

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

Previously-Reported Case Activity:

On April 16, 2020, Plaintiff Wild Fish Conservancy filed a motion for a preliminary injunction requesting that the court enjoin (i.e., halt) the commercial troll summer fishery in the Exclusive Economic Zone off the coast of Southeast Alaska (i.e., the East Area under the Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska). On June 9, 2020, the magistrate judge issued a report and recommendation that recommended to the district court judge that the court deny Plaintiff's motion for a preliminary injunction (Docket # 51). The magistrate judge concluded that, "because Plaintiff's Motion serves as a clear attack on the regulations under the Magnuson-Stevens Act authorizing the delegation of authority for the commercial troll salmon fishery in Southeast Alaska to the State of Alaska, the Magnuson-Stevens Act applies, and Plaintiff's Motion [for a Preliminary Injunction] is barred pursuant to 16 U.S.C. § 1855(f) because it was filed beyond the 30-day limitations period" (Docket # 51).

Recent Case Activity:

On March 1, 2021, the district court adopted the magistrate judge's report and recommendation and denied Plaintiff's motion for a preliminary injunction (Docket # 69).

On March 9, 2021, the State of Alaska filed a motion to intervene as a defendant. On March 30, 2021, the court granted that motion (Docket # 88). The State of Alaska and Alaska Trollers Association are now both Defendant-Intervenors in this case.

On March 18, 2021, Plaintiff Wild Fish Conservancy filed a motion for expedited review of the case. On March 31, 2021, the court granted the Plaintiff's motion to expedite, concluding that, "because the Magnuson-Stevens Act applies to Plaintiff's requested relief, expedited review of this matter is proper pursuant to 16 U.S.C. § 1855(f)(4)" (Docket # 89). The court "will endeavor to assign the earliest possible hearing date to any matter requiring a hearing in this case, and to expedite consideration of this matter" (Docket # 89). The court's order did not change the existing briefing schedule.

Pursuant to the existing briefing schedule, briefing on motions for summary judgment will proceed as follows:

- Plaintiff Wild Fish Conservancy will file its motion for summary judgment on May 5, 2021.
- Federal Defendants' combined cross-motion for summary judgment and response to Plaintiff's motion for summary judgment is due May 26, 2021. Defendant-Intervenors State of Alaska and Alaska Trollers Association also must file their combined cross-motions for summary judgment/responses by May 26, 2021.
- Plaintiff Wild Fish Conservancy's combined response/reply is due June 9, 2021.
- Federal Defendants' reply is due June 16, 2021. Defendant-Intervenors State of Alaska and Alaska Trollers Association also must file replies by June 16, 2021.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY,  
  
  Plaintiff,  
  
          v.  
  
BARRY THOM, et al.,  
  
  Defendants,  
  
          and  
  
ALASKA TROLLERS  
ASSOCIATION,  
  
  Defendant-Intervenor.

Case No. C20-417-RAJ-MLP  
  
REPORT AND RECOMMENDATION

**I. INTRODUCTION**

This matter is before the Court on Wild Fish Conservancy’s Motion for a Preliminary Injunction (“Plaintiff’s Motion”). (Mot. (Dkt. # 14).) Plaintiff seeks a preliminary injunction staying the National Marine Fisheries Service’s (“NMFS”) authorization of commercial Chinook salmon fisheries in federal waters off the coast of Southeast Alaska, through its delegation of authority to the State of Alaska, currently set to commence on July 1, 2020. (*Id.* at 9.) Having

1 considered Plaintiff's Motion, the parties' submissions, the parties' argument, the governing law,  
2 and the balance of the record, the Court recommends Plaintiff's Motion be DENIED.

## 3 II. BACKGROUND

### 4 A. Procedural History

5 On March 2020, Plaintiff filed a Complaint in this action against NMFS, Regional  
6 Administrator of NMFS Barry Thom, Assistant Administrator of NMFS Chris Oliver, Secretary  
7 of the United States Department of Commerce Wilbur Ross, Jr., and the United States  
8 Department of Commerce ("Defendants"). (Compl. (Dkt. # 1).) Plaintiff's Complaint alleges that  
9 Defendants failed to ensure management and authorization of commercial salmon fisheries  
10 within the Exclusive Economic Zone (herein referred to as "federal waters") off the coast of  
11 Southeast Alaska was not likely to jeopardize the Southern Resident Killer Whale ("SRKW") or  
12 result in adverse modification or destruction of the SRKW's habitat under Section 7(a)(2) of the  
13 Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. (*Id.* at ¶¶ 13, 114-15.)

14 Specifically, Plaintiff challenges Defendants' failure to comply with the ESA and the  
15 National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m-12, by means of the  
16 Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, in NMFS's issuance of a  
17 biological opinion concerning the effects of its management and ongoing delegation of certain  
18 authority to the State of Alaska regarding the salmon fisheries within Southeast Alaska ("2019  
19 BiOp"). (Compl. at ¶¶ 13, 116-120.) Plaintiff requests declaratory relief requiring Defendants to  
20 comply with the ESA and NEPA and a ruling that the 2019 BiOp is arbitrary, capricious, and not  
21 in accordance with the ESA and NEPA. (*Id.* at 28-29.) Plaintiff additionally seeks injunctive  
22 relief enjoining Defendants from continuing to delegate authority to the State of Alaska, or  
23 otherwise continuing to allow, the operation of salmon fisheries in federal waters of Southeast

1 Alaska and an enjoinder of Defendants' authorizing of any take associated with salmon  
2 fisheries until Defendants comply with the ESA and NEPA. (*Id.*)

3 On April 14, 2020, Plaintiff filed its Motion. (Mot. at 9.) In its Motion, Plaintiff identifies  
4 that it seeks preliminary injunction on NMFS's delegation of authority to the State of Alaska  
5 authorizing the commercial Chinook salmon fisheries in federal waters off the coast of Southeast  
6 Alaska, currently set to commence on July 1, 2020. (Mot. at 29 ("To remedy the specific harm at  
7 issue, [WFC] requests an order staying NMFS's take authorization and delegation of authority to  
8 Alaska for commercial salmon fisheries in the Exclusive Economic Zone of Southeast Alaska  
9 and directing NMFS to take any additional steps needed to halt such fisheries before  
10 commencement of the fishing season on July 1."))

11 On May 11, 2020, Defendants filed a Response. (Resp. (Dkt. # 43).) Defendants argue  
12 Plaintiff's requested relief is barred because it is aimed directly at NMFS's delegation of  
13 fisheries management authority to the State of Alaska under the Magnuson-Stevens Fishery  
14 Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. §§ 1801 *et seq.* (*Id.* at  
15 7-10.) Consequently, Defendants argue that Plaintiff failed to timely bring its challenge because  
16 the Magnuson-Stevens Act provides a 30-day limitations period for judicial review and that  
17 Plaintiff's Motion fails because the Magnuson-Stevens Act's jurisdictional provision  
18 encompasses claims brought under other statutes, including the ESA and NEPA, and does not  
19 "permit end-runs around the provision via artful pleading." (*Id.* at 9.) Defendants additionally  
20 argue this Court lacks jurisdiction because Plaintiff failed to establish organizational or  
21 representational standing as it pertains to the SRKW. (*Id.* at 10-12.)

22 On May 15, 2020, Plaintiff filed a Reply. (Reply (Dkt. # 44).) In its Reply, Plaintiff  
23 argues that this matter is not an action subject to the Magnuson-Stevens Act because it is not

1 challenging: (1) NMFS’s promulgation of regulations under the Magnuson-Stevens Act; (2) an  
2 action, published in the Federal Register, taken by NMFS, under regulations that implement a  
3 FMP; or (3) NMFS’s compliance with the ESA or NEPA on such an action. (*Id.* at 8.)

4 On May 22, 2020, Defendants filed an Answer to Plaintiff’s Complaint. (Answer (Dkt.  
5 # 45).) On May 28, 2020, the Court held a hearing regarding the Court’s jurisdiction to issue  
6 Plaintiff’s requested relief and heard oral argument from the parties over video conference.<sup>1</sup>  
7 (Dkt. # 47.) This matter is now ripe for review.

## 8 **B. Statutory Background**

### 9 *i. Magnuson-Stevens Act*

10 Congress enacted the Magnuson-Stevens Act “to conserve and manage the fishery  
11 resources found off the coasts of the United States, and the anadromous species and Continental  
12 Shelf fishery resources of the United States.” 16 U.S.C. § 1801(b)(1). The Magnuson-Stevens  
13 Act establishes exclusive federal management over fisheries within the federal waters of the  
14 United States, which extends from the seaward boundary of each coastal state to 200 nautical  
15 miles from the coastline. 16 U.S.C. §§ 1802(11), 1811(a). The Secretary of Commerce is charged  
16 with implementing the Magnuson-Stevens Act and has delegated this responsibility to NMFS. 16  
17 U.S.C. §§ 1854, 1855(d).

---

18  
19  
20 <sup>1</sup> On April 23, 2020, Defendant-Intervenor Alaska Trollers Association (“Defendant-Intervenor”) filed an  
21 Unopposed Motion to Intervene that this Court granted. (Dkt. ## 19, 25.) On May 11, 2020,  
22 Defendant-Intervenor filed its Response to Plaintiff’s Motion, arguing that WFC could not likely succeed  
23 on the merits for its preliminary injunction request. (Resp. (Dkt. # 33) at 4.) Defendant-Intervenor’s  
Response did not address any jurisdictional issues regarding Plaintiff’s requested relief. (*See* Dkt. # 33.) On  
April 28, 2020, Defendant-Intervenor filed its Answer to Plaintiff’s Complaint. (Answer (Dkt. # 29).)  
Defendant-Intervenor appeared and made brief oral argument concerning the jurisdictional issues to  
Plaintiff’s requested relief during the hearing but has not otherwise submitted any materials for the Court’s  
consideration on these issues.

1 The Magnuson-Stevens Act provides for eight Regional Fishery Management Councils  
2 (“Regional Councils”). 16 U.S.C. §§ 1852(a)(1). The Regional Councils prepare fishery  
3 management plans (“FMPs”), including the addition of any amendments to a FMP, for each  
4 fishery under their jurisdiction. 16 U.S.C. §§ 1852(h)(1), 1854(a)-(b). NMFS reviews submitted  
5 FMPs from the Regional Councils, including amendments, to determine whether they are  
6 consistent with the Magnuson-Stevens Act “and any other applicable law.” 16 U.S.C.  
7 § 1854(a)(1)(A), (a)(3).

8 The Regional Councils also submit proposed regulations to NMFS to implement FMPs  
9 that NMFS promulgates if the proposed regulations are consistent with the FMP and other  
10 applicable laws. 16 U.S.C. §§ 1853(c), 1854(b). The Magnuson-Stevens Act provides that a State  
11 may regulate fishing outside its boundaries if authorized by a FMP and if the State’s fishing  
12 regulations are consistent with the applicable FMP. 16 U.S.C. § 1856(a)(3)(B).

13 *ii. Endangered Species Act*

14 Congress enacted the ESA to conserve endangered species and protect the ecosystems  
15 they depend on. 16 U.S.C. § 1531(b). The statute assigns implementation responsibilities to the  
16 Secretary for the Department of Commerce and the Secretary of the Interior, who have delegated  
17 duties to NMFS and the United States Fish and Wildlife Service (“FWS”), respectively. *See* 50  
18 C.F.R. § 402.01(b). NMFS retains ESA authority for marine and anadromous species, while  
19 FWS has jurisdiction over terrestrial and freshwater species. *See* §§ 50 C.F.R. 17.11, 223.102,  
20 224.101.

21 Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized,  
22 funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of  
23 any endangered species or threatened species or result in the destruction or adverse

1 modification” of critical habitat. 16 U.S.C. § 1536(a)(2). An agency proposing an action must  
2 determine whether its action “may affect” a listed species or critical habitat. 50 C.F.R. § 402.14.  
3 If the agency determines the action may affect a listed species, it must consult with NMFS, FWS,  
4 or both (collectively, “Service”). 50 C.F.R. §§ 402.03, 402.13, 402.14. Formal consultation  
5 eventually results in the issuance of a biological opinion. 50 C.F.R. § 402.14(h)(3). A biological  
6 opinion includes the Service’s opinion on whether a proposed action is likely to jeopardize the  
7 existence of an affected species or result in the destruction or adverse modification of its critical  
8 habitat. *See* 50 C.F.R. § 402.14.

9 Section 9 of the ESA prohibits “take” of a listed species, 16 U.S.C. § 1538. “Take” is  
10 defined to include harming, harassing, or killing listed species. 16 U.S.C. § 1532(19). If the  
11 consulting agency determines the proposed action is not likely to jeopardize the species, but will  
12 result in the incidental “take” of some individual members of a listed species, the agency  
13 provides an “incidental take statement” (“ITS”) with the biological opinion for that specific  
14 action. *See* 16 U.S.C. § 1536(b)(4)(i)-(ii). Any “take” in compliance with an ITS does not violate  
15 Section 9 of the Act. 16 U.S.C. § 1536(o)(2).

16 *iii. National Environmental Policy Act*

17 NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”)  
18 for “major Federal actions significantly affecting the quality of the human environment.” 42  
19 U.S.C. § 4332(2)(C). The EIS ensures that a federal agency consider information on  
20 environmental impacts when reaching decisions and that the information will be made available  
21 to the larger audience who may also play a role in the decision-making process. *Robertson v.*  
22 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

1 NEPA regulations direct agencies to prepare an Environmental Assessment (“EA”) to  
2 determine whether an EIS is necessary unless the proposal is one that “normally requires” an EIS  
3 or is one that “normally does not require” either an EIS or an EA. *Hale v. Norton*, 476 F.3d 694,  
4 700 (9th Cir. 2007); *see* 40 C.F.R. § 1501.4(a)-(b). Even if an EA is not required, “[a]gencies  
5 may prepare an environmental assessment on any action at any time in order to assist agency  
6 planning and decisionmaking.” 40 C.F.R. § 1501.3(b). If it is determined no significant impact  
7 will occur, the agency must issue a “finding of no significant impact.” 40 C.F.R. §§ 1501.4(e),  
8 1508.13.

### 9 C. Factual Background

10 Wild Fish Conservancy (“WFC”) is a membership-based 501(c)(3) nonprofit  
11 organization incorporated in the State of Washington, with its principal place of business in  
12 Duvall, Washington. (Compl. at ¶ 14.) WFC’s asserted mission is “dedicated to the preservation  
13 and recovery of Washington’s native fish species and the ecosystems upon which those species  
14 depend.” (*Id.*) WFC brings this action on behalf of its members who the organization asserts  
15 regularly spend time in areas in and around the waters occupied by the SRKW. (*Id.* at ¶ 15.)

#### 16 i. *The SRKW and Chinook Salmon*

17 NMFS listed the SRKW as endangered under the ESA in 2005. 50 C.F.R. § 224.101(h);  
18 *see also* Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903 (Nov. 18,  
19 2005). Critical habitat was designated for the SRKW in 2006. 50 C.F.R. § 226; *see also*  
20 Proposed Rulemaking to Revise Critical Habitat for the Southern Resident Killer Whale Distinct  
21 Population Segment, 71 Fed. Reg. 69,054 (Nov. 29, 2006). Per the 2019 BiOp, the SRKW faces  
22 many threats, including limits on the quantity and quality of its prey, toxic chemicals, oil spills,  
23



1 and disturbance from vessels. (Resp., Ex. A (Dkt. # 43-1) at 115-23.) As of December 2018, the  
2 SRKW population consisted of 74 whales. (*Id.* at 109.)

3 NMFS listed the Snake River fall-run Chinook salmon evolutionary significant unit  
4 (“ESU”) as a threatened species in 1992. 50 C.F.R. § 223.102(e); *see also* Threatened Status for  
5 Snake River Spring/Summer Chinook Salmon Threatened Status for Snake River Fall Chinook  
6 Salmon, 57 Fed. Reg. 14,653 (Apr. 22, 1992). The Puget Sound, the Lower Columbia River, and  
7 the Upper Willamette River Chinook salmon ESUs were listed as threatened species in 1999. 50  
8 C.F.R. § 223.102(e); *see also* Threatened Status for Three Chinook Salmon ESUs in Washington  
9 and Oregon, and Endangered Status for One Chinook Salmon ESU in Washington, 64 Fed. Reg.  
10 14,308 (Mar. 24, 1999). The 2019 BiOp notes NMFS has consulted on the effects of the various  
11 Southeast Alaska fisheries on the SRKW and threatened Chinook Salmon under the ESA since  
12 1992. (Resp., Ex. A at 28-31.)

13 *ii. The Pacific Salmon Treaty*

14 Chinook salmon regularly migrate across the boundary between the United States and  
15 Canadian waters, and as a result, fish originating in one country are often caught or “intercepted”  
16 by those fishing in the other country. (Resp., Ex. A at 27.) To resolve this issue, the United States  
17 and Canada ratified the Pacific Salmon Treaty (“PST”) in 1985, establishing a framework for the  
18 management of Pacific salmon fisheries in those waters off the coast of the United States and  
19 Canada that fall within the PST’s geographical scope. (*Id.*). The United States and Canada  
20 subsequently entered into Agreements under the PST in 1999 and 2009. (*Id.* at 27-28.) In 2019,  
21 the countries negotiated the most recent PST, which establishes the current upper limits on  
22 intercepting fisheries. (*Id.*; *see* Resp., Ex. C (Dkt. # 43-1).) Chapter 3 of Annex IV to the 2019  
23

1 PST defines the management regime for the Chinook salmon fisheries and is effective from 2019  
2 through 2028. (Resp., Ex. C at 651-71.)

3 *ii. The Salmon FMP*

4 NMFS delegated its authority over salmon fisheries in the federal waters in Southeast  
5 Alaska to the State of Alaska. 50 C.F.R. § 679.3(f). Pursuant to the Magnuson-Stevens Act, the  
6 North Pacific Fishery Management Council (“NPFMC”) has “authority over the fisheries in the  
7 Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska.” 16 U.S.C. § 1852(a)(1)(G).  
8 NPFMC first developed a FMP for salmon fisheries in Alaska in 1979 (“Salmon FMP”) and has  
9 since issued several amended plans, with the most recent completed in 2018. (Resp., Ex. B (Dkt.  
10 # 43-1); Fisheries of the Exclusive Economic Zone Off Alaska; Essential Fish Habitat  
11 Amendments, 83 Fed. Reg. 31,340 (July 5, 2018).) On December 21, 2012, NMFS reaffirmed its  
12 delegation of authority over the salmon fisheries in Southeast Alaska to the State of Alaska in  
13 FMP Amendment 12. (Resp., Ex. D (Dkt. # 43-1); 50 C.F.R. § 679.3(f); *see also* Fisheries of the  
14 Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 75,570 (Dec. 21, 2012).)

15 The 2018 Salmon FMP provides for two salmon fisheries in Southeast Alaska: (1) a  
16 commercial troll salmon fishery; and (2) a sport fishery. (Resp., Ex. B at 464-65.) Pertinent to  
17 this action, the commercial troll salmon fishery provided for under the FMP opens on July 1 and  
18 targets all remaining Chinook salmon available under the annual quota set pursuant to the PST.  
19 (*Id.* at 489-90.) On February 11, 2020, Alaska announced this year’s Chinook salmon harvest  
20 limits would be consistent with the 2019 PST limits. (Mot., Ex. A (Dkt. # 14-1) at 530-31.)

21 *iii. 2019 BiOp*

22 Following the completion of the 2019 PST, NMFS reinitiated consultation under the ESA  
23 on the Alaska salmon fisheries, and on April 5, 2019, NMFS issued the 2019 BiOp. (Resp., Ex.

1 A). The proposed federal actions addressed in the 2019 BiOp include NMFS’s ongoing  
2 delegation of management authority to the State of Alaska over the salmon fisheries in the  
3 federal waters of Southeast Alaska and NMFS’s funding to Alaska for its management and  
4 monitoring of the fisheries. (*Id.* at 29-33.)

5 In the 2019 BiOp, NMFS ultimately concluded the continued operation of the salmon  
6 fisheries, consistent with the PST established harvest limits, was not likely to jeopardize the  
7 SRKW or adversely modify its critical habitat. (*Id.* at 340-41.) Similarly, NMFS concluded the  
8 proposed actions would not jeopardize the four threatened Chinook salmon ESUs. (*Id.* at 350.)  
9 The 2019 BiOp includes an ITS allowing for the salmon fisheries to harvest up to the limits  
10 allowed under the 2019 PST. (*Id.* at 351-52.) The 2019 BiOp outlines that the salmon harvest  
11 that may occur under the proposed actions is likely to result “in some level of harm constituting  
12 take of SRKW by reducing prey availability” and causing the SRKW “to forage for longer  
13 periods, travel to alternate locations, or abandon foraging efforts.” (*Id.* at 352.)

### 14 III. DISCUSSION

#### 15 A. Legal Standards for Preliminary Injunction

16 A plaintiff seeking a preliminary injunction must show: “(1) it is likely to succeed on the  
17 merits; (2) it is likely to suffer irreparable harm if the preliminary injunction is not granted; (3)  
18 the balance of equities tips in its favor; and (4) an injunction is in the public’s interest.”  
19 *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013) (citing *Winter v.*  
20 *Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). The moving party bears the burden of persuasion  
21 and must make a clear showing it is entitled to such relief. *Winter*, 555 U.S. at 22.

22 As an alternative to this test, a preliminary injunction may also be appropriate if “serious  
23 questions going to the merits were raised and the balance of the hardships tips sharply” in the

1 moving party's favor, thereby allowing preservation of the status quo when complex legal  
2 questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d  
3 1127, 1134-35 (9th Cir. 2011). Nevertheless, the "serious questions" approach supports a court's  
4 entry of a preliminary injunction only if the moving party also shows there is a likelihood of  
5 irreparable injury and that the injunction is in the public interest. *Id.* at 1135.

6 "When considering an injunction under the ESA, we presume . . . that the balance of  
7 interests weighs in favor of protecting endangered species, and that the public interest would not  
8 be disserved by an injunction." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d  
9 803, 817 (9th Cir. 2018); *see also Wash. Toxics Coal. v. Env'tl. Prot. Agency*, 413 F.3d 1024,  
10 1035 (9th Cir. 2005) ("Congress has decided that under the ESA, the balance of hardships  
11 always tips sharply in favor of the endangered or threatened species.").

## 12 **B. Judicial Review under the Magnuson-Stevens Act**

13 The judicial review provision of the Magnuson-Stevens Act, 16 U.S.C. § 1855(f),  
14 provides in pertinent part:

15 (1) Regulations promulgated by the Secretary under this chapter and actions  
16 described in paragraph (2) shall be subject to judicial review to the extent  
17 authorized by, and in accordance with, chapter 7 of Title 5, if a petition for such  
review is filed within 30 days after the date of the regulations are promulgated or  
the action is published in the Federal Register, as applicable; except that—

18 (A) section 705 of such Title is not applicable, and

19 (B) the appropriate court shall only set aside any such regulation or action on a  
20 ground specified in section 706(2)(A), (B), (C), or (D) of such Title.

21 (2) The actions referred to in paragraph (1) are actions that are taken by the  
22 Secretary under regulations which implement a fishery management plan, including  
but not limited to actions that establish the date of closure of a fishery to commercial  
or recreational fishing.

1 Section 1855(f)(1)(A) precludes preliminary injunctive relief. *See* 5 U.S.C. § 705 (“When an  
2 agency finds that justice so requires, it may postpone the effective date of action taken by it,  
3 pending judicial review. On such conditions as may be required and to the extent necessary to  
4 prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate  
5 process to postpone the effective date of an agency action or to preserve status or rights pending  
6 conclusion of the review proceedings.”) Under § 1855(f)(1)(B), a court may only set aside  
7 regulations if they are: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in  
8 accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in  
9 excess of statutory jurisdiction, authority, limitations, or short of statutory right; or (d) without  
10 observance of procedure required by law. 5 U.S.C. § 706(2)(A)-(D).

11 Plaintiff argues that this matter is not an action subject to the Magnuson-Stevens Act  
12 because it is not asserting ESA or NEPA challenges to NMFS’s promulgation of regulations that  
13 implement an FMP or to an action taken by NMFS under such regulations. (Reply at 8.)  
14 Defendants contend that Plaintiff’s requested relief is aimed directly at NMFS’s delegation of  
15 authority to the State of Alaska for the commercial troll salmon fishery under the  
16 Magnuson-Stevens Act, and consequently, that this action is time-barred under the  
17 Magnuson-Stevens Act’s 30-day limitations period for judicial review. (Resp. at 7-10.)

18 Although Plaintiff has not expressly alleged a violation of the Magnuson-Stevens Act,  
19 and desires to pursue this action solely under its ESA and NEPA claims, it is clear Plaintiff’s  
20 Motion seeks to enjoin NMFS’s authorization and delegation of authority to the State of Alaska  
21 for the commercial troll salmon fishery in Southeast Alaska. (*See* Mot. at 9, 29.) The authority  
22 for the commercial troll salmon fishery is exclusively provided for by the Magnuson-Stevens Act  
23 regulations delegating authority to the State of Alaska for the implementation of the Salmon

1 FMP. 50 C.F.R. §§ 679.1, 679.3; *see also* Fisheries of the Exclusive Economic Zone Off Alaska;  
2 Pacific Salmon, 77 Fed. Reg. at 75,570. As further explained below, because the source of  
3 Plaintiff’s requested relief places this action within the purview of the Magnuson-Stevens Act,  
4 and Plaintiff has missed the deadline for challenging the relevant regulations, this Court lacks  
5 jurisdiction to enjoin the commercial troll salmon fishery.<sup>2</sup>

6 *i. Applicability of the Magnuson-Stevens Act*

7 The Ninth Circuit has previously expressed that “the decisive question” in deciding  
8 whether a plaintiff’s environmental claims entail the Magnuson-Stevens Act “is whether the  
9 regulations are being attacked, not whether the complaint specifically asserts a violation of the  
10 Magnuson-Stevens Act.” *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 438  
11 F.3d 937, 945 (9th Cir. 2006). In *Turtle Island*, NMFS issued regulations under the  
12 Magnuson-Stevens Act reopening part of a Hawaii-based longline swordfish fishery. *Id.* at 940.  
13 The Ninth Circuit examined the applicability of the Magnuson-Stevens Act regarding the  
14 plaintiff’s motion for a preliminary injunction, which sought “to requir[e] defendants to  
15 withdraw their authorization of swordfish longlining in the Pelagic fisheries of the Western  
16 Pacific, and enjoin[] . . . all longline swordfish fishing activities.” *Id.* at 945 (internal quotations  
17 and citations omitted). Similar to Plaintiff’s Complaint in the instant matter, the plaintiff in  
18 *Turtle Island* sought to proceed strictly under other environmental statutes, including ESA,  
19 NEPA, and Migratory Bird Act challenges. *Id.* at 943-44.

20 Despite the plaintiff’s characterization of its action, the Ninth Circuit determined the  
21 essence of plaintiff’s challenge in *Turtle Island* was the challenge to the reopening of the  
22

23 <sup>2</sup> On May 26, 2020, the Court heard oral argument on the Court’s jurisdiction to issue Plaintiff’s requested relief regarding § 1855(f), as well as the issue of WFC’s standing to bring this challenge. (Dkt. # 47.) Having decided that Plaintiff’s Motion is time-barred by § 1855(f), the Court reserves ruling on Defendants’ standing challenge at this time.

1 swordfish fishery. *Turtle Island Restoration Network*, 438 F.3d at 944. The Ninth Circuit  
2 specifically noted that “[t]o allow parties to avoid [the Magnuson-Stevens Act] through  
3 manipulation of form . . . while in substance challenging [Magnuson-Stevens Act] regulations,  
4 would permit parties ‘through careful pleading . . . [to] avoid the strict jurisdictional limits  
5 imposed by Congress.’” *Id.* (quoting *California Save Our Streams Council, Inc. v. Yeutter*, 887  
6 F.2d 908, 911 (9th Cir. 1989) (citations omitted)). Finding that the challenge to the reopening of  
7 the swordfish fishery was central to plaintiff’s environmental claims, the Ninth Circuit held  
8 plaintiff’s “challenge cannot credibly be viewed as anything other than an attack on the  
9 regulations” under the Magnuson-Stevens Act. *Id.* at 945; see *Am. Bird Conservancy v. F.C.C.*,  
10 545 F.3d 1190, 1195 (9th Cir. 2008).

11 Other federal courts have previously rejected prior attempts by parties to avoid  
12 jurisdictional limitations imposed under the Magnuson-Stevens Act by seeking relief under other  
13 environmental statutes. In *Blue Water Fishermen’s Ass’n v. Nat’l Marine Fisheries Serv.*,  
14 plaintiffs sought a preliminary injunction under the Magnuson-Stevens Act and ESA,  
15 challenging regulations closing portions of the Atlantic Ocean to pelagic longline fishing. 158  
16 F.Supp.2d 118, 120-21 (D. Mass. 2001). The plaintiffs’ challenge was brought in part because of  
17 a biological opinion that determined Atlantic pelagic longline fishing jeopardized the continued  
18 existence of loggerhead and leatherback sea turtles under the ESA, which inspired NMFS’s  
19 promulgation of the regulations closing the fishery. *Id.* at 121-22. The district court noted that  
20 although the regulations at issue were premised on a jeopardy finding in a biological opinion, the  
21 regulations were issued pursuant to NMFS’s authority under the Magnuson-Stevens Act, and not  
22 the ESA. *Id.* at 122. The district court determined that plaintiffs’ attempt to bring its claim solely  
23 under the ESA was clearly an attempt to evade the jurisdictional limitations imposed by the

1 Magnuson-Stevens Act and held plaintiff’s “couching the action in different statutory language”  
2 was “not a hook which [could] remove the prohibitions of the [Magnuson-Stevens Act].” *Id.*  
3 (citation omitted); *see Sea Hawk Seafoods v. Locke*, 568 F.3d 757, 765 (9th Cir. 2009) (finding  
4 Magnuson-Stevens Act, rather than the APA, was applicable to fish processors’ action  
5 challenging Magnuson-Stevens Act regulations promulgated to implement amendments to FMPs  
6 and that Magnuson-Stevens Act’s jurisdictional requirements could not be avoided through artful  
7 pleading).

8         In this case, the essence of Plaintiff’s request in its Motion—the closure of the  
9 commercial troll salmon fisheries in the federal waters off the coast of Southeast Alaska—places  
10 this matter squarely within the province of the Magnuson-Stevens Act. The Southeast Alaska  
11 commercial troll salmon fishery’s authorization is granted by the regulations promulgated under  
12 the Magnuson-Stevens Act. 50 C.F.R. §§ 679.1, 679.3; *see also Fisheries of the Exclusive*  
13 *Economic Zone Off Alaska; Pacific Salmon*, 77 Fed. Reg. at 75,570. Plaintiff attempts to render  
14 its injunction request as a challenge exclusively related to its ESA and NEPA claims. (Compl. at  
15 ¶¶ 13, 116-120; Mot. at 19, 28; Reply at 8.). However, an action seeking to enjoin the  
16 authorization of a federal fishery, the regulations promulgated under the Magnuson-Stevens Act,  
17 cannot be couched solely as an ESA or NEPA challenge to avoid the Magnuson-Stevens Act.  
18 Though Plaintiff endeavors to characterize its action differently, Plaintiff’s challenge necessarily  
19 entails the Magnuson-Stevens Act because an injunction in this matter would require the closure  
20 of a federal fishery. *See Turtle Island Restoration Network*, 438 F.3d at 945; *see also Blue Water*  
21 *Fishermen’s Ass’n*, 158 F.Supp.2d at 121-22; *Sea Hawk Seafoods*, 568 F.3d at 765.

22 Consequently, Plaintiff’s Motion clearly serves as an attack on the regulations authorizing the  
23 delegation of authority for the commercial troll salmon fishery to the State of Alaska under the



1 Magnuson-Stevens Act, and therefore, the Magnuson-Stevens Act is applicable to Plaintiff's  
2 requested relief in this action.<sup>3</sup>

3           ii.       *Section 1855(f)'s 30-Day Limitations Period*

4           Next, the Court must look to whether Plaintiff has timely brought a challenge under  
5 § 1855(f). In *Turtle Island*, the Ninth Circuit articulated the congressional directive regarding  
6 § 1855(f)'s limitations period is "clear and uncomplicated": a party seeking judicial review of  
7 "[r]egulations promulgated by the Secretary under the [Magnuson-Stevens Act]' must do so  
8 within thirty days of their promulgation." *Turtle Island*, 438 F.3d at 943-44 (citing *Northwest*  
9 *Env'tl. Def. Ctr. v. Brennen*, 958 F.2d 930, 934 (9th Cir. 1992) (holding that regulations are  
10 "promulgated" within the meaning of §1855(f) when published in the Federal Register)); see  
11 *Norbird Fisheries v. Nat'l Marine Fisheries Serv.*, 112 F.3d 414, 416 (9th Cir. 1997) (holding  
12 that 16 U.S.C. § 1855(f)(1) "deprives the district court of jurisdiction to hear an attack on the  
13 regulations if review is not sought within 30 days of their promulgation.").

14           Additionally, other federal courts addressing the timeliness of challenges brought under  
15 the Magnuson-Stevens Act have determined that an action published in the Federal Register, or  
16 an action commenced under a regulation regarding the Magnuson-Stevens Act, is reviewable so  
17 long as it was done within 30-days of the action. *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d  
18 1104, 1112 (9th Cir. 2006) (finding publication of management measures in Federal Register  
19 was "action" under Magnuson-Stevens Act and triggered 30-day limitations period); *Gulf*

20  
21 \_\_\_\_\_  
22 <sup>3</sup> Given the applicability of the Magnuson-Stevens Act to Plaintiff's requested relief, Plaintiff could have  
23 sought a consistency review through the Salmon FMP. (Resp., Ex. B at 510-14.) Chapter 9 of the Salmon  
FMP allows for any member of the public to petition NMFS to review fishing management measures  
implemented by the State of Alaska. (*Id.* at 511 ("Any member of the public may petition NMFS to conduct  
a consistency review of any state management measure that applies to salmon fishing in the East Area if  
that person believes the management measure is inconsistent with the provisions of the FMP, the  
Magnuson-Stevens Act, or other applicable federal law."))

1 *Fishermen’s Ass’n v. Gutierrez*, 529 F.3d 1321, 1324 (11th Cir. 2008) (finding notice by  
2 Secretary of Commerce delaying effective date for requirement that vessels with federal  
3 commercial permits to harvest and sell reef fish in Gulf of Mexico be equipped with approved  
4 monitoring system was an “action” within meaning of Magnuson-Stevens Act). Thus, the  
5 Magnuson-Stevens Act provides a strict 30-day limitation on judicial review to NMFS’s  
6 promulgation of regulations or NMFS’s actions taken under regulations that implement a FMP.  
7 *See* 16 U.S.C. § 1855(f).

8         Given that Plaintiff’s requested relief is circumscribed by the Magnuson-Stevens Act and  
9 § 1855(f)’s 30-day limitations period to bring a challenge, Plaintiff’s challenge is time-barred,  
10 and the Court therefore lacks jurisdiction to issue relief. Here, the most recent regulations that  
11 affirmed delegating management authority of the commercial troll salmon fishery to the State of  
12 Alaska was published on December 21, 2012. 50 C.F.R. § 679.3(f); *see also* Fisheries of the  
13 Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. at 75,570. Even if the Court  
14 were to construe the issuance of the 2019 BiOp as new action under the regulations, Plaintiff was  
15 required to have brought its challenge within 30 days of the 2019 BiOp’s issuance on April 5,  
16 2019. (*See Resp., Ex. A.*) Regardless of whether Plaintiff sought to challenge the regulations  
17 promulgated under the Magnuson-Stevens Act in 2012, or the issuance of the biological opinion  
18 in April 2019, the Magnuson-Stevens Act’s 30-day limitations period precludes this Court from  
19 adjudicating Plaintiff’s challenge.<sup>4</sup> *See Turtle Island Restoration Network*, 438 F.3d at 943-44.

20  
21  
22 \_\_\_\_\_  
23 <sup>4</sup> Section 1855(f) applies “only to a very specific class of claims—those that clearly challenge regulations promulgated under the [Magnuson-Stevens Act].” *Turtle Island Restoration Network*, 438 F.3d at 948. Though the Court lacks jurisdiction to issue Plaintiff’s requested relief under the Magnuson-Stevens Act, the Magnuson-Stevens Act does not itself bar Plaintiff from continuing to seek relief for its claims that the 2019 BiOp violated the ESA and NEPA in this action. *See id.* at 949.

1 Accordingly, because Plaintiff's Motion serves as a clear attack on the regulations under  
2 the Magnuson-Stevens Act authorizing the delegation of authority for the commercial troll  
3 salmon fishery in Southeast Alaska to the State of Alaska, the Magnuson-Stevens Act applies,  
4 and Plaintiff's Motion is barred pursuant to § 1855(f) because it was filed beyond the 30-day  
5 limitations period.

#### 6 IV. CONCLUSION

7 The Court recommends Plaintiff's motion for a preliminary injunction (dkt. # 14) be  
8 DENIED. A proposed order accompanies this Report and Recommendation.

9 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
10 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and  
11 Recommendation is signed. Failure to file objections within the specified time may affect your  
12 right to appeal. Objections should be noted for consideration on the District Judge's motions  
13 calendar for the third Friday after they are filed. Responses to objections may be filed within  
14 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be  
15 ready for consideration by the District Judge on June 26, 2020.

16 The Clerk is directed to send copies of this Report and Recommendation to the parties  
17 and to the Honorable Richard A. Jones.

18 Dated this 9th day of June, 2020.

19 

20 MICHELLE L. PETERSON  
21 United States Magistrate Judge  
22  
23

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff,

v.

Case No. C20-417-RAJ-MLP

BARRY THOM, et al.,

ORDER

Defendants, and

ALASKA TROLLERS  
ASSOCIATION,

Defendant-Intervenor.

The Court, having reviewed the Report and Recommendation of the Honorable Michelle L. Peterson, United States Magistrate Judge, any objections and responses 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 Preliminary Injunction (Dkt. #14) is DENIED; and
- (3) The Clerk is directed to send copies of this Order to the parties.

DATED this 1st day of March, 2021.



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, *et al.*,

Defendant-Intervenors.

Case No. C20-417-RAJ-MLP

ORDER GRANTING UNOPPOSED  
MOTION TO INTERVENE BY STATE  
OF ALASKA

This matter comes before the Court upon the State of Alaska's Motion to Intervene ("State's Motion"). (Dkt. # 75.) Based on the State's Motion, and because none of the parties oppose the State of Alaska's intervention in this matter (*see* dkt. ## 81-83), the Court finds the State of Alaska is entitled to intervene in this action pursuant to Federal Rule of Civil Procedure 24(a)(2). Accordingly, it is hereby ORDERED that:

(1) The State's Motion (dkt. # 75) is GRANTED. The State of Alaska shall be made Defendant-Intervenor in this action;

(2) The State of Alaska shall electronically file its Answer to Plaintiff's Complaint within **seven (7)** court days from the date of the signing of this Order;

(3) The State of Alaska shall comply with the current briefing schedule (dkt. # 79), the previously established page limitations schedule (dkt. # 60), and shall file its briefs concurrently under the same deadlines and page limitations applicable to Defendant-Intervenor Alaska Trollers Association; and

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

Dated this 30th day of March, 2021.



---

MICHELLE L. PETERSON  
United States Magistrate Judge

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY,  
  
Plaintiff,  
  
v.  
  
BARRY THOM, *et al.*,  
  
Defendants,  
  
and  
  
ALASKA TROLLERS ASSOCIATION, *et al.*,  
  
Defendant-Intervenors.

Case No. C20-417-RAJ-MLP  
  
ORDER

This matter is before the Court on Plaintiff Wild Fish Conservancy’s “Renewed Motion to Expedite” (“Plaintiff’s Motion”). (Dkt. # 80.) Plaintiff seeks expedited review of this case based on this Court’s determination that the Magnuson-Stevens Fishery and Conservation Management Act’s (“Magnuson-Stevens Act”) judicial review provision, 16 U.S.C. § 1855(f), applied in this action. (*Id.* at 1.)

Plaintiff previously filed its first motion to expedite on June 26, 2020. (Dkt. # 57.) On November 10, 2020, this Court struck Plaintiff’s first motion to expedite without prejudice and

1 directed Plaintiff to refile after the Honorable Richard A. Jones ruled on the Court's then pending  
2 Report and Recommendation regarding Plaintiff's motion for preliminary injunction and the  
3 applicability of the Magnuson-Stevens Act. (Dkt. # 65 at 2.) On March 1, 2021, Judge Jones  
4 adopted this Court's Report and Recommendation. (Dkt. # 69 at 1.)

5 In Defendant's response to Plaintiff's Motion, Defendants state that they take no position  
6 on the timing of the Court's setting of hearing dates and consideration of motions but that they  
7 disagree with Plaintiff's characterization of how the Magnuson-Stevens Act applies to this  
8 matter. (Dkt. # 84 at 2.) Defendants note that, to the extent Plaintiff suggests Defendants will  
9 engage in undue delay, Defendants object to that category of expedition. (*Id.* at 4.) Defendants  
10 additionally note Plaintiff's proposed order contains an additional form of expedition not  
11 mentioned in Plaintiff's Motion in that it proposes the Court "require expedited scheduling from  
12 the parties on all matters." (*See* dkt. # 80-1 at 2.) Defendant-Intervenor Alaska Trollers  
13 Association joined and adopted Defendants' response to Plaintiff's Motion. (Dkt. # 84.)

14 The judicial review provision of the Magnuson-Stevens Act provides that: "Upon a  
15 motion by the person who files a petition under this subsection, the appropriate court shall assign  
16 the matter for hearing at the earliest possible date and shall expedite the matter in every possible  
17 way." 16 U.S.C. § 1855(f)(4). Because preliminary injunctive relief is not available under the 16  
18 U.S.C. § 1855(f)(1)(A), "the Magnuson-Stevens Act trades preliminary relief for expedited  
19 review." *Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 158 F.Supp.2d 118, 124  
20 (D. Mass. 2001); *see also N.C. Fisheries Ass'n v. Gutierrez*, 518 F.Supp.2d 62, 72 (D.D.C. 2007)  
21 ("If the party challenging the Secretary's action so requests, the court is obliged to hold a hearing  
22 and to expedite the matter in every possible way.") (internal quotations omitted).

23 In this case, this Court's previous Report and Recommendation found the



1 Magnuson-Stevens Act “is applicable to Plaintiff’s requested relief in this action,” which was  
2 Plaintiff’s request for the closure of the commercial troll salmon fisheries in federal waters off  
3 the coast of Southeast Alaska. (*See* dkt. # 51 at 15-16.) Therefore, because the  
4 Magnuson-Stevens Act applies to Plaintiff’s requested relief, expedited review of this matter is  
5 proper pursuant to 16 U.S.C. § 1855(f)(4).

6 Accordingly, Plaintiff’s Motion (dkt. # 80) is GRANTED. The Court will endeavor to  
7 assign the earliest possible hearing date to any matter requiring a hearing in this case, and to  
8 expedite consideration of this matter. Nevertheless, the Court maintains the parties’ stipulated  
9 amended briefing schedule and its established deadlines at this time. (*See* dkt. ## 60, 79.)

10 The Clerk is directed to send copies of this Order to the parties and to Judge Jones.

11  
12 Dated this 31st day of March, 2021.

13 

14 

---

MICHELLE L. PETERSON  
15 United States Magistrate Judge  
16  
17  
18  
19  
20  
21  
22  
23