

HONORABLE RICHARD A. JONES

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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,)
)
Defendant-Intervenor.)
_____)

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

PLAINTIFF’S OBJECTIONS TO
MAGISTRATE JUDGE’S REPORT
AND RECOMMENDATION

NOTE ON MOTION CALENDAR:
July 3, 2020

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GLOSSARY OF ACRONYMS

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APA	Administrative Procedure Act
BiOp	Biological Opinion
ESA	Endangered Species Act
ITS	Incidental Take Statement
MSA	Magnuson-Stevens Fishery Conservation and Management Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
R&R	[Magistrate Judge’s] Report and Recommendation

1 Plaintiff Wild Fish Conservancy (“Conservancy”) hereby objects to the Magistrate
2 Judge’s Report and Recommendation, Dkt. No. 51 (“R&R”), and respectfully requests the Court
3 reject the R&R and grant Plaintiff’s Motion for Preliminary Injunction, Dkt. No. 14 (“Motion”).

4 **I. INTRODUCTION.**

5 The Conservancy requests a preliminary injunction staying the National Marine Fisheries
6 Service’s (“NMFS”) authorizations of commercial Chinook salmon fisheries in federal waters
7 off the coast of Southeast Alaska to protect imperiled Southern Resident Killer Whales while this
8 lawsuit is pending. NMFS authorized the fisheries at levels that will continue to starve Southern
9 Residents, heightening the risk of extinction for this critically endangered species, in violation of
10 the Endangered Species Act (“ESA”) and the National Environmental Policy Act (“NEPA”).

11 The Conservancy’s claims focus on NMFS’s issuance and adoption of an April 5, 2019
12 biological opinion (“2019 SEAK BiOp”) evaluating and authorizing take of ESA-listed species
13 from the fisheries from 2019 through 2028 under harvest regimes set in the 2019 Pacific Salmon
14 Treaty. The R&R found that the claims are time-barred under the Magnuson-Stevens Fishery
15 Conservation and Management Act (“MSA”) because they were not brought within thirty days
16 of issuance of certain MSA regulations in 2012 or, in the alternative, within thirty days of
17 issuance of the 2019 SEAK BiOp. Those holding are contrary to the MSA’s judicial review
18 provisions and Ninth Circuit precedent. The Court should reject the R&R’s unprecedented
19 application of a statute of limitations as barring claims seven years before they even accrued.
20

21 The Motion provides detailed descriptions of the statutory background, relevant facts,
22 standard of review for a preliminary injunction, and arguments in support of the requested relief.
23 Dkt. No. 14; *see also* Dkt. No. 44. Those efforts are not repeated here, but instead incorporated
24 by this reference. The Conservancy respectfully requests that the Court reject the time-bar ruling
25 in the R&R and enter the relief requested in the Motion. The Conservancy requests such relief
26 even if not entered before commencement of the summer season on July 1, as harvest extends
27 through August and even into September and the winter harvest season commences in October.
28

1 **II. OBJECTIONS.**

2 The Conservancy makes the following objections to the R&R:

3 1. As described in more detail below, the R&R erroneously found that 16 U.S.C.
4 § 1855(f) applies to the claims alleged herein;

5 2. The R&R erroneously found that the Conservancy seeks review of all claims
6 under the Administrative Procedure Act (“APA”). Dkt. No. 51 at 2. The First Cause of Action
7 alleges that NMFS is in violation of the substantive obligation of section 7(a)(2) to ensure that its
8 actions do not jeopardize ESA-listed species. Dkt. No. 1 ¶ 114. That claim is properly alleged
9 under the ESA citizen suit provision, 16 U.S.C. § 1540(g), and not the APA. *Id.* ¶ 115; *Envtl.*
10 *Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078–79 (9th Cir. 2001).

11 **III. STANDARD OF REVIEW.**

12 This Court reviews the R&R de novo and may accept, reject, or modify, in whole or in
13 part, the R&R. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C); *McDonnell Douglas Corp. v.*
14 *Commodore Bus. Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

15 **VI. ARGUMENT.**

16 **A. The Claims Are not Reviewed under 16 U.S.C. § 1855(f).**

17 **1. Turtle Island extended § 1855(f) to a “very specific class” of claims**
18 **challenging MSA fisheries, while leaving “many” others “untouched”.**

19 The MSA includes provisions governing judicial review of regulations and certain
20 actions issued under the statute. The Ninth Circuit has applied those provisions to claims that
21 NMFS violated the ESA and NEPA in promulgating MSA regulations; i.e., claims that accrue
22 with the issuance of regulations. The court emphasized that it was not eliminating effective
23 environmental enforcement of commercial fisheries because its holding applies to a very specific
24 class of claims and not to other ESA and NEPA that accrue after the regulations. *See Turtle*
25 *Island Restoration Network v. U.S. Dep’t of Commerce*, 438 F.3d 937, 948–49 (9th Cir. 2006).

26 The MSA provision governing review of regulations sets a limitations period as follows:

27 **(1) Regulations promulgated by [NMFS] under [the MSA] and actions described**

1 **in paragraph (2)** shall be subject to judicial review to the extent authorized by, and
 2 in accordance with, chapter 7 of title 5, . . . if a petition for such review is filed
 3 within **30 days after the date on which the regulations are promulgated or the**
 4 **action is published in the Federal Register**, as applicable; . . .

4 *****

5 (2) The actions referred to in paragraph (1) are **actions that are taken by [NMFS]**
 6 **under regulations which implement a fishery management plan**, including but
 7 not limited to actions that establish the date of closure of a fishery to commercial
 8 or recreational fishing.

9 16 U.S.C. § 1855(f) (emphases added). The judicial review provisions also prohibit preliminary
 10 injunctions, require expedited production of the administrative record, and require proceedings
 11 be expedited “in every possible way” upon request. *Id.* § 1855(f)(1)(A), (f)(3), (f)(4). These
 12 provisions apply to two types of actions: promulgation of regulations under the MSA and actions
 13 taken by NMFS “under regulations which implement a fishery management plan” that are
 14 published in the Federal Register. *Id.* § 1855(f)(1), (f)(2).

15 Section 1855(f) does not govern every claim related to a MSA fishery. For example,
 16 another provision of the MSA provides jurisdiction over various enforcement claims. *Id.* §
 17 1861(d). Parties may collaterally attack regulations issued under the MSA in such actions
 18 without complying with the 30-day limitations period of § 1855(f). *Fishing Co. of Alaska v.*
 19 *United States*, 195 F. Supp. 2d 1239, 1246–47 (W.D. Wash. 2002), *aff’d*, 333 F.3d 1045 (9th Cir.
 20 2003). Thus, § 1855(f) does not apply to every attack on the implementation of MSA regulations.

21 The Ninth Circuit found that § 1855(f) does apply to challenges to NEPA and ESA
 22 documents prepared in support of the promulgation of a MSA regulation. *See Turtle Island*, 438
 23 F.3d at 939. At issue was a regulation reopening a fishery. *Id.* at 939–40. NMFS consulted under
 24 ESA section 7 on the proposed regulation and issued a biological opinion (“BiOp”) on reopening
 25 the fishery. *Id.* at 941. Under NEPA, NMFS prepared an environmental impact statement on
 26 alternatives and issued a record of decision (“ROD”) electing to promulgate the regulation. *Id.* at
 27 941–42. Consistent with the MSA, there were opportunities for public involvement throughout
 28 the process, including notices, hearings, and comment opportunities. *Id.* at 940–41.

1 Plaintiff did not file suit within thirty days of the regulation. *Id.* at 942. The complaint did
 2 not allege a MSA claim, but instead alleged that NMFS violated NEPA, the ESA, and the
 3 Migratory Bird Treaty Act when it reopened the fishery. *Id.* However, “[t]he essence of [the]
 4 complaint was not in dispute—it challenge[d] the reopening of the swordfish fishery,” which
 5 “came about as a result of the regulations” *Id.* at 944. The NEPA claim challenged the ROD
 6 electing to reopen the fishery, which was “the foundation for those regulations.” *Id.* at 945. The
 7 ESA claim alleged that, because reopening the fishery violated NEPA, the BiOp’s incidental take
 8 statement (“ITS”) violated the ESA by authorizing “take” from an otherwise unlawful activity.
 9 *Id.* This claim was also “premised on the issuance of regulations reopening the fishery.” *Id.*

10 The court found that “all of the claims flow[ed] from the reopening of the fishery”
 11 through promulgation of the regulations and were therefore subject to 16 U.S.C. § 1855(f). *Id.* at
 12 943, 945. The challenges to the ROD and ITS could not be pursued as “stand alone challenge[s]
 13 to agency action” and were dismissed as time-barred under the MSA. *Id.* at 945, 949. The court
 14 noted that its application of § 1855(f) was consistent with the MSA’s “highly detailed and public
 15 process leading up to the adoption of regulations,” a process that interweaves development of
 16 regulations with ESA and NEPA processes supporting the regulation. *See id.* at 947–48
 17 (describing Federal Register notices, public hearings, and comment periods).

18 The court carefully limited its holding in *Turtle Island*, explaining that its application of
 19 16 U.S.C. § 1855(f) will **not “eliminate effective enforcement of environmental laws in
 20 commercial fisheries.”** *Id.* at 948 (emphasis added). Rather, “**Section 1855(f) applies only to a
 21 very specific class of claims**—those that clearly challenge regulations promulgated under the
 22 [MSA]”—**it does “not . . . affect every claim that may arise later.”** *Id.* (emphasis added).
 23
 24

25 For example, [§ 1855(f)] would not encompass claims that NMFS failed to
 26 reinstate consultation when the taking specified in the [ITS] is exceeded or a new
 27 species is listed or “new information reveals effects of the action that may affect
 28 listed species . . . to an extent not previously considered” in the [BiOp]. Similarly,
 29 NEPA imposes a continuing duty to supplement an existing EIS in response to
 “significant new circumstances or information relevant to environmental concerns
 bearing on the proposed action or its impacts. **We do not intend these examples**

1 **to serve as an exhaustive list, but rather as illustrative of the many claims left**
2 **untouched by § 1855(f).**

3 *Id.* at 948–49 (internal citations omitted, emphasis added).

4 With respect to the ESA example, reinitiation of a consultation is required where the
5 federal agency retains control over the underlying action and a triggering event occurs; e.g., there
6 is new information on impacts. *See* 50 C.F.R. § 402.16. Typical relief includes an injunction of
7 the underlying action pending completion of a new consultation. *See, e.g., Pac. Rivers Council v.*
8 *Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994); *Cottonwood Envtl. Law Ctr. v. U.S. Forest*
9 *Serv.*, 789 F.3d 1075, 1088–92 (9th Cir. 2015). For the NEPA example, an agency is required to
10 supplement a prior NEPA document where there are, *inter alia*, “significant new circumstances
11 or information relevant to environmental concerns” 40 C.F.R. § 1502.9(c)(1). Typical relief
12 includes enjoining the underlying action pending completion of supplemental NEPA processes.
13 *See, e.g., Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

14 *Turtle Island* thus explicitly provides that parties may bring claims outside of the judicial
15 review provisions of § 1855(f), including the 30-day limitations period, alleging that NMFS must
16 reinitiate ESA consultation and undertake supplemental NEPA processes to evaluate the ongoing
17 effects of a MSA-regulated fishery in light of changed circumstances. The relief available would
18 include an injunction against the fishery pending a new BiOp and NEPA document. These
19 claims do not arise with the promulgation of regulations, but instead from events that “arise
20 later,” and are therefore “untouched” by § 1855(f). *See Turtle Island*, 438 F.3d at 948–49.

21 *Turtle Island* is consistent with the rule that Congress drafts statutes of limitations to
22 begin when the plaintiff has a complete and present cause of action. *See Graham Cty. Soil &*
23 *Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 418 (2005). Claims challenging
24 NMFS’s ESA and NEPA efforts supporting the promulgation of a regulation accrue with
25 issuance of the regulation and can be filed within thirty days thereof as required under § 1855(f).
26 ESA and NEPA claims that accrue after, and are unrelated to, the issuance of regulations
27 generally cannot be filed within thirty days of the regulations. It is “highly doubtful” that
28

1 Congress intended the statute of limitations of § 1855(f) to apply to ESA and NEPA claims that
 2 accrue at a time when they would already be time-barred by § 1855(f). *See Johnson v. United*
 3 *States*, 544 U.S. 295, 305 (2005) (rejecting argument that “the statute of limitations may begin to
 4 run (and may even expire) before the . . . claim and its necessary predicate even exist”).

5 **2. The Conservancy was not required to file claims pertaining to the**
 6 **2019 SEAK BiOp within 30 days of the 2012 Regulations.**

7 Under this framework, it is apparent that the claims here are not subject to 16 U.S.C. §
 8 1855(f). The 2019 SEAK BiOp is not “the foundation for [the 2012] regulations,” and the claims
 9 challenging the BiOp did not “flow from,” or come about through, issuance of the 2012 MSA
 10 regulations; i.e., they did not accrue with the promulgation of regulations. *See Turtle Island*, 438
 11 F.3d at 943–45. Rather, the claims arose through events after and unrelated to the 2012 issuance
 12 of regulations and are therefore “untouched” by § 1855(f). *Id.* at 948–49. The R&R’s findings to
 13 the contrary would accomplish precisely what the Ninth Circuit sought to prevent—“eliminate
 14 effective enforcement of environmental laws in commercial fisheries.” *See id.* at 948.

15 The R&R held that the claims are time-barred because they were not filed within thirty
 16 days of NMFS’s promulgation of MSA regulations in 2012, which facilitated delegation of
 17 authority to Alaska to manage the fishery. Dkt. No. 51 at 17. Those regulations, implementing
 18 Amendment 12 to the Fishery Management Plan, were subjected to an ESA consultation and a
 19 NEPA process. Dkt. No. 14-1 at 29 (describing consultation); Dkt. No. 43-1 at 938–1207 (2012
 20 NEPA document). Under *Turtle Island*, challenges to those 2012 ESA and NEPA efforts would
 21 have been reviewed under 16 U.S.C. § 1855(f), but the Conservancy does not assert such claims.

22 The Conservancy’s claims accrued through subsequent events unrelated to promulgation
 23 of MSA regulations. NMFS had previously consulted on the 10-year fishery regimes set in the
 24 2009 Pacific Salmon Treaty. Dkt. No. 14-1 at 28. When that agreement was replaced by the 2019
 25 Pacific Salmon Treaty, NMFS “reinitiate[ed] . . . consultation on delegation of management
 26 authority” to Alaska to address, *inter alia*, impacts of the fishery from 2019 through 2028. *Id.* at
 27 29–30. That reinitiated consultation culminated in NMFS’s issuance and adoption of the 2019
 28

1 SEAK BiOp. Importantly, the 2019 SEAK BiOp was not prepared to consult on proposed
2 regulations, NMFS did not provide any public notices or hearings as required for proposed MSA
3 regulations, and no new MSA regulations were issued. Instead, NMFS consulted on the ongoing
4 effects of the fishery as authorized by preexisting regulations in light of changed circumstances.

5 The Conservancy's claims all relate to NMFS's issuance and adoption of the 2019 SEAK
6 BiOp triggered by the 2019 Pacific Salmon Treaty. The Conservancy alleges that: (1) by
7 adopting and implementing the 2019 SEAK BiOp, NMFS is failing to ensure that its actions do
8 not jeopardize ESA-listed species as required by section 7(a)(2) of the ESA; (2) the 2019 SEAK
9 BiOp is arbitrary and not in accordance with law; and (3) NMFS violated NEPA by issuing and
10 adopting the 2019 SEAK BiOp without preparing new or supplemental NEPA documents. Dkt.
11 No. 1 ¶¶ 114–19. These are among “the many claims left untouched by § 1855(f),” as they did
12 not arise with the promulgation of a regulation. *See Turtle Island*, 438 F.3d at 948–49.
13

14 In fact, the Conservancy's ESA claims are very similar to the failure to reinstate claim
15 that the court held out in *Turtle Island* as an example of what is not subject to § 1855(f). *Id.*
16 Here, NMFS did reinstate consultation to address the ongoing impacts of the fishery under
17 existing regulations, so the Conservancy is not alleging a failure to reinstate claim, but is instead
18 challenging the result of NMFS's reinstated consultation—the 2019 SEAK BiOp. That is a
19 distinction without a difference: the failure to reinstate claim and the Conservancy's claims
20 challenging the product of a reinstatement are not related to, and do not accrue with, the
21 promulgation of a regulation. The Conservancy's NEPA claim is directly aligned with the
22 example provided in *Turtle Island* as not subject to § 1855(f)—the Conservancy alleges that
23 NMFS must undertake new or supplemental NEPA efforts to address ongoing effects of the
24 fishery under existing regulations in light of changed circumstances.
25

26 In sum, the Conservancy is not challenging NMFS's ESA and NEPA efforts supporting
27 promulgation of a regulation. Instead, the Conservancy's ESA and NEPA claims arose after, and
28 are unrelated to, the issuance of any MSA regulations and are therefore “untouched” by 16

1 U.S.C. § 1855(f). The R&R therefore erred in finding the claims barred for not being filed within
 2 thirty days of NMFS’s 2012 promulgation of regulations—seven years before the 2019 SEAK
 3 BiOp was issued. *See* Dkt. No. 51 at 17. Indeed, it would be unprecedented to apply a statute of
 4 limitations to time-bar claims before they even accrued. *See Graham Cty.*, 545 U.S. at 418.¹

5 **3. The Conservancy was not required to file its claims within 30 days of**
 6 **issuance of the 2019 SEAK BiOp.**

7 The R&R also stated that “[e]ven if the Court were to construe the issuance of the 2019
 8 BiOp as a new action under the regulations, Plaintiff was required to have brought its challenge
 9 within 30 days of the 2019 BiOp’s issuance” Dkt. No. 51 at 17. This is error. In addition to
 10 regulations, § 1855(f) applies to actions “taken by [NMFS] under regulations which implement a
 11 fishery management plan, including but not limited to actions that establish the date of closure of
 12 a fishery to commercial or recreational fishing.” 16 U.S.C. § 1855(f)(2). The limitations period
 13 expires “30 days after the date on which . . . the action is published in the Federal Register.” *Id.* §
 14 1855(f)(1). The 2019 SEAK BiOp was neither prepared in support of such an “action,” nor was
 15 notice published in the Federal Register to commence the abbreviated limitations period.

16 The “actions” contemplated by § 1855(f) are those taken by NMFS pursuant to existing
 17 MSA regulations that implement a fishery management plan by establishing management
 18 measures, such as harvest limits or season dates. *See Or. Trollers Ass’n v. Gutierrez*, 452 F.3d
 19 1104, 1112–16 (9th Cir. 2006). For most MSA fisheries, NMFS retains management authority
 20 and implements the fishery management plan itself. When taking actions under MSA regulations
 21 to implement a fishery management plan, NMFS provides public notice and participation
 22

23
 24 ¹ Acknowledging the paradox created by application of the limitations period, the R&R asserts that the
 25 Conservancy could have sought a consistency review. Dkt. No. 51 at 16 n.3. This is a reference to
 26 provisions of the Fishery Management Plan that allow the public to petition NMFS to review Alaska’s
 27 management measures. Dkt. No. 14-1 at 485–87. However, NEPA and ESA section 7 apply exclusively
 28 to federal agencies and therefore do not even apply to Alaska’s management measures. *See* 42 U.S.C. §
 4331; 16 U.S.C. § 1536(a)(2). Thus, the Fishery Management Plan’s consistency review provisions do not
 29 provide an opportunity to petition NMFS’s to remedy its ESA and NEPA violations alleged herein.
 Moreover, as required by the ESA, the Conservancy notified NMFS of its violations and informed NMFS
 that the Conservancy would bring suit if the violations were not remedied within 60 days, and NMFS
 elected to not take any corrective action. *See* Dkt. No. 1 at 32–43; 16 U.S.C. § 1540(g)(2).

1 opportunities and is subject to NEPA. *See, e.g., id.* at 1115–16; 16 U.S.C. § 1854(i)(1); 50 C.F.R.
 2 §§ 660.408, 660.411; 84 Fed. Reg. 19,729 (May 6, 2019).

3 Here, in contrast, NMFS previously delegated management authority to Alaska. Thus,
 4 NMFS did not take an action under MSA regulations that implemented the Fishery Management
 5 Plan, nor did it provide public notice or participation opportunities required for such MSA
 6 actions. The R&R and NMFS do not identify an action taken by NMFS under MSA regulations
 7 that implemented the Fishery Management Plan. That is unsurprising given that the 2019 SEAK
 8 BiOp was not prepared for such an action and not published in the Federal Register, but instead
 9 was prepared as a reinitiation of consultations to evaluate the ongoing effects of a fishery
 10 authorized by existing regulations in light of new information. *See* Dkt. No. 14-1 at 29–30.

11 To the extent the R&R finds that the 2019 SEAK BiOp is itself an “action taken by
 12 [NMFS] under regulations which implement a fishery management plan,” the Court should reject
 13 this novel and wholly unsupported interpretation of the MSA and the ESA. A BiOp is prepared
 14 under section 7 of the ESA and supporting ESA regulations to evaluate “the nature and extent of
 15 jeopardy posed to [a] species by the agency action.” *Conner v. Burford*, 848 F.2d 1441, 1452
 16 (9th Cir. 1988); 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(h). A BiOp is not an action taken by
 17 NMFS under MSA regulations that implement a fishery management plan. *See* 16 U.S.C. §
 18 1855(f)(2); *Gutierrez*, 452 F.3d at 1112–16.

19 Finally, the abbreviated 30-day limitations period of § 1855(f) commences **only upon**
 20 **publication of the action or regulation in the Federal Register**. *See* 16 U.S.C. § 1855(f);
 21 *Gutierrez*, 452 F.3d at 1113–16 (publication of “action” triggers the 30-day period); *Nw. Env'tl.*
 22 *Def. Ctr. v. Brennen*, 958 F.2d 930, 933–34 (9th Cir. 1992) (publication of regulation triggers 30-
 23 day period); *see also Turtle Island*, 438 F.3d 947–48 (the “limited window for judicial review” is
 24 consistent with notice requirements that put challengers in “prime position to seek judicial
 25 review”). It is undisputed that NMFS did not publish any notice in the Federal Register related to
 26 issuance of the 2019 SEAK BiOp; in fact, NMFS did not provide any public notice or
 27
 28

1 participation opportunities as would be required for MSA regulations or actions. The R&R
 2 wholly ignores the publication requirement for triggering the limitations period in finding that
 3 the Conservancy was required to file suit within thirty days of NMFS's completion of the 2019
 4 SEAK BiOp. *See* Dkt. No. 51 at 17. The limitations period of 16 U.S.C. § 1855(f) did not
 5 commence with the issuance of the 2019 SEAK BiOp because NMFS did not publish notice.

6 In sum, the Conservancy was not required to file suit within thirty days of the 2019
 7 SEAK BiOp because that BiOp was not prepared for "actions taken by [NMFS] under
 8 regulations which implement a fishery management plan," nor is the 2019 SEAK BiOp such an
 9 action itself, and NMFS did not publish notice required to commence the limitation period.
 10

11 **4. 16 U.S.C. § 1855(f) is not selectively applied.**

12 The R&R and NMFS seek to selectively apply 16 U.S.C. § 1855(f) to bar some relief
 13 requested, but not others. This is inconsistent with § 1855(f) and *Turtle Island*.

14 While NMFS's response to the Motion suggested that the claims were reviewed under 16
 15 U.S.C. § 1855(f) and would therefore be time-barred, NMFS clarified its position at argument:

16 The plaintiff is suggesting that—what we're saying is that all aspects of this case
 17 cannot go forward and that you couldn't challenge a [BiOp] under the [APA] if you
 18 said that the [BiOp], for example, was arbitrary and capricious, or if there was a
 19 NEPA failure, or something along those lines.

20 What we're focused on here is not the entire scope of the complaint. We're focused,
 particularly, on the relief that was requested in the preliminary injunction motion.

21 Attachment, 28:5–13. NMFS thus argues that § 1855(f) only applies to some relief requested
 22 under the claims. NMFS also argued that, although the limitations period of § 1855(f) applies,
 23 the requirement for expedited production of the administrative record under § 1855(f)(3)(B) does
 24 not apply. *Id.* at 48:13–25; Dkt. No. 48 at 2 n.1. The R&R accepted a piecemeal application of §
 25 1855(f), finding the relief requested in the Motion precluded by the limitations period, but that
 26 the claims may nonetheless proceed as ESA and NEPA claims. Dkt. No. 51 at 17 n.4. However,
 27 the Magistrate Judge subsequently indicated that the claims are reviewed under § 1855(f),
 28 leaving the applicability of the limitations period to all of the claims unclear. Dkt. No. 52 at 2.

1 Such piecemeal application of § 1855(f) is inconsistent with the statute and *Turtle Island*.
 2 Initially, § 1855(f) provides a comprehensive scheme for judicial review of actions subject to the
 3 provision; it establishes a truncated limitations period, precludes preliminary injunctions,
 4 requires expedited production of the administrative record, and requires expedited review upon
 5 request. *See* 16 U.S.C. § 1855(f)(1)–(4); *Turtle Island*, 438 F.3d at 943–44. These provisions are
 6 designed to work in harmony; selective application of § 1855(f) would undermine that intent.
 7 Moreover, the plaintiff in *Turtle Island* argued that the Court could review its ESA and NEPA
 8 claims as “stand alone challenge[s] to agency action[s],” just as NMFS is arguing here and as the
 9 R&R accepted. *See Turtle Island*, 438 F.3d at 945. The Ninth Circuit rejected that argument,
 10 holding that the ESA and NEPA claims that arose with the promulgation of MSA regulations
 11 must be dismissed in their entirety as time-barred under § 1855(f). *Id.* at 943–44, 949.

12
 13 In contrast, the Ninth Circuit held that other ESA and NEPA claims that arise after the
 14 promulgation of regulations, such as those here, are among “**the many claims left untouched by**
 15 **§ 1855(f).**” *Id.* at 949 (emphasis added). To avoid any doubt that plaintiffs would be able to seek
 16 relief against the actual fisheries in ESA and NEPA claims not subject to § 1855(f), the court
 17 emphasized that there would still be “effective enforcement of environmental laws in
 18 commercial fisheries.” *Id.* at 948. There is no basis to preclude some relief otherwise available in
 19 ESA and NEPA claims by invoking § 1855(f) when that provision does not apply to judicial
 20 review of the claims whatsoever; i.e., when the claims are “untouched” by § 1855(f).

21 **B. The Conservancy Has Standing to Pursue its Claims.**

22 NMFS asserts that standing is lacking because the interests of the Conservancy’s
 23 members—protection of Southern Residents—are not germane to the Conservancy’s mission,
 24 which NMFS claims is limited to fish.² Dkt. No. 43 at 19–20. The R&R reserved this issue given
 25

26
 27 ² NMFS also argued in a footnote that the injuries to one of Conservancy’s members—Mr. McMillan—
 28 are not sufficiently concrete. Dkt. No. 43 at 20 n.5. This argument has no bearing on the Motion because
 29 NMFS did not challenge the injuries of another member—Mr. Soverel—which is sufficient for
 representational standing. *See, e.g., Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1105–06 (9th Cir.
 2006). Regardless, Mr. McMillan’s injuries are not speculative. *See* Dkt. No. 14-5 ¶¶ 6, 21; *see*

1 its application of the limitations period. Dkt. No. 51 at 13 n.2. This Court should reject NMFS's
 2 unsupported and wholly inaccurate factual assertion. The Conservancy's mission includes the
 3 protection of Southern Residents and other key components of wild salmonids' ecosystem.

4 For representational standing, the interests of the organization's members at issue must
 5 be germane to those of the organization. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153,
 6 1159 (9th Cir. 1998). The "germaneness test" is "undemanding." *Id.* (citing *Humane Soc'y of the*
 7 *U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)). In *Presidio*, the court rejected defendant's
 8 attempt to narrowly define a private golf club's interest as gathering to play golf, and accepted
 9 the club's description of its own interests as including the "corollary purpose" of maintaining a
 10 certain environment desired by the club and its members such that it could pursue NEPA claims.
 11 *Id.* at 1158–59; *see also Hodel*, 840 F.2d at 58–59 (the "modest" germaneness test requires only
 12 "pertinence," or relevance, between the interests in the litigation and those of the organization).
 13

14 The Conservancy plainly meets this test, as its mission is to protect wild fish and their
 15 "ecosystems." Dkt. No. 14-4 ¶¶ 2–3 ("salmonids **and aquatic species** in the Northwest")
 16 (emphasis added); *Ecosystem*, Merriam-Webster Dictionary, [https://www.merriam-](https://www.merriam-webster.com/dictionary/ecosystem)
 17 [webster.com/dictionary/ecosystem](https://www.merriam-webster.com/dictionary/ecosystem) ("the complex of a community of organisms . . ."). To the
 18 extent there is any uncertainty, the Conservancy requests an opportunity to provide further
 19 testimony on its mission and its long history in seeking to protect Southern Residents. *See* 28
 20 U.S.C. § 636(b)(1)(C) (Court "may . . . receive further evidence" when revising the R&R).
 21

22 V. CONCLUSION.

23 Wherefore, the Conservancy respectfully requests that the Court reject the R&R and enter
 24 an order establishing the preliminary injunction requested by the Motion.

25 Respectfully submitted this 15th day of June, 2020.

26
 27 *Associated Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d, 1178, 1181 (9th Cir. 1998)
 28 ("regularly" taking action not speculative); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141,
 1147 (9th Cir. 2000) (injury satisfied where individual "shows . . . an aesthetic or recreational interest is a
 29 particular . . . animal . . . and that that interest is impaired by a defendant's conduct").

PLAINTIFF'S OBJECTIONS TO
 MAGISTRATE JUDGE'S REPORT - 17
 Case No. 2:20-cv-00417-RAJ-MLP

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