Appeal Nos. 23-35322, 23-35323, 23-35324, 23-35354

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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WILD FISH CONSERVANCY,

*Plaintiff-Appellee/Cross-Appellant*,

vs.

JENNIFER QUAN, in her official capacity as the Regional Administrator for the National Marine Fisheries Service, *et al.*,

*Defendants-Appellants/Cross-Appellees*,

and

STATE OF ALASKA and ALASKA TROLLERS ASSOCIATION,

*Intervenor-Defendants-Appellants/Cross-Appellees*.

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On Appeal from the United States District Court for the Western District of Washington Case No. 2:20-cv-00417-RAJ-MLP

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# PLAINTIFF-APPELLEE/CROSS-APPELLANT'S REPLY TO FEDERAL DEFENDANTS' RESPONSE SUPPORTING THE STATE OF ALASKA'SMOTION FOR STAY PENDING APPEAL

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## GLOSSARY OF ACRONYMS

| | |
|---|---|
| APA | Administrative Procedure Act |
| BiOp | Biological Opinion |
| ESA | Endangered Species Act |
| ITS | Incidental Take Statement |
| NEPA | National Environmental Policy Act |
| NMFS | National Marine Fisheries Service |
| SEAK | Southeast Alaska |
| SRKW | Southern Resident Killer Whale |
| WFC_A | Wild Fish Conservancy's Appendix, filed with Plaintiff-Appellee/ Cross-Appellant's Motion for Injunction Pending Appeal |
| WFC_ER | Wild Fish Conservancy's Excerpts of Record, filed with Plaintiff-Appellee/Cross-Appellant's Motion for Injunction Pending Appeal |
| WFC_SER | Wild Fish Conservancy's Supplemental Excerpts of Record, filed with Plaintiff-Appellee/Cross-Appellant's Response to Intervenor-Defendant-Appellant State of Alaska's Motion for Stay Pending Appeal |

Plaintiff Wild Fish Conservancy ("Conservancy") hereby replies to Federal Defendants' Response Supporting the State of Alaska's Motion for a Stay Pending Appeal ("NMFS's Response").

Alaska's Motion for Stay Pending Appeal ("Motion to Stay") was filed May 26, 2023 ("Motion to Stay") and the Conservancy's response thereto was filed June 5, 2023 ("Conservancy's Response"). This reply to NMFS's Response is limited to issues not addressed in the Conservancy's Response.

## I. INTRODUCTION.

The Court should reject the National Marine Fisheries Service's ("NMFS") request to allow its unlawful approval of overfishing to continue while it remedies its violations by reviewing the fisheries under the Endangered Species Act ("ESA) and the National Environmental Policy Act ("NEPA"). The Southern Resident Killer Whale ("SRKW") is among the species "most at risk of extinction" due, in large part, to NMFS's mismanagement of fisheries "over the last decade," which has ensured insufficient "salmon availability . . . to support [SRKW] population growth." *See* WFC_ER378–79, 744. NMFS's biological opinion ("SEAK BiOp") approving overharvests of salmon in Southeast Alaska in reliance on undeveloped and unlawful mitigation in contravention of the ESA, issued without evaluating the fisheries' cumulative impacts or alternatives as required by NEPA, continues that mismanagement. It is therefore unsurprising that NMFS expects the SRKW's

"downward trend in population growth" to continue. *See* WFC_ER518. The District Court did not abuse its discretion in fashioning equitable relief that ensures the continued survival of SRKWs. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 168,174, 184, 194 (1978) (Congress enacted the ESA to "halt and reverse the trend toward species extinction, whatever the cost," making clear that "endangered species [should] be afforded the highest of priorities," and "courts [should] enforce [such Congressional priorities] when enforcement is sought.").

## II. ARGUMENT.

### A. NMFS Fails to Make a Strong Showing of Success on the Merits.

"An applicant for a stay pending appeal must make 'a **strong showing** that he is likely to succeed on the merits.'" *Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020 (emphasis added) (citation omitted). NMFS falls far short of its burden.

NMFS notes that an abuse of discretion standard applies to the appeal of the partial vacatur of the incidental take statement ("ITS") and that such review is "highly deferential to the district court." NMFS's Response 10 (citation and quotation omitted). A district court abuses its discretion by basing its decision on an incorrect legal standard or clearly erroneous factual findings. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008). NMFS does not make a strong showing that the District Court applied an incorrect legal standard or made clearly erroneous factual findings.

**1. The District Court applied the correct vacatur standards.**

NMFS contends the District Court erred in finding the Administrative Procedure Act ("APA") carries a presumption of vacating unlawful agency actions. NMFS's Response 12. NMFS's argument lacks merit.

The APA directs that "[t]he reviewing court **shall**" "hold unlawful and **set aside** agency action . . . found to be" "not in accordance with law[.]" 5 U.S.C. § 706(2)(a) (emphasis added). "Congress could not have chosen stronger words to express its intent that" the remedy of vacatur "be mandatory." *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (discussing statute that provides courts "'shall order' forfeiture" of certain property (citation omitted)).

This Court has consistently applied a presumption that unlawful agency actions are to be set aside. *See, e.g.*, *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) (explaining that "vacatur of an unlawful agency action normally accompanies a remand" and finding the agency had "not overcome the presumption of vacatur"); *350 Mont. v. Haaland*, 29 F.4th 1158, 1177 (9th Cir. 2022) (noting that "vacatur is the presumptive remedy under the APA" and courts "remand without vacatur only in limited circumstances" (citation and quotation omitted)). The party requesting a court deviate from the statutory mandate to "set aside" unlawful actions must demonstrate that such relief is warranted, and courts may grant such requests "only 'when equity demands.'" *See*

*Pollinator Stewardship Council v. U.S. Env't Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015) (citation omitted); *All. for the Wild Rockies*, 907 F.3d at 1121–22.

The District Court correctly applied these standards in vacating the ITS. *See, e.g.*, WFC_ER24.

**2. The District Court correctly found the violations serious.**

Contrary to NMFS's arguments, its ESA and NEPA errors remain serious.

**a. NMFS's unlawful reliance on the prey increase program is a serious and ongoing error.**

NMFS represents that "implementation of the prey increase program as anticipated has effectively cured" the errors in relying on this program as mitigation. NMFS's Response 13. That is manifestly incorrect.

NMFS may rely on mitigation only if it is detailed, subject to deadlines or enforceable obligations, and sufficiently addresses impacts to avoid jeopardizing species. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020). Indefinite mitigation frustrates an assessment of whether the agency is implementing mitigation that avoids jeopardy, making it "difficult to know . . . whether the action agency has failed to comply" with the BiOp. *Id.* at 744.

NMFS violated these requirements in relying on the prey increase program. NMFS "failed to create a binding mitigation measure that described 'in detail the . . . plan to offset the environmental damage caused by the project'" and impose "specific deadlines . . . [and] requirements by which to confirm that the mitigation

is being implemented in the manner and on the schedule needed to avoid the extinction of the SRKW." WFC_ER80–81.

These violations persist because NMFS has yet to prepare a detailed plan showing when and how mitigation will be implemented to ensure the fisheries do not jeopardize SRKWs. The Court should reject NMFS's self-serving declarations representing that, despite the agency's failure to develop the required specific plan with deadlines subject to objective evaluation, NMFS is implementing the program as anticipated. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185–86 (9th Cir. 2011) ("Deference to agency experts [on remedy issues] is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error."). These declarations do not compensate for the lack of detailed plans and cannot satisfy NMFS's obligation to insure its actions do not jeopardize SRKWs. *See Bernhardt*, 982 F.3d at 743–44. Moreover, NMFS is not implementing the program as contemplated. It has been four years since the SEAK BiOp was issued and, based on NMFS's data, the program is releasing less than half the hatchery smolts targeted. *See* Conservancy's Response 13–14.

Further, NMFS cannot rely on the program as mitigation because NMFS has not consulted under the ESA on the program's adverse impacts to threatened salmonids or complied with any NEPA requirements. WFC_ER83–85, 89–90; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1208,

1213–16 (D. Or. 2003) (finding that NMFS improperly relied on mitigation that had not undergone ESA consultation, including hatchery measures). It is a blatant violation of NEPA's prohibition on predetermining an outcome for NMFS to insist this program will continue before completing NEPA efforts, including a meaningful consideration of alternatives like reduced harvests. *See Metcalf v. Daley*, 214 F.3d 1135, 1138, 1143–44 (9th Cir. 2000). NMFS cannot rely on this program that "may be substantially modified, or may be found to jeopardize the species upon closer scrutiny during future [ESA] consultation." *See Nat'l Wildlife Fed'n*, 254 F. Supp. 2d at 1208.

It is undisputed that NMFS has not cured its failure to comply with the ESA and NEPA for the prey increase program—NMFS anticipates that to occur by November 2024. NMFS's Response 17. NMFS represents, however, that it has "completed site-specific ESA and NEPA analyses or identified existing ESA and NEPA analyses that evaluated the effects of increased" production. *Id.* at 14. "Site-specific review cannot cure a failure to consult at the programmatic level, and incremental-step consultation is inadequate to comply with the ESA." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 891 (9th Cir. 2022).

Further, NMFS's contention that it "identified" applicable analyses is disingenuous. *See* NMFS's Response 14. What NMFS apparently did was identify old ESA and NEPA reviews for hatcheries that have since reduced production to

levels below that contemplated in the older analyses; NMFS now claims those outdated documents analyzed impacts from increasing hatchery production today as part of the prey increase program. *See* WFC_ER100, 122–25, 188–89. This level of disregard for the ESA is disheartening. ESA consultation requires, inter alia, NMFS "[e]valuate the **current** status and environmental baseline of the listed species" to determine whether the action, along with "cumulative effects"—i.e., effects of reasonably foreseeable future State or private actions—are likely to jeopardize the continued existence of listed species. 50 C.F.R. §§ 402.02, 402.14(g)(2), (4) (emphasis added). A BiOp prepared in 2007 did not evaluate the current status of threatened salmonids or the impact of increasing hatchery releases in 2021 and 2022. *See* WFC_ER125. Moreover, available data show some of these hatcheries are already violating "take" limits imposed to protect listed salmonids and that increased production under the program will cause more severe violations. *See* WFC_A9–14 ¶¶ 19–29.

NMFS's unlawful reliance on the prey increase program remains a serious violation.

**b. NMFS's unlawful reliance on Puget Sound Chinook salmon mitigation is a serious and ongoing error.**

Separate from the prey increase program, NMFS's reliance on mitigation needed for Chinook salmon is a continuing and serious violation.

The SEAK BiOp explained that mitigation was needed to conserve Puget

Sound Chinook salmon. *See* WFC_ER441–42. NMFS assumed impacts would be mitigated through habitat restoration and conservation hatchery programs targeting four Puget Sound Chinook salmon populations. *See* WFC_ER442. The District Court found that NMFS's reliance on this vague and uncertain mitigation violated the ESA; e.g., "NMFS . . . cannot [even] confirm additional fish will be produced by the funding." WFC_ER82–83. These serious violations are continuing because NMFS has yet to prepare a detailed plan for mitigating harm. Further, available information indicates a key mitigation component—a new conservation hatchery program in Hood Canal—never materialized. *See* WFC_ER442–661.

**c. NMFS's failure to comply with NEPA for the ITS is a serious and ongoing error.**

NMFS violated NEPA by issuing the ITS without completing any required processes. WFC_ER86–89. These are serious and ongoing NEPA violations. *See* Conservancy's Response 14–15.

**3. The District Court did not abuse its discretion in finding that disruptive consequences do not outweigh the seriousness of the violations.**

The District Court thoughtfully weighed the consequences of vacatur against the severity of NMFS's violations and determined that partial vacatur of the ITS was warranted. NMFS failed to show that was an abuse of discretion.

NMFS erroneously argues the District Court abused its discretion when assessing benefits to SRKWs. NMFS's Response 15–17. The District Court

considered evidence from all parties on this issue, noted that "no party . . . suggests that there would not be at least some benefit to the SRKW," and found partial vacatur "meaningfully improves prey available to the SRKW, as well as SRKW population stability and growth, under any scenario." WFC_ER39, 44. The District Court was not, as NMFS contends, required to simply defer to NMFS on this issue remedy issue. *See Sherman*, 646 F.3d at 1185–86 (finding a court abused its discretion in deferring to agency on injunctive relief issues).

The SRKW "has declined to historically low levels" primarily due to inadequate prey—Chinook salmon—causing premature mortality and reduced fecundity. WFC_ER516, 675, 744; WFC_SER193, 209–10. Current conditions are "unprecedented," with more than a fifth of the population likely vulnerable and emaciated. WFC_SER83–84. 69% of "pregnancies are aborted due to insufficient Chinook salmon," with some females "chronically pregnant—carrying a fetus for over a year, and then becoming pregnant again the following year after miscarrying their previous fetus," likely contributing to premature deaths. WFC_SER82; *see also* WFC_ER744. "[A]n immediate increase in the abundance of Chinook [salmon] . . . [is needed] to avoid functional extinction." WFC_SER85.

NMFS's management of fisheries has been insufficient to support SRKW population growth and NMFS projects the "downward trend in population growth" will continue. WFC_ER743–44. NMFS's ITS continues its pattern of enabling

excessive harvests that threaten SRKWs' continued survival. The District Court explained that "absent the mitigation . . . , NMFS would be unable to conclude that the proposed actions would not destroy or adversely modify critical habitat for the SRKW." WFC_ER80. Yet, NMFS approved the fisheries in reliance on undeveloped and uncertain mitigation. The District Court's finding that partial vacatur of the ITS would "meaningfully" benefit SRKWs was not clearly erroneous. *See* WFC_ER39; Conservancy's Response 17–19.

NMFS argues, unconvincingly, that the District Court "misunderstood" economic consequences of vacatur. NMFS's Response 15. The District Court summarized economic evidence from both sides and explained it "does not take such economic consequences lightly." WFC_ER40. NMFS fails to show a clearly erroneous finding.

The District Court did not abuse its discretion in weighing the consequences of vacatur against the seriousness of NMFS's violations and concluding that partial vacatur was warranted—relief that ensures the fisheries will not jeopardize listed species, while allowing most fisheries covered by the illegal ITS to continue. *See* WFC_ER47; *McNair*, 537 F.3d at 987 ("Under this standard, 'as long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" (citation omitted)). This relief was consistent with Congress' intent for

"endangered species to be afforded the highest of priorities" through a policy of "institutionalized caution." *Hill*, 437 U.S. at 174, 194.

The Motion to Stay should be denied because NMFS has failed to make a "strong showing" of success on appeal. *See Lado*, 952 F.3d at 1010.

**B. The Stay Would Substantially Injure the Conservancy.**

The Motion to Stay should be denied because NMFS failed to establish that a stay would not substantially injure the Conservancy. *See Lado*, 952 F.3d at 1006–07. The fisheries take threatened Chinook salmon and SRKWs without adequate mitigation, risking functional extinction of SRKWs, which constitutes irreparable injury. *See* Conservancy's Response 6; WFC_SER85; *Env't Def. Ctr.*, 36 F.4th at 891.

**C. The Equities and Public Interests Disfavor a Stay.**

NMFS cannot show the equities favor a stay. "Congress intended endangered species to be afforded the highest of priorities" and the "courts 'may not use equity's scales to strike a different balance,'" as "'the balance of hardships always tips sharply in favor of endangered and threatened species.'" *Hill*, 437 U.S. at 174, 184, 187; *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (citation omitted).

The Court should reject NMFS's nebulous argument, made for the first time on appeal, that vacatur of the ITS could harm SRKWs. *See* NMFS's Response 19.

The only support NMFS cites for this hollow argument are statements expressing concern over halting the prey increase program, not vacating the ITS. *See id.* (citing FE-16–17 ¶¶ 25, 27). NMFS's interest in prioritizing commercial fisheries may be consistent with its mission as an agency within the Department of Commerce to promote economic activities. However, it is entirely inconsistent with the ESA mandate that NMFS "afford first priority to . . . saving endangered species," even "over the [agency's] 'primary missions.'" *See Hill*, 437 U.S. at 185.

## III. CONCLUSION.

The Conservancy respectfully requests the Court deny the Motion to Stay.

Respectfully submitted this 8th day of June 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the requirements of Federal Rules of Appellate Procedures 27(d)(1) and 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced font.

I further certify that this reply complies with Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,597 words, according to the count of Microsoft Word.

DATED this 8th day of June 2023.

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