

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BARRY THOM, in his official capacity as )  
Regional Administrator for the National )  
Marine Fisheries Service, *et al.*, )  
 )  
Defendants, )  
 )  
and )  
 )  
ALASKA TROLLERS ASSOCIATION, )  
and STATE OF ALASKA, )  
 )  
Defendant-Intervenors. )  
\_\_\_\_\_ )

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

**[PROPOSED]** ORDER GRANTING  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** is Plaintiff Wild Fish Conservancy’s Motion for Summary Judgment, Dkt. No. 91.

Plaintiff Wild Fish Conservancy (“Conservancy”) moves for summary judgment under Federal Rule of Civil Procedure 56 and requests that the Court:

1. Determine that the National Marine Fisheries Service’s (“NMFS”) biological opinion for salmon fisheries in Southeast Alaska (“2019 SEAK BiOp”) is arbitrary, capricious, an abuse of discretion, and/or not in accordance with law;

1           2.       Determine that NMFS is violating section 7(a)(2) of the Endangered Species Act  
2 (“ESA”) by failing to ensure that its actions identified in the 2019 SEAK BiOp are not likely to  
3 jeopardize ESA-listed species or adversely modify their critical habitat;

4           3.       Determine that NMFS violated the National Environmental Policy Act (“NEPA”)  
5 by issuing and adopting the 2019 SEAK BiOp without any NEPA processes;

6           4.       Vacate the 2019 SEAK BiOp; and

7           5.       Enjoin NMFS’s implementation of increased hatchery production identified in the  
8 2019 SEAK BiOp until NMFS complies with the ESA and NEPA.

9           The Court **FINDS** as follows:

10           1.       The 2019 SEAK BiOp is arbitrary, capricious, an abuse of discretion, and/or not  
11 in accordance with law for the following reasons:

12                   a.       NMFS’s “no jeopardy” opinions rely on uncertain mitigation measures;

13                   b.       NMFS fails to draw a rational connection between the facts found and the  
14 no jeopardy opinions reached for Southern Residents;

15                   c.       NMFS assumes the supposed benefits of the prey increase program in its  
16 jeopardy assessment for Southern Residents, but fails to evaluate whether the prey increase  
17 program will jeopardize threatened salmonids; and

18                   d.       the incidental take statement fails to adequately limit take of Southern  
19 Resident Killer Whales;

20           2.       NMFS is in violation of section 7(a)(2) of the ESA by failing to ensure that its  
21 actions identified in the 2019 SEAK BiOp are not likely to jeopardize ESA-listed species or  
22 adversely modify their critical habitat;

23           3.       NMFS violated NEPA for the following reasons:

24                   a.       NMFS failed to prepare an environmental impact statement (“EIS”) or an  
25 environmental assessment (“EA”) and a finding of no significant impact (“FONSI”), or provide  
26 any other NEPA procedures, for its issuance of the incidental take statement included in the 2019  
27 SEAK BiOp authorizing take associated with Southeast Alaska salmon fisheries conducted under  
28  
29

1 the 2019 Pacific Salmon Treaty; and

2           b.       NMFS failed to prepare an EIS or an EA and a FONSI, or provide any  
3 other NEPA procedures, for its adoption and implementation of the prey increase program  
4 included in the 2019 SEAK BiOp;

5           4.       The deficiencies in the 2019 SEAK BiOp are serious violations of the law and  
6 NMFS cannot show that the disruptive consequences of vacating the 2019 SEAK BiOp outweigh  
7 the seriousness of those violations and the harm to ESA-listed species and the environment;

8           5.       The Conservancy has demonstrated that, absent an injunction of the prey increase  
9 program, irreparable injury under the ESA and NEPA will occur for which there is no other  
10 adequate remedy at law; and

11           6.       The balance of harms and the public interests support an injunction under NEPA  
12 because of the potential environmental impacts and because NMFS's decisions are not supported  
13 with an adequate record.  
14

15           Accordingly, the Court hereby **GRANTS** Plaintiff's motion for summary judgment and  
16 **ORDERS** as follows:

17           1.       The 2019 SEAK BiOp is arbitrary, capricious, an abuse of discretion, and/or not  
18 in accordance with law;

19           2.       NMFS is in violation of section 7(a)(2) of the ESA by failing to ensure that its  
20 actions identified in the 2019 SEAK BiOp are not likely to jeopardize ESA-listed species or  
21 adversely modify their critical habitat;

22           3.       NMFS violated NEPA by issuing the incidental take statement included in the  
23 2019 SEAK BiOp authorizing take associated with Southeast Alaska salmon fisheries conducted  
24 under the 2019 Pacific Salmon Treaty without preparing an EIS or an EA and a FONSI and  
25 without providing any other NEPA process;

26           4.       NMFS violated NEPA by adopting and implementing the prey increase program  
27 included in the 2019 SEAK BiOp without preparing an EIS or an EA and a FONSI and without  
28 providing any other NEPA process;  
29

