

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

Parties:

**Plaintiff:** Wild Fish Conservancy.

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

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

Case:

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

Current Case Activity:

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

Attachment:

The magistrate judge's report and recommendation is attached.





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

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

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

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

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

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

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

1           **B.       Statutory Background**

2                   *i.        Endangered Species Act*

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

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

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

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

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

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

18 *ii. National Environmental Policy Act*

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

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

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

14 *iii. Magnuson-Stevens Act*

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

20 **C. Factual Background**

21 WFC is a membership-based 501(c)(3) nonprofit organization in the State of Washington,  
22 with its principal place of business in Duvall, Washington. (Compl. at ¶ 14.) WFC brings this  
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1 1453-58 (9th Cir. 1988); *Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F.Supp.2d 1137, 1150  
2 (W.D. Wash. 2000) (“A biological opinion which is not coextensive in scope with the identified  
3 agency action necessarily fails to consider important aspects of the problem and is, therefore,  
4 arbitrary and capricious.”). Therefore, the Court finds that NMFS’s failure to make a jeopardy  
5 determination on the prey increase program for the Chinook salmon ESUs violated its  
6 obligations under the ESA.

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

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

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

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

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

7 **E. NEPA Claims**

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

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

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

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

3 *i. Change in Position*

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

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

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

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

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

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

21 *ii. Effect of Ramsey and Jewell*

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

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

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

21 *iii. Prey Increase Program*

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











