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

Parties:

Plaintiff: Wild Fish Conservancy.

Federal Defendants: Barry Thom, Regional Administrator, NMFS West Coast Region; Paul Doremus, Acting Assistant Administrator for Fisheries of the National Marine Fisheries Service (NMFS); NMFS; Department of Commerce; and Secretary of Commerce Gina Raimondo.

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

Case:

This case involves a challenge to a biological opinion NMFS issued in April 2019 that examined the effects of three actions—reinitiation on the delegation of salmon fishery management in the federal waters off of Southeast Alaska to the State of Alaska, the funding of grants to the State of Alaska, and the establishment of a conservation framework for habitat improvement and hatchery production—on seven species listed under the Endangered Species Act (ESA).

Current Case Activity:

The parties are in the middle of briefing on motions and cross-motions for summary judgment. Pursuant to the existing briefing schedule, briefing is proceeding as follows:

- Plaintiff Wild Fish Conservancy filed its motion for summary judgment on May 5, 2021.
- Federal Defendants filed a combined cross-motion for summary judgment and response in opposition to Plaintiff's motion for summary judgment on May 26, 2021. Defendant-Intervenors State of Alaska and Alaska Trollers Association also filed their combined cross-motions for summary judgment and responses on May 26, 2021.
- Plaintiff Wild Fish Conservancy's combined response and 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.

Attachment:
The parties' briefs on summary judgment (without supporting attachments) are included.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

BARRY THOM, in his official capacity as Regional Administrator for the National Marine Fisheries Service, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION, and STATE OF ALASKA,

Defendant-Intervenors.

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

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: June 16, 2021

ORAL ARGUMENT REQUESTED

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
BiOp	Biological Opinion
DPS	Distinct Population Segment
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FONSI	Finding of No Significant Impact
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
SEAK	Southeast Alaska

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I. MOTION.

Plaintiff Wild Fish Conservancy (the "Conservancy") hereby moves for summary judgment and respectfully requests the Court: 1) determine that the National Marine Fisheries Service's ("NMFS") biological opinion for salmon fisheries in Southeast Alaska ("2019 SEAK BiOp") is not in accordance with law; 2) determine NMFS is violating section 7(a)(2) of the Endangered Species Act ("ESA") by failing to ensure its actions identified in the 2019 SEAK BiOp do not jeopardize species; 3) determine NMFS violated the National Environmental Policy Act ("NEPA") by issuing and adopting the 2019 SEAK BiOp without NEPA processes; (4) vacate the 2019 SEAK BiOp; and 5) enjoin NMFS's implementation of increased hatchery production identified in the 2019 SEAK BiOp until NMFS complies with the ESA and NEPA.

II. INTRODUCTION.

In enacting the ESA, Congress instructed federal agencies to "insure," at "whatever the cost," that activities they authorize, fund, or implement will not jeopardize the continued existence of species, requiring agencies "give endangered species priority over [their] 'primary missions . . . .'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184–85 (1978); 16 U.S.C. § 1536(a)(2). NMFS violated ESA mandates by approving salmon harvest levels that will continue to starve Southern Resident Killer Whales towards extinction, relying on undeveloped plans to increase hatchery production that, if implemented, would themselves inhibit recovery of threatened salmonids. Exacerbating these ESA violations, NMFS made these decisions without public input and without considering and disclosing alternatives in violation of NEPA.

III. LEGAL FRAMEWORK.

A. The Endangered Species Act.

The ESA assigns implementation responsibilities to the Secretaries for the Departments of Commerce and the Interior, who have delegated duties to NMFS and the United States Fish and Wildlife Service ("FWS"), respectively. *See* 50 C.F.R. § 402.01(b). NMFS generally has ESA authority for marine and anadromous species, while FWS has jurisdiction over terrestrial and freshwater species. *See id.* §§ 17.11, 223.102, 224.101.

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Section 4 of the ESA prescribes mechanisms by which NMFS and FWS list "species," defined to include a "distinct population segment of any species of vertebrate . . . . [that] interbreeds when mature," as endangered or threatened, and designate "critical habitat" for such species. 16 U.S.C. §§ 1532(16), 1533(a). Section 9 of the ESA makes it unlawful to "take" listed species. *See id.* § 1538(a)(1)(B); 50 C.F.R. § 223.203(a). "Take" includes to harm, kill, or capture a protected species. 16 U.S.C. § 1532(19). Harm includes "significant habitat modification" that "kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, . . . [or] feeding . . . ." 50 C.F.R. § 222.102.

Section 7 of the ESA imposes substantive and procedural requirements on federal agencies. *See id.* § 402.03. Substantively, it mandates that federal agencies "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification" of such species' 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). Procedurally, it requires an agency planning an action that "may affect" listed species (the "action agency") to consult with NMFS and/or FWS (the "consulting agency"). 50 C.F.R. § 402.14(a). Such consultation is intended to facilitate compliance with the 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).

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 critical habitat. 50 C.F.R. § 402.14(h)(3). If the consulting agency determines that the 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. *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 to avoid jeopardy and adverse modification, the BiOp will include an incidental take statement

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("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). The ITS also includes terms to minimize impacts and monitor take. 16 U.S.C. § 1536(b)(4)(C)(ii), (iv); 50 C.F.R § 402.14(*i*)(1)(ii), (iv), (*i*)(3); *Wild Fish Conservancy v. Salazar* (*WFC*), 628 F.3d 513, 531–32 (9th Cir. 2010). 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).

B. The National Environmental Policy Act.

NEPA directs federal agencies to prepare an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). An EIS ensures that the agency considers detailed information on environmental impacts when reaching decisions and that the information will be made available to the larger audience that may also play a role in the decision making process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires the environmental information be available *before* decisions are made and *before* actions are taken. 40 C.F.R. § 1500.1(b), (c) (2019).[1] 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. If it is determined that no significant impact will occur, the agency must issue a "finding of no significant impact" ("FONSI"). 40 C.F.R. §§ 1501.4(e), 1508.13.

C. The Magnuson-Stevens Act.

The Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act") establishes exclusive federal management over fisheries within the Exclusive Economic Zones of the United States; i.e., the "federal waters" generally located between three and 200 nautical miles from the coastline. 16 U.S.C. §§ 1802(11), 1811(a); 48 Fed. Reg. 10,605 (Mar. 14, 1983). The Secretary of Commerce is charged with implementing the statute and has delegated

[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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responsibilities to NMFS. *See* 16 U.S.C. §§ 1854, 1855(d).

IV. STATEMENT OF FACTS.

A. Endangered Southern Resident Killer Whale.

The Southern Resident Killer Whale distinct population segment ("DPS") was listed as an endangered species in 2005. 70 Fed. Reg. 69,903 (Nov. 18, 2005); 50 C.F.R. § 224.101(h). The species is at a high risk of extinction—considered by NMFS to be one of the eight most at risk species. AR 15988–89. "[T]he Southern Resident population has declined to historically low levels." AR 47276. As of December 2018, there were only 74 whales. *Id.* In early 2019, there were 26 reproductive age females, and only 14 had successfully reproduced in the prior 10 years, and there had been no viable calves since the beginning of 2016. AR 47434.

A primary limiting factor for Southern Residents is prey availability, with limited prey contributing to premature mortality and reduced fecundity. AR 47276, 47282, 47286–87, 47434. Females are producing a low number of surviving calves during their reproductive life span and experiencing late onset of sexual maturity and a long average reproductive interval (6.1 years). AR 47276. "[T]his reduced fecundity is largely due to nutritional limitation." AR 47276, 47434. Indeed, a recent assessment by Dr. Robert Lacy found that "the effects of prey abundance on fecundity and survival had the largest impact on the population growth rate." AR 47278.

Southern Residents consume a variety of fish species. AR 47282–83. However, salmon and steelhead make up to 98 percent of their diet. AR 47283. Specifically, the whales consume mostly larger (i.e., older) Chinook salmon, with 80 to 90 percent of the species' diet consisting of Chinook salmon. *Id.* This preference for Chinook salmon persists despite low abundance. *Id.*

B. Threatened Salmonids.

The Snake River fall-run Chinook salmon evolutionarily significant unit ("ESU") was listed as a threatened species in 1992, followed by the Puget Sound, the Lower Columbia River, and the Upper Willamette River Chinook salmon ESUs in 1999. 57 Fed. Reg. 14,653 (Apr. 22, 1992); 64 Fed. Reg. 14,308 (Mar. 24, 1999); 50 C.F.R. § 223.102(e). The primary causes of their decline include harvests and hatcheries. AR 01729, 14492, 15761, 15891. Chinook salmon in

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these ESUs are harvested in Southeast Alaska, Canada, and other fisheries. *See* AR 47373–419.

Hatchery programs harm wild salmonids in several ways, including through genetic and ecological interactions between hatchery and wild fish. AR 47422–24. Hatchery fish become less fit to survive and reproduce in the wild through "domestication selection," a process whereby natural selection processes occur in an unnatural environment. AR 47423, 39742–46, 13519–20. This domestication harms wild fish when hatchery fish, released *en masse*, mate with wild fish and transfer their maladapted genes, reducing productivity of wild populations. AR 47422–24, 30274. Harm through ecological interactions occurs, *inter alia*, when hatchery fish compete with wild fish for resources, including food and rearing and spawning habitat. *See* AR 47424–25.

Puget Sound Chinook salmon historically consisted of 31 independent populations; 22 remain in five major population groups. AR 01741–42. "To lower the extinction risk . . . , all existing independent populations . . . will need to improve . . ., and some will need to attain a low [extinction] risk status." AR 01741. All populations are below escapement levels set for recovery and most populations are declining. AR 01747. Most populations suffer low productivity, with "[h]atchery-origin spawners . . . present in high fractions in most populations . . . ." *Id.*

Lower Columbia River Chinook salmon consists of 32 populations in six major population groups. AR 15905. "The majority of the populations . . . remain at high [extinction] risk, with low natural-origin abundance levels." AR 15911. "Hatchery contribution to naturally spawning-spawning fish remains high." *Id.* NMFS funds most hatchery production affecting the species under the Mitchell Act and recently completed a BiOp for the programs ("Mitchell Act BiOp"). AR 13233–767; AR 47244. The Mitchell Act BiOp requires large reductions in numerous Chinook salmon hatchery programs in the Columbia River to reduce harm to the Lower Columbia River Chinook salmon ESU. *See* AR 13267–72, 13666, 13677.

C. The Pacific Salmon Treaty.

The United States and Canada first ratified the Pacific Salmon Treaty in 1985. AR 00523. A primary objective was to ensure that each county receive equitable benefits from the salmon originating in its waters. *Id.* The Pacific Salmon Treaty establishes upper limits on

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"intercepting fisheries," defined as fisheries in one country that harvest salmon originating in another country. AR 47194. These fishing regimes are contained in Annex IV to the Pacific Salmon Treaty. *Id.* The original agreed-upon regimes expired in 1992. *Id.* A new comprehensive agreement was reached in 1999 that established 10-year fishery regimes, with the next set agreed upon in 2009. AR 47194–95. The current set of agreements became effective in 2019. *See* AR 47195. Chapter 3 of Annex IV to the 2019 Pacific Salmon Treaty defines the management regime for the Chinook salmon fisheries and is effective from 2019 through 2028. *See id.*

D. Southeast Alaska Salmon Fisheries.

There is a commercial troll salmon fishery and a sport salmon fishery in Southeast Alaska. AR 00514–15. The commercial fishery harvests primarily Chinook and coho salmon. AR 00540. Harvests are limited annually to a specific number of "Treaty Chinook salmon" according to an abundance estimate established under the Pacific Salmon Treaty. *Id.*

The commercial fishery is divided into two seasons: winter and general summer, and the general summer season is divided into spring and summer fisheries. *Id.* The winter season is from October 11 through April 30 and is managed to not exceed harvesting 45,000 Chinook salmon. *Id.* Treaty Chinook salmon caught in the winter season count towards the annual limit for Southeast Alaska set under the Pacific Salmon Treaty. *Id.* The spring fishery begins when the winter season ends and harvests primarily Alaska hatchery-produced Chinook salmon not subject to the Pacific Salmon Treaty, although some Treaty Chinook salmon are also caught. AR 00540–41. The summer troll season opens on July 1 and targets all Treaty Chinook salmon that remain available under the annual quota set pursuant to the Pacific Salmon Treaty. AR 00541.

All winter and spring harvests and some summer harvest occur in state waters and are therefore not subject to the Magnuson Stevens Act. *See* AR 00540–41. Some of the summer fishery occurs in the Exclusive Economic Zone that is subject to the Magnuson Stevens Act. AR 00541. The North Pacific Fishery Management Council, which manages fisheries in the federal waters of Alaska, developed a salmon fishery management plan in 1979 and has since issued numerous amendments. *See* 16 U.S.C. § 1852(a)(1)(G); AR 00502–03; 83 Fed. Reg. 31,340

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(July 5, 2018). That plan delegates management authority over the fishery in federal waters of Southeast Alaska to the State of Alaska. *See* AR 00515. However, NMFS retains oversight authority of Alaska's management of these federal fisheries. AR 00561–65.

Under this regime, Alaska manages salmon fisheries "as a single unit throughout federal and state waters" using the allocations set under the Pacific Salmon Treaty. *See* AR 00515, 00541. NMFS provides federal funding to Alaska to "monitor and manage salmon fisheries in State and Federal waters to meet the obligations of [the Pacific Salmon Treaty] . . . ." AR 47198.

E. NMFS's 2019 SEAK BiOp on the 2019 Pacific Salmon Treaty.

NMFS first consulted under the ESA on the Southeast Alaska salmon fisheries in 1993. AR 47195. NMFS consulted in 1999 and again in 2009 on the 10-year harvest regimes set under the Pacific Salmon Treaty. AR 47195–96. NMFS reinitiated consultation after completion of the 2019 Pacific Salmon Treaty and issued the 2019 SEAK BiOp on April 5, 2019. AR 47173–76.

The 2019 SEAK BiOp is the product of an intra-agency ESA consultation; i.e., NMFS is both the action agency and the consulting agency. *See Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, No. 01-765 (CKK/JMF), 2002 U.S. Dist. LEXIS 7263, at *5 n.4 (D.D.C. Apr. 25, 2002). The 2019 SEAK BiOp consults on three actions: (1) NMFS's ongoing delegation of authority to Alaska to manage the portion of the summer fishery that occurs in federal waters; (2) NMFS's disbursement of funds to Alaska to manage all Southeast Alaska salmon fisheries to ensure compliance with the Pacific Salmon Treaty; and (3) a new grant program whereby NMFS will disburse funds for hatchery and habitat programs intended to partially mitigate harvests. AR 47198–204. The 2019 SEAK BiOp analyzes Southeast Alaska salmon fisheries, in both State and federal waters, under the regimes of the 2019 Pacific Salmon Treaty. *See, e.g.*, AR 47366.

The 2019 SEAK BiOp acknowledges that Southern Residents are at a high risk of extinction due to low fecundity rates, primarily attributable to reduced prey abundance. AR 47276–78, 47434. Under NMFS's management of fisheries "over the last decade, salmon availability has not been sufficient to support Southern Resident population growth." AR 47503. In 2017, Dr. Lacy found that prey abundance has the largest impact on population growth and

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that **Chinook abundance would need to increase by 15%** to achieve the recovery growth rate target for Southern Residents. AR 47278, 47503. While the 2019 Pacific Salmon Treaty reduced some harvests, it was insufficient for Southern Residents and Puget Sound Chinook salmon:

> [T]here was a practical limit to what could be achieved through the bilateral negotiation process. As a consequence . . . , the U.S. Section generally recognized that **more would be required to mitigate the effects of harvest** and other limiting factors that contributed to the reduced status of Puget Sound Chinook salmon and [Southern Resident Killer Whales] . . . .

AR 47201–02 (emphasis added). Southeast Alaska harvests under the 2019 Pacific Salmon Treaty will reduce Southern Resident prey in coastal waters from 0.2% to **12.9%**, and in inland waters from 0.1% to 2.5%. AR 47439–40. The fisheries will reduce larger Chinook salmon preferred by Southern Residents from the whale's critical habitat up to 2.5%. AR 47283, 47507.

The Pacific Salmon Treaty sets an **upper limit** on fisheries; **NMFS can further restrict harvests to protect species under the ESA**. *E.g.*, AR 47436. Instead of limiting harvests to ensure they do not jeopardize species, NMFS manufactured a hypothetical federal "funding initiative" in an effort to partially mitigate harm to Puget Sound Chinook salmon and Southern Residents. AR 47201–03. This initiative includes three elements. AR 47202. First, $3.06 million per year is to be allocated for Puget Sound Chinook salmon "conservation"[2] hatcheries; to increase funding for existing programs on the Nooksack, Dungeness, and Stillaguamish Rivers and to fund a new program in Hood Canal. AR 47202, 47420. Second, $31.2 million is to fund (unidentified) habitat projects to benefit Chinook salmon populations in those same four Puget Sound watersheds. AR 47202, 47419–20. The third component seeks to dramatically increase Chinook salmon hatchery production to provide a 4% to 5% increase in prey for the Southern Residents. AR 47202–03. NMFS proposes spending "no less than $5.6 million per year" on this "prey increase program" in order to release 20 million smolts annually; five to six million smolts in Puget Sound and the rest in the Columbia River and the Washington Coast. AR 47203.

[2] A conservation hatchery is designed to preserve the genetic resources of a salmon population, as opposed to a program designed to provide other benefits, such as harvests. *See* AR 47420.

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The 2019 SEAK BiOp found that the Southeast Alaska salmon fishery "**is likely to adversely affect designated critical habitat**" for Southern Residents "[d]uring the time it takes for . . . hatchery fish [produced under the prey increase program] to return as adults to critical habitat areas . . . ." AR 47507 (emphasis added). It is unclear how long NMFS believes that will be, as the mitigation "is not anticipated to be implemented immediately." AR 47435. Further, any hatchery fish would not be available to Southern Residents until "several years" after release because the whales "prefer to consume larger (i.e., older) Chinook salmon." AR 47507.

NMFS nonetheless assumed that this aspirational "mitigation package" will eventually produce beneficial effects when evaluating whether the Southeast Alaska salmon fisheries are likely to jeopardize species or adversely modify critical habitat under section 7(a)(2) of the ESA. *See, e.g.*, AR 47500–01, 47506–07. NMFS ultimately concluded that the fisheries, given the mitigation, are not likely to jeopardize Southern Residents or adversely modify their critical habitat. *See* AR 47508; 50 C.F.R. § 402.02 (defining "jeopardize the continued existence of").

NMFS also found that fisheries under the 2019 Pacific Salmon Treaty are not likely to jeopardize four Chinook salmon ESUs, including Puget Sound Chinook salmon and Lower Columbia River Chinook salmon. AR 47485–47501. Despite assuming the supposed benefits to Southern Residents from the hypothetical new hatchery production, the 2019 SEAK BiOp did not evaluate whether that increased production will jeopardize ESA-listed salmonids. *See id.*

The 2019 SEAK BiOp includes an ITS authorizing take of Southern Residents and four threatened Chinook salmon ESUs resulting from the Southeast Alaska salmon fisheries up to the harvest limits in 2019 Pacific Salmon Treaty. AR 47518–19. The ITS does not authorize take associated with the hypothetical mitigation—the proposed hatchery and habitat programs—explaining instead that future ESA consultations will be required. *E.g.*, AR 47420, 47428, 47433.

V. STANDARD OF REVIEW.

Challenges to a BiOp and to an agency's compliance with NEPA are reviewed under the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 174–79 (1997); *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1195 (9th Cir. 2010). Summary judgment is

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generally the appropriate mechanism for resolving the merits of such claims. *See Occidental Eng'g Co. v. Immigr. & Naturalization Serv.*, 753 F.2d 766, 769–70 (9th Cir. 1985). The APA directs courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

VI. ARGUMENT.

A. The 2019 SEAK BiOp Is Arbitrary and Not in Accordance with Law.

1. NMFS's no jeopardy opinion relies on uncertain mitigation.

NMFS's management of fisheries has pushed Southern Residents to the brink of extinction. *See, e.g.*, AR 47503. The 10-year harvests contemplated by the 2019 Pacific Salmon Treaty will continue to reduce prey to far below what is necessary for the species. *See* AR 47201–02, 47278, 47439–41, 47503, 47507. NMFS found that, absent other measures, these fisheries will "**adversely affect designated critical habitat**" of Southern Residents. AR 47507 (emphasis added). That finding should require the imposition of reasonable alternatives under the ESA. 16 U.S.C. § 1536(b)(3)(A). Instead of imposing such alternatives, NMFS approved the maximum harvests contemplated in the 2019 Pacific Salmon Treaty based on an assumption that it will be able to develop mitigation plans before Southern Residents go extinct. *See* AR 47201–02, 47498–47501 (mitigation also needed to preserve Puget Sound Chinook salmon). NMFS's reliance on this undeveloped and poorly-defined mitigation violates the ESA.

To satisfy ESA section 7's duty to "insure" no jeopardy, NMFS 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); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (*NWF III*), 184 F. Supp. 3d 861, 914 (D. Or. 2016). The Ninth Circuit has adopted strict standards:

> Mitigation measures . . . 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

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> mitigation measures cannot refer only to generalized contingencies or gesture at 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) (internal citations and quotations omitted); *see also NWF II*, 524 F.3d at 935–36 (there must be "specific and binding plans" for the mitigation). The proposed funding initiative relied upon by NMFS in formulating the 2019 SEAK BiOp is dramatically deficient under these standards.

a. <u>The mitigation lacks specific and binding plans</u>.

The mitigation measures relied upon by NMFS lack specific and binding plans. *E.g.*, AR 47203 ("[t]he **specific details** of how the three activities for which funding would be used **have not been developed**" (emphasis added)). This vagueness undermines an analysis of whether the mitigation will be sufficient to satisfy the "no jeopardy" standard of section 7 of the ESA. *See Bernhardt*, 982 F.3d at 743 (mitigation must satisfy the jeopardy and adverse modification standards). Further, the lack of specific "deadlines or otherwise-enforceable obligations" frustrates a determination as to whether the mitigation contemplated in the 2019 SEAK BiOp is being implemented. Agencies are required to reinitiate consultation when mitigation is not implemented and they can become liable under the ESA for take. *Id.* at 743–44. Mitigation that is too vague undermines that structure and cannot be relied upon to satisfy they ESA. *Id.*

The "prey increase" proposal to fund production of 20 million hatchery smolts annually is devoid of specifics. *See* AR 47202–03, 47315, 47432–33. The only detail available is that the mitigation must "increase prey availability by 4-5 percent in areas that are most important to [Southern Residents]." AR 47202–03, 47315. NMFS knows the outcome needed to support its "no jeopardy" opinion, **but there is no plan whatsoever** for achieving that outcome; e.g., what hatcheries will be used; what hatchery stocks will be used; who will operate the programs; where the fish will be released; the age of fish released; the smolt to adult return ratio; the number of fish needed for broodstock; or when, where, or how many salmon will be available to the Southern Residents. *See, e.g.*, AR 47315 (mitigation "is less well defined and does not lend itself to further specification"); AR 47433 ("the details needed to conduct site-specific assessments

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have not been worked out"). The mitigation is exceedingly less-defined than that rejected in *Bernhardt*, where a specific entity was to conduct annual surveys for polar bears dens within a specified radius, but that mitigation still lacked sufficient detail. 982 F.3d at 744–46.

Instead of describing the details of how this mitigation will be implemented as required, the 2019 SEAK BiOp directs NMFS to come up with a plan: "NMFS shall design the prey increase program using the best available information . . . ." AR 47525. 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." AR 47433. This is glaringly contrary to the Ninth Circuit's explicit holding that a BiOp cannot rely on undeveloped "hopeful plans" in lieu of "describe[ing], in detail, [NMFS's] plan to offset" impacts. *Bernhardt*, 982 F.3d at 743; *see also NWF III*, 184 F. Supp. 3d at 913 (rejecting BiOp's reliance on "unidentified projects" to be implemented by others); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1004 (D. Ariz. 2011) (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."); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1154 (D. Ariz. 2002) (rejecting reliance on undeveloped plans that would "identify the necessary mitigation").[3]

Reliance on the "prey increase" proposal is also impermissible because the mitigation is not subject to "deadlines or otherwise-enforceable obligations." *See Bernhardt*, 982 F.3d at 743. Notably, the 2019 SEAK BiOp does not include any deadlines whatsoever for this mitigation, nor does it include specific requirements by which to confirm that the mitigation is being implemented in the manner and on the schedule needed to avoid the extinction of Southern Residents. *See* AR 47525–26. Instead, NMFS vaguely admits that the mitigation "is not anticipated to be implemented immediately." AR 47435; *see also* AR 47203 (2019 SEAK BiOp noting that if "funding is not provided in time for actions to take effect during the [10-year] agreement" set in the 2019 Pacific Salmon Treaty, that "**may** constitute a modification" requiring

[3] "District courts in this circuit follow the standard [for reliance on mitigation] articulated by *Rumsfeld*. *Bernhardt*, 982 F.3d at 743 n.6.

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new ESA consultation (emphasis added)). Reliance on such "vague" and "indefinite" mitigation measures is inconsistent with the ESA. *See Bernhardt*, 982 F.3d at 743–44.

The mitigation proposal to provide funding to four Puget Sound conservation hatcheries is also too ill-defined for reliance under ESA section 7. Remarkably, NMFS cannot even confirm that additional fish will be produced. AR 47420 (funding will "most likely include increased production"). NMFS does not specify how the funds will be spent; how many additional fish could be produced; where fish would be released; the age of fish released; the number of adult fish needed for broodstock; or when, where, or how many adult salmon could be made available to Southern Residents or to aid recovery of Puget Sound Chinook salmon. *See* AR 47420–27. NMFS has thus failed to describe, in detail, how funding these four conservation hatcheries would mitigate harvest impacts. *Bernhardt*, 982 F.3d at 743. This mitigation also does not meet the Ninth Circuit's standards because the 2019 SEAK BiOp **lacks any** "deadlines or otherwise-enforceable obligations" to guide this supposed mitigation as required under the ESA. *See id*.

With respect to the habitat restoration component of mitigation, NMFS admits that "while a list of potential habitat restoration projects . . . exists, it has not been decided which projects would be funded . . . ." AR 47203; *see also* AR 47420 ("site specific details" for habitat restoration "are not yet available"). Moreover, even the "original project [sic] listed may change." AR 47427. NMFS does not provide any details about which projects will be implemented, who will implement them, when they would be implemented, or, most importantly, the extent to which they would mitigate harvest impacts. *See* AR 47427–32. The Ninth Circuit has rejected such reliance on lists of "'possible' strategies, without selecting a mitigation measure from the incorporated list or committing [the agency] to carrying out any specific number of measures." *Bernhardt*, 982 F.3d at 746; *see also Salazar*, 804 F. Supp. 2d at 1002 (cannot rely on a "laundry list of possible mitigation measures" (quoting *Rumsfeld*, 198 F. Supp. 2d at 1153)). Separately, reliance on the habitat projects is impermissible because there are absolutely no "deadlines or otherwise-enforceable obligations." *See Bernhardt*, 982 F.3d at 743.

In sum, the mitigation does not meet applicable standards because there are no details for

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implementation, nor is the mitigation subject to deadlines or otherwise-enforceable obligations.

b. <u>The mitigation is not subject to NMFS's control or otherwise reasonably certain to be fully and timely implemented</u>.

NMFS's reliance on the mitigation is also, and independently, impermissible under the ESA because the mitigation is not subject to NMFS's "control or otherwise reasonably certain to occur." *See Bernhardt*, 982 F.3d at 743; *NWF II*, 524 F.3d at 935–36 n.17.

NMFS does not intend to implement any mitigation itself; instead, it intends to develop a "grant program" to provide funding to others for the hatchery and habitat projects. *E.g.*, AR 47447; AR 47201–02, 47433 (NMFS intends to work with "state and tribal co-managers," which operate hatcheries, to develop mitigation). However, NMFS's administrative record **does not contain a single commitment, legal or otherwise, to implement mitigation** from any entity that would be responsible for implementation; i.e., Tribes, States (Washington, Oregon, and Idaho), and FWS. NMFS's record does not even contain communications from those entities indicating that they have the capacity or ability to implement the projects. There is nothing in the record to support a finding that the mitigation is subject to NMFS's "control or otherwise reasonably certain to occur," and NMFS's reliance on the mitigation is therefore inconsistent with Ninth Circuit precedent. *See Bernhardt*, 982 F.3d at 743; *NWF II*, 524 F.3d at 935–36 n.17; *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987) ("This reliance on the proposed actions of others does not satisfy [the agency's] burden of insuring that its actions will not jeopardize . . . species" (quotation, citations, and original alterations omitted)); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (*NWF I*), 254 F. Supp. 2d 1196, 1213–14 (D. Or. 2003) (reliance on mitigation to be implemented by third-parties, States and Tribes, where there was no authority or binding agreements to compel implementation, was impermissible). Further, "there is a degree of uncertainty regarding whether Congress will [timely] provide the [mitigation] funding, in whole or in part . . . ." AR 47203.

Additionally, the hatchery components of mitigation lack the requisite "solid guarantees that they will actually occur" in the time and manner contemplated by NMFS because they

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require review and approval under the ESA and NEPA. *See NWF II*, 524 F.3d at 935; *NWF I*, 254 F. Supp. 2d at 1208, 1213–16 (NMFS improperly relied on mitigation that had not undergone ESA consultation, including habitat and hatchery measures). NMFS cannot rely on these proposals because, as the Tribes explained in *NWF I*, the mitigation "may never occur, may be substantially modified, or may be found to jeopardize the species upon closer scrutiny during future [ESA] consultation." 254 F. Supp. 2d at 1208.

NMFS has long-recognized that hatcheries harm wild salmonids. *See, e.g.*, *NWF II*, 524 F.3d at 935 ("NMFS explicitly found that continued reliance on the hatchery operation itself threatens [the salmon's] chances of recovery . . . ."). Hatchery production is already suppressing recovery of salmonids, including Puget Sound and Lower Columbia River Chinook salmon. *See supra* sec. IV.B. NMFS's proposal to fund even more hatchery production would exacerbate that harm and requires further ESA consultation. AR 47420 (funding Puget Sound Chinook salmon conservation hatcheries requires "further consultation once the site specific details are fully described"), 47433 ("Once the details are known" for the prey increase program, "NMFS would complete site-specific [ESA] consultations.").

ESA consultation on these hatchery programs may determine that they are likely to jeopardize species. *See* 16 U.S.C. § 1536(a)(2). That would preclude implementation unless NMFS is able to prescribe "reasonable and prudent alternatives," such as smaller programs. *Thomas*, 753 F.2d at 763; 16 U.S.C. § 1536(b)(3)(A). Further, any BiOp will include terms to minimize impacts to threatened salmonids, which could alter the hatchery programs as contemplated. *See Thomas*, 753 F.2d at 763; 16 U.S.C. § 1536(b)(4)(ii). Notably, the Mitchell Act BiOp requires that numerous hatcheries **reduce** annual releases into the Columbia River by 2022 by nearly two million Chinook salmon to protect ESA-listed salmonids. *See* AR 13267–72. NMFS cannot rely on hatcheries as mitigation because the programs may be modified or rejected when reviewed under the ESA. *See NWF I*, 254 F. Supp. 2d at 1208, 1213–16.

NMFS's massive new federal grant program to fund mitigation for the Southeast Alaska salmon harvests is also subject to NEPA. *See* 40 C.F.R. § 1508.18(a); *Alaska v. Andrus*, 591 F.2d

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537, 540 (9th Cir. 1979) (federally funded projects subject to NEPA); *see also Ramsey v. Kantor*, 96 F.3d 434, 443–44 (9th Cir. 1996) (ESA take authorizations also trigger NEPA requirements).[4] NMFS already violated NEPA by adopting the hatchery mitigation identified in the 2019 SEAK BiOp without first providing any NEPA procedures. *See infra* sec. VI.C.2; *Metcalf v. Daley*, 214 F.3d 1135, 1138, 1143–44 (9th Cir. 2000) (NMFS, et al., unlawfully predetermined NEPA by committing to support a specific harvest quota before preparing EIS or EA).

When NMFS does comply with NEPA for the hatchery mitigation, it will be required to consider reasonable alternatives, including smaller hatchery releases that pose less harm to wild salmonids. *See Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1110 (D. Or. 2014) (NMFS violated NEPA by failing to consider smaller hatchery releases); *Wild Fish Conservancy v. Nat'l Park Serv.*, 8 F. Supp. 3d 1289, 1299–1301 (W.D. Wash. 2014) (same); *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) ("touchstone" of NEPA is proper "selection and discussion of alternatives [to] foster[] informed decision-making"). NMFS cannot provide "solid guarantees" that the hatchery programs will occur as contemplated in the 2019 SEAK BiOp because NMFS has yet to disclose and evaluate alternatives as required by NEPA; reliance on this mitigation is therefore impermissible. *See NWF II*, 524 F.3d at 935.

NMFS's reliance on the mitigation proposals is impermissible because they are not subject to its "control or otherwise reasonably certain to occur." *Bernhardt*, 982 F.3d at 743.

2. <u>The 2019 SEAK BiOp fails to draw a rational connection between the facts and the no jeopardy opinion reached for Southern Residents</u>.

NMFS is required to articulate a rational connection between the facts found and its "no jeopardy" conclusions reached. *E.g.*, *WFC*, 628 F.3d at 525–27; *NWF III*, 184 F. Supp. 3d at 909–10 (BiOp "must provide sufficient information so that a reviewing court can educate itself in order to perform its reviewing function—'determining whether the agency's conclusions are rationally supported'" (quotation omitted)). NMFS has failed to meet this standard because it has

[4] *See also Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1107–09 (D. Or. 2014) (NMFS's approval of hatcheries under ESA regulations is subject to NEPA).

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not explained how the Southeast Alaska salmon harvests, combined with other west coast fisheries, will not continue to starve Southern Residents into extinction, regardless of whether the hypothetical mitigation is implemented. This deficiency is exacerbated by NMFS's apparent failure to account for increases in harvests that would result from the prey increase program, reducing any benefits to Southern Residents.

In *WFC*, a BiOp that found a local bull trout population was small and vulnerable to extirpation, was declining in size, and was likely to continue declining primarily due to the hatchery operations under review. 628 F.3d at 525–26. FWS nonetheless concluded that the hatchery would not jeopardize bull trout. *Id.* at 526–27. The Ninth Circuit rejected the BiOp because FWS failed to explain the apparent contradiction between the factual findings and the "no jeopardy" opinion. *Id.* at 527–29. While FWS may have believed that the population could be lost without jeopardizing the entire bull trout species, a BiOp can be affirmed only on the bases articulated by the agency and FWS's record did not include such a finding. *Id.* at 529.

The 2019 SEAK BiOp suffers from this same deficiency. NMFS considers Southern Residents one of the species most at risk of extinction. AR 15988–89. "[T]he Southern Resident population has declined to historically low levels," primarily because insufficient prey abundance is reducing fecundity. AR 47276, 47282, 47286–87, 47434. NMFS's management of salmon fisheries over the last 10 years has been insufficient to support Southern Resident population growth. AR 47503. NMFS predicts that the "downward trend in population growth" for Southern Residents will continue. AR 47502.

A recent population viability assessment found prey abundance has the largest impact on the Southern Residents' population growth rate and Chinook salmon abundance would need to increase by 15% to achieve growth rate targeted for recovery of Southern Residents. AR 47278, 47503. NMFS does not identify the increase needed to merely sustain the severely depressed population size. The 2019 Pacific Salmon Treaty somewhat reduced salmon harvests relative to the prior agreement. *E.g.*, AR 47445, 47504. Those reductions provide very minor improvements in prey availability; e.g., prior Southeast Alaska harvests reduced prey in coastal waters up to

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15.1%, while those harvests under the 2019 Pacific Salmon Treaty will reduce prey in coastal waters up to 12.9%. AR 47505. While NMFS assumes that the prey increase program will eventually increase prey by 4% to 5%, that is far below the 15% increase needed for recovery. *See* AR 47202–03. Yet, NMFS concludes that the Southeast Alaska salmon harvests, along with other west coast fisheries, are not likely to jeopardize Southern Residents. AR 47508. NMFS fails to draw a rational connection between that conclusion and the facts found, including the fact that Southern Resident population size is expected to continue declining primarily due to inadequate prey. *See* AR 47502; *WFC*, 628 F.3d at 525–29.

This failure is aggravated by NMFS's complete failure to explain the assumption that releasing 20 million hatchery smolts annually will increase Southern Residents' prey by 4% to 5%. *See* AR 47202–03, 47432–33. It is unclear whether that assumption accounts for increased harvests that will also result. Harvests are set annually under the 2019 Pacific Salmon Treaty for Southeast Alaska, North-Central British Columbia, and West Coast Vancouver Island using an abundance index. *See* AR 47205–09. The abundance index reflects the predicted abundance of Chinook salmon available to the fisheries where an index of 1.0 equals the average abundance from 1979 to 1982, and an index of 1.2 is 20% greater. AR 47205. Harvest limits increase with abundance index increases. *See* AR 47208. Hatchery releases will increase the abundance index; as a crude example, using a smolt to adult ratio of 0.7%, an annual release of 20 million smolts could produce 140,000 adult fish that could be included in the abundance index. *See*, *e.g.*, AR 30609 (smolt to adult ratios in the range of 0.5% to 1.0%). That would raise an abundance index of 1.0 (around 1,235,020 salmon) to 1.1 (around 1,375,020 salmon), increasing harvests from 390,500 salmon (1.0 abundance index) to 462,500 salmon (1.1 abundance index); an increase in harvest of 72,000 salmon. *See* AR 47208. Under this scenario, over half of the 140,000 adult salmon produced by the prey increase program could be harvested and not benefit Southern Residents. NMFS's record does not provide "sufficient evidence" to show that it considered this critical issue. *See NWF III*, 184 F. Supp. 3d at 909–10; *Nw. Coal. for Alts. to Pesticides v. U.S. Env't Prot. Agency*, 544 F.3d 1043, 1052 (9th Cir. 2008) (agency failed to provide enough

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information to demonstrate a rational connection between the facts and its conclusion).

In sum, NMFS has failed to draw a rational connection between the facts, including its predicted continued decline of Southern Residents, and the "no jeopardy" conclusion.

3. The 2019 SEAK BiOp violates the ESA by failing to evaluate whether the prey increase program will jeopardize threatened salmonids.

NMFS identified the prey increase program as an "action" consulted on in the 2019 SEAK BiOp because it needed to assume the benefits to approve the Southeast Alaska harvests. Yet, the 2019 SEAK BiOp altogether ignores the prey increase program in evaluating whether the "actions" are likely to jeopardize threatened salmonids. That is inconsistent with the ESA.

a. The 2019 SEAK BiOp includes benefits of the prey increase program in its jeopardy analysis for Southern Residents.

NMFS explains that the prey increase program was developed because the 2019 Pacific Salmon Treaty did not reduce harvests enough to protect Southern Residents. *See* AR 47201–02. The 2019 SEAK BiOp contends that enough information is available to assume the supposed benefits of that program to Southern Residents: "Some effects of the [mitigation] funding initiative can be described specifically and analyzed quantitatively now (e.g., increasing in prey abundance for [Southern Residents] by 4-5 percent)." AR 47420; *see also* AR 47432, 47447. NMFS's biological opinion that the actions addressed in the 2019 SEAK BiOp are not likely to jeopardize Southern Residents relies upon the supposed benefits of the prey increase program. *See* AR 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).[5]

b. The 2019 SEAK BiOp ignores harm from the prey increase program in its jeopardy analyses for threatened salmonid.

In contrast to the supposed beneficial impacts, NMFS altogether ignores the prey increase program and its harmful impacts in its jeopardy analyses for threatened salmonids.

NMFS explains that it is unable to analyze harm to threatened Chinook salmon from the

[5] NMFS's jeopardy analyses and opinions are in the "Integration and Synthesis" section of the 2019 SEAK BiOp. AR 47484–85.

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prey increase program in any detail because the program is too undeveloped. AR 47420. The discussion of such effects is barely half a page; NMFS expects of "a range of effects" similar to the Puget Sound conservation hatcheries proposed as a separate mitigation component. AR 47432–33. NMFS also lacks sufficient information to conduct a detailed analysis of the conservation hatcheries and instead provides a generic summary of concerns associated with artificial propagation programs in general. AR 47420–27.

NMFS's analyses of whether the actions addressed in the 2019 SEAK BiOp are likely to jeopardize four threatened Chinook salmon ESUs **omits the prey increase program altogether**. AR 47485–47501. Thus, the 2019 SEAK BiOp **does not include NMFS's biological opinion** as to whether the prey increase program is likely to jeopardize the threatened Puget Sound, Lower Columbia River, Upper Willamette, and Snake River Fall-Run Chinook salmon ESUs.[6]

Similarly, NMFS omits the prey increase program when addressing impacts to other threatened salmonids—i.e., those not caught in the Southeast Alaska fishery—such as threatened Lower Columbia River steelhead and Puget Sound steelhead. *See* AR 47528–31.[7] The 2019 SEAK BiOp concludes that the "actions" "are not likely to adversely affect" any salmonid species that is not caught in the Southeast Alaska salmon fishery. AR 47528. When such a determination is made, there is no formal consultation under section 7 of the ESA and NMFS does not issue a BiOp determining whether the action is likely to jeopardize the species. *See* 50 C.F.R. § 402.14(b). In concluding that the actions addressed in the 2019 SEAK BiOp are "not likely to adversely affect" numerous threatened salmon species, NMFS considers the salmon harvests only, completely omitting the prey increase program as an "action." *See* AR 47528–31.

c. <u>The 2019 SEAK BiOp's failure to evaluate whether the prey</u>

[6] In contrast, NMFS provides a cursory analysis of impacts to threated Puget Sound Chinook salmon from the conservation hatchery mitigation component. AR 47498–99. In doing so, NMFS explains that it has "consider[ed] in this opinion the effects of the [Southeast Alaska] fishery . . . and the effects of the conservation funding initiative," thereby admitting that its "no jeopardy" opinion for Puget Sound Chinook salmon does not account for the harmful impacts from the prey increase program. AR 47500.

[7] The prey increase program will, unquestionably, adversely affect salmonids species in addition to the four Chinook salmon ESUs caught in the Southeast Alaska fishery. *See, e.g.*, AR 30641–46 (NMFS's BiOp describing take of threated Puget Sound steelhead from Chinook and coho salmon programs).

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increase program may jeopardize salmonids violates the ESA.

The 2019 SEAK BiOp is inconsistent with the ESA and implementing regulations because it does not include analyses or opinions on whether the prey increase program is likely to jeopardize threatened salmonids. Instead, NMFS's impermissibly segmented consultation by assuming benefits of the prey increase program in its jeopardy analysis for Southern Residents, while omitting the program altogether in its jeopardy analyses for threatened salmonids.

The central function of consultation under section 7 of the ESA is formulation of NMFS's biological opinion as to whether proposed actions will jeopardize species or adversely modify their critical habitat. *See Thomas*, 753 F.2d at 763; 16 U.S.C. § 1536(b)(3)(A) ("Promptly after conclusion of consultation . . . , [NMFS] shall provide . . . a written statement setting forth [NMFS's] opinion . . . . If jeopardy or adverse modification is found, [NMFS] shall suggest . . . reasonable and prudent alternatives . . . ."). The ESA implementing regulations provide:

> 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) (emphasis added); *see also* 50 C.F.R. § 402.14(g)(4) (NMFS must "formulate [its] opinion as to whether the action is likely to jeopardize . . . listed species or result in . . . adverse modification of critical habitat."). The Ninth Circuit has reiterated this fundamental requirement of a BiOp: "[d]uring 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) (emphasis added) (quoting 50 C.F.R. § 402.14(g)(4)); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004) ("The first requirement of an ESA BiOp is to determine whether the proposed action is likely to jeopardize . . . species."). The 2019 SEAK BiOp is not in accordance with the ESA because it lacks any analyses or opinions on whether the prey increase program is

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likely to jeopardize ESA-listed salmonids, including the Chinook salmon affected by the Southeast Alaska salmon fisheries and other salmonid species affected by the hatcheries.

Further, by including benefits of the prey increase program in the jeopardy analysis for Southern Residents, but entirely omitting the program from the jeopardy analysis for threatened salmonids, NMFS impermissibly segmented its consultation on this program. *See Conner v. Burford*, 848 F.2d 1441, 1453–58 (9th Cir. 1988). "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." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1150 (W.D. Wash. 2000). Regardless of uncertainties, NMFS cannot "'ignore available biological information [and] fail to develop projections' which may indicate potential conflicts between the proposed action and the preservation of endangered species." *See id.* at 1150 (quoting *Conner*, 848 F.2d at 1454) (rejecting NMFS's argument that a lack of information prevented further analysis); *NWF II*, 524 F.3d at 936 (NMFS improperly relied on hatcheries as mitigation without also considering the "impact of prolonging the [salmon's] hatchery dependence on its eventual prospects for recovery.").

The BiOp in *Conner* purported to address issuance of leases for oil and gas exploration and "all resulting subsequent activities." 848 F.2d at 1453. However, the BiOp "concluded that there was insufficient information pertaining to specific location and extent of post-leasing . . . activities to render a comprehensive [BiOp] beyond the initial lease stage." *Id.* The BiOp therefore contemplated an "incremental-step" process where future ESA consultations would occur. *Id.* at 1452. The Ninth Circuit held that FWS "violated the ESA by failing to use the best information available to prepare comprehensive [BiOps] considering all stages of the agency action, and thus failing to adequately assess whether the agency action was likely to jeopardize [ESA-listed species] as required by section 7(a)(2)." *Id.* at 1454. Regardless of "incomplete information," the BiOp must use "available biological information" and "develop projections" to "assess whether [all phases of] the agency action [are] likely to jeopardize . . . species . . . ." *Id.* The "incremental-step" process would allow the "piecemeal chipping away" of species. *Id.*; *see*

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also WFC, 628 F.3d at 521–25 (rejecting temporal segmentation of effects analysis).

As in *Conner*, the 2019 SEAK BiOp violates the ESA because it "pay[s] lip service" to the requirement to prepare a comprehensive BiOp by including the prey increase program as an "action," without analyzing whether the program will jeopardize ESA-listed salmonids. 848 F.2d at 1453; *see also Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255 (D.D.C. 2003) ("ESA requires that all impacts of agency action—both present *and* future effects of species—be addressed in the consultation's jeopardy analysis"). NMFS thereby violated the ESA by failing to prepare a comprehensive BiOp using available information and making projections, as necessary, to evaluate whether the prey increase program may jeopardize salmonid species. NMFS instead relied entirely on future "site-specific consultations" akin to the "incremental-step" consultations rejected in *Conner*. *See* AR 47433.

NMFS's inclusion of the prey increase program as an "action" in the 2019 SEAK BiOp, without evaluating whether it jeopardizes threatened salmonids, has significant consequences. First, NMFS believes that hatcheries may be appropriate to "alleviate short-term extinction risks," but must otherwise be limited to protect wild salmonids. AR 47422. Yet, NMFS's "no jeopardy" opinion for Southern Residents relies on the prey increase program to provide "long-term" benefits. AR 47506. Second, actions that have undergone consultation are assumed in the "environmental baseline" for future consultations. 50 C.F.R. § 402.02 (defining "environmental baseline"). The 2019 SEAK BiOp explains that the benefits of the prey increase program will be assumed in the baseline in future consultations on other fisheries that affect Southern Residents. AR 47203–04. Thus, NMFS seeks to authorize harvests all along the west coast that will deprive Southern Residents of prey in reliance on the prey increase program before even evaluating whether that increased hatchery production will jeopardize ESA-listed salmonids.

NMFS's failure to make a jeopardy determination on the prey increase program—an "action" included in the 2019 SEAK BiOp—for ESA listed salmonids violates the ESA. *See*, *e.g.*, 50 C.F.R. § 402.14(g)(4), (h)(1)(iv); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d at 1107.

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4. The ITS fails to adequately limit take of Southern Residents.

The ITS in 2019 SEAK BiOp authorizes whatever amount of take of Southern Residents happens to result due to harvests set under the 2019 Pacific Salmon Treaty. AR 47519. This is an impermissible limit on take, as the limit is coextensive with the action subject to the consultation. *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1038–41 (9th Cir. 2007); *see* Dkt. 14, at 26–28.

B. NMFS Failed to Ensure Its Actions Do not Jeopardize ESA-Listed Species.

Section 7 of the ESA imposes a substantive duty on NMFS to ensure that any action it authorizes or funds is not likely to jeopardize species or destroy critical habitat. *See* 16 U.S.C. § 1536(a)(2). NMFS is in violation of that obligation because NMFS is relying on the 2019 SEAK BiOp, which contains the legal flaws discussed above, to support its continued authorization of and funding for management of salmon fisheries in Southeast Alaska and to support its funding of new hatchery production as supposed mitigation. *See WFC*, 628 F.3d at 532.

C. NMFS Violated NEPA by Failing to Prepare an EIS or an EA and FONSI.

NMFS violated NEPA by failing to conduct any NEPA analysis for its authorization of take resulting from the 10-year fishery regimes set in the 2019 Pacific Salmon Treaty. NMFS further violated NEPA by adopting the prey increase program without NEPA processes.

1. NMFS's failure to complete NEPA for its authorization of take by the 2019 Pacific Salmon Treaty fisheries is not in accordance with law.

The Ninth Circuit held in 1996 that NMFS violated NEPA by failing to prepare an EA or an EIS "*before* issuing" an ITS authorizing take associated with salmon fisheries. *Ramsey*, 96 F.3d at 443–44 (emphasis in original). Inexplicably, NMFS disregarded *Ramsey* and issued the ITS in the 2019 SEAK BiOp, authorizing take associated with Southeast Alaska salmon fisheries under the 2019 Pacific Salmon Treaty, without any NEPA process. Under the unequivocal holding in *Ramsey*, that violated NEPA. *See id.*

NMFS's ITS in *Ramsey* authorized take associated with salmon fisheries under the Columbia River Fish Management Plan, a "federal-state-tribal compact that controls . . . harvests for fish that enter the Columbia River system." *Id.* at 438. Like the Pacific Salmon Treaty, the

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plan did not directly regulate fisheries; state fishery rules were enacted consistent with the plan. *Id.* at 438, 444. Like the 2019 SEAK BiOp, the BiOp in *Ramsey* was the result of an intra-agency consultation; NMFS was both the federal action agency involved in preparing the plan and the ESA consulting agency issuing the BiOp. *Id.* at 438–39. NMFS was required to prepare an EA or EIS because the ITS "is the functional equivalent to a permit because the activity in question would, for all practical purposes, be prohibited but for the [ITS]." *Id.* at 444. NEPA compliance rested with NMFS in its capacity as the ESA consulting agency issuing the ITS because "there was no downstream federal agency [implementing the project] to complete an EIS." *Jewell*, 747 F.3d at 643–44 (explaining *Ramsey*). Rather, Washington and Oregon, which are not subject to NEPA, implement the fishery through rules; "[i]f the consulting agency, the NMFS, did not comply with the EIS requirement in *Ramsey*, then the action would have evaded NEPA review altogether . . . ." *Id.* at 644.

NMFS responded to *Ramsey* with a 2003 programmatic EIS covering several fisheries, including the Southeast Alaska salmon fisheries, explaining:

> 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.

AR 47948, 47952–53. The federal actions subject to the EIS included NMFS's ITS authorizing take associated with Southeast Alaska fisheries under the 1999 Pacific Salmon Treaty (through 2008) and the "continued deferral of management [over the fisheries] to the State" of Alaska. AR 47953. NMFS recognized that it would be required to comply with NEPA even if it authorized take associated with the fisheries under section 10 of the ESA, applicable to non-federal actions, instead of section 7 of the ESA, which applies only to federal actions. *Id.*

The ITS issued with the 2019 SEAK BiOp is identical, in all relevant aspects, to that in *Ramsey*. This new ITS applies to fisheries that "incidentally take[] salmon that are listed" under the ESA; specifically, Southeast Alaska fisheries from 2019 through 2028 under the 2019 Pacific

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Salmon Treaty. *Ramsey*, 96 F.3d at 444; AR 47518. The ITS was the result of an intra-agency consultation; i.e., NMFS consulted on its own actions, including its disbursement of funds to Alaska to manage the fisheries under the 2019 Pacific Salmon Treaty. AR 47197–47204; *see also* 16 U.S.C. § 1536(a)(2) (requiring consultation under ESA section 7 for actions "authorized, funded, or carried out" by a federal agency). Alaska implements the fisheries through state rules, so there is no "downstream federal agency to complete an EIS." *Jewell*, 747 F.3d at 644. NMFS was therefore required to comply with NEPA as the consulting agency authorizing take associated with fisheries under the 2019 Pacific Salmon Treaty; otherwise, "the action would . . . evade[] NEPA review altogether . . . ." *Id.* NMFS violated NEPA by failing to prepare an EA or and EIS for the fisheries "*before* issuing the [ITS]." *Ramsey*, 96 F.3d at 444.

2. NMFS's failure to complete NEPA for its adoption of a new federal grant program to fund hatcheries is not in accordance with law.

NMFS further violated NEPA by adopting the federal grant program for new hatchery production described in the 2019 SEAK BiOp without first preparing an EIS or even an EA.

As discussed, the Ninth Circuit explained in *Jewell* circumstances under which NMFS is required to comply with NEPA in its role as an ESA consulting agency issuing an ITS. 747 F.3d at 643–45. The court went on to explain that, when the action subject to ESA consultation is undertaken by a federal agency, that action agency's adoption and implementation of the BiOp is subject to NEPA. *Id.* at 645–46; *see also NWF III*, 184 F. Supp. 3d at 935 ("In *Jewell*, the Ninth Circuit held clearly and explicitly, for the first time, that action agencies adopting a [decision] implementing a biological opinion generally *must* prepare an EIS.").

In *Jewell*, FWS issued a BiOp concluding that the Bureau of Reclamation's continued operations of a water project jeopardizes a species and the BiOp therefore identified reasonable and prudent alternatives to avoid jeopardy; i.e., alternative operations that reduce water exported from northern to southern California. 747 F.3d at 592. Reclamation would be subject to liability under section 9 of the ESA for take of listed species if it chose to deviate from the BiOp's reasonable and prudent alternatives. *Id.* at 642–43. "Reclamation . . . notified the FWS that it

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intends to operate the Projects in compliance with the biological opinion." *Id.* at 592. The Ninth Circuit held that Reclamation's "provisional adoption and implementation of the BiOp triggered its obligation to comply with NEPA." *Id.* at 642; *see also NWF III*, 184 F. Supp. 3d at 933 (Reclamation and Army Corps of Engineers' decisions "adopting and implementing [NMFS's] 2014 BiOp [for operations of the Federal Columbia River Power System] triggered those agencies' obligations to comply with NEPA."). An exception to this requirement may apply where the action addressed in the BiOp does not change the status quo, but the BiOp in *Jewell* resulted in material changes to operations and thus triggered NEPA. 747 F.3d at 646.

NEPA applies to NMFS's adoption of the prey increase program in the same manner as it did to Reclamation's adoption of the reasonable and prudent alternatives in *Jewell*. The consulting agency—FWS—proposed the reasonable and prudent alternatives in *Jewell* as alternatives to Reclamation's proposal to ensure that the action does not jeopardize species. 747 F.3d at 592, 642–43. Similarly, NMFS included the prey increased program in the 2019 SEAK BiOp as an additional action it would implement to ensure that the fisheries would not result in jeopardy or adverse modification. *E.g.*, AR 47506–07. Reclamation needed to comply with the reasonable and prudent alternatives outlined in the BiOp in *Jewell* to be immune from liability under section 9 of the ESA. 747 F.3d at 642–43. NMFS is likewise required to implement the prey increase program included as mitigation/conservation measures in the 2019 SEAK BiOp to be immune from liability for under section 9 of the ESA. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1113–15.

Under the Ninth Circuit's precedent in *Jewell*, NMFS violated NEPA by failing to prepare an EIS or an EA before the agency's "provisional adoption and implementation of the [2019 SEAK] BiOp . . . ." 747 F.3d at 601, 642 ("We affirm the district court's judgment that Reclamation failed to comply with NEPA before implementing FWS's BiOp."); *NWF III*, 184 F. Supp. 3d at 948 (granting summary judgment where "Action Agencies failed to comply with NEPA" prior to adoption of BiOp). NMFS has unquestionably adopted the 2019 SEAK BiOp's actions, as it is both the action agency that developed the actions for consultation, including the

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prey increase program, and the consulting agency that issued the 2019 SEAK BiOp on the actions. NMFS has also moved forward seeking to implement the prey increase program. Dkt. 43-4 ¶¶ 10, 14–17; Dkt. 43-5 ¶¶ 5–11; *see also* Second Decl. of Brian A. Knutsen, Exhibit 1.[8]

3. Conclusion on NMFS's Failure to Comply with NEPA.

"NEPA does not set out substantive environmental standards, but instead establishes 'action-forcing' procedures that require agencies take a 'hard look' at environmental consequences." *Metcalf*, 214 F.3d at 1141 (quoting *Robertson*, 490 U.S. at 348). "Proper timing is [therefore] one of NEPA's central themes. An assessment must be 'prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'" *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (quoting 40 C.F.R. § 1502.5). Further, the "touchstone" of NEPA is proper "selection and discussion of alternatives [to] foster[] informed decision-making." *California v. Block*, 690 F.2d at 767; *see also Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998); 40 C.F.R. § 1502.1. NEPA therefore prohibits agencies from making any "irreversible and irretrievable commitment of resources," or taking any action that would "[l]imit the choice of reasonable alternatives" or "[h]ave an adverse environmental impact," before NEPA procedures are complete. *Metcalf*, 214 F.3d at 1144; 40 C.F.R. § 1506.1(a).

NMFS violated these requirements and undermined NEPA's intent by issuing the 2019 SEAK BiOp without first preparing an EIS or an EA. In issuing the ITS, NMFS decided to authorize take of Chinook salmon from fisheries at levels it predicts will continue to suppress Southern Residents and Puget Sound Chinook salmon. In an effort to mitigate that harm, NMFS developed the prey increase program; a program with doubtful benefits for Southern Residents and certain harmful impacts to threatened salmonids. These decisions constituted irreversible commitments of resources and have caused environmental harm; e.g., the fisheries irretrievably

[8] The Court should consider extra-record material generated after the 2019 SEAK BiOp that shows NMFS is seeking to implement the actions. Such consideration is appropriate because this claim alleges that NMFS failed to act—i.e., failed to complete NEPA procedures—under 5 U.S.C. § 706(1), and the record for such a claim is not limited to the record as it existed at any single point. *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002).

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took salmon that would otherwise have been available to Southern Residents or to aid wild salmon recovery. These decisions also limited NMFS's reasonable alternatives; namely, the alternative of reduced harvests to protect Southern Residents in lieu of new hatchery production.

NMFS made these decisions without the public disclosure procedures or alternative analyses required by NEPA. Any subsequent NEPA process would simply be to "rationalize or justify decisions [it] already made," which violates NEPA. *See* 40 C.F.R. § 1502.5. Accordingly, NMFS's actions violate NEPA. *See, e.g.*, *Metcalf*, 214 F.3d 1143–45 (NMFS violated NEPA by agreeing to a whaling quota and working to effectuate the agreement before preparing an EA or EIS); *Env't Def. Fund, Inc. v. Andrus*, 596 F.2d 848, 851–52 (9th Cir. 1979) (The failure to prepare an EIS before deciding to allocate 832,000 acre feet of water annually to industrial uses violated NEPA, even though "the details of subsequent use" were not yet known.).

D. The Appropriate Remedies for NMFS's Violations.[9]

1. The 2019 SEAK BiOp, including the ITS, should be vacated.

The 2019 SEAK BiOp, including the ITS, should be vacated, along with NMFS's adoption of the 2019 SEAK BiOp, for NMFS's ESA and NEPA violations.

The APA instructs that a "reviewing court **shall** . . . set aside agency action" that is "arbitrary . . . or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (emphasis added). This provision demands a "presumption of vacatur." *E.g.*, *All. for the Wild Rockies v. U.S. Forest Serv.* (*Wild Rockies*), 907 F.3d 1105, 1121–22 (9th Cir. 2018); *see also E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 856–57 (9th Cir. 2020) ("[O]ur obligation . . . is to vacate the unlawful agency action."). The party seeking to avoid vacatur bears the burden of demonstrating that the Court should invoke its equitable authority to withhold the presumptive statutory remedy of vacatur. *See Wild Rockies*, 907 F.3d at 1121–22 (defendant failed to overcome vacatur presumption); *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of*

[9] The APA provides that a court should determine whether an agency action is "arbitrary and capricious" based on "the whole record," but that limit on the scope of review does not apply to relief issues. *E.g.*, *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1107–08 (N.D. Cal. 2018).

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Eng'rs, 417 F. Supp. 3d 1354, 1369 (W.D. Wash. 2019) ("Because there is a presumption in favor of vacatur, defendants . . . will be the moving parties . . . regarding the appropriate relief for the APA violations discussed above."); *see also Aquall. v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 882 (E.D. Cal. 2018). NMFS cannot meet this burden.

An invalid action will be left in place during a remand "only in limited circumstances" and "only when equity demands." *Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015) (quotations omitted). Two factors are considered: "how serious the agency's errors are 'and the disruptive consequences of an interim change'" that may result from vacatur. *Cal. Cmtys. Against Toxics v. U.S. Env't Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). Vacatur is withheld only if it would cause "serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015). "In balancing these factors in ESA cases, courts will tip the scales in favor of the endangered species under the [statute's] 'institutionalized caution' mandate." *Id.* (quoting *Marsh*, 816 F.2d at 1383); *see also N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1037–38 (D. Mont. 2020).

Violations are generally serious if the remand may result in changes to the agency decision. *E.g.*, *Pollinator Stewardship Council*, 806 F.3d at 532–33 (obtaining adequate studies may lead to different conclusion); *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1243–45; *Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-cv-00431-HA, 2014 U.S. Dist. LEXIS 33365, at *9–10 (D. Or. Mar. 14, 2014); *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, at 1145 (C.D. Cal. 2002). In contrast, "technical" violations where the same result could be reached on remand are generally less serious. *Nat'l Family Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 929 (9th Cir. 2020).

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NMFS's ESA violations are exceedingly serious. The Southern Residents are at a severe risk of extinction due primarily to inadequate Chinook salmon for prey. Decl. of Dr. Deborah Giles, Ph.D ("Giles Decl.") ¶¶ 5, 7 9; Dkt. 14-3 ¶¶ 6, 33; Second Decl. of Dr. Robert Lacy, Ph.D. ("Second Lacy Decl.") ¶¶ 6, 8. Despite the ESA requiring agencies afford endangered species the highest of priorities, NMFS authorized salmon harvest levels that will lead to the Southern Residents' continued slide towards extinction, while gambling on undeveloped mitigation. *See Hill*, 437 U.S. at 185, 194. Even if the mitigation is fully implemented, it would not provide enough prey to support growth of the Southern Residents and, if the mitigation does not produce the maximum benefit hypothesized by NMFS, harvests will continue to reduce prey to levels that cause Southern Residents to decline. Second Lacy Decl. ¶¶ 6, 9, 12–13.

Exacerbating the seriousness of those violations is that the supposed mitigation will suppress recovery of salmonids, but NMFS has not even analyzed the adverse impacts of the mitigation or determined whether it may jeopardize listed salmonids. These are not "technical or procedural formalities," but are instead serious substantive errors that undermine the ESA and cast doubt on NMFS's reaching the result on remand, making the presumptive remedy of vacatur appropriate. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1243–45; *Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 2014 U.S. Dist. LEXIS 33365, at *9–10. Similarly, NMFS's complete failure to study and disclose alternatives and their impacts as required by NEPA is a serious violation that warrants vacatur of the 2019 SEAK BiOp and its ITS. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1245; *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 896–97 (D. Mont. 2020); *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 468 F. Supp. 3d 1148, 1151–52 (D. Alaska 2020); *Wild Fish Conservancy v. Nat'l Park Serv.*, No. C12-5109 BHS, 2014 U.S. Dist. LEXIS 105689, at *7–8 (W.D. Wash. July 31, 2014); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, No. 3:10-CV-01397-SI, 2012 U.S. Dist. LEXIS 190899, at *10 (D. Or. Dec. 10, 2012); *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010).

Courts generally prioritize harm to species and the environment over administrative or

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economic burdens when considering any "disruptive consequences." *E.g.*, *Wild Rockies*, 907 F.3d at 1121–22; *Pollinator Stewardship Council*, 806 F. 3d at 532; *Coal. to Protect Puget Sound Habitat*, 466 F. Supp. 3d at 1126; *N. Plains Res. Council*, 460 F. Supp. 3d at 1038–41; *Peña*, 2015 U.S. Dist. LEXIS 46279, at *12–15; *Wild Fish Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *9–10. Any disruptive consequences from vacatur here are significantly outweighed by NMFS's serious NEPA and ESA errors and by the severe consequences to Southern Residents and Chinook salmon that would occur absent vacatur.

Accordingly, the presumptive remedy of vacatur is appropriate for the 2019 SEAK BiOp.

2. NMFS's prey increase program should be enjoined.

The Court should enjoin NMFS's implementation of the prey increase program until NMFS prepares a BiOp that complies with the ESA and completes required NEPA procedures.[10]

Generally, a plaintiff seeking a permanent injunction must show: (1) it has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (*NWF IV*), 886 F.3d 803, 817 (9th Cir. 2018). However, "Congress intended endangered species to be afforded the highest of priorities" and once Congress has so "decided the order of priorities in a given area, it is . . . for the courts to enforce them . . . ." *Hill*, 437 U.S. at 174, 194. Thus, "[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." *NWF IV*, 886 F.3d at 817; *see also Wash. Toxics Coal. v. Env't Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005) ("the balance of hardships always tips sharply in favor of the . . . threatened species").

Irreparable injury is evaluated with reference to the statute being enforced. *NWF IV*, 886 F.3d at 818. "The 'plain intent' of Congress in enacting the ESA was 'to halt and reverse the

[10] If NMFS would halt the prey increase program in response to vacatur of the 2019 SEAK BiOp, an injunction is not necessary. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010).

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trend toward species extinction, whatever the cost.'" *Id.* (citation omitted). This is achieved through "incremental steps" that include protecting individual members of species; "[h]arm to those 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.'" *Id.* (citation omitted). Thus, an extinction-level threat is not required for an injunction. *Id.* at 819; *Cottonwood*, 789 F.3d at 1091 ("establishing irreparable injury [under the ESA] should not be an onerous task"). Also, the activity enjoined need not be the exclusive cause of harm and a showing that the injunction would forestall the injury is sufficient. *NWF IV*, 886 F.3d at 819.

The injury to threatened salmonids from NMFS's prey increase program easily meets these standards. Threatened Puget Sound and Lower Columbia River Chinook salmon are not meeting recovery objectives due, in part, to excessive hatchery influences. *See*, *e.g.*, AR 01741–42, 01747, 15911; *see also* Decl. of Dr. Gordon Luikart, Ph.D ("Luikart Decl.") ¶¶ 24–53. 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"—which represents the percentage of adult fish on spawning grounds that are hatchery origin. *See, e.g.*, AR 30260. Generally, the productivity of wild populations decreases as pHOS increases. *E.g.*, AR 13546. pHOS levels that exceed HSRG recommendations are acceptable only where the wild population is at a high risk of extinction and the hatchery is used to reduce short term extinction risk. AR 10419.

The pHOS levels for most Puget Sound and Lower Columbia River Chinook salmon populations are well in excess of HSRG guidelines. Luikart Decl. ¶¶ 51–53. The recent Mitchell Act BiOp requires reductions in annual releases by nearly two million hatchery Chinook salmon to protect wild Chinook salmon and meet pHOS levels. *See* AR 13267–72. The prey increase program will cause biologically significant increases in pHOS levels "and thereby further inhibit the prospects for the continued survival, much less recovery," of threatened Chinook salmon. Luikart Decl. ¶¶ 54–64. This constitutes irreparable injury under the ESA for which there is no

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adequate remedy at law. *See NWF IV*, 886 F.3d at 818–19, 822–23; *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1140 (N.D. Cal. 2017); *see also infra* sec. VI.E (and cited declarations). An injunction is therefore warranted for the ESA violations, as the Court does not balance hardships or public interests in assessing an injunction for such violations.

For NEPA, "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). Here, NMFS decided to implement the prey increase program, which will impede recovery of threatened salmonids, to offset and thereby subsidize salmon harvests without any consideration of alternatives or other analyses or disclosures required under NEPA. This constitutes irreparable injury for which there is no adequate remedy at law. *See, e.g.*, *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.") (quoting *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008) and *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

The balance of harms and the public interests support an injunction based on NMFS's NEPA violation 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). "[S]uspending such projects until that consideration occurs 'comports with the public interest'" where NEPA is violated. *Id.* (citation omitted); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) ("[T]he public interest favor[s] issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA.").

Accordingly, the Court should enjoin the prey increase program until NMFS prepares a BiOp that complies with the ESA for this program and completes required NEPA procedures.

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E. The Conservancy Has Standing to Pursue this Matter.

The Conservancy has standing because: 1) it has suffered an "injury in fact;" 2) the injury is fairly traceable to the challenged conduct; and 3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Further, the interests at stake are germane to the Conservancy's purposes. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998); Second Decl. of Kurt Beardslee ("Second Beardslee Decl.") ¶¶ 2–13; *see also* Second Decl. of William John McMillan ("Second McMillan Decl.") ¶ 2.

The "injury in fact" requirement in environmental cases is satisfied if an individual adequately shows an aesthetic or recreational interest in a particular place or animal and shows reasonable concerns that those interests are impaired by the defendant's conduct. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147, 1151 (9th Cir. 2000); *Laidlaw*, 528 U.S. at 183–84. Members of the Conservancy derive recreational and aesthetic enjoyment from Puget Sound and its wildlife, and their use and enjoyment are diminished by NMFS's violations and by the members' reasonable concerns about NMFS's violations. Second Beardslee Decl. ¶¶ 18–19; Second McMillan Decl. ¶¶ 2–34; Second Decl. of Peter W. Soverel ¶¶ 2–23. The injuries stem from NMFS's conduct addressed herein and are therefore "fairly traceable" to the violations. *See* Second McMillan Decl. ¶¶ 2–34; Second Decl. of Peter W. Soverel ¶¶ 2–23; *Ecological Rights Found.*, 230 F.3d at 1152; *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001). The injuries are redressable by an order from the Court because proper ESA and NEPA analysis could influence agency actions. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860–61 (9th Cir. 2005) (procedural); *Covington v. Jefferson Cty.*, 358 F.3d 626, 639 (9th Cir. 2004). Finally, the Conservancy has prudential standing because its interests fall within the "zone of interests" protected by NEPA and the ESA. *See Ocean Advocates*, 402 F.3d at 859, 861.

VII. CONCLUSION.

For the foregoing reasons, the Conservancy respectfully requests that the Court enter an order granting summary judgment and relief as requested herein.

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Respectfully submitted this 5th day of May, 2021.

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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. BARRY THOM, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor, and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: JUNE 18, 2021

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TABLE OF ACRONYMS

AABM	Aggregate Abundance-Based Management
APA	Administrative Procedure Act
BiOp	Biological Opinion
DPS	Distinct Population Segment
EA	Environmental Assessment
EIS	Environmental Impact Statement
EEZ	Exclusive Economic Zone
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FMP	Fishery Management Plan
FRAM	Fishery Regulation Assessment Model
FWS	U.S. Fish & Wildlife Service
ISBM	Independent Stock-Based Management
ITS	Incidental Take Statement
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPFMC	North Pacific Fishery Management Council
PFMC	Pacific Fishery Management Council
PST	Pacific Salmon Treaty
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whale
WCVI	West Coast Vancouver Island

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WDFW	Washington Department of Fish and Wildlife
WFC	Wild Fish Conservancy

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INTRODUCTION

In April 2019, the National Marine Fisheries Service (NMFS) issued a Biological Opinion (BiOp) that carefully examined the effects of three actions—the delegation of salmon fishery management in the federal waters off of Southeast Alaska (SEAK), the funding of grants to Alaska, and the establishment of a conservation framework for habitat improvement and hatchery production—on seven species listed under the Endangered Species Act (ESA). These actions represent three pieces of a complex regulatory puzzle that includes a bilateral treaty on the management of all the salmon that migrate across state and national boundaries in the Pacific Ocean, the development of fishery management plans (FMPs) by two Regional Fishery Management Councils, and NMFS's efforts to aid the recovery of not only endangered Southern Resident killer whales (SRKW), but also threatened Chinook salmon, some of which are consumed by SRKW and some of which are caught in fisheries. A careful examination of the evidence in this case shows that NMFS exercised its scientific judgment and reasonably determined that these actions would not jeopardize any species or destroy or adversely modify critical habitat. In doing so, NMFS fully complied with the ESA and the National Environmental Policy Act (NEPA).

The Court should uphold NMFS's reasoned decisionmaking in this complex management regime and reject Plaintiff's flawed criticisms. Plaintiff overlooks key aspects of the BiOp and critical pieces of the regulatory puzzle, and fails to acknowledge that the conservation program is a programmatic action that approves a framework for site-specific actions. Plaintiff's requested relief would remove an integral piece from the regulatory puzzle that will benefit SRKW, which is a species Plaintiff seeks to protect in the litigation. The Court should grant Defendants' Cross-Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

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STATUTORY BACKGROUND

I. Endangered Species Act

Under Section 7(a)(2), federal agencies must ensure that any action funded, authorized, or carried out by the agency is "not likely to jeopardize the continued existence of any endangered species or threatened species" or to destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2).[1] The ESA requires that action agencies consult with the Fish and Wildlife Service (FWS) or NMFS whenever the agency's action "may affect" a listed species. *Id.*; 50 C.F.R. § 402.14(a). If the action is "likely to adversely affect" listed species or critical habitat, the agencies must engage in formal consultation. 50 C.F.R. § 402.14. Formal consultation culminates in the issuance of a "biological opinion" by the consulting agency. *Id.* § 402.14(h). A BiOp includes the Service's opinion on whether the proposed action is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of its designated critical habitat. *See id.*. If the consulting agency reaches a no-jeopardy decision, but the action will result in "take"[2] of a listed species, the agency must issue an incidental take statement (ITS). *See* 16 U.S.C. § 1536(b)(4)(i)-(ii). Any take that is in compliance with the statement is exempt from liability under Section 9. 16 U.S.C. § 1536(o)(2).

II. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision makers of environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. 42 U.S.C. § 4321; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). If an action does not have significant effects, it is categorically excluded.

[1] Here, NMFS is the action agency and the consulting agency.
[2] "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

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40 C.F.R. § 1501.4(b)(1). If the action is not likely to have significant effects, then an environmental assessment (EA) is appropriate, and if the action is likely to have significant effects, an environmental impact statement (EIS) must be prepared. *Id.* § 1501.4(b)(2).

III. Magnuson-Stevens Act

Congress enacted the Magnuson-Stevens Act (MSA) "to conserve and manage the fishery resources found off the coasts of the United States." 16 U.S.C. § 1801(b)(1). The MSA provides the Secretary of Commerce, by and through NMFS, the authority to regulate fisheries in the Exclusive Economic Zone (EEZ).[3] *Id.* §§ 1854, 1855(d). The Act empowers the Secretary to review and implement FMPs, which are developed by Regional Fishery Management Councils and submitted to NMFS. *Id.* § 1854(a). States can regulate fishing vessels in the EEZ when the FMP delegates management of the fishery to a State and a State's laws and regulations are consistent with the FMP. *Id.* § 1856(a)(3)(B).

FACTUAL BACKGROUND

NMFS's 2019 BiOp analyzed the relationship between the harvesting of Chinook salmon and seven ESA-listed species, including four types of threatened Chinook salmon. These species are protected and managed under federal law, but given the migratory nature of the salmon, this case also involves international coordination on salmon fisheries under the Pacific Salmon Treaty (PST) and management of fishing in the federal waters off the coast of SEAK.

I. Chinook Salmon

Chinook salmon (*Oncorhynchus tshawytscha*) are anadromous fish that spawn and rear in freshwater and then migrate to the ocean, where they mature. AR 47204.[4] During this marine life

[3] The EEZ—referred to herein as "federal waters"—extends from the seaward boundary of each coastal state to 200 nautical miles from the coastline. 16 U.S.C. §§ 1802(11), 1811(a).
[4] Citations to NMFS's Administrative Record are denoted by AR [Bates number].

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stage, Chinook salmon can travel substantial distances, and those salmon spawning in the Pacific Northwest often migrate into and through Canadian waters. *Id.* Most Chinook salmon return to their spawning ground in 4-5 years. *Id.*

NMFS has listed different types of Chinook salmon under the ESA, which recognizes listing of a subspecies or a distinct population segment (DPS) of a species. 16 U.S.C. § 1532(16). For salmon, the population segment is referred to as an evolutionarily significant unit (ESU). AR 47218. In the 2019 BiOp, NMFS determined that the proposed actions were likely to adversely affect four Chinook salmon ESUs—the Lower Columbia River, Upper Willamette River, Snake River fall-run, and Puget Sound. AR 47173, 47221. The Lower Columbia River and the Upper Willamette River ESUs were listed in 1999 and critical habitat was designated in 2005. AR 47222, 47245. The fish in the former spawn in the Lower Columbia River and its tributaries along the Washington-Oregon border. AR 47222-26. The fish in the latter spawn nearby in the Clackamas and Upper Willamette Rivers in Oregon. AR 47245-47. The Chinook salmon that spawn in the fall in the Snake River form a third ESU; this ESU was listed as threatened in 1992 and critical habitat was designated in 1993. AR 47252-55. The fourth—the Puget Sound ESU—includes salmon that spawn in rivers flowing into the Sound from the Elwha River and eastward. AR 47261-66. It was listed as threatened in 1999 and critical habitat was designated in 2005. AR 47261, 47304. The recovery of these four ESUs has been limited by numerous factors, including degraded habitat, hydropower facilities, poor water quality, fishing, and hatchery-related effects.[5]

II. Southern Resident Killer Whales

SRKW, also known as orcas, are long-lived marine mammals that occur in the coastal and inland waters of the Pacific Northwest. AR 47276-78; 15988. Females produce a low

[5] Each ESU consists of historical populations of salmon and salmon produced in hatchery programs. AR 47222-23; *see* AR 47245; 47252-53; 47262-63.

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number of surviving calves during their lives, and mothers maintain stable bonds with offspring that undergird matrilineal social structures. AR 47276. SRKW are divided into three pods—J, K, and L. *Id.* These pods spend a significant amount of time in inland waterways during the spring, summer, and fall, and move into offshore coastal waters in the winter months. AR 47280, 16017. SRKW numbers increased between 1974 and 2011 to a total of 87, and experienced further population growth in 2014-2015; however, the population recently decreased to 74. AR 47276.

NMFS listed the SRKW DPS as endangered in 2005 and designated critical habitat in 2006. AR 47276, 47305. SRKW face a variety of threats, including limits on the quantity and quality of prey, toxic chemicals, oil spills, vessels, and sound. AR 47282-90. In terms of prey, Chinook salmon serve as the primary source for SRKW, though coho salmon contribute up to 40% of SRKW diet in late summer months. AR 47282-83. While there is evidence that SRKW can identify Chinook salmon, there is no evidence that they distinguish between wild and hatchery Chinook, both of which likely have the same caloric content and size when they return to their spawning grounds. *See id.* In addition, "hatchery production is a significant component of the salmon prey base returning to watersheds within the range of the SRKW." AR 47286. SRKW also face threats from pollutants, which can act synergistically with the nutritional stress from reduced Chinook salmon populations, and risks from oil spills; vessels can harm SRKW through both strikes and sound. AR 47287-90, 47278; Dkt. No 43-3 (Barre Decl.) ¶¶ 8, 13.

III. Northern Pacific Fisheries

Because of the Chinook salmon's migratory patterns, fish that originate in the United States are often caught or "intercepted" by those fishing in Canada, and vice versa. AR 47194, 47205-06; *see* Fig. 1 below (AR 47204). In addition, some Chinook salmon that originate off the coasts of Washington and Oregon migrate to Alaska and are harvested in the SEAK fisheries.

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AR 47204. These migratory patterns result in a complex regulatory puzzle for salmon management.

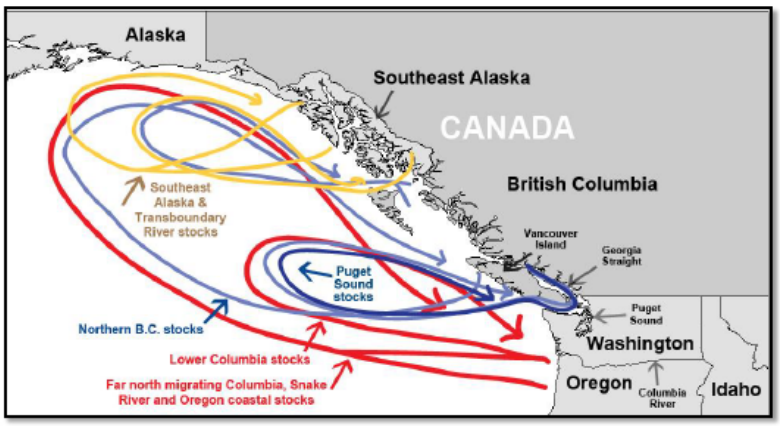

Figure 1. Migratory patterns of major Chinook salmon stock groups.

A. Pacific Salmon Treaty

To help manage the conflicts that arose from the transboundary interception of Chinook salmon, the United States and Canada signed the PST in 1985. Ex. A. (Fisheries Pacific Salmon Treaty Between the United States of America and Canada, Jan. 28, 1985, T.I.A.S. No. 11091). Central to this bilateral framework are the fishing regimes aimed at meeting the conservation, production, and harvest allocations established by the Treaty. AR 47194. The two countries incorporated these regimes into Annex IV of the PST. *Id.* In 1999 and 2009, the two countries entered into 10-year agreements that comprehensively updated the fishing regimes. AR 47195. The countries entered into a new agreement in 2019. AR 47195. The PST agreement governs the SEAK salmon fisheries as well as salmon fisheries in Canada and the Southern U.S. (off the coasts of Washington, Oregon, and California). *Id.*

A key component of the 2019 Agreement, and the most complex and difficult piece of the puzzle, was an update to the Chinook fishing regime (Annex IV, Chapter 3), which established the upper limits for Chinook salmon harvest. *Id.* In reaching this agreement, the parties agreed that a successful program rested on, *inter alia*:

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> (i) science-based fishery management regimes that foster healthy and abundant Chinook stocks by contributing to the restoration and rebuilding of depressed natural stocks while providing opportunities to harvest sustainably abundant natural stocks as well as abundant hatchery produced fish, . . .
>
> (iii) scientifically sound enhancement activities that provide mitigation to fisheries for habitat loss or degradation. . . .

Ex. A at 47-48. Fisheries covered by Chapter 3 are divided into two categories, Aggregate Abundance-Based Management (AABM) and Independent Stock-Based Management (ISBM). AR 47205. Fisheries governed by the former are managed by setting an abundance index that captures the relationship between the abundance of all the stocks in a fishery and a base period (1979-1982). *Id.* SEAK salmon sport, net, and troll fisheries are managed as an AABM fishery and the upper limits for harvest in these fisheries are set forth in Table 1. Ex. A at 63-64. The PST also established a Pacific Salmon Commission to make recommendations or advise the parties; it is composed of two sections, one from each country. After ratification of the PST, Congress enacted the Pacific Salmon Treaty Act. Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, 99 Stat. 7 (1985).

B. SEAK Fisheries

Commercial and recreational fishing for Chinook salmon in federal waters in SEAK is governed by the Salmon FMP, which was prepared by the North Pacific Fishery Management Council (NPFMC) and approved by NMFS in 1979. AR 502; *see* 16 U.S.C. § 1852(a)(1)(G). The Salmon FMP was comprehensively amended in 1990, in part to incorporate the limits from the 1985 PST, and it delegated management authority over sport and commercial troll fishing for salmon in federal waters off the coast of SEAK to the State of Alaska. AR 502; *see* 50 C.F.R. § 679.3(f). NMFS reaffirmed its delegation of such authority in Amendment 12 to the FMP. *See* 77 Fed. Reg. 75,570 (Dec. 21, 2012). NMFS maintains oversight of Alaska's management as

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outlined in Chapter 9 of the FMP. AR 561-65. The Alaska Department of Fish & Game sets the annual catch limits each year consistent with Annex IV of the 2019 Agreement. AR 527-29, 531-32. Between 2011 and 2019, Alaska estimates that, on average, 14% of the total commercial fishery Chinook salmon harvest occurred in federal waters in Southeast Alaska. Dkt. No. 43-2 (Merrill Decl.) ¶ 22. The recreational sport fishery represents a substantially smaller portion of the harvest in the federal waters of SEAK. AR 552-54.

IV. NMFS' 2019 BiOp

On April 5, 2019, NMFS issued a BiOp that considered the combined effects of two related actions and one programmatic action on ESA-listed species. AR 47193-204, 47176. First, NMFS analyzed its own ongoing delegation of authority over salmon fisheries in SEAK federal waters to Alaska. AR 47197-98. Second, NMFS analyzed the federal funding of grants to Alaska that will assist the state in meeting the obligations of the PST. AR 47197-201. Third, NMFS analyzed funding for a conservation program that is designed to benefit both critical stocks of Puget Sound Chinook salmon and SRKW. AR 47201-4. The first two parts of this conservation program will aid Puget Sound Chinook salmon by continuing conservation hatchery programs for three populations and supporting establishment of a similar program for another population (at a cost of $3.06 million per year) and implementing habitat restoration projects for the same four Puget Sound populations (for a total cost of $31.2 million). AR 47202. By improving Chinook salmon abundance, the first two parts of the conservation program would also help SRKW by bolstering the amount of prey available. *Id.* The third part of the program is a hatchery production program that has an objective of increasing Chinook salmon available as prey for SRKW by 4-5% (at a cost of $5.6 million per year). AR 47202-3. NMFS made clear that this funding program was a framework programmatic action, and therefore that the agency would

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assess the future, site-specific projects that received the funding to determine whether they are covered by an existing BiOp or require additional ESA consultation. *Id.*

NMFS laid the foundation for its effects analysis of these proposed actions by analyzing the status of the listed species and the environmental baseline. AR 47217-366. NMFS built upon this analysis and examined the effects of the proposed actions using a retrospective analysis. AR 47366-483. NMFS also ran a retrospective analysis on the percent reductions in the Chinook salmon that would be available to SRKW in both inland and coastal waters. AR 47436-41. In addition, NMFS analyzed the effects of the conservation program. AR 47419-33. Though this section recognized that site-specific analysis would follow the programmatic plan, NMFS considered the general impacts of the hatchery programs and habitat restoration and protection efforts that would help both Chinook salmon and SRKW. AR 47420-32. NMFS concluded that the actions were not likely to appreciably reduce the likelihood of the survival or recovery of the species considered in the BiOp or destroy or adversely modify critical habitat. AR 47484-517.

STANDARD OF REVIEW

Judicial review of administrative actions is governed by the Administrative Procedure Act (APA). 5 U.S.C. § 706(2). *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, reviewing courts may set aside an agency's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* A court must only "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard of review is narrow and "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Courts are at their most deferential "where, as

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here, the challenged decision implicates substantial agency expertise." *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

ARGUMENT

I. Plaintiff Lacks Standing.

Plaintiff has failed to meet its burden for Article III standing. *Contra* Dkt. No. 91 (Plaintiff's Motion for Summary Judgment (Mot.)) at 46; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An organization can establish standing as a representative of its members or on its own behalf. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019). In its Motion, Plaintiff Wild Fish Conservancy (WFC) asserts standing on behalf of its members, but fails to demonstrate that one its "members would otherwise have standing to sue in their own right." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).[6] WFC relies on the declarations of two members, but neither satisfies the causation or redressability prongs. *Id.*; *see* Dkt. No. 91-7 (McMillan Decl.); Dkt. No. 91-8 (Soverel Decl.). For causation, any injury would need to be fairly traceable to the action challenged in this case, namely the issuance of the BiOp and the reliance on it. While the members complain about the general impacts of fishing and hatcheries, they do not connect the dots between their injuries and NMFS's challenged actions. This failure is highlighted by the statements in the Soverel Declaration indicating that the decline in fishing opportunities has been occurring for 10 to 15 years. Soverel Decl. ¶¶ 7-8. These timeframes precede the issuance of the BiOp. Moreover, there are a number of factors that could affect the members' ability to fish or see SRKW, and there is not a direct link between the BiOp and an injury. *E.g.*, AR 47260; 47286-90; *see* Dkt. No. 91-3

[6] WFC's Motion does not assert standing on its own, but the Executive Director's declaration articulates only a procedural injury under NEPA, *see* Dkt. No. 91-6 (Beardslee Decl.), and thus WFC has not shown standing for the ESA claims.

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(Giles Decl.) ¶ 7 ("Lack of prey, increased toxins and vessel disturbance have been listed as potential causes of these whales' decline but partitioning these pressures has been difficult."). The flip side of causation is redressability, and here, the members have not shown that a favorable decision is likely to remedy the harm. Even if the Court grants the requested relief, hatchery fish will continue to be produced, and it is not clear how it will remedy general concerns such as "I will be upset if I catch a hatchery Chinook when I fish in Puget Sound and along the Washington coast." McMillan Decl. ¶ 32. General statements that merely use the word "remed[y]" are insufficient. *E.g.*, Soverel Decl. ¶ 23.

II. NMFS' 2019 BiOp Fully Complied with the ESA and NEPA.

A. The Conservation Program Supports NMFS's Decision.

Substantial reductions in the SEAK, Southern U.S., and Canadian fisheries were achieved through the negotiations that produced the 2019 Agreement. AR 47202. Nevertheless, there were limits to what could be achieved in bilateral negotiations, and the United States recognized that it would need to engage in additional efforts to mitigate the effects not only of fisheries, but also other factors that have contributed to the reduced status of Chinook salmon and SRKW, especially habitat degradation. *Id.* Thus, NMFS developed a proposal to fund a conservation program that includes conservation hatcheries, habitat restoration, and hatchery production that would increase the prey available for SRKW. *Id.* Plaintiff characterizes the conservation program as "ill-defined" and "uncertain" (Mot. at 21-27), but in reality, the program was designed to be flexible versus rigidly specific, as explained below.

1. The Conservation Program Is Sufficiently Detailed.

Much of Plaintiff's disappointment stems from a fundamental misunderstanding of the action. NMFS has established a three-part conservation program with a level of detail that satisfies the standard set forward by the Ninth Circuit, yet also anticipates that NMFS will make

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site-specific funding decisions within each part. This approach is consistent with the ESA implementing regulations. Those regulations define "action" as "all activities and *programs* of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02 (emphasis added). Here, the conservation program is a "framework programmatic action," which is "a framework for the development of future action(s) that are authorized, funded, or carried out at a later time." *Id.* The 2019 BiOp represents a "broad-scale examination of [the] program's potential impacts on a listed species and its designated critical habitat—an examination that is not as readily conducted when the later, action-specific consultation occurs on a subsequent action developed under the program framework." 80 Fed. Reg. 26,832, 26,836 (May 11, 2015). And NMFS planned to perform site-specific consultations, as needed, on the effects of the specific hatcheries and projects that are funded.

NMFS established the first and second parts of the conservation program to benefit the weakest populations of Puget Sound Chinook salmon that are considered essential for recovery and those most affected by northern fisheries. AR 47202. Specifically, NMFS planned to fund existing conservation hatchery programs on the Nooksack, Dungeness, and Stillaguamish Rivers and to support establishment of a new hatchery program for the Mid-Hood Canal. *Id.* Because the first three programs are already in place, NMFS provided details about them in the environmental baseline of the BiOp. AR 47343-44; *see* AR 30515-672. In addition, NMFS provided specific guidance on how the expanded or new hatchery programs will operate through its analysis of the factors used for hatchery programs. AR 47421-27; *see* AR 10412-34. For example, NMFS expects each program, "as a requirement of the funding, to use locally derived hatchery broodstock" in order to decrease the risk associated with outbreeding, or gene flow from other populations. AR 47423. The second part of the program directs funding for habitat

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improvements. AR 47202. This funding was structured around an initial list of approximately 15 high-priority restoration projects developed by Puget Sound co-managers and NMFS in consultation with local experts. AR 47427, 36626.

The third part—the prey increase program[7]—also contains specifics. When fully operational, the program will produce 5-6 million smolts each year from facilities in Puget Sound and an additional 14-15 million smolts each year from facilities on the Washington coast and Columbia River. AR 47203. These numbers and locations resulted from a 2018 analysis performed by NMFS at the request of the U.S. Section of the Pacific Salmon Commission. AR 37928-30. In that analysis, the agency relied on several sources of information, including the identification by NMFS and Washington Department of Fish and Wildlife (WDFW) of the priority Chinook salmon stocks, the identification of production facilities that either had capacity to increase production or could be brought online quickly, and an estimate of the increase in prey that would result from increased production. AR 37929, 16334-41. "These tools in combination allowed [National Oceanic and Atmospheric Administration (NOAA)] to evaluate a scenario for increasing the production of Chinook smolts . . . by specific amounts." AR 37929. In the time since that 2018 analysis, some of the details for the prey increase program have crystallized further as NMFS has established the criteria for selection of the hatcheries and funded the first year of recipients. Dkt. No. 91-2 (Knutsen Decl.), Ex. 1 at 2, 7-9.[8] Specifically, criteria 1, 2, and 4 enshrine the principles of focusing on priority Chinook salmon and focusing on facilities that do not require major capital upgrades. *Id.* at 2. Criteria 3 clarifies that "[i]ncreased production

[7] This program is alternatively referred to as the "Hatchery Production Initiative for Southern Resident Killer Whales."

[8] This citation is to the Hatchery Production Initiative for Southern Resident Killer Whales FY20 Report, which was finalized on January 8, 2021, and which was attached to Plaintiff's Motion. It and other evidence regarding the site-specific analysis can be considered by the Court because Plaintiff has challenged the lack of specificity in a programmatic action that authorized future site-specific actions. *See* 50 C.F.R. § 402.02.

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cannot jeopardize the survival and recovery of any ESA-listed species, including salmon and steelhead." *Id.* (emphasis added).

Additional specifics relate to Congress's appropriation of funds for the components of the conservation program. In Fiscal Year 2020, Congress appropriated $35.5 million to implementation of the 2019 Agreement and directed NMFS to establish a Spend Plan to determine how those funds will be distributed. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019); Dkt. No. 43-4 (Rumsey Decl.) ¶¶ 11-12. Consistent with the expectations in the 2019 BiOp, the Spend Plan for 2020 directed $3.1 million to conservation hatcheries, $10.4 million to habitat restoration, and $5.6 million to the prey increase program. Rumsey Decl. ¶ 14. Congress increased the appropriation in Fiscal Year 2021 to $39.5 million. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); *see also* Ex. B. (Explanatory Statement Regarding the House Amendment to the Senate Amendment to H.R. 133, Consolidated Appropriations Act, 2021) at H7928. In 2021, $7.4 million of that funding will be used for the prey increase program. Ex. C (Memorandum to File from Scott. M. Rumsey) at 4. This detailed funding shows more than a "general desire" to make improvements; it "constitute[s] a 'clear, definite commitment of resources . . . to future improvements.'" *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743, 747 (9th Cir. 2020) (quoting *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-6 (9th Cir. 2008)).

NMFS also acknowledged in the BiOp that some aspects of the conservation program would be decided in the future. In particular, NMFS understood that its selection of the funding recipients for the second and third parts of the conservation program would be determined each year and that NMFS would perform site-specific ESA and NEPA analysis as needed.[9] AR 47420,

[9] NMFS has completed ESA and NEPA analysis for each of the recipients of 2020 funds, unless those programs were already covered by previous ESA and NEPA analysis. (Purcell Decl.) ¶¶ 11, 21.

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47427, 47433. NMFS's approach—which combines concrete mitigation measures that will "address the threats to the species" and future identification of funding recipients—is entirely consistent with a framework programmatic action. *Bernhardt*, 982 F.3d at 743 (citation omitted).

Plaintiff's argument about the conservation program goes awry from the start. Plaintiff contends that NMFS's management of fisheries has pushed SRKW to "the brink of extinction," Mot. at 21, yet fishing is only part of the story: approximately 140 SRKW were killed or removed for public display in the 1960s and 1970s, and there are other stressors, such as pollutants, non-fishing vessels such as whale watching boats, and oil spills. AR 47277, 47287-90. Similarly, Plaintiff's claim about the adverse effect from hatcheries on SRKW critical habitat is taken out of context. Mot. at 21 (quoting AR 47507). Read in full, the sentence in the BiOp states: "During the time it takes for these hatchery fish to return as adults to critical habitat areas, the proposed fishing is likely to adversely affect designated critical habitat." AR 47507. The first clause is a key qualifier because it indicates that the effect will be offset when the hatchery produced fish grow to maturity in approximately 3-5 years. NMFS added: "larger reductions in prey are not expected to occur in multiple consecutive years or in conjunction with low Chinook abundance in consecutive years during the period before we expect hatchery fish to be available as prey." *Id.*; *see* AR 47446-47. These points, combined with the benefits from the prey increase program, supported NMFS's conclusion that the proposed actions would not destroy or adversely modify critical habitat. AR 47508; *see Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) (upholding FWS's decision that the species "could survive the loss of habitat at Lake Mead for eighteen months until 500 acres could be protected, then survive an additional two years until an additional 500 acres could be protected").

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Plaintiff's argument that the mitigation lacks "specific and binding plans" faces two significant obstacles. Mot. at 22-25. First, it cannot be squared with the evidence discussed above. *See supra* at 12-14. Indeed, Plaintiff brushes aside every detail about the conservation program, ignoring evidence regarding the location of the conservation hatchery programs as well as details on when and where the salmon will be available to SRKW and the types of hatcheries that will be used. AR 47421-27, 47203; *see* Dkt. No. 91-2, Ex. 1. Instead, Plaintiff cherry-picks language from the BiOp to suggest that the mitigation measures are vague. In doing so, Plaintiff conflates future, site-specific funding decisions with the known specifics of the conservation program. *See Sw. Ctr. for Biological Diversity*, 143 F.3d at 518 (upholding mitigation even though "FWS did not identify specific areas available and suitable for acquisition and restoration"). A closer look at the quoted language, in context, reveals that it either relates to the future funding decisions or another issue.

Second, Plaintiff misapplies the case law. The through-line in the cases cited by Plaintiff is that the mere potential for mitigation measures does not satisfy the ESA. *See Bernhardt*, 982 F.3d at 743, 746-47 (stating that "generalized contingencies," "hopeful plans," and "possible strategies" are insufficient); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1004 (D. Ariz. 2011) (noting that "promise[s] . . . to develop a plan" or proposals that are "entirely unwritten" are insufficient); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139 (D. Ariz. 2002) (rejecting a "laundry list of possible mitigation"). Yet the conservation program in this case is more than a possible strategy, and therefore it is distinguishable from the mitigation in the cases that Plaintiff cites. In *Bernhardt*, the court rejected mitigation measures proposed by an applicant seeking to construct an offshore drilling and production facility. 982 F.3d at 731, 743-47. The four measures involved contacting FWS for guidance if polar bears were detected,

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compliance with authorizations under the Marine Mammal Protection Act, possible mitigation measures taken from a generalized list, and plans for operations and polar bear interactions in the event that interactions occur. *Id.* at 743-47. The first two were rejected because they were "unapproved and undefined" and the second two were rejected because they referenced "'possible' strategies, without selecting a mitigation measure" and were "offered only as *examples* of possible strategies." *Id.* By contrast, NMFS's conservation program here provides a defined plan that embodies a three-part strategy to recover threatened salmon, restore habitat, and increase the prey for SRKW and explains *how* the chosen strategy will work.

Neither *Rumsfeld* nor *Salazar* supports Plaintiff's argument. Mot. at 23-24. In *Rumsfeld*, the court invalidated the BiOp because the mitigation would only be identified *after* the Army developed a resource management plan. 198 F. Supp. 2d at 1153-54. In *Salazar*, the court found the BiOp arbitrary because it relied on a "proposal to develop a 'targeted mitigation strategy'" that was "entirely unwritten" and noted that the mitigation measures were not "identified [or] included in the BiOp." 804 F. Supp. 2d at 1004. Here, by contrast, NMFS's conservation program has identified the specific uses for the funding, described the program and its impacts in the BiOp's proposed action and effects sections, and developed criteria for the prey program. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1046 (9th Cir. 2015).

Plaintiff also errs in its attempt to undermine the conservation program based on a lack of deadlines or otherwise-enforceable obligations. Mot. at 23-24. The BiOp explicitly describes the timing for the three parts of the conservation program: the conservation hatchery program will "operate each year for the duration of the [2019] Agreement"; the habitat restoration will be "funded and completed during the first three years of the Agreement"; and the prey increase program will "operate each year" of the Agreement. AR 47202-03. Further, the program is

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"included as part of the [action], and so subject to the ESA's consultation and enforcement provisions." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1119 (9th Cir. 2012). NMFS also made clear that if the funding is not provided or "if the anticipated actions are not otherwise implemented through other means (e.g., non-fishing related restoration activities, other funding sources) this may constitute a modification," and if so, "reinitiation of consultation would therefore be required." AR 47203. Here, Plaintiff highlights the word "may," Mot. at 23, but this overlooks the fact that NMFS would need to analyze any change and ignores the language about reinitiation being "required."

2. The Conservation Program Is Reasonably Certain to Occur.

Plaintiff's misunderstanding of the conservation program undercuts its suggestion that the program's components are not under NMFS's control or otherwise reasonably certain to occur. Mot. at 25-27. As an initial matter, NMFS will play a role as the agency determining which entity receives the funding under each part of the program. In that role, NMFS has established criteria for the recipients of the funding for the prey increase program. Dkt. No. 91-2, Ex. 1 at 2. Moreover, the funding initiative is reasonably certain to occur. The best evidence for this is Congress's appropriation of funds for the program for 2020 and 2021, consistent with the funding expectations in the 2019 BiOp, and the Washington State Legislature's commitment to provide approximately $13 million of funding "prioritized to increase prey abundance for southern resident orcas." *Id.*; *see supra* at 14; *Rock Creek All. v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 444 (9th Cir. 2011) (company "has already purchased approximately 273 acres of mitigation land, demonstrating its commitment of resources").

Plaintiff's reliance on precedent is misplaced. Mot. at 25. *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987), is distinguishable. There, the action agency relied "only on the

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outcome of uncertain litigation to provide replacement habitat" and the consulting agency (FWS) found the conservation measures to be insufficient. *Sw. Ctr. for Biological Diversity*, 143 F.3d at 524 (discussing *Marsh*). Neither of those elements is present here. Likewise, *National Wildlife Federation v. National Marine Fisheries Service*, 254 F. Supp. 2d 1196 (D. Or. 2003), does not bear the weight placed on it because there the agency stated that the measures had a "reasonable chance" (rather than a "reasonable certainty") to be implemented. *Id.* at 1213-14. Moreover, Plaintiff refers to that court's consideration of the lack of authority and binding agreements, but Plaintiff fails to mention that the court also assigned significance to the unavailability of necessary funding. *Id.* at 1213. Any degree of uncertainty in the funding for the conservation program in this case has greatly diminished with the 2020 and 2021 appropriations.

Plaintiff misses the mark with its argument about the site-specific ESA and NEPA analysis forestalling the hatchery components of the conservation program. Mot. at 25-26. Plaintiff simply ignores the overarching ESA regulations that contemplate site-specific analysis following a programmatic action. 50 C.F.R. §§ 402.02, 402.14(i)(6). The argument also fails to recognize that, as explained in the 2019 BiOp, NMFS will select recipients of the hatchery funding to ensure consistency with both the goals of the conservation program as well as the ESA and NEPA. AR 47433. Indeed, NMFS has established criteria for selecting recipients of the funds under the prey increase program; some of the criteria provide NMFS flexibility in choosing the recipient consistent with the purpose of the program, while criteria 3 states that "[i]ncreased production *cannot* jeopardize the survival and recovery of any ESA-listed species, including salmon and steelhead" and criteria 6 states that "[a]ll increased production must be reviewed under the ESA and NEPA, as applicable, *before* NMFS funding can be used." Dkt. No. 91-2, Ex. 1 at 2 (emphasis added); *see id* at 5-9 (tables showing programs funded and not funded

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in 2020). If a candidate hatchery fails to meet the criteria, a replacement candidate will be selected. Purcell Decl. ¶ 11. Plaintiff also incorrectly assumes that NEPA will be triggered for each site-specific project. Mot. at 27.[10] The trigger for NEPA is a "major Federal action" and some of the projects may not meet this threshold. 42 U.S.C. § 4332(2)(C).

Plaintiff may be dissatisfied with NMFS's balancing of the needs of the endangered SRKW with the sometimes competing needs of threatened salmon, but this is not grounds for dismantling these pieces of the puzzle. *See Am. Rivers v. Nat'l Marine Fisheries Serv.*, No. Civ. 96-384-MA, 1997 WL 33797790, at *1 (D. Or. Apr. 3, 1997) (noting that the "agencies are in the unenviable position of having to assess the 'reasonableness' and 'prudence' of proposed mitigation measures by balancing the needs of the listed Snake River salmon against the competing needs of other threatened species and the needs of resident ecosystems"). NMFS's conservation program is neither arbitrary nor capricious.

B. NMFS Rationally Reached a No Jeopardy Decision on SRKW.

Plaintiff attempts to portray NMFS's decision about SRKW as based on insufficient evidence, Mot. at 27-30, but a full review of the 2019 BiOp's analysis shows that NMFS thoroughly considered the effects of the proposed actions and provided a rational explanation for its no jeopardy conclusion. AR 47276-90, 47346-59, 47433-49, 47502-8. NMFS's analysis is cogently summarized in Section 2.7.5. of the BiOp. AR 47502-8. NMFS began by examining the environmental baseline, which includes all of the factors affecting SRKW and all of the fishing activity under the PST. AR 47502-04. NMFS then analyzed the actions against this baseline. AR 47504. In terms of the SEAK fisheries, NMFS expects the Chinook salmon harvests to be

[10] As discussed in greater detail below, the framework conservation program—which Plaintiff describes as a "massive new federal grant program" for purposes of its NEPA argument and as a "hypothetical" program with "supposed benefits" for purposes of its ESA argument—did not trigger NEPA. *Contra* Mot. at 26-27.

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reduced by 7.5% compared to the catch levels under the 2009 Agreement, which will be more than a "very minor improvement[]." Mot. at 28; AR 47504-05. Yet NMFS estimated that the fisheries would still reduce prey available for SRKW. For the months July through September, the potential reductions range from 1% to 2.5% for inland waters and 0.2% to 12.9% for coastal waters; however, the higher numbers occur when SRKW are typically not in coastal waters, and 12.9% occurred in only one year. AR 47505. From October through April, the potential prey reductions in coastal waters would be 0.2% to 1.1%. *Id.* The assessment also included a comparison between the Chinook salmon caught in the SEAK fisheries with the priority stocks for SRKW. "With the exception of the Columbia River salmon stocks, the largest stocks contributing to the SEAK fisheries catch are currently not considered at the top of the priority prey list for SRKWs." AR 47506.

NMFS completed the analysis by incorporating the prey increases anticipated from the conservation program. The program to increase hatchery production will likely produce 4 to5% more prey in those areas that are most important to SRKW, *i.e.*, inland areas around Puget Sound in the summer and coastal areas in the winter and spring. AR 47506, 47447. This increase "helps to offset some of the reduction in prey abundance." AR 47506. And it exceeds the reduction in most of the years in NMFS's retrospective analysis; the only exceptions occur in coastal waters when SRKW are in inland waters. The agency also found that any overlap between relatively large percent reductions and low abundance would be spread out over time, and that habitat actions would also support increased availability of Puget Sound Chinook salmon. AR 47507-08. Weighing all of the evidence, NMFS determined that no jeopardy was likely for SRKW. The agency "articulated a rational connection between the facts found and the conclusions made." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014).

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Plaintiff's assertion that NMFS failed to offer a rational explanation on effects to SRKW collapses in the face of this record evidence. *See* Mot. at 28-29.[11] First, NMFS was *not* required, as Plaintiff errantly suggests, to base its jeopardy analysis on whether the proposed actions would result in an increase in Chinook abundance of 15%. Mot. at 28-29. The 15% increase in Chinook would be needed to achieve a 2.3 growth rate for recovery as established in NMFS's 2008 SRKW Recovery Plan, and not to avoid jeopardy. *See* Barre Decl. ¶ 8. Plaintiff's attempt to conflate the standard by which actions are evaluated in a BiOp with the threshold standards considered in recovery plans is misleading. Under ESA Section 7, the agency evaluates whether an action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, whereas under ESA Section 4, the agency is required to develop recovery plans which describe management actions necessary for the conservation and survival of the species and that would lead to the delisting of the species under the ESA. *Compare* 16 U.S.C. § 1536(a)(2) *with* 16 U.S.C. § 1533(f)(1). Plaintiff's confusion is further underscored by its strained analogy to *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010). *See* Mot. at 27-29. In that case, the court rejected the agency's no-jeopardy conclusion because it had not explained how a negative population trend in a local bull trout population could *improve* the overall bull trout population. *Wild Fish Conservancy,* 628 F.3d at 528. The court added: "It may be that . . . the decrease in the local population over the five-year period under study would not have an 'appreciable' negative impact . . . [b]ut how it could have a *positive* impact remains unclear." *Id.* at 529. Here, NMFS has not concluded that there will be a positive impact on SRKW population trends; instead, NMFS applied its expertise and decided that the actions are

[11] Plaintiff implies that the NMFS analysis needed to explain how SEAK fisheries *and* "other west coast fisheries" will affect SRKW, but the BiOp was focused on the SEAK fisheries and other fisheries, which have been consulted upon separately and are part of the environmental baseline. Mot. at 28.

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not likely to appreciably reduce SRKW survival or recovery. AR 47508. Second, Plaintiff provides a skewed version of the reductions in the SEAK fisheries under the 2019 Agreement. Mot. at 28-29. Plaintiff references only the highest percentage (12.9%), but that number must be placed into context. *Id.*; *see supra* at 21.

Third, Plaintiff misses the mark with its assertions that NMFS failed to explain the 4-5% increase in prey and that it is "unclear" whether NMFS accounted for increased harvests of the prey. Mot. at 30. In order to calculate the prey increase that could result from releasing 20 million smolts per year, NMFS relied on three key elements: the list of priority Chinook salmon created by NMFS and WDFW, a list of hatcheries with available capacity, and the Fishery Regulation Assessment Model (FRAM), which is a tool "used by fishery managers to design and evaluate fisheries, and has been used in the past to assess fishery effects on SRKW prey abundance." AR 37929; *see also* AR 47447, 16334-41. The FRAM allows fishery managers to assess the impact of harvest by linking year-specific stock abundances with catches by fishery and time period. AR 47371. In this specific analysis using FRAM, NMFS modeled all fisheries as rates (as opposed to fixed catch of Chinook salmon) in order to account for additional catch resulting from the expected increases in abundance due to the hatchery production initiative. Also, Plaintiff's "crude example" is flawed and fails to advance its argument. *See* Mot. at 29. The abundance index is determined by more than the raw number of adult fish.

C. NMFS Evaluated the Effects of the Prey Increase Program and Will Continue to Evaluate Effects Through Site-Specific Consultation.

Plaintiff assails the BiOp for not analyzing the prey increase program in the integration section on threatened salmon, Mot. at 30-32, but this puts form over substance—NMFS considered the effects on wild fish in other parts of the BiOp and referenced that analysis on the conservation program in the discussion of Puget Sound Chinook salmon. Plaintiff also assails the

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BiOp for segmenting consultation, *Id.* at 32-34, but NMFS properly analyzed the broad-scale impacts of the program and determined that it would consider the effects of funded hatcheries on a site-specific basis. *See* 50 C.F.R. § 402.02.

In the "Effects of the Actions" section, NMFS analyzed the conservation program (referred to as the "Mitigation Funding Initiative" in the BiOp). AR 47419-33. NMFS recognized that some effects of the program could be described specifically, but that analyzing other effects in detail would require site specific information. AR 47420. As such, NMFS's analysis "reflects a programmatic level review." *Id.* Section 2.5.3.3. considered the prey increase program at that level and determined that

> at a general level we would expect the effects of this component of the funding initiative to include positive effects to SRKW as described in the next section [2.5.4], and a range of effects from positive to negative on listed Puget Sound Chinook salmon and its designated critical habitat similar to those described above in Section 2.5.3.1.

AR 47433. NMFS noted that it would complete site-specific consultations on the selected hatchery programs using the approach and considerations outlined in Section 2.5.3.1. Thus, in addition to NMFS's top-level statement, it indicated that it was relying on analysis in the previous and following sections.

In the previous section (2.5.3.1.), NMFS analyzed the potential benefits and risks associated with hatchery-produced fish. AR 47420-27. Here, NMFS relied on a 2018 ESA consultation and summarized that prior analysis, with a focus on the six factors NMFS' uses when analyzing hatchery programs. AR 47420-21; *see* AR 9838-10434. For example, under Factor 2, NMFS considers the effects of hatchery fish on natural-origin (or wild) fish. AR 47422-25. This analysis included a detailed discussion on the genetic effects of hatchery production, which can range from outbreeding to domestication, as well as the ecological effects. *Id.*

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In the following section (2.5.4), NMFS incorporated a discussion on the effects of the hatchery funding on SRKW and wild salmon. AR 47447. NMFS began by noting that hatchery production is a significant component of the salmon prey base returning to watersheds in the SRKW range, and identified the Mitchell Act and Federal Columbia River Power System programs as examples. *Id.*; *see* AR 13512-656; 22762-64. NMFS added that "hatcheries also pose risks to natural-origin salmon populations" and cited to four studies on the issue. AR 47447 (citing AR 45960-66, 44008-18, 41057-63, 40917-1051). Moreover, "hatchery programs are often modifying various program elements to adaptively manage the program in ways that minimize effects on listed species and allow operators to achieve program goals." AR 47447.

For each of the threatened salmon, NMFS concluded that after reviewing, *inter alia*, the effects of the action, the proposed actions are not likely to appreciably reduce the likelihood of both survival and recovery, and thus incorporated the effects analysis into the jeopardy analysis. AR 47490, 47494, 47497, 47501. Moreover, in the "Integration and Synthesis" section on Puget Sound salmon, NMFS explicitly referred back to its analysis of the conservation program. AR 47484-517[12] It explained: "The effects of projects implemented as a result of the third proposed action, the conservation initiative, will be reviewed once the details of the site specific projects are known using the procedures and considerations described in Section 2.5.3. [("Mitigation Funding Initiative")] However, we conclude that the adverse effects are likely to be limited. . . ." AR 47500. Some of these effects were discussed in the preceding pages. AR 47498-99.

Much of the agency's analysis on the impacts of the prey increase program on wild fish occurred in the "Effects" section rather than the "Integration" section, but that does not mean that NMFS failed to consider the prey program in its no-jeopardy determination. *See Locke*, 776 F.3d

[12] NMFS did not "admit[]" that the no jeopardy opinion did not account for the prey program. Mot. at 31 n.6.

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at 994 (citation omitted) ("[e]ven when an agency explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may be reasonably discerned'"). Taken together, the record evidence belies Plaintiff's assertion that NMFS ignored the effects of the prey program on threatened salmon. *See* Mot. at 30-32.[13]

Plaintiff's assertion that NMFS "segmented its consultation" also misses the mark. Mot. at 32-34. Rather than segment the consultation, NMFS appropriately consulted at the programmatic level and acknowledged that any necessary site-specific consultation would occur when, and if the specific projects were funded. *See supra.* Plaintiff's invocation of *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) is off-base. Mot. at 33-34. There, the agency stated that the "action" included "not just final lease issuance but all resulting subsequent activities" yet it did not analyze the impacts on the subsequent activities due to a lack of information. *Conner*, 848 F.2d at 1453. By contrast, NMFS's action here is the framework conservation program; it does *not* cover all resulting subsequent activities. Indeed, NMFS properly indicated that it would consult further, as needed on the future actions. AR 47202-03; *see* Purcell Decl. ¶¶ 10-12. Thus, this case is more like *Cabinet Mountain Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982), in which FWS's BiOp detailed the effects of the program and the court emphasized that "[a]ny future proposals . . . to conduct drilling activities in the Cabinet Mountains area will require further scrutiny under . . . the ESA." 685 F.2d at 687.

D. The Incidental Take Statement for SRKW Complies With the ESA.

An ITS establishes a permissible level of "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity." 50 C.F.R. § 402.02. In the BiOp, NMFS

[13] NMFS' "not likely to adversely affect" determinations were made against the backdrop of the agency's broad-scale analysis of the prey increase program earlier in the BiOp described above, and the agency is considering any adverse effects in its site-specific analysis. *Contra* Mot. at 31.

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used the annual level of Chinook salmon catch in the SEAK fishery as a surrogate for measuring the incidental take for SRKW. AR 47519. Plaintiff challenges this level of take because it is coextensive with the action. Mot. at 35. But in 2015, NMFS and FWS explained that even where surrogates are "fully coextensive with the *anticipated* impacts of the project" they are appropriate triggers if "the surrogate nevertheless provides a meaningful reinitiation trigger consistent with the purposes of an [ITS]." 80 Fed. Reg. at 26,834 (emphasis in original). Here, if the annual catch exceeds the allowed amount, then reinitiation would be triggered.

E. NMFS Satisfied Its Substantive Obligations to Ensure Against Jeopardy.

Plaintiff asserts that NMFS (as the action agency) violated ESA Section 7 by relying on the BiOp, Mot. at 35, but this argument is premised on the mistaken conclusions about the BiOp. Here, NMFS's BiOp represented a thorough and reasoned analysis of the proposed actions and their effects as measured against the baseline. *See supra*; *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (holding that the action agency did not act arbitrarily and capriciously in its reliance on a valid BiOp). Moreover, "even when the [BiOp] is based on 'admittedly weak' information, another agency's reliance on that opinion will satisfy its obligations under the Act if a challenging party can point to no 'new' information—*i.e.,* information the Service did not take into account—which challenges the opinion's conclusions." *Pyramid Lake*, 898 F.2d at 1415. Plaintiff has not put forth any new information NMFS did not take into account. Thus, NMFS satisfied its substantive duty.

F. NMFS Complied with NEPA.

The first part of Plaintiff's NEPA argument—that NMFS failed to complete NEPA on the ITS—is built on a subtle, yet critical misinterpretation of the action at issue in this case and a misreading of *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996). Mot. at 35-37. The second part of

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its NEPA argument—that NMFS was required to complete NEPA on one part of the conservation program—relies on a flawed application of the statute to the facts. Mot. at 37-39.

1. The ITS in this Case Did Not Trigger NEPA.

According to Plaintiff, this case is on all fours with *Ramsey*. Mot. at 36. But a closer look at *Ramsey* shows that the comparison is inapt. *Ramsey* involved three types of salmon that spawn in the Snake River. 96 F.3d at 437. After these salmon are born, they migrate to the Pacific Ocean and return 2 to5 years later. *Id.* at 438. During the journey, the salmon come under a "bewildering array of agencies and legal regimes." *Id.* When the salmon are in the ocean, the harvest of salmon is governed by the MSA, and the Secretary of Commerce is charged with ensuring the Regional Fishery Management Councils that oversee the fishing in federal waters abide by the MSA. *Id.* When the salmon re-enter the rivers, which are not governed by the MSA, the harvest is supervised by the Columbia River Fish Management Plan, which is a "unique, judicially created, federal-state-tribal compact that controls, through a consent decree, the rules and regulations governing fishing allocations and rights of harvest." *Id.* This Plan "apportions the fishing rights to the state and tribal members." *Id.* The states then enact regulations governing fishing in the Columbia River, and "absent regulations promulgated by Oregon and Washington, most fishing could not occur in the relevant area of the Columbia River." *Id.* at 438, 442. In *Ramsey*, NMFS had prepared a BiOp on the "full range of salmon fisheries that may affect" the salmon in the rivers, and prepared an ITS that "serves as the authorizing document." *Id.* at 439.

The relevant fishery action in this case is distinct. The action here is NMFS's ongoing *delegation* of fishery management authority *in the federal waters* to the State of Alaska pursuant to *the MSA* whereas the action in *Ramsey* was the *apportionment* of fishing rights *in state waters* to the state and tribal members under the *unique compact* created through a consent decree.

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Moreover, unlike *Ramsey*, if NMFS had not delegated to Alaska the authority to manage fishing in federal waters, the fishing could be managed by the NPFMC and NMFS under the MSA. These are distinctions with a difference because the authority to fish in the federal waters in SEAK flows from the MSA and not from the ITS. The flaw in Plaintiff's analogy between this case and *Ramsey* is evident from Plaintiff's suggestion that "[l]ike the Pacific Salmon Treaty, the [Columbia River Fish Management] plan did not directly regulate fisheries." Mot. at 35-36. But NMFS was not consulting on the PST's regulation of fishing; it was consulting on the delegation of management authority under the MSA. AR 47198; *see* AR 47518 (the PST Agreement "does not itself authorize the conduct of any fishery").

Plaintiff contends that the *Ramsey* ruling is based in part on the idea that there will be "no downstream federal agency to complete an EIS," Mot. at 36 (quoting *Jewell*, 747 F.3d at 644), but here there was a federal agency—NMFS—to complete NEPA analysis on the MSA delegation. A look at the record shows that NMFS completed not only the 2003 EIS on salmon fisheries referenced by Plaintiff, but also a 2012 EA in connection with Amendment 12 to the Salmon FMP. AR 47912-8524, 47632-901. The 2012 EA considered the impacts of the ongoing delegation and included analysis of NMFS's 2008 BiOp on the delegation to Alaska and accompanying ITS. AR 47797-825. The 2008 BiOp had examined the impact of the delegation on species such as SRKW. AR 343-61; 399-402.

Plaintiff cannot salvage the analogy to *Ramsey* by reference to the 2003 EIS. Mot. at 36. The quoted language in Plaintiff's brief referred to a different part of the *Ramsey* decision that examined a claim that NMFS was required to conduct NEPA analysis on the ocean salmon fishing that took place in the territory under the jurisdiction of the NPFMC, which is the federal waters of SEAK. *Ramsey*, 96 F.3d at 444-45. The court determined that NMFS's review of the

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delegated authority to Alaska constituted a major federal action. *Id.* at 445. Thus, NMFS's EIS referred to *Ramsey* in the section on SEAK. AR 47952-53.[14] Plaintiff compounds the misreading by skipping over the EIS's reference to *Ramsey* in a separate section on Columbia River Basin fisheries, which states: "In *Ramsey v. Kantor*, the Ninth Circuit Court of Appeals held that, *with respect to the Columbia River basin fisheries*, the issuance of an ITS is a major federal action requiring NEPA compliance." AR 47955 (emphasis added). This reference to an ITS as a major federal action is expressly tied to the very specific circumstances in the part of *Ramsey* that analyzed the Columbia River Fish Management Plan. *See Grand Canyon Tr. v. U.S. Bureau of Reclamation*, No. CV-07-8164-PHX-DGC, 2011 WL 1211602, at *11 (D. Ariz. Mar. 30, 2011) ("*Ramsey*'s holding has been construed narrowly"). The decision in *Ramsey* regarding the Columbia River Fish Management Plan does not apply in these circumstances.[15]

2. NMFS' Conservation Program Did Not Trigger NEPA.

Plaintiff asserts that the first and third parts of the conservation program are major federal actions subject to NEPA, but the argument is based on a misapplication of the statute and case law.[16] Mot. at 26-27; 37-39. First, Plaintiff contends that this hatchery production constitutes "massive new federal funding," Mot. at 26, but characterizing funding as "massive" does not make it "major" for purposes of NEPA. Plaintiff's reference to *State of Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979), is a thin reed on which to rest its argument. The *Andrus* court stated that "[m]ost courts agree that significant federal funding turns what would otherwise be a local project into a major federal action," *id.* at 540 (citing *Homeowners Emergency Life Prot. Comm.*

[14] This section of *Ramsey* did not mention an ITS, and so the EIS reference to the ITS was in error.
[15] This analysis applies to NMFS acting in its role as the action agency. It is well-established that where NMFS acts as the consulting agency, an ITS is not a major federal action that triggers NEPA. *Jewell*, 747 F.3d at 642-43.
[16] Plaintiff does not argue that NEPA applied to the habitat restoration, which is the second part of the conservation program. Moreover, the second proposed action—the grants to Alaska—are categorically excluded under NEPA. *See* Ex. D (Memorandum for the Record from Stephanie Coleman, June 21, 2019) at 3.

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v. Lynn, 541 F.2d 814 (9th Cir. 1976) (per curiam)); however, there was no federal funding at issue in *Andrus*, and the *Homeowners* case it cited involved $33.2 million in federal funds, which today would be the equivalent of $155 million. 541 F.2d at 816; *see* https://www.inflationtool.com/us-dollar/1976-to-present-value?amount=33200000 (last visited May 26, 2021). The level of funding here is different in degree and does not rise to the level of a major federal action.

Second, Plaintiff wrongly asserts that the decision in *Jewell* applies with equal force to this case. Mot. at 37-39. In *Jewell*, the consulting agency issued a jeopardy opinion that contained reasonable and prudent alternatives that the action agency should take to avoid jeopardy. 747 F.3d at 592; *see* 50 C.F.R. §§ 402.14(h)(1)(iv)-(2), 402.02. The implementation of those alternatives constituted a major federal action. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184. F. Supp. 3d 861, 935, 947 (D. Or. 2016). The circumstances here are distinct. There is no jeopardy opinion, and thus no reasonable and prudent alternatives that, if not implemented, would expose NMFS to liability to take under Section 9. *Contra* Mot. at 38. Rather than adopting and implementing a BiOp's reasonable and prudent alternatives, NMFS, as the action agency, developed a framework conservation program that included hatchery production; this proposed action was a direct result of implementation of the 2019 Agreement. AR 47193-94.

Finally, the Court should reject Plaintiff's suggestion that any subsequent NEPA process by NMFS for the site-specific programs would "simply 'rationalize or justify decisions [it] already made.'" Mot. at 40 (citing *Metcalf v. Daley*, 214 F.3d 1135, 1143-45 (9th Cir. 2000); *Env't Def. Fund, Inc. v. Andrus* (*EDF*), 596 F.2d 848, 851-52 (9th Cir. 1979)). Plaintiff's position is grounded on the theory that NMFS has made an irreversible commitment of resources, Mot. at 39, yet that is not accurate—NMFS has only decided on a decision to fund the program, and if any individual candidate hatchery fails to meet the criteria or site-specific NEPA

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analysis indicates an alternative would be preferable, then another candidate will be selected. Neither *Metcalf* nor *EDF* alters the outcome of the analysis. In *Metcalf*, NOAA did not complete an EA related to its proposal to the International Whaling Commission on behalf of a tribe until after NOAA had entered into an agreement with the tribe. *Metcalf*, 214 F.3d at 1144. Because of this timing, the agency had made an irreversible commitment of resources prior to completing the EA. Similarly, in *EDF*, the Department of the Interior developed a marketing program and executed contracts before a NEPA analysis. 596 F.2d at 851. NMFS's approach to the funding of the hatcheries here did not violate NEPA. And in the time since the BiOp was issued, NMFS has engaged in NEPA analysis for all of the hatcheries receiving funding from the prey increase program in FY 2020 that were not already covered. Purcell Decl. ¶¶ 11, 21.

III. If the Court Finds a Violation, the Proper Remedy is Remand without Vacatur, and Plaintiff Has Failed to Demonstrate that the Prey Program Aimed to Benefit SRKW Should Be Enjoined.

Although Defendants have fully satisfied all of their statutory obligations, should the Court conclude that Defendants have failed to fully comply with the ESA or NEPA, it should remand the matter to the agency to fix any errors, not vacate the Biological Opinion. Mot. at 40-43. Also, Plaintiff has failed to meet the burden for a permanent injunction. *Id.* at 43-45.

A. Vacatur is not Warranted in this Case.

"Although the district court has power to do so, it is not required to set aside every unlawful agency action." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). 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). "Whether 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.*

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Against Toxics v. U.S. EPA, 688 F.3d 989, 992 (9th Cir. 2012). Courts also look to "whether the agency would likely be able to offer better reasoning" on remand. *Nat'l Fam. Farm Coal. v. U.S. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (citation omitted). The Court retains this discretion with ESA claims. *All. for the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152, 1155 (D. Mont. 2019).

Plaintiff seeks to vacate the Biological Opinion yet fails to identify "serious" errors. *See supra*; *Nat'l Fam. Farm*, 966 F.3d at 929 ("EPA's error—failing to consider harm to monarch butterflies caused by killing target milkweed—is not 'serious'"). Nor has Plaintiff shown that NMFS would be unlikely to offer better reasoning on remand. Moreover, vacatur of the BiOp would have significant disruptive consequences to the implementation of a conservation program aimed at protecting endangered SRKW and threatened Chinook salmon. Barre Decl. ¶¶ 11-14. For example, NMFS could not continue implementing the habitat restoration and prey increase programs thereby harming the very interests Plaintiff purports to champion. *Id.* at ¶¶ 12, 14 ("Disruptions could affect the long-term support and commitment needed to fund this program and provide benefits to SRKW over the next decade and could negatively impact the critical partnerships and momentum for recovery and conservation of SRKW and salmon."). In similar circumstances, courts have chosen not to vacate agency actions under the ESA where it would "remove beneficial measures which even [p]laintiffs acknowledge provide some protection for the species." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011); *see also Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, No. 3:12-CV-00431-HA, 2014 WL 1030479, at *3 (D. Or. Mar. 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.").

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B. Enjoining the Prey Increase Program is Improper.

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). And here, Plaintiff has failed to carry its burden on all four injunctive relief factors. *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015). There is considerable tension, if not an outright inconsistency, between Plaintiff's asserted injury in this case and its request for permanent injunctive relief. Plaintiff has clearly taken the position that it does not seek to enjoin any fishery. Ex. E (Plaintiff's counsel stated that the Conservancy "is not seeking an injunction against a fishery."). Instead, Plaintiff seeks to enjoin the prey increase program, despite the fact that Plaintiff contends that it has an interest in the health of SRKW and its experts opine that prey abundance is the single most limiting factor for the health of these whales. Giles Decl. ¶ 11 ("There is no question that the Southern Resident killer whales, under existing conditions, are not getting enough food to eat throughout their entire range. Without an increase in the abundance of Chinook, not only will NFMS' population growth goal not be met, but this population will likely go extinct."). Plaintiff's position does not make any sense. Barre Decl. ¶ 12 ("Plaintiff's declarants assert that prey abundance has the largest impact on the population growth rate of SRKW and that increases in prey abundance are needed for SRKW to recover, and yet enjoining or disrupting the prey increase program would result in reduced future abundance of prey for SRKW."). It is axiomatic that injunctive relief must redress the asserted injury; here there is a disconnect. *Salazar v. Buono*, 559 U.S. 700, 718 (2010) ("A court must find prospective relief that fits the remedy to the wrong or injury that has been established.").

Further, the requested injunction would compound Plaintiff's own asserted irreparable harm. Barre Decl. ¶ 14. NMFS spent a great deal of time thoughtfully developing the prey

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increase program through programmatic and site-specific analyses, Congress has now consistently appropriated significant sums of money for the program, and current implementation is increasing the prey base while responsibly balancing the effects on wild fish. Purcell Decl. ¶¶ 19-21. Enjoining NMFS's efforts is anathema to the health of SRKW. *Defs. of Wildlife v. U.S. Army Corps of Eng'rs*, 730 F. App'x 413, 415-16 (9th Cir. 2018) (reversing the district court's irreparable harm findings where the project was designed to aid in recovery of the species).

Finally, Plaintiff's generalized assertions of harm to wild fish are wholly inadequate. Mot. at 44. Plaintiff's expert failed to evaluate the site-specific analyses performed by NMFS to ensure that the prey increase program is not likely to jeopardize listed species.[17] Moreover, Plaintiff's expert makes the fundamental and incorrect assumption that all hatchery production will return to the same location. Purcell Decl. ¶ 18. In developing the prey increase program, NMFS carefully balanced the needs of SRKW, while ensuring that effects from the program are not likely to jeopardize wild fish. This is far cry from irreparable harm. Purcell Decl. ¶ 21. And to the extent the Court balances the equities, when there are two listed species at issue in a case, the Court should defer to NMFS as the agency charged by Congress to administer the ESA. *Nw. Env't Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) (deferring to NMFS in the context of a preliminary injunction).

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Cross-Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

[17] Ignoring relevant analyses and data is a basis to strike the Declaration of Dr. Luikart, or at the very least, it goes to the weight of his testimony. *Abarca v. Franklin Cnty. Water Dist.*, 761 F. Supp. 2d 1007, 1054, 1069, 1073 (E.D. Cal. 2011) ("Many cases decided under *Daubert* have excluded opinion testimony from experts who ignored facts or considerations that must be considered under methods based on reliable principles.").

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Dated: May 26, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, 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
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. 2:20-cv-00417-RAJ-MLP

DEFENDANT-INTERVENOR ALASKA TROLLERS ASSOCIATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE

Noting Date: June 16, 2021

ORAL ARGUMENT REQUESTED

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I. MOTION

Plaintiff Wild Fish Conservancy's ("WFC") motion for summary judgment ("WFC MSJ") (Dkt. No. 91), which requests that the Court vacate the National Marine Fisheries Service's ("NMFS") 2019 Southeast Alaska Biological Opinion ("2019 SEAK BiOp") and Incidental Take Statement ("ITS") that authorize commercial salmon fisheries in southeast Alaska and enjoin the hatchery production discussed in the 2019 SEAK BiOp, is without merit and should be denied. Defendant-Intervenor Alaska Trollers Association ("ATA") hereby cross-moves for summary judgment and submits that WFC does not have standing to support its substantive Endangered Species Act ("ESA") claim that the 2019 BiOp was not in accordance with law or violated the ESA with respect to the impact of the southeast Alaska ("SEAK") troll fishery on the population of the southern resident killer whale ("SRKW").

Pursuant to this Court's Chamber Procedures, the ATA conferred with Federal Defendants, Defendant-Intervenor State of Alaska, and WFC over telephone and email between May 20, 2021 and May 25, 2021. Federal Defendants do not oppose the ATA motion, Defendant-Intervenor State of Alaska joins the ATA motion, and WFC opposes the ATA motion. In addition to opposing WFC's motion and submitting this cross-motion, the ATA generally joins in the arguments submitted by both Federal Defendants and Defendant-Intervenor State of Alaska.

II. INTRODUCTION

A. The Alaska Trollers Association.

The ATA, organized nearly a century ago in 1925, is a non-profit commercial trade organization based in Juneau, Alaska. Daugherty Decl. (Dkt. No. 35), ¶ 2. The ATA is currently composed of over 400 members that rely on the southeast Alaska salmon troll fishery for their economic livelihood. Daugherty Decl., ¶ 2. The ATA and its members rely on the sustainability of multiple species of salmon, including the Chinook. Daugherty Decl., ¶ 5. Thus, the ATA serves the dual purposes of protecting the Alaska troll fishery and supporting sound management

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and conservation of salmon. Daugherty Decl., ¶ 5. The Alaska troll salmon fishery is the second largest fleet in Alaska—composed of more than 1,000 individual permit holders operating each year. Olson Decl. (Dkt. No. 39), ¶ 14. The majority of those permit holders are family-owned businesses and more than 80 percent of them reside in southeast Alaska. Olson Decl., ¶¶ 14-15. Typically, the communities throughout southeast Alaska rely heavily on the commercial fishing industry. Olson Decl., ¶ 18. That reliance is currently heightened as the ongoing COVID-19 pandemic has significantly impaired the tourism industry in southeast Alaska. Olson Decl., ¶ 16; Alaska Trollers' Brief in Opposition to Prelim Inj. (Dkt. No. 33), 3. In this matter, WFC threatens closure of the SEAK troll fishery by requesting that the 2019 SEAK BiOp and accompanying ITS be vacated in order to prevent the SRKW population from starving. *See* WFC MSJ, 42. That attempt relies on an overstatement of the relationship between the SEAK troll fishery and the SRKW. The consequences of WFC's desired outcome would be detrimental to the communities of southeast Alaska while providing only negligible benefits to the SRKW population.

B. Legal Framework.

The subject of this cross-motion and response is WFC's standing for its substantive ESA claim regarding NMFS's no-jeopardy finding concerning the SRKW. Accordingly, the relevant legal standards for standing and jeopardy are discussed below.

1. The Endangered Species Act.

Section 7 of the ESA requires that "[e]ach Federal agency shall…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 for such species. 16 U.S.C. § 1536(a)(2). "Agencies proposing actions that may affect an ESA-listed species must consult with either the NMFS or the FWS—depending on the species involved—which then reviews the proposed action and prepares a 'biological opinion' ('BiOp') that evaluates whether and the extent to which the action may

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impact the species." *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 730 (9th Cir. 2017) (citing 16 U.S.C. § 1536(b)). If an action is not likely to jeopardize a species but may nevertheless result in incidental take of a listed a species, the consulting agency may permit that take, via an Incidental Take Statement published with the BiOp, ensuring that it does not violate the take prohibition of Section 9 of the ESA. *See* 16 U.S.C. § 1536(b)(4)(i-iv); *Id.* § 1536(o)(2).

2. Legal Standard for Standing.

"A plaintiff must demonstrate standing for each claim he or she seeks to press and for each form of relief sought." *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013). Generally, a plaintiff must satisfy three requirements to establish Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A plaintiff has the burden to demonstrate that "(1) it 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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). An association or organization will have standing to bring a suit on behalf of its members "if its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181.

"The precise manner and degree of evidence required to demonstrate standing will vary according to the stage of litigation." *United States v. JP Morgan Chase Bank Account*, 835 F.3d 1159, 1164 (9th Cir. 2016). "[G]eneral factual allegations of injury resulting from the defendant's conduct may suffice" at the pleading stage. *Defs. of Wildlife*, 504 U.S. at 561. In response to a summary judgment motion, a plaintiff "must 'set forth' by affidavit or other evidence, 'specific facts,' which for purposes of the summary judgment will be taken to be true."

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Id. (quoting FRCP 56(e)); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407-12, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (plaintiff was required to set forth specific facts at the summary judgment stage when both parties moved for summary judgment). Lastly, any disputed facts regarding standing "must be supported adequately by the evidence adduced at trial." *Id.*

A plaintiff's burden will also vary depending on the nature of the claims presented. Standing may be "substantially more difficult to establish" if the plaintiff is not "the object of the government action or inaction" being challenged. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493-94, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (citing *Defs. of Wildlife*, 504 U.S. at 562). In the context of procedural claims, the standing "requirements are relaxed." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015).

III. STATEMENT OF THE FACTS

A. Pacific Salmon Treaty.

The management framework at issue implicates the Pacific Salmon Treaty between the United States and Canada, first ratified in 1985. AR 47194. The Treaty has been renegotiated in 1999, 2009, and most recently in 2019. AR 47194-95. Treaty negotiations have repeatedly resulted in lowered harvest levels for southeast Alaska fisheries—the 2019 Treaty reduced harvest by 7.5 percent after the 2009 Treaty reduced harvests by 15 percent. Lyons Decl. (Dkt. No. 34), ¶¶ 10, 27-30.

B. 2019 SEAK BiOp.

The 2019 SEAK BiOp was issued after NMFS consulted on three federal actions. First, NMFS reinitiated consultation on the delegation of management authority over the salmon troll fishery and the sport salmon fishery in the SEAK Exclusive Economic Zone to the State of Alaska.[1] AR 47198. Second, NMFS consulted concerning federal funding that NMFS may, in its

[1] The management authority was delegated to the State of Alaska from the North Pacific Fishery Management Council in 1999, and Alaska is required to manage the fisheries in the SEAK Exclusive Economic Zone consistent with a Fish Management Plan, the Magnuson-Stevens Act, the Pacific Salmon Treaty, the ESA, and more. AR 47196, 47198.

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discretion, disburse through grants to Alaska to "monitor and manage salmon fisheries in State and federal waters to meet the obligations of the PST through 2028." AR 47198. The third action was funding for a conservation program for critical prey for the SRKWs—a hatchery prey increase program. AR 47201-02. The 2019 SEAK BiOp concluded that none of the actions would jeopardize the continued existence of the SRKWs or the listed salmon that the whales depend on. AR 47508. Accompanying that no jeopardy conclusion, NMFS issued an ITS that, as relevant to this case, permitted the actions at issue to result in incidental take of Chinook Salmon and SRKWs.[2] AR 47518-19.

C. Wild Fish Conservancy Claims.

Plaintiff, WFC, is a Washington State non-profit organization. Beardslee Decl. (Dkt. No. 91-6), ¶ 2. WFC asserts four claims and requests that this Court vacate the 2019 SEAK BiOp and accompanying ITS. WFC MSJ, 40. In the claim that is the primary subject of this cross-motion and response, WFC alleges that NMFS violated section 7 of the ESA because it did not adequately ensure that delegation of authority to Alaska would not jeopardize the SRKW. WFC MSJ, 12, 27. In that claim, WFC calls into question the BiOp conclusion that, as summarized by WFC, "the Southeast Alaska salmon harvest, along with other west coast fisheries, are not likely to jeopardize Southern Residents." WFC MSJ, 28. *See also* AR 47508 ("[I]t is NMFS' biological opinion that the proposed actions are not likely to appreciably reduce the likelihood of both survival and recovery of Southern Resident killer whales…."). Thus, WFC seeks to vacate the 2019 SEAK BiOp and ITS that allow the SEAK troll fishery to operate, thereby shutting down the fishery. *See* WFC MSJ, 40. WFC also claims that NMFS did not adequately assess whether the hatchery prey increase program would jeopardize listed salmonids, WFC MSJ, 12, 30; the 2019 SEAK BiOp is arbitrary and capricious for improperly relying on uncertain mitigation

[2] Although the State of Alaska manages the commercial troll fishery in federal and state waters as a single unit, AR 00515, only the summer season of the SEAK troll fishery takes place in the federal waters of the Exclusive Economic Zone, AR 00540-41. Therefore, at the very least, WFC's attempt to vacate the ITS directly implicates the summer troll fishery.

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factors, WFC MSJ, 12, 21; and NMFS did not undertake the environmental review required by NEPA, WFC MSJ, 12, 35.

D. Southern Resident Killer Whale Population.

Central to WFC's claims is the status of the endangered SRKW. The record reflects, and WFC's own expert acknowledges, that "the current small size of the SKRW population was not caused by lack of salmon," but, rather, it is "due in large part to the legacy of unsustainable live-capture fishery for display in aquariums." AR 29608. The record also reflects that the SRKW population needs to achieve a 2.3 percent growth rate to eventually be delisted. AR 38558. The primary threats to the SRKW population are Chinook prey availability, vessel noise and disturbance, and persistent chemical contamination. AR 29604. Multiple threats must be addressed in order to achieve the desired growth rate for the population. AR 29605-06. With respect to prey availability, the record acknowledges "many potential reasons why not all foregone Chinook salmon catch would be available to SRKW." AR 38564. Those reasons include, in part, other predators of Chinook salmon, the fact that harvests are not exclusively of those stocks most important to SRKW, and low ocean harvest rates of Chinook salmon. AR 38563. Thus, the link between prey availability and the SRKW population is not as concrete and linear as WFC implies. *See* Tienson Decl. (Dkt. No. 42), Ex. A, p. 84; Schindler Decl. (Dkt. No. 36), ¶ 8.i. The manner in which the SEAK troll fishery affects prey availability and the SRKW population is even less certain. With the exception of the Columbia River brights that have relatively large run sizes, the [SRKW's] priority stocks are not a high proportion of the SEAK fisheries catch. AR 47508. The 2019 SEAK BiOp determined that the most important stocks to the SRKWs, Puget Sound Chinook salmon and lower Columbia River fall stocks, make up roughly 2 to 3 percent of the total southeast Alaska fishery catch and that catch is "a relatively lower proportion of the total run size of those stocks." AR 47506.

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E. WFC's Alleged Standing Regarding SRKWs.

In its motion for summary judgment, WFC attempts to cure the defects of its standing arguments during the preliminary injunction briefing with an additional set of declarations. *See* WFC MSJ, 46. The declarations submitted by WFC purport to include the "magic words" that will satisfy the standing requirements. First, WFC alleges that the health of the SRKW population is "germane" to its organizational purposes. WFC MSJ, 46; 2nd Beardslee Decl., ¶¶ 8-10. Second, WFC submits member declarations that allege injuries related to the health of SRKW population. One member, William John McMillan, asserts that one of his goals in life, seeing an SRKW, remains unfulfilled. 2nd McMillan Decl. (Dkt. No. 91-7), ¶ 7. As alleged by McMillan, if the SRKW "population[] increased, [his] chance of seeing one would increase." 2nd McMillan Decl., ¶ 7. Another member, Peter W. Soverel, expressed the enjoyment he gets from seeing SRKWs at his home or on his annual trip to the San Juan Islands. 2nd Soverel Decl. (Dkt No. 91-8), ¶¶ 14-15. In the words of Soverel, he fears there will be "a time in the near future" when he will no longer be able to see SRKWs, and if the SRKW "populations recovered," [he] could enjoy them more." 2nd Soverel Decl., ¶¶ 15-16. Therefore, with respect to SRKWs, the gist of the injury alleged by WFC is that if there were more SRKWs, its members would be able to see them and enjoy them more in the wild. Here, WFC asserts that that injury will be redressed by shutting down the SEAK troll fishery.

In addition to the member declarations, WFC also submits declarations of two experts retained by WFC to explain the connection between prey availability and the SRKW population. *See* Giles Decl. (Dkt. No. 91-3) and 2nd Lacy Decl. (Dkt. No. 91-4). While Dr. Giles explains that it would be "impossible" for the SRKW to achieve an average growth rate of 2.3 percent without an increase in prey availability, she does not conclude that increasing prey is, alone, sufficient to reach the desired growth rate. Giles Decl., ¶ 10. In his declaration, Dr. Lacy acknowledges a recent report that identified Chinook abundance as the largest threat the SRKW population but found that "relationships of Southern Resident Killer Whale birth and death rates

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to Chinook abundance … are weaker than had been reported previously." 2nd Lacy Decl., ¶ 6.f. Dr. Lacy, concludes that, due to those weaker relationships, *more* actions are needed to increase Chinook availability. 2nd Lacy Decl., ¶ 6.f. As an example of how uncertain the analysis presented by WFC is, a year ago during the preliminary injunction briefing, Dr. Lacy estimated that there was a 59 percent chance that the population would become "functionally extinct" within the next 100 years. 2nd Lacy Decl., ¶ 8. Dr. Lacy now estimates that that chance has dropped to 21 percent. 2nd Lacy Decl., ¶ 8. Dr. Lacy also concludes the 7.5 percent reduction in catch by the SEAK fishery will "result[] in less than 0.5% increase in the Southern Resident Killer Whale prey." 2nd Lacy Decl., ¶ 11. Thus, Dr. Lacy concludes that although increased prey could support growth of the SRKW population, faster recovery will require focus on reductions in noise and contamination than focusing on prey abundance alone. 2nd Lacy Decl., ¶¶ 12, 17. Notably, neither Dr. Giles nor Dr. Lacy conclude that closing the SEAK troll fishery, alone, would be sufficient to increase the SRKW population, or prevent further declines in that population.

IV. STANDARD OF REVIEW

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to the judgment as a matter of law." FRCP 56(a). When undertaking such a review, a court will "view[] the evidence in the light most favorable to the nonmoving party." *L. F. v. Lake Washington Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020).

V. ARGUMENT

As the moving party, WFC must demonstrate that, viewing the evidence "in the light most favorable to the nonmoving party," there are not "genuine issues of material fact" that it has standing for its ESA claim concerning SRKWs. *United States v. Phattey*, 943 F.3d 1277, 1280 (9th Cir. 2019) (explaining general standard of review of a summary judgment). Contrary to WFC's motion, however, the ATA submits that there are no issues of general material fact that

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WFC does *not* have standing for that claim. With respect to the remaining portions of WFC's motion, WFC has not demonstrated that the vacatur remedy is warranted at the summary judgment stage.

A. WFC Does Not Have Standing for Its Substantive ESA Claim Pertaining to the SRKW No Jeopardy Determination in the 2019 SEAK BiOp.

Here, viewing the evidence in the light most favorable to WFC, there is no genuine issue of material fact that WFC's alleged injury is neither sufficiently causally related to the SEAK troll fishery nor redressable by the relief sought with WFC's claim.[3] Thus, WFC does not have standing to challenge the no jeopardy finding in the 2019 SEAK BiOp with respect to the SRKW population.

The Ninth Circuit has acknowledged that the causation and redressability requirements "overlap and are two facets of a single causation requirement." *Washington Envtl. Council*, 732 F.3d at 1146. Nevertheless, they are distinct in that "causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and the requested judicial relief." *Id*.

1. The Link Between the SEAK Troll Fishery and the Health of the SRKW Population is Not Fairly Traceable.

To support its standing, WFC briefly asserts that its members "derive recreational and aesthetic enjoyment from Puget Sound and its wildlife, and their use and enjoyment are diminished by NMFS's violations and by the members' reasonable concerns about NMFS's violation." WFC MSJ, 46. Thus, according to WFC, its injuries "stem from NMFS's conduct addressed herein and are therefore 'fairly traceable' to the violations." WFC MSJ, 46. That conclusory statement neither supports its motion for summary judgment, nor, in light of the discussion below, refutes this cross-motion.

[3] Because WFC's arguments are based on injuries to its members and fail to satisfy the causation and redressability requirements for standing, WFC necessarily does not have organizational standing because its members would not have standing to bring a suit on their own for the same reasons.

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"[T]he causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight… as to demonstrate that the plaintiffs would succeed on the merits." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000). Standing does not require that the challenged action "be the sole source of injury," and "[a] causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible." *Washington Envtl. Council*, 732 F.3d at 1141-42. Further, "a litigant challenging an agency action need not eliminate any other contributing causes to establish its standing." *WildEarth Guardians*, 795 F.3d at 1157 (9th Cir. 2015). But "where the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, the causal chain is too weak to support standing." *Washington Envtl. Council*, 732 F.3d at 1142 (ellipses omitted).

In *Washington Envtl. Council*, the Ninth Circuit determined that the plaintiffs did not have standing because plaintiffs had relied on "an attenuated chain of conjecture" to satisfy the causality requirement. *Id.* at 1143. In that case, the plaintiffs challenged an agency's lack of regulation of five oil refineries in Washington, alleging that the greenhouse gas pollution from those refineries caused recreational, aesthetic, economic, and health injuries. *Washington Envtl. Council*, 732 F.3d at 1135, 1139-40. The court noted that, although the challenged conduct may have demonstrated environmental injury, that alone was insufficient to establish that the plaintiffs' localized injuries were "fairly traceable" to the challenged conduct. *Id.* at 1144. The court emphasized that the five oil refineries were responsible for nearly six percent of Washington's emissions, an amount that was "scientifically indiscernible" in the context of global climate change. *Id.* at 1143-44. Ultimately, "the causal chain [was] too tenuous to support standing" because "a multitude of independent third parties [were] responsible for the changes contributing to Plaintiffs' injuries." *Id.* at 1144. In cases where the Ninth Circuit has concluded there is sufficient causation when there are multiple causes to the injury, the court has

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emphasized the traceability of the injury to the challenged conduct. *See WildEarth Guardians*, 795 F.3d at 1158 (noting that there were "at most two causes" to the alleged injury and the conduct at issue "contribute[d] very discernibly to that injury"); *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 860 (9th Cir. 2005) (acknowledging that "other factors may also cause additional tanker traffic and increase the attendant risk of an oil spill" but emphasizing that "the link between the new [oil] platform and increased traffic [was] not tenuous or abstract").

Here, the record reflects the tenuous connection between the ability for WFC members to view SRKWs and the operations of the SEAK troll fishery. According to WFC's expert, Dr. Giles, in addition to the natural threats affecting the SKRW population, the primary anthropogenic threats include prey limitation, acoustic and physical disturbance, and PCB contamination. AR 29607. The ATA does not dispute that salmon abundance is a key factor affecting SRKW population dynamics. *See* AR 29607. Rather, the ATA challenges WFC's characterization of the relationship between Chinook salmon, the SEAK troll fishery, and the SRKW population. The 2019 Pacific Salmon Treaty reduced the SEAK troll fishery catch up to 7.5 percent from the catch allowed in the previous decade under the prior agreement. AR 47445. The 2019 SEAK BiOp concludes that that harvest reduction will "reduce[] effects to prey availability under the 2019 Agreement than under the previous regime." AR 47504. That reduction comes on the heels of previous significant reductions in prior iterations of the Treaty—the allowable catch for SEAK troll fishery has reduced by 45 percent since the Treaty first took effect. Lyons Decl., ¶ 28. Thus, this is not an instance where the SEAK troll fishery is recklessly harvesting unchecked. Rather, WFC seeks the extreme outcome of closing the SEAK troll fishery, and that does not align with the sacrifices already made and the actual effects that such harvests have on the SRKW.

In light of the other threats affecting the SRKW population and salmon abundance, any influence that the SEAK troll fishery has on prey availability for the sustainability and growth of

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the SRKW population is scientifically indiscernible for the purposes of standing. The record details other factors that affect the link between the SEAK troll fishery and the SRKW population. The SRKW compete for prey with northern resident killer whales, seals, and sea lions. AR 38558. Further, the long-term viability of salmon is affected by habitat impacts such as floods, landslides, and droughts. AR 47345. There are also many other anthropogenic activities that may reduce prey to SRKW in addition to harvests, including agriculture, forestry, marine construction, levy maintenance, shoreline armoring, dredging, and hydropower operations and new development. AR 47347. With respect to harvests, salmon abundance is affected by fishing in Alaska State waters, Canadian fisheries, and fisheries in the Pacific Northwest. Schindler Decl., ¶ 8.h.

In the context of those factors, the SEAK troll fishery catch has a tenuous link to the SRKW population. As mentioned, the SEAK troll fishery catch is a relatively lower proportion of the total run size of the stocks most valued by SRKW. AR 47506. WFC emphasizes that the 2019 SEAK BiOp estimates that the SEAK fisheries may reduce SRKW prey by 12.9 percent. WFC MSJ, 19. However, the 2019 SEAK BiOp presents a broad range of potential effects, estimating that the effects of SEAK fishery harvests could reduce SRKW prey in coastal waters by as little as 0.2 percent, or as much as 12.9 percent in an extreme scenario. WFC MSJ, 19; AR 47439-40. Additionally, the 2019 SEAK BiOp estimated that the potential reductions of prey in inland waters could range from 0.1 percent to 2.5 percent. AR 47440. The 2019 SEAK BiOp also explains that "[a]lthough the proposed SEAK fisheries could result in up to 12.9% reduction in the prey available to the whales in their coastal range, this would likely occur rarely and during a time period when the whales are more often observed in inland waters." AR 47445. "Furthermore, these greater prey reductions in coastal waters would be spread across a larger portion of the geographic range of Southern Residents." AR 47445. Thus, given the many factors affecting salmon abundance and the specific stocks that the SEAK troll fishery targets, the challenged NMFS action pertaining to the SEAK troll fishery has an attenuated connection to the

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population of the SRKW. Stated differently, WFC has failed to demonstrate that the indiscernible number of salmon that may be SRKW prey if not for SEAK troll fishery, let alone summer troll fishery, harvests is fairly traceable to the alleged injuries regarding the ability to see SRKWs in the wild.

2. WFC's Alleged Injury Will Continue Unabated Even if the SEAK Troll Fishery is Closed.

In asserting that it has met the redressability requirement, WFC identifies that it must show a likelihood that its injury will be redressed by a favorable decision. WFC MSJ, 46. However, WFC only argues that its "injuries are redressable by an order from the Court because proper ESA and NEPA analysis could influence agency actions." *Id*. Importantly, that standard is the required showing for redressability for a procedural claim. *See WildEarth Guardians*, 795 F.3d at 1155. Thus, like the causation requirement, WFC's arguments are insufficient to establish standing or to refute a lack of standing.

As mentioned, the redressability analysis effectively mirrors the causation analysis. *See Washington Envtl. Council*, 732 F.3d at 1146 (concluding that the plaintiffs failed to meet the redressability requirement "for many of the same reasons they fail[ed] to meet the causality requirement"). In *Washington Envtl. Council*, the court concluded that the plaintiffs' injuries were "likely to continue unabated" even if the plaintiffs had received the remedy that they sought. *Id.* at 1147. Thus, in order for a plaintiff to satisfy the redressability requirement, there must be evidence in the record that demonstrates a "substantial likelihood" that the injury will be redressed if the plaintiffs receive a favorable decision. *Id.* at 1146. In the same case, the Ninth Circuit emphasized that the agency did not pursue the actions desired by the plaintiffs, but "decided to use its limited resources to pursue other efforts" to address the emissions issues implicated by the plaintiffs' alleged injuries. *Id.*

Here, the record is devoid of evidence demonstrating a "substantial likelihood" that the Plaintiffs may be more likely to see SRKW if the SEAK troll fishery is closed. Dr. Giles states

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that "[i]t is essentially impossible to meet NMFS' recover goal of an average growth rate of 2.3% in the Southern Resident killer whale population without increasing the abundance of Chinook available to the Southern Residents as prey.[4] Giles Decl., ¶ 10. Assuming that conclusion is true, it does not mean that closing the SEAK troll fishery will necessarily result in a meaningful increase in prey for the SRKW. In fact, the record reflects that reducing Chinook salmon fisheries will not achieve that desired growth rate for the SRKWs. *See* AR 38558. If the fishery was closed, the Chinook that would have otherwise been caught by the fishery would still have to survive fishing efforts in Alaska state waters, Canadian fisheries, northern resident killer whales, fisheries in the Pacific Northwest, and other threats in order to be available prey to the SRKW. Schindler Decl., ¶ 8.h. Only a "trivial amount" of Chinook may become SRKW prey if the SEAK troll fishery was closed. Schindler Decl., ¶¶ 8-9. Ultimately, the 2019 SEAK BiOp represents an effort by NMFS to use its limited resources to address the SRKW population while maintaining the SEAK troll fishery. Even if the SEAK troll fishery was shut down in response to WFC's claims, WFC's injuries related to the inability to see SRKW in the wild would continue unabated. Accordingly, shutting down the SEAK troll fishery could not redress WFC's injuries so that its members could see more SRKWs in the wild.

B. WFC's Remaining Claims Do Not Warrant Shutting Down the Southeast Alaska Troll Fishery.

Regardless of whether WFC has demonstrated sufficient standing on its remaining claims, the ATA submits that the relief sought by WFC at the summary judgment stage is not warranted. WFC alleges that the 2019 BiOp and the Incidental Take Statement should be vacated as unlawful actions under the Administrative Procedure Act ("APA") due to NMFS's ESA and NEPA violations. WFC MSJ, 40. "A federal court is not required to set aside every unlawful

[4] The actions contemplated by the 2019 SEAK BiOp are not required to achieve a 2.3 percent growth rate or guarantee recovery for the SRKW. Rather, the ESA requires NMFS to ensure that an action does not "[j]eopardize the continued existence" of a species—meaning it will not "reduce appreciably the likelihood of both the survival and recovery of a listed species." 50 C.F.R. § 402.02.

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agency action and the decision to grant or deny injunctive or declaratory relief under [the] APA is controlled by principles of equity." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Here, the equities do not warrant the extreme relief sought by WFC's remaining claims and WFC has not established that there are no issues of genuine material fact that would preclude a summary judgment.[5]

WFC alleges that NMFS did not properly consider potential harm from the hatchery prey increase program in reaching a "no jeopardy" determination in the 2019 SEAK BiOp for threatened salmonids. WFC MSJ, 30-34. WFC acknowledges that NMFS considered salmon harvests, including from the SEAK troll fishery, in reaching a "no jeopardy" conclusion. WFC MSJ, 31. Thus, to the extent that WFC seeks additional analysis related to the prey increase program, closing the SEAK troll fishery will not redress WFC's procedural injury that is unrelated to the troll fishery.

WFC also alleges a procedural claim that NMFS violated NEPA by failing to conduct any NEPA analysis for authorizing take under the 2019 Pacific Salmon Treaty and failing to conduct a NEPA analysis for the prey increase program. WFC MSJ, 35. Similarly, the prey increase program is unrelated to the SEAK troll fishery and, thus, any potential procedural errors related to that analysis cannot justify shutting down the SEAK troll fishery. That is particularly true in light of the equities in this case. WFC maintains that any harms from vacatur would not significantly outweigh the magnitude of NMFS's error in this case in light of the SRKW's endangered status. WFC MSJ, 41-42. That argument, however, overstates the tenuous link between the SEAK troll fishery and the SRKW and fails to appreciate the severe impacts a vacatur would have on the communities of southeast Alaska. Only a "trivial amount" of the foregone SEAK troll fishery may end up becoming prey for the SRKW. Schindler Decl., ¶ 8.i. On the contrary, the effects of vacatur on the communities of southeast Alaska would be direct

[5] The ATA incorporates and adopts the State of Alaska's and NMFS's arguments as to why WFC has failed to demonstrate that summary judgment is warranted on its remaining claims.

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and severe. Closing the SEAK troll fishery would affect over 1,400 men and women who fish for a living, and another 250 seafood processing plant workers. Calvin Decl. (Dkt. No. 41), ¶¶ 4-5; Donohoe Decl. (Dkt. No. 37), ¶¶ 3-5; Watson Decl. (Dkt. No. 40), ¶¶ 3-5. The total economic impact of closing the SEAK troll fishery on the local community has been estimated to be approximately $85 million. Olson Decl., ¶ 19. Accordingly, the equities do not support vacatur to remedy a procedural error of a fully informed agency decision.

Further, for the reasons laid out by the State of Alaska and NMFS, NMFS was not required to conduct a NEPA analysis before issuing its Incidental Take Statement. Accordingly, WFC cannot establish that there are no genuine issues of material fact that it has procedural standing to vacate the Incidental Take Statement. The redressability requirement for standing, in the context of a procedural injury, "is satisfied when the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision." *WildEarth Guardians*, 795 F.3d at 1156. Here, WFC has not successfully demonstrated that, under the summary judgment standard, NMFS did not follow the correct procedures. As a result, the vacatur that WFC seeks is not appropriate at the summary judgment stage.

VI. CONCLUSION

WFC's motion for summary judgment overstates the connection between the SEAK troll fishery and the health of the SRKW population. In doing so, WFC does not have standing to seek the relief identified in its motion. Additionally, the relief that WFC seeks is inappropriate at the summary judgment stage because the equities do not weigh in favor of vacating the 2019 SEAK BiOp and ITS. Accordingly, the ATA respectfully submits that the Court deny WFC's motion for summary judgment and grant the ATA's cross-motion.

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DATED this 26th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, 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 May 26, 2021, in Seattle, Washington.

/s Eliza Hinkes
Eliza Hinkes, Paralegal

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Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

vs.

BARRY THOM, *et al.*,

Defendants,

ALASKA TROLLERS ASSOCIATION, and STATE OF ALASKA,

Defendant-Intervenors.

CASE NO: 2:20-cv-417-RAJ-MLP

STATE OF ALASKA'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: June 16, 2021

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Wild Fish Conservancy ("Plaintiff") asks the Court to rule, as a matter of law, that the National Marine Fisheries Service ("NMFS") biological opinion ("BiOp") for salmon fisheries in Southeast Alaska ("SEAK") was unlawfully adopted in violation of the Endangered Species Act ("ESA") 16 U.S.C. § 1531, *et seq.*, and the National Environmental Policy Act ("NEPA") 42 U.S.C. § 4321, *et seq.*. As a remedy, Plaintiff asks this Court to vacate the BiOp and its Incidental Take Statement ("ITS"), resulting, by default, in the closure of SEAK troll fisheries that occur in federal waters. This is relief that the Court has previously denied because of Plaintiff's untimely challenge to Alaska's management of the salmon fisheries under the Magnuson-Stevens Act ("MSA"), and the Court continues to have no jurisdiction to grant such relief. *See* Report and Recommendation, Dkt. 51 at 12-16. Plaintiff also asks the Court to enjoin NMFS from implementing the prey increase program that is designed to provide an immediate and meaningful increase in prey availability for Southern Resident Killer Whales ("SRKW"). Dkt. 91, p. 12.

Because NMFS complied with the requirements of the ESA, NEPA, and associated regulations and interpreting case law, the State of Alaska ("State" or "Alaska") opposes Plaintiff's motion and asks the Court to deny it. On the basis of the arguments set forth in this brief and pursuant to LCR 7(k), the State respectfully cross-moves for summary judgment that the BiOp is lawful,[1] and for a final judgment dismissing with prejudice any claims by Plaintiff based upon the delegation of management of the SEAK salmon fishery to the State of Alaska under the MSA.

On March 30, 2021, the Court granted the State's motion to intervene. Dkt. 88. Alaska, as a sovereign state and pursuant to its public trust responsibilities, has an interest in managing and conserving all wildlife and other natural resources within its jurisdiction, including SEAK salmon fisheries. Alaska Const. art. VIII, §§ 1, 4; Alaska Stat. § 16.05.020; *see also* Dkt. 76 at 4, ¶¶9, 10.

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[1] Alaska joins in the arguments of Federal Defendants regarding the ESA and NEPA claims and Defendant-Intervenor Alaska Troller's Assoc. with respect to standing.

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Section 7 of the ESA provides that taking incidental to an otherwise lawful agency action is not considered to be a prohibited "taking" under the ESA if that action is performed in compliance with the terms and conditions of an ITS. AR 47517. In this case, that action is continued salmon fishing in SEAK. Vacatur of the BiOp and ITS would be an extraordinary overreaction to the untimely claims advanced by Plaintiff and would be inappropriate in this case. Such an order would decimate SEAK's coastal communities, while providing no colorable benefit to SRKW. Vacatur of the SEAK BiOp would also impact the biological opinion on the Authorization of the West Coast Ocean Salmon Fisheries Through Approval of the Pacific Salmon Fishery Management Plan, because consultation on the Pacific Salmon Treaty ("PST" or "Treaty") mitigation funding initiative, which is included in the SEAK BiOp, is an important element of the environmental baseline in the West Coast salmon fisheries BiOp.

As the record demonstrates, NMFS engaged in reasoned decision making and its determinations are entitled to deference. Plaintiff's ESA and NEPA claims are entirely without merit and should be summarily denied.

II. FACTUAL BACKGROUND

A. Southeast Alaska Salmon Fisheries.

The SEAK troll fishery operates in both federal and State waters, and is managed as a single unit. AR 00540; AR 00515. The Alaska Department of Fish & Game ("ADF&G") has managed salmon fisheries in federal waters since statehood in 1959 and has made "substantial investments over the years in facilities, communications, information systems, vessels, equipment, experienced personnel capable of carrying out extensive management, research, and enforcement programs." AR 00522. In 1979, the North Pacific Fishery Management Council developed, and the Secretary of Commerce ("Secretary") approved, the *Fishery Management Plan for the Salmon Fisheries in the EEZ off Alaska* ("FMP") under the MSA. With the implementation of the FMP, the State has played the major role in managing the salmon fisheries in the federal exclusive economic zone ("EEZ"). AR 00522.

The SEAK subsistence, commercial, and sport salmon fisheries are a vitally important and

longstanding part of the social and economic fabric of coastal communities in SEAK. Dkt. 76, p 6, ¶ 14. From a purely economic perspective, the SEAK salmon fishery produced $806 million in output, $484 million in gross domestic product, $299 million in labor income or wages, and provided 6,600 full time equivalent jobs on average from 2012 to 2015. *Id*. The economic activity generated by the SEAK fisheries is critically important to the coastal communities in the region. Dkt. 76 at ¶ 16. The EEZ constitutes approximately 87% of SEAK waters (81,203 out of 93,167 total nautical miles squared), a nearly 7:1 ratio of EEZ waters to State of Alaska waters in the region. Dkt. 76 at ¶ 12.

The SEAK Chinook salmon fishery is managed to stay within the negotiated annual all-gear PST total allowable catch limit determined by the Pacific Salmon Commission and to meet escapement goals for wild stocks originating from SEAK and transboundary rivers. *See* AR 47318. Chinook catch is allocated through regulations established by the Alaska Board of Fisheries among subsistence, troll, net, sport, and personal use fisheries. AR 00544. Under Article VII, Section 4 of the Alaska Constitution, all fisheries must be managed on the sustained yield principle. *See also* 5 AAC 39.222 (the Board's Policy for the Management of Sustainable Salmon Fisheries).

Subsistence fishing is managed as the priority and all other fisheries are restricted to ensure reasonable opportunity as defined by the Alaska Board of Fisheries. AS 16.05.258. Outside of subsistence, the current allocation plan reserves 1,000 fish for set gillnet fisheries and 4.3% and 2.9% of the remaining all-gear catch is allocated to the purse seine and drift gillnet fisheries. AR 00544. After the net quotas are subtracted, 80% of the remainder is allocated to the commercial troll fishery and the other 20% to sport fisheries. *Id.* All fisheries are sampled in-season for coded-wire tags and/or genetics, which are processed and used to determine the proportion of catch comprised of Alaska hatchery fish. AR 00541.

Annual accounting of troll fisheries occurs on a cycle that begins October 1 and ends September 30 each year. AR 00540. The troll fishery consists of two seasons: (1) a winter fishery that occurs from October 11 to April 30 of the following year and (2) a summer fishery that occurs from May through September. AR 00540. The summer season is further divided into spring fishery

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which occurs May 1 through June 30 and a summer fishery which occurs July 1 through September 30. *Id*. The winter and spring troll fisheries are limited to State waters; the summer troll fishery occurs in both federal and State waters. *Id*. The winter fishery is managed to a guideline harvest level of 45,000 Treaty fish and the open fishing area is restricted to within the troll boundary of the outer coast surf line. *Id*. The spring troll fishery (May 1 or earlier, through June 30) is managed to target Chinook produced from SEAK hatcheries. AR 00540-41.

The summer troll fishery accounts for the majority of the annual Chinook salmon commercial harvest and is closely monitored and managed to prevent exceeding the troll portion of the annual harvest limit by allowing retention of Chinook salmon during two or more periods in most years. AR 00541. The first summer troll fishery opening, beginning July 1 by regulation, allows harvest in the waters of frequent high Chinook abundance and is managed to not exceed 70% of the remaining troll portion of the annual harvest limit. *Id*. Once the July fishery is closed, the troll fleet targets coho salmon, and Chinook retention by the troll fleet is not allowed unless it is determined that additional openings will not result in exceeding the annual harvest limit. AR 00541. Coho salmon management is subject to Chapter 7 Attachment B of the 2019 PST Agreement and regulatory provisions established by the Board of Fisheries for allocation and conservation of SEAK coho stocks. AR 00521.

The majority of coho salmon harvested in the troll fishery are of SEAK local origin, as coho are less migratory than Chinook salmon and coded-wire tag studies suggest that "none of the ESA-listed coho salmon ESUs on the west coast are likely to range into SEAK fisheries." AR 47530, AR 25190. Accordingly, Washington and Oregon origin coho salmon stocks are not encountered in substantial numbers in the troll fisheries occurring in SEAK fisheries. The SEAK BiOp accurately concluded that SEAK fisheries were unlikely to adversely affect ESA-listed coho stocks. AR 47174.

The State relies on information reported on fish tickets to estimate the proportion of fish harvested in the State waters and in the EEZ. AR 00542, 00548. Over the most recent 10-year period (2010–2019), the State estimates that, on average, 14% (28,907 fish) of the total troll fishery

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Chinook harvest and 7% or 90,268 of the troll coho harvest occurred in the EEZ.[2] Dkt. 36, p. 6.

B. **Southern Resident Killer Whales.**

The SRKW distinct population segment ("DPS") was listed as an endangered species under the ESA in 2005. AR 47196. The reproductive rates of SRKW have been found to be significantly lower than those of Northern Residents or Alaska Residents. AR 47347. "Compared to Northern Resident killer whales (a resident killer whale population with a sympatric geographic distribution ranging from coastal waters of Washington State and British Columbia north to SEAK) Southern Resident females appear to have reduced fecundity." AR 47276. Two of the toxic chemicals that have been found to be present in relatively high levels in SRKW, polychlorinated biphenyls (PCBs) and dichlorodiphenyltrichloroethane (DDT), can cause reproductive impairment. AR 37742

The primary factors inhibiting SRKW population growth include high levels of contaminants from pollution, disturbances from vessel traffic and vessel noise, and reduced prey availability. AR 47276, 47282, 47286-87, 47433, 47434. Oil spills and disease as well as the small population size are also risk factors. *Id*. It is likely that multiple threats are acting together to impact the whales. *Id.* There have been studies that have suggested the low fecundity of SRKW is in large part attributable to nutritional limitations, however, much uncertainty remains. AR 47276, 47433. The cumulative effects of the primary factors, along with high uncertainty in Chinook abundance estimates, the low number and long life of the SRKW, and reduced immune function from chronic stress make the findings of those studies more uncertain. AR 47433, 47288.

SRKW range throughout the coastal waters off Washington, Oregon, and Vancouver Island and are known to travel as far south as central California. AR 47280. There has been only one sighting in SEAK, in Chatham Strait in 2007. 84 FR 49218. As such, the inclusion of SRKW in the SEAK BiOp is solely within the context of prey resources harvested in the SEAK fishery that

[2] These data from the ADF&G Mark, Tag, and Age Laboratory are publicly available at https://mtalab.adfg.alaska.gov/CWT/reports/default.aspx, last visited May 13, 2021. The Court may take judicial notice of these public agency records. *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (noticing agency document readily accessible on agency website).

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could potentially otherwise be available to SRKW. AR 47504.

C. **Threatened Salmonoids.**

NMFS considered the effects of the SEAK fishery on four ESA-listed stocks or Evolutionary Significant Units ("ESU") of Chinook salmon in the SEAK BiOp: Puget Sound, Lower Columbia River, Upper Willamette River, and Snake River fall-run. AR 47193. The primary causes of declines in the ESUs are loss of freshwater and estuarine habitat, hydropower development, poor ocean conditions, overfishing, and hatchery practices. AR 14492, 15761, 15891. Per the ESA hatchery listing policy, several hatchery stocks are now included within each ESU and therefore are within the ESA-listing. AR 01730. However, Chinook fisheries have been reduced under the Treaty in response to these conservation concerns. *See* AR 47504.

The record shows that SEAK fisheries have an insignificant impact on endangered West Coast salmon stocks. *See* AR 47589-607. For Puget Sound stocks, the majority of the fisheries impacts occur in West Coast Vancouver Island, Southern British Columbia, and Puget Sound fisheries with small exploitation occurring in SEAK fisheries. AR 08030, 08031, 08039, 08040, 08042, 08043, 08046, 08047, 08052. Lower Columbia Fall Chinook stocks are primarily harvested in the West Coast Vancouver Island, Southern British Columbia, and South Cape Falcon fisheries. AR 08023, 08045. Snake River Fall Chinook are primarily harvested in fisheries occurring along the Washington and Oregon coasts. AR 08026, 47593.

D. **The Pacific Salmon Treaty.**

Prior to the signing of the Treaty in 1985, management of salmon fisheries of the two countries was not coordinated and was often competitive, leading to overfishing and the loss of production to both Canada and the United States. *See, e.g.*, AR 00523. The fundamental goals of the Treaty are to prevent overfishing and to provide for the optimum production and fair sharing of the harvest of salmon. AR 47194. To achieve these goals, the Treaty establishes a process through which the parties interact to establish, implement, and monitor science-based fishery management regimes applicable to their respective jurisdictions. *See, e.g.*, AR 00523. These fishery management regimes are tailored to each of the major geographical regions covered by the

Treaty, reflecting coast-wide differences in migration and concentration of the various salmon species and stocks. *Id.*

Alaska's obligations under the Chinook Chapter of the 2019 Treaty include managing SEAK fisheries to (1) not exceed the annual preseason catch limit, with the severe penalty for exceeding annual harvest limits of paying back any overages the following year; (2) achieve escapement goals for SEAK and transboundary river wild stocks; and (3) not exceed limits on incidental mortality.[3] AR 00541. The Treaty also contains obligations to collect the data necessary to evaluate compliance. AR 47201. Since the 2019 version of the Treaty was signed, Alaska has met all of its obligations set forth in the Treaty.

1. Treaty harvest reductions.

Chinook fisheries have been reduced substantially since the Treaty was first ratified in 1985. AR 47202. Significant harvest reductions occurred in association with the 1999 and 2009 revisions to the Treaty. *Id.* Further reductions occurred in conjunction with the 2019 revision. *Id.* In response to conservation concerns particularly for ESA-listed Puget Sound Chinook stocks, the 2009 Treaty revisions called for negotiated reductions of 15% and 30%, respectively, in catches in the SEAK and West Coast Vancouver Island outside fisheries. AR 47212. These reductions were intended to provide more Chinook to the spawning grounds for ESA-listed Puget Sound stocks as substantial harvest of Puget Sound Chinook stocks occurs off the West Coast of Vancouver Island. *See id.* The 2019 Treaty reduces the allowable annual catch in the SEAK and West Coast of Vancouver Island fisheries by up to 7.5% and 12.5%, respectively, beyond the reductions imposed in the 2009 Treaty. *Id.*

All of these measures were specifically designed to reduce fishery impacts in all fisheries to respond to conservation concerns, including the need to provide additional prey for SRKW. This is despite the fact that following issuance of a 2011 biological opinion on the management

[3] To this end, the SEAK FMP calls for a decrease in "the incidental mortalities of salmon hooked and released, consistent with allocation decisions and the objective of providing the greatest overall benefit to the people of the United States." AR 00519.

plan for Puget Sound fisheries, NMFS convened an independent science panel to critically evaluate the effects of salmon fisheries on the abundance of Chinook salmon available to SRKW. AR 47286. The panel concluded that while salmon abundance will likely influence the recovery of SRKW, the "impact of reduced Chinook salmon harvest on future availability of Chinook salmon to Southern Residents is not clear, and cautioned against overreliance on correlative studies or implicating any particular fishery." *Id.*

2. Treaty funding mechanisms.

Federal funding is provided annually through NOAA, which provides grants to the state and federal agencies conducting the work of implementing the Treaty and for mitigation actions. Public Law 99–5, (Mar. 15, 1985), 99 Stat. 7 (Amended through Public Law 111–8, March 11, 2009). Congressional appropriations have increased substantially in recent years to implement the Treaty. Pub. L. No. 116-260 (Dec. 27, 2020).

The fiscal year 2020 congressional appropriations bill provided $35.5 million for Treaty implementation. Pub. L. No. 116-93, 113 Stat. 2317 (Dec. 20, 2019). The spend plan agreed to by the U.S. Commissioners on February 21, 2020, directed $19.1 million to ESA-related conservation activities, with $3.1 million for the conservation hatchery programs, $10.4 million for habitat restoration actions, and $5.6 million for hatchery production aimed at increasing prey for SRKW. Dkt. 43-4, p. 6 ¶ 14. The fiscal year 2021 Congressional appropriation for Treaty implementation included $39.5 million in Commerce, an increase of $4.0 million over the fiscal year 2020 enacted level. Pub. L. No. 116-260 (Dec. 27, 2020). With this funding, the United States invested no less than $20.0 million to implement the mitigations activities within the SEAK BiOp including habitat restoration projects in Puget Sound, hatchery programs to conserve at-risk Chinook salmon stocks in Puget Sound, and new hatchery production to increase the food available for SRKW. *Id.*

The relationship between fisheries in Alaska, Canada, and the Southern U.S. are complex and it was necessary to ensure that all fisheries were reduced to provide benefits for SRKW. AR 47202. The U.S. Commissioners to the PST recognized that further mitigation could be addressed through a targeted funding initiative. *Id.* The funding initiative was relevant to NMFS'

consideration of the SEAK fishery in the BiOp, and became an essential element of the environmental baseline in other BiOps regarding Puget Sound and other Southern U.S. fisheries in Washington, Oregon, and California. *Id.*[4] The funding of additional mitigation measures, contemplated by the U.S. Commissioners to the PST and incorporated into the SEAK BiOp, is inextricably tied to the fundamental underpinnings of the BiOps for numerous West Coast salmon fisheries. *Id.*

E. **2019 Southeast Alaska Biological Opinion.**

The 2019 biological opinion challenged by Plaintiff in this action is only one in series of continued consultations under the ESA. NMFS conducted its first ESA review of salmon fisheries in SEAK in 1993, and continued their consideration of the SEAK fisheries by means of annual consultations through 1998. AR 47195. After that NMFS, consulted on the three 10-year Treaty agreements in 1999, 2009, and 2019. AR 47196-97. The consultation on the 1999 version of the Treaty was the first time that NMFS consulted directly on a fishery management regime that involved specific harvest provisions for both U.S. and Canadian fisheries. AR 47196. The opinion on the 1999 Treaty focused primarily on the effects of fisheries in SEAK and Canada ("northern fisheries") on the same 4 ESA-listed Chinook stocks. *Id.* The scope of the consultation for the 2009 Treaty Agreement differed from that of the opinion on the 1999 Treaty Agreement, as NMFS extended its specified action area to also include all marine and freshwater areas in the southern U.S. subject to provisions of the PST. *Id.* The biological opinion again focused in particular on the effects on the same four Chinook salmon ESUs and Hood Canal summer-run chum, and for the first time, SRKW. *Id.*

The consultation in 2019 had a vastly different scope than the previous BiOps as it was focused on the SEAK fishery. NMFS consulted on the delegation of management authority over

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[4] *See also* ESA BiOp on Implementation of the PFMC Salmon FMP in 2020, https://repository.library.noaa.gov/view/noaa/27908, p 10-11, last accessed May 13, 2021. The Court may take judicial notice of this public record and as an agency action posted on the agency's website. *See* Fed. R. Evid. 201; *Catholic League for Religious and Civil Rights v. City and Cnty. of San Francisco*, 567 F.3d 595, 606 n.13 (9th Cir. 2009) (noticing local resolution as matter of public record).

salmon fisheries in the EEZ in SEAK to the State of Alaska, federal grants to the State of Alaska for the implementation of the 2019 PST, and also included three U.S. domestic mitigation funding actions for a conservation program for critical Puget Sound stocks and SRKW associated with the 2019 PST Agreement. AR 47197.

Chronologically, the SEAK fishery begins first and with the separation of the SEAK fishery from the remainder of the fisheries subject to the Treaty, the consultation of the SEAK fishery was completed before all others. Presumably, this is the basis for NMFS' inclusion in the consultation of impacts to ESA-listed species from U.S. domestic mitigation actions associated with the 2019 Treaty Agreement which are applicable to NMFS' consideration of all U.S. fisheries subject to the Treaty. The mitigation action for federal funding of a conservation program for critical Puget Sound salmon stocks through conservation hatcheries and habitat restoration is tangential to impacts from the SEAK fishery, as harvests of Puget Sound stocks in Alaska are small. *See* AR 47589-607. The inclusion of federal funding to increase prey availability for SRKW at no less than $5.6 million per year is likewise intended to mitigate for harvest along the West Coast and Canada. *See, e.g.*, AR 47203; *see also* ESA BiOp on Implementation of the PFMC Salmon FMP in 2020, https://repository.library.noaa.gov/view/noaa/27908, p 10-11, last accessed May 13, 2021.

The mitigation funding initiative is also relevant to NMFS' consideration in its BiOp for the Pacific Fishery Management Council authorization of ocean salmon fisheries off the coasts of Washington, Oregon, and California, and will likewise be an essential element of the environmental baseline in upcoming opinions regarding Puget Sound and other southern U.S. fisheries. AR 47203-04. "Fundamentally, all U.S. fisheries may be affected by decisions made in the event that funding is not provided." *Id.*

III. STAUTORY BACKGROUND

A. Endangered Species Act.

Congress enacted the ESA in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved…." 16 U.S.C. § 1531.

Section 7 of the ESA ("Section 7") requires each federal agency 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 the species' designated critical habitat. 16 U.S.C. § 1536(a)(2). Section 7(a)(2)'s consultation requirement applies to "any endangered species or threatened species." *Id.*

Section 7 consultation requires NMFS to prepare a biological opinion to determine whether the proposed action will result in jeopardy to the species or result in the destruction or adverse modification of the species' critical habitat. *Id.*; *see also* 50 C.F.R. § 402.14. If NMFS determines the action will not cause jeopardy or adverse modification, or offers reasonable and prudent alternatives that avoid jeopardy or adverse modification, it may issue an ITS. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

A finding of jeopardy requires population level impacts that threaten the continued survival and recovery of the species. *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093-94 (9th Cir. 2005) (jeopardy determination requires consideration of the impacts to the species *population*); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518-19 (9th Cir. 2010) (jeopardy analysis conducted at the *population* level).

NMFS' only task in a formal consultation is to prepare a BiOp that discusses whether the proposed action is likely to cause jeopardy and the effects of the proposed action on listed species or on the species' critical habitat. 50 C.F.R. § 402.14(h). In preparing its opinion, NMFS must use "the best scientific and commercial data available." *Id.* § 402.14(g)(8). If NMFS concludes that a proposed action will result in the incidental taking of an endangered or threatened species but will not cause jeopardy, it must include in its BiOp an ITS specifying, among other things, "the impact of such incidental taking on the species" affected. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Under the ESA, a taking that complies with an ITS "shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2).

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B. **National Environmental Policy Act.**

NEPA declares a broad national commitment to protecting and promoting environmental quality and establishes important "action-forcing procedures" to meet this goal. *Robertson v. Methow Valley Citizens Council*, 490 U S. 332, 348 (1989).

However, NEPA "does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) (internal quotations and citations omitted); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).

NEPA often requires the preparation of an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). However, a consulting agency that prepares a biological opinion or issues an ITS has not commenced a "major Federal action" for the purposes of triggering NEPA. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 643 (9th Cir. 2014) ("We would not ordinarily consider an 'opinion' or 'suggest[ion]' a 'major Federal action[ ].'")

C. **Magnuson-Stevens Act.**

In the MSA, Congress established eight regional fishery management councils, comprised of state and federal officials and fisheries experts nominated by state governors and appointed by the Secretary. 16 U.S.C. § 1852(b). The principal task of each council is to prepare and submit to the Secretary for approval fishery management plans "for each fishery under its authority that requires conservation and management," amendments to plans, and regulations to implement the plans. AR 00507; 16 U.S.C. §§ 1801(b)(4), 1852(h)(l), 1853(c). Relevant to this case, the MSA establishes the North Pacific Fishery Management Council with authority over fisheries in the EEZ of the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. 16 U.S.C. § 1852(a)(l)(G). The EEZ begins three geographical miles from the coast and extends out 200 nautical miles. AR 00512.

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Under the MSA, the United States claims exclusive management authority over all fish in the EEZ, 16 U.S.C. § 1811(a), yet in a section entitled "State jurisdiction," the MSA allows States to manage fisheries in the EEZ if the fishery management plan for the fishery in which a fishing vessel is operating delegates management of the fishery to a State and the State's laws and regulations are consistent with such fishery management plan. *Id.* § 1856(a)(3). Such is the case here with respect to the State's management of the SEAK salmon fisheries under the FMP and state regulations. *See also* AR 00520.

Regulations promulgated by the Secretary under the MSA "shall be subject to judicial review to the extent 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 on which the regulations are promulgated or the action is published in the Federal Register…." 16 U.S.C. § 1855 (emphasis added). This Court has previously found the 30-day requirement to be jurisdictional. Dkt. 51 at 17 ("Given that Plaintiff's requested relief is circumscribed by the Magnuson-Steven's Act and § 1855(f)'s 30 day limitations period to bring a challenge, Plaintiff's challenge is time-barred, and the Court therefore lacks jurisdiction to issue relief.")

IV. STANDARD OF REVIEW

Courts review agency compliance with NEPA and the ESA under § 706 of the Administrative Procedure Act. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 641 (9th Cir. 2010); *Wild Fish Conservancy*, 628 F.3d at 521. Under the APA, the court may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009) (quoting 5 U.S.C. § 706(2)(A)); *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Under both of these statutes, the traditional deference is "at its highest where a court is reviewing an agency action that required a high level of technical expertise." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989)).

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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). As the Ninth Circuit explained, 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). It is not the court's function to instruct the agency, choose among scientific studies, and order the agency to explain every possible scientific uncertainty. *Id.* "Deference is particularly important when the agency is making predictions, within its area of special expertise, at the frontiers of science." *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001) (internal quotations omitted).

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to 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 is a record review case, the Court may direct that 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).

V. ARGUMENT

Plaintiff's main argument is that the 2019 SEAK BiOp is arbitrary primarily because it, according to Plaintiff, relies on uncertain mitigation and "fails to draw a rational connection between the facts and the no jeopardy opinion reached for Southern Residents." Dkt. 91, pp. 21, 27. Plaintiff also alleges that NMFS failed to comply with NEPA. Dkt. 91, p. 35. Plaintiff's arguments are without merit and should be rejected. The Federal Defendants have briefed these and other issues in their cross motion for summary judgment. The State agrees with and joins with Federal Defendants' arguments.

Plaintiff also lacks standing to pursue this matter. Intervenor-Defendant Alaska Trollers Assoc. has briefed the Plaintiff's lack of standing, and the State agrees with and joins in their arguments. In order to avoid replicating arguments, the State will touch on some of these issues, but will focus primarily on the appropriate remedy in the event that one should become necessary.

In addition, Plaintiff 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 authority. Dkt, 51, 69. The Court previously found that it lacked jurisdiction under the MSA to grant injunctive relief because the Plaintiff's challenge to authorization of commercial Chinook salmon fisheries in SEAK was an MSA action and untimely. *Id*. The State respectfully requests the Court issue an order dismissing with prejudice Plaintiff's challenge to the authorization and funding of the SEAK Chinook fishery through the delegation of authority to the State under the FMP for lack of subject matter jurisdiction under Federal Rule 12(b)(1). *See Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 438 F.3d 937 (9th Cir. 2006); *Frigard v. U.S.*, 862 F.2d 201 (9th Cir. 1988).

Even if Plaintiff had brought a timely challenge under the MSA, its motion is legally and factually flawed, and the requested relief should be denied for the reasons set forth below.

A. **Plaintiff's Focus on the Southeast Alaska Salmon Fishery is Misplaced.**

Plaintiff begins the argument section of its brief with the allegation that "NMFS's management of fisheries has pushed Southern Residents to the brink of extinction." Dkt. 91, p 21. In support of this protestation, Plaintiff cites "e.g., AR 47503." Plaintiff is presumably referring to the statement that "[u]nder the existing management and recovery regimes over the last decade, salmon availability has not been sufficient to support Southern Resident population growth." AR 47503. But this ignores several important factors that are impacting SRKW, none of which have anything to do with Alaska or its fisheries.

Plaintiff's focus on Alaska's fisheries ignores that other omnipresent factors, such as "toxic chemicals that accumulate in top predators," disturbance from vessels, and oil spills are all factors that are limiting SRKW recovery. AR 47502.

1. Environmental contaminants.

Puget Sound is a "deep-water ford with several sills that restrict mixing and inhibit both ocean inflow and the outflow of toxic chemicals. AR 37444. As a result, "POPs that enter the Puget Sound basin have long residence times, resulting in an increase in contaminant exposure and

bioaccumulation in local food webs." *Id.* SRKWs frequent the marine areas "where relatively high levels of PCBs [polychlorinated biphenyls], PBDEs [polybrominated diphenyl ethers], and DDTs [dichlorodiphenyltrichloroethane] are found." AR 37507. And exposure to these pollutants "may hinder recovery of the SRKW population." *Id.* Indeed, "[h]igh concentrations of PCBs, DDTs, and PBDEs have been detected in the blubber and scat of the whales. AR 37965.

The SRKW recovery plan identified "a number of environmental contaminants that may pose a health risk to killer whales." AR 37741. Among those environmental contaminants that may pose a risk to SRKW, the following were found at relatively high levels in SRKW and their environment: PCBs, which can cause reproductive impairment, skeletal abnormalities, neuro- and immunotoxicity, terato- and carcinogenicity, and endocrine disruption; PBDEs, which can cause endocrine disruption, liver and thyroid function impairment, autoimmunity induction, immunosuppression, and impacts on lung and neural development; and DDT, which can cause reproductive impairment, immunosuppression, and adrenal and thyroid effects. AR 37742. Other environmental pollutants include dioxins, furans, polycyclic aromatic hydrocarbons, perfluorooctane sulfonate, tributyltin, dibutyltin, polychlorinated paraffins, polychlorinated naphthalenes, alkylphenol ethoxylates, and polychlorinated terphenyls, which are associated with liver damage, birth defects, reproductive impairment, cancer, cardiac dysfunction, developmental neurotoxicity, and endocrine disruption. AR 37742-43.

2. Vessel traffic.

Plaintiff's focus on the SEAK fishery also ignores the acoustic and physical disturbances to SRKW that result from vessel traffic in their home waters. The "Georgia Basin and Puget Sound are among the busiest waterways in the world, with several thousand trips made per month by various types of commercial vessels." AR 20914. And Haro Strait, which is frequented by SRKW, "is one of the region's primary shipping lanes." *Id.* "Killer whales are the principal target species for the commercial whale watch industry" and "encounter a variety of other vessels in their urban environment (e.g., recreational, fishing, ferries, military, shipping)." AR 37965, AR 20906. SRKWs experience "much heavier viewing pressure" than do their Northern Resident

counterparts. AR 20914. In fact, SRKW are so frequently in the presence of whale watching vessels that researchers have not been able to study their behavior absent vessels for comparison purposes. *Id.*

The Recovery Plan specifically listed "direct vessel strikes, the masking of echolocation and communication signals by anthropogenic sound, and behavioral changes" as possibly negatively impacting the whales. AR 37965. "Research has shown that the whales spend more time traveling and performing surface active behaviors and less time foraging in the presence of all vessel types, including kayaks, and that noise from motoring vessels up to 400m away has the potential to affect the echolocation abilities of foraging whales." *Id.* And beyond direct vessel strikes, commercial shipping is a major source of low frequency sound in the oceans that may disturb SRKW. AR 20915.

3. Prey availability.

When it comes to prey salmon, the SEAK fisheries are not the primary factor impacting their availably to SRKW. The would-be prey Chinook are adversely impacted by land use activities that result in habitat loss and degradation; hydropower systems; climate effects from Pacific decadal oscillation and other events that cause changes in ocean productivity; predation in the ocean by pelagic fishes, birds, and marine mammals such as abundant Northern Resident killer whales other than SRKW; and habitat-altering activities such as agriculture, forestry, marine construction, levy maintenance, shoreline armoring, dredging, and new development that can all reduce prey available to SRKW. AR 47347.

Restoring Puget Sound, reducing vessels impacts on the whales, and rebuilding the stocks of prey salmon are long-term projects. But producing 20 million additional Chinook smolt as near-future prey for SRKW provides an immediate improvement to the whales near- and long-term outlook. *See* AR 47447. Regardless, Plaintiff seeks to enjoin the hatchery program that will produce more SRKW prey. Dkt. 91, p. 43. There are many factors impacting SRKW and, unlike toxic pollutants and vessel traffic in Puget Sound, the apparent lack of prey is one where an

immediate remedy exists. The meaningful increase is Chinook abundance will increase prey for SRKW, AR 47202, alleviating one of the many environmental stressors.

SRKW's primary marine environment is both heavily polluted and one of the busiest waterways in the world, while many salmon stocks on which the whales forage have been decimated by habitat loss and degradation. These issues provide a clear linear connection between cause and effect when it comes to the population decline of SRKW. The same cannot be said of Plaintiff's proposed relief of closing down the SEAK salmon fishery. While fishing undoubtedly removes some potential SRKW prey from the water, Alaskan fisheries, which are separated from SRKW by a great distance and another country, are not the primary factor in reducing prey. This is likely why independent scientists cautioned against overreliance on correlative studies or implicating any particular fishery as the cause of reduced prey, by stating that the "impact of reduced Chinook salmon harvest on future availability of Chinook salmon to Southern Residents is not clear." AR 47285.

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, Northern Resident killer whales 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.

If ensuring an increase in prey Chinook for SRKWs is the goal, then the BiOp and the associated mitigation measures must be upheld by this Court.

B. NMFS was Not Required to Conduct a New NEPA Analysis After the 2019 Treaty.

Plaintiff argues that NMFS "violated NEPA by failing to conduct any NEPA analysis for its authorization of take resulting from the 10-year fishery regimes set in the 2019 Pacific Salmon

Treaty." Plaintiff is simply wrong. NMFS conducted an Environmental Assessment ("EA") for the FMP in 2012. AR 47632, AR 00500.

Consistent with the requirements of the MSA, the North Pacific Fishery Management Council promulgated an FMP covering federal waters off SEAK in 1979. AR 47634. That FMP was comprehensively revised in 2012. AR 00507. NMFS completed an EA concerning the FMP salmon fisheries impact on the environment. AR 47638. Specifically, the EA stated that the "proposed action concerns the application of federal management in addition to the existing State management for the salmon fisheries that occur in the EEZ." AR 47638. The EA also concluded that the considered alternatives "would have an insignificant impact on Alaska salmon stocks, Pacific salmon stocks listed under the Endangered Species Act, marine mammals, seabirds, and essential fish habitat." *Id*.

SRKW were specifically analyzed in the EA. "The FMP salmon fisheries occur outside of the range of the SRKW, therefore, there are no direct interactions between the whales and these fisheries." AR 47824. Given that, the EA focused on SRKW prey. *Id*. And in doing so, found that "the extent of adverse impact is limited by management measures that define catch or total mortality limits on Chinook in the Pacific Salmon Treaty Agreement." *Id*. As such, "the Southeast Alaska troll fishery is not likely to adversely affect the Southern Resident killer whales or critical habitat beyond those effects previously analyzed in the 2008 BiOp." *Id*. Of course, since that was written in the 2012 EA, both Alaska and Canada took substantial reductions in their annual catch quotas, thus it cannot rationally be argued that the fisheries pose a greater issue to SRKW today than they may have in 2012. Finally, the EA closed the analysis by stating that "all potential adverse effects to the Southern Resident killer whale critical habitat would be insignificant, NMFS makes a determination that the proposed project may effect, but is not likely to adversely affect Southern Resident killer whale critical habitat." AR 47825.

Plaintiff ignores the 2012 EA that considered the SEAK fisheries' potential impact on SRKW, as though it does not exist. But it does exist, and it is part of the record. And the record is

clear that NMFS complied with NEPA. As such, the Defendants should be granted summary judgment on this claim.

C. **Vacatur Would Not Be Appropriate in This Case.**

Plaintiff asks the Court to vacate the "BiOp, including the ITS, along with NMFS's adoption of the 2019 SEAK BiOp." Dkt. 91 at p. 40. Their request lacks merit for a number of legal and practical reasons and should be denied.

First, Plaintiff's request for vacatur is simply a convoluted attempt to make an end-run around Plaintiff's jurisdictional issues. The practical effect of Plaintiff's vacatur request would be to imperil the SEAK EEZ salmon fishery and force its closure. The Ninth Circuit foreclosed just such a maneuver in *Turtle Island Restoration Network.* There, the plaintiff attempted to prevent the reopening of a federally authorized fishery on ESA grounds. But as the Ninth Circuit observed, "Standing alone, the Incidental Take Statement [for the fishery] did nothing. It became operational, and allegedly unlawful, only upon the promulgation of regulations reopening the fishery." 438 F.3d 937, 945-46. An untimely challenge to the conduct of a fishery authorized through an MSA action cannot be "circumvented by artful pleading." *Id*. at 945. Through its request for vacatur, Plaintiff attempts again to obtain improperly the relief that the Court has previously denied, and its request should be denied again.

But even if Plaintiff's challenge was timely, "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. Nat'l Marine Fisheries Serv*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015). And in this case the relief that Plaintiff seeks would cause serious and irremediable harms, without producing any tangible benefit. Vacating the entire BiOp would effectively halt a broad range of activities that are not challenged in this lawsuit, and would be disproportionate given the issues that are before this Court. The State requests that if the Court finds Plaintiff's latest request to be timely, and identifies any flaw with the agency actions, that the BiOp and the ITS remain in effect while the matter is remanded for NMFS to cure any defect.

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1. Legal standards.

"When a biological opinion is unlawful, the ordinary remedy is to vacate and remand for immediate reinitiation of consultation." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 949 (D. Or. 2016) (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. Envtl. Prot. Agency*, (*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.[5]

2. Vacatur should not be considered here.

In considering an appropriate remedy for a timely challenge, a district court "has 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, like in *Idaho Farm Bureau*, the balance of the equities clearly favors leaving the BiOp, and the ITS, in place if the matter must be remanded. Plaintiff claims that "NMFS authorized salmon harvest levels that will lead to the Southern Residents' continued slide towards extinction," but this is simply not the case. Dkt. 91 p. 42. Rather, if the BiOp is vacated the incentive behind the prey increase program, which will provide an "immediate and meaningful increase in prey availability for" SRKW, vanishes. AR 47202. This would, without question, lead to less prey for SRKW while destroying SEAK's economy—and it would do so without producing any colorable benefit. If the financing of mitigation measures is found to be unduly speculative, then remanding the matter to NMFS without vacatur is the only outcome that would protect SRKW to ensure the prey increase program

[5] This is often referred to as the two-part *Allied-Signal* test, and is explained in more detail infra at 2.a.

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continues, while not destroying the economy of SEAK. NMFS can, and, if necessary, should be given the opportunity to conduct any review on remand with the current BiOp and ITS left in place.

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)). The State's primary interest in this matter is clear cut: the economic vitality of an entire region of Alaska. Importantly, that interest can be balanced with the health of SRKW in a manner that does not require discarding the protection afforded by the ITS and vacating the BiOp if any shortcomings are identified by the Court.

a. Conservation Interest

The SRKW prey increase program is the most immediate and dependable way to ensure conservation of the DPS. The conservation hatchery and habitat programs would contribute to prey abundance for SRKW over the intermediate and long-term, but the prey increase program is "specifically designed to increase the production of hatchery Chinook salmon to provide an immediate and meaningful increase in prey availability for SRKWs." AR 47432. SRKW are negatively impacted by pollution and vessel traffic and other issues could be, but are not likely to be remediated, in the near term. *See Supra* V. A. One issue that is immediately remediable is the amount of prey available to the whales, and that is precisely what this BiOp reviews. Producing 20 million additional Chinook smolt as future prey for SRKW provides an immediate improvement to the whales near-term outlook. AR 47447.

Assuring that the mitigation measures continue is one of the best ways to ensure the SRKW population does not decline. Given that, if remand is ultimately required for any reason, vacatur would not be beneficial to SRKW in this particular situation. Indeed, vacatur of the BiOp may interfere with the one well-defined action that will benefit the whales: production of more prey. If the goal is to protect SRKW, vacatur is not the means to that end and should not be considered.

When deciding to remand to an agency, with or without vacatur, the legal standard involves the two-part test articulated in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d

146 (D.C. Cir. 1993). The conservation interest can be viewed alongside the first prong, which 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. *See Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010).

When making this determination, courts defer to the expert agency, which Congress has chosen to implement its legislative design, to reconsider and repair its own errors. S*an 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.") (citation omitted).

Here, Federal Defendants could repair any error alleged by Plaintiff on remand without vacating the BiOp. Plaintiff complains chiefly that the no jeopardy opinion relies on uncertain mitigation. Dkt. 91, p. 21. The State believes that the record demonstrates the contemplated mitigation is occurring and the matter should not be remanded. But even if the Court finds that the mitigation measures need review, doing so while the BiOp and ITS remain in place allows for the mitigation measures—which will categorically benefit SRKW—to continue occurring while any issues are addressed on remand.

b. 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.

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.

Fishing is critically important to SEAK. From 2012 to 2015 the SEAK salmon fishery produced $806 million in output, $484 million in gross domestic product, $299 million in labor income or wages, and provided 6,600 full time equivalent jobs on average. Dkt 76 p. 6, ¶ 14. The State levies a fishery resource landing tax which 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 p. 6, ¶ 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 the BiOp, thereby effectively closing several of Alaska's fisheries, 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. It should be axiomatic that 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 reflexive, as suggested by Plaintiff.

Plaintiff addresses the catastrophic economic consequences of the sought relief by simply noting that courts sometimes prioritize harm to species over "disruptive consequences." According to plaintiff, "[c]ourts generally prioritize harm to species and the environment over administrative or economic burdens when considering any 'disruptive consequences.'" Dkt. 91, at 42-43. But Ninth Circuit case law does not support that formulaic conclusion.

Perhaps the best example of this is the first case plaintiffs cite for support: *Alliance for the Wild Rockies v. U.S. Forest Serv. (Wild Rockies)*, 907 F.3d 1105, 1121-22 (9th Cir. 2018). Dkt. 91, p. 40. Plaintiff claims that Wild Rockies supports the proposition that any APA violation "demands a 'presumption of vacatur.'" *Id*. The actual quote from *Wild Rockies* reveals a considerably more nuanced approach:

> Although not without exception, vacatur of an unlawful agency action normally accompanies a remand. This is because '[o]rdinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.' When equity demands, however, the regulation can be left in place while the agency reconsiders or replaces the action, or to give the agency time to follow the necessary procedures. A federal court 'is not required to set aside every unlawful agency action,' and the 'decision to grant or deny injunctive or declaratory relief under APA is controlled by principles of equity.'

907 F.3d at 1121. (citations omitted).

In *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Marine Fisheries Serv*, another case cited by Plaintiff, Dkt. 91, p. 41, the Court ordered vacatur after finding that "the Services failed to perform a cumulative impacts analysis—an integral part of fulfilling NEPA's purpose—of its proposed actions in three different areas." 109 F. Supp. 3d at 1245. Importantly, the court specifically stated that the possible economic harm in that case did not "rise to the concrete, foreseeable economic harm like that found in *California Communities Against Toxics*, where vacatur meant halting construction of a power plant that would lead to 350 layoffs, blackouts to the community, and additional action from the California legislature." *Id*. at 1246.

Here, however, any possible ESA or NEPA violation is much more circumscribed than in *Klamath-Siskiyou*, and the agency is much better positioned to address any potential infirmity absent vacatur. Similarly, the economic consequences of vacatur on the SEAK region would be

considerably more extreme than shutting down a single power plant in Northern California. There are other powerplants in California. There are no other seafaring economic opportunities in SEAK.

It is important to remember that while vacatur would result in catastrophic economic harm to SEAK, far worse than the economic disruption described in *Cal Communities*, it would likely not benefit SRKW in any material way.

This Court can and should weigh the economic consequences to Alaska's economy if determining an appropriate remedy becomes necessary. Vacatur poses the prospect of both current and future irremediable economic harm to SEAK that far outweighs any potential harm to SRKW from remand without vacatur.

3. Vacatur would be overbroad because the BiOp covers much that is not challenged in this litigation.

It is important to note that the BiOp covers a significant swath of activity not at issue in this litigation. As previously explained, the BiOp covers three actions: "the delegation of management authority over salmon troll fishery and the sport salmon fishery (the only authorized fisheries currently occurring in the SEAK EEZ) in the SEAK EEZ to the State of Alaska," the disbursal of "grants to the State of Alaska to monitor and manage salmon fisheries in State and Federal waters to meet the obligations of the PST through 2028," and the "funding of a conservation program for critical Puget Sound stocks and SRKW." AR 47198, AR 47534. Any challenge to the first two actions are untimely. Dkt. 51. Even if the Court were to find fault with the funding for mitigation measures, those are the type of issues that could and should be addressed on remand while the BiOp and ITS are left in place so that a majority of the actions contemplated in the BiOp, actions which are not at issue here, may continue to occur.

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

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. (*citing Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010)). If the Court finds a flaw in NMFS hatchery program, or any other

challenged portion of the BiOp, remand is the remedy—but 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 a permanent injunction sought by Plaintiff should also be roundly rejected by this Court.

"[A] plaintiff seeking permanent injunctive relief must satisfy a four-factor test by showing: (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 Envtl. Law 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) (*citing Cottonwood*, 789 F.3d at 1090). The ESA removes the latter 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. "There is no presumption of irreparable injury where there has been a procedural violation in ESA cases." *Id.* (*citing Cottonwood*, 789 F.3d at 1091). Plaintiffs must demonstrate that irreparable injury "is *likely* in the absence of an injunction." *Id.* (*citing Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)) (emphasis in original). "A 'possibility' of irreparable harm cannot support an injunction." *Id.* And 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.*

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). But in this matter, Plaintiff does not cite substantial proof required to support the extraordinary remedy sought.

For example, Plaintiff states that "[t]hreatened Puget Sound and Lower Columbia River Chinook salmon are not meeting recovery objectives due, in part, to excessive hatchery influences. *See, e.g.*, AR 01741-42, 01747, 15911." Dkt. 91, p 44. But the administrative record does not support the proposition for which it is cited. The cited document is the 5-year Review Summary and Evaluation of Puget Sound Chinook Salmon. While AR 01741-42 does discuss hatcheries, nowhere in the cited pages does it conclude or indicate that Puget Sound Chinook are not meeting recovery objectives due to excessive hatchery influences. Contrary to Plaintiff's claim, the Puget Sound Technical Recovery Team recommended "that viable populations of Chinook salmon be spread throughout the region to minimize the risk of a catastrophic loss." AR 01742. The same is true for the subsequent citations. The team noted that natural-origin fish levels were low and hatchery-produced fish are prevalent in certain areas, but there is no conclusion of a cause of effect relationship as presented by Plaintiff. AR 01747, 15911.

The closest the team came to suggesting that hatcheries were problematic was the observation that "the long-term use of artificial propagation *may* pose risks to natural productivity and diversity. The magnitude and type of the risk is dependent on the status of affected populations and on specific practices at the hatchery program." AR 01788 (emphasis added). But any potential risk is obviated by the finding that "[h]atchery programs can provide short-term demographic benefits such as increases in abundance in periods of low natural abundance and they can help preserve genetic resources until limiting factors are addressed." *Id.*

Plaintiff states that the "recent Mitchell Act BiOp requires reductions in annual releases by nearly two million hatchery Chinook salmon to protect wild Chinook salmon and meet pHOS

levels." Dkt. 91, p. 44. But NMFS has explained that it will "work with hatchery operators and funders to ensure that all increased hatchery production to support SRKW has been reviewed under the ESA (and NEPA as applicable) to ensure that it does not jeopardize the survival and recovery of any ESA-listed species." ESA BiOp on Implementation of the PFMC Salmon FMP in 2020, p 47. Moreover, NMFS specifically addresses this issue in the SEAK BiOp, stating that they expect the risk of "adverse competitive interactions between hatchery- and natural-origin fish will be minimized by the proposed action awarding funding to programs that use the following strategies:

- Releasing hatchery smolts that are physiologically ready to migrate. Hatchery fish released as smolts emigrate seaward soon after liberation, minimizing the potential for competition with juvenile naturally produced fish in freshwater
- Operating hatcheries such that hatchery fish are reared to a size sufficient to ensure that smoltification occurs in nearly the entire population
- Releasing hatchery smolts in lower river areas, below areas used for stream-rearing by naturally produced juveniles
- Monitoring the incidence of non-migratory smolts (residuals) after release and adjusting rearing strategies, release location, and release timing if substantial competition with naturally rearing juveniles is determined likely."

AR 47425.

NMFS plans to address predation concerns by "awarding funding to hatchery programs that can implement the following strategies:

- Releasing all hatchery fish as actively migrating smolts so that the fish migrate quickly seaward, limiting the duration of interaction with any co-occurring natural-origin fish downstream of the release site.
- Ensuring that a high proportion of the population have physiologically achieved full smolt status. Juvenile salmon tend to migrate seaward rapidly

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when fully smolted, limiting the duration of interaction between hatchery fish and naturally produced fish present within, and downstream of, release areas.

- Operating hatchery programs and releases to minimize the potential for residualism."

AR 47425-26.

The entirety of the prey increase plan shows that the hatchery releases are done in accordance with the ESA and are necessary to benefit SRKW.

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.

VI. CONCLUSION

For the foregoing reasons, the State respectfully asks the Court to deny Plaintiff's motion and grant the State's cross-motion for summary judgment.

DATED: May 26, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, 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/ Linda R. Larson
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