issued several amendments to its original 1979 fishery management plan for
7 salmon fisheries in Alaska (the “Salmon FMP”), with the most recent amendment completed in
8 2018. Fisheries of the Exclusive Economic Zone Off Alaska; Essential Fish Habitat
9 Amendments, 83 Fed. Reg. 31,340 (July 5, 2018). On December 12, 2012, NMFS reaffirmed its
10 delegation of authority over the salmon fisheries in Southeast Alaska to the State of Alaska in
11 FMP Amendment 12. 50 C.F.R. § 679.3(f); *see also* Fisheries of the Exclusive Economic Zone
12 Off Alaska; Pacific Salmon, 77 Fed. Reg. 75,570 (Dec. 21, 2012). The Salmon FMP delegates
13 management authority over the fishery in federal waters of Southeast Alaska to the State of
14 Alaska; however, NMFS retains oversight authority. AR at 515, 561-65.

15 The 2018 Salmon FMP provides for two salmon fisheries in Southeast Alaska: (1) a
16 commercial troll salmon fishery; and (2) a sport fishery. AR at 514-15. Harvests are limited to a
17 specific number of “Treaty Chinook salmon” according to the abundance estimate established
18 under the PST. *Id.* at 540-41. All winter and spring harvests, and some summer harvest, occur in
19 state waters and are not subject to the Magnuson-Stevens Act. *See id.* However, some of the
20 summer harvest occurs in the Exclusive Economic Zone subject to the Magnuson-Stevens Act.
21 *Id.*

1 iv. 2019 SEAK BiOp

2 Following the completion of the 2019 PST, NMFS reinitiated consultation under the ESA
3 on the Alaska salmon fisheries, and on April 5, 2019, issued the 2019 SEAK BiOp. AR at
4 47173-76, 47193-204. The 2019 SEAK BiOp considered the combined effects of three actions.
5 *Id.* at 47193-204. First, NMFS analyzed its ongoing delegation of management authority over the
6 Southeast Alaska salmon fisheries in federal waters to the State of Alaska. *Id.* at 47197-98.
7 Second, NMFS analyzed federal funding to the State of Alaska to meet the obligations of the
8 PST. *Id.* at 47198-201. Third, NMFS analyzed funding for a conservation program to benefit
9 Puget Sound Chinook salmon stocks and the SRKW. *Id.* at 47201-04. The 2019 SEAK BiOp
10 analyzes Southeast Alaska salmon fisheries under the 2019 PST. *See, e.g., id.* at 47366.

11 In the 2019 SEAK BiOp, NMFS ultimately concluded the continued operation of the
12 salmon fisheries, consistent with the PST established harvest limits, was not likely to jeopardize
13 the SRKW or adversely modify its critical habitat. AR at 47508 (“it is NMFS’ [BiOp] that the
14 proposed actions are not likely to appreciably reduce the likelihood of both survival and recovery
15 of [the SRKW] or destroy or adversely modify their designated critical habitat.”). Similarly,
16 NMFS concluded the proposed actions would not jeopardize the Lower Columbia River, Upper
17 Willamette River Chinook, Snake River-fall run, and Puget Sound Chinook salmon ESUs. *Id.* at
18 47485-47501.

19 v. Conservation Program

20 Relevant to the instant matter, under the third action in the 2019 SEAK BiOp, NMFS
21 planned to secure national and state funding for a conservation program to benefit Puget Sound
22 Chinook salmon stocks and the SRKW. AR at 47201-04. NMFS’s federal “funding initiative”
23 under the proposed conservation program contains three elements. *Id.* at 47202. The first and

1 second parts of the conservation program were projected to benefit populations of Puget Sound
2 Chinook salmon that are considered essential for recovery as well as the SRKW. *Id.* First, NMFS
3 noted \$3.06 million per year would be allocated for Puget Sound Chinook salmon conservation
4 hatcheries to increase funding for existing programs on the Nooksack, Dungeness, and
5 Stillaguamish Rivers and to fund a new program in Hood Canal. *Id.* at 47202, 47420. Second,
6 NMFS noted that \$31.2 million would be provided to fund habitat projects to benefit Chinook
7 salmon populations in the same four watersheds. *Id.* at 47202, 47419-20. The 2019 SEAK BiOp
8 specified that the habitat related recovery projects are “one[-]time capital projects that would . . .
9 be funded and completed during the first three years.” *Id.*

10 The third component of the conservation program contemplated by the 2019 SEAK BiOp
11 is a prey increase program that was specifically designed to “increase hatchery Chinook salmon
12 abundance to provide a meaningful increase in prey availability for SRKWs.”² AR at 47202,
13 47419-20. The prey increase program sought to provide a four to five percent increase in prey for
14 the SRKW in approximately 4-5 years. *Id.* at 47202-03. Per the 2019 SEAK BiOp, NMFS
15 proposed spending at least \$5.6 million annually on the conservation program to release 20
16 million smolts annually. *Id.* at 47203.

17 For purposes of the 2019 SEAK BiOp, NMFS considered the conservation program
18 action to be a “framework programmatic action.” AR at 47203; *see* 50 C.F.R. § 402.02. As a
19 result, the 2019 SEAK BiOp acknowledged aspects of the conservation program would be
20 decided in the future, such as the selection of funding recipients for the habitat restoration
21 programs. AR at 47203. NMFS noted that it would perform site-specific analysis as needed if the
22 activities were determined to not be covered by existing programmatic BiOps. *Id.*

23 _____
² This program is alternatively referred to by Government Defendants the “Hatchery Production Initiative for Southern Resident Killer Whales.” (Gov. Defs.’ Mot. at 13 n.7.)

1 vi. *Incidental Take Statement*

2 The 2019 SEAK BiOp includes an ITS authorizing take of the SRKW in addition to the
3 four threatened Chinook salmon ESUs, allowing for the salmon fisheries to harvest up to the
4 limits put in place under the 2019 PST. AR at 47518-19. The ITS does not authorize take
5 associated with the proposed hatchery and habitat programs for the Chinook salmon ESUs. *Id.*;
6 *see also id.* at 47420, 47428, 47433. Instead, the ITS acknowledges “limited adverse effects to
7 the listed Chinook salmon as a result of increased hatchery production and habitat restoration
8 work associated with the mitigation funding initiative” and that the 2019 SEAK BiOp constitutes
9 a programmatic review of the funding action. *Id.* at 47519 (“[W]e do not provide an exemption
10 from the take prohibition for those actions in this take statement. This will be addressed in future
11 project-specific consultations, 4(d) rule approvals, or determinations of coverage by existing
12 biological opinions.”).

13 The ITS included in the 2019 SEAK BiOp additionally notes that the salmon harvest that
14 may occur under the proposed actions was likely to result “in some level of harm constituting
15 take of SRKW by reducing prey availability” by causing the SRKW to forage for longer periods,
16 travel to alternate locations, or abandon foraging efforts. AR at 47519. Therefore, NMFS utilized
17 the level of Chinook salmon catch in Southeast Alaska as a surrogate for incidental take of
18 SRKW. *Id.* (“The extent of take for SRKW is therefore the same as the extent of take for
19 Chinook salmon and is described by the provisions of Chapter 3, Annex IV of the PST
20 Agreement that define annual catch or total mortality limits on Chinook salmon (including
21 ESA-listed and non ESA-listed Chinook salmon.”).

1 vii. *Environmental Assessment and Environmental Impact Statement History*

2 In 1998, NMFS prepared an EA to comply with NEPA for its continued deferral of
3 management to Alaska that addressed the Southeast Alaska salmon fisheries through 2003. AR at
4 47953. Subsequent to the 1998 EA, the 1999 PST was completed, which set the harvest limits
5 from 1999 through 2008. *Id.* Under the guidance of the 1998 EA, NMFS issued a BiOp with an
6 ITS “that covers the 1999 [PST], and the deferral of management to the State of Alaska for the
7 duration of this management program subject to conditions that require reinitiation of
8 consultation.” *Id.*

9 In November 2003, NMFS issued a programmatic EIS addressing its review of several
10 salmon fisheries—including those located in Southeast Alaska. AR at 47914. The EIS addressed
11 the ITS for the 1999 PST and the “annual decision regarding continued deferral of management
12 to the State [of Alaska] and the issuance of an ITS through the Section 7 consultation process.”
13 *Id.* at 47953. The 2003 EIS additionally explained that the Ninth Circuit’s “decision in *Ramsey v.*
14 *Kantor* clarifies that the actions ensuing from NMFS’s review are the decision of whether to
15 continue deferral of management to the State of Alaska and the associated issuance of an [ITS],
16 and that those actions need to comply with NEPA.” *Id.* at 47953.

17 In 2012, NMFS completed an EA in connection with Amendment 12 to the Salmon FMP
18 considering the impacts of the ongoing delegation of authority to the State of Alaska, which
19 included an analysis of the 2008 BiOp and an ITS. AR at 47797-825. The 2008 BiOp surveyed
20 the impact of the ongoing delegation on both the SRKW and Chinook salmon ESUs. *Id.* at
21 343-61, 399-402.

1 **III. DISCUSSION**

2 **A. Legal Standards**

3 Summary judgment is generally the appropriate mechanism for resolving the merits of
4 ESA and NEPA claims. *See e.g., Occidental Eng'g Co. v. Immigr. & Naturalization Serv.*, 753
5 F.2d 766, 769-70 (9th Cir. 1985). Summary judgment in such case is appropriate where there is
6 no genuine issue of material fact and the moving party is entitled to a judgment as a matter of
7 law. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (citing
8 *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007)). Because this matter is a record
9 review case, the Court may direct summary judgment be granted to either party based upon
10 review of the administrative record. *Id.* (citing *Lands Council v. Powell*, 395 F.3d 1019, 1026
11 (9th Cir. 2005)).

12 Federal agencies' compliance with the ESA and NEPA is reviewed under the APA. *Ctr.*
13 *for Biological Diversity v. Ilano*, 928 F.3d 774, 779-80 (9th Cir. 2019); *Jewell*, 747 F.3d at 601.
14 Under the APA, "an agency action must be upheld on review unless it is 'arbitrary, capricious,
15 an abuse of discretion, or otherwise not in accordance with law.'" *Jewell*, 747 F.3d at 601
16 (quoting 5 U.S.C. § 706(2)(A)). A reviewing court "must consider whether the decision was
17 based on a consideration of the relevant factors and whether there has been a clear error of
18 judgment." *Id.* (citation and quotation marks omitted). Courts will "reverse a decision as
19 arbitrary and capricious only if the agency relied on factors Congress did not intend it to
20 consider, entirely failed to consider an important aspect of the problem, or offered an explanation
21 that runs counter to the evidence before the agency or is so implausible that it could not be
22 ascribed to a difference in view or the product of agency expertise." *N. Plains Res. Council, Inc.*
23 *v. Surface Transp. Bd.*, 668 F.3d 1067, 1074-75 (9th Cir. 2011).

1 The Court’s “review of agency actions, including the promulgation of a BiOp, is narrow.”
2 *Alaska v. Lubchenco*, 723 F.3d 1043, 1052 (9th Cir. 2013). The Court should give “deference to
3 a reasonable interpretation of a statute by an administrative agency charged with its
4 implementation.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 344 (1984).
5 Courts should be at their most deferential “when reviewing scientific judgments and technical
6 analyses within the agency’s expertise.” *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir.
7 2010). “Deference is particularly important when the agency is making predictions, within its
8 area of special expertise, at the frontiers of science.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish &*
9 *Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quotations omitted).

10 **B. Standing**

11 Before considering the merits of WFC’s claims, the Court must first address WFC’s
12 standing. Government Defendants and ATA both argue WFC lacks standing for its substantive
13 ESA claim concerning the “no jeopardy” determination for both the SRKW and Chinook salmon
14 ESUs in the 2019 SEAK BiOp. (Gov. Defs.’ Mot. at 10-11; ATA’s Mot. at 9-14.) Specifically,
15 both Government Defendants and ATA contend WFC’s alleged injury is neither causally related
16 to the Southeast Alaska troll fishery nor redressable by the relief sought by WFC. (*Id.*) In
17 addition, Government Defendants and ATA argue WFC lacks organizational standing to bring its
18 substantive and procedural ESA claims because WFC’s claims are premised on injuries to its
19 members, fail to satisfy the causation and redressability requirements, and, therefore, WFC
20 members would not have standing to bring a suit on their own.³ (Gov. Defs.’ Mot. at 10; ATA’s
21 Mot. at 9 n.3.)

22
23 ³ Neither Government Defendants nor ATA challenge WFC’s standing as to its NEPA claim. (*See* ATA’s
Mot. at 8-14; Gov. Defs.’ Mot. at 10 n.6.)

1 Generally, a plaintiff must establish that it meets both constitutional and prudential
2 standing requirements. *Ocean Advocates v. U.S. Army Corps of Engineers.*, 402 F.3d 846, 859
3 (9th Cir. 2005). To that end, Article III standing requires that WFC demonstrate:

4 (1) [I]t has suffered an injury in fact that is (a) concrete and particularized and (b)
5 actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable
6 to the challenged action of the defendant; and (3) it is likely, as opposed to merely
7 speculative, that the injury will be redressed by favorable decision.

8 *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs., Inc.*, 528 U.S. 167, 180-81 (2000));
9 *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). WFC must also demonstrate
10 standing for each claim it seeks to press and for each form of relief sought. *Washington Env'tl.*
11 *Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citation omitted). At the summary
12 judgment stage, a plaintiff cannot rest on “mere allegations [of standing] but must set forth by
13 affidavit or other evidence specific facts” to support it. *Gerlinger v. Amazon.com Inc., Borders*
14 *Group, Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008). “A plaintiff’s basis for standing must
15 affirmatively appear in the record.” *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545
16 F.3d 1220, 1228 n.5 (9th Cir. 2008) (citation and internal quotation omitted).

17 To satisfy the prudential standing requirement, WFC must demonstrate its interests fall
18 within the “zone of interests” protected by the ESA and NEPA. *Ocean Advocates*, 402 F.3d at
19 859 (citing *Bennet v. Spear*, 520 U.S. 154, 162 (1997)). Per Plaintiff’s complaint, WFC is
20 “dedicated to the preservation and recovery of Washington’s native fish species and the
21 ecosystems upon which those species depend” and functions as a self-described environmental
22 watchdog. (See Pl.’s Compl. at ¶ 14.) Given WFC’s interests involve protecting ESA-protected
23 species such as the SRKW and Chinook salmon, and that Defendants do not contest WFC’s

1 espoused interests, the Court finds WFC interests fall within the “zone of interests” protected by
2 the ESA and NEPA for prudential standing.

3 Because Government Defendants and ATA have challenged WFC’s standing on both its
4 substantive and procedural ESA claims, the Court examines each claim under the applicable
5 standards below.

6 *i. Substantive Injury (“No Jeopardy”) Claim*

7 1. Injury in Fact

8 The Supreme Court has held environmental plaintiffs adequately allege injury when they
9 allege that they use an affected area and are individuals “for whom the aesthetic and recreational
10 values of the area will be lessened” by the challenged activity. *Sierra Club v. Morton*, 405 U.S.
11 727, 735 (1972); *see Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147, 1151
12 (9th Cir. 2000) (“The ‘injury in fact’ requirement in environmental cases is satisfied if an
13 individual adequately shows that she has an aesthetic or recreational interest in a particular place,
14 or animal . . . and that that interest is impaired by a defendant’s conduct.”).

15 WFC asserts that their injury is WFC members’ decreased viewing opportunities of the
16 SRKW and Chinook salmon in the wild. (*See* Pl.’s Reply at 39, 43-44.) Per WFC’s members’
17 declarations, WFC members derive recreational and aesthetic enjoyment from Puget Sound and
18 its wildlife. (*See* Second McMillan Decl. (Dkt. # 91-7) at ¶¶ 7-9, 17, 21, 27-34; Second Soverel
19 Decl. (Dkt. # 91-8) at ¶¶ 3-5, 14, 16, 18.) WFC members note that depleting Chinook salmon
20 populations negatively affect their ability to perform spawning surveys, or otherwise observe
21 Chinook salmon, and impact their ability to view SRKW due to the SRKW’s reliance on
22 Chinook salmon as prey. (*See* Second McMillan Decl. at ¶¶ 5, 8-9, 22-25, 32; Second Soverel
23 Decl. at ¶¶ 5, 24, 22.) In addition, WFC members testify that the prey increase program that

1 would release hatchery Chinook salmon will directly adversely impact wild salmonids, and in
2 turn, WFC members’ recreational and aesthetic enjoyment of the Puget Sound and its wildlife.
3 (See Second McMillan Decl. at ¶¶ 9, 29-33; Second Soverel Decl. at ¶¶ 4, 20-22.) As a result,
4 WFC members testify their use and enjoyment of Puget Sound, and its wildlife, are diminished
5 by NMFS’s alleged violations of the ESA and NEPA. (See Second McMillan Decl. at ¶ 9;
6 Second Soverel Decl. at ¶ 4.)

7 Based on the record before the Court, WFC members have adequately demonstrated
8 injury in fact. Furthermore, Government Defendants and the ATA both do not challenge the
9 validity of WFC members’ claim of injury. (See Gov. Defs.’ Mot. at 20-21; ATA’s Mot. at 9-16;
10 ATA’s Reply at 2-3.) Therefore, the Court finds WFC has demonstrated injury in fact for its
11 substantive ESA claims.

12 2. Causation

13 To establish causation, a plaintiff need only establish the theory of causation is at least
14 plausible. See *Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002). The causal
15 connection need not be airtight but cannot be too speculative or rely on conjecture. See
16 *Ecological Rights Found.*, 230 F.3d at 1152; *Bellon*, 732 F.3d at 1141-42 (“A causal chain does
17 not fail simply because it has several links, provided those links are not hypothetical or tenuous
18 and remain plausible.”). In addition, “a litigant challenging an agency action need not eliminate
19 any other contributing causes to establish its standing.” *WildEarth Guardians v. U.S. Dep’t. of*
20 *Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015).

21 ATA argues that, in light of the other threats affecting the SRKW population and
22 Chinook salmon abundance, the effect the Southeast Alaska troll fishery has on prey availability
23 is “scientifically indiscernible” for purposes of standing. (ATA Mot. at 9-13.) On this point,

1 ATA centrally argues that the Ninth Circuit’s decision in *Bellon* is illustrative that WFC’s theory
2 of causation remains tenuous. (*Id.*)

3 In *Bellon*, plaintiffs challenged several environmental agencies’ lack of regulation of five
4 oil refineries in the State of Washington and alleged that greenhouse gas pollution from those
5 refineries caused recreational, aesthetic, economic, and health injuries that were causally linked
6 to the agencies’ failure to regulate. *Bellon*, 732 F.3d at 1135, 1139-41. The Ninth Circuit noted
7 that the refineries were responsible for only six percent of Washington’s emissions, an amount
8 the court found was “scientifically indiscernible” in the context of global climate change. *Id.* at
9 1143-44. Therefore, the Ninth Circuit determined that plaintiffs failed to demonstrate causation
10 because “a multitude of independent third parties [were] responsible for the changes contributing
11 to Plaintiffs’ injuries” and, therefore, the “the causal chain [was] too tenuous to support
12 standing” *Id.* at 1144.

13 Here, the Court finds that WFC’s theory of causation remains plausible. While the Court
14 notes that there are several environmental and third-party factors that have contributed to the
15 population decrease for both SRKW and Chinook salmon (*see* AR 29607, 47345-47), absent the
16 2019 SEAK BiOp, Chinook salmon that the fisheries are authorized to take would otherwise be
17 available for the SRKW and for wildlife viewing. Based on the 2019 SEAK BiOp, NMFS
18 estimates prey reductions as a result of the Southeast Alaska fisheries amounting to, at
19 maximum, 12.9 percent in coastal waters and 2.5 percent in inland waters. *See id.* at 47507.
20 NMFS notes that prey availability is a primary factor limiting recovery and that the fisheries
21 covered by the 2019 SEAK BiOp will “adversely affect” SRKW critical habitat unless other
22 measures are taken. *See id.* at 47282-83, 47507. To compensate for the decrease in prey, NMFS
23

1 sought to provide a 4 percent to 5 percent increase in prey through hatchery production, which
2 the BiOp characterizes as a “meaningful increase.” *See id.* at 47202-03.

3 Consequently, the Court finds that reduction of Chinook salmon availability through the
4 Southeast Alaska fisheries meaningfully contributes to the decreased viewing opportunities of
5 the SRKW and Chinook salmon for WFC’s members. *See e.g., WildEarth Guardians*, 795 F.3d
6 at 1158. Furthermore, WFC’s claims are distinguishable from the plaintiff’s claims in *Bellon*
7 because the Southeast Alaska fisheries’ impact on prey availability is not “scientifically
8 indiscernible” given the 2019 SEAK BiOp’s noted impacts of prey availability to the SRKW.
9 *See AR 47282-83, 47507.* Therefore, the Court finds that WFC has met the causation
10 requirement for standing on its substantive claim.

11 3. Redressability

12 In order to meet the redressability prong to find standing for WFC’s substantive injury
13 claims, there must be evidence in the record that demonstrates a “substantial likelihood” that the
14 injury will be redressed to some degree if the plaintiffs receive a favorable decision. *Bellon*, 732
15 F.3d at 1146; *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011).
16 “Redressability does not require certainty, but only a substantial likelihood that the injury will be
17 redressed by a favorable decision.” *Northwest Requirements Utilities v. F.E.R.C.*, 798 F.3d 796,
18 806 (9th Cir. 2015).

19 WFC argues its members’ alleged injuries are likely redressable by a Court order that
20 NMFS failed to ensure its actions would not jeopardize the SRKW and ESA-listed Chinook
21 salmon because NMFS would have to stop relying on the 2019 SEAK BiOp. (Pl.’s Reply at
22 43-44.) ATA argues that the record fails to evince that there is a substantial likelihood the WFC
23

1 members may be more likely to see SRKW if the Southeast Alaska troll fishery is closed.
2 (ATA’s Mot. at 13-14.)

3 As previously considered above, NMFS has noted prey availability is a primary factor
4 limiting recovery for the SRKW and the Southeast Alaska fisheries covered by the 2019 SEAK
5 BiOp will “adversely affect” the SRKW. *See* AR at 47282-83, 47507. With more Chinook
6 salmon in the population, there would be an increase in prey availability that would help to
7 increase SRKW population recovery, and therefore, WFC members’ chances of seeing SRKW
8 would likely rise. (*See* Second McMillan Decl. at ¶¶ 7, 34; Second Soverel Decl. at ¶¶ 22-23.)
9 Thus, the Court finds that an order requiring NMFS to reinitiate consultation to ensure against
10 jeopardy is substantially likely to redress WFC members’ injuries to some degree. *See Barnum*
11 *Timber Co.*, 633 F.3d at 901; *see also Cal. Sea Urchin Comm’n v. Bean*, 883 F.3d 1173, 1181-82
12 (9th Cir. 2018) (“We have held that in order to have standing a plaintiff need not show that the
13 requested relief will inevitably alleviate the harm complained of.”). Consequently, the Court
14 finds that WFC has met its redressability burden as a favorable decision would likely redress
15 WFC members’ concerns.

16 *ii. Procedural Injury Claim*

17 *1. Injury in Fact*

18 Under the procedural injury test, a plaintiff must show “the procedures in question are
19 designed to protect some threatened concrete interest of his that is the ultimate basis of his
20 standing.” *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th
21 Cir. 2015) (quoting *Salmon Spawning*, 545 F.3d at 1225). The Ninth Circuit has previously held
22 that the consultation procedures under Section 7 of the ESA are designed to protect “concrete
23 interests”—such as the recreational and aesthetic interests asserted by WFC members in this

1 case. *See Salmon Spawning*, 545 F.3d at 1225-26 (“These procedures are designed to advance
2 the ESA’s overall goal of species preservation, and thus the [conservation group’s] specific goals
3 as to salmon preservation, by ensuring agency compliance with the ESA’s substantive
4 provisions.”). Therefore, WFC has adequately alleged injury in fact for its procedural ESA
5 claim.

6 2. Causation and Redressability

7 “A showing of procedural injury lessens a plaintiff’s burden on the last two prongs of the
8 Article III standing inquiry, causation and redressability.” *Salmon Spawning*, 545 F.3d at 1226
9 (citing *Lujan*, 504 U.S. at 572). Because WFC is asserting a procedural injury under its
10 procedural ESA claim, it therefore ““must show only that [it has] a procedural right that, if
11 exercised, *could* protect [its] concrete interests”” in order to demonstrate causation. *Id.*
12 (quoting *Def. of Wildlife*, 420 F.3d at 957 (emphasis in original)). As for redressability, WFC
13 “need[s] to show only that the relief requested—that the agency follow the correct procedures—
14 may influence the agency’s ultimate decision of whether to take or refrain from taking a certain
15 action. This is not a high bar to meet.” *Id.* at 1226-27 (citations omitted).

16 Here, requiring adequate ESA consultation clearly “could protect” the WFC members’
17 recreational and aesthetic interests in the SRKW and the Chinook salmon. Furthermore, as
18 previously discussed in the redressability analysis for WFC’s substantive ESA claim, the
19 Southeast Alaska fisheries and the prey increase program authorized by the 2019 SEAK BiOp
20 have considerable impacts on SRKW population recovery and the Chinook salmon ESUs. *See*
21 AR at 47282-83, 47507. Thus, any deficiencies in the 2019 SEAK BiOp could be remedied by
22 WFC’s requested relief that NMFS follow the correct procedures in determining “no jeopardy”
23 to the SRKW and Chinook salmon ESUs.

1 iii. *Organizational and Statutory Standing*

2 To bring a suit under the APA, WFC must also establish organizational and statutory
3 standing. 16 U.S.C. § 1540(g)(1)(A); *see Friends of the Earth*, 528 U.S. at 180-81. To establish
4 organizational standing, WFC must demonstrate that: (1) its members would otherwise have
5 Article III standing to sue in their own right; (2) the interests at stake are germane to the
6 organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the
7 participation of individual members in the lawsuit. *Friends of the Earth, Inc.* 528 U.S. at 181; *see*
8 *also Am. Diabetes Ass’n v. U.S. Dep’t of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019). For
9 statutory standing, the plaintiff must establish “(1) that there has been a final agency action
10 adversely affecting the plaintiff, and (2) that, as a result, it suffers legal wrong or that its injury
11 falls within the ‘zone of interests’ of” the statute in question. *Ocean Advocates*, 402 F.3d at 861
12 (quoting *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998)).

13 The Court finds that WFC has organizational and statutory standing for all of its claims.
14 As considered above, WFC has adequately alleged standing as to its members for both its
15 substantive and procedural ESA claims. The interests at stake—the impacts of the 2019 SEAK
16 BiOp to the SRKW population and Chinook salmon—are germane to WFC’s interests as an
17 environmental advocacy organization. There is also no indication that resolving WFC’s claims
18 and injuries would require the participation of individual WFC members. As for statutory
19 standing, as also previously considered above, WFC’s claims fall within the “zone of interests”
20 of both the ESA and NEPA under the prudential standing requirement. The entirety of WFC’s
21 claims are derived from NMFS’s decision process regarding the 2019 SEAK BiOp and
22 accompanying ITS, and, therefore, the Court finds that the 2019 SEAK BiOp was a final agency
23 action that adversely affected WFC.

1 Accordingly, finding that WFC meets standing requirements to bring its substantive and
2 procedural ESA claims, the Court turns to an analysis of WFC’s claims.

3 **C. Procedural ESA Claim**

4 *i. Conservation Program*

5 WFC argues the 2019 SEAK BiOp is arbitrary and capricious for improperly relying on
6 uncertain mitigation to find no jeopardy to the SRKW.⁴ (Pl.’s Mot. at 21-27.) Specifically, WFC
7 alleges that the conservation program measures relied upon by NMFS in the 2019 SEAK BiOp
8 to find no jeopardy to the SRKW lack specific and binding plans, lack specific deadlines or
9 otherwise-enforceable obligations, and are not subject to agency control or otherwise reasonably
10 certain to occur. (*Id.*)

11 Government Defendants characterize the conservation program as a framework
12 programmatic action as well as allege it is the mitigating factor for their first two authorized
13 actions. (Gov. Defs.’ Mot. at 19.) Government Defendants argue that because the conservation
14 program is a framework programmatic action,”the initial analysis is broad but is followed by
15 site-specific analyses as additional details become available. (*Id.*) Consequently, Government
16 Defendants argue NMFS met its ESA obligations as the action and consulting agency by
17 “establishing a flexible, legally compliant conservation program that will substantially aid
18 SRKW and salmon.” (*Id.*)

19
20 ⁴ In addition, WFC contends that the 2019 SEAK BiOp was arbitrary and capricious because it: (1) fails
21 to draw a rational connection between the facts found and the no jeopardy opinion for the SRKW; and (2)
22 the ITS regarding the SRKW failed to adequately limit take of SRKW. (Pl.’s Mot. at 27-30, 35.) Because
23 the Court finds the 2019 SEAK BiOp relies on uncertain mitigation to find no jeopardy to the SRKW and
fails to evaluate whether the prey increase program would jeopardize the Chinook salmon ESUs, and thus
was not in accordance with law, the Court declines to consider WFC’s additional arguments. *See*
Fairweather Fish, Inc. v. Pritzker, 155 F.Supp.3d 1136, 1142 (W.D. Wash. 2016) (citing *PDK Labs, Inc.*
v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (“[I]f it is not necessary to decide more, it is necessary not to
decide more.”) (Roberts, J., concurring in part and concurring in the judgment)).

1 While mitigation is allowed to satisfy ESA section 7’s duty to ensure against jeopardy, an
2 agency cannot rely on future mitigation to offset negative impacts absent “solid guarantees that
3 they will actually occur.” *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv. (NWF II)*, 524
4 F.3d 917, 935 (9th Cir. 2008). The Ninth Circuit has adopted strict standards when it comes to
5 such mitigation:

6 Mitigation measure[s] . . . must constitute a clear, definite commitment of
7 resources, and be under agency control or otherwise reasonably certain to occur. A
8 sincere general commitment to future improvements—without more specificity—
9 is insufficient. The measures must be subject to deadlines or otherwise-enforceable
10 obligations; and most important, they must address the threats to the species in a
way that satisfies the jeopardy and adverse modification standards. Binding
mitigation measures cannot refer only to generalized contingencies or gesture to
hopeful plans; they must describe, in detail, the action agency’s plan to offset the
environmental damage caused by the project.

11 *Ctr. For Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) (citations and
12 internal quotations omitted); *see also NWF II*, 524 F.3d at 935-36 (there must be “specific and
13 binding plans” for mitigation).

14 1. Framework Programmatic Action

15 A framework programmatic action for an ITS “approves a framework for the
16 development of future action(s) that are authorized, funded, or carried out at a later time, and any
17 take of a listed species would not occur unless and until those future action(s) are authorized,
18 funded, or carried out and subject to further section 7 consultation.” 50 C.F.R. § 402.02. For a
19 framework programmatic action, an ITS “is not required at the programmatic level; any
20 incidental take resulting from any action subsequently authorized, funded, or carried out under
21 the program will be addressed in subsequent section 7 consultation, as appropriate.” 50 C.F.R.
22 § 402.14(i)(6). For a mixed programmatic action, an ITS is “required at the programmatic level
23 only for those program actions that are reasonably certain to cause take and are not subject to
further section 7 consultation.” *Id.*

1 Though mitigation measures can be used for a framework programmatic action, there is
2 no indication that the mitigation itself to find “no jeopardy” can be a site-specific or framework
3 programmatic action under 50 C.F.R. §§ 402.02, 402.14(i)(6). A framework programmatic action
4 can defer consultation to a later site-specific analysis for the purposes of take, however, this
5 would only occur once an action is found to pose no jeopardy to listed species under ESA section
6 7. *See id.* Government Defendants’ arguments referencing ESA regulations that contemplate
7 site-specific analysis following a programmatic action are therefore inaccurately applied to the
8 mitigation measures challenged in this action. (*See Gov. Defs.’ Mot.* at 11-12, 14-15, 19.)
9 Furthermore, Government Defendants cite to *Bernhardt* to argue that NMFS’s approach “is
10 entirely consistent with a framework programmatic action.” (*Id.* at 14-15.) However, there is no
11 indication in *Bernhardt* that a framework programmatic action can be utilized to alleviate
12 concerns with uncertain mitigation or where take is certain to occur. *See Bernhardt*, 982 F.3d at
13 743.

14 While the ESA contemplates programmatic consultations, the ESA’s allowance for
15 programmatic consultations does not nullify the Ninth Circuit’s stated requirements for
16 mitigation measures. As such, the Court finds that NMFS’s actions identified in the 2019 SEAK
17 BiOp require certain mitigation.

18 2. Specific and Binding Plans

19 In the 2019 SEAK BiOp, NMFS found that absent other measures, the Southeast Alaska
20 fisheries would “adversely affect” the SRKW. AR at 47507. Despite this finding, NMFS
21 approved the maximum harvest limits allowed by the 2019 PST, citing that it would be able to
22 develop and implement mitigation plans to counter the Southeast Alaska fisheries prior to the
23 SRKW’s extinction. *See id.* at 47201-02, 47498-47501 (finding mitigation also needed to

1 preserve Puget Sound Chinook salmon). As a result, WFC argues that NMFS’s reliance on
2 “undeveloped and poorly defined” mitigation violates the ESA and, therefore, the 2019 SEAK
3 BiOp is arbitrary and capricious. (Pl.’s Mot. at 21.)

4 Here, the central point at issue is the third component of NMFS’s conservation plan—the
5 prey increase program—as it relates to the adverse impact on SRKW. As NMFS noted in the
6 2019 SEAK BiOp, a 4-5 percent increase in Chinook salmon would be needed to “address the
7 threats to the [listed] species” that their 2019 SEAK BiOp action would cause. AR at 47420. In
8 effect, the prey increase program is NMFS’s essential long-term mitigation solution to NMFS’s
9 proposed actions. Therefore, absent the mitigation from the prey increase program, NMFS would
10 be unable to conclude that the proposed actions would not destroy or adversely modify critical
11 habitat for the SRKW.

12 Per the 2019 SEAK BiOp, NMFS noted that the plans for the prey increase program
13 could not be described in further detail and merely set out a plan to later iron out the specifics.
14 *See e.g.*, AR at 47203 (“The specific details of how the three activities for which funding would
15 be used have not been developed.”), 47525 (“NMFS shall design the prey increase program
16 using the best available information . . .”), 47433 (NMFS hopes “to work collaboratively with
17 the state and tribal co-managers [that operate hatcheries] . . . to develop a program that meets the
18 goal related to increasing prey abundance.”). When describing the funding plan for the prey
19 increase program in the 2019 SEAK BiOp, NMFS listed specific goals but admitted the plan was
20 “less well defined” and “will likely be subject to additional review once they are fully
21 described.” *Id.* at 47315. Therefore, the Court finds that NMFS failed to create a binding
22 mitigation measure that described “in detail the action agency’s plan to offset the environmental
23 damage caused by the project” for the prey increase program. *Bernhardt*, 982 F.3d at 743; *see*

1 also *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. (NWF III)*, 184 F.Supp.3d 861, 935 (D.
2 Or. 2016); *Ctr. for Biological Diversity v. Salazar*, 804 F.Supp.2d 987, 1004 (D. Ariz. 2011)
3 (finding that a BiOp cannot rely on a “promise—no matter how well-intended—to develop a
4 plan in the future to mitigate the impacts of its proposed action.”).

5 In addition, and as previously noted, proper mitigation plans must be “subject to
6 deadlines or otherwise-enforceable obligations.” *Bernhardt*, 982 F.3d at 743. Government
7 Defendants argue that the 2019 SEAK BiOP provided such deadlines for the three parts of the
8 conservation program because the BiOp states the programs will “operate each year” and “during
9 the first three years.” (Gov. Defs.’ Mot. at 17-18.) Nevertheless, it does not appear from the
10 record that these are deadlines for implementation but merely prospective timelines. *See AR at*
11 *47202-03*. Notably, the 2019 SEAK BiOp does not include any specific deadlines for
12 implementing the proposed mitigation, nor does it include specific requirements by which to
13 confirm that the mitigation is being implemented in the manner and on a schedule needed to
14 avoid the extinction of the SRKW.⁵ *See id.* at 47435 (noting that the mitigation “is not
15 anticipated to be implemented immediately.”), 47525-26; *see also id.* at 47203 (noting that if
16 “funding is not provided in time for actions to take effect during the [10-year] agreement” set in
17 the 2019 PST, that “may constitute a modification” requiring new consultation). The purpose of

18
19
20 ⁵ Government Defendants reliance on *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*,
21 143 F.3d 515 (9th Cir. 1998) is also misplaced. Government Defendants argue that mitigation has
22 previously been upheld where FWS “did not identify specific areas available and suitable for acquisition
23 and restoration.” *Id.* at 518. However, the reasonable and prudent alternatives (“RPA”) in that case
required FWS to acquire a defined number of acres of replacement habitat for the endangered species by a
specific date to mitigate acres lost by the action. *Id.* at 524. The Ninth Circuit specifically noted the record
demonstrated the amount of acreage required was available and there was “no indication that [the Bureau
of Reclamation] cannot acquire and restore the needed replacement habitat as specified in the final RPA
by the required deadlines.” *Id.* Here, the 2019 SEAK BiOp offers no timetables or specific deadlines to
implement the mitigation.

1 the deadlines and enforceable obligations precedent for mitigation is to ensure that the prey
2 increase program would be implemented in the manner NMFS deemed necessary to avoid
3 jeopardizing the SRKW. Merely stating a length of the action and that NMFS “may” be required
4 to reinitiate consultation if a modification is needed due to a lack of funding is insufficient to
5 ensure the prey increase program will effectively mitigate the jeopardy to the SRKW. *See*
6 *Bernhardt*, 982 F.3d at 743-44 (“An indefinite mitigation measure is less likely to trigger
7 re-consultation because it will be difficult to know at which point or whether the action agency
8 has failed to comply.”).

9 In considering NMFS’s proposed mitigation to provide funding to four Puget Sound
10 conservation hatcheries, per the 2019 SEAK BiOp, NMFS notes it cannot confirm additional fish
11 will be produced by the funding. *See* AR at 47420 (funding will “most likely include increased
12 production”). Tellingly, NMFS fails to specify how the funds will be spent, how many additional
13 fish could be produced, where fish would be released, or when, where, or how many salmon
14 could be made available to SRKW or to aid recovery of Chinook salmon. *See id.* at 47420-27.
15 NMFS failed to describe, in detail, how funding these four conservation hatcheries would
16 mitigate harvest impacts or provide “deadlines or otherwise enforceable obligations” to guide the
17 proposed mitigation as required under the ESA. *See Bernhardt*, 982 F.3d at 743.

18 With respect to the habitat restoration component, NMFS admits that “while a list of
19 potential habitat restoration projects . . . exists, it has not been decided which projects would be
20 funded” AR at 47203; *see also id.* at 47420 (“site specific details” for habitat restoration
21 “are not yet available”). Moreover, even the “original project listed may change.” *Id.* at 47427.
22 NMFS does not provide any details about which projects will be implemented, who will
23 implement them, when they would be implemented, or the extent to which they would mitigate

1 harvest impacts. *See id.* at 47427-32. As such, these mitigation measures also fail for lack of
2 specificity and deadlines or otherwise enforceable obligations. *See Bernhardt*, 982 F.3d at 743.

3 3. Subject to Agency Control or Reasonably Certain to Occur

4 NMFS’s conservation program is premised as a “grant program” to provide funding to
5 other parties and entities for the habitat and hatchery projects. *See AR* at 47201-02, 47433,
6 47447. But based on the record before the Court, the 2019 SEAK BiOp does not enumerate a
7 party or entity that would be responsible for implementation of such projects. *See id.*

8 Furthermore, NMFS also notes that “there is a degree of uncertainty regarding whether Congress
9 will [timely] provide the funding in whole or in part” *See id.* at 47203. Consequently, based
10 on the 2019 SEAK BiOp, NMFS’s reliance on the mitigation proposals was not subject to
11 NMFS’s “control or otherwise reasonably certain to occur”. *See Bernhardt*, 982 F.3d at 743; *see*
12 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv. (NWF I)*, 254 F.Supp.2d 1196, 1213-14 (D.
13 Or. 2003) (finding “absence in the record of any binding commitments by the States, Treaty
14 Tribes, and private parties” to implement mitigation was impermissible).

15 ii. *Prey Increase Program*

16 WFC further argues that the 2019 SEAK BiOp violates the ESA by failing to evaluate
17 whether the prey increase program will jeopardize the Chinook salmon ESUs. (Pl.’s Mot. at
18 30-34.) WFC argues that NMFS impermissibly segmented consultation by assuming benefits of
19 the prey increase program in its jeopardy analysis for the SRKW, while omitting the program in
20 its jeopardy analyses for the threatened salmonids. (*Id.* at 32-34.) Government Defendants argue
21 that NMFS considered the effects on wild fish in other parts of the 2019 SEAK BiOp and that
22 NMFS otherwise appropriately consulted at the programmatic level. (Gov. Defs.’ Mot. at 20-23.)

23 Pursuant to the ESA implementing regulations concerning the requirements of a BiOp:

1 The biological opinion shall include . . . [NMFS’s] opinion on whether the action
2 is (A) Likely to jeopardize the continued existence of a listed species or result in
3 the destruction or adverse modification of critical habitat (a “jeopardy” biological
4 opinion); or (B) Not likely to jeopardize the continued existence of a listed
5 species or result in the destruction or adverse modification of critical habitat (a
6 “no jeopardy” biological opinion).

7 50 C.F.R. § 402.14(h)(1)(iv); *see also* 50 C.F.R. § 402.14(g)(4). “During the formal consultation
8 process, the [consulting agency] must ‘formulate its biological opinion as to whether the
9 action . . . is likely to jeopardize the continued existence of listed species’” *Ctr. for*
10 *Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1107 (9th Cir. 2012)
11 (quoting 50 C.F.R. § 402.14(g)(4)).

12 Here, NMFS’s biological opinion that the actions addressed in the 2019 SEAK BiOp are
13 not likely to jeopardize the SRKW relies upon the benefits of the prey increase program. *See* AR
14 at 47506-08 (“The hatchery production will increase abundance of Chinook salmon . . . , which
15 will reduce impacts from the [harvest] action during times of low prey for the whales”). Yet,
16 NMFS’s analyses of whether the actions addressed in the 2019 SEAK BiOp are likely to
17 jeopardize the Chinook salmon ESUs omits mention of the prey increase program altogether. *See*
18 *id.* at 47485-47501. For the Lower Columbia River, Upper Willamette River, and Snake River
19 Chinook salmon ESUs, the jeopardy analysis only addressed impacts associated with the
20 Southeast Alaska fisheries. *See id.* at 47485-97. For Puget Sound Chinook salmon, the jeopardy
21 analysis discusses the Puget Sound conservation hatchery and habitat mitigation but does not
22 mention the prey increase program. *See id.* at 47497-47501.

23 By including benefits of the prey increase program in the jeopardy analysis for the
SRKW but omitting the program from the jeopardy analysis for the threatened Chinook salmon
ESUs, NMFS improperly segmented its consultation. *See Conner v. Burford*, 848 F.2d 1441,

1 1453-58 (9th Cir. 1988); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F.Supp.2d 1137, 1150
2 (W.D. Wash. 2000) (“A biological opinion which is not coextensive in scope with the identified
3 agency action necessarily fails to consider important aspects of the problem and is, therefore,
4 arbitrary and capricious.”). Therefore, the Court finds that NMFS’s failure to make a jeopardy
5 determination on the prey increase program for the Chinook salmon ESUs violated its
6 obligations under the ESA.

7 In conclusion, there is no support in the administrative record that the NMFS’s mitigation
8 contains “specific or binding plans” nor that it is under NMFS’s “control or reasonably certain to
9 occur.” *See Bernhardt*, 982 F.3d at 743. The mitigation identified in the 2019 SEAK BiOp does
10 not meet the Ninth Circuit’s standards and was relied upon by NMFS in the 2019 SEAK BiOp to
11 reach its no jeopardy findings for the SRKW. Additionally, NMFS’s failure to make a jeopardy
12 determination on the prey increase program for the Chinook salmon ESUs violated its procedural
13 obligations under the ESA. The Court therefore recommends that summary judgment on WFC’s
14 procedural ESA claim be granted as the 2019 SEAK BiOp was arbitrary, capricious, and not in
15 accordance with law under 5 U.S.C. § 706(2)(A).

16 **D. “No Jeopardy” Finding under the ESA**

17 An agency violates its substantive duty under Section 7 of the ESA to ensure against
18 jeopardy when it relies on a BiOp that suffers legal flaws. *See e.g., Wild Fish Conservancy v.*
19 *Salazar*, 628 F.3d 513, 532 (9th Cir. 2010); *Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th
20 Cir. 2005). As a result of the Court’s finding that NMFS’s reliance on the 2019 SEAK BiOp was
21 arbitrary and capricious in regard to mitigation measures utilized to find no jeopardy to the
22 SRKW, the Court concludes that NMFS violated its substantive duty to ensure no jeopardy to the
23 SRKW. Particularly, and as noted above, the unspecified and deadline-lacking conservation

1 program contemplated by the 2019 SEAK BiOp does not meet the standards for certain
2 mitigation to find no jeopardy to the SRKW. In addition, NMFS was similarly incapable of
3 finding no jeopardy for the threatened Chinook salmon ESUs because NMFS failed to address
4 the prey increase program in its jeopardy analysis for the Chinook salmon ESUs.

5 Consequently, the Court recommends that summary judgment on WFC’s substantive
6 ESA claims regarding the SRKW and Chinook salmon ESUs be granted.

7 **E. NEPA Claims**

8 Next, WFC argues that NMFS violated NEPA by failing to conduct any NEPA analysis
9 for the issuance of the ITS in the 2019 SEAK BiOp and by adopting the prey increase program.
10 (Pl.’s Mot. at 35-39.) In addition, WFC argues that NMFS failed to provide an explanation for its
11 change in legal position concerning the effect of *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996)
12 and its requirement for NEPA procedures for the issuance of an ITS.⁶ (Pl.’s Supp. Br. (Dkt.
13 # 108) at 3-5.) Government Defendants counter that NMFS complied with NEPA when it
14 completed the federal actions subject to consultation and analyzed in the 2019 SEAK BiOp and
15 the associated ITS. (Gov. Defs.’ Mot. at 27-32.). Government Defendants additionally argue
16 NEPA review was not needed because it previously provided NEPA procedures on its delegation
17 of authority to Alaska to manage fisheries in federal waters.⁷ (*Id.* at 29-30.)

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21 ⁶ At oral argument, Government Defendants acknowledged that NMFS’s interpretation of *Ramsey* had
22 changed since it issued the 2003 EIS covering the Southeast Alaska fisheries (AR at 47914). (Dkt. # 110
at 74-75.) As a result, the Court authorized supplemental briefing from the parties on this issue. (Dkt.
105-109.)

23 ⁷ Government Defendants’ contention is incorrect that prior NEPA efforts were sufficient. The actions
here include NMFS’s decision to provide “funding to the State of Alaska for the implementation of the
2019 [PST] in SEAK.” AR at 47366. Prior NEPA efforts undertaken with the 2012 EA regarding the
Southeast Alaska salmon fisheries clearly did not address implementation of the 2019 PST.

1 For the reasons explained below, the Court finds that NMFS violated NEPA requirements
2 in issuing the ITS in the 2019 SEAK BiOp.

3 *i. Change in Position*

4 Under APA review, “[w]hen an agency changes its position, it must (1) ‘displace
5 awareness that it is changing its position,’ (2) show ‘the new policy is permissible under the
6 statute,’ (3) ‘believe’ the new policy is better, and (4) provide ‘good reasons’ for the new
7 policy.” *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1067 (9th Cir. 2021). The
8 standards apply where an agency has changed its position for legal reasons. *See Fed. Commc’ns*
9 *Comm’n v. Fox TV Stations, Inc.*, 56 U.S. 502, 515-16 (2009); *see also Organized Village of*
10 *Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015). The agency must also provide its
11 rationales “in a form that can adequately be examined on judicial review, not simply present
12 arguments in its briefing how the decision may have been reached.” *Haaland*, 998 F.3d at 1068;
13 *Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040, 1049-50 (9th Cir. 2010).

14 In *Ramsey v. Kantor*, the Ninth Circuit determined that NMFS must comply with NEPA
15 when it issues an ITS under the ESA for a fishery implemented by non-federal entities. 96 F.3d
16 at 444. In that case, NMFS issued a BiOp for several fisheries that included an ITS which
17 “allowed takings to occur in those fisheries notwithstanding the prohibitions of § 9 [of the
18 ESA].” *Id.* at 439. The Ninth Circuit explained that in such instances NEPA is generally required
19 “if a federal permit is a prerequisite for a project.” *Id.* at 444. The Ninth Circuit further explained
20 that the subject ITS in *Ramsey* was “functionally equivalent to a permit because the activity in
21 question would, for all practical purposes, be prohibited but for the [ITS].” *Id.* As a result, the
22 Ninth Circuit held that NMFS “was required . . . to comply with the requirements of NEPA
23 before issuing the [ITS].” *Id.*

1 In 2003, NMFS responded to *Ramsey* with a programmatic EIS covering several
2 fisheries, including those in Southeast Alaska. AR at 47914. Pursuant to that EIS, NMFS noted:

3 The Ninth Circuit Court of Appeals, in its 1996 decision in *Ramsey v. Kantor . . .*,
4 clarifies that the actions ensuing from NMFS' review are the decision of whether
5 to continue deferral of management to the State of Alaska and the associated
issuance of an Incidental Take Statement (ITS), and that those actions need to
comply with NEPA.

6 *Id.* at 47948, 47952-53. The actions subject to the EIS included NMFS's ITS authorizing take
7 associated with the Southeast Alaska fisheries under the 1999 and the "continued deferral of
8 management [over the fisheries] to the State [of Alaska]." *Id.* at 47953.

9 Here, NMFS's change in legal position is the sort of change that requires NMFS to
10 provide an explanation for its change in course. As noted, NMFS previously explained in its
11 2003 EIS that it was required under *Ramsey* to complete NEPA procedures when issuing an ITS
12 for PST fisheries (*see* AR at 47948, 47952-53) and NMFS did so for the ITS issued with the
13 1999 PST. *See id.* at 47953. However, the 2019 SEAK BiOp and ITS lack any clarification why
14 NMFS concluded NEPA procedures were required for ITS issued for the 1999 PST but not for
15 the ITS issued for the 2019 PST. As such, NMFS's change in legal position required NMFS to
16 provide the explanations identified under the APA requirements. *See, e.g., Haaland*, 998 F.3d at
17 1067. The record before the Court is also devoid of any showings that NMFS's changed position
18 is permissible, that NMFS believes the new position is better, and that NMFS had good reasons
19 for its new policy. *See id.* Therefore, NMFS did not sufficiently explain why it changed its prior
20 position to escape the import of *Ramsey* requiring NEPA procedures for the issuance of an ITS.

21 *ii. Effect of Ramsey and Jewell*

22 In any event, NMFS violated NEPA by issuing the 2019 SEAK BiOp's ITS, and in
23 adopting the prey increase program, without preparing an EIS or EA. In *Ramsey*, the Ninth

1 Circuit held that NMFS was required to prepare an EA or EIS “before issuing” an ITS. *Ramsey*,
2 96 F.3d at 443-44 (emphasis in original). Here, NMFS issued an ITS for the Southeast Alaska
3 fisheries under the 2019 PST (see AR at 47366, 47518) that was the functional equivalent of a
4 federal permit because it authorized take of the Chinook salmon in Southeast Alaska set by the
5 2019 PST that could not occur but for the ITS. Accordingly, the ITS constituted a major federal
6 action for purposes of NEPA, and thus, the preparation of an EA or EIS under NEPA was
7 required prior to the issuance of the ITS. See *Ramsey*, 96 F.3d at 443-44; see also 42 U.S.C.
8 § 4332(2)(C)(i).

9 Moreover, NMFS is both the consulting and action agency in this case. (See Gov. Defs.’
10 Mot. at 2 n.1.) The Ninth Circuit has clarified that a BiOp and ITS do not necessarily function as
11 automatic triggers for NEPA review, but where there was no “downstream federal agency”
12 poised to complete NEPA review prior to the major federal action occurring, the consulting
13 agency must complete NEPA review. *Jewell*, 747 F.3d at 644. In *Jewell*, FWS’s BiOp at issue
14 was found not subject to NEPA because “its implementation [was] contingent on [Bureau of
15 Reclamation’s (the downstream federal agency)] adoption of the BiOp, which is an action that
16 will trigger Reclamation’s obligation to complete an EIS.” 747 F.3d at 645. Here, there is no
17 separate downstream federal agency implementing the fisheries that will comply with NEPA.
18 NMFS was therefore required to comply with NEPA as the consulting agency authorizing take
19 because otherwise, “the action would . . . evade[] NEPA review altogether” See *Jewell*, 747
20 F.3d at 644.

21 *iii. Prey Increase Program*

22 Finally, NMFS violated NEPA in adopting the prey increase program without preparing
23 an EIS or an EA. The prey increase program was included in the 2019 SEAK BiOp as a new

1 “action” subject to consultation and as a “reasonable and prudent measure” imposed in the ITS
2 under section 7(b)(4) of the ESA. *See* AR at 47201-03, 47524-25. Based on the record, the prey
3 increase program is entirely funded by federal grants administered by NMFS. *See e.g., id.* at
4 47202-03. Consequently, the Court finds that NMFS’s prey increase program is a major federal
5 action subject to NEPA. *See, e.g., Sierra Club v. U.S. Fish & Wildlife Serv.*, 235 F.Supp.2d 1109,
6 1120-21 (D. Or. 2002) (“Significant federal funding can turn what would otherwise be a state or
7 local project into a major federal action.”) (citation and internal quotations omitted).

8 In sum, the Court concludes NMFS failed to conduct necessary NEPA analyses for the
9 issuance of the ITS contained in the 2019 SEAK BiOp and adoption of the prey increase
10 program. Accordingly, the Court recommends that summary judgment on WFC’s NEPA claim
11 be granted.

12 **F. Magnuson-Stevens Act**

13 The State of Alaska requests that the Court dismiss WFC’s “challenge to the
14 authorization and funding of the SEAK Chinook fishery through the delegation of authority to
15 the State under the [FMP]” (AK’s Mot. at 21.) The State of Alaska argues that WFC “may
16 not challenge actions related to the delegation of management authority to the State under the
17 MSA, nor can it seek any relief that results in the suspension of that management” *Id.* In
18 effect, the State of Alaska argues that the Magnuson-Stevens Act functions to prevent the Court
19 from granting WFC’s claims.

20 As the Court previously noted in adjudicating the previous motion for preliminary
21 injunction, “Section 1855(f) [of the Magnuson-Stevens Act] applies only to a very specific class
22 of claims—those that clearly challenge regulations promulgated under the Magnuson-Stevens
23 Act.” (Dkt. # 51 at 17 n.4 (quoting *Turtle Island Restoration Network v. U.S. Dept. of*

1 *Commerce*, 438 F.3d 937, 948-49 (9th Cir. 2006)).) While the Magnuson-Stevens Act allows for
2 the delegation of authority of the management of fisheries in international waters to the State of
3 Alaska, the Magnuson-Stevens Act does not apply in the manner sought by the State of Alaska
4 because the management itself is not being challenged. *See Lubchenco*, 723 F.3d at 1048. The
5 2019 SEAK BiOp incorporated a renewal of the delegation of authority to Alaska; however, the
6 procedural and substantive injuries being alleged by WFC in this matter do not relate to the
7 redelegation of authority to Alaska. *See id.* at 1049; *Turtle Island*, 438 F.3d at 949. Therefore, the
8 Court declines to recommend dismissal of WFC’s claims on the State of Alaska’s requested
9 basis.

10 IV. CONCLUSION

11 For the foregoing reasons, the Court recommends that Plaintiff’s Motion (dkt. # 91) be
12 GRANTED, and that Government Defendants’ Cross-Motion (dkt. # 93), Defendant-Intervenors
13 ATA’s Cross-Motion (dkt. # 92), and State of Alaska’s Cross-Motion (dkt. # 94) be DENIED.
14 The Court will consider an appropriate remedy for NMFS’s violations of section 7(a)(2) of the
15 ESA and NEPA in the 2019 SEAK BiOp upon Judge Jones’ determination of this Report and
16 Recommendation. A proposed Order accompanies this Report and Recommendation.

17 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
18 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and
19 Recommendation is signed. Failure to file objections within the specified time may affect your
20 right to appeal. Objections should be noted for consideration on the District Judge’s motions
21 calendar for the third Friday after they are filed. Responses to objections may be filed within
22 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be
23 ready for consideration by the District Judge on **October 15, 2021**.

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The Clerk is directed to send copies of this Order to the parties and to the Honorable
Richard A. Jones.

Dated this 27th day of September, 2021.



MICHELLE L. PETERSON
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

 Plaintiff,

 v.

BARRY THOM, *et al.*,

 Defendants,

 and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

 Defendant-Intervenors.

Case No. C20-417-RAJ-MLP

ORDER

The Court, having reviewed the Report and Recommendation of the Honorable Michelle L. Peterson, United States Magistrate Judge, any objections thereto, and the remaining record, hereby finds and ORDERS as follows:

- (1) The Report and Recommendation is approved and adopted;
- (2) Plaintiff’s Motion for Summary Judgment (dkt. # 91) is GRANTED. Judge

Peterson will submit an additional report and recommendation to the Court considering an

1 appropriate remedy for Defendants' violations of section 7(a)(2) of the Endangered Species Act
2 and the National Environmental Policy Act.

3 (3) Defendants' Cross-Motion (dkt. # 93), Defendant-Intervenors Alaska Trollers
4 Association's Cross-Motion (dkt. # 92), and the State of Alaska's Cross-Motion (dkt. # 94) are
5 DENIED; and

6 (4) The Clerk is directed to send copies of this Order to the parties.

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8 DATED this _____ day of _____, 2021.

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RICHARD A. JONES
United States District Judge

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