UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

Litigation Materials for the
October 2022 Meeting of the North Pacific Fishery Management Council:
***Wild Fish Conservancy v. Rumsey*, 2:20-cv-00417-RAJ-MLP**
(Western District of Washington)

Parties:

Plaintiff: Wild Fish Conservancy.

Federal Defendants: Scott Rumsey, Acting 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 M. 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 (NMFS) issued in April 2019 that considered the effects on species listed under the Endangered Species Act (ESA) from three actions. Two of these actions relate to salmon fisheries in Southeast Alaska—the Council's and NMFS's delegation of management authority over salmon fisheries in federal waters off of Southeast Alaska to the State of Alaska and NMFS's funding of grants to the State of Alaska to implement the Pacific Salmon Treaty. The third action is a conservation funding program for habitat improvement and hatchery production to be implemented in the Pacific Northwest to offset the effects of salmon fisheries managed under the Pacific Salmon Treaty on ESA-listed Puget Sound Chinook salmon and Southern Resident killer whales.

As previously reported, on September 27, 2021, the magistrate judge issued a report and recommendation on the parties' motions for summary judgment (the parties' summary judgment briefs are available on the June 2021 Agenda, under B3 NOAA GC Report- Litigation Update). The magistrate judge recommended the district court grant Plaintiff's motion for summary judgment and deny Federal Defendants' and Defendant-Intervenors' motions for summary judgment, on the grounds that NMFS violated the National Environmental Policy Act (NEPA) and section 7(a)(2) of the ESA.

Current Case Activity:

On August 8, 2022, the district court adopted the report and recommendation of the magistrate judge, granting Plaintiff's motion for summary judgment and denying the Federal Defendants' and Defendant-Intervenors' motions for summary judgment. The next step is for the parties to brief the magistrate judge on the appropriate remedy. The briefing schedule is:

- September 7, 2022: Plaintiff filed motion on remedy
- October 3, 2022: Federal Defendants and Defendant-Intervenors filed responses
- October 14, 2022: Plaintiff's reply due

Attachments:

- District court's order and the magistrate judge's report and recommendation
- Plaintiff's motion on remedy
- Federal Defendants' response, including NMFS Alaska Region declaration
- Defendant-Intervenors's responses

HONORABLE RICHARD A. JONES

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,

Defendants.

Case No. 20-cv-417-RAJ

ORDER ADOPTING REPORT AND RECOMMENDATION

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

(3) Defendants' Cross-Motion (Dkt. # 93), Defendant-Intervenors Alaska Trollers Association's Cross-Motion (Dkt. # 92), and the State of Alaska's Cross-Motion (Dkt. #

94) are DENIED; and

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

DATED this 8th day of August, 2022.

The Honorable Richard A. Jones
United States District Judge

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

REPORT AND RECOMMENDATION

I. INTRODUCTION

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

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

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

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

II. BACKGROUND

A. Procedural History

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

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

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

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

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

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

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

[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.

B. Statutory Background

i. Endangered Species Act

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

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

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

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

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

If the consulting agency determines a proposed action is not likely to jeopardize the species, or if reasonable and prudent alternatives are identified to avoid jeopardy and adverse modification but will likely result in the incidental "take" of some individual members of a listed species, the agency provides an "incidental take statement" ("ITS") along with the BiOp for the 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 compliance with an ITS does not violate Section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

ii. National Environmental Policy Act

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

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

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

iii. Magnuson-Stevens Act

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

C. Factual Background

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

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

i. The SRKW and Chinook Salmon

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

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

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

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

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

ii. The Pacific Salmon Treaty

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

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

iii. The Salmon Fishery Management Plan

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

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

iv. 2019 SEAK BiOp

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

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

v. Conservation Program

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

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

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

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

[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.)

vi. Incidental Take Statement

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

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

vii. Environmental Assessment and Environmental Impact Statement History

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

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

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

III. DISCUSSION

A. Legal Standards

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

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

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

B. Standing

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

[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.)

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

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

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

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

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

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

i. Substantive Injury ("No Jeopardy") Claim

1. Injury in Fact

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

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

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

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

2. Causation

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

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

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

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

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

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

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

3. Redressability

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

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

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

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

ii. Procedural Injury Claim

1. Injury in Fact

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

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

2. Causation and Redressability

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

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

iii. Organizational and Statutory Standing

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

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

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

C. Procedural ESA Claim

i. Conservation Program

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

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

[4] In addition, WFC contends that the 2019 SEAK BiOp was arbitrary and capricious because it: (1) fails to draw a rational connection between the facts found and the no jeopardy opinion for the SRKW; and (2) the ITS regarding the SRKW failed to adequately limit take of SRKW. (Pl.'s Mot. at 27-30, 35.) Because 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)).

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

> Mitigation measure[s] . . . must constitute a clear, definite commitment of resources, and be under agency control or otherwise reasonably certain to occur. A sincere general commitment to future improvements—without more specificity—is insufficient. The measures must be subject to deadlines or otherwise-enforceable 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.

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

1. Framework Programmatic Action

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

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

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

2. Specific and Binding Plans

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

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

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

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

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

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

[5] Government Defendants reliance on *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998) is also misplaced. Government Defendants argue that mitigation has previously been upheld where FWS "did not identify specific areas available and suitable for acquisition 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.

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

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

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

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

3. Subject to Agency Control or Reasonably Certain to Occur

NMFS's conservation program is premised as a "grant program" to provide funding to other parties and entities for the habitat and hatchery projects. *See* AR at 47201-02, 47433, 47447. But based on the record before the Court, the 2019 SEAK BiOp does not enumerate a party or entity that would be responsible for implementation of such projects. *See id.* Furthermore, NMFS also notes that "there is a degree of uncertainty regarding whether Congress will [timely] provide the funding in whole or in part . . . ." *See id.* at 47203. Consequently, based on the 2019 SEAK BiOp, NMFS's reliance on the mitigation proposals was not subject to NMFS's "control or otherwise reasonably certain to occur". *See Bernhardt*, 982 F.3d at 743; *see Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. (NWF I)*, 254 F.Supp.2d 1196, 1213-14 (D. Or. 2003) (finding "absence in the record of any binding commitments by the States, Treaty Tribes, and private parties" to implement mitigation was impermissible).

ii. Prey Increase Program

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

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

> The biological opinion shall include . . . [NMFS's] opinion on whether the action is (A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion); or (B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).

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

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

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,

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

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

D. "No Jeopardy" Finding under the ESA

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

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

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

E. NEPA Claims

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

[6] At oral argument, Government Defendants acknowledged that NMFS's interpretation of *Ramsey* had 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.)

[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.

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

i. Change in Position

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

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

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

> The Ninth Circuit Court of Appeals, in its 1996 decision in *Ramsey v. Kantor* . . ., clarifies that the actions ensuing from NMFS' review are the decision of whether 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.

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

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

ii. *Effect of* Ramsey *and* Jewell

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

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

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

iii. Prey Increase Program

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

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

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

F. Magnuson-Stevens Act

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

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

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

IV. CONCLUSION

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

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

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

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

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

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

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

DATED this _____ day of _____, 2021.

_____
RICHARD A. JONES
United States District Judge

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 PLAINTIFF'S MOTION FOR A FINAL ORDER ON RELIEF AND FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINAY INJUNCTION PENDING ENTRY OF A FINAL ORDER ON RELIEF NOTE ON MOTION CALENDAR: October 14, 2022 ORAL ARGUMENT REQUESTED

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
BiOp	Biological Opinion
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FWS	United States Fish and Wildlife Service
HSRG	Hatchery Scientific Review Group
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
pHOS	Proportion of Hatchery-Origin Spawners
PVA	Population Viability Analysis
RPA	Reasonable and Prudent Alternative
SEAK	Southeast Alaska
SRKW	Southern Resident killer whale

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Plaintiff Wild Fish Conservancy ("Conservancy") respectfully moves for a final order remanding the National Marine Fisheries Service's ("NMFS") 2019 biological opinion ("BiOp") for southeast Alaska salmon fisheries ("2019 SEAK BiOp") to remedy the Endangered Species Act ("ESA") and National Environmental Policy Act ("NEPA") violations found by the Court. *See* Dkts. 111, 122. The Conservancy further requests that, until those violations are remedied, the final order: (1) narrowly vacate those portions of the 2019 SEAK BiOp that authorize "take" of endangered Southern Resident killer whale ("SRKW") and threatened Chinook salmon resulting only from commercial harvests of Chinook salmon during the winter and summer seasons (excluding the spring season) of the troll fisheries; (2) vacate those portions of the 2019 SEAK BiOp that adopt, and purport to consult under section 7 of the ESA on, the prey increase program; and (3) enjoin NMFS's implementation of the prey increase program.

Finally, the Conservancy respectfully moves the Court for a temporary restraining order and/or preliminary injunction vacating the 2019 SEAK BiOp in the manner described above and enjoining the prey increase program until the Court enters its final order on relief.

I. INTRODUCTION.

The requested relief is urgently needed to protect imperiled species while NMFS addresses the significant ESA and NEPA violations that pervaded its approval of the salmon fisheries. The Conservancy has narrowly limited the relief requested to minimize disruptive consequences, while still protecting ESA-listed species from NMFS's unlawful decisions.

In 2016, the SRKW population was comprised of 83 whales and identified by NMFS as among those species most at risk of extinction. AR 15988–89. There are only 73 members today. Third Decl. of Dr. Deborah Giles, Ph.D. ("Third Giles Decl.") ¶ 4. Insufficient prey—namely, Chinook salmon—is the primary cause of the decline. Dkt. 14-3 ¶ 6.b. Dr. Deborah Giles, a conservation biologist focused on SRKWs, estimates that 69% of SRKW pregnancies are aborted due to insufficient Chinook salmon, with females suffering physical and emotional stress from chronic pregnancies ending in miscarriage. Third Giles Decl. ¶ 7; Dkt. 14-2 ¶¶ 2–5. The species' current conditions are "unprecedented," with more than a fifth of the population likely

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in a vulnerable state due to emaciated body conditions. Third Giles Decl. ¶¶ 11, 14. Two males are presumed to have recently died, a 29-year-old that should have been prime age for reproduction and an 11-year-old that had not even reached sexual maturity. *Id.* ¶¶ 8–9.

Salmon populations throughout the Pacific Northwest "are at fractions of their historic levels," due primarily to harvests, hatcheries, hydroelectric projects, and habitat loss. *See* AR 47306. While the 2019 Pacific Salmon Treaty included some reductions in harvests from prior agreements, it was recognized that more is needed to conserve Chinook salmon and SRKWs. *See* AR 47201–02. NMFS could have reduced harvests further to protect these imperiled species and sought to mitigate any associated economic impacts; e.g., by purchasing and retiring fishing licenses. *See* AR 47436; Third Giles Decl. Ex. B. Instead, NMFS decided to spend millions of dollars annually on increased hatchery production in a supposed effort to offset the fisheries and to approve harvest levels that continue to starve SRKWs. The increased hatchery production would pose severe genetic risks to threatened Chinook salmon and thereby further harm SRKWs that depend on the fish as prey. Yet, NMFS did not even evaluate whether this scheme would jeopardize salmonids when it approved the actions. Nor did NMFS provide any processes required by NEPA, such as considering and disclosing to the public alternative approaches.

These are not technical or minor errors; they are violations that undermine key Congressional objectives of the ESA and NEPA. The Conservancy respectfully requests that the Court impose the interim and final relief requested to protect SRKWs and Chinook salmon and ensure that NMFS remedies its violations before further implementing its unlawful actions.

II. STATUTORY FRAMEWORK.

When the ESA was passed it "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, **whatever the cost**." (emphasis added)). To this end, section 9 of the ESA makes it unlawful to "take" listed species. *See* 16 U.S.C. § 1538(a)(1)(B).

Section 7 of the ESA imposes substantive and procedural requirements on federal

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agencies. Substantively, agencies must "insure" their actions "[are] not likely to jeopardize the continued existence of . . . [listed] species or result in the destruction or adverse modification of [their critical] habitat . . . ." 16 U.S.C. § 1536(a)(2); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). ESA Section 7's procedural requirements are intended to facilitate compliance with that substantive mandate. *See Thomas v. Peterson*, 753 F.2d 754, 763–65 (9th Cir. 1985), *abrogated on other grounds*, *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091–92 (9th Cir. 2015). Specifically, agencies planning an action that "may affect" listed species ("action agency") must consult with NMFS and/or the U.S. Fish and Wildlife Service ("FWS") ("consulting agency"). 50 C.F.R. § 402.14(a).

Consultation results in the consulting agency's issuance of a biological opinion ("BiOp") determining whether the action is likely to jeopardize listed species or adversely modify their critical habitat. *Id.* § 402.14(h)(1). If so, the BiOp will suggest "reasonable and prudent alternatives" that avoid jeopardy or adverse modification. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 634 (9th Cir. 2014); 16 U.S.C. § 1536(b)(3)(A). If jeopardy and adverse modification are not likely, or if reasonable and prudent alternatives are identified, the BiOp will include an incidental take statement ("ITS") defining the amount of take anticipated. *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1158–59 (9th Cir. 1999); 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(*i*)(1)(i). Take in compliance with an ITS is exempt from liability under ESA section 9. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(*i*)(5).

"NEPA 'is our basic national charter for protection of the environment.' . . . The statute provides environmental protection not by mandating 'particular results,' but by prescribing the process that an agency must follow to evaluate and approve an action that will have environmental consequences." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020) (citations omitted). As such, NEPA requires the environmental information be available *before* decisions are made and *before* actions are taken. *See* 40 C.F.R. § 1500.1(b), (c)[1];

[1] The 1978 NEPA regulations, as amended, were in effect when NMFS made the relevant decisions here. *See* 85 Fed. Reg. 43,304, 43,305 (July 16, 2020). All citations to the NEPA regulations herein are to that version.

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Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988).

An environmental impact statement ("EIS") is required for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). The EIS "serves NEPA's 'action-forcing' purpose in two important respects. . . . It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (citation omitted). An environmental assessment ("EA") must be prepared to determine whether an action will have significant environmental impacts if the action is neither one that normally requires an EIS nor one that is excluded from NEPA review. *Hale v. Norton*, 476 F.3d 694, 700 (9th Cir. 2007); 40 C.F.R. § 1501.4.

Whether an EIS or EA is prepared, NEPA requires agencies fully consider alternatives to the proposal. *See* 42 U.S.C. § 4332(2)(C)(iii), (2)(E); *see also, e.g.*, *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012). "The consideration of alternatives requirement furthers [NEPA's goals] by guaranteeing that agency decisionmakers 'have before them and take into proper account all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance . . . . Informed and meaningful consideration of alternatives . . . is thus an integral part of the statutory scheme." *Hodel*, 852 F.2d at 1228 (citation omitted).

III. STATEMENT OF FACTS.

A. Endangered Southern Resident Killer Whales.

The SRKW is one of the eight most at-risk species. AR 15988–89. "[T]he . . . population has declined to historically low levels . . . ." AR 47276. "A primary limiting factor . . . is prey availability, which has contributed to premature mortality and reduced fertility." Dkt. 111 at 8; *see also* Dkt. 14-3 ¶¶ 6.b, 33.b–c. "While the SRKW consume a wide variety of fish species, 80 to 90 percent of the SRKW's diet consists of older and larger Chinook salmon." Dkt. 111 at 8.

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Dr. Robert Lacy is a conservation scientist that has developed tools to guide species conservation and management, including the Vortex population viability analysis ("PVA"). Dkt. 14-3 ¶¶ 2, 8–13. Dr. Lacy's models are used in countries all over the world. *See, e.g.*, *id.* p. 47. In fact, NMFS's 2019 SEAK BiOp and Canada both "have relied on analyses completed with Vortex for assessing the status of [SRKW]." *Id.* ¶ 13; *see also* AR 47278, 47282, 47502–03. Dr. Lacy "is among the world's most experienced, respected, and sought-after modelers for conducting [PVA] for the management and conservation of threatened species." Dkt. 91-5 ¶ 23.

Dr. Lacy conducted PVA modeling for the SRKW for this litigation. Dkt. 14-3 ¶ 16; Dkt. 91-4 ¶ 8; Third Decl. of Dr. Robert Lacy, Ph.D. ("Third Lacy Decl.") ¶ 4. Dr. Lacy confirms that "prey abundance is the factor that has the largest impact on [SRKW] population growth or decline." Dkt. 14-3 ¶ 6.b; *see also* Dkt. 91-4 ¶¶ 17–22; Third Lacy Decl. ¶ 7. The most recent modeling from March 2022 predicts that "[t]he long-term . . . trend continues to be a slide toward extinction." Third Lacy Decl. ¶ 5. The modeling indicates that prey needs to increase by around 5% to merely stop the SRKW's decline, "with much greater increases . . . or the addition of other protective measures . . . required to achieve good population growth toward recovery." *Id.* ¶ 6.

Current conditions of SRKWs are likely worse than that reflected in Dr. Lacy's March 2022 modeling. It is presumed that two whales recently died: a 29-year-old male that was of "prime age" and "important for future breeding success" and an 11-year-old male that was not yet sexually mature. Third Giles Decl. ¶¶ 8–9. In June 2022, Washington State identified 12 whales as vulnerable because their "body condition is assessed as falling into the lowest 20% of measurements for age and sex, including showing signs of emaciation." *Id.* ¶ 11. Dr. Giles estimates that "well over" one-fifth of the population may qualify as vulnerable. *Id.* ¶ 14. The poor condition of this species "is simply unprecedented," prompting Washington State and Canada to take emergency responsive actions. *See id.* ¶¶ 10–14, 18. "[A]n immediate increase in the abundance of Chinook [salmon] . . . [is needed] to avoid functional extinction." *Id.* ¶ 18.

B. Threated Chinook Salmon.

The Puget Sound, the Lower Columbia River, the Upper Willamette River, and the Snake

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River fall-run evolutionarily significant units ("ESU") of Chinook salmon are listed as threated species under the ESA. Dkt. 111 at 8; 50 C.F.R. § 223.102(e). "The primary limiting factors for the Chinook salmon ESUs' decline include harvests, loss of habitat, and hatcheries." Dkt. 111 at 8–9 (citing AR 1729, 14492, 15761, 15891, 47422-24). Chinook salmon in these four ESUs are harvested in Southeast Alaska, Canada, and other fisheries. *See* AR 47319, 47373–419.

Dr. Gordan Luikart is a wildlife geneticist and is recognized as "one of the world's most influential scientific minds" for his research. Dkt. 91-5 ¶¶ 6–8. He explains:

> Hatchery domestication results from a process analogous to natural selection, but occurring under unnatural conditions (i.e., the hatchery rearing environment)—the individual fish (and genes) that are "selected" are those better adapted to life in unnatural conditions . . . . The process results in reduced ability to avoid predation, reduced disease resistance, reduced ability to forage and spawn efficiently, etc. . . . .

Id. ¶ 24 (citations omitted); *see also* AR 47423, 39742–46, 13519–20. This domestication harms wild fish when hatchery fish, released *en masse*, mate with wild fish and thereby transfer their maladapted genes, reducing productivity of wild populations. AR 47422–24, 30274.

Congress established the Hatchery Scientific Review Group ("HSRG") to, *inter alia*, develop guidelines to conserve wild salmonids. *See, e.g.*, AR 30242; AR 10419. To limit harm through genetic introgression, the HSRG developed criteria using the metric pHOS—the "proportion of hatchery-origin spawners"—representing the percentage of adult fish on spawning grounds that are hatchery origin. *See, e.g.*, AR 30260; Dkt. 91-5 ¶ 32. Generally, the productivity of wild populations decreases as pHOS increases. *E.g.*, AR 13546. According to NMFS, pHOS levels that exceed HSRG criteria are acceptable only where a wild salmon population is at a high risk of extinction and the hatchery is used to reduce the short-term extinction risk. AR 10419.

The HSRG recommends that pHOS not exceed 5% for some salmon populations and 10% for others. Dkt. 91-5 ¶ 35. The pHOS estimates for Chinook salmon populations in most rivers in Puget Sound, the Lower Columbia River, and the Washington coast "are well in excess of levels recommended by the HSRG;" ranging from 12% to 97%. Dkt. 95-1 ¶¶ 51–53; Third Decl. of Gordon Luikart, Ph.D. ("Third Luikart Decl.") ¶¶ 6–7. Dr. Luikart explains "that it is

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imperative to significantly and rapidly *reduce*" these pHOS levels "if these Chinook populations are to have a reasonable chance of surviving and recovering. Third Luikart Decl. ¶ 18.

C. NMFS's 2019 SEAK BiOp.

A "key objective" of the United States in negotiating the 2019 Pacific Salmon Treaty was to reduce harvests to "help address ongoing conservation concerns" for Puget Sound Chinook salmon and SRKWs. AR 47201–02. While some reductions were achieved, it was "generally recognized that more would be required to mitigate the effects of harvests . . . ." AR 47202. Southeast Alaska harvests will continue to significantly reduce SRKW prey, including larger Chinook salmon preferred by SRKWs from critical habitat. AR 47283, 47439–40, 47507.

NMFS could have reduced harvests under the ESA to protect these species. *See, e.g.*, AR 47212, 47368, 47436. NMFS found that, absent other measures, the salmon fishery "**is likely to adversely affect designated critical habitat**" for SRKWs. AR 47507 (emphasis added). A finding that an action is likely to adversely modify critical habit or jeopardize species typically requires that the BiOp prescribe reasonable and prudent alternatives to the proposed action that would avoid such a result. *See* 16 U.S.C. § 1536(b)(3)–(4); *Thomas*, 753 F.2d at 763; *Greenpeace v. Nat'l Marine Fisheries Serv.*, 237 F. Supp. 2d 1181, 1185 (W.D. Wash. 2002).

Instead of imposing alternative harvests limits that meet the standards of section 7 of the ESA, NMFS announced a federal "funding initiative" as a new action supposedly consulted on in the 2019 SEAK BiOp alongside the salmon fisheries. AR 47201–03. The initiative includes three elements. AR 47202. First, $3.06 million per year is to be spent on four Puget Sound Chinook salmon "conservation" hatcheries. AR 47202, 47419–20. Second, $31.2 million is to fund (unidentified) habitat projects to benefit Chinook salmon populations in Puget Sound. AR 47202, 47419–20. Third, NMFS seeks to spend "no less than $5.6 million per year" on a SRKW "prey increase program" that would increase Chinook salmon hatchery production in Puget Sound, the Columbia River, and on the Washington coast. AR 47202–03. NMFS predicts that the new funding initiative will eventually produce sufficient benefits such that the Southeast Alaska salmon fisheries will not jeopardize ESA-listed species or adversely modify their critical habitat.

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See AR 47500–01, 47506–08. The 2019 SEAK BiOp thus includes an ITS authorizing take of SRKWs and four threatened Chinook salmon ESUs resulting from the Southeast Alaska salmon fisheries up to the harvest limits of the 2019 Pacific Salmon Treaty. AR 47518–19.

D. The Court's Summary Judgment Order.

The Report and Recommendation on summary judgment was issued on September 27, 2021 and adopted by the Court on August 8, 2022. Dkts. 111, 122. The Court first rejected arguments that the Conservancy lacks standing to pursue its ESA claims. Dkt. 111 at 16–25.

Turning to the merits, the Court emphasized that "absent the mitigation from the prey increase program, NMFS would be unable to conclude that the proposed actions would not destroy or adversely modify critical habitat for the SRKW." *Id.* at 28. The Court held that NMFS's reliance on the funding initiative was inconsistent with ESA standards because all three components lacked sufficient detail as to how they would be implemented to mitigate harm to species, were not subject to deadlines or other enforceable obligations, and were not subject to NMFS's control or otherwise reasonably certain to occur. *Id.* at 28–31.

The Court found that the 2019 SEAK BiOp was also inconsistent with the ESA because, despite identifying the prey increase program as an "action" subject to the consultation, NMFS failed to determine whether the program is likely to jeopardize threatened Chinook salmon. *Id.* at 31–33. NMFS thereby unlawfully segmented consultation on this program by including the supposed benefits in its jeopardy analysis for SRKWs, while omitting the harmful impacts from its jeopardy analysis on threatened salmonids. *Id.*

The Court held that NMFS violated its substantive obligation under section 7(a)(2) of the ESA to ensure that its actions do not jeopardize ESA-listed species by relying on the 2019 SEAK BiOp, which suffers from the legal deficiencies identified above. *Id.* at 33–34.

With respect to the NEPA claims, the Court initially noted that NMFS had changed its position, without explanation, on whether NEPA procedures are needed for an ITS authorizing take associated with Southeast Alaska salmon fisheries. *Id.* at 36. The Court then held that, regardless of its change in position, NMFS's complete failure to provide any NEPA process for

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its ITS approving take associated with the salmon fisheries under the 2019 Pacific Salmon Treaty was unlawful. *Id.* at 36–37. Finally, the Court held that NMFS violated NEPA by adopting the prey increase program without preparing an EIS or EA. *Id.* at 37–38.

IV. ARGUMENT.[2]

A. The Court Should Narrowly Vacate Specific Items in the 2019 SEAK BiOp.

The Conservancy requests that the Court narrowly vacate the 2019 SEAK BiOp's ITS to the extent that it authorizes take of SRKWs and threatened Chinook salmon resulting from commercial harvests of Chinook salmon in Southeast Alaska's troll fishery (excluding the spring season). The Conservancy further requests that the Court vacate those portions of the 2019 SEAK BiOp that adopt, and purport to consult under section 7 of the ESA on, the prey increase program. Such relief is warranted and urgently needed under applicable standards.

1. Vacatur under the Administrative Procedure Act.

The Administrative Procedure Act ("APA") provides that a "reviewing court shall . . . set aside" unlawful agency actions. 5 U.S.C. § 706(2). As such, "vacatur is the presumptive remedy under the APA . . . ." *350 Mont. v. Haaland*, 29 F.4th 1158, 1177 (9th Cir. 2022); *see also All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Courts regularly vacate actions for violations of NEPA and the ESA. *E.g.*, *Bernhardt*, 982 F.3d at 751; *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1128 (9th Cir. 2012).

"The burden is on the parties opposing invalidation of unlawful agency action to rebut the APA's 'presumption of vacatur.'" *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 3d 1217, 1219, 1226 (W.D. Wash. 2020), *aff'd* 843 F. App'x 77 (9th Cir. 2021); *see also W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020); *All. for the Wild Rockies*, 907 F.3d at 1121–22. Courts order the unusual remedy of remand without vacatur "only in limited circumstances . . . when equity demands that [a court] do so." *Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015)

[2] The Conservancy previously demonstrated standing to seek the relief requested and incorporates by this reference the prior arguments and materials cited. Dkt. 91 at 46; Dkt. 96 at 38–44; Dkt. 111 at 16–25.

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(quotations and citations omitted); *see also Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *Wood v. Burwell*, 837 F.3d 969, 975–76 (9th Cir. 2016). In considering a request for remand without vacatur, courts weigh the seriousness of the agency's errors against the disruptive consequences that might result from the interim change that vacatur would impose. *Cal. Cmtys. Against Toxics v. U.S. Env't Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *Allied-Signals, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

Violations that undermine important congressional objectives of the underlying statute are serious. *See, e.g.*, *Zinke*, 441 F. Supp. 3d at 1083 ("[T]he seriousness of . . . deficiencies . . . 'should be measured by the effect the error has in contravening the purposes of the statutes in question . . . ." (citation omitted)); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Fish & Wildlife Serv.*, No. 3:10-cv-01397-SI, 2012 U.S. Dist. LEXIS 190899, at *10 (D. Or. Dec. 10, 2012) ("Cumulative impacts analysis is at the heart of [NEPA's] process, and a failure to analyze cumulative impacts will rarely—if ever—be so minor an error as to satisfy this first *Allied-Signal* factor."); *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 468 F. Supp. 3d 1148, 1151–52 (D. Alaska 2020). Violations are also serious where the agency may reach a different result on remand. *E.g.*, *Pollinator Stewardship*, 806 F.3d at 532–33 (obtaining adequate studies may lead to different conclusions); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1243–45 (N.D. Cal. 2015); *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 991–92 (D. Alaska 2021) (violations were serious where it was possible, but not likely, the agency would reach the same decision); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Peña*, No. 3:12-cv-02271-HZ, 2015 U.S. Dist. LEXIS 46279, at *8–12 (D. Or. Apr. 6, 2015); *see also Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 275 F. Supp. 2d 1136, 1145 (C.D. Cal. 2002). "Technical" errors may be less serious because it is more likely the same conclusion will be reached on remand. *Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 929 (9th Cir. 2020); *see also California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017) ("Courts generally only remand without vacatur when the errors are minor procedural mistakes . . . .").

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For "disruptive consequences," the "court largely should focus on potential environmental disruption, as opposed to economic disruption." *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1038 (D. Mont. 2020); *see also In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1028 (N.D. Cal. 2021).

"The cases in which remand without vacatur was deemed appropriate 'highlight the **significant disparity** between the agencies' relatively minor errors, on the one hand, and the damage that vacatur could cause the very purpose of the underlying statutes, on the other." *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 U.S. Dist. LEXIS 199358, at *16–17 (W.D. Wash. Nov. 26, 2018) (citation omitted, emphasis added); *see also Klamath-Siskiyou*, 109 F. Supp. 3d at 1242 ("'[C]ourts may decline to vacate . . . when vacatur would cause serious and irremediable harms that **significantly outweigh** the . . . agency's error.'" (citation omitted, emphasis added); *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1226 (ordering partial vacatur where "the equities [were] unclear"). For example, vacatur was not imposed for technical errors—failure to disclose certain documents considered on a nearly-completed power plant—where it would threaten a "billion-dollar venture" and risk blackouts that increase air pollution from generators, "the very danger the Clean Air Act aims to prevent." *Cal. Cmtys. Against Toxics*, 688 F.3d at 992–94; *see also Klamath-Siskiyou*, 109 F. Supp. 3d at 1242–43 (discussing *Cal. Cmtys. Against Toxics*); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (failure to make a report available during rulemaking did not warrant vacatur where concern existed for the potential extinction of a species); *Nat'l Family Farm Coal.*, 966 F.3d at 929–30 (failure to consider harm to a butterfly from killing milkweed under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") did not warrant vacatur where there was "full compliance with the ESA and substantial compliance with FIFRA").

Further, "[t]he ESA . . . 'did not seek to strike a balance between competing interests' but rather 'singled out the prevention of species [extinction] . . . as an overriding federal policy objective.'" *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 891 (9th Cir. 2022) (citation omitted). Courts thus tip the scale in favor of protecting listed species in considering

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vacatur. *Klamath-Siskiyou*, 109 F. Supp. 3d at 1242; *see also N. Plains*, 460 F. Supp. 3d at 1037–38; *Aquall. v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 883 (E.D. Cal. 2018).

2. The Conservancy's request for partial vacatur is narrow.

The partial vacatur requested focuses on the most harmful aspects of NMFS's unlawful actions, while minimizing disruptive consequences. Courts look favorably on such efforts. *See, e.g.*, *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1225–27 (adopting plaintiff's "suggested compromise" to complete vacatur), *aff'd*, 843 F. App'x at 80 ("Full vacatur is the ordinary remedy . . . . Here, the court ordered briefing from the parties on the appropriate remedy and carefully crafted a hybrid remedy that reasonably balanced the competing risks of environmental and economic harms."); *League of Wilderness Defs.*, 2012 U.S. Dist. LEXIS 190899, at *13 ("Applying the *Allied-Signal* standard, this Court believes that full vacatur would be warranted. [Plaintiff], however, is only seeking partial vacatur, and the Court agrees that a more tailored remedy would be preferable."); *Wild Fish Conservancy v. Nat'l Park Serv.*, 2014 U.S. Dist. LEXIS 105689, No. C12-5109-BHS, at *9–10 (W.D. Wash. July 31, 2014) ("Plaintiffs' proposal of partially vacating the [action] provides the most reasonable interim process.").

The request for partial vacatur of take authorization narrowly focuses on the fisheries that have the most impact on ESA-listed SRKWs and Chinook salmon. Specifically, the winter troll season targets 45,000 Chinook salmon and the summer troll season targets the remaining "Treaty" Chinook salmon available under the Pacific Salmon Treaty. AR 47318. These fisheries reduce prey available to SRKWs and harvest fish from the four threatened Chinook salmon ESUs. *See, e.g.*, AR 47319, 47366–47419, 47433–49. The Conservancy seeks to vacate the ITS only to the extent it authorizes take resulting from commercial harvests of Chinook salmon in these two seasons of the toll fishery. Available information indicates that halting these harvests would increase prey available to SRKWs by around 4.8%. *See* Third Lacy Decl. ¶ 8. That increase "would provide just enough benefit to [SRKWs] to allow the population to stabilize—that is, the projected long-term mean population growth rate would be 0.00%." *Id.* ¶ 9.

Much of the ITS would remain untouched. For example, this relief would not affect any

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subsistence, recreational, or sport fishing addressed in the 2019 SEAK BiOp. *See* AR 47318–19, 47471–79, 47523. The spring season of the troll fishery, which catches mostly Chinook salmon released from Alaska hatcheries, would not be impacted. *See* AR 47318. The Conservancy does not seek relief against coho salmon harvests.[3] Take authorization would remain for Chinook salmon incidentally caught in net fisheries targeting other species. *See* AR 47318–19. Coverage for take of marine mammals caused by gillnet and purse seine fisheries would be unaffected. *See* AR 47519–24. The requested relief would not impact terminal Chinook salmon fisheries, which target fish primarily from Alaskan rivers. *See* AR 47318–19. In economic terms, the Chinook salmon fisheries affected by the proposed relief represent less than 2.6 percent of Southeast Alaska's seafood industry. *See* First Decl. of Hans Radtke, Ph.D. ("Radtke Decl.") ¶ 31.

The Conservancy also requests vacatur of those portions of the 2019 SEAK BiOp that adopt, and purport to consult on, the prey increase program. This relief is warranted because, despite labeling the program an "action" covered by the 2019 SEAK BiOp, NMFS did not evaluate whether it would jeopardize threatened salmon or comply with NEPA. Dkt. 111 at 31–33, 37–38. Such vacatur is also needed because NMFS is assuming the supposed benefits of the program into the environmental baseline in consultations on other fisheries based on its unlawful position that the program underwent consultation in the 2019 SEAK BiOp. *See* AR 47202.

3. <u>The limited vacatur requested is warranted</u>.

NMFS's violations are exceedingly serious and the risks to ESA-listed species absent vacatur greatly outweigh any disruptive consequences posed by vacatur. This is not the "rare circumstance" where NMFS can show that there is "significant disparity" between "relatively minor [agency] errors, on the one hand, and the damage that vacatur could cause the very purpose of the underlying statutes, on the other." *See Locke*, 626 F.3d at 1053 n.7; *Puget Soundkeeper All.*, 2018 U.S. Dist. LEXIS 199358, at *16–17. Thus, vacatur is warranted.

a. <u>NMFS's violations are plainly serious</u>.

[3] To the extent any party is concerned that the relief may affect some coho fisheries, it could propose terms that maintain some take authorization for Chinook salmon incidentally caught in fisheries targeting coho salmon.

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NMFS's violations are plainly serious. Indeed, they undermine primary objectives of the ESA and NEPA and preclude any assumption that identical decisions will result on remand.

The SRKWs are at a severe and worsening risk of extinction due primarily to inadequate Chinook salmon for prey. *See* Third Giles Decl. ¶¶ 4–14, 18; Third Lacy Decl. ¶¶ 5–7. The 2019 Pacific Salmon Treaty set harvest levels that will continue to substantially reduce prey. *See* AR 47283, 47439–40, 47507. Dr. Lacy and NMFS agree that SRKWs will continue to decline towards extinction under existing management regimes. *See* Third Lacy Decl. ¶ 5; AR 47502. NMFS found that, absent other measures, the fishery "is likely to adversely affect [SRKW's] designated critical habitat." *See* AR 47507. That finding should have triggered the imposition of reasonable and prudent alternatives to harvest levels that satisfy ESA section 7. *See* 16 U.S.C. § 1536(b)(3)–(4); *Thomas*, 753 F.2d at 763 ("If the [BiOp] concludes that the proposed action would jeopardize the species or . . . adversely modify critical habitat, . . . then the action may not go forward unless the [consulting agency] can suggest an alternative that avoids such . . . [a result]." (citations omitted)); *Greenpeace*, 237 F. Supp. 2d at 1185 ("When jeopardy or adverse modification is found, the expert agency must purpose 'reasonable and prudent alternatives' (RPAs), by which the action can proceed without causing" that result. (citation omitted)).

Instead, NMFS violated the ESA by relying on undeveloped future mitigation to authorize harvests that will continue to starve SRKWs into extinction. *See* Dkt. 111 at 27–31. Magnifying these errors, NMFS failed to determine whether the prey increase program will itself jeopardize species—i.e., threatened Chinook salmon—thereby unlawfully segmenting consultation on the program by assuming the supposed benefits to SRKWs without consulting on the harm it will cause to threatened salmonids. These serious violations of the consultation requirements undermine the ESA's substantive mandate for federal agencies to **insure** that their actions do not jeopardize species or adversely modify their critical habitat. *See* 16 U.S.C. § 1536(a)(2); *Wash. Toxics Coal. v. Env't Prot. Agency*, 413 F.3d 1024, 1034 (9th Cir. 2005) ("The purpose of the consultation process . . . is to prevent later substantive violations . . . .").

Courts regularly find similar and less substantial ESA violations serious; e.g., where an

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agency failed to fully explain its determinations on effects to species or where the errors call into question the "no jeopardy/no adverse modification" decision. *See, e.g.*, *Ctr. for Biological Diversity v. Haaland*, No. CV 20-181-M-DWM, 2022 U.S. Dist. LEXIS 94822, at *12–14 (D. Mont. May 26, 2022); *Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, No. 21-cv-00344-JSW, 2022 U.S. Dist. LEXIS 30123, at *55, __ F. Supp. 3d __ (N.D. Cal. Feb. 10, 2022); *Klamath-Siskiyou*, 109 F. Supp. 3d at 1243–45; *N.M. Farm & Livestock Bureau v. U.S. Dep't of Interior*, Civ. No. 15-428 KG/CG, 2021 U.S. Dist. LEXIS 15220, at * 23–24 (D.N.M. Jan. 27, 2021); *N. Plains*, 460 F. Supp. 3d at 1037–38; *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 795–804 (D. Alaska 2021) ("[A]s to the errors found by the Court, [which include reliance on uncertain mitigation in violation of the ESA], they are serious.").

For example, in *Cook Inletkeeper*, NMFS violated the ESA, NEPA, and Marine Mammal Protection Act by failing to explain its determination that tugboat noise from oil and gas activities would not harm beluga whales. 541 F. Supp. 3d at 990–91. The errors were serious and "particularly troublesome" because the whales are endangered and have a declining population. *Id.* at 991. While it was "possible" NMFS could reach the same conclusion, additional mitigation may be needed and it was thus not "likely" that the "exact same determinations" would result on remand. *Id.* at 991–92. NMFS's violations therefore warranted partial vacatur. *Id.* at 992.

NMFS's ESA violations here are as or more severe because they undermine the finding of "no jeopardy/no adverse modification," which is a prerequisite to issuance of an ITS for the fisheries. *See Thomas*, 753 F.2d at 763; 16 U.S.C. § 1536(b)(4). Notably, the Court explained that, "absent the mitigation from the prey increase program, NMFS would be unable to conclude that the proposed actions would not destroy or adversely modify critical habitat for the SRKW," and held that the mitigation is not reasonably certain to occur. *See* Dkt. 111 at 28, 31. Moreover, NMFS did not even evaluate whether the prey increase program will itself jeopardize threatened Chinook salmon and thereby cause more long-term harm, than benefit, to SRKWs. *See id.* at 31–33. These are extremely serious violations that go to "the heart of the ESA" and pose severe risks to some of the most precarious species. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d

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472, 495 (9th Cir. 2011) ("The heart of the ESA is section 7(a)(2) . . . . ").

NMFS's failure to provide any NEPA processes for the ITS or the prey increase program independently calls for vacatur. *See* Dkt. 111 at 35–38. NMFS failed to prepare an EIS or EA evaluating the impacts of the Southeast Alaska salmon harvests and the prey increase program, or of the cumulative impacts of those actions with other salmon harvests and hatchery programs. NMFS did not provide any opportunity for public input. Nor did NMFS consider alternatives to its decision to fund increased hatchery production as supposed mitigation to allow authorization of the full harvest levels identified in the 2019 Pacific Salmon Treaty—a decision to federally subsidize commercial fisheries by increasing hatchery production that will harm wild salmonids.

Notably, NMFS seeks to spend $8.6 million annually on increased hatchery production to mitigate the Chinook salmon harvests, while the Southeast Alaska commercial harvests of Chinook salmon provide around $9.5 million in annual income. *See* AR 47202–03; Radtke Decl. ¶ 26. Alternatives could include paying licensees to refrain from fishing for Chinook salmon or purchasing and retiring fishing licenses, like Canada is doing now. *See* Third Giles Decl. Ex. B. NMFS violated NEPA by failing to consider such reasonable alternatives and, when "giv[ing] full and *meaningful* consideration" to alternatives on remand, NMFS may elect a different approach. *See Wild Fish Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *7–8.

These most-serious NEPA violations warrant vacatur. *See, e.g.*, *League of Wilderness Defs.*, 2012 U.S. Dist. LEXIS 190899, at *10 ("[A] failure to analyze cumulative impacts will rarely—if ever—be so minor an error as to satisfy this first *Allied-Signal* factor."); *Wild Fish Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *7–8 (failure to consider a viable alterative was a serious NEPA violation, despite agency's protestation that "further evaluation will not change the outcome of its determination"); *Se. Alaska Conservation Council*, 468 F. Supp. 3d at 1151–54 (violations were serious because the "EIS's lack of site-specificity and inadequate comparison of alternatives precluded . . . the requisite hard look at the Project's potential impacts and deprived the public of the opportunity to comment on those impacts, thus undermining 'the two fundamental objectives' of NEPA: the agency's careful consideration of 'detailed information

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concerning significant environmental impacts' and the public's ability to participate in the decision-making process."); *Sovereign Iñupiat*, 555 F. Supp. 3d at 804 (failure to "adequately analyze a reasonable range of alternatives . . . — a process that is at 'the heart of [NEPA's EIS],'" was a serious violation (citation omitted)); *Peña*, 2015 U.S. Dist. LEXIS 46279, at *8–12.

b. <u>Any disruptive consequences from vacatur are far outweighed by the risks posed by leaving the 2019 SEAK BiOp intact</u>.

There will be some economic disruption associated with the requested vacatur of the ITS. However, those consequences are substantially limited by the narrow request for limited vacatur. Further, the Court should reject arguments that vacatur on the prey increase program poses risks to SRKWs given NMFS's failure to provide details on how that program will be implemented to mitigate harm and its failure to evaluate whether the program would jeopardize threatened Chinook salmon and thereby increase risks to SRKWs. Moreover, the requested partial vacatur of the ITS for fisheries would provide immediate prey increases to SRKWs that more than offset any hypothetical future benefits from NMFS's increased funding to hatcheries. Overall, any disruptive consequences cannot overcome the presumption of vacatur attached to NMFS's pervasive and severe violations, especially given the substantial threat posed to endangered SRKWs and threatened Chinook salmon from allowing the unlawful actions to remain in place.

As noted, the court should "largely should focus on potential environmental disruption, as opposed to economic disruption, under the second [vacatur] . . . factor." *N. Plains*, 460 F. Supp. 3d at 1038. The SRKW is at a high and increasing risk of extinction that requires rapid and meaningful responsive measures. *See* Third Giles Decl. ¶¶ 4–18. Remand without vacatur of the ITS would pose severe risks to the species by allowing the harvests to continue at levels that are contributing significantly to the SRKW's decline. *See* Third Lacy Decl. ¶¶ 5, 11. The mitigation NMFS relied on to approve those harvests is undeveloped and not reasonably certain to occur. Dkt. 111 at 27–31. Further, NMFS failed to properly consult under the ESA on the impacts to salmonids from the prey increase program and failed to comply with NEPA for that mitigation component. *Id.* at 31–33, 37–38. It is entirely unclear how long it will take NMFS to complete

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ESA and NEPA processes for the prey increase program and whether NMFS will ultimately elect an entirely different approach. *See, e.g.*, Dkt. 14 at 25–26 (describing NMFS's delays of more than ten years to conduct NEPA and ESA reviews for hatchery programs); *Wild Fish Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *7–8 (on remand, NMFS must "give full and *meaningful* consideration to all reasonable alternatives" under NEPA). "[A]bsent the mitigation from the prey increase program, NMFS would be unable to conclude that the proposed actions would not destroy or adversely modify critical habitat for the SRKW." Dkt. 111 at 28. Under these circumstances, it is imperative that the ITS be vacated to prevent substantial environmental disruption; i.e., adverse modification of SRKW critical habitat. *See Thomas*, 753 F.2d at 763.

There will be economic consequences. However, the Conservancy has limited its request to the extent possible, despite vacatur of the entire decision being the typical remedy. *See Coal. to Protect Puget Sound*, 843 F. App'x at 80 ("Full vacatur is the ordinary remedy . . . ."). The requested relief focuses narrowly on the authorization of take for commercial harvests of Chinook salmon during the troll fisheries' summer and winter seasons. "The potential economic impact from closing the Chinook salmon component winter and summer seasons would be about $9.5 million income." Radtke Decl. ¶ 26. For comparison, the Southeast Alaska commercial seafood industry generates an average annual income of $411 million. *Id.* ¶ 14. The region's total labor earnings in 2020 were $2.155 billion and the total personal income was $3.592 billion. *Id.* ¶ 12. The commercial Chinook salmon troll fishery (including the spring season) represents "about 2.6 percent of the [Southeast Alaska] seafood industry and 0.5 percent of [Southeast Alaska] total labor earnings in 2020." *Id.* ¶ 31. Further, closure of a fishery does not necessarily translate to an economic loss equal to the value of the closed fishery, as some vessels will move into other fisheries. *See* Fourth Decl. of Brian A. Knutsen ("Fourth Knutsen Decl.") 815–24.

These economic impacts, while meaningful, do not overcome the presumption of vacatur for NMFS's severe violations, especially given the harm posed by leaving the ITS in place. *See, e.g.*, *Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 960 F.3d 1120, 1144–45 (9th Cir. 2020) (vacating pesticide registration for FIFRA violations despite significant economic impact

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on farmers across the country); *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1226; *Se. Alaska Conservation Council*, 468 F. Supp. 3d at 1154–56; *Zinke*, 441 F. Supp. 3d at 1087–89. Most importantly, such economic impacts cannot justify the continuation of an unlawful action that is starving SRKWs into extinction. *See Klamath-Siskiyou*, 109 F. Supp. 3d at 1245–47; *N. Plains*, 460 F. Supp. 3d at 1038–41; *Sovereign Iñupiat*, 555 F. Supp. 3d at 804–05. In enacting the ESA, Congress sought to "halt and reverse the trend toward species extinction, **whatever the cost.**" *Hill*, 437 U.S. at 184 (emphasis added). Congress intended for "endangered species to be afforded the highest of priorities" and, as the Supreme Court explained, "courts . . . [should] enforce [such Congressional priorities] when enforcement is sought." *See id.* at 168, 174, 194.

The Court should reject arguments that relief against the prey increase program poses risks to SRKWs. "NMFS failed to create a binding mitigation measure that described 'in detail the action agency's plan to offset the environmental damage caused by the program' for the prey increase program." Dkt. 111 at 28 (citation omitted).[4] NMFS's post hoc rationalizations attempting to show that the program will actually provide mitigation for SRKWs are not entitled to deference and should be viewed with skepticism. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185–86 (9th Cir. 2011) ("Deference to agency experts [on remedy issues] is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error."); *Audubon Soc'y of Portland v. Jewell*, 104 F. Supp. 3d 1099, 1102 (D. Or. 2015).

Further, NMFS violated ESA section 7 by failing to evaluate whether the prey increase program will jeopardize threatened salmon. Dkt. 111 at 31–33. Chinook salmon populations throughout the Lower Columbia River and Puget Sound are declining and face extinction risks. *See* AR 15904–05, 15911, 01741–42, 01747. Hatcheries are a primary factor impeding their recovery. *See* Dkt. 111 at 8–9. "The levels of pHOS in the majority of [rivers and streams in Puget Sound and the Lower Columbia River] . . . pose a significant threat to the survival and recovery of the wild Chinook populations." Dkt. 91-5 ¶¶ 17, 51; *see also* Third Luikart Decl. ¶¶

[4] The Conservancy also explained that the prey increase program may increase salmon abundance estimates that allow for greater harvests of Chinook salmon, resulting in almost no benefit to SRKWs. Dkt. 91 at 29–30.

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6–7. The pHOS levels for these Chinook salmon populations already far-exceed the criteria set by the Congressionally chartered HSRG. *See* Third Luikart Decl. ¶¶ 6–7; Dkt. 91-5 ¶¶ 29–40, 51–53. This substantially reduces productivity of wild populations. *See, e.g.*, Dkt. 91-5 ¶¶ 18.c., 38, 63. Indeed, NMFS recently required significant reductions in hatchery releases into the Columbia River to protect threatened Chinook salmon. *See* AR 13267–72, 13666, 13677.

"NMFS's proposal to increase Chinook salmon hatchery production in an effort to offset impacts to [SRKWs] from salmon harvests will lead to even higher pHOS levels, thereby exacerbating adverse genetic impacts to ESA-listed wild Chinook salmon populations." Dkt. 91-5 ¶¶ 17, 52–54, 62–64. pHOS criteria "should not be interpreted as 'benchmarks' or 'goals' . . . [;] violation of any of those guidelines on a sustained basis over many generations will pose long-term genetic risks to the future viability of naturally-spawning population." Dkt. 91-5 ¶ 36; *see also* AR 10419 (NMFS allows for exceedances of pHOS criteria only when the hatchery program is being used to conserve a salmon population at a high risk of extinction to "reduce extinction risk in the short-term"). Yet, "the prey increase program is NMFS's essential long-term mitigation solution" for the Southeast Alaska salmon harvests. *See* Dkt. 111 at 28. This will "further inhibit the prospects for the continued survival, much less recovery," of threatened Chinook salmon. Dkt. 91-5 ¶ 64; *see also* Third Luikart Decl. ¶¶ 20–21. This poses long-term threats to SRKWs that depend on healthy Chinook salmon populations for prey.

Moreover, while NMFS optimistically predicts that the unlawful prey increase program will someday increase SRKW prey by four to five percent, even NMFS concedes the program "is not anticipated to be implemented immediately" and would then "take several [more] years" to actually produce adult salmon available as prey. AR 47202, 47435. The requested vacatur of the ITS for the fisheries would produce rapid prey increases of around five percent, which Dr. Lacy states would be just sufficient to halt the species' downward trend. *See* Third Lacy Decl. ¶¶ 5–11. Any hypothetical disruption posed by relief against the prey increase program is therefore more than offset by the requested partial vacatur of take authorization for the fisheries.

In sum, this is not a rare case that "'highlight[s] the **significant disparity** between the

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agencies' relatively minor errors, on the one hand, and the damage that vacatur could cause the very purpose of the underlying statutes, on the other[,]" such that vacatur is unwarranted. *See Puget Soundkeeper All.*, 2018 U.S. Dist. LEXIS 199358, at *16–17 (citation omitted, emphasis added); *see also Klamath-Siskiyou*, 109 F. Supp. 3d at 1242; *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1226. NMFS's severe and pervasive ESA and NEPA errors warrant partial vacatur to avoid exacerbating the risks to already imperiled SRKWs and Chinook salmon. *See, e.g.*, *Klamath-Siskiyou*, 109 F. Supp. 3d at 1241–47; *N. Plains*, 460 F. Supp. 3d at 1036–41; *Sovereign Iñupiat*, 555 F. Supp. 3d at 804–05; *Cook Inletkeeper*, 541 F. Supp. 3d at 990–96.

B. The Court Should Enjoin Implementation of the Prey Increase Program.

The Court should enjoin the prey increase program. This relief is needed to prevent NMFS's implementation of the program until it remedies the violations found by the Court.

"If a less drastic remedy [than an injunction] (such as partial or complete vacatur . . .) was sufficient to redress [plaintiff's] injury, no recourse to the additional and extraordinary relief of an injunction was warranted." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). NMFS has represented that, if the Court vacates the 2019 SEAK BiOp, the agency "could not continue implementing the . . . prey increase programs." Dkt. 93 at 43.

However, vacatur of a BiOp does not ensure NEPA compliance. Further, the 2019 SEAK BiOp's ITS does not cover the prey increase program and it is therefore unclear whether NMFS would implement the program without preparing a new BiOp. *See* AR 47518–19. NMFS has sought to determine, for individual disbursements of funds, the level of ESA and NEPA compliance required. Through this process, NMFS has determined that the ESA and NEPA are inapplicable to some disbursements and, for others, that funding for increased hatchery production does not require ESA or NEPA review because of pre-existing reviews under those statutes. *See* Dkt. 93-4 ¶ 10 & pp. 189–90; *see also* Dkt. 43-5 ¶ 10; Dkt. 96–2; Fourth Knutsen Decl. 4–814. This piecemeal approach violates the ESA and NEPA and is inconsistent with the Court's summary judgment order. *See* Dkt. 111 at 37–38; *Env't Def. Ctr.*, 36 F.4th at 891; *Conner*, 848 F.2d at 1453–58. An injunction is therefore warranted. *See Env't Def. Ctr.*, 36 F.4th

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at 882 (vacating EA and enjoining permitting activities until NEPA compliance is achieved).

1. Standards for permanent injunctions.

Generally, a party seeking an injunction must show: success on the merits; that it has suffered or is likely to suffer an irreparable injury; that remedies available at law are inadequate; that the balance of hardships justify a remedy in equity; and that the public interest would not be disserved by an injunction. *See Monsanto*, 561 U.S. at 156–57. However, "[w]hen considering an injunction under the ESA, we presume . . . that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817–18 (9th Cir. 2018). Thus, courts decide only whether there is irreparable injury for ESA violations. *Id.*

2. The requested permanent injunction is warranted.

The prey increase program should be enjoined for NMFS's ESA and NEPA violations. Such relief is warranted under applicable standards and needed to fulfill statutory objectives.

NMFS violated the ESA by failing to determine whether the prey increase program will jeopardize salmonids, thereby unlawfully segmenting consultation on the program by assuming the supposed benefits to SRKWs, without consulting on the threats to salmonids. Dkt. 111 at 31–33. An injunction of the program is warranted for these violations to prevent irreparable injury. *See Nat'l Wildlife Fed'n*, 886 F.3d at 817–19 (explaining that an "extinction-level threat" is not required for an injunction under the ESA; rather, "[h]arm to [individual] members is irreparable because 'once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult'") (citation omitted); *Env't Def. Ctr.*, 36 F.4th at 891 ("[P]otential harm to endangered species supports a finding of irreparable injury . . . ."). As explained above, the program will "further inhibit the prospects for the continued survival, much less recovery," of threatened Chinook salmon. Dkt. 91-5 ¶ 64; *see also* Third Luikart Decl. ¶ 20.

NMFS's NEPA violations also, and independently, necessitate the injunction. *See* Dkt. 111 at 37–38 (NMFS violated NEPA by failing to prepare an EIS or EA on the prey increase program); *Env't Def. Ctr.*, 36 F.4th at 882 (remanding with instructions to enjoin actions until

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agency prepares an EIS and "fully and fairly evaluated all reasonable alternatives). "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). "The NEPA duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). NMFS's failure to consider alternatives to the prey increase program—such as smaller harvests—or to consider the cumulative effects of the program with other hatchery programs constitutes irreparable injury for which there is no adequate remedy at law. *See, e.g.*, *Env't Def. Ctr.*, 36 F.4th at 882; *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) ("Environmental injury . . . can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.") (quotations and citations omitted).

The balance of harms and interests supports an injunction because of the public "interest in careful consideration of environmental impacts before major federal projects go forward . . . ." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (When environmental injury is likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment."); *Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009). "[S]uspending such projects until that consideration occurs 'comports with the public interest.'" *Cottrell*, 632 F.3d at 1138 (citation omitted); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) ("[T]he public interest favor[s] . . . an injunction because . . . allowing . . . [a] damaging program to proceed without an adequate record of decision [is] contrary to . . . NEPA.").

Enjoining the prey increase program is necessary to ensure that NMFS fully evaluates the program's ecological impacts and meaningfully considers and discloses alternatives to increased hatchery production, as opposed to merely "rationaliz[ing] or justify[ing] decisions already made." *See Metcalf v. Daley*, 214 F.3d 1135, 1142, 1146 (9th Cir. 2000) (NMFS's preparation of an EA after deciding to support a whaling proposal required a new NEPA process "done under

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circumstances that ensure an objective evaluation free from the previous taint." (citation omitted)). Accordingly, the Conservancy respectfully requests the Court enjoin the program.

C. The Court Should Impose a Temporary Restraining Order and/or Preliminary Injunction until a Final Order on Relief is Issued.

The Conservancy respectfully requests that the Court issue a temporary restraining order and/or preliminary injunction imposing the partial vacatur described above and enjoining the prey increase program until such time as the Court issues a final order on relief.

The standards for temporary restraining orders and preliminary injunctions are substantially identical to that for a permanent injunction, except the latter requires a showing of actual success on the merits instead of "a likelihood" of success. *See Amoco Prod. Co.*, 480 U.S. at 546 n.12; *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013); *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). As described above, these standards are satisfied, and the requested relief is warranted.

Further, the relief is urgently needed. The condition of SRKWs is "unprecedented," with much of the population vulnerable and emaciated. Third Giles Decl. ¶¶ 4–14. The "immediate increase" in prey provided by the requested vacatur of the ITS is needed to "avoid functional extinction," not unsubstantiated promises to develop mitigation in the future. *See id.* ¶ 18. Immediate relief against the prey increase program is also needed to stop NMFS's diversion of funds to an unlawfully adopted program that harms imperiled species. *See, e.g.*, *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1339–41 (D. Idaho 2018) (preliminary injunction issued to halt "bureaucratic momentum" while NEPA violations are remedied). No bond should be imposed for this relief. *See Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985); Dkt. 14-4 ¶¶ 3–9; Third Decl. of Kurt Beardslee ¶¶ 3–7.

V. CONCLUSION.

For the forgoing reasons, the Conservancy respectfully requests that the Court enter an order granting the relief described herein.

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Respectfully submitted this 7th day of September 2022.

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HONORABLE MICHELLE L. PETERSON

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

WILD FISH CONSERVANCY, Plaintiff, v. SCOTT RUMSEY, *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 PLAINTIFF'S MOTION FOR A FINAL ORDER ON RELIEF

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ADF&G	Alaska Department of Fish & Game
BiOp	Biological Opinion
EA	Environmental Assessment
EEZ	Exclusive Economic Zone
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
ITS	Incidental Take Statement
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
pHOS	Proportion of Hatchery-Origin Spawners
PST	Pacific Salmon Treaty
RPA	Reasonable and Prudent Alternative
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whales

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INTRODUCTION

Plaintiff's remedy motion seeks two forms of vacatur and two forms of injunctive relief. Yet contrary to Plaintiff's suggestion, these four forms of relief are neither "narrow" nor "limited" in scope. In fact, a careful examination of the errors identified by the Court balanced against the disruptive consequences of any or all of this relief weighs heavily in favor of *not* vacating any portion of the Incidental Take Statement (ITS) or Biological Opinion (BiOp). Further, Plaintiff has utterly failed to meet the standards for both permanent and preliminary injunctive relief. As such, the Court should remand without vacatur to the National Marine Fisheries Service (NMFS) to allow the agency to undertake further analysis under both the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) and deny any injunctive relief. As described below, this conclusion finds support in the application of the relevant case law to the specific facts here.

Plaintiff's position on remedy also suffers from a number of fundamental flaws that severely undermine its request. *First*, Plaintiff presents an excessively narrow view of Southeast Alaska (SEAK) fisheries and the prey increase program that ignores the larger context in which Chinook salmon fisheries are managed by the United States and Canada from SEAK to the Pacific Northwest. *Second*, Plaintiff's motion suffers from internal inconsistencies. Plaintiff attempts to shut down a program that will *increase prey abundance* for Southern Resident Killer Whales (SRKW), which Plaintiff purports to be protecting through this lawsuit. Moreover, Plaintiff's request for injunctive relief is based on alleged irreparable harm from a prey increase program that Plaintiff has repeatedly argued is not reasonably certain to occur, and which, contrary to Plaintiff's assertions, has been thoroughly evaluated by NMFS. *Third*, Plaintiff mischaracterizes (or simply misunderstands) how the ESA operates, particularly in terms of critical habitat, which severely undermines Plaintiff's assertion that NMFS's errors were serious and that vacatur is warranted. Plaintiff's motion should be denied and the Court should remand without vacatur.

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ARGUMENT

I. Plaintiff Misconstrues Key Factual Elements and Overlooks Others.

Plaintiff's motion seeks to vacate the ITS "to the extent that it authorizes take of SKRW and threatened Chinook salmon resulting from commercial harvests of Chinook salmon" and the parts of the BiOp that "adopt, and purport to consult under section 7 of the ESA on, the prey increase program." Pl's Mot. for a Final Order on Relief (Mot.) at 18. Plaintiff seeks additional relief tied to the prey increase program—namely, an injunction stopping implementation of the program until the new analysis is complete. *Id.* at 30.[1] Despite demanding these far-reaching remedies, Plaintiff ignores important details on how fishing works under the Pacific Salmon Treaty (PST) and the mechanics of the prey program that is aimed at substantially boosting the amount of Chinook salmon; Plaintiff also fails to appreciate the ramifications of its requested relief. A closer look at the contours of the overarching fishing regime and the prey increase program makes clear that the relief requested will not only have disruptive consequences but will also be counter-productive to Plaintiff's putative goals.

A. Fishing in Southeast Alaska

Consistent with the jurisdictional scheme set out in the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the State of Alaska manages salmon fisheries in state waters, which extend three nautical miles outward from the shoreline and is where most of the salmon fisheries occur. *See* 16 U.S.C. §§ 1802(11); 1811. Congress vested NMFS with authority over the fisheries in Federal waters—which extend from state waters outward to 200 nautical miles from the shoreline—however, under the Fishery Management Plan for Salmon Fisheries in the Exclusive Economic Zone (EEZ) off Alaska, NMFS delegated authority over Federal fisheries in SEAK to the State in 1990. *See id.*; 50 C.F.R. § 679.3(f); AR 502; Keaton Decl. ¶ 9.

SEAK fisheries are just one part of the overall management of Chinook salmon fisheries, some of which occurs at the international level because these anadromous fish migrate through the waters of the United States and Canada during their lifespans and therefore are

[1] Plaintiff also seeks a preliminary injunction pending the resolution of its Motion. Mot. at 33.

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subject to harvest in both countries. AR 47194; 47204-06; *see* Dkt. No. 93 at 5-8. In 2019, the two countries entered into a bilateral agreement regarding salmon management. That 2019 Agreement is the most recent in a series of agreements that set limits on Chinook harvest by both countries, and reduced harvest levels below those set in the 2009 Agreement, which were in turn reduced significantly from the 1999 Agreement. AR 47202. In addition to SEAK fisheries, U.S. fisheries in the Pacific Northwest are managed consistent with the 2019 Agreement.

Under the Agreement, upper limits on Chinook harvest for SEAK and certain British Columbia fisheries are set based on abundance in any given year. AR 47205.[2] The Alaska Department of Fish & Game (ADF&G) establishes annual Chinook catch limits consistent with the upper catch limit for SEAK. AR 527-29; 531-32; Keaton Decl. ¶ 17. ADF&G allocates this catch limit among sport and commercial fisheries in SEAK, with purse seine, drift gillnet, and set gillnet (the net gear fisheries) receiving 4.3%, 2.9%, and 1,000 salmon, respectively. Keaton Decl. ¶ 18. The remaining catch of treaty Chinook salmon is divided between commercial troll (80%) and sport fisheries (20%). *Id.* During the years 2018-2022, the net gear fisheries were allocated an average of 7.78% of the annual catch limit, and the sport fishery was allocated an average of 18.44%. *Id.* ¶ 19. These allocations left an average of 73.78% to the troll fishery, which represents "a significant portion of the overall treaty Chinook limit for the State of Alaska." *Id.* In the troll fishery, there are two methods—power and hand trolling. *Id.* ¶ 25. From 2011-20, over 1,000 permit holders participated in the power and hand troll fisheries annually (on average). *Id.* ¶ 32. Trollers harvest on average 76% of treaty Chinook salmon (and 67% of all Chinook salmon), and Chinook have the highest value per pound of salmon harvested in SEAK. *Id.* ¶¶ 23, 26.

In addition to the distribution by gear types, there is a seasonal distribution in the SEAK commercial troll fishery. Two of those seasons—winter and summer—are implicated by

[2] The Agreement sets upper limits on harvest of individual Chinook stocks for fisheries in the Pacific Northwest and Southern British Columbia; these are accounted for in domestic fishery management, which includes management by the Pacific Fishery Management Council and NMFS of ocean fisheries off the West Coast, and management by the states of Washington, Oregon, Idaho and the treaty Indian tribes of fisheries in inland waters. AR 47209-12.

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Plaintiff's Motion. The winter season runs from October 11 to March 15, and the State-established guideline harvest level is 45,000 treaty Chinook salmon.[3] *Id.* ¶ 21. From 2017-2021, the troll fleet has harvested an average of 18,745 treaty Chinook during the winter. *Id.* The summer season runs from July 1 to September 30, and it targets the remaining allotment under the PST after the winter and spring harvests are subtracted.[4] *Id.* ¶ 22. From 2017-2021, the troll fleet has harvested an average of 100,200 treaty Chinook salmon during the summer. *Id*. The majority of the troll fishery takes place in State waters, and only the summer fishery occurs in both State and Federal waters. *Id.* ¶ 27. From 2017-2021, the average commercial troll harvest was 129,802 treaty Chinook salmon, which is a decline in average annual harvests since 1962. *Id.* ¶¶ 23-24.[5]

In the 2019 BiOp, NMFS considered the potential impacts of SEAK fishing by examining two NMFS actions: (1) the delegation of authority of fishing in Federal waters to the State and; (2) the distribution of PST funds to the State.[6] AR 47198-201. At most abundance levels, the 2019 Agreement results in overall harvest *reductions* of 7.5% in the SEAK salmon fisheries from the harvest levels permitted under the 2009 PST Agreement. AR 47209. NMFS estimated that fishing in SEAK consistent with the 2019 Agreement would decrease SRKW prey by an average of 0.5% in the coastal waters during winter, and an average of 1.8% during summer, the times and areas in which Chinook salmon are most likely to become potential prey to SRKW. Third Barre Decl. ¶ 9. NMFS concluded that the "prey reductions from the SEAK troll fisheries, particularly in the most important locations and seasons for the whales, are small and, considered in concert with the hatchery production program, will not jeopardize their survival or recovery." *Id.* ¶ 5. This evidence demonstrates that Dr. Lacy's statement projecting a

[3] If that number is not reached, the remainder could be harvested in the spring and summer fisheries. Keaton Decl. ¶ 21.

[4] The spring fishery (May and June) mostly targets hatchery Chinook salmon produced in Alaska, and over the last five years, the spring troll fishery has harvested an average of 10,833 treaty Chinook salmon. Keaton Decl. ¶ 20.

[5] Some of the non-Alaska salmon are hatchery produced and some are natural origin. Keaton Decl. ¶ 29. Plaintiff's argument that the hatchery and natural origin salmon caught in the SEAK fishery should be allowed to return to the Pacific Northwest to feed SRKW is at odds with Plaintiff's assertion that the release of hatchery fish by the hatchery program will cause putative genetic risks to Chinook salmon.

[6] PST funds are also distributed to Washington, Oregon, and Idaho. Second Rumsey Decl. Att. A, B.

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6% decrease is an "oversimplification and overestimation." *Id.* ¶ 9. In addition, most of the stocks high on the list of those harvested in the SEAK fisheries are *not priority stocks* for SRKW. *Compare* AR 47443 (showing that with the exception of Columbia Upriver bright stocks, the other stocks at the top of the SEAK catch list are not high on the SRKW priority list) *with* AR 47506 (showing the highest-priority stocks for SRKW—Puget Sound and lower Columbia River fall stocks—account for only 2-3% of the total catch in the SEAK fisheries); AR 47284-85; 47444-45.

Plaintiff not only overestimates the impact of the SEAK fishery, but also underestimates the impacts of other factors that lead to the reduction of prey. Even if the commercial troll fishery did not operate, "only a portion of the fish allocated to the State of Alaska under the Pacific Salmon Treaty would return to rivers and hatchery facilities in British Columbia and the Pacific Northwest due to natural mortality and harvest in other fisheries." Keaton Decl. ¶ 30; *see* AR 47316 (figure showing the fishery areas along the Pacific coast, including the North coast of British Columbia and West Coast of Vancouver Island, which are two areas between SEAK and the coast of Washington). The threats faced by SRKW include, among others, contaminants, variable oceanographic conditions, and disturbances from vessels, including whale watching boats. Third Barre Decl. ¶¶ 19, 22. Indeed, even one of Plaintiff's declarants acknowledged that there "will be some natural mortality within the ecosystem, [and] Chinook salmon can be harvested in other migration route geographic areas." Dkt. No. 127-4 (Radtke Decl.) (citing the same map that NMFS included in its BiOp and Cross-Motion for Summary Judgment).

Plaintiff also ignores the efforts of NMFS and others to minimize those impacts. These efforts include mandatory and voluntary vessel measures that reduce interference with SRKW foraging, cleaning up or reducing inputs of harmful contaminants, conservation hatchery programs, and habitat restoration projects. Third Barre Decl. ¶ 22; *see also* AR 47508 ("starting in 2018, additional protective measures in U.S. and Canadian waters are being implemented to reduce impacts from fisheries and vessels in key foraging areas"); Third Barre Decl. Att. A (PFMC BiOP) at 13-17 (discussing measures).

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Plaintiff's incomplete analysis of salmon fishing in the Pacific and NMFS's regulatory efforts leads to a miscalculation of the impacts of SEAK fishing.

B. The Prey Increase Program

NMFS began analyzing the possibility of a prey increase program in 2018. AR 37928-30. In that analysis, NMFS looked at hatchery facilities and priority stocks that could boost food for SRKW. *Id.* Soon after, NMFS, based on direction from Congress, allocated approximately $5.6 million per year for the production of 20 million smolts[7] each year as part of annual spend plans developed for PST-related funding. *See* Dkt. 43-4 (First Rumsey Decl.) ¶ 14; AR 47203. NMFS has established criteria for selecting the hatcheries that are used to supplement the SRKW food supply; they include a requirement that production "cannot jeopardize the survival and recovery of any ESA-listed species, including salmon and steelhead." Dkt. No. 93-4 (Second Purcell Decl.) ¶ 8. Another requirement is that the production must be reviewed under the ESA and NEPA *before* funding can be used. *Id.*

Critically, for all of the programs receiving funding, NMFS has completed ESA and NEPA analyses or identified existing ESA and NEPA analyses which evaluate all of the effects of production. Third Purcell Decl. ¶ 5; *see id.* Att. 2 (showing all of the ESA and NEPA coverage). In evaluating these programs, NMFS relied on its extensive experience assessing the effects of hatchery programs, as well as a series of guidance documents, to ensure that the funded production will not jeopardize the survival and recovery of any ESA listed species. *Id.* ¶ 6; Second Purcell Decl. ¶ 14. In particular, NMFS has completed BiOps and NEPA documents on nearly 200 hatchery programs over the last decade. Second Purcell Decl. ¶ 15. These BiOps include "a detailed assessment of genetic risks, competition and predation, facility effects, and disease risks to ESA-related species," which obviously include listed salmonids. *Id.*

The site-specific BiOps and NEPA documents for the programs receiving prey increase funding represent "the best way to evaluate risks associated with the prey increase program because it is difficult to understand biological risks without knowing the project-level details." Third Purcell Decl. ¶ 8. For example, to fully evaluate effects, NMFS needs "to know where the

[7] A smolt is a young salmon that is usually two years old and is ready to migrate to the ocean.

fish will be released, the origin of the broodstock (e.g., local or non-local), how many natural-origin fish will be included in the broodstock, how will the fish be acclimated and released, how the returning adults be managed (e.g., will they be removed at a weir), and what the role of the affected population(s) is in recovery of the species." *Id.* This evidence undercuts Plaintiff's contention that the prey increase program would harm SRKW because it will "pose severe genetic risks to threatened Chinook salmon and thereby further harm SRKWs." Mot. at 11.

The prey program has been fully funded, as planned, for the past three years (2020-2022). Second Rumsey Decl. ¶¶ 7-9.[8] The program is already "increasing the prey available to SRKW now." Third Barre Decl. ¶ 22. As such, the program is providing direct and significant benefits to SRKW. *Id.* ¶¶ 11, 13. The "increase in abundance anticipated from the prey increase program will contribute to the overall Chinook abundance, and reduce the potential for SKRWs to experience low abundance conditions in general." *Id.* ¶ 15. Moreover, the program may be most beneficial in those years when the overall Chinook abundance is low because the "percent increase resulting from the funded production may be higher" in those years. *Id.* ¶ 14.

The evidence before the Court demonstrates that the prey increase program is a vital program for SRKW and that it will not jeopardize listed salmonids. Plaintiff ignores these aspects of the prey increase program, and therefore underestimates the benefits that will flow from the program.

II. Plaintiff Misreads the ESA.

Plaintiff bases its argument for vacatur in part on the misplaced assertion that NMFS violated a key provision of the ESA regarding critical habitat. Mot. at 23 (stating that the finding of "likely to adversely affect [SKRW] designated critical habitat . . . should have triggered the imposition of reasonable and prudent alternatives"); *see id.* at 16. As with the

[8] Plaintiff suggests that the program covers $8.6 million in mitigation for harvests totaling $9.5 million in income. Mot. at 25. It is not clear what the first number refers to since the program allocates approximately $5.6 million per year, and to the extent that Plaintiff has added the prey increase program and the conservation hatchery program together, that argument is misplaced because Plaintiff claims to focus this part of the relief on the prey increase program. Mot. at 22. In any event, even if Plaintiff's number is correct, the economic output of the fisheries is substantially greater than $9.5 million. Keaton Decl. ¶¶ 34-41.

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factual mistakes identified above, this represents a basic misreading of the ESA and its implementing regulations.

Under the ESA, an action agency must consult with NMFS (or the Fish and Wildlife Service (FWS), as appropriate) if it takes an action that "may affect" listed species or designated critical habitat.[9] 50 C.F.R. § 402.14(a). If the action "may affect," but is "not likely to adversely affect," then informal consultation is appropriate. *Id.* §§ 402.14(b)(1); 402.13. If, however, the action is likely to adversely affect a species or critical habitat, then formal consultation is appropriate. *Id.* § 402.14; *see* Endangered Species Consultation Handbook (1998) at xv, https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf (last visited Oct. 3, 2022). In formal consultation, NMFS must make a determination as to whether the action is "likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat," which is a significantly higher standard than "likely to adversely affect." *Id.* § 402.14(g)(4); 16 U.S.C. § 1536(a)(2). If the answer to either question is affirmative, then NMFS must recommend reasonable and prudent alternatives (RPAs), which are defined as alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action and that would avoid the likelihood of jeopardy to listed species or destruction or adverse modification of critical habitat. 50 C.F.R. §§ 402.02, 402.14(g)(5). NMFS is not required to recommend RPAs where, as here, NMFS concludes the action is not likely to jeopardize and not likely to destroy or adversely modify critical habitat. *Id.* As shown by the chart at the start of the 2019 BiOp, NMFS determined that while the proposed action was likely to adversely affect SRKW critical habitat (thereby triggering formal consultation), the action was not likely to destroy or adversely modify critical habitat, and thus there was no need to identify an RPA. AR 47173-75.

Plaintiff is also wrong when it characterizes its second request for relief as seeking to vacate "those portions of the 2019 SEAK BiOp that adopt, and purport to consult under section 7 of the ESA." Mot. at 10. When NMFS is wearing its hat as the consulting agency, it does not

[9] Here, NMFS is the action agency and the consulting agency.

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"adopt" an action. Instead, it either issues a letter of concurrence in an informal consultation, or it formulates its opinion as to whether the action is likely to jeopardize a species or destroy or modify critical habitat. This distinction matters because it underscores the limits of the Court's remedial authority vis-à-vis NMFS as the consulting agency.

III. Plaintiff Misapplies the Two-Part Vacatur Test

A court "is not required to set aside every unlawful agency action," even though it has the power to do so. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *see Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) ("[a]n inadequately supported rule . . . need not necessarily be vacated"). When equity demands, the action "can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *Pac. Bell v. Pac. W. Telecomm. Inc.*, 325 F.3d 1114, 1123 (9th Cir. 2003) (allowing agency actions to remain in place pending completion of remand, even where the actions have been found to be arbitrary and capricious).

The concept of remand without vacatur applies with equal force to cases involving BiOps and ITSs. *See*, *e.g.*, *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 883 (D. Mont. 2021) (stating in a BiOp and ITS challenge that "underlying agency action may be 'left in place while the agency reconsiders or replaces the action'") (citing *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010)); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1041-43 (D. Ariz. 2009) (finding FWS BiOp arbitrary and remanding for reconsideration). *Nat'l Wildlife Fed'n v. NMFS*, 254 F. Supp. 2d 1196, 1215 (D. Or. 2003) (remanding biological opinion without vacatur, "in order to give [NMFS] the opportunity to consult [on defects the court had identified in the biological opinion]"); *Columbia Snake River Irrigators Ass'n v. Evans*, No. CV 03–1341–RE, 2004 WL 1240594, at *1 (D. Or. June 3, 2004) (expressly stating that the court "did not order the [biological opinion in *Nat'l Wildlife Fed'n v. NMFS*, 254 F. Supp. 2d 1196] vacated, but remanded it").

The determination of "[w]hether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)

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(per curiam) (quotation omitted)); *see Inst. for Fisheries Res. v. U.S. Food & Drug Admin.*, 499 F. Supp. 3d 657, 669 (N.D. Cal. 2020) ("Vacatur of an agency action is an equitable remedy that courts can refrain from imposing when the disruptive consequences of vacatur would outweigh the seriousness of the agency's errors."). As part of the analysis, courts look to "whether the agency would likely be able to offer better reasoning" on remand. *Nat'l Family Farm Coal. v. U.S. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (quotation omitted); *see Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (also relevant to the analysis is "whether by complying with procedural rules, [the agency] could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand."). When the consequences of vacatur would be "severe," especially for endangered species, courts have remanded without vacatur. *E.g.*, *Cal. Cmtys. Against Toxics*, 688 F.3d at 992.

Contrary to Plaintiff's assertions, the severe consequences of vacatur here outweigh the errors identified by the Court, and thus the presumption of vacatur is rebutted. *See* Mot. at 18-30. In this case, remand without vacatur will ensure that a crucial source of food can continue to produce prey for the endangered SRKW while the agency corrects the errors under the ESA and NEPA. It will also ensure the continued operation of the SEAK salmon fisheries.

A. Plaintiff Mischaracterizes the Scope of the Requested Relief.

Before addressing the flaws in Plaintiff's application of the two-part vacatur test, it is important to understand that Plaintiff's Motion relies on the flawed premise that it has requested "narrow" vacatur. Mot. at 21-22. According to Plaintiff, the disruptive consequences of vacatur are minimized because it seeks less than full vacatur. *See id.* But the evidence shows that the vacatur would likely have wide impacts not only on SEAK fishing, but also to the prey increase program that provides fish for SRKW.

Plaintiff misrepresents the scope of the requested vacatur by contending that it seeks to vacate the ITS "only to the extent it authorizes take resulting from commercial harvests of Chinook salmon in two seasons of the troll fishery" and that "[m]uch of the ITS would remain untouched." *Id.* at 21. In terms of fishing, the SEAK troll fishery is allocated an average of

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73.78% of the overall limit for treaty Chinook salmon in the State. *See supra* at 3; Keaton Decl. ¶ 19. Of the three fishing seasons, the winter and summer combined account for the vast majority of the harvest of treaty Chinook salmon (118,945 of 129,802 treaty Chinook salmon harvested on average from 2017-2021). Keaton Decl. ¶¶ 21-23. Thus, Plaintiff is simply wrong when it suggests that the scope here is "limited." Plaintiff compounds this error when it states that the requested relief would impact less than 2.6% of the entire SEAK seafood industry. Mot. at 22 (citing Radtke Decl.). The calculation of this number is described in some detail later in the Motion, but that calculation underestimates the impact because it fails to engage with the full effects to the fishing community. Based on analysis of the ADF&G data on the ex-vessel value[10] of the troll fleet as well as the McDowell Group on the Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet, which considered additional value created by wages, processing, and income from goods and services supporting fishing operations, the total annual economic output of the Chinook salmon commercial troll fleet for the winter and summer seasons is approximately $29 million. Keaton Decl. ¶¶ 36, 40. But even if the smaller number proposed by Plaintiff is accurate, the fact that it is a small portion of the overall fishing industry does not, *a fortiori*, mean that the impact is insignificant. *See infra* at 19-20.

Plaintiff also includes the vacatur related to the prey increase program in its section on so-called "narrow" relief, but provides no argument explaining how such relief is limited. Mot. at 22. Plaintiff asks the Court to vacate the analysis of the prey program in its entirety, which would cut off the funding aimed at replenishing the SRKW food supply. That effort is "a critical tool to help address a primary threat to SRKW and without it there will be a negative impact on the recovery program for SRKW." Third Barre Decl. ¶ 23. Thus, contrary to Plaintiff's suggestion, the purportedly limited relief it seeks would, in fact, have significant impacts on ESA-listed SRKW. Plaintiff's argument that it has "minimiz[ed] disruptive consequences" collapses under scrutiny. Mot. at 21.

[10] ADF&G calculates ex-vessel value by multiplying the number of salmon caught by the average weight by the average price per pound. Keaton Decl. ¶ 33. Ex-vessel value does not account for additional value created by, for example, wages, processing, and tax revenue. *Id*. ¶ 36.

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B. The Errors Identified By the Court Do Not Weigh in Favor of Vacatur.

Plaintiff's assertions about the nature of the errors fail to tip the scale toward vacatur because they rely on a misreading of the ESA and are not supported by the case law. Mot. at 22-26. Plaintiff discusses three "violations." First, Plaintiff focuses on NMFS's decision that the fishery is "likely to adversely affect [SRKW] designated critical habitat," which Plaintiff contends should have led to RPAs because it was the equivalent of finding a likelihood of adverse modification. Mot. at 23. But, as explained above, the ESA consultation process contemplates a threshold decision of "likely to adversely affect" critical habitat to trigger formal consultation that is then followed by an adverse modification analysis. *See supra* at 7-8. Those steps occurred here, and NMFS ultimately determined that the SEAK fisheries were not likely to adversely modify SRKW critical habitat. In fact, the Court did not accept Plaintiff's invitation to misconstrue the consultation process. And so Plaintiff's primary example of a serious error is no error at all.

Second, Plaintiff contends that the two ESA issues identified by the Court—NMFS's reliance on undeveloped mitigation and its failure to determine the impact of the prey increase on threatened Chinook salmon—constitute serious errors. Mot. at 23.[11] But Plaintiff offers no explanation for why these are serious errors other than a recitation of ESA Section 7 (with bolded text) and conclusory assertions about "extremely serious violations." *Id.* at 23-24. Moreover, courts considering what remedy to impose do not automatically or reflexively find errors as serious enough to warrant vacatur. In *National Family Farm*, the Ninth Circuit identified an error under the Federal Insecticide, Fungicide, and Rodenticide Act—"failing to consider harm to monarch butterflies caused by killing target milkweed"—was not serious. 966 F.3d at 929. And in *WildEarth Guardians*, the court remanded without vacatur even after finding numerous errors in a consultation between the Forest Service and FWS, including a failure to consider the impacts of a new Forest Plan on the grizzly population as a whole and a flawed grizzly bear take statement. 545 F. Supp. 3d at 884. The principle applies even when the

[11] These are the only two ESA errors identified by the Court, which did not reach the other ESA claims. *Wild Fish Conservancy v. Thom*, No. C20-417-RAJ-MLP, 2021 WL 8445587, at *11 n. 4 (W.D. Wash. Sept. 27, 2021), *report and recommendation adopted*, No. 20-CV-417-RAJ, 2022 WL 3155784 (W.D. Wash. Aug. 8, 2022).

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"errors are not minor." *Id.* Further, the seriousness of the errors with regard to the prey increase program is substantially undermined by the fact that every program funded has been subject to ESA and NEPA compliance that ensures the additional funding does not jeopardize SRKW or listed Chinook salmon.

Plaintiff's reliance on selected case law is misplaced. Mot. at 23-24. As an initial matter, Plaintiff cites five cases in support of its contention that "similar" violations have been found to be serious errors, "e.g. where an agency failed to fully explain its determinations on effects to species or where the errors call into question the 'no jeopardy/no adverse modification' decision." *Id.* Yet, four of the cases do not involve effects or jeopardy analyses under Section 7; instead, they involve listing decisions or critical habitat designation under Section 4 or permits issued under Section 10. In addition, the decision in *Sovereign Inupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739 (D. Alaska 2021), is distinguishable because there the agency committed serious errors in the greenhouse gas analysis and the take analysis, while "no significant environmental disruption will occur." *Id.* at 804-05. On balance, the error weighed in favor of vacatur.

Likewise, Plaintiff's reference to *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987 (D. Alaska 2021), is unavailing. Mot. at 24. Plaintiff suggests that the court found the errors to be serious because the agency did not explain its determination that one subset of oil and gas activities (tugs towing a drilling rig) would not "harm" beluga whales. *Id.* But this elides a key point—the agency had determined that those activities would not *take* beluga whales, "an error that was reflected in its [Incidental Take Regulations], BiOp, and EA/[Finding of No Significant Impact]." *Cook Inletkeeper*, 541 F. Supp. 3d at 990-91 (imposing a narrow vacatur regarding tugs towing drill rigs). Here, by contrast, NMFS acknowledged the potential for take associated with SEAK fisheries, NMFS authorized the take reasonably certain to occur from the SEAK fisheries, and thus the error is less serious.

Third, Plaintiff invokes the NEPA violations, but these do not rise to the level of serious errors. *See* Mot. at 25-26. NEPA is a procedural statute. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005). Where error, such as the Court found here, is procedural,

remand without vacatur gives the agency an opportunity to correct its procedural error or provide further explanation. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). By contrast, vacatur is typically applied in situations where the agency's decision is substantively illegal or cannot be reconciled with the law. *See*, *e.g.*, *Fox Television Stations, Inc. v. Fed Commc'ns Comm'n*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002) (vacatur is appropriate where a rule is "irredeemable"). Because the omission found by the Court was procedural rather than substantive, vacatur is not required. Remand alone will allow NMFS to address the issue by releasing new NEPA analyses and determinations.

Even assuming that the ESA or NEPA violations are deemed to be more than "minor" errors, they do not warrant vacatur because the agency could "offer better reasoning" on remand. *Nat'l Family Farm Coal.*, 966 F.3d at 929. First, Plaintiff has provided nothing to suggest that NMFS would be unable to improve its analysis in the new BiOp and new NEPA documents. To the contrary, the record indicates that NMFS is well-positioned to better explain and/or conduct its analysis. For the first ESA violation (specific and binding plans), NMFS can provide additional reasoning on the prey increase program because the program has now been implemented for three consecutive years. Third Purcell Decl. ¶ 3. For the second ESA violation (failure to make a jeopardy determination on the impacts to threatened Chinook salmon), NMFS can re-structure and/or add analysis to its BiOp. For the two NEPA violations, NMFS can build off of the existing NEPA documents—the site-specific analyses that have been performed and the prior analysis of the delegation to the State. *Id.* ¶ 5.

Even if NMFS's errors are not "minor," they did not undermine the objectives of the ESA or NEPA, and they do not outweigh the severe disruption to SRKW described below. *See Idaho Farm Bureau*, 58 F.3d at 1405 (finding that agency had committed a "significant procedural error" but electing not to vacate agency action given equities).

C. The Disruptive Consequences of Vacatur Will Be Significant.

Plaintiff's framing of the environmental and economic consequences associated with its requested relief is ill-conceived. *See* Mot. at 26-30. Plaintiff's assessment of the impacts that would flow from vacatur severely underestimates the disruption, which will be especially

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significant for SRKW. Further, Plaintiff's position is inconsistent depending on the species that is potentially at risk. When Plaintiff discusses SRKW, closing down nearly three-quarters of the commercial troll fishery in SEAK is required because the prey increase program is "undeveloped and not reasonably certain to occur." *Id.* at 26. And yet when Plaintiff discusses Chinook salmon, the program is sufficiently certain such that Plaintiff can argue that the program "will further inhibit the prospects for the continued survival, much less recovery, of threatened Chinook salmon." *Id.* at 29 (quotation marks omitted). Plaintiff cannot have it both ways—Plaintiff either believes the program is certain to occur or that it is not.

When vacating an agency action will have damaging impacts to a species, courts have declined to vacate the action, even if it is flawed. For example, in *Idaho Farm Bureau*, the Ninth Circuit declined to vacate an agency's rule because vacatur would have risked the extirpation of a species of snail. 58 F.3d at 1405-06 (9th Cir. 1980). In that case, FWS had determined that the Springs Snail was endangered, but committed "a significant procedural error" in promulgating the rule. *Id.* at 1405. Rather than vacate the rule, which provided protection for the snail, simple remand to the agency was deemed the appropriate remedy. *Id.* Like *Idaho Farm Bureau*, the prey increase program challenged in this case is designed to protect ESA-listed SRKW as it provides a meaningful increase in prey. Third Barre Decl. ¶¶ 5, 13; *see supra* at 6-7.

The Ninth Circuit also remanded without vacatur in *California Communities Against Toxics*, based on the potential for severe impacts from air pollution. 688 F.3d at 994. In that case, a California district had revised its state implementation plan for air quality to accommodate the state legislature approving emissions reduction credits for a new power plant named Sentinel. *Id.* at 991-92. Vacatur would have "pave[d] the road to legal challenges to Sentinel's construction," and if Sentinel was not online, it could "necessitate the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent." *Id.* at 993-94. This detrimental impact to air quality, combined with the economic impacts of stopping a "billion-dollar venture employing 350 workers," led the court to reject vacatur. *Id.* at 994; *see also Western Oil and Gas v. EPA,* 633 F.2d 803, 813 (9th Cir.1980) ("Our hesitancy [to vacate

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the defective rule] springs from a desire to avoid thwarting in an unnecessary way the operation of the Clean Air Act in the State of California during the time the deliberative process is reenacted."). Like *California Communities Against Toxics*, a decision to vacate that impacts the prey increase program would leave SRKW with less food, and thus make survival and recovery more difficult, which is the "very danger" that the ESA seeks to prevent. *See* Third Barre Decl. ¶¶ 16-17; *see infra*.

Following the Ninth Circuit's lead, numerous courts have chosen to remand agency actions under the ESA where vacatur would harm species. *See Nat'l Wildlife Fed. v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) (holding that "equity can authorize the district court to keep an invalid [action] in place during any remand if it provides protection for listed species within the meaning of the ESA."); *Inst. for Fisheries Res.*, 499 F. Supp. 3d at 670 ("revoking the approval would presumably require the current stock of salmon to be destroyed, a significant loss of property and animal life that would be wasteful given the real possibility that the [agency] will be able to cure the NEPA and ESA errors on remand"); *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1146 (C.D. Cal. 2002) ("The strong public policy in favor of environmental protection indicates that the Court should resolve uncertainties in estimating the risk of harm from habitat conversion during remand, in the absence of viable critical habitat designations, in favor of retaining the disputed rules.").

The attached Barre and Purcell Declarations show that the disruptive consequences of vacating the part of the BiOp that applies to the prey increase program could be severe. A disruption in funding "would likely result in a gap in additional prey abundance" and a decrease in prey could lead to "increased risk to the health of the SRKWs." Third Barre Decl. ¶ 16. Specifically, the impact "could manifest in the whales foraging for longer periods, traveling to alternate locations, or abandoning foraging efforts." *Id.* ¶ 17. In turn, changes to that foraging behavior "could result in SRKWs not consuming sufficient prey to meet their energetic needs, which could affect the health of individual whales, reproduction and the status and growth of the population." *Id.*

These potential negative impacts are forward-looking, but there could also be negative effects for the production that has already been funded and implemented. It is possible that hatchery operators would use other sources of funds to rear the fish; however, it is also possible that the fish are released early, "in which case they would have lower survival, reducing their potential contribution to SRKW diet." Third Purcell Decl. ¶ 9; *see Native Fish Soc. v. NMFS*, No. 3:12-cv-431-HA, 2014 WL 1030479 at *4 (D. Or. March 14, 2014) ("In addition to the fact that vacatur would potentially cause serious harm to the species in the near term, vacatur would also be disruptive to the future operation of the Sandy Hatchery by potentially eliminating the possibility of collecting future broodstock, and to the short-term interests of amici in a sport and harvest fishery."). An additional "biological concern is that if the fish are released early, they would probably not be externally marked (e.g., adipose fin clip) or tagged," which would limit the ability to "monitor and manage genetic risks" to wild fish. Third Purcell Decl. ¶ 9. To state the obvious, it takes money to mark fish. For example, "in some tributaries, weirs are used to block the passage of fish so that hatchery-origin fish can be removed to control [proportion of hatchery-origin spawners (pHOS)]. If the hatchery fish are not marked, they will likely be indistinguishable from the wild fish and would be passed above the weir to spawn naturally, which would increase pHOS and could potentially increase genetic risk in those tributaries." *Id.* Taken together, these statements underscore the varied and disruptive consequences that all weigh heavily against vacatur.

Plaintiff's attempt to steer around these impacts is misguided. *See* Mot. at 28. First, the fact that the Court invalidated the 2019 BiOp's analysis is irrelevant to the inquiry because the Court's opinion focused on events up to and including the issuance of the BiOp in early 2019, and NMFS has made significant and consistent strides in the implementation in the more than three years since that time. *See supra* at 7. Plaintiff quickly shifts to a preemptive challenge to evidence from the agency's experts, but this broadside is off target. Mot. at 28 (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011) (per curiam)). The statements made in the attached declarations regarding the prey increase program impacts are based on sound science, and in a telling omission, Plaintiff has not offered any statements to the contrary. In

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fact, Dr. Giles opines that SRKW "need an immediate increase in the abundance of Chinook available to them." Dkt. No. 127-1 ¶ 18. That increase is available through the prey increase program, which is now entering its fourth year.

Perhaps realizing that the requested remedy would meaningfully reduce prey available to SRKW, Plaintiff tries to argue that vacating the ITS will "offset" the substantial reduction that would result from stopping the prey increase program. Mot. at 29. But this line of argument is also misguided because it overestimates the benefits that will flow from vacatur and underestimates the impact to the SEAK fisheries. *See id.* at 27-28 (citing Radtke Decl.; Third Lacy Decl.). First, the analysis presented in the Lacy Declaration is outdated and oversimplified.[12] Third Barre Decl. ¶¶ 6-9. The model utilized by Dr. Lacy is based on "outdated correlations of coastwide Chinook abundance and survival or fecundity of SRKW." *Id.* ¶ 6. The Pacific Fishery Management Council's Ad Hoc Workgroup found that these relationships "have weakened or are not detectable," and an expert panel "cautioned against overreliance on correlative studies or implicating any particular fishery in evaluating the status of SRKWs." *Id.* ¶ 7. In addition to this quantitative issue, Dr. Lacy's conclusions "overstate the benefits that would likely be realized by the whales." *Id.* ¶ 8. As noted in the Third Barre Declaration:

> Both the Chinook salmon prey and SRKW predators are highly mobile. Thus, not all of the Chinook salmon caught in SEAK troll fisheries would migrate south into SRKW habitat and those that would migrate south would not all survive or be intercepted by the whales.

Id.; *see* Keaton Decl. ¶¶ 23, 29-30 (only a portion of the average 118,945 treaty Chinook salmon harvested in the winter and summer seasons would return). This highlights the fact that Dr. Lacy has not accounted for all the factors in making his calculation. The calculation is also flawed because it fails to incorporate seasonal and spatial variability. Third Barre Decl. ¶ 9. Indeed, Dr. Lacy never explains how curtailment of fishing in Alaska (thousands of miles away where most of the fish caught are not priority stocks for SRKW) compensates directly for a prey increase

[12] Dr. Lacy also failed to include the most recent SRKW population updates, which include two new calves born in early 2022. Third Barre Decl. ¶ 6.

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program that was specifically designed to produce high priority stocks when and where SRKW need them. *See supra* at 3-5. Because the calculation is unsound, Plaintiff's argument relying on the alleged 5% benefit from closing the troll fishery in the winter and summer is suspect. Since that benefit is suspect, so too is Plaintiff's contention that the supposed increase from vacatur would "offset" the loss of the increase expected from the prey increase program.

Second, Plaintiff fails to fully register the economic impacts of the vacatur that it seeks. Courts consider economic consequences along with environmental consequences when deciding the appropriate remedy. *See Cook Inletkeeper*, 541 F. Supp. 3d at 993 ("The Ninth Circuit has explicitly considered the economic consequences of vacatur where vacatur would halt a 'billion-dollar venture employing 350 workers.'"); *Beverly Hills Unified Sch. Dist. v. Fed. Transit Admin.*, No. 12-cv-9861GW(SSx), 2016 WL 4445770 at *11 (C.D. Cal. Aug. 12, 2016) (remanding without vacatur because vacatur would "disrupt and delay the progress" of a project "created to meet a pressing public need," cause "serious economic problems," and result in "duplicative efforts," in addition to possible environmental harm); *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1018 (E.D. Cal. 2013) (rejecting Plaintiffs' attempt to limit analysis of vacatur to potential environmental harm and finding "courts should consider economic and other practical concerns") (citation omitted); *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) (stating that "the determination of when to remand without vacatur should not be limited to situations where it is necessary to avoid environmental harm, but should instead be based on a broader examination of the equities.").

Plaintiff asks this Court to vacate the ITS with respect to the winter and summer troll fishery for Chinook salmon. To be clear, vacating the ITS in and of itself does *not* result in a prohibition on fishing in State or Federal waters.[13] Instead, vacating the ITS means that there is no exemption from liability under Section 9 of the ESA in the event that take occurs. *See* 16

[13] To the extent that Plaintiff seeks to enjoin the fisheries in Federal waters, that relief is simply not available. *See Wild Fish Conservancy v. Thom*, No. C20-417-RAJ-MLP, 2020 WL 8675751, at *6 (W.D. Wash. June 9, 2020), *report and recommendation adopted*, No. C20-417-RAJ-MLP, 2021 WL 781074 (W.D. Wash. Mar. 1, 2021) (finding that "this Court lacks jurisdiction to enjoin the commercial troll salmon fishery" because the source of the source of such relief places this action within the purview of the MSA, and "Plaintiff has missed the deadline for challenging the relevant regulations").

U.S.C. § 1536(o)(2) ("any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned"); Keaton Decl. ¶ 31. Thus, in the absence of the ITS, those engaged in commercial trolling would have to decide whether to fish without an ESA exemption or forego economic revenue. Keaton Decl. ¶ 31.

If we simply assume that the trollers would not fish, then the economic disruption would be even more substantial than Plaintiff suggests. *See id.* ¶¶ 31-41. Plaintiff paints a distorted picture of the troll fishery that does not account for economic impact beyond income. Mot. at 27. The data shows that the economic output of the commercial troll fishery in the winter and summer, inclusive of the wages, processing, and income from goods and services supporting fishing operations as well as ex-vessel value, would be approximately $29 million. Keaton Decl. ¶ 40. This number is substantially higher than the $9.5 million referenced in the Radtke Declaration. Plaintiff's picture is further distorted by the arbitrary comparison between the commercial troll fishery and the entire labor earnings in the southeastern portion of Alaska. Mot. at 27. Any number can be made to appear small by expanding the universe it is compared to. These economic impacts will affect individual people and the fishing communities that are dependent on the troll fleet, which in SEAK harvests 67% of all Chinook salmon, the highest value salmon. Keaton Decl. ¶ ¶ 26, 32.

Taken together, these environmentally, administratively, and economically disruptive consequences tip the remedy scale in favor of remanding without vacatur. Plaintiff cannot overcome this conclusion with a faulty comparison that ignores the negative impact of disrupting the prey increase program, overestimates the benefits to SRKW from vacating the ITS, and unduly minimizes the economic impacts. Mot. at 27-28. Moreover, Plaintiff's reference to *TVA v. Hill*, 437 U.S. 153 (1978) is misplaced because Plaintiff seeks to bring an end to a prey increase program that aims to "halt and reverse the trend toward species extinction." Mot. at 28. The same is true for *Klamath-Siskiyou Wildlands Ctr. v. National Marine Fisheries Service*, 109 F. Supp. 3d 1238, 1245-47 (N.D. Cal. 2015), because in that case, the court found that the potential economic harm did not "rise to the concrete, foreseeable

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economic harm like that found in *California Communities Against Toxics*," whereas the harm here is concrete and foreseeable. *See supra*.

Plaintiff tacks on an argument about the impact of the increased hatchery production on wild fish; however, this requires an about-face by Plaintiff because it assumes that the hatcheries are in fact producing the prey for SRKW. Mot. at 29; *see also* Luikart Decl. ¶ 17 (describing "[t]he releases of additional Chinook salmon hatchery smolts that have recently occurred and are proposed to occur in the immediate future . . ."). Even more problematic, however, is that the statements about the impacts of the increased hatchery production on the survival and recovery of ESA-listed Chinook salmon are inaccurate. Third Purcell Decl. ¶ 7; *see* Second Purcell Decl. ¶ 18.

At the bottom of the very same page, Plaintiff flips back and asserts that the program is uncertain. *See* Mot. at 29 ("NMFS optimistically predicts that the unlawful prey increase program will someday increase SRKW . . ."). Not only is this incorrect, it relies on a mischaracterization of the BiOp. Plaintiff states that the prey increase program "would then 'take several [more] years' to actually produce adult salmon. . . ." *Id.* (quoting AR 47435). Plaintiff's addition of the word "more" improperly suggests that salmon production will not come to fruition for several additional years. But the BiOp was written in 2019 and NMFS anticipated that in several years from 2019, the prey increase would start to materialize. And now it has materialized. *See* Third Barre Decl. ¶ 22.

IV. No Form of Injunctive Relief Is Warranted

In addition to two forms of far-reaching vacatur, Plaintiff asks this Court for two injunctions—one enjoining the implementation of the prey increase program, and another "imposing" the vacatur and enjoining the prey increase program "until such as time as the Court issues a final order on relief." Mot. at 30-33. A permanent injunction is "a drastic and extraordinary remedy" that is inappropriate here. *Monsanto v. Geerston Seed Farms*, 561 U.S. 139, 165 (2010). Also, given that Plaintiff has not filed a separate motion for preliminary or temporary relief, it is not clear how such relief would be granted before a final order issues. In any event, one cursory paragraph asserting that relief is "urgently needed" is woefully

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insufficient to support imposition of interim emergency relief, especially during the pendency of the Court's resolution of remedy.

A. Plaintiff Fails to Satisfy the Standard for a Permanent Injunction.

The burden for obtaining a permanent injunction is substantial. A plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 561 U.S. at 156-57. Plaintiff has not satisfied any of these factors.

Most importantly, Plaintiff makes only one specific assertion about irreparable injury: that the program will "further inhibit the prospects of continued survival, much less recovery" of threatened Chinook salmon. Mot. at 31 (quoting Luikart Decl.). This argument is undermined by the evidence presented in the Third Purcell Declaration that NMFS carefully evaluated the effects of the prey increase program on threatened Chinook salmon to avoid jeopardy to these fish. Third Purcell Decl. ¶¶ 4-5; *see id.* Att. 2. Plaintiff's argument is also completely divorced from its assertions of harm for standing purposes. In addition, this fails to articulate what the injury is to the Plaintiff. Moreover, an inhibition of prospects is a far cry from irreparable harm, especially in light of Dr. Luikart's qualification that the release of 20 million smolts "will *likely* further increase pHOS levels." Luikart Decl. ¶ 20 (emphasis added). Plaintiff's remaining references to irreparable injury—which are purportedly tied to the NEPA violations—are merely conclusory. For example, Plaintiff contends that NMFS's "failure to consider alternatives to the prey increase program . . . constitutes irreparable injury" without any explanation of how this is an injury or how it is irreparable. Mot. at 32.

Next, Plaintiff wrongly asserts that the third and fourth factors support an injunction. Mot. at 32. In cases involving the ESA, "the balance of hardships and the public interest tip heavily in favor of endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (citation omitted). Here, Plaintiff directly asks this Court to interfere with an action designed by NMFS to benefit SRKW; such an effort runs counter to the public interest.

Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation omitted) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."). It is telling that Plaintiff does not even mention SRKW in this section of its brief.

Plaintiff also advances a flawed argument about why an injunction is needed even if the Court grants the request for vacatur. Mot. at 30. But where "a less drastic remedy" than an injunction is "sufficient to redress [the] injury, no recourse to the additional and extraordinary relief of an injunction [i]s warranted." *Monsanto* , 561 U.S. at 165-66 (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 31-33 (2008)); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) ("If a district court could, in every case, effectively enjoin agency action simply by recharacterizing its injunction as a necessary consequence of vacatur, that would circumvent the Supreme Court's instruction in *Monsanto* that a court must determine that an injunction should issue under the traditional four-factor test.") (citation omitted). Plaintiff asserts that vacatur is not sufficient to ensure NEPA compliance and that it is unclear whether NMFS would implement the program without a new BiOp. The first assertion fails to recognize that the agency would be required to comply with a remand order on NEPA and that Plaintiff could challenge a failure to satisfy the remand. The second assertion is confusing because, as Plaintiff acknowledges, the agency has articulated that it "could not continue implementing" the prey increase program if there is vacatur of the BiOp. Mot. at 30.[14]

B. Plaintiff Fails to Meet the Standard for Temporary or Preliminary Relief.

Plaintiff's request for a temporary restraining order and/or preliminary injunction falls short of the high bar for such extreme relief. Mot. at 33; *see Defs. of Wildlife v. U.S. Army Corps of Eng'rs*, 730 F. App'x 413, 415 (9th Cir. 2018) (stating that a plaintiff has "the burden of proving some irreparable harm that would result" from the action); *Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right."). Plaintiff's

[14] Plaintiff incorrectly states that "NMFS has determined that the ESA and NEPA are inapplicable to some disbursements." Mot. at 30. That is not true. Some of the production did not require new analysis because it was covered by existing analyses, but NMFS has not argued that the statutes are "inapplicable."

argument on the four factors for emergency relief is derivative of its flawed argument for a permanent injunction, and thus fails. *See supra*.

Moreover, because Plaintiff seeks interim relief pending the final order on remedy, it "must establish that irreparable harm is *likely,* not just possible" during any interim period. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Plaintiff's enervated contention that relief is "urgently needed" does not satisfy this requirement. Mot. at 33.[15] First, Plaintiff's reliance on the Dr. Giles declaration is off-base because it does not indicate where the "immediate increase" in prey should come from; instead, it simply states that an increase is needed. Giles Decl. ¶ 18. That increase can now come from the prey increase program, which is not mentioned in the declaration and is about to enter its fourth year. Second, Plaintiff engages in another about-face when it insists, without support, that the prey increase program must be stopped because it "harms imperiled species," namely threatened salmon. Mot. at 33. There is no indication of harm that is likely to occur during the period between the Motion and a final remedy order. This lack of evidence is telling when compared to the statements in the Third Purcell Declaration, which demonstrate the thorough site-specific ESA and NEPA analysis that has occurred during the pendency of the prey increase program. Third Purcell Decl. ¶¶ 4-5.

CONCLUSION

This case involves a complex dynamic between fishing and protecting species that takes place in the context of a broad, bilateral management regime. This case also involves an intricate balance between two species—SRKW and Chinook salmon—one of which is prey for the other and both of which are protected under the ESA. The Court has identified errors in the way that NMFS has navigated these issues in the 2019 BiOp, however, the proper remedy in these circumstances is to remand to NMFS to correct the errors and do so without granting the far-reaching, unwarranted, and disruptive vacatur or the injunctive relief that Plaintiff requests. Therefore, the Court should deny Plaintiff's Motion.

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[15] Plaintiff invokes the term "vulnerable" when describing SRKW. Mot. at 33 (citing Giles Decl. ¶¶ 4-14). The "vulnerable" designation is made by Washington State as part of its Commercial Whale Watch Licensing system, which "highlights the connection between vessel impacts and prey accessibility." Third Barre Decl. ¶ 20. When whales are "vulnerable" additional limitations on commercial whale watching are put into place. *Id.* Plaintiff's failure to explain this context highlights its disregard for the other threats to SRKW.

Dated: October 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, 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.

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

WILD FISH CONSERVANCY, Plaintiff, v. SCOTT RUMSEY, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor, and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP DECLARATION OF JOSH KEATON

I, JOSH KEATON, declare:

1. I am currently the Acting Assistant Regional Administrator of the Sustainable Fisheries Division, National Marine Fisheries Service ("NMFS") Alaska Region, which is an operating unit within the National Oceanic and Atmospheric Administration ("NOAA"), a component of the United States Department of Commerce ("DOC"). I have occupied this position since August 29, 2022. My duties generally include managing the Sustainable Fisheries Division, providing technical and policy advice, and assisting in the preparation and review of regulatory documents. Prior to my current position, I served as the head of Sustainable Fisheries Division's Monitoring Branch. I have worked for NMFS Alaska Region for over twenty years, primarily in inseason management, where I worked on the day-to-day management of federal fisheries in Alaska and the monitoring programs used to collect necessary data for fisheries management.

2. As part of my official duties, I assist the Alaska Region in carrying out duties delegated by the Secretary of Commerce, Gina M. Raimondo ("Secretary"). This includes carrying out the Secretary's responsibilities for complying with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), as that statute applies to the implementation of fishery management plans ("FMPs") and FMP amendments for fisheries in the exclusive economic zone ("EEZ") off Alaska. I assist with coordinating the development and implementation of policies governing the management of Federal fisheries off Alaska, including the salmon fisheries off Alaska under the "Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska" ("Salmon FMP"). I also serve on the North Pacific Fishery Management Council ("Council") as the voting alternate for NMFS Alaska

Region. I am familiar with the Salmon FMP, its amendments, and its implementing regulations.

3. I am familiar with the issues in this litigation, and I have read Plaintiff's Motion for Remedy.

4. The following paragraphs provide: (1) a brief history of the Salmon FMP; (2) an explanation of the Salmon FMP's delegation of management of fishing in federal waters (the EEZ off Southeast Alaska) to the State of Alaska; (3) an overview of the Southeast Alaska Chinook salmon commercial troll fishery; and (4) an overview of the economic value of the Southeast Alaska Chinook salmon commercial troll fishery.

Brief History of the Salmon FMP

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

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

7. The Secretary of Commerce approved and implemented the original Salmon FMP in 1979. The 1979 Salmon FMP established the Council's and NMFS's authority over the commercial and sport salmon fisheries occurring in the EEZ, or federal waters, off Alaska and divided the EEZ into two areas – an East Area and a West Area – at the longitude of Cape

Suckling. 50 C.F.R. § 679.2 (defining the East Area as the area of the EEZ in the Gulf of Alaska east of the longitude of Cape Suckling (143° 53.6' W)).

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

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

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

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

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

Delegation of Management Authority in the East Area to the State of Alaska

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

[1] Since Amendment 12, the Council and NMFS have amended the FMP three times. The 2018 FMP amendment (Amendment 13 to the Salmon FMP) updated the description and identification of essential fish habitat for salmon species, *see* 83 Fed. Reg. 31,340 (July 5, 2018). The 2021 FMP amendment (Amendment 15 to the Salmon FMP) updated the FMP to clearly and accurately explain bycatch reporting consistent with requirements to establish 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.

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

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

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

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

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

The Southeast Alaska Chinook Salmon Commercial Troll Fishery

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

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

18. The Southeast Alaska Chinook salmon all-gear catch limit is allocated among sport and commercial fisheries under management plans specified by the Alaska Board of Fisheries. Under the current plans, the commercial purse seine, commercial drift gillnet, and commercial set gillnet are first allocated their limit, as follows: commercial purse seine, 4.3 percent of the all-gear catch limit; commercial drift gillnet, 2.9 percent of the all-gear catch limit; and commercial set gillnet, 1,000 Chinook salmon. After subtraction of the net gear limits, the remainder of the all-gear catch limit is allocated as follows: commercial troll, 80 percent; sport, 20 percent.

19. Over the previous five years (2018 to 2022), I estimate that the three net gear fisheries were allocated on average 7.78 percent of the annual all-gear Chinook catch limit, the sport fishery was allocated on average 18.44 percent of the annual all-gear Chinook catch limit, and the troll fishery was allocated on average 73.78 percent of the annual all-gear Chinook catch limit. The annual allocation to the troll fishery is therefore a significant portion of the overall treaty Chinook limit for the State of Alaska, with the sport fishery receiving the second highest portion of the overall treaty Chinook limit for the State of Alaska.

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

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

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

22. The summer season is July 1 through September 30. Most of the Chinook salmon harvested in the summer fishery are non-Alaska hatchery origin (meaning, treaty Chinook subject to the Pacific Salmon Treaty). The summer fishery targets the number of treaty Chinook salmon remaining on the annual troll allocation after the winter and spring troll treaty Chinook harvests are subtracted. The State of Alaska manages the summer troll fishery to achieve the remaining catch limit of treaty fish available for the troll fleet, with an additional harvest of Chinook salmon produced in Alaska hatcheries. The trollers harvested 128,626 treaty Chinook salmon in the summer season in 2021. I estimate the commercial troll summer fishery harvested an average of 100,200 treaty Chinook salmon per year from 2017 through 2021 (of the total annual average of 102,254 Chinook salmon per year, an average of 3 percent were of Alaska hatchery origin), based on the Pacific Salmon Commission, Joint Chinook Technical Committee's Annual Reports of Catch and Escapement.

23. For the winter and summer seasons, I estimate the commercial troll fleet harvested an average of 118,945 treaty Chinook salmon per year from 2017 through 2021. For all three seasons, I estimate the commercial troll fleet harvested an average of 129,802 treaty Chinook salmon per year from 2017 through 2021 (and 135,930 total Chinook salmon per year). During this same time period, all Southeast Alaska salmon fisheries (net, troll, and sport)

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

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

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

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

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

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

28. The State of Alaska relies on information reported on state Fish Tickets to estimate the proportion of fish harvested in state waters and federal waters. Over the 2011-2019 period, we have estimated that, on average, 14 percent (28,915 fish) of the total troll fishery Chinook salmon harvest occurred in federal waters each year. Both the amount and the proportion of Chinook salmon harvested in federal waters has varied over this time period (2011-2019). The proportion of Chinook salmon harvested in federal waters each year can vary depending on oceanographic conditions, weather, or other factors, and commercial fishing vessels targeting Chinook salmon independently decide where to fish, depending on each vessel's operating decisions. Overall the proportion of Chinook salmon harvested in federal waters each year generally represents a small proportion (14 percent average) of total Chinook salmon harvested by the commercial troll fishery. *See* Merrill Decl. ¶¶ 22-23 (Doc. 43-2).

29. Most of the Chinook salmon harvested in Southeast Alaska are of non-Alaska origin, caught consistent with the terms of the Pacific Salmon Treaty. The non-Alaska component of the harvest is made up of both hatchery and wild stocks emanating from British Columbia and the Pacific Northwest. For example, for the winter troll fishery, ADF&G estimates the coastwide hatchery contribution of fish caught in the winter troll fishery, which includes hatchery fish from Alaska, British Columbia, Idaho, Oregon, and Washington. For the 2020-2021 fishery, the coastwide hatchery contribution was 42 percent of catch, with Alaska

hatchery fish comprising 11 percent. For the 2021-2022 fishery, the coastwide hatchery contribution was 35 percent of catch, with Alaska hatchery fish comprising 7 percent.

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

Economic Value of the Southeast Alaska Chinook Salmon Commercial Troll Fishery

31. If the incidental take statement (ITS) were vacated as to the Chinook salmon troll fishery, the Southeast Alaska troll fleet would no longer have incidental take coverage under the Endangered Species Act (ESA) for the take of listed species. Vacatur of the ITS could have significant disruptive consequences for the prosecution of the Chinook salmon troll fishery, as trollers would be forced to decide between fishing without ESA incidental take coverage and risking liability under the ESA or halting fishing activities to avoid liability under the ESA and therefore foregoing economic revenue. If the trollers did not operate in the winter and summer seasons, however, it is not certain that the reduction in harvest in Southeast Alaska would mean that all their unharvested treaty fish would be available to Southern Resident killer whales in their habitat. Recent average catches in the troll winter and summer seasons have totaled 118,945 treaty Chinook salmon from 2017 through 2021 (see ¶ 23). Not all of those treaty fish (meaning non-Alaska wild and hatchery fish that are returning to rivers and hatchery facilities in British Columbia and the Pacific Northwest)

would return to Southern Resident killer whale habitat due to natural mortality and harvest in other fisheries. To estimate economic impacts to the Chinook troll fleet if that fleet was unable to fish for Chinook salmon, I looked at the number of troll permits issued and the ex-vessel value of the Chinook troll fleet, information that is publicly available on ADF&G's website. I also looked at a report on the total economic impact from the entire troll fleet. I referenced these outside reports because they are the best information available to NMFS.

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

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

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

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

35. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel value of all Southeast Alaska salmon fisheries (all gear types, all salmon species) was $142,949,849, and I estimate that the Chinook troll fishery constituted 9.49 percent of that total ex-vessel value. Based on the ADF&G's annual overviews of the fishery seasons from 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the ex-vessel value of the Chinook troll fishery is on average 10.91 percent of the total ex-vessel value of all Southeast Alaska salmon fisheries (2017-2021), but can be as high as 20.81 percent of total ex-vessel value of all Southeast Alaska salmon fisheries, as was the case in 2020.

36. Ex-vessel value is one measurement of the value of a fishery, but it does not account for additional value created by, for example, wages, processing, and tax revenue. A report prepared the McDowell Group on the Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet examined the following impacts of the troll fleet: direct (skipper and crew income), indirect (jobs and wages generated by the purchase of goods and services in support of troll fishing operations), and induced (jobs and wages generated when skippers and crew spend their fishing income in support of their households) impacts. The McDowell Group report was based on five-year averages from 2014 to 2018, and included the following information on the economic output of the fleet:

- Ex-vessel earnings averaged $32.9 million.
- An average of 729 permits were fished, and approximately 1,400 fishermen earn income directly from the fishery, including skippers (permit holders) and crew.
- Total direct, indirect, and induced employment is estimated at 735 jobs.
- Direct labor income (the amount skippers and crew take home) is estimated at $20.4 million.
- Total direct, indirect, and induced labor income is estimated at $28.5 million.
- Total annual output is estimated at $44.1 million. Output is a measure of total spending related to the commercial troll fleet. It includes the total amount trollers are paid for their catch plus all the secondary spending in Southeast Alaska that occurs as fishermen purchase goods and services. It does not include effects of processing troll-caught fish.
- Processors add value to the troll catch, generating total average annual first wholesale value of the troll harvest totaling about $70 million (based on statewide relationship between ex-vessel and first wholesale values for species harvested by trollers).
- Though it is difficult to attribute specific seafood processing jobs to the troll catch (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.

- Chinook accounted for about 44 percent of the power troll fleet's total ex-vessel value over the 2014 to 2018 period. All other factors held equal, Chinook account for approximately $37 million in annual economic output in Southeast Alaska.

- Total ex-vessel value of the hand troll harvest averaged $1.6 million, with an average of 285 permits fished. The hand troll fleet's total regional economic impact, as measured in terms of total output, is approximately $3.3 million annually.

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

38. Over the most recent time period (2017 to 2021), the ex-vessel value of Chinook caught by the troll fleet constituted a slightly smaller percentage of the ex-vessel value of all salmon species caught by the troll fleet (41.56 percent compared to 44 percent used by the McDowell Group). I used this updated percentage to estimate the annual economic output of the Chinook salmon commercial troll fishery (for all three seasons) at $30,203,730.

39. Finally, I account for the ex-vessel value of the spring fishery. Based on the annual overviews published by ADF&G of the fishery seasons from 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the average annual ex-vessel value (2017 to 2021) of the spring Chinook salmon commercial troll fleet is $1,054,893.66.

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

41. In sum, if the court granted Plaintiff's request and vacated the ITS for the Chinook salmon commercial troll fishery in the winter and summer seasons, vacatur of the ITS could have significant consequences to the Chinook troll fleet and fishing communities in Southeast Alaska if the troll fleet was unable to fish for Chinook salmon in the absence of ESA take coverage:

- Based on my review of reports from ADF&G, the ex-vessel value of the Chinook salmon commercial troll fishery totaled $13,560,260 in 2021, with an estimated five-year annual average of $11,462,827.60. Excluding the estimated five-year annual average ex-vessel value of the spring season, I estimate the annual average ex-vessel of the Chinook salmon commercial troll fishery in the winter and summer seasons to be $10,407,933.94.

- Based on my review of reports from ADF&G and a report from the McDowell Group, and accounting for recent declines in ex-vessel value and the estimated ex-vessel value of the spring fishery, I estimate the total annual economic output of the Chinook salmon commercial troll fishery in the winter and summer seasons to be approximately $29 million.

Pursuant to 28 U.S.C. § 1746, I swear under penalty of perjury that the foregoing is true and correct.

KEATON.ROBERT.JOSHUA.1365854897
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Date: 2022.10.03 14:21:22 -08'00'

JOSH KEATON
Acting Assistant Regional Administrator,
Sustainable Fisheries Division, Alaska Region
National Marine Fisheries Service

October 3, 2021
DATE

Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

vs.

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 STATE OF ALASKA'S RESPONSE TO PLAINTIFF'S MOTION FOR A FINAL ORDER ON RELIEF

Noting Date: October 14, 2022

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff Wild Fish Conservancy ("WFC") challenged the National Marine Fisheries Service's ("NMFS") 2019 Southeast Alaska Biological Opinion ("2019 SEAK BiOp") on the grounds that it is not in accordance with the Administrative Procedure Act ("APA"), violates section 7(a)(2) of the Endangered Species Act ("ESA"), and violates the National Environmental Policy Act ("NEPA"). *See* Dkt. 111 ("Report and Recommendation"). After briefing and argument on cross-motions for summary judgment, Magistrate Judge Peterson issued a Report and Recommendation (adopted August 8, 2022, Dkt. 122) granting WFC's motion. Dkt. 111. This Court then ordered supplemental briefing on the appropriate remedy for NMFS's violations of section 7(a)(2) of the ESA and NEPA. WFC filed a motion for a final order on relief September 7, 2022. Dkt. 127. Intervenor State of Alaska ("Alaska" or "State") submits this brief in response.

WFC asks that the Court 1) vacate the 2019 SEAK BiOp's Incidental Take Statement ("ITS") to the extent that it authorizes take of Southern Resident Killer Whales ("SRKW") and threatened Chinook salmon resulting from commercial harvests of Chinook in Southeast Alaska's troll fishery, excluding the spring season; 2) vacate those portions of the 2019 SEAK BiOp that adopt and purport to consult under section 7 of the ESA on the prey increase program; and 3) enjoin the implementation of the prey increase program, through the immediate imposition of a TRO or preliminary injunction "until such time as the court issues a final order on relief" and then by the imposition of a permanent injunction. Dkt. 127 at 18, 30-33.

However, Alaska strongly believes that the appropriate relief here is to remand the matter to NMFS without vacatur. Vacatur of the 2019 SEAK BiOp's ITS and the resultant closure of the winter and summer troll fisheries would cause severe economic impact to communities in Southeast Alaska. Additionally, reductions in SRKW prey caused by the SEAK troll fishery were previously overestimated. Forgone harvest in closed SEAK troll fisheries would only lead to improved harvest in Canadian and Washington fisheries, as well as increased predation and consumption of Chinook salmon by Northern Resident Killer Whales ("NRKW") and other

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predators. Vacatur of the ITS and closure of the SEAK Chinook troll fisheries would achieve no measurable gain in the number of salmon available as prey for the SRKW while causing a significant economic disruption for the State. Such a drastic action should not be taken for such uncertain gain.

II. DISCUSSION

Plaintiff asks the Court to vacate the 2019 SEAK BiOp's ITS, to vacate portions of the BiOp itself, and to enjoin implementation of the prey increase program. These requests threaten to upend the economic health of Southeast Alaska communities for no discernable conservation gain and granting them is not required under the law. The Court should deny Plaintiff's requests.

A. Legal Standards.

"When a biological opinion is unlawful, the ordinary remedy is to vacate and remand the BiOp to the action agencies for immediate reinitiation of consultation." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1128 (D. Or. 2011) (citing *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985)). However, vacatur is not the only or automatic remedy in the ESA or NEPA context: "when equity demands, the regulation can be left in place while the agency follows the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *see also California Communities Against Toxics v. U.S. E.P.A. (Cal. Communities)*, 688 F.3d 989, 993–94 (9th Cir. 2012). "Whether agency action should be vacated depends on [1] how serious the agency's errors are 'and [2] the disruptive consequences of an interim change that may itself be changed.'" *Cal. Communities*, 688 F.3d at 992 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).[1] "Courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr. v. NMFS*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015).

[1] This is often referred to as the two-part *Allied–Signal* test, and is explained in more detail *infra* section C.

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B. Vacatur is Not Merited Here.

In considering an appropriate remedy, district courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994). Here, the balance of the equities clearly favors leaving the BiOp and ITS in place while on remand.

Balancing the equities is not an exact science; rather it is "lawyers' jargon for choosing between conflicting public interests." *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring)). From the State of Alaska's perspective, the existing interests that require balancing in fashioning a remedy are 1) the health of, and prey availability within, critical habitat for the SRKW, as well as the health of threatened Chinook salmon stocks; and 2) the economic vitality and continued viability of Southeast Alaska communities reliant on the troll fishery. Contrary to the stance presented in Plaintiff's opening remedy brief, these interests are not in direct competition and can both be served—without vacating the BiOp and ITS—by simply requiring NMFS on remand to provide more detail on the financing and implementation of the prey increase program, to determine whether the program is likely to jeopardize threatened Chinook stocks, and to prepare an EIS for the program. Without further NMFS analysis prior to vacatur of the current BiOp and ITS, a closure of troll fisheries could simultaneously have little to no positive impact on SRKW prey availability while unnecessarily devastating Southeast Alaska communities.

1. Conservation interest.

The conservation interest can be viewed alongside the first prong of the *Allied-Signal* test, which requires the court to weigh the "the seriousness of the order's deficiencies." *Allied-Signal*, 988 F.2d at 150 (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). In the instant case, Plaintiff has overstated the potential positive impact on SRKW prey availability that would result from shutting down the troll fisheries.

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Plaintiff asserts that halting the winter and summer Chinook troll fisheries in Southeast Alaska would increase the prey available to SRKW by 4.8%, and that, coincidentally, that precise increase "would provide just enough benefit to SRKWs to allow the population to stabilize—that is, the projected long-term mean population growth would be 0.00%." Dkt. 127 at 21 (quoting Third Lacy Decl. ¶ 9). However, new data and analysis suggest that a 4.8% increase in SRKW prey availability given a troll closure is a gross overestimation. Plaintiff's use of 6% as the "approximate middle value" for reduction in prey availability caused by the SEAK fishery "as a whole" in its updated analysis (Third Lacy Decl.) is also not supported. Declaration of Danielle Evenson ("Evenson Decl.") ¶ 15. The Southeast Alaska troll fishery is a mixed stock fishery that harvests a variety of stocks from along the Pacific coast. *Id.* ¶ 12. New information collected after the analyses used in the SEAK BiOp has led to improved understanding of SRKW distribution in space and time and the priority Chinook stocks that constitute their prey base. *Id.* ¶¶ 13-14. This information has been used to develop an improved model to quantify Chinook salmon abundance by ocean area and time. *Id.* ¶ 13. The additional resolution and more accurate representation included in these analyses demonstrated weaker relationships between SRKW and prey stocks than were found in the previous studies used in the SEAK BiOp. *Id.* Put differently, the estimated prey reduction that would result from restricting SEAK fisheries suggested by the prior models is biased high and the subsequent assumed benefits accrued to SRKW are not supported by the newer, more accurate data. *Id.* When the more current methodology is applied to the SEAK troll fishery, the result is a much lower harvest impact to SRKW than was previously estimated when the BiOp was written in 2018. *Id.* ¶ 13, 21. Forgone harvest in the SEAK troll fishery does not result in commensurate benefits to SRKW. *Id.* ¶ 21.

Using this new information on priority prey stocks, Alaska Department of Fish and Game's Gene Conservation Laboratory aligned the stock groupings from the coastwide genetics baseline for Chinook salmon with SRKW priority prey stocks to the extent possible and summarized them into three reporting groups: 1) high priority prey stocks, 2) low priority prey stocks, and 3) stocks that do not contribute as prey to SRKW. *Id.* ¶ 14. The calculations of prey

reduction in the 2019 SEAK BiOp cited in Plaintiff's Third Lacey Declaration were done prior to this prioritization and did not account for the low prevalence of priority stocks in the SEAK catch. *Id*.

The calculations of SRKW prey reduction in the SEAK BiOp were also performed prior to sorting stocks of Chinook harvested in the SEAK troll fishery based on their priority as SRKW prey. *Id.* Three stock groups that do not contribute to SRKW prey—those originating in Southeast Alaska, Northern British Columbia, and Southern British Columbia, which are predominantly wild-origin fish—make up a substantial portion of the Southeast Alaska Chinook troll fishery catch. *Id.* In contrast, the estimated contribution data show a significant reduction on average in the harvest of high priority prey stocks over the most recent five-year period (2017-2021) when compared to the average during the last treaty period (2009-2018). *Id.* Furthermore, the majority of the fish from these high priority Chinook stocks in the SEAK harvest are raised and released from hatcheries. *Id.* Accordingly, the projected reduction of SRKW availability caused by the SEAK troll fishery was an overestimation.

Other factors point to the inaccuracy of the 4.8% prey reduction figure. Estimated reductions to SRKW prey during July to September in coastal waters caused by the SEAK troll fishery come in at 2.4%–12.9%. *Id.* ¶ 15. However, during this July to September period SRKW are typically foraging in inside waters (not coastal waters) and feed on local stocks of Chinook where reductions in prey due to the SEAK fishery are estimated at only 1.0%–2.5%. *Id.* Also, SRKW are thought to be most limited in prey availability during the winter period, which they spend in coastal waters. *Id.* From October through April, SEAK troll fisheries were estimated to reduce prey availability in these locales by only 0.2%–1.1%. *Id.* Accordingly, the prey reduction analysis performed in the 2019 SEAK BiOp vastly overestimates the potential real-world benefits to SRKW from restricting the SEAK troll fishery.

The benefits from closure of the SEAK troll fishery are also grossly overestimated due to the certain loss of the SRKW priority Chinook stocks to fisheries in Canada as well as loss to predators such as Northern Resident Killer Whales ("NRKW"), salmon sharks, and pinnipeds

(seals). *Id.* ¶ 16. NMFS' analysis suggests that over the next ten years SEAK fisheries would reduce available prey in coastal waters by only 5% and in inland waters by just 1%. AR 47439. But again, as explained previously, shutting down the SEAK salmon fisheries would have negligible, if any, impact on SRKW, as any Chinook not caught in SEAK must travel some seven hundred miles past Canadian commercial and recreational fisheries, tribal fisheries, NRKW and Steller sea lions, which are also predators of large Chinook, and Southern U.S. fisheries to reach the SRKWs. *See, e.g.*, AR 16128, 16126, 47363, 36320.

Marine mammals are estimated to consume over thirty million salmon per year in the Northeast Pacific, a six-fold increase over 40 years. Evenson Decl. ¶ 16. Populations of NRKW have been growing rapidly in recent years and would also intercept a healthy portion of fish migrating to Puget Sound. *Id.* Forgoing harvest of Chinook salmon in SEAK troll fisheries would also likely lead to improved catches in Canadian and Washington fisheries. *Id.* Finally, and disturbingly, vessel traffic and contamination in Puget Sound exist to such a high degree that recent models indicate that increased prey availability has little beneficial effect for SRKW. *Id.*

Simply put, the number of Chinook salmon that would remain in the water in Southeast Alaska because of the restriction or elimination of Chinook salmon harvest in the SEAK fisheries are unlikely to result in an equal number of Chinook salmon becoming available to SRKW. *Id.* Given the high level of uncertainty as to whether closure of the SEAK troll fishery would lead to a measurable or commensurate increase in prey for SRKW, the ITS and BiOp should remain in place while on remand.

2. Economic interest.

According to the Ninth Circuit, economic impacts are a worthy consideration with respect to the disruptive consequences of vacatur, and thus, this Court should fully consider them. *See, e.g.*, *Cal. Communities*, 688 F.3d at 993-94. This is analogous to *Allied-Signal's* second prong, which requires the court to weigh the "disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150-51 (quoting *International Union,* 920 F.2d at 967). As discussed in greater detail *infra* section C.2, the disruptive

consequences of vacating the BiOp would be disproportionate and unnecessary and would severely hamper SEAK's economy while providing comparatively little improvement to the SRKW prey availability.

Plaintiff argues that the economic disruption associated with the requested vacatur of the ITS will be "substantially limited by the narrow request for limited vacatur." Dkt. 127 at 26. But from the perspective of communities in Southeast Alaska, the "disruption" would not be limited in the slightest. Vacatur of the ITS would result in closure of the winter and summer Chinook troll fishery, which would have far-reaching impacts, as the commercial troll fishery is vitally important to the social and economic fabric of coastal communities in Southeast Alaska. *See* Second Declaration of Vincent-Lang, ¶ 2.

C. Remand Without Vacatur is the Most Appropriate Remedy in Light of the Court's Order.

An agency's flawed determinations "need not be vacated" even if "the agency's error was significant." *Cal. Communities*, 688 F.3d at 992. *See also Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("the terms 'invalid' and 'vacated' are not synonyms"). In *Cal. Communities,* plaintiffs challenged the EPA's final rule approving the transfer of reduction credits to a new power plant. 688 F.3d at 991-92. The EPA agreed with the plaintiffs that both procedural and substantive flaws existed in the final rule and requested remand. *Id*. at 992. The Ninth Circuit remanded the matter but declined to vacate an invalidated rule because significant public harms would result from stopping power plant construction, including power shortages, the loss of 350 jobs, and duplicative legislative efforts. *Id*. at 994. The court specifically noted that "[s]topping construction would also be economically disastrous" and, referencing the holding in *Idaho Farm Bureau*, stated that "if saving a snail warrants judicial restraint, so does saving the power supply." *Id*. (citation omitted).

To reiterate the two-part *Allied-Signal* test from above, "[w]hether agency action should be vacated depends on [1] how serious the agency's errors are 'and [2] the disruptive consequences of an interim change that may itself be changed.'" *Cal. Communities*, 688 F.3d at

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992 (quoting *Allied-Signal*, 988 F.2d at 150-51). Under this test, the ITS and BiOp should not be vacated.

1. Because the issues identified by the Court are likely to be cured during remand, the first *Allied-Signal* factor weighs against vacatur.

Allied–Signal's first prong requires the court to weigh the "the seriousness of the order's deficiencies." *Id*. at 150. Under this prong, courts have found that vacatur may not be an appropriate remedy where there is a likelihood that the agency can cure any defects and justify the defective ruling on remand. *Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010).

When making this determination, courts defer to the expert agency that Congress has chosen to implement its legislative design to reconsider and repair its own errors. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("When examining this kind of scientific determination [under the ESA], as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983))). Here, NMFS can provide more detail on the financing and implementation of the prey increase program, determine whether the program is likely to jeopardize threatened Chinook stocks, and prepare an EIS for the program while the ITS and BiOp remain in effect. Since such actions were not undertaken during the first BiOp, there is no reason to think that NMFS cannot justify its previous position on the 2019 SEAK BiOp on remand. These defects—which are not serious because they can easily be remedied—are the type that can and should be addressed on remand.

2. The second *Allied-Signal* factor weighs against vacatur.

Allied-Signal's second prong requires the court to weigh the "disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150–51. As explained above, economic impacts are a worthy consideration with respect to the disruptive consequences of vacatur and this Court should fully consider them. *See, e.g., Cal. Communities*, 688 F.3d at 994. Because Southeast Alaska coastal communities face a disruptive economic catastrophe if the troll fishery is closed, the second prong of the test weighs heavily here in favor of remand

without vacatur. And an interim decision to close the fishery would likely only last until NMFS reconsidered the 2019 SEAK BiOp and is therefore an "interim change that may itself be changed." Weighing the disruptive effect of a SEAK troll fishery closure with the uncertain positive effects of such a closure on SRKW necessitates a decision to remand without vacatur under *Allied-Signal.*

In many of the smaller communities in Southeast Alaska a substantial portion of the population relies on trolling as a primary source of their income and, in many cases, it is the only source. Second Declaration of Vincent-Lang, ¶ 4. For example, 100% of the population of Elfin Cove, 91% of Meyers Chuck, 58% of Pelican, 46% of Point Baker, and 26% of Port Alexander hold trolling permits. *Id.* Table 2. The effects of closure would be felt as well in larger towns like Sitka, where only 7% of the population holds a troll permit, as the troll fishery still brings in over eight million "ex-vessel" dollars per year—a hugely significant number for a town with only 8,000 residents. *Id.* ¶ 5.

From 2012–2021, the winter/summer Chinook salmon trolling seasons represented an average of 37 percent of the trollers' ex-vessel value. *Id.* Table 1. Closure of the winter/summer Chinook troll fishery could reduce the earning potential of a troll permit by anywhere from a third to a half; such a reduction would most likely render the troll fishery no longer financially feasible for many fishers to participate in. *Id.* ¶ 3. While there are other Southeast Alaska fisheries that displaced trollers could theoretically participate in, the costs associated with acquiring new permits ($63,000-$176,000), different gear ($24,000-$50,000), and potentially even a different boat ($250,000-$2,500,000) would be prohibitive for a large portion of the displaced troll fleet. *Id.* ¶ 8.

In addition to the direct impacts to troll permit holders, fishery closure would also impact overall economic activity in the State through a chilling effect on the handling, processing, wholesaling, and retailing of Chinook salmon. *Id.* ¶ 6. These impacts could even lead to closure of fish processing plants during the winter months, as the winter troll fishery is their only source of fish at that time. *Id.* It would also lead to reduced fishery resource landing tax revenue—which

provides for schools, utilities, and harbor maintenance—for the State and for municipalities. *Id.* ¶ 7. Particularly in those small communities where trolling is the primary or sole source of income, the domino effect could reach even further, with families having to relocate elsewhere to make a living. *Id.* ¶ 4. In some communities, that could reach a tipping point where there are no longer sufficient children of school age to allow the schools to keep state funding, which typically results in the closure of schools. *Id.*

In addition to these small coastal communities, fishing is critically important to Southeast Alaska as a whole. The State levies a fishery resource landing tax that is collected primarily from floating processors that process fishery resources outside of the State three-mile limit and bring their products into Alaska for transshipment. Dkt 76 ¶ 16. All revenues from the fishery resource landing tax are deposited into Alaska's General Fund, and 50% of taxes are shared with the respective municipalities or unorganized boroughs in which landings occur. *Id*. The shared revenue provides for municipal school districts, school bond debt, utilities, and other municipal or borough services. *Id*. In addition to the fishery landing tax, municipalities may impose their own taxes, and commercial fishing operations contribute a share of the motor fuel and corporate income tax revenues collected by the State. *Id*.

The importance of these fisheries to SEAK cannot be overstated—and vacating portions of the BiOp and the ITS, thereby effectively closing the Chinook troll fishery, would decimate the region. Such a court order would result in the loss of substantial tax revenues to the State and to the communities in which fish are landed, while jeopardizing many of the full-time fisheries jobs.

Ninth Circuit case law is clear that economic devastation of the nature contemplated here is a worthy consideration with respect to the disruptive consequences of vacatur. Substantially impacting a stable, functioning, and relatively predictable sector of Alaska's economy is a significant consideration, and the determination of whether to shut down a critically important industry should not be considered lightly.

In short, Plaintiff's claim that there will be "some economic disruption" but that those

"consequences are substantially limited" is wildly inaccurate. Closure of the winter/summer Chinook troll fishery could lead to catastrophic impacts to coastal Southeast Alaska communities. *Id.* Given the very uncertain benefits to SRKWs from closure of the winter/summer Chinook troll fishery, and the certain economic devastation of Southeast Alaska communities posed by such closure, equity demands a certain degree of caution. The ITS and BiOp should remain in place during consideration on remand.

D. The Court Should Not Enjoin NMFS's Prey Increase Program.

In addition to vacatur, Plaintiff also requests that the Court enjoin the implementation of the prey increase program through the immediate imposition of a TRO or preliminary injunction, and then further through the imposition of a permanent injunction. This request is misguided, unwarranted, and would have impacts well beyond the SEAK troll fishery. The Court should not enjoin the prey increase program.

1. Plaintiff has not shown irreparable injury.

A court's decision to issue an injunction constitutes an unwarranted "extraordinary remedy" if a less drastic remedy could sufficiently redress plaintiff's injury. *Klamath-Siskiyou Wildlands Center*, 109 F. Supp. 3d at 1247. (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010)). Given the Court found that NMFS improperly segmented its consultation on the prey increase program, the proper remedy is remand—injunctive relief is disfavored. If a "court concludes that an agency invested with broad discretion to fashion remedies has apparently … omit[ed] a remedy justified in the court's view …, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course." *NLRB v. Food Store Emps. Union*, 417 U.S. 1, 10 (1974).

Vacatur is not appropriate in this matter, for the reasons explained in the previous section. It then naturally follows that the more drastic "extraordinary remedy" of the permanent injunction sought by Plaintiff should also be roundly rejected by this Court.

A plaintiff seeking permanent injunctive relief must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the

> balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

Cottonwood Env't L. Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1088 (9th Cir. 2015) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "[T]he ESA strips courts of at least some of their equitable discretion in determining whether injunctive relief is warranted." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018) (quoting *Cottonwood*, 789 F.3d at 1090). The ESA removes the last three factors in the four-factor injunctive relief test from courts' equitable discretion. *Id.*

The ESA does not, however, restrict courts' discretion to decide whether a plaintiff has suffered an irreparable injury. *Id.* at 818. An injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that equitable relief is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). Here, the Plaintiff has not made a clear showing or presented the substantial proof required to support the extraordinary remedy sought.

"There is no presumption of irreparable injury where there has been a procedural violation in ESA cases." *Nat'l Wildlife Fed'n*, 886 F.3d at 818 (quoting *Cottonwood*, 789 F.3d at 1091). Plaintiffs must demonstrate that irreparable injury "is *likely* in the absence of an injunction." *Id*. (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "A 'possibility' of irreparable harm cannot support an injunction." *Id*. Furthermore, if a court determines that injunctive relief is warranted, such relief must be tailored to remedy the specific harm. *Melendres v. Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015) ("We have long held that injunctive relief must be tailored to remedy the specific harm alleged.") (internal quotations omitted). "Nevertheless, the district court has broad discretion in fashioning a remedy." *Id*.

Plaintiff does not come close to the "clear showing" of "substantial proof" that an increase hatchery-origin Chinook—produced for the purpose of enhancing prey available to SRKW—is causing irreparable injury to endangered stocks. As such, the request for a permanent injunction should be denied.

2. Enjoining the prey increase program would likely significantly impact other Pacific Northwest fishery management plans.

Beyond the fact that Plaintiff has not made the requisite showing for a permanent injunction, the Court should not enjoin the prey increase program because of the impact such an injunction would have outside of Southeast Alaska, most notably on Puget Sound and Pacific Fishery Management Council ("PFMC") salmon fishery BiOps and other Pacific Northwest fishery management plans. Recall that NMFS required a mitigation program in the SEAK BiOp to support a no jeopardy finding for the SEAK salmon fisheries and for PFMC-managed fisheries and Puget Sound fisheries. (BiOp Decl. ¶ 3). The framework programmatic action has three elements: a Puget Sound habitat restoration program funded at $31.4 million, Puget Sound hatchery programs to conserve at-risk Chinook salmon stocks from extinction funded at $3.06 million per year, and new hatchery production to increase food available for SRKW funded at no less than $5.6 million per year. *Id.* These funding initiatives also serve as the environmental baseline for Puget Sound and PFMC salmon fishery BiOps and other Pacific Northwest fishery management plans, such that all those fisheries may be affected in the event that funding is not provided. *Id.* ¶ 4. Enjoining the SRKW prey increase program until the Court enters its final order on relief as requested in the Plaintiff's motion will likely have cascading impacts to commercial and recreational fisheries off the coasts of Washington and Oregon, in Puget Sound, and in other areas. *Id.*

While these funding initiatives were relevant to NMFS's consideration of the SEAK salmon fishery, they were also designed to mitigate for impacts of the PFMC salmon fisheries and Puget Sound salmon fisheries. *Id.* ¶ 13. For example, in the PFMC BiOp, NMFS assumed that "funding for the conservation program for Puget Sound Chinook salmon and SRKW will continue" largely as described in the PFMC BiOp and the SEAK BiOp "associated with domestic actions related to the 2019 PST Agreement and the program will be implemented during the duration of the new Chinook salmon regime under the 2019 PST agreement." *Id.* ¶ 4. The BiOps and management plans for PFMC and Puget Sound commercial and recreational

fisheries rely on the increased hatchery production from this mitigation action to stay above a Chinook abundance threshold to limit the effects that the fisheries have on SRKWs by way of reduced prey availability and accessibility in years when Chinook abundance is particularly low. *Id.* Enjoining the prey production program would increase the likelihood that Chinook abundances would fall below thresholds specified in the PFMC BiOp, resulting in additional limits to those commercial and recreational fisheries and in Puget Sound. *Id.* For all of these reasons, the Court should not enjoin NMFS's prey increase program.

III. CONCLUSION

The benefits of increased SRKW prey due to a closure of the SEAK Chinook troll fishery are hazy at best. However, the economic calamity that Southeast Alaska coastal communities face if the summer and winter troll fisheries are closed is crystal clear. The remedy sought by Plaintiff would result in significant harms to Alaskan communities with no certain or measurable benefit to SRKW. As such, the balance of the equities and the *Allied-Signal* test strongly weigh against vacating portions of the BiOp and ITS. In addition, the Plaintiff has not made a clear showing of substantial proof that the prey increase program is causing irreparable injury to endangered stocks. Furthermore, enjoining the prey increase program would likely impact other commercial and recreational fisheries in Puget Sound and off the coast of Washington.

The Court should order remand without vacatur. The Court should also reject Plaintiff's request for a TRO, preliminary injunction, or permanent injunction of the prey increase program.

DATED: October 3, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, 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

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 RESPONSE TO PLAINTIFF WILD FISH CONSERVANCY'S MOTION FOR RELIEF

Noting Date: October 14, 2022

ORAL ARGUMENT REQUESTED

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Plaintiff Wild Fish Conservancy's ("WFC") Motion for a Final Order on Relief and for a Temporary Restraining Order and/or a Preliminary Injunction Pending Entry of a Final Order on Relief ("WFC's Motion") seeks anything but "narrow" or "limited" relief. The requested relief is neither warranted by the Court's prior ruling on the merits nor the equities at issue. The relief proposed by WFC presents a small hypothetical benefit to the SRKW population, but a guaranteed economic disaster for the communities that rely on the Southeast Alaska troll fishery ("SEAK troll fishery"). The Alaska Trollers Association ("ATA") respectfully requests that the Court deny WFC's Motion and remand the 2019 Southeast Alaska Biological Opinion ("2019 BiOp") without vacatur.

I. INTRODUCTION

With the merits portion of this case completed, the issue before this Court is whether singling out and closing the SEAK troll fishery, just one of many entities that harvest Chinook salmon under the international Pacific Salmon Treaty, is appropriate to gain only a mere hypothetical benefit to the SRKW population. Trolling in Southeast Alaska is a way of life that has been passed down through many generations. Southeast Alaskan trollers are unique in the commercial fishing industry in that they catch one fish at a time. As a result, they have great respect for the Chinook salmon that they rely on to survive. They are conservationists by tradition and by necessity. They are advocates for Chinook salmon. Ruling in favor of WFC will not appreciably benefit the SRKW, but it will risk losing this unique way of life.

The ATA, organized nearly a century ago in 1925, is a non-profit commercial trade organization based in Juneau that represents over 350 fishers in rural Southeast Alaska. Granting WFC's requested relief means those fishers will be out of jobs and cities will be left without significant sources of income. Despite WFC's attempts to paint them as such, these communities are not insignificant numbers or percentages. Granting WFC's requested relief will not save the SRKW, but it will threaten livelihoods throughout Southeast Alaska.

Altering fishery catches is not a linear solution to the problem of the health of the SRKW

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population. This is a highly complex, multi-faceted problem. Singling out the Southeast Alaska trollers only punishes Southeast Alaska communities. Closing a fishery, let alone one that is among many components of a multi-state and multi-national system, is a remarkable action for the Court to take. The equities do not justify such an extraordinary remedy here.

II. STATEMENT OF THE FACTS

The ATA summarizes the following relevant facts from the underlying record, prior briefing, the Court's opinion on the merits, declarations previously filed, and declarations accompanying this Response.[1]

A. Requested Relief.

In the merits portion of this case, the Court agreed with WFC that, in issuing the 2019 BiOp, the National Marine Fisheries Service ("NMFS") violated section 7(a)(2) of the Endangered Species Act ("ESA") in failing to ensure that the actions authorized by the 2019 BiOp would not jeopardize endangered SRKWs and Chinook salmon. Dkt. No. 111 at 1-2. The Court also ruled that NMFS failed to follow adequate procedures required by the National Environmental Policy Act ("NEPA"). *Id.* at 2.

At the remedy stage, WFC now requests that the Court vacate the portions of the incidental take statement ("ITS") from the 2019 BiOp that authorize commercial harvest of Chinook salmon in the winter and summer seasons of the SEAK troll fishery. Dkt. No. 127 at 18, 21.[2] WFC also requests that the Court vacate the portion of the 2019 BiOp that approved NMFS's prey increase program designed to provide additional prey for the SRKW population. *Id.* at 18. Lastly, WFC seeks a permanent injunction that enjoins the implementation of the prey increase program and a temporary restraining order granting all the requested relief in the interim until the Court can issue a final order on relief. *Id.* at 30-33.

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[1] The ATA submits the following declarations in support of this Response: Declaration of Patricia Phillips ("Phillips Decl."); Declaration of Eric Jordan ("Jordan Decl."); Declaration of Paul Olson ("Olson Decl."); and Declaration of Tad Fujioka ("Fujioka Decl.").

[2] WFC explicitly states that it is not seeking relief that would preclude coho salmon harvests. Dkt. No. 127 at 22.

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B. Communities of Southeast Alaska.

The ATA represents over 350 members who participate in the SEAK troll fishery and depend on the fishery for their livelihood. Dkt. No. 35 at ¶ 2. Nearly 72,500 people live in 33 communities in Southeast Alaska. Olson Decl. at ¶ 29. These communities range from small villages with less than one hundred residents to larger towns with tens of thousands of residents, but all are dependent on commercial fishing. *Id.* at ¶¶ 29-35. The 11 communities that range between 10-100 annual residents will face the most severe impacts if the troll fishery is closed. *Id.* at ¶ 32. These communities are historic fishing villages that rely almost exclusively on commercial fishing. *Id*. One of those communities, the City of Pelican, sees its population boon from 75 residents to over 200 residents in the summer troll fishery season. Phillips Decl. at ¶ 2. The influx of revenue that results from the troll fishery is critical to Pelican. The City's share of the State's raw fish tax alone represents 10 percent of the City's annual local revenue. *Id.* at ¶ 5. The influx of residents and fishers also allows local businesses to remain viable as those individuals support the local economy through paying moorage, buying ice, refueling, and visiting the local café. *Id.* at ¶ 6.

C. Economic Consequences of Closing the SEAK Troll Fishery.

Although WFC claims that its requested relief is "limited" or "narrow" by focusing on the winter and summer seasons, those two seasons represent most of the SEAK troll fishery. The winter and summer seasons together last 10 months each year and are responsible for the vast majority of fish harvested throughout the year. *See* AR47318. Closing those seasons risks closing the entire fishery. Olson Decl. at ¶ 44.

WFC's estimate that closing the summer and winter seasons of the SEAK troll fishery will *only* result in $9.5 million in economic impacts underreports the economic consequences of the proposed relief. *See* Dkt. No. 127 at 27. Paul Olson's supporting declaration demonstrates where WFC's declarant erred in underestimating the economic impacts. Olson Decl. at ¶¶ 12-28, 41-44. A more comprehensive analysis that was performed at the outset of this litigation

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determined that the total annual economic output of the SEAK troll fishery is $85 million. *Id.* at ¶ 41; Dkt. No. 41 at ¶ 5. The portion of that output attributable to the Chinook fishery is approximately $37 million. Olson Decl. at ¶ 41; Dkt. No. 41 at ¶ 6.

The raw numbers do not tell the story of the loss of vessels and livelihood that will result if the Court grants WFC's request to close the troll fishery. Troll vessels are specialized and cannot easily be repurposed. Olson Decl. at ¶ 42. Permit requirements limit the ability to enter other fisheries. *Id*. Selling a troll business will not earn enough to support an investment into another fishery. *Id*. All these factors demonstrate that the ability to mitigate impacts by shifting to other fisheries if WFC's requested closure is implemented by this Court will be limited. *Id*. Instead, many trollers will be forced to cease fishing immediately. *Id.*at ¶ 44. Closing the SEAK troll fishery will cause the region to lose its second largest fishery. *Id*. Thus, the underreported annual economic numbers presented by WFC fail to recognize the true impacts that will be felt for years.

D. Closing the SEAK Troll Fishery Does Not Provide a Directly Proportional Amount of Increased Prey to the SRKW Population.

WFC asserts that closing the winter and summer seasons of the SEAK troll fishery will result in a 4.8 percent increase in prey to the SRKW. Dkt. No. 127 at 21. That analysis is overly simplistic and assumes too much of a linear relationship between the SEAK troll fishery catch and the salmon preyed on by SRKWs. In fact, WFC's estimate assumes an increase in prey to the SRKW that exceeds the number of fish typically caught by the SEAK troll fishery on an annual basis. Fujioka Decl. at ¶¶ 27-29. The ATA conducted a more detailed analysis than WFC that demonstrates that closing the SEAK troll fishery amounts to only a 0.58 percent increase in prey in the times and places where SRKWs are most likely to be. *Id.* at ¶ 34.

WFC's analysis fails to account for the fact that closing the SEAK troll fishery will likely result in an *increased* catch of the highest priority stocks for SRKWs by Canadian fisheries. *Id.* at ¶¶ 22-26. WFC's simplistic analysis is fundamentally flawed because it fails to consider the

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workings of the Pacific Salmon Treaty and differing compositions of catches in Southeast Alaska and Canada. For instance, closure of the ocean fishery (a strict quota fishery) in Alaska creates opportunities for increased harvests by Canadian fishers in the Individual Stock Based Management ("ISBM") fisheries in Canada. *Id.* at ¶ 22. Curtailing the Southeast Alaska harvest would result in the catch of 20 Puget Sound Chinook—the highest priority stock of Chinook to SRKWs—for every one catch of Puget Sound Chinook forgone by the closure of the SEAK fisheries. *Id.* at ¶ 26. Stated differently, closing the SEAK troll fishery actually risks increasing the overall harvest of Chinook salmon that are the highest priority prey for SRKWs. *Id.* at ¶¶ 20-26.

The link between prey availability and the SEAK troll fishery is not as simple or linear as WFC suggests. Closing the SEAK troll fishery risks the careful balance achieved by the Pacific Salmon Treaty and, even if it results in less harvested fish overall, may result in more harvest of those Chinook stocks most desired by the SRKW. Closing the SEAK troll fishery will not result in meaningful prey increases for SRKW. *See id.* at ¶¶ 34-35.

III. ANALYSIS

The ATA presents five arguments in response to WFC's Motion: (1) WFC has not established standing for the requested relief; (2) remand without vacatur is the appropriate remedy; (3) WFC's requested permanent injunction is hypocritical and threatens environmental harm; (4) preliminary relief is not justified; and (5) WFC should be required to post a bond to justify its requested preliminary relief.

A. WFC Lacks Standing for the Requested Remedy.

"A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018). Here, the Court held that WFC had standing to bring its substantive and procedural ESA

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claims. Dkt. No. 111 at 25.[3] Although the Court conducted some redressability analysis in the context of those clams, the Court must also, at this remedy stage, find that WFC has standing for the specific forms of relief now requested by WFC.

WFC does not have standing for the extraordinary remedy of closing the SEAK troll fishery. WFC also lacks standing to permanently enjoin the prey increase program and request a temporary restraining order for all forms of relief. For its part, WFC presents no argument on standing but merely incorporates its prior briefing on the issue. Dkt. No. 127 at 18 n.2.

As the Court recognized at the merits stage, WFC must demonstrate that it has standing by showing that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 816 (9th Cir. 2017) (internal quotation marks omitted). The Court held that WFC has suffered an injury in fact that is fairly traceable to the challenged conduct of the Federal Defendants.[4] Dkt. No. 111 at 18-23. WFC, however, is unable to satisfy the redressability prong of standing for the relief it now seeks.

To establish Article III redressability, WFC must show that the relief it seeks "is both (1) substantially likely to redress [its] injuries; and (2) within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). WFC does not have standing because closing the SEAK troll fishery will not increase viewing opportunities of SRKWs.

WFC has identified its injury requiring redressability as decreased opportunities for its members to view SRKWs in the wild. Dkt. No. 98 at 6 (citing Dkt. No. 96 at 43-44). However, WFC also stated that invalidating the 2019 BiOp would allow for more "fishing in the Pacific Northwest." Dkt. No. 96 at 41. Suggesting that WFC's members could catch some of the fish

[3] The Court also held that it was undisputed that WFC had standing to pursue its NEPA claims. Dkt. No. 111 at 16 n.3.

[4] Although the ATA elects to not further brief this issue at this stage, the ATA preserves for appeal the issue of whether WFC's alleged injury in fact is fairly traceable to the Federal Defendants' conduct in the 2019 BiOp that effectively authorizes the SEAK troll fishery.

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that the SEAK troll fishery would otherwise catch is completely at odds with the purported purpose of this lawsuit and the requested relief. Notwithstanding the hypocrisy in WFC's approach, history shows that WFC is unable to satisfy the redressability requirement. The SEAK troll fishery's catch has been significantly reduced in the last five decades with *no* discernible effect on the SRKW population. In fact, while the Southeast Alaska troll catch has been reduced by nearly 30 percent under the Pacific Salmon Treaty, the SRKW population experienced no correlated increase. Fujioka Decl. at ¶ 35. Eliminating the troll catch does not save those fish from harvest. Sport fisheries are permitted to harvest the remaining portion of the allowable catch after net and troll catches are accounted for. AR47318. Further, as explained above, closing the SEAK troll fishery risks reducing the number of priority stock Chinook available for the SRKW.

Although this Court may vacate the SEAK troll fishery's incidental take protection, it does not have power over the accompanying ripple effects in Chinook harvest under the complex system set forth in the Pacific Salmon Treaty. This Court has no control over whether those fish would be caught in Canada. This Court cannot enjoin sport fishers in Alaska, Canada, Washington, or Oregon. Nor could this Court enjoin natural predators from consuming the fish that were not caught in the SEAK troll fishery. In that sense, the Court cannot require the Federal Defendants to redress WFC's injury through closure of the SEAK troll fishery. *See Juliana*, 947 F.3d at 1174 (if "a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability." (quoting *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)) (internal brackets omitted)).

B. The Equitable Remedy in this Case is Remand Without Vacatur.

WFC argues that the presumed remedy here is vacatur. Dkt. No. 127 at 18. In the Ninth Circuit, "[v]acatur is the traditional remedy for erroneous administrative decisions." *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 38 F.4th 34, 51 (9th Cir. 2022). The parties opposing vacatur must demonstrate that it is not appropriate. *Coal. to Protect Puget Sound Habitat v. U.S.*

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Army Corps. of Engineers, 466 F. Supp. 3d 1217, 1219 (W.D. Wash. 2020), *aff'd*, 843 Fed. Appx. 77 (9th Cir. 2021). This case—where WFC's alleged environmental benefit may actually pose environmental harm and the economic consequences are severe—is a prime instance where remand without vacatur is appropriate.

Courts deviate from the ordinary remedy of vacatur when "equity demands." *Coal. to Protect Puget Sound Habitat*, 843 Fed. Appx. 77, 80 (9th Cir. 2021) (internal quotation marks omitted). In determining whether vacatur is appropriate, a court considers "*at least* three factors." *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 38 F.4th at 51 (emphasis added). First, a court weighs "the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Id.* (internal quotation marks omitted). Second, a court considers "the extent to which either vacating or leaving the decision in place would risk environmental harm." *Id.* at 51-52 (internal quotation marks omitted). Third, courts "examine whether the agency would likely be able to offer better reasoning and adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Id.* at 52 (internal quotation marks and alterations omitted).

WFC views the standard for remand without vacatur too narrowly. WFC argues that courts focus on "environmental disruption, as opposed to economic disruption" when determining whether vacatur is appropriate. Dkt. No. 127 at 20 (quoting *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1038 (D. Mont. 2020)). As highlighted above, the *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency* test is not limited to the above three factors or environmental concerns. 48 F.4th at 51 (courts consider "at least three factors"). When weighing whether vacatur is appropriate, it is commonplace for courts to consider the economic impacts of vacatur. *See e.g.*, *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993-94 (9th Cir. 2012); *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1028 (N.D. Cal. 2021); *Cook Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 993 (D. Alaska 2021); *Se.*

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Alaska Conservation Council v. United States Forest Serv., 468 F. Supp. 3d 1148, 1154-55 (D. Alaska 2020), *appeal dismissed*, 20-35738, 2020 WL 6882569 (9th Cir. Oct. 22, 2020); *N. Plains Res. Council*, 460 F. Supp. 3d at 1040 (D. Mont. 2020); *All. for the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152, 1157 (D. Mont. 2019); and *All. for the Wild Rockies v. Marten*, CV 17-21-M-DLC, 2018 WL 2943251, at *4 (D. Mont. June 12, 2018).

Although each of those decisions considered economic consequences, they did not all deny vacatur—remand without vacatur is appropriate in "limited circumstances." *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015) (internal quotation marks omitted). Courts find those circumstances occur regularly so as to not render the burden to rebut the presumption of vacatur impossible. Some courts have recognized that remand without vacatur is "common." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring). Despite WFC's attempts to overstate the environmental consequences of no vacatur and undersell the economic consequences of vacatur, the limited circumstances warranting remand without vacatur are present. There will be only a hypothetical benefit to SRKWs from closing the troll fishery and enjoining the prey increase program. Closing the fishery and the prey increase program risks environmental harm and economic devastation to the communities of Southeast Alaska.

1. The Potential Environmental Harm from Remand Without Vacatur is Not Significant.

WFC oversimplifies the effects of vacatur and inflates the potential environmental benefit that will result from closing the SEAK troll fishery. As referenced above, WFC's assertion that closing the summer and winter seasons of the SEAK troll fishery would increase SRKW prey by 4.8 percent appears to overestimate the annual catch of the SEAK troll fishery and fails to account for the nuances in the Pacific Salmon Treaty that will allow Canadian fisheries to increase their catch and intercept many of the fish forgone by the SEAK troll fishery. Fujioka Decl. at ¶¶ 20-34. When properly considering those factors, the ATA estimates that closing the

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SEAK troll fishery is more likely to result in only a 0.58 percent income in prey for the SRKW. *Id.* at ¶ 34.

Remand with vacatur threatens *more* environmental harm. *See Pollinator Stewardship Council*, 806 F.3d at 532 (courts "consider whether vacating a faulty rule could result in possible environmental harm, and… have chosen to leave a rule in place when vacating would risk such harm"). Closing the SEAK troll fishery may allow the Canadian fisheries, which catch a higher percentage of priority stocks to the SRKW, to actually catch more priority Chinook salmon than the SEAK troll fishery would have otherwise caught. Fujioka Decl. at ¶¶ 20-26.[5] And, as briefly discussed below and more fully discussed by Federal Defendants, vacating the 2019 BiOp eliminates the federal government's chance at keeping its prey increase program (that is not yet scheduled to introduce fish into the water) alive while it attempts to fix the errors in the underlying analysis that the Court identified in the merits portion of this case. This is particularly problematic in light of WFC's assertion that shutting down the SEAK troll fishery will be "just enough" to stabilize the SRKW population and maintain a 0.0 percent growth rate in the "long-term." Dkt. No. 127 at 21 (quoting Third Lacy Declaration).[6] Thus, vacatur would eliminate a significant effort on behalf of the federal government to provide prey increases to the SRKWs beyond merely reducing allowable catch—increases that, according to WFC, are necessary if the SRKW is to increase in population at all in the next century.

[5] Although WFC failed to appreciate this dynamic, it recognizes the plausibility of it in another context. In arguing that the Federal Defendants' prey increase program would not be beneficial to the SRKW, WFC asserts that the program "may increase salmon abundance estimates that allow for greater harvests of Chinook salmon, resulting in almost no benefit to SRKWs." Dkt. No. 127 at 28 n.4. WFC's recognition of this dynamic in the context of the prey increase program (projected increase 4-5 percent) but not closing the troll fishery (WFC projected increase of 4.8 percent) strains logic. The SEAK troll fishery catches relatively few Chinook salmon that are priority stocks to SRKWs, AR47508, and the prey increase program would direct additional prey to "the times and areas most important to the SRKWs," AR47203.

[6] It is unclear if WFC's "long-term" analysis, which appears to project a 0.0% growth rate over a 100-year period, assumes that the SEAK troll fishery will never harvest Chinook salmon again in that time period even though the Federal Defendants will have opportunities to issue future incidental take statements. Either this assumption represents another oversimplification that undercuts the reliability of WFC's analysis, or it corroborates the below analysis that closing the upcoming winter and summer troll seasons will have catastrophic economic consequences that will prevent trollers from bouncing back and will end their way of life.

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As demonstrated below, the lack of prey increase from closing the SEAK troll fishery, coupled with the harm to the SRKW that could result if vacatur is granted, does not justify vacatur in light of the significant economic consequences of vacatur.

2. WFC Underestimates the Economic Consequences of Vacatur, Which Justify Remand Without Vacatur.

WFC argues that it has "substantially limited" the economic consequences by seeking a "limited vacatur." Dkt. No. 127 at 26. As explained above, this is a disingenuous description. WFC's request to close 10 months of the troll fishery would effectively close the entire fishery because trolling will no longer be economically viable. Olson Decl. at ¶ 44. Additionally, WFC underestimates the impacts to the communities of Southeast Alaska. *Id.* at ¶¶ 16, 41.

WFC dismisses the significant impact to the communities of Southeast Alaska by arguing that those impacts are relatively insignificant in a broader context. *See* Dkt. No. 127 at 27. The ATA has demonstrated that the bottom-line impacts of the requested relief are approximately four times greater than that reported by WFC. *Cf.* Dkt. No. 127 at 27 (WFC reports $9.5 million) and Olson Decl. at ¶ 41 (Chinook fishery represents $37 million of the $85 million annual output of the troll fishery). While these dramatic impacts will harm all 33 communities in Southeast Alaska that rely on the fishery, they will threaten the livelihood of the 11 more rural communities that rely almost exclusively on the fishery. *See* Olson Decl. at ¶¶ 29-34; Phillips Decl. at ¶¶ 1-9. WFC argues that these communities could merely move into other fisheries. Dkt. No. 127 at 27. However, given the uniqueness and value of trolling operations and the barriers to entry into other fisheries, that is not a realistic outcome for most fishers. Olson Decl. at ¶ 42.

The environmental benefits are significantly outweighed by the environmental harm and economic consequences of vacatur. WFC oversimplifies the potential prey increase from vacatur. Vacatur would likely *reduce* the availability of priority stocks to the SRKW while ending a program designed to provide even more prey to the SRKW. The economic impacts will be real and detrimental to Southeast Alaska. Closing 10 months of their fishery is not "limited" or

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"narrow." WFC's requested remedy will end the trollers' way of life. Under these equities, this case represents a limited circumstance where remand without vacatur is appropriate.

C. The Permanent Injunction Proposed by WFC is Perplexing and Hypocritical.

Concerned that vacating the 2019 BiOp will not preclude NMFS from implementing its prey increase program, WFC also seeks a permanent injunction to achieve that end. The Federal Defendants are best suited to defend its program. The ATA joins the Federal Defendants' arguments and highlights WFC's logical inconsistencies.

At the most rudimentary level, WFC presents its claims as a proponent of the SRKW. In seeking this permanent injunction, WFC opposes an effort intended to address the very threat WFC claims is starving the SRKW out of existence. NMFS has represented in this litigation that a vacatur would disrupt the necessary commitment and render NMFS unable to "continue implementing the habitat restoration and prey increase programs." Dkt. No. 93 at 33. The ATA fails to see why WFC is unwilling to keep every option available to increase the available prey of the SRKW. What is the harm in allowing the Federal Defendants to maintain its commitment to the prey increase program in the interim, but only allowing it to be implemented if the requisite ESA and NEPA analyses are adequately completed? WFC argues that the unlawful 2019 BiOp "is starving SRKWs into extinction." Dkt. No. 127 at 28. WFC is wrong. Permanently enjoining the prey increase program without granting the federal government a chance to correct its analysis will waste substantial investment in prey for the SRKW and further starve it into extinction.

D. WFC Has Not Made a Sufficient Showing of Success on the Proposed Vacatur to Warrant a Temporary Restraining Order.[7]

WFC also requests preliminary relief that grants the relief it seeks, immediately, until the Court renders its final order on remedy. *Id.* at 33. "A plaintiff seeking a preliminary injunction must establish that [it] is [1] likely to succeed on the merits, [2] that [it] is likely to suffer

[7] Although unclear from WFC's briefing, the ATA understands WFC to be requesting that Judge Peterson issue a magistrate report and recommendation on a temporary restraining order.

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irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest." *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)) (brackets in *Recycle for Change*). "A preliminary injunction is an extraordinary remedy never awarded as of right." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (internal quotation marks omitted). Courts "put no thumb on the scale in favor of an injunction." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013)

As demonstrated in this brief, WFC is not likely to succeed on its requested relief. Remand without vacatur would not give rise to irreparable environmental harm, and the balance of equities tip in its favor. With respect to the final factor, "[t]he effect on the health of the local economy is a proper consideration in the public interest analysis." *All. for the Wild Rockies*, 632 F.3d at 1138. In that case, hindering 18 to 26 temporary jobs and the associated indirect beneficial effects on the local economy was insufficient to prevent a preliminary injunction. *Id.* at 1138-39. Here, however, preliminary injunction risks permanent and irreparable harm to the way of life of communities throughout Southeast Alaska, not just 18 to 26 temporary jobs. For example, Pelican, Alaska relies heavily on the influx of visitors from the winter and summer troll fishers. Phillips Decl. at ¶ 4. The population of Pelican maxes out around 200 individuals during the summer season. *Id.* at ¶ 2. In addition to the 30 percent of the population that participates in the troll fishery, 40 people are hired to process the salmon catches and 10 people are employed at the port. *Id.* at ¶¶ 6-7. The City also receives approximately 10 percent of its annual local revenue from the raw fish tax on the troll fishery catches. That revenue funds crucial services such as education, water, snowplowing, trash collection, and harbor repairs. *Id.* at ¶ 5. Lastly, the viability of local businesses, including the port and the local café, depend on the troll fishery. *Id.* at ¶ 6. As discussed above, closing the winter and summer seasons of the troll fishery will effectively close the entire fishery and fishers will be unable to shift to other fisheries. Olson

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Decl. at ¶¶ 42-44. Thus, the impacts to the Pelican will be immediate and lasting. Similar effects would be expected in the other 10 rural Southeast Alaska communities similarly situated to Pelican.

The ATA respectfully asks the Court to consider the way of life of the Southeast Alaska trollers. Trolling is not just an occupation; it is a way of life that has been passed down through generations. Jordan Decl. at ¶ 2. Trollers harvest one salmon at a time and have great respect for the salmon that sustain their bodies. *Id.* at ¶ 8. Trollers are conservationists that have much in common with WFC. *Id.* at ¶¶ 6-7. In the words of third-generation troller Eric Jordan, closing the troll fishery "risk[s] losing one of the Chinook's strongest advocates." *Id.* at ¶ 7. Preliminary relief that cancels the next winter and summer troll seasons will cause irreparable harm to the trollers, even if NMFS eventually issues a sufficient BiOp, because they may not be able to withstand an entire year without trolling. Olson Decl. at ¶ 44. Ruling in favor of WFC will be against the public interest, particularly when, as demonstrated, the environmental benefit is only hypothetical.

A decision with such severe ramifications should not be made lightly and without the Court's full consideration. The equities of this case demonstrate that, here, preliminary relief is inappropriate.

E. WFC Should Be Required to Post a Bond to Back the Extraordinary Remedy Sought.

WFC asserts that "[n]o bond should be imposed" for the requested preliminary relief. Dkt. No. 127 at 33. It is within the Court's discretion to consider the relative hardships and set an appropriate bond, so long as the amount would not "effectively deny access to judicial review." *Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (internal quotation marks omitted).

Contrary to WFC's representations, it is a sophisticated, serial litigant. It has filed 23 lawsuits in federal courts since 2005. WFC has singled out the SEAK troll fishery as the

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scapegoat of the SRKW's perils. Closing the troll fishery will not save the SRKW from endangered status, but it is guaranteed to decimate many communities in Southeast Alaska. Given the high stakes of the requested preliminary relief, the ATA respectfully requests that the Court impose a bond requirement on WFC.

IV. CONCLUSION

WFC presents conflicting arguments. WFC argues that SRKW prey is so crucial that the entire troll fishery must be closed. WFC is also seeking the ability to fish more in the Pacific Northwest and demands that the Federal Defendants' prey increase program be enjoined. WFC has not—and in fact could not—challenge the 2019 BiOp on the basis that its members were not getting their fair share of Chinook to harvest. Instead, WFC has picked up the false mantle of being an advocate for SRKWs and has tried to weaponize the plight of SRKWs to eliminate the SEAK troll fishery. WFC's arguments in doing so strains logic. WFC apparently seeks to cut off the prey increase program because it does not like hatchery fish. But that prey program is intended to provide crucial aid to SRKWs, which WFC purports to be an advocate of in this lawsuit.

WFC's linkage between the troll fishery and SRKW prey is hypothetical at best. WFC tries to argue that closure of the troll fishery will result in a prey increase of 4.8 percent, which is more fish than the entire troll fishery harvests. WFC completely ignores complex treaty dynamics and complex fishery dynamics. The ATA respectfully requests that this Court carefully scrutinize those dynamics, the Administrative Record, and the declarations submitted by ATA.

Mr. Jordan explains that ethical trolling requires a single, confident, and directed "conk" to the fish—a hesitant series of "taps" leaves the fish "angry, in pain, and flailing." Jordan Decl. at ¶ 8. As explained above, WFC's requested relief is misdirected, ill-informed, and will fail to save the SRKW. It will only threaten the Southeast Alaska trollers' way of life. In other words, the requested relief is a series of hesitant "taps" that are not directed at the solution to the problem. The unique circumstances of this case do not warrant vacatur of the 2019 BiOp.

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DATED this 3rd day of October, 2022.

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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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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 this 3rd day of October, 2022, in Seattle, Washington.

/s/ Eliza Hinkes
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