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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILD FISH CONSERVANCY,
Plaintiff/Appellee,

v.

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

and

ALASKA TROLLERS ASSOCIATION, and STATE OF ALASKA,
Defendant-Intervenors/Appellants

Appeal from the United States District Court for the Western District of Washington
No. C-20-417 (Hon. Richard A. Jones)

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL

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GLOSSARY

ESA	Endangered Species Act
EEZ	Exclusive Economic Zone
FE	Federal Exhibits attached to this Opposition
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SEAK	Southeast Alaska
SRKW	Southern Resident killer whales
WFC_ER	Exhibits attached to the Wild Fish Conservancy's motion

INTRODUCTION

The Endangered Species Act ("ESA") protects threatened Chinook salmon and endangered Southern Resident killer whales. The salmon is prey for the whale, meaning that Alaska's management of the Chinook salmon fisheries in state and federal waters—the latter of which is subject to federal delegation and oversight—involves both species. The National Marine Fisheries Service ("NMFS") concluded in a 2019 biological opinion that the federal government's continued delegation of management authority to Alaska, as well as a federally-funded program designed to increase the number of Chinook salmon available as prey for the killer whale (the "prey increase program"), complied with the ESA with regard to both species. NMFS also issued an incidental take statement that enabled the fisheries to operate consistently with the ESA subject to limitations.

The district court concluded that NMFS's biological opinion was lacking in certain respects. With regard to the prey increase program in particular, it held that the agency needed to further analyze the effects of the program—which is designed to enhance conservation of the killer whale—on wild salmon. But it remanded to NMFS for further analysis without vacating the portion of the biological opinion relating to the prey increase program, in light of the program's importance to the killer whale. NMFS expects to complete those additional analyses no later than November 2024. However, the Wild Fish Conservancy now asks this Court to effectively shut down a conservation program that is expected to result in substantial benefits to the killer whale. This request should be denied.

STATEMENT OF THE CASE

A. Statutory background

Section 7 of the ESA mandates that federal agencies ensure that their actions are "not likely to jeopardize the continued existence" of any endangered or threatened species. 16 U.S.C. § 1536(a)(2). Federal agencies must accordingly consult with NMFS whenever the agency's action "may affect" a listed marine species. *Id.*; 50 C.F.R. § 402.14(a). Where NMFS itself proposes to take an action that may affect listed species, NMFS is both the action and consulting agency. If the action is "likely to adversely affect" listed species or critical habitat, the agencies must engage in formal consultation, which culminates in the consulting agency issuing a biological opinion, which includes (among other things) the agency's opinion whether the action is likely to jeopardize the continued existence of the species. *Id.* § 402.14(h).

ESA Section 9 separately prohibits the "take" (*i.e.*, harassment, harm, hunting, trapping, capturing, killing) of a listed species. 16 U.S.C. §§ 1538(a)(1)(B), 1532(19). When a consulting agency determines that the action under consideration is not likely to jeopardize a listed species' existence but is reasonably certain to result in "take," the agency issues along with its biological opinion an "incidental take statement" that, among other things, identifies the extent of anticipated take and measures to minimize such take. *Id.* § 1536(b)(4). Take in compliance with the incidental take statement is exempt from Section 9's prohibition. *Id.* § 1536(o).

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, establishes a process for federal agencies to consider the environmental impacts of

their proposed actions. *Vt. Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 558 (1978). NEPA imposes procedural, not substantive, requirements. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Under NEPA, a federal agency must prepare an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

B. Southern Resident killer whales and Chinook salmon

Southern Resident killer whales are a distinct population segment of killer whales found in the coastal and inland waters of the Pacific Northwest. They were listed as endangered in 2005. WFC_ER-516-18. These killer whales face various threats, including limits on the quantity and quality of prey, toxic chemicals, oil spills, vessels, and sound. WFC_ER-522-30.

Chinook salmon serve as these whales' primary source of prey. Chinook spawn and rear in freshwater and young salmon then migrate to the ocean, where they mature. WFC_ER-444. They travel substantial distances in the ocean, migrating through Alaskan and Canadian waters. Most mature in 3-5 years and return to their spawning ground in 4-5 years. *Id.*; Federal Exhibits ("FE") 70, ¶ 12. NMFS has listed certain populations (known as "evolutionarily significant units") of Chinook salmon under the ESA, 16 U.S.C. § 1532(16). WFC_ER-458. Hatchery-produced salmon—i.e., salmon raised in a hatchery and then released to the wild—provide a significant portion of killer whale prey. WFC_ER-522-23; WFC_ER-526.

Because of migratory patterns, fish that originate in the United States are often caught by those fishing in Canada, and vice versa. WFC_ER-444-46; WFC_ER-534.

To help manage conflicts arising from this dynamic, the United States and Canada signed the Pacific Salmon Treaty in 1985, which established a management framework for Pacific salmon, set upper limits on the harvest of Chinook salmon, and is periodically updated. WFC_ER-534-35.

C. The 2019 Biological Opinion

In 2019, NMFS issued a biological opinion that considered the effects of three actions on listed species including Southern Resident killer whales and four evolutionarily significant units of threatened Chinook salmon (Puget Sound Chinook salmon, Upper Willamette River Chinook salmon, Lower Columbia River Chinook salmon, and Snake River Fall-run Chinook salmon). WFC_ER-433-44. The three actions are: (1) the delegation of management authority to Alaska over salmon fisheries in federal waters off Alaska's coast; (2) federal funding of Alaska's implementation of the Treaty; and (3) federal funding of a conservation program designed to benefit threatened Chinook salmon and killer whales.

One component of the conservation program—the prey increase program—sought to release hatchery-raised salmon to serve as additional prey for the killer whale. The prey increase program was estimated to result in the release of millions of hatchery-raised young salmon per year. WFC_ER-442-43. At the time the 2019 biological opinion issued, NMFS's analysis of this program was considered "programmatic," meaning that the agency assessed impacts at a broad framework level. NMFS would then assess the future, site-specific projects that received funding once the specifics of those projects became known, to determine whether the projects

are adequately covered by an existing biological opinion or require additional consultation. WFC_ER-442-43; WFC_ER-101, ¶ 8.

The biological opinion concluded that the three actions were not likely to jeopardize the continued existence of either the Chinook salmon or the Southern Resident killer whale. WFC_ER-758.

The biological opinion also included an incidental take statement that exempted take resulting from the Southeast Alaska fisheries up to the allowed levels of annual catch. WFC_ER-759-60. Consistent with the ESA implementing regulations, NMFS did not exempt take associated with the prey increase program (for example, any possible harm to wild Chinook from releasing hatchery fish) because it was evaluated at a programmatic level and would instead address any such take in site-specific consultations. WFC_ER-760; 50 C.F.R. §§ 404.2, 402.14(i)(6). NMFS did not analyze under NEPA the effects of either the incidental take statement or the prey increase program at the programmatic level.

The prey increase program has been fully funded (costing more than $5 million per year), as planned, for the past three years (2020-2022). FE-60-62, ¶¶ 7-9. As anticipated in the programmatic analysis, NMFS has completed or identified applicable site-specific ESA consultations and NEPA analyses for specific hatchery programs. WFC_ER-100, ¶ 5; WFC_ER-121-23; FE-23-24, ¶¶ 9-11; FE-41-43. In so doing, NMFS relied on its extensive experience assessing the effects of hatchery programs, as well as a series of guidance documents, to ensure that the releases will

not jeopardize the survival and recovery of any ESA-listed species. WFC_ER-100, ¶ 6; WFC_ER-178-81, ¶¶ 8, 14; WFC_ER-443.

Although not every additional salmon in the wild ends up as prey for killer whales due to fishing and other pressures, the program is already meaningfully benefitting killer whales by "increasing the prey available." FE-69, 70-71, 74-75, ¶¶ 11, 13, 22. The "increase in abundance anticipated from the prey increase program will contribute to the overall Chinook abundance, and reduce the potential for [killer whales] to experience low abundance conditions in general." FE-71-72, ¶ 15.

D. Proceedings below

Plaintiff Wild Fish Conservancy sued NMFS in March 2020 to challenge the biological opinion and incidental take statement, raising several claims under the Administrative Procedure Act ("APA"), ESA, and NEPA. Alaska and a representative of the Alaskan commercial fishing industry (the Alaska Trollers Association) intervened as co-defendants. In September 2021, a magistrate judge issued a report and recommendation on the parties' cross-motions for summary judgment, which the district court adopted in full in August 2022. Dkt. Nos. 111, 122. The court found that NMFS's finding of no-jeopardy in the 2019 biological opinion was arbitrary and capricious—and that NMFS therefore violated its duty under Section 7 of the ESA to ensure that its actions are not likely to jeopardize listed species—because NMFS relied on the effects of mitigation measures that were uncertain to occur. Dkt. No. 111 at 25, 33-34. The court also found that NMFS had improperly "segmented" its analysis by taking the prey mitigation program into account when considering the likely

(beneficial) effects of agency action on the killer whales, without simultaneously considering the effects of that program on the Chinook salmon (which the Conservancy believes may be negative). *Id.* at 31-33. The court further held that NMFS should have analyzed under NEPA the effects of both the issuance of the incidental take statement and the prey increase program. *Id.* at 34-38.

Remedy proceedings followed. In December 2022, the magistrate judge issued a report recommending partial vacatur of the biological opinion to remedy the previously-identified ESA and NEPA violations. Dkt. No. 144. On May 2, 2023, the district court adopted the report in full. Dkt. No. 165. The court remanded without vacating the portion of the biological opinion that consulted on the impacts of the prey increase program at a broad-scale programmatic level. Remand without vacatur enables the prey increase program to continue to operate while NMFS conducts the ESA and NEPA analyses on remand.

Alaska, Alaska Trollers Association, the Conservancy, and NMFS each appealed. Alaska moved for a stay of the remedy order insofar as it vacated the portion of the incidental take statement exempting take from the Chinook salmon commercial fishery. The Conservancy moved for an injunction pending appeal of the remedy order to the extent that the order did not vacate the portion of the biological opinion relating to the prey increase program. On May 26, 2023, the district court denied the motions of Alaska and the Conservancy. Dkt. No. 193. Alaska moved for a stay pending appeal in this Court the same day, which NMFS supported in a separate filing on June 1, 2023. The Conservancy filed this motion on May 30, 2023.

REASONS TO DENY THE REQUESTED INJUNCTION

An injunction pending appeal is "an extraordinary and drastic remedy." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). To obtain such a remedy, a plaintiff must establish (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of injunctive relief; (3) "that the balance of equities tips in [its] favor"; and (4) "that an injunction is in the public interest." *Winter v Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). The equities inquiry merges with the public interest analysis when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

This Court has allowed a movant to satisfy this standard by demonstrating "serious questions" on the merits, but only when the movant carries its burden on the other three elements and has shown that balance of hardships "tips *sharply*" in its favor. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added). In any case, because an injunction is "never awarded as of right," *Winter*, 555 U.S. at 24, the moving party must make a "clear showing" that it has met all four requirements of the standard, *id.* at 22. *See also Cottrell*, 632 F.3d at 1134-35 (explaining that movants must still "make a showing on all four prongs"). The Conservancy falls far short of meeting this standard.

I. The Conservancy is not likely to succeed on the merits of its appeal.

The merits argument presented in the Conservancy's motion concerns the district court's selection of a remedy. A district court's decision to vacate rather than

remand agency action is subject to review for abuse of discretion. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066, 1082 (9th Cir. 2010). The abuse of discretion standard is "highly deferential to the district court," and reversal is required only where the court makes an error of law or where this Court is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (citation omitted). This Court is unlikely to find that the district court abused its discretion when it remanded without vacatur the portion of the biological opinion applicable to the prey increase program.

A. Vacatur is an equitable remedy that the court must evaluate in accordance with traditional equitable factors.

While the Conservancy cites to opinions that describe vacatur as the presumptive remedy for an APA violation, *see* Mot. at 11 (citing *Alliance for the Wild Rockies v. United States Forest Service*, 907 F.3d 1105, 1121-22 (9th Cir. 2018)), this Court has also held that it is not automatically "required to set aside every unlawful agency action." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *see Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). This Court set forth the standard that it applies when determining whether to vacate agency action in *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). That decision explained that the question whether to vacate "depends on how serious the agency's errors are and the disruptive consequences of an interim change

that may itself be changed." *Id.* at 992 (quotation omitted).[1] Other decisions have explained that, to evaluate the seriousness of an agency's errors, courts may consider "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Nat'l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (quotation omitted). Courts may also consider the consequences to the environment and, in particular, endangered species. *See id.; see also California Communities*, 688 F.3d at 992; *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (declining to vacate an agency's rule because vacatur would have risked the extirpation of a species of snail).

Vacatur remains an equitable remedy and therefore should be granted only if the relevant equitable considerations favor relief. *California Communities*, 688 F.3d at 992; *Nat'l Wildlife Fed'n*, 45 F.3d at 1343; *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with "traditions of equity practice"); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (an injunction "should issue only if the traditional four-factor test is satisfied" and rejecting the "presum[ption] that an

[1] The Conservancy contends that this Court has only remanded without vacatur where the agency's errors were not significant, Mot. at 17-18, but this Court explained in *California Communities* that the agency had made both procedural and substantive errors and nevertheless remanded without vacatur in light of the severe environmental and economic consequences that would result. *See* 688 F.3d at 993-94.

injunction is the proper remedy for a NEPA violation except in unusual circumstances"—"[n]o such thumb on the scales is warranted").[2] In any event, regardless of whether there is a presumption of vacatur, the district court did not abuse its discretion in declining to vacate the biological opinion on this record.

B. The district court did not abuse its discretion when it held that remand without vacatur was warranted.

The district court correctly concluded that vacatur of the biological opinion was not warranted given the "serious and certain risk to prey abundance and availability" to the killer whale that would result. Dkt. No. 144 at 37.

As an initial matter, while the district court ultimately reached the right conclusion—that vacatur was unwarranted—it erred in determining that NMFS's errors were serious. Dkt. No. 144 at 27-28. The court identified an ESA violation (NMFS's failure to consider the impact of the prey increase program on threatened Chinook salmon) as well as a NEPA violation (NMFS's failure to conduct a NEPA analysis on the prey increase program). Dkt. No. 111 at 31-33, 37-38. But since the 2019 biological opinion was issued, for every hatchery program receiving program funding, NMFS has completed site-specific ESA and NEPA analyses or identified existing analyses that evaluated the effects of increased hatchery production, including impacts to listed salmon. WFC_ER-100, ¶ 5; WFC_ER-121-23; FE-23-24, ¶¶ 9-11; FE-41-43. These analyses have reduced the significance of any error on the part of

[2] The position of the United States is that vacatur is not authorized by Section 706 of the APA. *See United States v. Texas*, No. 22-58 (S. Ct.), Gov't Op. Br. 40-44; Gov't Reply Br. 16-20. The federal government acknowledges that this Circuit's precedent on APA remedies controls at this stage of the proceedings.

NMFS in issuing the 2019 biological opinion—a fact which the Conservancy fails to address in its motion, Mot. at 12-14, and the district court failed to appreciate in its analysis, Dkt. No. 144 at 26-28.[3]

Despite this error on the seriousness factor, the district court still reached the right conclusion that vacatur was unwarranted due to the disruptive consequences. Dkt. No. 144 at 31. NMFS presented evidence showing that the consequences to the killer whale would be substantial. The prey increase program has been in operation since 2020 and is beginning to result in "a certain and definite increase in prey." Dkt. No. 144 at 31; FE-68-69, ¶ 9-10; FE-46-47, 51, 55-57, ¶¶ 7, 15, 23-25, 27; FE-22, ¶¶ 6-8; FE-29-38.

Shuttering the program, however, "could manifest in the whales foraging for longer periods, traveling to alternate locations, or abandoning foraging efforts." FE-54-55, ¶ 21. This impact "could result in [killer whales] not consuming sufficient prey to meet their energetic needs, which could affect the health of individual whales, reproduction and the status and growth of the population." *Id.* These types of environmental harms counselled against vacatur. *See Idaho Farm Bureau,* 58 F.3d at 1405-06. The district court correctly deferred to the agency's expertise in this matter in concluding that the environmental consequences of vacatur would be too severe.

[3] These errors are also procedural in nature, and remand without vacatur provides the opportunity to correct such errors and provide further explanation, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), which NMFS is poised to do, Dkt. No. 144 at 36.

See Friends of Animals v. U.S. & Wildlife Serv., 28 F.4th 19, 29 (9th Cir. 2022); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014).

In the face of this evidence, the Conservancy asserts that the district court's vacatur of the incidental take statement (which essentially enjoins the commercial Chinook fishery from operating and is the subject of Alaska's motion to stay pending appeal referenced above) obviates the need for the prey increase program. Mot. at 14. This contention fails for two reasons.

First, the Conservancy and its declarant, Dr. Lacy, overestimate the amount of prey to be gained from vacatur of the incidental take statement. Mot. at 14; Dkt. No. 144 at 29. As explained by NMFS's Lynne Barre (who leads NMFS's killer whale recovery program and whose expertise was acknowledged by the court, Dkt. No. 144 at 17-20), the Lacy analysis is outdated and oversimplified, and fails to account for seasonal and spatial variability. FE-47-49, ¶¶ 8, 10, 11. NMFS estimated that fishing in *all* Southeast Alaska salmon fisheries—of which the fisheries at issue here are only a part—would reduce prey availability for killer whales by an average of only 0.5% in the coastal waters where whales are generally present during the winter and an average of 1.8% in inland waters where whales are generally present during the summer. FE-68, ¶ 9; FE-49, ¶ 11; WFC_ER-681-82; WFC_ER-746. The reductions in prey expected to result from only the winter and summer commercial Chinook salmon troll fisheries at issue in here would necessarily be even lower. *See also* FE-49, ¶ 11; FE-12-13, ¶ 31.

Second, in asserting there is no need for the program, the Conservancy mischaracterizes how it works. Chinook salmon do not become available as killer whale prey until the age of three at the earliest. *See* FE-22, ¶ 8. Accordingly, fish produced using funds disbursed in 2023 will not be available as prey until 2026. Thus, stopping the prey increase program through vacatur in 2023 does not mean hatchery fish will be unavailable as prey in 2023, when a shutdown of the fishery could (in the Conservancy's view) arguably offset prey availability; it instead means that smaller numbers will be available as prey in 2026 and beyond—long after the agency's anticipated completion of the remand (no later than November 2024) and long after the fishery has reopened. In sum, the closure of the commercial Chinook salmon fishery pending appeal—even assuming this Court does not stay that closure pending appeal, per Alaska's request—is not an adequate substitute for the prey increase program, and the Court should reject the Conservancy's attempt to skew the numbers in its favor.

The Conservancy also asserts that the district court erroneously found that the federally-funded portion of the prey increase program had released 19 million juvenile salmon, when in fact the federal government funded the release of approximately 8 million salmon and the state funded the remainder. Mot. at 14-15. But the district court did not commit such an error. The court stated that NMFS contributed $5.4 million in funds and that over 19 million salmon were released, but did not attribute state-funded releases to NMFS. Dkt. 144 at 31 (citing WFC_ER-99 ¶ 3 and WFC_ER-120). In any event, the relevant remedy question is what effect vacatur

would have in future years. The record demonstrates that vacatur would significantly disrupt future federal funding, without which hatchery operators would be unlikely to spawn additional fish that are necessary to ensure increased prey for killer whales. WFC_ER-101-02, ¶ 9; FE-27, ¶ 18.

The Conservancy also misstates the impacts of the prey increase program on wild fish. Mot. at 15-16. At certain times and locations, hatchery-origin fish can pose a risk to wild fish, including from competition or breeding, which reduces genetic diversity and fitness. FE-25-26, ¶ 15. But these risks are best addressed at the site-specific level, where NMFS will evaluate all the risks posed by hatchery releases and will continue to evaluate genetic risks posed by individual releases based on where the fish are being released, the origin of the broodstock being used by the hatchery, how many wild fish are incorporated into the broodstock, and whether hatchery fish will be removed from the wild to control the numbers of fish that might interact with wild fish, among other things. FE-23-24, ¶¶ 9-11. NMFS has been working with hatchery operators to implement tools that allow it to increase prey while simultaneously reducing genetic risks to ESA-listed salmon. FE-26, ¶ 17. NMFS does not fund the release of hatchery fish if such release will jeopardize the survival of any ESA-listed species, including threatened salmon populations. FE-23, ¶ 9.

The agency has not, as the Conservancy contends, Mot. at 16, relied on outdated or piecemeal analysis before funding hatchery programs. FE-24, ¶ 12. To the extent NMFS relies on preexisting analysis, it reviews such analysis to ensure that the proposed action falls within its parameters and that there is no new information that

would warrant reinitiation of consultation or preparation of new NEPA analysis. FE-23-24, ¶¶ 10, 12. Where necessary, NMFS has supplemented previous analysis and reinitiated consultation. FE-23, ¶ 10. NMFS has also considered some of the aggregate effects of hatchery programs as part of its site-specific analysis. FE-26, ¶ 16 (noting consideration of "cumulative" impacts).[4]

In sum, the district court did not abuse its discretion when it determined that vacatur would result in significant environmental harm and was therefore unwarranted.

II. The Conservancy has not shown a likelihood of irreparable harm while this appeal is pending.

The Conservancy fails to show that it likely will suffer irreparable harm without an injunction pending appeal, and its motion can be denied on that ground alone.

The Conservancy contends that the prey increase program is "likely" to "further inhibit the prospects for the continued survival, much less the recovery," of

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[4] Citing a new declaration that it included in its Appendix, the Conservancy also contends that hatchery programs are in violation of take limits imposed in previous biological opinions. Mot. at 16-17 (citing WFC_A9-14). This new declaration—which is not a part of the administrative record and was never filed in district court—is not part of the record on appeal. Fed. R. App. P. 10(a); *see also Nat'l Res. Def. Council v. Winter*, 502 F.3d 859, 865 n. 29 (9th Cir. 2007) (striking extra-record declarations filed on appeal). Because the declaration was "neither filed with the district court, considered by the court, nor even before the court when it entered the order" challenged on appeal, it is irrelevant to the determining whether the district court abused its discretion. *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077-78 (9th Cir. 1988). This Court should strike it and the portions of the motion (pages 16-17) that refer to it. Should this Court decline to do so, it should alternatively provide NMFS the opportunity to supplement the record so that NMFS may refute the extra-record declaration. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (discussing court's equitable power to supplement the record on appeal).

Chinook salmon. Mot. at 18-19. But irreparable harm is never presumed, even in cases that affect the environment. *See Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008), *overruled on other grounds by Winter*, 555 U.S. 7. Indeed, this Court has repeatedly declined "to adopt a rule that *any* potential environmental injury *automatically* merits an injunction." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010). To obtain an injunction pending appeal, the Conservancy therefore "must demonstrate immediate threatened injury," *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (quotation omitted), at the species level, *Nat'l Wildlife Federation v. NMFS*, 886 F.3d 803, 819 (9th Cir. 2015), that will occur "during the period before the appeal is decided," *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020).

The Conservancy has presented no evidence that Chinook salmon species will be imminently and irreparably harmed at all, much less during the appeal. As the district court explained, "[t]here is an inherent conflict in this case from the Chinook salmon, a threatened species, serving as priority prey for the endangered [killer whale]" and any "risks" to wild fish can be mitigated at the site-specific level "to limit any potential negative impacts." Dkt. No. 144 at 34-35; *see supra* p. 3. NMFS has in fact carefully evaluated the program's effects on threatened salmon and ensured before acting at the site-specific level that no jeopardy will result. FE-23-24, ¶¶ 9-11; *see supra* pp. 11-12, 15-16. The Conservancy provides no justification for discarding either the district court's conclusions or NMFS's expert opinion, developed through years of studies and experience.

Furthermore, the relevant inquiry is whether the Conservancy's interests will be harmed pending the appeal, not whether the program will cause environmental harm in the abstract. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (explaining that Article III remedies must redress an "injury to the plaintiff" rather than an "injury to the environment"). The Conservancy has not established that its members will suffer such harm. One declaration provides that the member "find[s] it discouraging to fish where there are aggressive hatchery programs," WFC_ER212, ¶ 17, and wishes to "angle more frequently." WFC_ER214-15, ¶ 20. That may be enough to establish standing, but more is needed to demonstrate irreparable harm. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011). Another declarant stated: "I intend to return to the Columbia River and its tributaries to fish for Chinook and steelhead, because even though wild populations are low here, there are still fishing opportunities—opportunities that no longer exist in many rivers in Puget Sound." WFC_ER198-99, ¶ 10. Rather than showing harm, this declaration demonstrates that wild Chinook fishing is not foreclosed, nor will be pending the appeal.

In sum, the Conservancy has not demonstrated that it will suffer immediate irreparable harm absent an injunction pending appeal.

III. The balance of equities and the public interest counsel against an injunction.

Even if the Conservancy could show that it will be irreparably harmed and that it is likely to succeed on the merits, an injunction cannot issue because the balance of harms and public interest weigh against granting such relief. *Winter*, 555 U.S. at 20.

The prey increase program is one part of a regulatory regime that is designed to help the survival and recovery of the killer whale; stopping the program will adversely affect the killer whale. *See supra* pp. 12-14. An injunction pending appeal would therefore run counter to the balance of the equities and the public interest. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) ("the balance of hardships and the public interest tip heavily in favor of endangered species") (citation omitted).

Denying the Conservancy's request is also in the public interest because, without the prey increase funding, the complex regulatory and statutory framework for managing fisheries and broader efforts to promote the recovery of ESA-listed species will be frustrated. Within that framework, NMFS works with its regional partners, including the States of Washington, Oregon, Alaska, and Tribes with treaty fishing rights, to, among other things, manage fisheries and establish a suite of restoration and recovery actions that benefit species such as endangered killer whales and threatened Chinook salmon. Congress has decided to provide funds used for the prey increase program against this backdrop. *See* FE-60-62, ¶¶ 7-9; FE-81, ¶ 9. Vacating the biological opinion pending appeal would interfere with this regulatory and statutory framework. *Cf. United States v. Oakland Cannabis Buyers' Co-operative*, 532

U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.").

CONCLUSION

For all these reasons, the Conservancy's motion for an injunction pending appeal should be denied.

Respectfully submitted,

s/ Thekla Hansen-Young

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DJ# 90-8-6-08342

CERTIFICATE OF COMPLIANCE

This motion response contains 5,164 words, excluding the items exempted by Cir. R. 27-1(1)(d). The type size and typeface comply with Fed. R. App. P. 27(d)(1)(E).

s/ Thekla Hansen-Young
THEKLA HANSEN-YOUNG

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LIST OF FEDERAL EXHIBITS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. JENNIFER QUAN, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor, and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP DECLARATION OF GRETCHEN HARRINGTON

I, Gretchen Harrington, declare:

1. I am the Assistant Regional Administrator of the Sustainable Fisheries Division, National Marine Fisheries Service ("NMFS") Alaska Region, which is an operating unit within the National Oceanic and Atmospheric Administration ("NOAA"), a component of the United States Department of Commerce ("DOC"). I have occupied this position since December 5, 2022. My duties generally include managing the Sustainable Fisheries Division,

providing technical and policy advice, and assisting in the preparation and review of regulatory documents. Prior to my current position, I served as the Assistant Regional Administrator for the Habitat Conservation Division, the National Environmental Policy Act Coordinator for Alaska Region, and the Fishery Management Plan Coordinator, including the Salmon Fishery Management Plan, for the Sustainable Fisheries Division. I have worked for NMFS Alaska Region since 1998, primarily in the Sustainable Fisheries Division, where I worked on developing and implementing the regulatory programs covering federal fisheries in Alaska.

2. As part of my official duties, I assist the Alaska Region in carrying out duties delegated by the Secretary of Commerce, Gina M. Raimondo ("Secretary"). This includes carrying out the Secretary's responsibilities for complying with the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), as that statute applies to the implementation of fishery management plans ("FMPs") and FMP amendments for fisheries in the exclusive economic zone ("EEZ") off Alaska. I assist with coordinating the development and implementation of policies governing the management of Federal fisheries off Alaska, including the salmon fisheries off Alaska under the "Fishery Management Plan for the Salmon Fisheries in the EEZ Off Alaska" ("Salmon FMP"). I also serve on the North Pacific Fishery Management Council ("Council") as the voting alternate for NMFS Alaska Region. I am familiar with the Salmon FMP, its amendments, and its implementing regulations.

3. I am familiar with the issues in this litigation, and I have read nearly all of the parties' briefing on their motions for summary judgment and their motions for a post-judgment stay and injunction.

4. In the following paragraphs, I affirm and update the statements that my predecessor, Josh Keaton, had provided, including: (1) a brief history of the Salmon FMP; (2) an explanation of the Salmon FMP's delegation of management of fishing in federal waters (the EEZ off Southeast Alaska) to the State of Alaska; (3) an overview of the Southeast Alaska Chinook salmon commercial troll fishery; and (4) an overview of the economic value of the Southeast Alaska Chinook salmon commercial troll fishery.

Brief History of the Salmon FMP

5. The State of Alaska has managed Southeast Alaska salmon fisheries inside and outside of state waters since statehood in 1959.

6. In 1976, Congress passed the Magnuson-Stevens Act, which established federal fishery management authority over the exclusive economic zone, 16 U.S.C. § 1811, which in Alaska generally includes waters from 3 to 200 nautical miles offshore. The State of Alaska manages fisheries that occur in waters up to 3 nautical miles offshore.

7. The Secretary of Commerce approved and implemented the original Salmon FMP in 1979. The 1979 Salmon FMP established the Council's and NMFS's authority over the commercial and sport salmon fisheries occurring in the EEZ, or federal waters, off Alaska and divided the EEZ into two areas – an East Area and a West Area – at the longitude of Cape

Suckling. 50 C.F.R. § 679.2 (defining the East Area as the area of the EEZ in the Gulf of Alaska east of the longitude of Cape Suckling (143° 53.6' W)).

8. In the East Area, the 1979 Salmon FMP authorized commercial fishing for salmon with hand troll or power troll gear and prohibited commercial fishing for salmon with any other gear type. The FMP also authorized sport fishing for salmon in the East Area. The 1979 Salmon FMP's primary function was to limit entry in the commercial troll fishery; the Council intended the rest of the Salmon FMP management measures for the sport fishery and the commercial troll fishery in the East Area to be complementary with State of Alaska regulations for the salmon fisheries in adjacent state waters. The 1979 Salmon FMP adopted the State of Alaska's harvest restrictions and management measures.

9. In 1990, the Council comprehensively revised the Salmon FMP with Amendment 3. In recommending and approving Amendment 3, the Council and NMFS reaffirmed that existing and future salmon fisheries occurring in the EEZ require varying degrees of Federal management and oversight. Under Amendment 3, the 1990 Salmon FMP continued to authorize sport fishing and commercial hand troll and power troll gear fishing in the East Area and to limit entry in the commercial troll fishery. However, in order to address the inefficiencies and management delays inherent with the federal system duplicating the State of Alaska's harvest restrictions and management measures for state waters, Amendment 3 delegated management authority to the State of Alaska to regulate the sport and commercial troll fisheries in the East Area.

10. Pursuant to the Magnuson-Stevens Act, 16 U.S.C. § 1856(a)(3)(B), NMFS may delegate management of a fishery in the EEZ to a state. In making this delegation, the

Salmon FMP was amended to include a chapter governing Council and NMFS oversight of the State's exercise of delegated authority.

11. In 2012, NMFS approved Amendment 12 to the Salmon FMP. With regard to the East Area, Amendment 12 updated the Salmon FMP to include several provisions that addressed new requirements arising from revisions to the Magnuson-Stevens Act; these provisions included annual catch limits and accountability measures. Amendment 12 also reaffirmed the existing delegation of management authority for the sport and commercial troll salmon fisheries in the East Area to the State of Alaska, as well as the prohibition on net fishing in the East Area.[1]

Delegation of Management Authority in the East Area to the State of Alaska

12. The Salmon FMP sets forth the Council's management policy and objectives for the salmon fisheries in the EEZ off Alaska (Chapter 3 of the Salmon FMP). The Salmon FMP establishes the management areas and the salmon fisheries to be managed by the FMP (Chapter 2 of the Salmon FMP). The Salmon FMP also specifies the commercial gear types authorized (Chapter 5), the status determination criteria applicable to salmon fisheries in the East Area (Section 6.1), and identifies and describes essential fish habitat and habitat areas of particular concern for the salmon stocks managed by the FMP (Chapter 7). However, the

[1] Since Amendment 12, the Council and NMFS have amended the FMP three times. The 2018 FMP amendment (Amendment 13 to the Salmon FMP) updated the description and identification of essential fish habitat for salmon species, *see* 83 Fed. Reg. 31,340 (July 5, 2018). The 2021 FMP amendment (Amendment 15 to the Salmon FMP) updated the FMP to clearly and accurately explain bycatch reporting consistent with requirements to establish standardized bycatch reporting methodology in FMPs, *see* 86 Fed. Reg. 51,833 (Sept. 17, 2021). Another 2021 FMP amendment (Amendment 14 to the Salmon FMP) addressed management of salmon fishing in Cook Inlet, in the West Area, *see* 86 Fed. Reg. 60,568 (Nov. 3, 2021). There is ongoing litigation over management in the West Area, but that does not implicate the provisions of the FMP that apply to the East Area. The 2018 and 2021 FMP amendments do not alter the Council's and NMFS's delegation of management of the commercial troll and sport fisheries in the East Area to the State of Alaska.

Salmon FMP delegates all other management and regulation of the commercial troll and sport salmon fisheries in the East Area to the State of Alaska pursuant to 16 U.S.C. § 1856(a)(3)(B) of the Magnuson-Stevens Act.

13. Chapter 4 of the Salmon FMP describes the roles of the various agencies in implementing the FMP. Section 4.3.2 describes the role of the Alaska Department of Fish and Game ("ADF&G"). Under the Salmon FMP, the Council and NMFS delegated regulation of the commercial troll and sport salmon fisheries in the East Area to the State of Alaska. In general, these fisheries are controlled by State of Alaska regulations prescribing limits on harvests, fishing periods and areas, types and amounts of fishing gear, commercial fishing effort, minimum length for Chinook salmon, and reporting requirements. State regulations apply to all fishing vessels participating in these fisheries regardless of whether the vessel is registered under the laws of the State of Alaska.

14. ADF&G manages the fisheries during the fishing season (e.g., inseason) and issues emergency regulations to achieve conservation objectives and to implement allocation policies established by the Alaska Board of Fisheries. ADF&G also monitors the fisheries, collects data on the stocks and the performance of the fisheries, and provides annual reports on stocks and fisheries for each of the State of Alaska's management areas.

15. Although the Salmon FMP delegates to the State of Alaska much of the day-to-day management of the sport and commercial troll salmon fisheries occurring in the East Area, State of Alaska management measures applicable to the sport and commercial troll salmon fisheries in the East Area must be consistent with the Salmon FMP, the Magnuson-Stevens Act, and other applicable federal law. Chapter 9 of the Salmon FMP states that the Council

and NMFS stay apprised of state management measures and ensure that the delegation of fishery management authority to the State is carried out in a manner consistent with the Salmon FMP, the Magnuson-Stevens Act, and other applicable federal law.

The Southeast Alaska Chinook Salmon Commercial Troll Fishery

16. The following paragraphs are based on my review of publicly-available reports and information provided by ADF&G and the Pacific Salmon Commission's Chinook Technical Committee, and my review of a publicly-available report published by the McDowell Group on the Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet.

17. Under management provisions of the Pacific Salmon Treaty, ADF&G announces annual all-gear catch limits for treaty Chinook salmon. The all-gear catch limit for Southeast Alaska is based on a forecast of the aggregate abundance of Pacific Coast Chinook salmon stocks subject to management under the Pacific Salmon Treaty.

18. The Southeast Alaska Chinook salmon all-gear catch limit is allocated among sport and commercial fisheries under management plans specified by the Alaska Board of Fisheries. Under the current plans, the commercial purse seine, commercial drift gillnet, and commercial set gillnet are first allocated their limit, as follows: commercial purse seine, 4.3 percent of the all-gear catch limit; commercial drift gillnet, 2.9 percent of the all-gear catch limit; and commercial set gillnet, 1,000 Chinook salmon. After subtraction of the net gear limits, the remainder of the all-gear catch limit is allocated as follows: commercial troll, 80 percent; sport, 20 percent.

19. Over the previous five years (2018 to 2022), I estimate that the three net gear fisheries were allocated on average 7.78 percent of the annual all-gear Chinook catch limit, the sport fishery was allocated on average 18.44 percent of the annual all-gear Chinook catch limit, and the troll fishery was allocated on average 73.78 percent of the annual all-gear Chinook catch limit. The annual allocation to the troll fishery is therefore a significant portion of the overall treaty Chinook limit for the State of Alaska, with the sport fishery receiving the second highest portion of the overall treaty Chinook limit for the State of Alaska.

20. The spring fishery occurs in May and June and mostly targets Alaska hatchery-produced Chinook salmon. Non-Alaska hatchery fish are counted towards Alaska's annual catch limit of Chinook salmon under the Pacific Salmon Treaty. In 2021, the trollers harvested 12,952 treaty Chinook in the spring season. I estimate the commercial troll spring fishery harvested an average of 10,833 treaty Chinook salmon, and 13,865 total Chinook salmon, per year from 2017 through 2021, based on the Pacific Salmon Commission, Joint Chinook Technical Committee's Annual Reports of Catch and Escapement.

21. The winter season is currently October 11 to March 15. The State-established guideline harvest level (GHL) for the winter fishery is 45,000 non-Alaska hatchery-produced Chinook salmon (meaning, treaty Chinook subject to the Pacific Salmon Treaty). Any treaty Chinook salmon not harvested during the winter fishery are available for harvest in the spring and summer commercial troll fisheries. Based on ADF&G's Regional Information Report No. 1J21-14, the troll fleet has not harvested the entire GHL since 2016. In the 2020/2021 winter fishery, a total of 268 permits were fished, and the five-year average number of permits fished per year was 353 permits. The trollers harvested 14,013 treaty Chinook salmon in the

winter season in 2021. I estimate the commercial troll winter fishery harvested an average of 18,745 treaty Chinook salmon per year from 2017 through 2021 (of the total annual average of 19,811 Chinook salmon per year, an average of 8.8 percent were of Alaska hatchery origin), based on the Pacific Salmon Commission, Joint Chinook Technical Committee's Annual Reports of Catch and Escapement.

22. The summer season is July 1 through September 30. Most of the Chinook salmon harvested in the summer fishery are non-Alaska hatchery origin (meaning, treaty Chinook subject to the Pacific Salmon Treaty). The summer fishery targets the number of treaty Chinook salmon remaining on the annual troll allocation after the winter and spring troll treaty Chinook harvests are subtracted. The State of Alaska manages the summer troll fishery to achieve the remaining catch limit of treaty fish available for the troll fleet, with an additional harvest of Chinook salmon produced in Alaska hatcheries. The trollers harvested 128,626 treaty Chinook salmon in the summer season in 2021. I estimate the commercial troll summer fishery harvested an average of 100,200 treaty Chinook salmon per year from 2017 through 2021 (of the total annual average of 102,254 Chinook salmon per year, an average of 3 percent were of Alaska hatchery origin), based on the Pacific Salmon Commission, Joint Chinook Technical Committee's Annual Reports of Catch and Escapement.

23. For the winter and summer seasons, I estimate the commercial troll fleet harvested an average of 118,945 treaty Chinook salmon per year from 2017 through 2021. For all three seasons, I estimate the commercial troll fleet harvested an average of 129,802 treaty Chinook salmon per year from 2017 through 2021 (and 135,930 total Chinook salmon per year). During this same time period, all Southeast Alaska salmon fisheries (net, troll, and sport)

harvested an average of 170,627 treaty Chinook salmon (and 204,362 total Chinook salmon per year). Troll harvest therefore constituted on average 76 percent of the harvest of the Southeast Alaska all-gear catch limit for treaty Chinook salmon, and on average 67 percent of the harvest of all Chinook salmon in Southeast Alaska.

24. The estimated most recent five-year average catch of 129,802 treaty Chinook salmon and 135,930 total Chinook salmon in the troll fishery appears to be a marked decline considering the 2011-2020 average of 201,718 Chinook salmon per year, and the 1962-2020 average of 243,435 Chinook salmon per year, as reported by ADF&G (Fishery Management Report No. 22-05). While catch increased in 2020 and 2021, troll harvests were quite low in 2017 through 2019, with the lowest troll catch since 1962 reported in 2018.

25. The commercial troll fleet uses two fishing methods: hand trolling and power trolling.

26. Chinook salmon are the highest value per pound of the five salmon species harvested in Southeast Alaska, and Chinook salmon caught in the troll fishery have the highest value per pound for all gear types harvesting Chinook salmon. For example, in 2021, the average ex vessel price per pound for troll-caught Chinook salmon was $7.50 per pound, while the net fisheries per pound price ranged from $4.00 to $5.60 per pound. By comparison, the second highest value species are coho salmon: in 2021, price per pound of coho salmon caught in the troll fishery was $2.97 per pound, while the net fisheries per pound price ranged from $0.75 to $1.73 per pound.

27. The Southeast Alaska troll fishery operates in both federal and State of Alaska waters, although the majority of the catch and effort occurs in state waters. The commercial troll

fishery operates in both federal and state waters in only the summer season. The spring and winter commercial troll fisheries and all net fisheries (the commercial purse seine, drift gillnet, and set gillnet) occur in state waters.

28. The State of Alaska relies on information reported on state Fish Tickets to estimate the proportion of fish harvested in state waters and federal waters. Over the 2011-2019 period, we have estimated that, on average, 14 percent (28,915 fish) of the total troll fishery Chinook salmon harvest occurred in federal waters each year. Both the amount and the proportion of Chinook salmon harvested in federal waters has varied over this time period (2011-2019). The proportion of Chinook salmon harvested in federal waters each year can vary depending on oceanographic conditions, weather, or other factors, and commercial fishing vessels targeting Chinook salmon independently decide where to fish, depending on each vessel's operating decisions. Overall the proportion of Chinook salmon harvested in federal waters each year generally represents a small proportion (14 percent average) of total Chinook salmon harvested by the commercial troll fishery. *See* Merrill Decl. ¶¶ 22-23 (Doc. 43-2).

29. Most of the Chinook salmon harvested in Southeast Alaska are of non-Alaska origin, caught consistent with the terms of the Pacific Salmon Treaty. The non-Alaska component of the harvest is made up of both hatchery and wild stocks emanating from British Columbia and the Pacific Northwest. For example, for the winter troll fishery, ADF&G estimates the coastwide hatchery contribution of fish caught in the winter troll fishery, which includes hatchery fish from Alaska, British Columbia, Idaho, Oregon, and Washington. For the 2020-2021 fishery, the coastwide hatchery contribution was 42 percent of catch, with Alaska

hatchery fish comprising 11 percent. For the 2021-2022 fishery, the coastwide hatchery contribution was 35 percent of catch, with Alaska hatchery fish comprising 7 percent.

30. If the troll fishery did not operate, only a portion of the fish allocated to the State of Alaska under the Pacific Salmon Treaty would return to rivers and hatchery facilities in British Columbia and the Pacific Northwest due to natural mortality and harvest in other fisheries (for example, Canadian and southern U.S. fisheries). In addition, Chinook salmon return to spawn at various ages (from ages two to seven), and not all of the fish caught in the fishery would return in the same year to spawn. The fishery catches fish of all ages.

Economic Value of the Southeast Alaska Chinook Salmon Commercial Troll Fishery

31. If the incidental take statement (ITS) were vacated as to the Chinook salmon troll fishery, the Southeast Alaska troll fleet would no longer have incidental take coverage under the Endangered Species Act (ESA) for the take of listed species. Vacatur of the ITS could have significant disruptive consequences for the prosecution of the Chinook salmon troll fishery, as trollers would be forced to decide between fishing without ESA incidental take coverage and risking liability under the ESA or halting fishing activities to avoid liability under the ESA and therefore foregoing economic revenue. If the trollers did not operate in the winter and summer seasons, however, it is not certain that the reduction in harvest in Southeast Alaska would mean that all their unharvested treaty fish would be available to Southern Resident killer whales in their habitat. Recent average catches in the troll winter and summer seasons have totaled 118,945 treaty Chinook salmon from 2017 through 2021 (see ¶ 23). Not all of those treaty fish (meaning non-Alaska wild and hatchery fish that are returning to rivers and hatchery facilities in British Columbia and the Pacific Northwest)

would return to Southern Resident killer whale habitat due to natural mortality and harvest in other fisheries. To estimate economic impacts to the Chinook troll fleet if that fleet was unable to fish for Chinook salmon, I looked at the number of troll permits issued and the ex-vessel value of the Chinook troll fleet, information that is publicly available on ADF&G's website. I also looked at a report on the total economic impact from the entire troll fleet. I referenced these outside reports because they are the best information available to NMFS.

32. ADF&G reports the number of permits that are issued and fished each year. In 2021, the hand troll fleet had 902 issued permits, with 202 permit holders reporting salmon landings. ADF&G reports an annual average (2011-2020) of 971 issued permits and 295 fished permits for hand troll. In 2021, the power troll fleet had 957 issued permits, with 629 permit holders reporting salmon landings. ADF&G reports an annual average (2011-2020) of 961 issued permits and 715 fished permits for power troll. Based on these reports, on average from 2011 to 2020, there were over 1,000 annual active permittee holders (combined for power and hand troll permittees). While all troll permit holders might not target Chinook salmon, trollers harvest 76 percent of Southeast Alaska's total Pacific Salmon Treaty Chinook harvest, on average (and 67 percent of all Chinook salmon harvest in Southeast Alaska, on average) (see ¶ 23). Based on my professional understanding of the commercial fisheries in Southeast Alaska, there are several Southeast Alaska communities that are dependent on the Chinook troll fishery (to process fish, and/or provide services like fuel) and therefore could be disproportionately affected if the Chinook troll fleet did not operate.

33. ADF&G reports the ex-vessel value of the commercial salmon fisheries. Ex-vessel value measures the dollar value of commercial landings and is usually calculated by

considering the price per pound at the first purchase multiplied by the total pounds landed. Based on ADF&G's annual overviews of the Southeast Alaska salmon fisheries, ADF&G calculates ex-vessel value by multiplying the number of salmon caught by the average weight by the average price per pound.

34. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel value of the entire troll fishery (including all species of salmon) was $32,218,063, with the ex-vessel value of the troll fishery for Chinook salmon totaling $13,560,260. Based on ADF&G's annual overviews of the fishing seasons from 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate the five-year annual average of the ex-vessel value of the entire troll fishery is $28,128,983.20, with a five-year annual average of the ex-vessel value of the Chinook troll fishery of $11,462,827.60. I also estimate that the ex-vessel value of the Chinook troll fishery is on average 41.56 percent of the total ex-vessel value of the entire troll fishery.

35. Based on the ADF&G Fishery Management Report No. 22-05, in 2021, the ex-vessel value of all Southeast Alaska salmon fisheries (all gear types, all salmon species) was $142,949,849, and I estimate that the Chinook troll fishery constituted 9.49 percent of that total ex-vessel value. Based on the ADF&G's annual overviews of the fishery seasons from 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the ex-vessel value of the Chinook troll fishery is on average 10.91 percent of the total ex-vessel value of all Southeast Alaska salmon fisheries (2017-2021), but can be as high as 20.81 percent of total ex-vessel value of all Southeast Alaska salmon fisheries, as was the case in 2020.

36. Ex-vessel value is one measurement of the value of a fishery, but it does not account for additional value created by, for example, wages, processing, and tax revenue. A report prepared the McDowell Group on the Economic Impact of the Pacific Salmon Treaty on the Alaska Troll Fleet examined the following impacts of the troll fleet: direct (skipper and crew income), indirect (jobs and wages generated by the purchase of goods and services in support of troll fishing operations), and induced (jobs and wages generated when skippers and crew spend their fishing income in support of their households) impacts. The McDowell Group report was based on five-year averages from 2014 to 2018, and included the following information on the economic output of the fleet:

- Ex-vessel earnings averaged $32.9 million.
- An average of 729 permits were fished, and approximately 1,400 fishermen earn income directly from the fishery, including skippers (permit holders) and crew.
- Total direct, indirect, and induced employment is estimated at 735 jobs.
- Direct labor income (the amount skippers and crew take home) is estimated at $20.4 million.
- Total direct, indirect, and induced labor income is estimated at $28.5 million.
- Total annual output is estimated at $44.1 million. Output is a measure of total spending related to the commercial troll fleet. It includes the total amount trollers are paid for their catch plus all the secondary spending in Southeast Alaska that occurs as fishermen purchase goods and services. It does not include effects of processing troll-caught fish.
- Processors add value to the troll catch, generating total average annual first wholesale value of the troll harvest totaling about $70 million (based on statewide relationship between ex-vessel and first wholesale values for species harvested by trollers).
- Though it is difficult to attribute specific seafood processing jobs to the troll catch (as employees process fish from other commercial fisheries at the same time), approximately one-third of the added value is the cost of labor, or about $12 million annually.
- Including fishing, processing, and all related multiplier effects, the entire troll fleet (all species of salmon) has a total annual economic impact of approximately $85 million, as measured in terms of total output.

- Chinook accounted for about 44 percent of the power troll fleet's total ex-vessel value over the 2014 to 2018 period. All other factors held equal, Chinook account for approximately $37 million in annual economic output in Southeast Alaska.

- Total ex-vessel value of the hand troll harvest averaged $1.6 million, with an average of 285 permits fished. The hand troll fleet's total regional economic impact, as measured in terms of total output, is approximately $3.3 million annually.

37. Looking at the most recent five years of data (2017 to 2021) from ADF&G's Fishery Management Reports (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the average annual ex-vessel value of the entire troll fleet declined to $28,128,983.20, a $4,771,016.80 (or 14.50 percent) reduction from the annual ex-vessel value in the McDowell Group report of $32,900,000. I assume a 14.50 percent reduction in the ex-vessel value would correspond to similar reductions in economic impacts used to estimate the total annual economic output of the troll fleet, and therefore reduce the estimate by the McDowell Group of $85,000,000 by 14.50 percent. This results in an estimate of the total annual economic impacts of the entire troll fleet of $72,675,000. These reductions in value seem consistent with the decline in catch numbers of Chinook salmon (see ¶ 24) and the reductions in catch agreed to under the 2019 Pacific Salmon Treaty Agreement, which in most years imposes a 7.5 percent reduction in Chinook salmon harvest levels in Southeast Alaska.

38. Over the most recent time period (2017 to 2021), the ex-vessel value of Chinook caught by the troll fleet constituted a slightly smaller percentage of the ex-vessel value of all salmon species caught by the troll fleet (41.56 percent compared to 44 percent used by the McDowell Group). I used this updated percentage to estimate the annual economic output of the Chinook salmon commercial troll fishery (for all three seasons) at $30,203,730.

39. Finally, I account for the ex-vessel value of the spring fishery. Based on the annual overviews published by ADF&G of the fishery seasons from 2017 through 2021 (Fishery Management Reports No. 22-05, 21-12, 20-18, 19-06, and 18-01), I estimate that the average annual ex-vessel value (2017 to 2021) of the spring Chinook salmon commercial troll fleet is $1,054,893.66.

40. Based on the McDowell Group report and my review of the most recent ADF&G data on the ex-vessel value of the troll fleet (including, specifically the Chinook troll fleet), I therefore estimate the total annual economic output of the Chinook salmon commercial troll fleet, for the winter and summer seasons specifically, to be approximately $29 million ($29,148,836.34).

41. While troll fishing vessels are small, their economic impacts are far reaching, especially in Southeast Alaska, where nearly every community includes individuals who earn their living by trolling for salmon. The salmon troll fisheries support over 23 communities around Southeast Alaska. Further, a number of the communities where troll fishermen work and live are Alaska Native communities. Notably, the Southeast Alaska commercial salmon troll fisheries have an 85 percent Alaska residency rate, the highest level of local ownership of any major Alaska fishery, with about one in every 50 people in Southeast Alaska working on a trolling boat. The small, rural, isolated Southeast Alaska communities that are dependent on the Chinook salmon troll fishery (to homeport, to process fish, and/or to provide services like fuel), including Alaska Native communities, would be disproportionately affected if the Chinook troll fleet did not operate during the summer and winter seasons. A loss of troll fishing income would be devastating to these small coastal communities.

42. In sum, if the ITS for the Chinook salmon commercial troll fishery in the winter and summer seasons were to remain vacated, there will likely be significant consequences to the Chinook troll fleet and fishing communities in Southeast Alaska if the troll fleet was unable to fish for Chinook salmon in the absence of ESA take coverage. In addition to the disruptive and hard to quantify impacts described above, I find:

- Based on my review of reports from ADF&G, the ex-vessel value of the Chinook salmon commercial troll fishery totaled $13,560,260 in 2021, with an estimated five-year annual average of $11,462,827.60. Excluding the estimated five-year annual average ex-vessel value of the spring season, I estimate the annual average ex-vessel of the Chinook salmon commercial troll fishery in the winter and summer seasons to be $10,407,933.94.

- Based on my review of reports from ADF&G and a report from the McDowell Group, and accounting for recent declines in ex-vessel value and the estimated ex-vessel value of the spring fishery, I estimate the total annual economic output of the Chinook salmon commercial troll fishery in the winter and summer seasons to be approximately $29 million.

Pursuant to 28 U.S.C. § 1746, I swear under penalty of perjury that the foregoing is true and correct.

HARRINGTON.GRETCHEN.ANNE.1365893833

Digitally signed by HARRINGTON.GRETCHEN.ANNE.1365893833
Date: 2023.05.22 13:12:11 -08'00'

GRETCHEN HARRINGTON
Assistant Regional Administrator,
Sustainable Fisheries Division, Alaska Region
National Marine Fisheries Service

May 22, 2023
DATE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. JENNIFER QUAN, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor. and STATE OF ALASKA Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP FOURTH DECLARATION OF Allyson Purcell, National Marine Fisheries Service, West Coast Region

I, Allyson Purcell, declare and state as follows:

Introduction

1. I am currently the Division Manager for the National Marine Fisheries Service's (NMFS's) West Coast Region's Sustainable Fisheries Division. I previously prepared three declarations that were submitted in this matter; my first declaration was submitted on May 11, 2020 (First Purcell declaration) and my second declaration was submitted on May 25, 2021 (Second Purcell declaration); my third declaration was submitted on October 3, 2022 (Third Purcell declaration).

2. Prior to taking my current position within NMFS in 2022, and beginning in 2017, I was the Branch Chief for the Anadromous Production and Inland Fisheries Branch of the West Coast Region's Sustainable Fisheries Division. In that position I oversaw a team of biologists, who work with hatchery operators across Oregon, Washington, and Idaho to ensure their hatchery programs do not jeopardize the survival and recovery of species listed under the Endangered Species Act (ESA). In addition, the Anadromous Production and Inland Fisheries Branch administers the Mitchell Act grant program, which provides approximately $16 million in annual funding for hatchery programs in the Columbia River Basin.

3. I have worked for NMFS since 2002. Since 2002, my primary duties have included evaluating salmon and steelhead hatchery programs under the ESA and National Environmental Policy Act (NEPA).

4. I hold a Master of Science in Fisheries and Allied Aquaculture from Auburn University and a Bachelor of Science in Biology from Vanderbilt University.

5. In this fourth declaration, I provide an update on the Pacific Salmon Treaty's prey increase program for Southern Resident killer whales (SRKWs), and respond to specific allegations by the Wild Fish Conservancy in their motion for an injunction pending appeal.

Status of the Prey Increase Program

6. In previous declarations, I described how the prey increase program for SRKWs was implemented in fiscal year 2020, 2021 and 2022 (Second and Third Purcell Declarations). Attachment 1 to my third declaration included tables showing amounts spent and fish released from programs receiving funding. Attachment 1 to this declaration updates those tables; it includes updated juvenile Chinook release numbers with fiscal year 2020 through 2022 funding and includes information on what was funded in fiscal year 2022.[1] In summary, over $5.4 million of funds were distributed (after overhead removed) by NMFS in fiscal year 2022 for the prey increase program. More than 17 million juvenile Chinook were released in 2022 as a result of federal and Washington State legislature funding for additional hatchery Chinook production to increase prey for SRKW.

7. For fiscal year 2023, NMFS has not yet distributed funds, but we anticipate distributing more than $5.6 million in 2023.

8. Chinook salmon mature and become available as prey to SRKW at age three to five. Fourth Declaration of Lynne Barre, ¶ 14-15. Over 11 million additional juvenile Chinook salmon were released in 2020 to increase prey for SRKW using a combination of federal and state funding. Many of these fish are now adults and contributing to the SRKW prey base. More than 13 million additional juvenile Chinook salmon were released in 2021 and many of these fish will soon be adults and contributing to the SRKW prey base.

NMFS' Evaluation of the Prey Increase Program

[1] Some numbers in Attachment 1 to this declaration differ from the numbers in the tables in Attachment 1 to my third declaration; these changes are due to updated reporting from hatchery managers, either reporting actual releases in place of estimated releases, or correcting prior errors.

9. As described in my previous declaration (Second Purcell Declaration) and Attachment 1 to my third declaration (Third Purcell Declaration), NMFS uses a series of criteria when determining which hatchery production to fund as part of the prey increase program for SRKWs. In addition to considering where hatchery production will have the most value to SRKWs, NMFS considers the potential adverse effects of increased production on ESA-listed species. One of the criteria we use in deciding which programs to fund is that increased production cannot jeopardize the survival and recovery of any ESA-listed species. Another criterion is that all increased production must be reviewed under the ESA and NEPA, as applicable, before NMFS funding can be used. NMFS plans to continue to use these criteria to make funding determinations in 2023 and 2024.

10. Attachment 2 summarizes the ESA and NEPA analyses that NMFS has completed on the effects of the increased production proposals that have been awarded federal funds to date. In some cases, the effects of the increased production proposals were fully evaluated in previously completed ESA and NEPA documents. However, in other cases, the increased production proposals required new ESA and NEPA analyses. Each year, NMFS reviews the proposals and determines which ones need additional ESA and/or NEPA review. As Attachment 2 demonstrates, before these funds can be utilized, NMFS ensures the funded production is covered by site-specific ESA and NEPA reviews.

11. Our site-specific ESA and NEPA analyses are the best way to evaluate risks associated with the prey increase programs because it is difficult to understand biological risks without knowing the project-level details. That is, to fully evaluate effects, we need to know where the fish will be released, the origin of the broodstock (e.g., local or non-local), how many natural-

origin fish will be included in the broodstock, how will the fish be acclimated and released, how the returning adults will be managed (e.g., will they be removed at a weir), and what the role of the affected population(s) is in recovery of the species. Our site-specific ESA analyses ensure that none of the increased hatchery production jeopardizes survival and recovery of listed salmon or adversely modify designated critical habitat.

12. Wild Fish Conservancy argues that NMFS is relying on "outdated" site-specific biological opinions and NEPA analyses for programs awarded funds under the prey increase program. This is not the case. In some instances, NMFS is relying on biological opinions and NEPA documents that pre-date the funding program, but the fact that these documents pre-date the funding does not render them "outdated." This is because in many cases the hatchery operators ask NMFS to evaluate the effects of higher levels of production than what is typically produced in a hatchery program to give them the flexibility to increase production if additional funding becomes available. NMFS tracks production levels and other parameters on which hatchery managers are required to report under the incidental take statements associated with the relevant biological opinions. NMFS also tracks new scientific information on the effects of hatchery production, as new research is conducted and papers are published. If we become aware of new factual or scientific information that might trigger reinitiation of any of the biological opinions on which we rely, or which might require new or supplemental NEPA analysis, we reinitiate consultation and conduct new analyses. We are not aware of any such new information with regard to the hatchery programs that have received funds through the prey increase program, other than those programs for which we did new consultations and NEPA analyses specifically to address the prey increase funding.

13. NOAA has substantial experience with hatchery programs and has developed and published a series of guidance documents for designing and evaluating hatchery programs following best available science (Hard et al. 1992; Jones 2006; McElhany et al. 2000; NMFS 2004; NMFS 2005; NMFS 2008).

14. Over the past decade, we have completed biological opinions and NEPA documents (Environmental Assessments or Environmental Impact Statements) on close to 200 hatchery programs using best available science. Our biological opinions include a detailed assessment of genetic risks, competition and predation, facility effects, and disease risks to ESA-listed species. Our NEPA documents evaluate the effects of a full range of alternatives on the human environment, including an assessment of cumulative effects.

15. The major genetic risks that NOAA evaluates in our review of hatchery programs include loss of genetic diversity (both within and among populations) and the loss of fitness due to selection for traits favorable in the hatchery but deleterious in the wild. The Hatchery Scientific Review Group (HSRG) has developed recommendations for reducing genetic risks by managing the proportion of hatchery-origin fish spawning naturally (pHOS) and the proportion of natural-origin fish incorporated into the broodstock (pNOB). A population's Proportionate Natural Influence (PNI) is determined based on pHOS and pNOB values. The HSRG's recommendations for PNI and pHOS vary depending on whether a hatchery program is segregated or integrated.[2] Their recommendations also vary based on the biological significance of the population for ESA recovery (i.e., primary, contributing, or stabilizing) and the affected

[2] An integrated hatchery program includes natural-origin adults in the broodstock. Generally, an integrated program intends for the natural environment to drive the adaptation of a composite population of fish that spawns both in a hatchery and in the natural environment. A segregated hatchery program intends to isolate hatchery-origin fish from natural-origin fish, creating an isolated hatchery-origin population and an isolated natural-origin population.

population's recovery phase (i.e., preservation, recolonization, local adaptation and full restoration) (HSRG 2018).

16. Although NOAA has not formally adopted the HSRG's gene flow recommendations, we believe they are important and we use them along with other best available science in our review of hatchery programs. For a particular program, we may, based on specifics of the program, consider a pHOS or PNI level to be a lower risk than the HSRG would but, generally, if a program meets HSRG standards, NOAA will typically consider the risk levels to be acceptable.[3] Optimal pHOS will depend upon multiple factors, such as the importance of the population to ESA recovery and the fitness differences between hatchery-origin and natural-origin fish. NMFS considers these factors in its site-specific ESA evaluations. In addition, we consider the cumulative impacts of all other hatchery programs that may be contributing to pHOS for a particular population.

17. NOAA has worked tirelessly with hatchery operators to ensure that none of the increased production programs jeopardize the survival or recovery of ESA-listed species. Furthermore, we have been working with the hatchery operators to implement tools that allow us to increase prey for SRKW while simultaneously reducing genetic risks to ESA-listed salmon. For example, during development of our biological opinion on ten hatchery programs in the Green/Duwamish River Basins, we worked with the hatchery operators to implement some key changes in the fall Chinook hatchery program that we expect will

[3] There are a few exceptions. Based on recent guidance from the HSRG (HSRG 2018), the HSRG does not recommend PNI and pHOS standards during the "preservation" or "rebuilding" recovery phases. NOAA believes that unless hatchery programs are specifically designed to aid in the recovery of a population, pHOS and/or PNI should be managed during the preservation and rebuilding phases. Another exception where NOAA appears to be more conservative than the HSRG is with steelhead hatchery programs that use highly domesticated broodstocks. NOAA has imposed more stringent guidelines than recommended by the HSRG (NMFS 2016).

substantially increase PNI while producing an additional 2 million smolts to augment prey for endangered SRKW.

Impact of Interrupting Funding for the Prey Increase Program

18. It is hard to predict what would happen if funds for the prey increase program are interrupted. Without continued funding, hatchery operators would likely not spawn additional adult fish this fall to provide increased prey to SRKW. In addition, there are currently juvenile fish in the hatchery facilities that have been produced using FY 2022 funds. Without continued funding, hatchery operators may not be able to rear these fish until the time when they would normally be released. If the funds were interrupted, one potential result is that the hatchery operators would use other sources of funds to rear the juvenile fish in the hatcheries until they are ready for release. Another scenario would be that the hatchery operators release the fish early, in which case they would have lower chance of survival, reducing their potential contribution to SRKW diet. Another important biological concern is that if the fish are released early, they would probably not be externally marked (e.g., adipose fin clip) or tagged. Marking and/or tagging of hatchery-origin salmon allow us to monitor and manage genetic risks. As an example, in some tributaries, weirs are used to block the passage of fish so that hatchery-origin fish can be removed to control pHOS. If the hatchery fish are not marked, they will likely be indistinguishable from the wild fish and would be passed above the weir to spawn naturally, which would increase pHOS and could potentially increase genetic risk in those tributaries.

Conclusion

19. It is my opinion that NOAA is implementing the prey increase program in a thoughtful and careful manner. All increased production proposals are being reviewed in site-specific ESA and NEPA evaluations before federal prey increase funding is used. As a result, NOAA is able to ensure that the funding for the prey increase program is not resulting in irreparable harm to ESA-listed salmon, while providing benefits to endangered SRKW. Interrupting funding for the prey increase program is likely to decrease available prey to SRKW. Interrupting funding for the prey increase program may also increase risks to ESA-listed Chinook salmon species if it results in hatchery-origin fish being prematurely released from the hatcheries without being marked or tagged.

20. I declare under penalty of perjury that the foregoing is true and correct. Executed on May 22, 2023, in Portland, OR.

PURCELL.ALLYSON.OUZTS.1365850964 Digitally signed by PURCELL.ALLYSON.OUZTS.1365850964 Date: 2023.05.22 16:15:43 -07'00'

Allyson Purcell

Attachment 1

Table 1. Washington State Funding for SRKW Prey in the 2019-2021 biennium

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2019 Release	2020 Release	2021 Release
Kendall	Puget Sound	Sp. CK	WDFW	500,000	Kendall	Kendall	704,170	449,199	381,725
Whatcom Cr.	Puget Sound	F. CK	WDFW	500,000	Samish	Whatcom Cr.	200,000	670,000	491,747
Hupp Springs	Puget Sound	Sp. CK	WDFW	500,000	Minter	Hupp	259,873	388,909	543,034
Samish	Puget Sound	F. CK	WDFW	1,000,000	Samish	Samish	1,089,148	1,217,867	0
Wallace River	Puget Sound	Sum. CK	WDFW	400,000	Wallace River	Wallace River	-	260,745	0
Wallace River	Puget Sound	Sum. CK	WDFW	100,000	Wallace River	Wallace River	-	34,938	44,158
Soos/Palmer	Puget Sound	F. CK	WDFW	2,000,000	Green River	Palmer	282,638	1,210,986/[a]	-
Marblemount	Puget Sound	Sp. CK	WDFW	400,000	Marblemount	Marblemount	-	203,095	574,408
Sol Duc	WA Coast	Sum. CK	WDFW	500,000	Sol Duc	Sol Duc	500,143	582,479	480,291
Sol Duc	WA Coast	Sum. CK	WDFW	0	Sol Duc	Sol Duc	-	-	67,787
Humptulips *	WA Coast	F. CK	WDFW	500,000	Humptulips	Humptulips	-	-	-
Minter	Puget Sound	F. CK	WDFW	400,000	Minter	Minter	763,333	321,497	332,672
Naselle	WA Coast	F. CK	WDFW	2,500,000	Naselle	Naselle	-	-	1,472,258
Forks Creek	WA Coast	F. CK	WDFW	50,000	Forks Creek	Forks Creek	567,560	2,278,497	257,338
Wells Hatchery	Columbia River	Sum. CK	DPUD	500,000	Wells	Wells Hatchery	0	541,299	482,734
Quinault Lake	WA Coast	F. CK	Quinault Indian Nation	500,000	Quinault	Quinault Lake	-	-	500,000
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	150,000	Sol Duc	Bear Springs	-	-	147,913
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	75,000	Sol Duc	Bear Springs	-	70,000	70,758
Wilkeson Creek	Puget Sound	F. CK	Puyallup Tribe of Indians	1,075,200	Voights	Wilkeson Creek	-	728,587	246,849
White River	Puget Sound	Sp. CK	Muckleshoot Indian Tribes	200,000	White River	White River	-	-	167,557
Squaxin/South Sound Net Pens	Puget Sound	F. CK	Squaxin Island Tribe	500,000	Deschutes / Green River	Squaxin/South Sound Net Pens	-	-	-
Lummi Bay Hatchery	Puget Sound	Sp. CK	Lummi Nation	500,000	Kendall	Lummi Bay	-	50,000	222,168
Skookum Creek	Puget Sound	Early CK	Lummi Nation	1,000,000	Skookum Creek	Skookum Cr.	-	870,000	794,626

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Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2019 Release	2020 Release	2021 Release
Klickitat Hatchery	Columbia River	F. CK	Yakama Nation	1,000,000	Klickitat/Little White	Klickitat River	-	1,000,000	-
Lewis River	Columbia River	Sp. CK	WDFW	-	Lewis River	Lewis River	944,425		389,959
TOTAL							**5,311,290**	**10,878,098**	**7,278,023**

[a] Partially funded by PST with FY19 funds
SP CK = spring Chinook; F. CK = fall Chinook; WDFW = Washington Department of Fish and Wildlife

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Table 2. Washington State Funding for SRKW Prey in the 2021-2023 biennium

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2022 Release	Estimated 2023 Release
Kendall	Puget Sound	Sp. CK	WDFW	500,000	Kendall	Kendall	635,697	500,000
Whatcom Cr.	Puget Sound	F. CK	WDFW	500,000	Samish	Whatcom Cr.	543,181	500,000
Hupp Springs	Puget Sound	Sp. CK	WDFW	500,000	Minter	Hupp	515,642	476,000
Samish	Puget Sound	F. CK	WDFW	1,000,000	Samish	Samish	906,459	1,200,000
Wallace River	Puget Sound	Sum. CK	WDFW	400,000	Wallace River	Wallace River	1,049,421	1,200,000
Wallace River	Puget Sound	Sum. CK	WDFW	100,000	Wallace River	Wallace River	0	79,315
Marblemount	Puget Sound	Sp. CK	WDFW	500,000	Marblemount	Marblemount	128,022	500,000
Marblemount	Puget Sound	Sp. CK	WDFW	500,000	Marblemount	Marblemount	0	100,000
Sol Duc	WA Coast	Sum. CK	WDFW	500,000	Sol Duc	Sol Duc	558,969	436,000
Sol Duc	WA Coast	Sum. CK	WDFW	0	Sol Duc	Sol Duc	28,588	64,982
Minter	Puget Sound	F. CK	WDFW	400,000	Minter	Minter	291,083	400,000
Naselle	WA Coast	F. CK	WDFW	2,500,000	Naselle	Naselle	2,577,982	1,800,000
Forks Creek	WA Coast	F. CK	WDFW	50,000	Forks Creek	Forks Creek	108,072	90,000
Wells Hatchery	Columbia River	Sum. CK	DPUD	500,000	Wells	Wells Hatchery	520,239	514,000
Quinault Lake	WA Coast	F. CK	Quinault Indian Nation	500,000	Quinault	Quinault Lake	446,651	500,000
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	75,000	Sol Duc	Bear Springs	115,179	120,000
Sol Duc/Bear Springs	WA Coast	Sum. CK	Quileute Tribe	75,000	Sol Duc	Bear Springs	72,651	23,000
Wilkeson Creek	Puget Sound	F. CK	Puyallup Tribe of Indians	1,075,200	Voights	Wilkeson Creek	611,685	1,400,000
White River	Puget Sound	Sp. CK	Muckleshoot Indian Tribes	200,000	White River	White River	238,335	273,385
Squaxin/South Sound Net Pens	Puget Sound	F. CK	Squaxin Island Tribe	500,000	Deschutes / Green River	Squaxin/South Sound Net Pens	0	0
Lummi Bay Hatchery	Puget Sound	Sp. CK	Lummi Nation	500,000	Kendall	Lummi Bay	499,193	504,080
Skookum Creek	Puget Sound	Early CK	Lummi Nation	1,000,000	Skookum Creek	Skookum Cr.	0	800,000
Klickitat Hatchery	Columbia River	F. CK	Yakama Nation	1,000,000	Klickitat/Little White	Klickitat River	574,715	641,914
Lewis River	Columbia River	Sp. CK	WDFW	-	Lewis River	Lewis River	268,950	290,000
TOTAL							**11,090,714**	**12,412,676**

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Table 3. Programs that received FY20 PST funding for the Hatchery Production Initiative for SRKW

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2020 Release	2021 Release/[a]	2022 Release/[a]	Operating Cost	Infrastructure Cost	Total Cost
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum CK	Tulalip Tribe	1,000,000	Wallace	Tulalip Bay	-	-	958,415	$555,914	$783,414	$1,339328
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum CK	RCO overhead	-	N/A	-	-	-	-	-	-	$55,180
Soos Creek Hatchery	Puget Sound	F. CK	WDFW	2,000,000	Green River	Green River	-	2,003,244/[c]	-	$245,559	-	$245,559
Soos Creek Hatchery	Puget Sound	F. CK	RCO overhead	-	N/A	-	-	-	-	-	-	$10,117
Partial funding for NWIFC marking trailer	Puget Sound	All	NWIFC	-	N/A	-	-	-	-	-	$500,000	$500,000
Partial funding for NWIFC marking trailer	Puget Sound	All	RCO overhead	-	N/A	-	-	-	-	-	-	$20,600
Marion Drain Hatchery	Columbia River	Sum. CK	Yakama Nation	500,000	Entiat/ Wells/ Chelan	Yakima River	-	279,594	-	$43,000	-	$43,000
Select-Area Fishery Enhancement (SAFE)	Columbia River	Sp. CK	ODFW	1,320,000/[a]	Willamette River	Youngs Bay or Tongue Point	-	1,345,310	-	$600,000	-	$600,000
SAFE	Columbia River	Sp. CK	ODFW	1,500,000	Willamette River	Youngs Bay or Tongue Point	-	-	-	$251,477 /[b]	-	$251,477
Umatilla Hatchery	Columbia River	F. CK (URB)	ODFW	120,000	Little White	Umatilla River	-	-	-	$30,000	_	$30,000
Parkdale Hatchery	Columbia River	Sp. CK	CTWSR	Not enough BS; Funds need to be reallocated	Hood River	N/A	-	-	-	$31,230	-	$31,230
Round Butte Hatchery	Columbia River	Sp. CK	ODFW	Not enough BS. Funds reallocated to Bonneville tules	Deschutes River	N/A	-	167,000	-	$0	-	$0
Bonneville Hatchery	Columbia River	F. CK (tules)	ODFW	200,000	Bonneville Pool	Columbia River	-	344,122	-	$25,000	-	$25,000

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Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2020 Release	2021 Release/[a]	2022 Release/[a]	Operating Cost	Infrastructure Cost	Total Cost
Wells Hatchery	Columbia River	Sum. CK	DPUD	500,000	Wells	Columbia River	-	482,734	-	$170,000	-	$170,000
Little White/Willard National Fish Hatchery (NFH)	Columbia River	F. CK (URB)	USFWS	630,000	Little White	Little White River	479,694	-	-	$200,000	-	$200,000
Little White/Willard NFH	Columbia River	F. CK (URB)	USFWS	650,000	Little White	Little White River	-	649,356	-	$165,000	$140,000	$305,000
Little White/Willard NFH	Columbia River	Sp. CK	USFWS	400,000	Spring Chinook	Columbia River	-	-	380,578	$160,000	-	$160,000
Spring Creek NFH	Columbia River	F. CK (tules)	USFWS	2,000,000	Columbia River Gorge tules	Columbia River	-	688,509	-	$360,000	$515,000	$875,000
TOTAL							**479,694**	**5,959,869**	**1,338,993**	**$2,585,703**	**$1,938,414**	**$4,861,491**

[a] Tag codes will be available after the fish are tagged. [b] Additional funding will be needed in FY21 to complete rearing and release of these fish. [c] Partially funded by WDFW
RCO = WA's Recreation and Conservation Office; CTWSR = Confederated Tribes of the Warm Springs Reservation of Oregon; DPUD = Douglas Public Utility District; USFWS = United States Fish and Wildlife Service; ODFW = Oregon Fish and Wildlife Service; NWIFC = Northwest Indian Fisheries Commission; BS = broodstock; URB = Upriver Bright fall Chinook salmon; NFH = National Fish Hatchery; SP CK = spring Chinook; F. CK = fall Chinook

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Table 4. Programs that received FY21 PST funding for the Hatchery Production Initiative for SRKW

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2021 Release	2022 Release	2023 Release	Operating Cost	Infrastructure Cost	Total Cost
Issaquah Hatchery	Puget Sound	F. CK	WDFW	1,000,000	Issaquah/ Soos Creek	Issaquah Creek	-	707,026	-	$135,000	-	$135,000
Issaquah Hatchery	Puget Sound	F. CK	RCO overhead	-	NA	-	-	-	-	-	-	$5,562
Soos Creek Hatchery	Puget Sound	F. CK	WDFW	2,000,000	Green River	Green River	-	2,077,000	-	$428,000	-	$428,000
Soos Creek Hatchery	Puget Sound	F. CK	RCO overhead	-	N/A	-	-	-	-	-	-	$17,634
Marking trailer	Puget Sound	All	WDFW	-	N/A	-	-	-	-	-	$1,500,000	$1,500,000
Marking trailer	Puget Sound	All	RCO overhead	-	N/A	-	-	-	-	-	-	$61,800
Clark Creek Hatchery upgrades	Puget Sound	N/A	Puyallup Tribe	These upgrades will create additional capacity to raise fish	N/A	-	-	-	-	-	$1,200,000	$1,200,000
Clark Creek Hatchery upgrades	Puget Sound	N/A	RCO overhead	-	N/A	-	-	-	-	-	-	$49,440
University of Washington Hatchery	Puget Sound	F. CK	Muckleshoot Indian Nation	180,000	N/A	-	-	-	-	-	$325,000	$325,000
University of Washington Hatchery	Puget Sound	F. CK	RCO overhead	-	N/A	-	-	-	-	-	-	$13,390
Marblemount Hatchery	Puget Sound	N/A	WDFW	These upgrades will create additional capacity to raise fish	N/A	-	-	-	-	-	$346,587.02	$346,587.02
Marblemount Hatchery	Puget Sound	N/A	RCO overhead	-	N/A	-	-	-	-	-	-	$14,892.82
Enhanced monitoring plan for ecological effects	Puget Sound	All	WDFW	-	N/A	-	-	-	-	$5,000	-	$5,000
Enhanced monitoring plan for	Puget Sound	All	PSMFC overhead	-	N/A	-	-	-	-	$457		$457

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Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2021 Release	2022 Release	2023 Release	Operating Cost	Infrastructure Cost	Total Cost
ecological effects												
East Bank and Marion Drain Hatcheries	Columbia River	Sum. CK	Yakama Nation	500,000	Entiat/ Wells/ Chelan	Yakima River	-	19,755	-	$137,707	-	$137,707
Klickitat Hatchery	Columbia River	F. CK	Yakama Nation	These upgrades will create additional capacity to raise an additional 1,000,000 F. CK (URB)	N/A	-	-	-	-	-	$55,000	$55,000
Select-Area Fishery Enhancement (SAFE)	Columbia River	Sp. CK	ODFW	1,500,000	Willamette River	Youngs Bay or Tongue Point	-	1,507,467	-	$851,476	-	$851,476
Umatilla Hatchery	Columbia River	F. CK (URB)	ODFW	120,000	Little White	Umatilla River	-	127,931	-	$30,000	_	$30,000
Bonneville Hatchery	Columbia River	F. CK (tules)	ODFW	250,000	Bonneville Pool	Columbia River	-	250,000	-	$56,430[b]	-	$56,430
Umatilla and Bonneville Hatchery	Columbia River	F. CK (URB)	ODFW	100,000	Little White	Umatilla River	167,010	-	-	$35,778	-	$35,778
Wells Hatchery	Columbia River	Sum. CK	DPUD/WDFW	500,000	Wells	Columbia River	-	550,000	-	$175,000	-	$175,000
Dworshak NFH	Columbia River	Sp. CK	Nez Perce Tribe	500,000	Clearwater River	Clearwater River	-	544,979	-	$81,000	$75,000	$156,000
Little White NFH	Columbia River	Sp. CK	USFWS	650,000	Little White	Little White River	-	-	497,692	$200,915	$98,050	$289,965
Spring Creek NFH	Columbia River	F. CK (tules)	USFWS	2,000,000	Columbia River Gorge tules	Columbia River	-	66,294	-	$317,989	$88,200	$406,189
Carson NFH	Columbia River	Sp. CK	USFWS	100,000	Carson	Wind River	-	-	74,123	$65,459	$96,600	$162,059
TOTAL							**167,010**	**5,300,452**	**571,815**	**$2,519,754**	**$3,784,437.02**	**$6,467,367**

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Table 5. Programs that received FY22 PST funding for the Hatchery Production Initiative for SRKW

Facility	Region	Species	Entity	Increased Proposal	Brood Source	Release Location	2022 Release	Anticipated 2023 Release	Anticipated 2024 Release	Operating Costs	Capital Costs	Total Cost
Issaquah Hatchery	Puget Sound	F. CK	WDFW	1,000,000	Issaquah Hatchery	Issaquah Creek	-	1,000,000	-	$135,000	-	$135,000
Automatic marking trailer	Puget Sound	N/A	WDFW	N/A	NA	NA	-	-	-	-	$1,500,000	$1,500,000
Soos Creek-Palmer Pond Hatchery Chinook	Puget Sound	F. CK	WDFW	2,000,000	Green River	Green River	-	2,000,000	-	$428,000	-	$428,000
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum. CK	Tulalip Tribe	2,000,000	Wallace	Tulalip Bay	-	1,600,000	-	$555,914	-	$555,914
Tulalip Bernie Gobin Hatchery	Puget Sound	Sum. CK	RCO overhead	-	NA	NA	-	-	-	-	-	$22,904
University of Washington Hatchery	Puget Sound	F. CK	Muckleshoot Indian Tribe	180,000	NA	NA	-	-	-	$75,071	$315,261	$390,332
University of Washington Hatchery	Puget Sound	F. CK	RCO overhead	-	NA	NA	-	-	-	-	-	$16,082
Spring Creek NFH	Columbia River	F. CK (tule)	USFWS	2,000,000	Columbia River Gorge tules	Columbia River	-	0	-	$346,235	$156,993	$503,228
Little White Salmon NFH	Columbia River	Sp. CK	USFWS	650,000	Little White	Little White Salmon River	-	-	650,000	$214,477	-	$214,477
Carson NFH	Columbia River	Sp. CK	USFWS	100,000	Carson	Wind River	-	-	100,000	$89,281	$63,000	$152,281
Wells Hatchery	Columbia River	Sum. CK	WDFW/DPUD	500,000	Wells	Columbia River	-	514,000	-	$175,000	-	$175,000
East Bank and Marion Drain Hatcheries	Columbia River	Sum. CK	Yakama Nation	500,000	Entiat/Chelan/Wells	Yakima River	-	109,876	-	$148,212	-	$148,212
Dworshak NFH	Columbia River	Sp. CK	Nez Perce Tribe	500,000	Clearwater Spring Chinook/Dworshak NFH	Dworshak NFH	-	493,858	-	$140,775	-	$140,775
SAFE	Columbia River	Sp. CK	ODFW	1,500,000	Willamette Tribs	SAFE	-	1,430,813	-	$876,956	-	$876,956
Bonneville Hatchery	Columbia River	F. CK (tule)	ODFW	250,000	Bonneville	Tanner Creek	-	250,000	-	$150,854	-	$150,854

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Umatilla and Bonneville Hatcheries	Columbia River	F. CK (URB)	ODFW	100,000	URB (Little White)	Umatilla	-	0	-	$30,318	-	$30,318
TOTAL				**11,280,000**				**7,398,547**	**750,000**	**$3,366,093**	**$2,035,254**	**$5,440,333**

Table 6. Summary of 2020, 2021, 2022, and actual and anticipated 2023 hatchery-origin Chinook salmon releases

Funding Source	**Release Years**			
	2020	**2021**	**2022**	**2023 (Actual and Anticipated)**
PST FY20	479,694	5,959,869	1,338,993	-
PST FY21	-	167,000	5,300,452	571,815
PST FY22			-	7,398,547
Washington State Legislature ('19-'21)	10,850,280	7,278,023	-	-
Washington State Legislature ('21-'23)	-	-	11,090,714	12,412,676
TOTAL	11,357,792	13,404,892	17,730,159	20,383,038

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Attachment 2

Attachment 2, Fourth Purcell Declaration.

Pacific Salmon Treaty Prey Increase Program Funded SRKW hatchery production for FY2020 - FY2022 and NMFS' corresponding ESA and NEPA evaluations.

Program	Species	Operator	ESA Coverage	NEPA Coverage
Columbia River Basin				
Little White Salmon NFH	Spring Chinook	USFWS	Biological Opinion: USFWS Artificial Propagation Programs in the Lower Columbia and Middle Columbia River (Attachment 2a)	Environmental Impact Statement: Mitchell Act. Available at: https://www.fisheries.noaa.gov/resource/document/final-environmental-impact-statement-inform-columbia-river-basin-hatchery
Carson NFH				
Spring Creek NFH	Fall Chinook (tule)			
Little White Salmon NFH	Fall Chinook (brights)			
Dworshak NFH	Spring Chinook	Nez Perce/USFWS	Biological Opinion: Five Clearwater River Basin Spring/Summer Chinook Salmon and Coho Salmon Hatchery Programs (Attachment 2b)	
Wells	Summer Chinook	Douglas PUD	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2c)	
East Bank		Yakima Nation	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs. (Attachment 2c)	
Marion Drain				
Umatilla	Fall Chinook (URB)	Confederated Tribes of the Umatilla Indian Reservation/ODFW	Biological Opinion: Umatilla River Spring Chinook Salmon, Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2d)	
Bonneville	Fall Chinook (tule)	ODFW	Biological Opinion: Mitchell Act Final Environmental Impact Statement preferred alternative and administration of Mitchell Act hatchery funding (Attachment 2e)	
SAFE	Spring Chinook	ODFW	Biological Opinion: Select Area Fisheries Enhancement (SAFE) Spring Chinook Salmon and Coho Salmon Programs (Attachment 2f)	

Dworshak NFH	Spring Chinook	Nez Perce/USFWS	Biological Opinion: Five Clearwater River Basin Spring/Summer Chinook Salmon and Coho Salmon Hatchery Programs (Attachment 2b)	Environmental Assessment: Snake River Basin Hatcheries
Wells	Summer Chinook	Douglas PUD	Biological Opinion: Yakima River Spring Chinook Salmon, Summer/Fall Chinook Salmon, and Coho Salmon Hatchery Programs (Attachment 2c)	Supplemental Environmental Assessment: Wells Summer Chinook Salmon Program
Puget Sound Region				
Issaquah	Fall Chinook	WDFW	Biological Opinion: Five Hatchery Programs for Salmon in the Lake Washington Drainage (Attachment 2g) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Environmental Assessment: Lake Washington Basin Hatcheries Available at: https://media.fisheries.noaa.gov/2022-07/FINAL_Lake_Washington_EA_FONSI_BAT-2.15.2022_07262022.pdf
Soos Creek-Palmer Pond	Fall Chinook	WDFW	Biological Opinion: Ten Hatchery Programs for Salmon and Steelhead in the Duwamish/Green River Basin (Attachment 2h) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Environmental Impact Statement: Duwamish-Green Hatcheries Available at: https://www.fisheries.noaa.gov/resource/document/final-environmental-impact-statement-eis-duwamish-green-hatcheries
Tulalip Bernie Gobin	Summer Chinook	Tulalip Tribe	Biological Opinion: Seven Hatchery and Genetic Management Plans for Snohomish River basin Salmon (Attachment 2i) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Supplemental Environmental Assessment: Snohomish Hatcheries Available at: https://media.fisheries.noaa.gov/2022-09/SnohomishHatcheries_SupplEA_FONSI_20210506.pdf
University of Washington	Fall Chinook	Muckleshoot Indian Tribe	Biological Opinion: Five Hatchery Programs for Salmon in the Lake Washington Drainage (Attachment 2g) Biological Opinion: Hatchery Releases in Puget Sound (Attachment 2j)	Environmental Assessment: Lake Washington Basin Hatcheries Available at: https://media.fisheries.noaa.gov/2022-07/FINAL_Lake_Washington_EA_FONSI_BAT

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. JENNIFER QUAN, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP FOURTH DECLARATION OF Lynne Barre, National Marine Fisheries Service, West Coast Region

I, Lynne Barre, declare and state as follows:

Introduction

1. I am currently a Branch Chief in the Protected Resources Division of the National Marine Fisheries Service (NMFS), West Coast Region (WCR) and my duties have included leading the recovery program for Southern Resident killer whales (SRKW) since 2002.
2. My responsibilities in my current and previous positions with NMFS have included implementation of the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA). Since 2002 I have worked on the endangered listing of the SRKW, designated SRKW critical habitat, finalized a SRKW Recovery Plan and implemented actions to conserve and recover SRKW. Since SRKWs were listed under the ESA in 2005, I've worked on ESA section 7 consultations for a variety of projects, including fisheries actions, analyzing effects on SRKW and their designated critical habitat. In 2018-2019 I served as a member of the Washington State Orca Task Force, participating in Task Force meetings and threat-based workgroup meetings on prey, vessels/noise and contaminants.
3. In my current role as a Branch Chief, I oversee a team of employees working on implementation of a variety of MMPA and ESA programs, including completing section 7 ESA consultations for SRKW and other listed species, close collaboration with NMFS science centers and other research partners, and

coordinating with internal and external salmon recovery and management programs.

4. In preparation for this declaration I reviewed plaintiff's Motion for Injunction Pending Appeal and the State of Alaska's Motion for a Partial Stay Pending Appeal. For previous declarations, I reviewed the declarations submitted with Plaintiffs' filings, including the declarations of Dr. Robert Lacy and Dr. Deborah Giles. I am familiar with the scientific literature regarding SRKW.

The Effect of Plaintiff's Remedies on Southern Resident Killer Whales.

5. I was asked to provide my opinion on the effect of vacating portions of the 2019 Opinion on Southeast Alaska (SEAK) salmon fisheries (2019 Opinion) and shutting down NMFS's prey increase program for SRKW.

6. My previous declarations have addressed these topics in detail and summaries of key points are included here. The motions do not alter my conclusions and opinions in my first three declarations regarding the impacts on SRKWs of closing SEAK fisheries and shutting down the prey increase program. Nor is there any new scientific information or data that alters my previous conclusions.

7. As previously stated in the 2019 Opinion and based on our analysis, the prey reductions from the SEAK troll fisheries, particularly in the most important locations and seasons for the whales, are small and, considered in concert with the prey increase program, will not jeopardize their survival or recovery. Closing the SEAK fishery will provide only a small benefit to SRKWs. In contrast, shutting down the prey increase program will have a significant negative effect on

SRKWs. The prey increase program, designed to support the prey base for SRKWs and as implemented beginning in 2020, provides a meaningful increase in prey abundance and benefits SRKWs. Closing the SEAK troll fisheries and shutting down the prey increase program will likely result in a net reduction in prey available to the whales.

8. As described in my First Declaration, the relationship between SRKW and their prey is complex, and our understanding of that relationship has been evolving and is subject to considerable scientific uncertainty. Plaintiff's expert, Dr. Robert Lacy, reported effects from the SEAK fisheries on SRKW using his Population Viability Analysis (PVA) model; the primary assumption in this model is based on outdated correlations between Chinook abundance and SRKW fecundity and survival. Based on my review of recent scientific review and guidance, and my understanding of the complexity and uncertainty surrounding the SRKW/prey relationship, I find the plaintiff's estimate of the reduction in prey available due to SEAK fisheries is based on an outdated relationship quantifying specific changes in SRKW reproduction or survival metrics from specific Chinook salmon abundances and therefore presents an inaccurate assessment of the effects on SRKWs.

9. The Pacific Fishery Management Council (PFMC), an entity involved with management of ocean fisheries, formed an Ad Hoc Workgroup, which included a scientist with SRKW PVA modeling expertise, to evaluate the effects of Council-managed fisheries on SRKW. The Workgroup made efforts to quantify the relationships described above. In their 2020 report to the Council the Workgroup

described their analysis, results, and characterized the uncertainty for both abundance and demographic rates (PFMC 2020, Attachment B to Second Declaration of Allyson Purcell). They found the previous relationships between Chinook salmon abundance and SRKW demographic rates, which Dr. Lacy relies on in his model, have weakened or are not detectable, and therefore we do not rely on them in our analysis. That is, the relationship that Dr. Lacy relies on to support his opinions is no longer the best available science. Prior to the Ad Hoc Workgroup, an expert panel (Hilborn et al. 2012) also cautioned against overreliance on correlative studies or implicating any particular fishery in evaluating the status of SRKWs. The small SRKW population size limits the ability to detect a relationship to input into a PVA, the relationships are likely not constant over time, and we acknowledge that multiple factors, not just prey abundance, may be impacting the vital rates of the whales.

10. Aside from the problematic quantitative relationship between Chinook salmon abundance and SRKW population parameters used in the Lacy model, Plaintiff's estimate of a 4.8% increase in prey from closing the winter and summer troll fisheries and the general benefits to the SRKW population is oversimplified and overstates the benefits that would likely be realized by the whales. This is particularly true if the fishery is closed for just one year when Chinook abundance is not particularly low. Both the Chinook salmon prey and SRKW predators are highly mobile. Thus, not all of the Chinook salmon caught in SEAK troll fisheries would migrate south into SRKW habitat and those that would migrate south would not all survive or be intercepted by the whales.

11. The analysis of SEAK fisheries effects on SRKW and conclusions in our 2019 Opinion considered overall average prey reductions, however, we gave weight to a more detailed seasonal and spatial analysis for three time periods in both coastal and inland habitat areas. When taking SRKW seasonal movements into consideration and times and locations when Chinook salmon are expected to become potential prey for SRKW (i.e., coastal areas during Oct-Apr, inland areas during July-Sep), we estimated that prey reductions from all SEAK salmon fisheries that are part of the action, not just summer and winter troll fisheries, would be much lower: an average of 0.5% in the coast during winter (up to 1.1%), and an average of 1.8% in the inland during summer (up to 2.5%) [see 2019 Opinion pp. 248-249, 313]. Prey reductions from the summer and winter Chinook commercial troll fisheries, which are the subject of the court's vacatur, would be even lower than the estimates for all of the SEAK salmon fisheries.

12. NMFS concluded in the 2019 Opinion that SEAK salmon fisheries would cause adverse effects to the whales by removing prey from their habitat, but not cause injury or mortality that would jeopardize the SRKW population. The conclusions were based on our assessment of prey reductions for all SEAK salmon fisheries, focused on the times and areas most important to the whales, and relied on multiple lines of evidence about the SRKWs' diet, their energy needs, Chinook salmon abundance, how the fisheries will reduce available prey, and how the whales might change their behavior. In addition to the magnitude of prey reductions, we considered the context of Chinook salmon abundance levels, including natural variability in ocean conditions, and also other actions that are

being taken to improve the whales' ability to survive and recovery. We also relied on the conservation funding program described in the 2019 Opinion.

13. The conservation funding program includes funding for hatchery production to benefit SRKW by increasing Chinook abundance (prey increase program), conservation hatchery programs, and habitat restoration projects to support vulnerable populations of Puget Sound Chinook salmon with the added benefit of increasing SRKW prey abundance. Hatchery produced Chinook salmon support the prey base for the whales since the whales do not distinguish between hatchery produced or wild fish. As described in the 2019 Opinion, hatchery fish often contribute to the salmon stocks consumed by the whales (Hanson et al. 2010). The design of the prey increase program for SRKW focuses on achieving a "meaningful increase" in prey abundance with broad distribution to supplement prey where it is most important to whales (i.e. coastal areas during Oct-Apr, inland areas during July-Sep) as those times and areas were identified as most limiting for prey availability.

14. In the 2019 Opinion we acknowledged the initial delay in increased prey until 3-5 years following the first years of implementation, while hatchery fish mature and then become available to the whales as prey in times and areas that overlap with and are important to the whales. We also recognized that not every Chinook salmon produced would go directly to SRKWs, as there are other factors and predators driving salmon mortality, and in the 2019 Opinion we acknowledged that our ability to fully understand the efficacy and predict performance of the program was limited. We are not able to assign increases in prey availability

resulting from the hatchery funding as direct offsets for any particular fishery managed under the Pacific Salmon Treaty agreement (SEAK, U.S. West Coast or Puget Sound) because of the variability in annual reductions of available prey from those fisheries. However, even with these limitations, based on the best available science, we concluded that the prey increase program would provide a meaningful increase in prey abundance and benefit SRKWs. Since the 2019 Opinion my confidence in the benefits of the prey increase program for SRKW has only grown.

15. There has been significant progress on funding and implementation of the prey increase program for the benefit of SRKWs. The prey increase program considered in the 2019 Opinion is being implemented (see Fourth Purcell Declaration) and we anticipate increases in prey abundance starting in 2023, as we reach the 3-5 year maturation time frame following the first year of implementation.

16. We will continue monitoring the number of smolts produced by the hatchery programs funded by the prey increase program and other partners, as well as the increases in estimated levels of adult Chinook salmon prey available to the whales, to evaluate the efficacy of the program in achieving a meaningful increase in prey abundance.

17. The overall abundance of Chinook salmon is variable and affected by ocean conditions and the realized percent increase in prey abundance will be dependent on estimates of the overall abundance of Chinook salmon each year. That is, as natural abundance decreases, the effect of the prey increase program increases,

and vice versa. The funded hatchery production may be most important in a year in which overall Chinook abundance is low, and in such a low abundance year, the percent increase resulting from the funded production may be higher. Although the funded production would still make a contribution in a high Chinook salmon abundance year, the percent increase would be lower if overall Chinook salmon abundance is very high in any year.

18. In the 2019 Opinion, and also in our recent biological opinion on West Coast salmon fisheries (NMFS 2021, Attachment 1), which analyzes the effects of removing adult Chinook salmon prey that might otherwise be available to the SRKW, as well as in the Risk Assessment completed by the Council Ad Hoc Workgroup (PFMC 2020, Second Purcell Decl. Att. B), we identify that reductions in prey are expected to have the greatest impacts on the whales in low Chinook salmon abundance years. When prey are scarce, the SRKWs likely spend more time foraging compared to periods of high prey abundance. Increased energy expenditure and prey limitation can result in nutritional stress, which has been linked to reduced body condition, and lower birth and survival rates. The increase in abundance anticipated from the prey increase program will contribute to overall Chinook abundance, and reduce the potential for SRKWs to experience low abundance conditions in general.

19. Based on pre-season estimates of Chinook salmon abundance we are not anticipating a low abundance year for the 2023-2024 fishing season. In our recent analysis of impacts from Puget Sound salmon fisheries on SRKW (NMFS 2023, Attachment 2), we projected the pre-season abundance estimate for Chinook

salmon ages 3-5 in the Salish Sea was 706,713, which is slightly higher but similar to the post-season average annual abundance estimate of approximately 675,393 fish for the retrospective time period of 2009-2018. We also reviewed the pre-season estimate for the North of Falcon area[1] to evaluate whether Chinook salmon abundance was below the threshold that would trigger additional management measures to reduce fishery impacts on SRKW under Amendment 21 to the Pacific Fishery Management Council's Salmon Fishery Management Plan. The projected North of Falcon abundance was 889,900, which is above the threshold of 623,000 indicating low abundance and higher risk for SRKW (see Table 5 in Salmon Technical Team Report 1: Preliminary Analysis of Tentative 2023 Ocean Salmon Fishery Management Measures, Attachment 3). NMFS is particularly concerned with reductions in Chinook prey in years when pre-fishery Chinook abundance is low relative to historical abundances; this concern drives the approach taken in the PFMC's Amendment 21, and has been important in our analysis of the effects of the Puget Sound fisheries on SRKW. Because projected Chinook salmon abundance for Puget Sound and the North of Falcon areas is expected to be close to average in 2023, we are less concerned about the impacts of Chinook prey reductions resulting from the 2023 SEAK fisheries than we would be if abundances were lower than average.

[1] The North of Falcon area refers to the ocean area between the U.S./Canada border and Cape Falcon, Oregon. The mix of salmon stocks present in the ocean differs significantly between the areas north and south of Cape Falcon. The Council's Workgroup concluded that Chinook abundance in the North of Falcon area is of particular importance to SRKW.

20. Disrupting the prey increase program will reduce the amount of food available to SRKWs and negatively impact their foraging behavior, energy balance, health and reproduction, particularly in years of low abundance. If the prey increase program for SRKWs is enjoined or disrupted, the hatchery production actions that have been funded and implemented in 2020, 2021, and 2022, would still be expected to increase prey at some level through 2027 as those fish mature; however, additional hatchery production specifically targeted to benefit the SRKW could be compromised in later years. Any disruption in funding would result in a gap in additional prey abundance. In the absence of the intended prey increase, there would be lower overall abundance of Chinook salmon and there could be an elevated risk of Chinook salmon abundance falling to the low abundance levels associated with increased risk to the health of the SRKWs.

21. Plaintiff's declarants have asserted that prey abundance has the largest impact on the population growth rate of SRKWs and that increases in prey abundance are needed for SRKWs to recover, and yet disrupting the prey increase program would result in reduced future abundance of prey for SRKWs. The goal of the prey increase program is to help support increased prey available to SRKWs and support their recovery. It is difficult to precisely estimate the increased risk to the health of SRKWs from disrupting the prey increase program, but it could manifest in the whales foraging for longer periods, traveling to alternate locations, or abandoning foraging efforts. Changes to foraging behavior could result in SRKWs not consuming sufficient prey to meet their energetic needs, which could

affect the health of individual whales, reproduction and the status and growth of the population, as cited in the Plaintiff's declarations and our 2019 Opinion.

22. As described in the Fourth Purcell Declaration, ESA consultations have been completed to evaluate the potential impacts on threatened and endangered salmon. Therefore, in addition to supporting recovery of SRKWs, we have concluded that the hatchery production will not jeopardize survival or recovery of listed salmon.

23. In addition to the reductions in fisheries under the PST and the prey increase program, we continue to work on a comprehensive recovery program that addresses all of the primary threats to SRKW, including vessel disturbance and contaminants, and not only prey. We also acknowledge that all of the threats are potential limiting factors, not just prey availability, and that they are interconnected, as vessels and sound can impact the whales' ability to forage, access, and consume the prey that are available in their habitat. NMFS Recovery Plan and other documents such as the Washington State Orca Task Force (Task Force) 2018 and 2019 reports and recommendations, and the Canadian Recovery Plan for SRKW, also acknowledge the importance of and interactions between multiple threats.

24. Conservation and recovery of SRKW and their Chinook salmon prey is complex and challenging because there are multiple interacting threats over large geographic and transboundary landscapes and we have endangered predators relying on prey, some of which are also threatened or endangered. Both SRKW and Chinook salmon face impacts from many human activities, variable oceanographic conditions, and environmental change in their vast habitats.

Recovery programs for both species include a variety of tools and actions that can have short-term or long-term benefits. Significant actions have been taken that are effective in the short term and make the existing abundance of prey more available and accessible to SRKW, including reductions in fisheries to protect salmon and SRKW, and mandatory and voluntary vessel measures that reduce interference with SRKW foraging. Other actions like cleaning up or reducing inputs of harmful contaminants or recovering runs of salmon have a longer-term outlook for realizing benefits to SRKWs.

25. As part of the action considered in the 2019 Opinion, the conservation programs to aid Puget Sound Chinook salmon include continuing conservation hatchery programs and implementing habitat restoration projects. It will likely take many years before ecosystem services of the habitat are restored and they support increased Chinook salmon productivity. The prey increase program for SRKW, however, has already been implemented for multiple years and is increasing the prey available to SRKW now. With four years of funding and implementation resulting in additional prey for the whales starting in 2023, effects evaluated for threatened and endangered salmon, and protections for salmon in place, it fills an important gap until other longer-term actions for salmon and SRKW are successful. NMFS and our Federal, State and Tribal partners recognize the importance of working on actions with both short-term and long-term benefits to the SRKW, including the prey increase program, to help stop the decline of the endangered SRKW population and support their recovery.

26. A study published in 2023 (Kardos et al. 2023, Attachment 4) provided new insight into the role of genetic inbreeding in limiting the SRKW population through increased mortality and reduced reproductive capacity for females with shorter life spans. While the results of this study provide a new context for considering actions to address the threats, including actions to increase prey available to the whales, it does not change our conclusions about the importance of prey to the whales, impacts of SEAK fisheries, or benefits from the prey increase program.

27. Disrupting the prey increase program would result in fewer Chinook salmon available to SRKW, and increase the risk for harm to SRKW through behavioral and physiological impacts. 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. The prey increase program is a critical tool to help address a primary threat to SRKW and without it there will be a negative impact on the recovery program for SRKW.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2023, in Seattle, WA.

BARRE.LYNNE.M.1365828128 Digitally signed by BARRE.LYNNE.M.1365828128 Date: 2023.05.22 16:17:21 -07'00'

Lynne Barre

HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. SCOTT RUMSEY, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP SECOND DECLARATION OF Scott Rumsey, National Marine Fisheries Service, West Coast Region

I, Scott Rumsey, declare and state as follows:

1. I am currently the Acting Regional Administrator, and the Deputy Regional Administrator, with the National Marine Fisheries Service (NMFS) West Coast Region (WCR). I described my background and qualifications in my prior declaration filed in this case, and incorporate that description by reference, except as updated here. First Declaration of Scott Rumsey, (2020).

2. Of particular relevance for this declaration, in my capacity as WCR Deputy Regional Administrator, I am responsible for the budget planning and obligation of the Congressionally appropriated funds to implement the Pacific Salmon Treaty Agreement. In addition, I am currently the U.S. Federal Commissioner to the Pacific Salmon Commission.

3. In preparation for this declaration, I have reviewed the following documents: the 2019 Biological Opinion on the Consultation on the Delegation of Management Authority for Specified Salmon Fisheries to the State of Alaska (2019 Opinion); my first declaration; and the relevant (Fiscal Years 2020 through 2022) appropriations statutes, spend plans, and proposed federal budgets for the 2023 Fiscal Year. Specifically, I reviewed the Consolidated Appropriations Act, 2020, Public Law 116-93 (January 2020), Consolidated Appropriations Act, 2021, Public Law No: 116-260 (December 2020); Consolidated Appropriations Act, 2022, Pub. L. 117-103 (March 2022); the FY2020 Spend Plan for Pacific Salmon Treaty (Spend Plan, Attachment B to First Rumsey Declaration); FY 2021 Spend Plan for Pacific Salmon Treaty (Spend Plan, Attachment A); FY 2022 Spend Plan for Pacific Salmon Treaty (Spend Plan, Attachment B); Final FY 2023 NOAA Blue Book Budget Summary (Attachment C), and House (Attachment

D) and Senate (Attachment E) reports on the proposed FY 2023 budget. Additionally, I reviewed plaintiff's motion for a final order on relief and for a temporary restraining order and/or a preliminary injunction pending entry of a final order on relief.

4. The purpose of this declaration is to describe the status of the funding of conservation measures for ESA listed species as contemplated in the 2019 Opinion and described in more detail below, and the potential for an injunction as Plaintiffs have requested to disrupt future funding and the implementation of conservation measures.

5. The 2019 Opinion analyzed a proposed action with three components relating to domestic implementation of the 2019-2028 Pacific Salmon Treaty Agreement. The first component of the proposed action was the delegation of management authority over the salmon troll fishery and the sport salmon fishery in the Southeast Alaska Exclusive Economic Zone (EEZ) to the State of Alaska. The second component of the proposed action was related to Federal funding that NMFS distributes to the State of Alaska to monitor and manage salmon fisheries and implement the Pacific Salmon Treaty. The third component of the proposed action was funding of a conservation program for Puget Sound Chinook salmon and SRKW.

6. The funding for conservation activities that is the third component of the proposed action included three elements. The first two elements, conservation hatchery and habitat programs, are anticipated to improve abundance and productivity for the four critical Puget Sound Chinook populations, as well as increase prey availability for SRKW.

7. The third funding element, which is the focus of Plaintiff's remedy motion, was specifically designed to increase the production of hatchery Chinook salmon to provide a meaningful increase in prey availability for SRKW ("SRKW prey increase program").

The 2019 Opinion included a preliminary design of the SRKW prey increase program to use for purposes of the analysis and as a benchmark for evaluating the program. A key objective of the preliminary design was to increase adult prey availability by 4-5% in areas and at times that are most important to SRKW. The program was anticipated to cost $5.6 million per year.

Funding Since 2019 Pacific Salmon Treaty Agreement

8. Since the 2019 Opinion was signed, the non-federal U.S. Pacific Salmon Commissioners (representing native American tribes, and the states of Washington, Oregon, and Alaska) have sought funding from Congress to implement the 2019 Pacific Salmon Treaty Agreement, including funds for the conservation program that is the third element of the proposed action in the Opinion. For all three fiscal years (FY) since the 2019 Opinion was signed (i.e., FY 2020, FY 2021, and FY2022), Congress has appropriated funds for NOAA's implementation of the Pacific Salmon Treaty. As directed by Congress, NOAA, in consultation with the U.S. Section of the PSC, has developed annual Spend Plans regarding the expenditure of those funds, consistent with the 2019 Opinion. As described in my first declaration, for FY 2020, the Spend Plan allocated a total of $19.1 million for the conservation activities as follows: $3.1 million for conservation hatcheries, $5.6 million through NMFS for the SRKW prey increase program, and $10.4 million for Puget Sound habitat restoration and protection. First Rumsey Declaration, Att B.

9. For FY 2021, the Spend Plan allocated a total of $18.8 million for conservation activities as follows: $2.9 million for conservation hatcheries, $5.5 million through NMFS and $1.8 million through U.S. Fish and Wildlife Service ("FWS") for SRKW prey

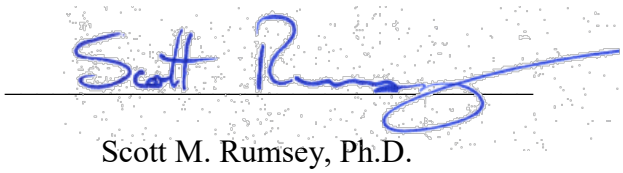
production (totaling $7.3 million), and $10.4 million for Puget Sound habitat restoration and protection.

10. For FY 2022 the Spend Plan allocated a total of $18.1 million for conservation activities as follows: $3.2 million for conservation hatcheries, $4.5 million through NMFS and $1.8 million through FWS for the SRKW prey increase program (totaling $6.3 million), and $10.4 million for Puget Sound habitat restoration and protection. These Spend Plans guide NMFS' distribution of the funds.

11. NMFS has, through carefully evaluated grants, successfully used these funds as anticipated in the 2019 Opinion and the referenced Spend Plans to contribute to the restoration of Chinook habitat in Puget Sound, implementation and development of conservation hatchery programs to protect and recover four highly vulnerable populations of Puget Sound Chinook, and to strategically increase production of hatchery Chinook to increase prey availability for SRKW. Of particular relevance to Plaintiff's remedy request, NMFS has successfully implemented the prey increase program by awarding funds through FY 2022 while ensuring that increased production does not jeopardize listed fish or adversely modify their critical habitat, and to ensure that production is targeted to maximize the benefits to SRKW. See Third Purcell Declaration.

12. FY 2023 presidential budget and Senate and House reports, if ultimately adopted, would provide funds for Pacific salmon management activities at a similar level to FY 2022. Thus it is likely that the prey increase program would continue in FY 2023 at a similar level to FY 2022 if it is not enjoined or disrupted.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 3, 2022, in Portland, OR.



Scott M. Rumsey, Ph.D.

THE HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. SCOTT RUMSEY, *et al.*, Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP THIRD DECLARATION OF Lynne Barre, National Marine Fisheries Service, West Coast Region

I, Lynne Barre, declare and state as follows:

Introduction

1. I am currently a Branch Chief in the Protected Resources Division of the National Marine Fisheries Service (NMFS), West Coast Region (WCR) and my duties have included leading the recovery program for Southern Resident killer whales (SRKW) since 2002. My qualifications and expertise regarding SRKW and Endangered Species Act (ESA) consultations were documented in my previous declarations (First Declaration (2020) and Second Declaration (2021)).
2. In preparation for this declaration I reviewed plaintiff's Motion for a Final Order on Relief filed September 7, 2022 and declarations by Dr. Lacy and Dr. Giles. I am also familiar with the scientific literature that has recently become available regarding SRKW as cited by Dr. Lacy and Dr. Giles.

The Effect of Plaintiff's Remedies on Southern Resident Killer Whales.

3. I was asked to provide my opinion on the effect of vacating portions of the 2019 Opinion on Southeast Alaska (SEAK) salmon fisheries (2019 Opinion) and enjoining NMFS's implementation of the prey increase program for SRKW.
4. My previous declarations have addressed these topics in detail and summaries of key points are included here. While the recent Lacy Declaration cites an update to data used for modeling relationships of Chinook abundance and population trajectory for SRKW, I have the same objections to the model detailed in my First Declaration. The conclusions from the update are similar to those presented in

previous Lacy Declarations. There is no substantial new information provided in the plaintiff's motion or the recent declarations by Dr. Giles and Dr. Lacy that alter my conclusions and opinions in my first two declarations regarding the impacts on SRWKs of closing SEAK fisheries and enjoining the prey increase program.

5. As previously stated in the 2019 Opinion and based on our analysis, the prey reductions from the SEAK troll fisheries, particularly in the most important locations and seasons for the whales, are small and, considered in concert with the prey increase program, will not jeopardize their survival or recovery. Closing the SEAK fishery will provide only a small benefit to SRKW. Enjoining the prey increase program will have a significant negative effect on SRKWs. The prey increase program, designed to support the prey base for SRKWs and as implemented over the last three years, provides a meaningful increase in prey abundance and benefits SRKWs. Closing the SEAK troll fisheries and enjoining the prey increase program will likely result in a net reduction in prey available to the whales.

6. As described in my First Declaration, based on scientific review and guidance, uncertainties, and the complexity surrounding the relationship between SRKW and their prey, I find Dr. Lacy's modeled relationship quantifying specific changes in reproduction or survival metrics from specific Chinook salmon abundances to be outdated and not based on the best available science. Although mentioned in Dr. Giles' Declaration, Dr. Lacy did not include the most recent population updates, including two new calves born in early 2022. The primary

assumption in the Lacy Population Viability Analysis (PVA) model that drives the results reported in the recent Lacy Declaration is based on outdated correlations of coastwide Chinook abundance and survival or fecundity of SRKW.

7. The Pacific Fishery Management Council (PFMC) formed an Ad Hoc Workgroup, which included a scientist with SRKW PVA modeling expertise, to evaluate the effects of Council-managed fisheries on SRKW and they made efforts to quantify these relationships. In their 2020 report to the Council the Workgroup described their analysis, results, and characterized the uncertainty (PFMC 2020). They found the previous relationships between Chinook salmon abundance and SRKW demographic rates, which Dr. Lacy relies on in his model, have weakened or are not detectable, and therefore we do not rely on them in our analysis. Prior to the Ad Hoc Workgroup an expert panel (Hilborn et al. 2012) also cautioned against overreliance on correlative studies or implicating any particular fishery in evaluating the status of SRKWs. The small SRKW population size limits the ability to detect a relationship to input into a PVA, the relationships are likely not constant over time, and we acknowledge that multiple factors, not just prey abundance, may be impacting the vital rates of the whales.

8. Aside from the problematic quantitative relationship between Chinook salmon abundance and SRKW population parameters used in the Lacy model, his conclusions about the general benefits to the SRKW population from closing the SEAK winter and summer troll fisheries overstate the benefits that would likely be realized by the whales. Both the Chinook salmon prey and SRKW predators

are highly mobile. Thus, not all of the Chinook salmon caught in SEAK troll fisheries would migrate south into SRKW habitat and those that would migrate south would not all survive or be intercepted by the whales.

9. Dr. Lacy summarizes that there is an overall average 6% reduction in Chinook salmon abundance from all SEAK fisheries and assumes that closing those fisheries would equate to a 6% increase in available prey for SRKW or a 4.8% increase from closing the winter and summer troll fisheries. This is an oversimplification and overestimation. The analysis of SEAK fisheries effects on SRKW and conclusions in our 2019 Opinion considered overall average prey reductions, however, we gave weight to a more detailed seasonal and spatial analysis for three time periods in both coastal and inland habitat areas. When taking SRKW seasonal movements into consideration and times and locations when Chinook salmon are expected to become potential prey for SRKW (i.e., coastal areas during Oct-Apr, inland areas during July-Sep), we estimated that prey reductions from SEAK fisheries would be much lower: average of 0.5% in the coast during winter (up to 1.1%), and an average of 1.8% inland during summer (up to 2.5%). AR 47440-41, 47505.

10. NMFS concluded in the 2019 Opinion that SEAK fisheries would cause adverse effects to the whales by removing prey from their habitat, but not cause injury or mortality that would jeopardize the SRKW population. The conclusions were based on our assessment of prey reductions for all SEAK fisheries, focused on the times and areas most important to the whales, and relied on multiple lines of evidence about the SRKWs' diet, their energy needs, Chinook salmon abundance,

how the fisheries will reduce available prey, and how the whales might change their behavior. In addition to the magnitude of prey reductions, we considered the context of Chinook salmon abundance levels, including natural variability in ocean conditions, and also other actions that are being taken to improve the whales' ability to survive and recovery. We also relied on the conservation funding program described in the 2019 Opinion.

11. The conservation funding program considered in the 2019 Opinion included funding for hatchery production to benefit SRKW by increasing Chinook abundance (prey increase program), conservation hatchery programs, and habitat restoration projects to support vulnerable populations of Puget Sound Chinook salmon with the added benefit of increasing SRKW prey abundance. Hatchery produced Chinook salmon support the prey base for the whales since the whales do not distinguish between hatchery produced or wild fish. As described in the 2019 Opinion, hatchery fish often contribute to the salmon stocks consumed by the whales (Hanson et al. 2010). The design of the prey increase program for SRKW focuses on achieving a "meaningful increase" in prey abundance with broad distribution to supplement prey where it is most important to whales (i.e. coastal areas during Oct-Apr, inland areas during July-Sep) as those times and areas were identified as most limiting for prey availability. The level of increased hatchery production (20 million Chinook salmon smolts released annually) for prey increase funding levels of roughly $5 million, as described in a NMFS memo (Dygert et al. 2018), would be expected to increase Chinook salmon abundance by 4-5% in both inland waters in the summer and in coastal waters in the winter.

12. In the 2019 Opinion we acknowledged the initial delay in increased prey until 3-5 years following the first years of implementation, while hatchery fish mature and then become available to the whales as prey in times and areas that overlap with and are important to the whales. We also recognized that not every Chinook salmon produced would go directly to SRKWs, as there are other factors and predators driving salmon mortality, and in the 2019 Opinion we acknowledged that our ability to fully understand the efficacy and predict performance of the program was limited. We are not able to assign increases in prey availability resulting from the hatchery funding as direct offsets for any particular fishery managed under the Pacific Salmon Treaty agreement (SEAK, U.S. West Coast or Puget Sound) because of the variability in annual reductions of available prey from those fisheries. However, even with these limitations, based on the best available science, we concluded that the prey increase program would provide a meaningful increase in prey abundance and benefit SRKWs.

13. There has been significant progress on funding and implementation of the prey increase program for the benefit of SRKWs. The prey increase program considered in the 2019 Opinion is being implemented (see Third Purcell Declaration) and we anticipate increases in prey abundance are near to or being realized as we reach the 3-5 year maturation time frame following each year of implementation. We will continue monitoring the number of smolts produced by the hatchery programs funded by the prey increase program and other partners, as well as the estimated levels of adult Chinook salmon prey available to the whales,

to evaluate the efficacy of the program in achieving a meaningful increase in prey abundance.

14. The overall abundance of Chinook salmon is variable and affected by ocean conditions and the realized percent increase in prey abundance will be dependent on estimates of the overall abundance of Chinook salmon each year. The funded hatchery production may be most important in a year in which overall Chinook abundance is low, and in such a low abundance year, the percent increase resulting from the funded production may be higher. Although the funded production would still make a contribution in a high Chinook salmon abundance year, the percent increase would be lower if overall Chinook salmon abundance is very high in any year. Nevertheless, this program will provide meaningful benefits for Southern Resident killer whales.

15. In the 2019 Opinion, and also in our recent biological opinion on West Coast salmon fisheries (Attachment A), which analyzes the effects of removing adult Chinook salmon prey that might otherwise be available to the SRKW, as well as in the Risk Assessment completed by the Council Ad Hoc Workgroup (PFMC 2020, Second Purcell Decl. Att. B), we identify that reductions in prey are expected to have the greatest impacts on the whales in low Chinook salmon abundance years. When prey are scarce, the SRKWs likely spend more time foraging compared to periods of high prey abundance. Increased energy expenditure and prey limitation can result in nutritional stress, which has been linked to reduced body condition, and lower birth and survival rates. The increase in abundance anticipated from the prey increase program will contribute to overall

Chinook abundance, and reduce the potential for SRKWs to experience low abundance conditions in general.

16. Enjoining or disrupting the prey increase program will reduce the amount of food available to SRKWs and negatively impact their foraging behavior, energy balance, health and reproduction, particularly in years of low abundance. If the prey increase program for SRKWs is enjoined or disrupted, the hatchery production actions that have been funded by NMFS and implemented in 2020, 2021, and 2022, as well as hatchery production funded by partners, particularly Washington State, as described in Allyson Purcell's Third declaration, would still be expected to increase prey at some level through 2027 as those fish mature; however, additional hatchery production specifically targeted to benefit the SRKW could be compromised in later years. Any disruption in funding would likely result in a gap in additional prey abundance. In the absence of the intended prey increase, there would be lower overall abundance of Chinook salmon and there could be an elevated risk of Chinook salmon abundance falling to the low abundance levels associated with increased risk to the health of the SRKWs.

17. Plaintiff's declarants assert that prey abundance has the largest impact on the population growth rate of SRKWs and that increases in prey abundance are needed for SRKWs to recover, and yet enjoining or disrupting the prey increase program would result in reduced future abundance of prey for SRKWs. Plaintiffs' request for relief is inconsistent with their declarants' assertions. The goal of the prey increase program is to help support increased prey available to SRKWs and support their recovery. It is difficult to precisely estimate the

increased risk to the health of SRKWs from disrupting the prey increase program if enjoined, but it could manifest in the whales foraging for longer periods, traveling to alternate locations, or abandoning foraging efforts. Changes to foraging behavior could result in SRKWs not consuming sufficient prey to meet their energetic needs, which could affect the health of individual whales, reproduction and the status and growth of the population, as cited in the Plaintiff's declarations and our 2019 Opinion.

18. As described in the Third Purcell Declaration, ESA consultations have been completed to evaluate the potential impacts on threatened and endangered salmon. Therefore, in addition to supporting recovery of SRKWs, we have concluded that the hatchery production will not jeopardize survival or recovery of listed salmon.

19. In addition to the reductions in fisheries under the Pacific Salmon Treaty and the prey increase program, we continue to work on a comprehensive recovery program that addresses all of the primary threats to SRKW, including vessel disturbance and contaminants, and not only prey. We also acknowledge that all of the threats are potential limiting factors, not just prey availability, and that they are interconnected, as vessels and sound can impact the whales' ability to forage, access, and consume the prey that are available in their habitat. NMFS Recovery Plan and other documents such as the Washington State Orca Task Force (Task Force) 2018 and 2019 reports and recommendations, and the Canadian Recovery Plan for SRKW, also acknowledge the importance of and interactions between multiple threats.

20. Dr. Giles describes information on the status of the SRKWs, including the "vulnerable" status of specific individuals. The designation of "vulnerable" whales by Washington State is part of their Commercial Whale Watch Licensing system, which implements a recommendation from the Task Force and highlights the connection between vessel impacts and prey accessibility. When whales are identified as "vulnerable" based on body condition or pregnancy, additional limitations on commercial whale watching are put into place. Limiting whale watching activities for both "vulnerable" whales and young calves reduces acoustic and physical disturbance, including impacts on foraging behaviors.

21. Dr. Giles cites multiple sources of information on Canadian fishery closures, which seems to imply that there is a direct benefit to the SRKW from all of them. This oversimplifies and overestimates the benefits to SRKW from Canadian fishery management actions. Aside from the measures specifically designed to support SRKW, some of the other closures or fishery reductions Dr. Giles references take place in rivers (where there is no overlap with SRKW) or support salmon stocks that do not overlap with and are not part of the diet of SRKW.

22. Conservation and recovery of SRKW and their Chinook salmon prey is complex and challenging because there are multiple interacting threats over large geographic and transboundary landscapes and we have endangered predators relying on prey, some of which are also threatened or endangered. Both species face impacts from many human activities, variable oceanographic conditions, and environmental change in their vast habitats. Recovery programs for both SRKW and Chinook salmon include a variety of tools and actions that can have short-

term or long-term benefits. Significant actions have been taken that are effective in the short term and make the existing abundance of prey more available and accessible to SRKW, including reductions in fisheries to protect salmon and SRKW, and mandatory and voluntary vessel measures that reduce interference with SRKW foraging. Other actions like cleaning up or reducing inputs of harmful contaminants or recovering runs of salmon have a longer-term outlook for realizing benefits to SRKWs. As part of the action considered in the 2019 Opinion, the conservation programs to aid Puget Sound Chinook salmon include continuing conservation hatchery programs and implementing habitat restoration projects. It will likely take many years before ecosystem services of the habitat are restored and they support increased Chinook salmon productivity. The prey increase program for SRKW, however, has already been implemented for multiple years and is increasing the prey available to SRKW now. With three years of funding and implementation, effects evaluated for threatened and endangered salmon, and protections for salmon in place, it fills an important gap until other longer-term actions for salmon and SRKW are successful. NMFS and our Federal, State and Tribal partners recognize the importance of working on actions with both short-term and long-term benefits to the SRKW, including the prey increase program, to help stop the decline of the endangered SRKW population and support their recovery.

23. Enjoining or disrupting the prey increase program would result in fewer Chinook salmon available to SRKW, and increase the risk for harm to SRKW through behavioral and physiological impacts. 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. The prey increase program is a critical tool to help address a primary threat to SRKW and without it there will be a negative impact on the recovery program for SRKW.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 3, 2022, in Seattle, WA.

BARRE.LYNNE.M.1365828128 Digitally signed by BARRE.LYNNE.M.1365828128 Date: 2022.10.03 14:07:03 -07'00'

Lynne Barre

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.	Case No. 2:20-cv-417-RAJ-MLP DECLARATION OF Scott Rumsey National Marine Fisheries Service, West Coast Region

I, Scott Rumsey, declare and state as follows:

1. I am currently the Deputy Regional Administrator with the National Marine Fisheries Service (NMFS) West Coast Region (WCR), which includes the states of Oregon, Washington, Idaho, and California. I have been employed with NMFS since 2001. I began my career with NMFS focusing on Endangered Species Act status reviews, listing determinations, protective regulations, and critical habitat designations. I have worked closely with West Coast states and tribes to coordinate research, monitoring, and recovery efforts for threatened and endangered salmon and steelhead, and to evaluate the effectiveness of habitat restoration actions. Prior to becoming the Deputy Regional Administrator in 2017, I was the Portland Branch Chief for the Protected Resources Division overseeing recovery planning and implementation for West Coast salmon and steelhead. I have served as the program manager for the Pacific Coastal Salmon Recovery Fund since 2008, and during that time the Fund has awarded nearly $900 million toward habitat restoration, hatchery, and other projects to recover West Coast salmon and steelhead. In my current role as Deputy Regional Administrator, I provide management and policy oversight of the WCR's programs administering the Endangered Species Act, Marine Mammal Protection Act, Magnuson-Stevens Fishery Conservation and Management Act, and other statutes. I also oversee budget, personnel, and operations for the WCR.

2. I obtained my bachelor's degree in biology with a marine emphasis from the University of California at Los Angeles in 1993. I earned my doctorate in biological oceanography from the Scripps Institution of Oceanography in 1999. After graduate school I was a lecturer in oceanography at the University of San Diego, and conducted

post-doctoral research at Oregon State University before joining the National Oceanic and Atmospheric Administration (NOAA) in 2001.

3. Since 2018 I have served as the shadow to the federal Alternate Commissioner on the Pacific Salmon Commission (Ms. Staci MacCorkle, U.S. Department of State). In this role I have become familiar with the management under the Pacific Salmon Treaty, negotiation of the 2019 Pacific Salmon Treaty Agreement, the overall funding the U.S. Pacific Salmon Commissioners agreed to pursue in connection with the Pacific Salmon Treaty Agreement, as well as the specific actions included in that initiative for the conservation of Puget Sound Chinook salmon and Southern Resident killer whales (SRKW). The Pacific Salmon Commission is the body formed by the governments of Canada and the United States to implement the Pacific Salmon Treaty. The Pacific Salmon Commission is a sixteen-person body with four Commissioners and four alternates from each Country, representing the interests of commercial and recreational fisheries as well as federal, state and tribal governments.

4. In my capacity as WCR Deputy Regional Administrator, I am responsible for the budget planning and obligation of the Congressionally appropriated funds to implement the Pacific Salmon Treaty Agreement. Through my experience managing the Pacific Coastal Salmon Recovery Fund, I am intimately familiar with the underlying science, planning, and implementation for habitat restoration actions and hatchery production to recover Endangered Species Act listed salmon, steelhead, and SRKW.

5. In preparation for this declaration, I have reviewed the 2019 Biological Opinion on the Consultation on the Delegation of Management Authority for Specified Salmon Fisheries to the State of Alaska (2019 Opinion). I also reviewed the Consolidated Appropriations

Act, 2020, Public Law 116-93 (January 2020) as well as the U.S. Section to the Pacific Salmon Treaty FY2020 Funding Agreements (Spend Plan) (Attachment A) and a briefing document on the Spend Plan prepared for Congress (Attachment B). Additionally, I reviewed plaintiff's motion for a preliminary injunction and the declarations filed in support of the motion by Dr. Deborah Giles and Dr. Robert Lacy.

6. The purpose of this declaration is to address the issues raised by the above declarants concerning the funding of conservation and mitigation measures as contemplated in the 2019 Opinion.

7. The 2019 Opinion analyzed a proposed action with three components relating to domestic implementation of the 2019-2028 Pacific Salmon Treaty Agreement. The first component of the proposed action was the delegation of management authority over the salmon troll fishery and the sport salmon fishery in the Southeast Alaska Exclusive Economic Zone (EEZ) to the State of Alaska. The second component of the proposed action was related to Federal funding that NMFS distributes to the State of Alaska to monitor and manage salmon fisheries and implement the Pacific Salmon Treaty.

8. The third component of the proposed action was funding of a conservation program for Puget Sound Chinook salmon and SRKW. The third component of the proposed action included three elements of this funding initiative. The first element supports continuation of conservation hatchery programs for the Nooksack, Dungeness and Stillaguamish Chinook salmon populations and develop a new program for the Mid-Hood Canal population. In the 2019 Opinion, these programs were estimated to require $3.06 million in funding annually and are intended target the weakest populations of Puget Sound Chinook salmon that are considered essential for recovery. The second

element improves habitat conditions for these four populations through projects that would cost $31.2 million and be implemented within the first three years of the 2019 Pacific Salmon Treaty Agreement. These two elements, conservation hatchery and habitat programs, are anticipated to improve abundance and productivity for the four critical Puget Sound Chinook populations, as well as increase prey availability for SRKW.

9. The third funding element was specifically designed to increase the production of hatchery Chinook salmon to provide a meaningful increase in prey availability for SRKW (Hatchery Production Initiative for SRKW). The 2019 Opinion included a preliminary design of the Hatchery Production Initiative for SRKW to use for purposes of the analysis and as a benchmark for evaluating the program. A key objective of the preliminary design was to increase adult prey availability by 4-5% in areas and at times that are most important to SRKW. The program was anticipated to cost $5.6 million per year which would result in an additional 20 million Chinook salmon smolts produced from hatchery programs.

10. Since implementation of the 2019 Opinion, the non-federal U.S. Pacific Salmon Commissioners (representing native American tribes, and the states of Washington, Oregon, and Alaska) have sought funding from Congress to implement the 2019 Pacific Salmon Treaty Agreement. In federal Fiscal Year (FY) 2020, Congress appropriated these funds to NMFS and other federal agencies to support implementation of the Pacific Salmon Treaty Agreement. The FY2020 funding NMFS received was consistent with the description of the funding initiative in the 2019 Opinion.

11. In the FY 2020 appropriations bill (Public Law 116-93, January 2020), Congress provided NMFS with $35.5 million to address all responsibilities and commitments associated with implementation of the 2019 Pacific Salmon Treaty Agreement. This was an increase in funding from FY 2019 of $20 million.

12. Following the FY 2020 appropriations, the U.S. House and Senate Appropriations committees directed NOAA to develop a Spend Plan regarding the $35.5 million appropriated for Pacific Salmon Treaty implementation activities. The committees directed NMFS to consult with the Pacific States, tribal communities and other stakeholders on the Spend Plan.

13.

14. On February 21, 2020, the U.S. Section (including federal and non-federal Commissioners), agreed to a consensus spending plan for the FY2020 appropriated funds that allocates $19.1 million to Endangered Species Act-related conservation activities in FY2020. This Spend Plan distributes the $19.1 million in FY2020 funds as follows: $3.1 million in annual funding for the conservation hatchery programs for critical stocks of Puget Sound Chinook salmon; $10.4 million in habitat restoration actions toward the $31.2 million in habitat restoration included as part of the conservation program evaluated in the 2019 Opinion; and $5.6 million in annual funding for the Hatchery Production Initiative for SRKW. The Spend Plan for the FY2020 funds guides NMFS's distribution of the FY2020 funds.

15. The non-federal Commissioners agreed to seek continued funding in future fiscal years for the conservation hatchery programs and Hatchery Production Initiative for SRKW for the duration of the 2019-2028 Pacific Salmon Treaty agreement, and to seek

$10.4 million for habitat restoration in FY21 and FY22 to fulfill the $31.2 million in habitat restoration contemplated as an element of the overall conservation program.

16. NOAA is required to obligate the funds received in FY2020 within two years. However, NMFS expects to distribute all of the FY2020 funds in FY2020 consistent with the Spend Plan distribution discussed in paragraph 14 above. The distribution of funds in the Spend Plan is consistent with the funding contemplated in the 2019 Opinion. Specifically, the Spend Plan allocates $19.1 million for implementation of the Puget Sound Chinook salmon and SRKW conservation measures as was evaluated in the third component of the proposed action in the 2019 Opinion.

17. The funding amounts in the Spending Plan are fully consistent with the proposed action in the 2019 Opinion. NMFS is and will be continuing to distribute appropriated funds consistent with the actions described in the 2019 Opinion.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 11, 2020, in Portland, OR.

Digitally signed by RUMSEY.SCOTT.M.1365888341
Date: 2020.05.11 12:29:46 -07'00'

Scott Rumsey

Attachment A

Draft B. February 21, 2020; 9:20AM
Evenson, Scott

U.S. Section Funding Agreements

2020 Fiscal Year

The U.S. section agrees upon the following for FY20:

1) Maintenance of fishery sampling and tagging programs:
   WDFW Ocean Fishery Sampling: $274,329
   ODFW Ocean Sampling: $210,000
   ODFW Elk River Coded-Wire-Tagging: $180,700
   Makah Staff Support and CWT Improvement: $119,000
   CRITFC Expansion of Hanford Reach CWT and PIT Tagging: $135,676
   ADFG SEAK Chinook Port Sampling: $540,000
   ADFG Coded-Wire Tag Processing Support: $160,000

2) Funding of LOA projects as described in the US CTC memorandum of February 19, 2020 for a total of $1,451,401.

3) State base grants, Bi-Op implementation, Southeast Alaska mitigation, and Tribal implementation as follows:

Category	Commerce		Interior
	New Funding	FY19 Funding	New Funding
State Base Grants Total	**$1,500,000**	**$9,934,485**	-
Alaska	$650,565	$5,592,502	-
Washington	$573,148	$2,274,331	-
Oregon	$276,287	$1,712,044	-
Idaho	-	$355,609	
Bi-Op Implementation Total	**$17,000,000**	**$2,082,963**	-
Hatchery Conservation Programs	$1,000,000	$2,082,963	
Habitat Restoration	$10,400,000	-	-
SRKW Prey	$5,600,000	-	-
Southeast Alaska Mitigation Total	**$1,500,000**	-	**$4,700,000**
Hatchery Enhancement	$1,500,000	-	-
Fish Marking and Tagging	-	-	-
Tribes Implementation	-	-	**$900,000**

2021 & 2022 Fiscal Years

The following will guide funding requests and decisions for FY21 and FY22:

1) The non-federal commissioners understanding is that $17 million per year for FY20, FY21, and FY22, and maintaining the base funding of $2.08M for Puget Sound hatchery conservation programs, will meet the funding requirements for implementation of the biological opinion.

2) State base grants for the amount in excess of the FY19 level will be distributed in the same proportion as the new funding in FY20 except by agreement of the U.S. section.

3) Funding of all other components of the U.S. package will be determined by agreement of the U.S. section in each year.

Attachment B

FY 2020 Spend Plan for Pacific Salmon Treaty Implementation

Developed pursuant to: Senate Report (116-127) and House Report (116-101) accompanying the Consolidated Appropriations Act, 2020 (P.L. 116-93)

THE SENATE REPORT (116-127) AND THE HOUSE REPORT (116-101) ACCOMPANYING THE CONSOLIDATED APPROPRIATIONS ACT, 2020 (P.L. 116-93) INCLUDED THE FOLLOWING LANGUAGE

NOAA is directed to provide the Committee with a detailed spending plan that is reflective of the funding recommendations produced by the U.S. section of the Pacific Salmon Commission and that strikes an appropriate balance between annual and initial funding needs. In doing so, NOAA is directed to consult with the Pacific States, tribal communities, and other stakeholders.

Within these funds, the Committee directs NOAA to develop and implement a plan to maximize the increase of relevant salmon stocks through the implementation of actions referenced in the treaty and supporting agreements, in addition to activities funded under the Salmon Management Activities line. The Committee is frustrated by the lack of information from the Administration regarding the Federal responsibilities related to the recent recertification of the Pacific Salmon Treaty and directs the Department, prior to the obligation of any funds and within 60 days of enactment of this Act, to brief the Committee on this plan.

I. Background

Signed by Canada and the U.S. in 1985, the Pacific Salmon Treaty provides a framework for the two countries to cooperate on the management of Pacific salmon. A high degree of cooperation is required to prevent overfishing, provide optimum production, and ensure that each country receives benefits that are equivalent to the production of salmon in its waters. The prior 2009-2018 harvest-sharing provisions (the "treaty agreement") expired under the Treaty on December 31, 2018. Canada and the U.S. negotiated treaty agreement provisions for the period of 2019-2028, and representatives from both nations to the Pacific Salmon Commission are currently coordinating to implement the new agreement.

In March 2019, the National Marine Fisheries Service (NMFS) completed a new biological opinion, which evaluated the effects of domestic actions associated with implementing the new agreement on species listed under the Endangered Species Act. The proposed action analyzed in this new biological opinion included domestic actions related to Southeast Alaska fisheries and funding for a conservation program for threatened Puget Sound Chinook salmon and endangered Southern Resident killer whales. The conservation program also supports other ocean salmon fisheries managed by NMFS and the Pacific Fishery Management Council under the Magnuson-Stevens Fishery Conservation and Management Act and Puget Sound Indian and non-Indian fisheries.

Traditionally, funding for implementation of the treaty agreement has been appropriated to the Departments of Commerce (for the fishery management activities), State (for administration of

the Treaty and the U.S. Section), and Interior (for participation and management costs of treaty Indian tribes in the Northwest). Funding for NMFS' Pacific Salmon Treaty activities is contained within the Salmon Management Activities Program, Project, and Activities (PPA). The FY 2020 appropriations included an increase of $20.0 million for a total of $35.5 million for implementation of the Pacific Salmon Treaty. The Committee requests a spend plan prior to obligation of funds, and this report provides NMFS' detailed plan for these funds.

II. Consensus FY 2020 Pacific Salmon Treaty Spend Plan

NMFS has collaborated closely with the state and tribal representatives to the Pacific Salmon Commission to develop a FY 2020 spend plan. The spend plan described below represents the consensus of the non-federal U.S. Pacific Salmon Commissioners from Alaska, Washington, Oregon, and Northwest native tribes. This consensus FY20 spend plan prioritizes activities to:

(1) support conservation activities to benefit listed species encountered in domestic fisheries evaluated in related biological opinions under the Endangered Species Act;
(2) maintain FY 2019 funding levels for ongoing Pacific Salmon Treaty implementation; and
(3) support additional state and tribal activities associated with U.S. implementation of the new 2019-2028 agreement.

(1) New Conservation Activities to Benefit Species Listed under the Endangered Species Act – $19.1 million

- Puget Sound Critical Stock Conservation Hatcheries: $3.1 million will be allocated to Washington State and Puget Sound tribes to preserve at-risk Puget Sound Chinook salmon stocks through the implementation of hatchery conservation programs.
- Southern Resident Killer Whale Prey: $5.6 million will support new hatchery production in Puget Sound and the Columbia River to provide increased prey availability for endangered Southern Resident killer whales.
- Puget Sound Critical Stock Habitat Restoration and Protection: $10.4 million for habitat restoration and protection projects for at-risk Puget Sound Chinook salmon stocks, including emphasis of the Nooksack, Stillaguamish, Mid-Hood Canal, and Dungeness Chinook salmon populations. Projects will be prioritized in close coordination with Washington, Puget Sound treaty tribes, and local recovery partners.

(2) Ongoing Implementation of the Pacific Salmon Treaty – $13.4 million

- Ongoing "Base" Grants to States for Treaty Implementation: $9.9 million will be provided to the states of Washington, Oregon, Idaho and Alaska for Treaty implementation activities including state fishery sampling and monitoring, spawner estimates, and assessing fishery exploitation rates.
- Grants for Coded Wire Tag Program: $1.9 million will be provided to the state and tribes in support of the Coded Wire Tag Program which provides essential information on exploitation patterns and rates, and evaluation of the effectiveness of fishery management actions for Chinook and coho stocks under the Treaty

- Grants for Chinook Salmon Assessment Letter of Agreement (LOA): $1.6 million to support Chinook LOA Grants to the states and Pacific Salmon Commission in support of abundance-based management approach for Chinook salmon fisheries in Southeast Alaska

(3) New funding to support implementation of the 2019-2028 Pacific Salmon Treaty Agreement – $3.0 million

- $1.5 million in new funding would support new data collection and fishery monitoring, stock assessment and analyses to successfully implement the new 2019-2028 agreement
- $1.5 million in new hatchery production in Southeast Alaska to mitigate for harvest reductions in Southeast Alaska fisheries agreed to as part of the new 2019-2028 agreement.

Table 1. Detailed Consensus FY 2020 spend plan for Pacific Salmon Treaty appropriated funds ($35.5M)[1].

Activity ($ in Millions)	FY 2019 Enacted	FY 2020 Consensus Spend Plan
(1) New Conservation Activities to Benefit Species Listed under the Endangered Species Act		
Puget Sound Critical Stock Conservation Hatcheries	$0	$3.1
Southern Resident Killer Whale Prey	$0	$5.6
Puget Sound Critical Stock Habitat Restoration and Protection	$2.1	$10.4
Subtotal of New Conservation Activities	***$2.1***	***$19.1***
(2) Ongoing Implementation of the Pacific Salmon Treaty		
Base Grants to States for Treaty	$9.9	$9.9
- Alaska	*$5.6*	*$5.6*
- Washington	*$2.3*	*$2.3*
- Oregon	*$1.7*	*$1.7*
- Idaho	*$0.3*	*$0.3*
Coded Wire Tag Program	$1.9	$1.9
Chinook Salmon Assessment Letter of Agreement	$1.6	$1.6
Subtotal of Ongoing Treaty Implementation Activities	***13.4***	***$13.4***
(3) New funding to support implementation of the 2019-2028 Pacific Salmon Treaty Agreement		
Implementation of new monitoring, assessments and analyses	$0	$1.5
- Alaska	*$0*	*$0.7*
- Washington	*$0*	*$0.6*
- Oregon	*$0*	*$0.2*
- Idaho	*$0*	*$0*
Implementation of the new activities for Southeast Alaska mitigation (Alaska only)	$0	$1.5
Subtotal of New Treaty Implementation Activities	***$0***	***$3.0***
TOTAL PACIFIC SALMON TREATY FUNDING	**$15.5**	**$35.5**

[1] The $35.5 million is the appropriated funding level for Pacific Salmon Treaty. NOAA is required to assess administrative expenses from programmatic budget lines, as the Federal budget appropriation structure for NMFS does not contain dedicated budget lines for compulsory mission support functions. As such, an equitable percentage of each budget line must contribute to overall administrative fees assessed to operate the organization. The overall administrative expenses assessed from Pacific Salmon Treaty activities are needed to support the activities that support implementation of NOAA's full participation in Pacific Salmon Treaty obligations.