

HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

BARRY THOM, *et al.*,

Defendants.

and

ALASKA TROLLERS ASSOCIATION,  
and STATE OF ALASKA,

Defendant-Intervenors.

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

DEFENDANT-INTERVENOR ALASKA  
TROLLERS ASSOCIATION'S CROSS-  
MOTION FOR SUMMARY JUDGMENT AND  
RESPONSE

Noting Date: June 16, 2021

ORAL ARGUMENT REQUESTED

**TABLE OF CONTENTS**

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

I. MOTION..... 1

II. INTRODUCTION ..... 1

    A. The Alaska Trollers Association..... 1

    B. Legal Framework..... 2

        1. The Endangered Species Act..... 2

        2. Legal Standard for Standing..... 3

III. STATEMENT OF THE FACTS ..... 4

    A. Pacific Salmon Treaty..... 4

    B. 2019 SEAK BiOp..... 4

    C. Wild Fish Conservancy Claims..... 5

    D. Southern Resident Killer Whale Population..... 6

    E. WFC’s Alleged Standing Regarding SRKW’s..... 7

IV. STANDARD OF REVIEW ..... 8

V. ARGUMENT..... 8

    A. WFC Does Not Have Standing for Its Substantive ESA Claim Pertaining to the SRKW  
    No Jeopardy Determination in the 2019 SEAK BiOp..... 9

        1. The Link Between the SEAK Troll Fishery and the Health of the SRKW Population  
        is Not Fairly Traceable..... 9

        2. WFC’s Alleged Injury Will Continue Unabated Even if the SEAK Troll Fishery is  
        Closed..... 13

    B. WFC’s Remaining Claims Do Not Warrant Shutting Down the Southeast Alaska Troll  
    Fishery..... 14

VI. CONCLUSION..... 16

**TABLE OF AUTHORITIES**

**Cases**

*All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105 (9th Cir. 2018)..... 15

*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)..... 4

*Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000) ..... 10

*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)..... 3

*L. F. v. Lake Washington Sch. Dist. #414*, 947 F.3d 621 (9th Cir. 2020)..... 8

*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)..... 3, 4

*Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005) ..... 11

*Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) ..... 4

*Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725 (9th Cir. 2017)..... 3

*United States v. JP Morgan Chase Bank Account*, 835 F.3d 1159 (9th Cir. 2016)..... 3

*United States v. Phatthey*, 943 F.3d 1277 (9th Cir. 2019)..... 8

*Washington Envtl. Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013)..... 3, 9, 10, 13

*WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148 (9th Cir. 2015) ..... passim

**Statutes**

16 U.S.C. § 1536..... 2, 3

**Rules**

FRCP 56(a) ..... 8

**Regulations**

50 C.F.R. § 402.02 ..... 14

## I. MOTION

1  
2 Plaintiff Wild Fish Conservancy’s (“WFC”) motion for summary judgment (“WFC  
3 MSJ”) (Dkt. No. 91), which requests that the Court vacate the National Marine Fisheries  
4 Service’s (“NMFS”) 2019 Southeast Alaska Biological Opinion (“2019 SEAK BiOp”) and  
5 Incidental Take Statement (“ITS”) that authorize commercial salmon fisheries in southeast  
6 Alaska and enjoin the hatchery production discussed in the 2019 SEAK BiOp, is without merit  
7 and should be denied. Defendant-Intervenor Alaska Trollers Association (“ATA”) hereby cross-  
8 moves for summary judgment and submits that WFC does not have standing to support its  
9 substantive Endangered Species Act (“ESA”) claim that the 2019 BiOp was not in accordance  
10 with law or violated the ESA with respect to the impact of the southeast Alaska (“SEAK”) troll  
11 fishery on the population of the southern resident killer whale (“SRKW”).

12 Pursuant to this Court’s Chamber Procedures, the ATA conferred with Federal  
13 Defendants, Defendant-Intervenor State of Alaska, and WFC over telephone and email between  
14 May 20, 2021 and May 25, 2021. Federal Defendants do not oppose the ATA motion,  
15 Defendant-Intervenor State of Alaska joins the ATA motion, and WFC opposes the ATA  
16 motion. In addition to opposing WFC’s motion and submitting this cross-motion, the ATA  
17 generally joins in the arguments submitted by both Federal Defendants and Defendant-Intervenor  
18 State of Alaska.

## II. INTRODUCTION

### A. The Alaska Trollers Association.

19  
20  
21 The ATA, organized nearly a century ago in 1925, is a non-profit commercial trade  
22 organization based in Juneau, Alaska. Daugherty Decl. (Dkt. No. 35), ¶ 2. The ATA is currently  
23 composed of over 400 members that rely on the southeast Alaska salmon troll fishery for their  
24 economic livelihood. Daugherty Decl., ¶ 2. The ATA and its members rely on the sustainability  
25 of multiple species of salmon, including the Chinook. Daugherty Decl., ¶ 5. Thus, the ATA  
26 serves the dual purposes of protecting the Alaska troll fishery and supporting sound management

1 and conservation of salmon. Daugherty Decl., ¶ 5. The Alaska troll salmon fishery is the second  
2 largest fleet in Alaska—composed of more than 1,000 individual permit holders operating each  
3 year. Olson Decl. (Dkt. No. 39), ¶ 14. The majority of those permit holders are family-owned  
4 businesses and more than 80 percent of them reside in southeast Alaska. Olson Decl., ¶¶ 14-15.  
5 Typically, the communities throughout southeast Alaska rely heavily on the commercial fishing  
6 industry. Olson Decl., ¶ 18. That reliance is currently heightened as the ongoing COVID-19  
7 pandemic has significantly impaired the tourism industry in southeast Alaska. Olson Decl., ¶ 16;  
8 Alaska Trollers’ Brief in Opposition to Prelim Inj. (Dkt. No. 33), 3. In this matter, WFC  
9 threatens closure of the SEAK troll fishery by requesting that the 2019 SEAK BiOp and  
10 accompanying ITS be vacated in order to prevent the SRKW population from starving. *See* WFC  
11 MSJ, 42. That attempt relies on an overstatement of the relationship between the SEAK troll  
12 fishery and the SRKW. The consequences of WFC’s desired outcome would be detrimental to  
13 the communities of southeast Alaska while providing only negligible benefits to the SRKW  
14 population.

15 **B. Legal Framework.**

16 The subject of this cross-motion and response is WFC’s standing for its substantive ESA  
17 claim regarding NMFS’s no-jeopardy finding concerning the SRKW. Accordingly, the relevant  
18 legal standards for standing and jeopardy are discussed below.

19 **1. The Endangered Species Act.**

20 Section 7 of the ESA requires that “[e]ach Federal agency shall...insure that any action  
21 authorized, funded, or carried out by such agency... is not likely to jeopardize the continued  
22 existence of any endangered species or threatened species or result in the destruction or adverse  
23 modification” of critical habitat for such species. 16 U.S.C. § 1536(a)(2). “Agencies proposing  
24 actions that may affect an ESA-listed species must consult with either the NMFS or the FWS—  
25 depending on the species involved—which then reviews the proposed action and prepares a  
26 ‘biological opinion’ (‘BiOp’) that evaluates whether and the extent to which the action may

1 impact the species.” *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878  
 2 F.3d 725, 730 (9th Cir. 2017) (citing 16 U.S.C. § 1536(b)). If an action is not likely to jeopardize  
 3 a species but may nevertheless result in incidental take of a listed a species, the consulting  
 4 agency may permit that take, via an Incidental Take Statement published with the BiOp, ensuring  
 5 that it does not violate the take prohibition of Section 9 of the ESA. *See* 16 U.S.C.  
 6 § 1536(b)(4)(i-iv); *Id.* § 1536(o)(2).

## 7           **2.       Legal Standard for Standing.**

8           “A plaintiff must demonstrate standing for each claim he or she seeks to press and for  
 9 each form of relief sought.” *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir.  
 10 2013). Generally, a plaintiff must satisfy three requirements to establish Article III standing.  
 11 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A  
 12 plaintiff has the burden to demonstrate that “(1) it has suffered an injury in fact that is (a)  
 13 concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the  
 14 injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed  
 15 to merely speculative, that the injury will be redressed by favorable decision.” *Friends of the*  
 16 *Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L.  
 17 Ed. 2d 610 (2000). An association or organization will have standing to bring a suit on behalf of  
 18 its members “if its members would otherwise have standing to sue in their own right, the  
 19 interests at stake are germane to the organization’s purpose, and neither the claim asserted nor  
 20 the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 181.

21           “The precise manner and degree of evidence required to demonstrate standing will vary  
 22 according to the stage of litigation.” *United States v. JP Morgan Chase Bank Account*, 835 F.3d  
 23 1159, 1164 (9th Cir. 2016). “[G]eneral factual allegations of injury resulting from the  
 24 defendant’s conduct may suffice” at the pleading stage. *Defs. of Wildlife*, 504 U.S. at 561. In  
 25 response to a summary judgment motion, a plaintiff “must ‘set forth’ by affidavit or other  
 26 evidence, ‘specific facts,’ which for purposes of the summary judgment will be taken to be true.”

1 *Id.* (quoting FRCP 56(e)); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407-12, 133 S.  
 2 Ct. 1138, 185 L. Ed. 2d 264 (2013) (plaintiff was required to set forth specific facts at the  
 3 summary judgment stage when both parties moved for summary judgment). Lastly, any disputed  
 4 facts regarding standing “must be supported adequately by the evidence adduced at trial.” *Id.*

5 A plaintiff’s burden will also vary depending on the nature of the claims presented.  
 6 Standing may be “substantially more difficult to establish” if the plaintiff is not “the object of the  
 7 government action or inaction” being challenged. *Summers v. Earth Island Inst.*, 555 U.S. 488,  
 8 493-94, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (citing *Defs. of Wildlife*, 504 U.S. at 562). In the  
 9 context of procedural claims, the standing “requirements are relaxed.” *WildEarth Guardians v.*  
 10 *U.S. Dep’t of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015).

### 11 III. STATEMENT OF THE FACTS

#### 12 A. Pacific Salmon Treaty.

13 The management framework at issue implicates the Pacific Salmon Treaty between the  
 14 United States and Canada, first ratified in 1985. AR 47194. The Treaty has been renegotiated in  
 15 1999, 2009, and most recently in 2019. AR 47194-95. Treaty negotiations have repeatedly  
 16 resulted in lowered harvest levels for southeast Alaska fisheries—the 2019 Treaty reduced  
 17 harvest by 7.5 percent after the 2009 Treaty reduced harvests by 15 percent. Lyons Decl. (Dkt.  
 18 No. 34), ¶¶ 10, 27-30.

#### 19 B. 2019 SEAK BiOp.

20 The 2019 SEAK BiOp was issued after NMFS consulted on three federal actions. First,  
 21 NMFS reinitiated consultation on the delegation of management authority over the salmon troll  
 22 fishery and the sport salmon fishery in the SEAK Exclusive Economic Zone to the State of  
 23 Alaska.<sup>1</sup> AR 47198. Second, NMFS consulted concerning federal funding that NMFS may, in its

24 \_\_\_\_\_  
 25 <sup>1</sup> The management authority was delegated to the State of Alaska from the North Pacific Fishery Management  
 26 Council in 1999, and Alaska is required to manage the fisheries in the SEAK Exclusive Economic Zone consistent  
 with a Fish Management Plan, the Magnuson-Stevens Act, the Pacific Salmon Treaty, the ESA, and more.  
 AR 47196, 47198.

1 discretion, disburse through grants to Alaska to “monitor and manage salmon fisheries in State  
 2 and federal waters to meet the obligations of the PST through 2028.” AR 47198. The third action  
 3 was funding for a conservation program for critical prey for the SRKWs—a hatchery prey  
 4 increase program. AR 47201-02. The 2019 SEAK BiOp concluded that none of the actions  
 5 would jeopardize the continued existence of the SRKWs or the listed salmon that the whales  
 6 depend on. AR 47508. Accompanying that no jeopardy conclusion, NMFS issued an ITS that, as  
 7 relevant to this case, permitted the actions at issue to result in incidental take of Chinook Salmon  
 8 and SRKWs.<sup>2</sup> AR 47518-19.

9 **C. Wild Fish Conservancy Claims.**

10 Plaintiff, WFC, is a Washington State non-profit organization. Beardslee Decl. (Dkt. No.  
 11 91-6), ¶ 2. WFC asserts four claims and requests that this Court vacate the 2019 SEAK BiOp and  
 12 accompanying ITS. WFC MSJ, 40. In the claim that is the primary subject of this cross-motion  
 13 and response, WFC alleges that NMFS violated section 7 of the ESA because it did not  
 14 adequately ensure that delegation of authority to Alaska would not jeopardize the SRKW. WFC  
 15 MSJ, 12, 27. In that claim, WFC calls into question the BiOp conclusion that, as summarized by  
 16 WFC, “the Southeast Alaska salmon harvest, along with other west coast fisheries, are not likely  
 17 to jeopardize Southern Residents.” WFC MSJ, 28. *See also* AR 47508 (“[I]t is NMFS’ biological  
 18 opinion that the proposed actions are not likely to appreciably reduce the likelihood of both  
 19 survival and recovery of Southern Resident killer whales....”). Thus, WFC seeks to vacate the  
 20 2019 SEAK BiOp and ITS that allow the SEAK troll fishery to operate, thereby shutting down  
 21 the fishery. *See* WFC MSJ, 40. WFC also claims that NMFS did not adequately assess whether  
 22 the hatchery prey increase program would jeopardize listed salmonids, WFC MSJ, 12, 30; the  
 23 2019 SEAK BiOp is arbitrary and capricious for improperly relying on uncertain mitigation

24 \_\_\_\_\_  
 25 <sup>2</sup> Although the State of Alaska manages the commercial troll fishery in federal and state waters as a single unit,  
 26 AR 00515, only the summer season of the SEAK troll fishery takes place in the federal waters of the Exclusive  
 Economic Zone, AR 00540-41. Therefore, at the very least, WFC’s attempt to vacate the ITS directly implicates the  
 summer troll fishery.



1 factors, WFC MSJ, 12, 21; and NMFS did not undertake the environmental review required by  
2 NEPA, WFC MSJ, 12, 35.

3 **D. Southern Resident Killer Whale Population.**

4 Central to WFC's claims is the status of the endangered SRKW. The record reflects, and  
5 WFC's own expert acknowledges, that "the current small size of the SKRW population was not  
6 caused by lack of salmon," but, rather, it is "due in large part to the legacy of unsustainable live-  
7 capture fishery for display in aquariums." AR 29608. The record also reflects that the SRKW  
8 population needs to achieve a 2.3 percent growth rate to eventually be delisted. AR 38558. The  
9 primary threats to the SRKW population are Chinook prey availability, vessel noise and  
10 disturbance, and persistent chemical contamination. AR 29604. Multiple threats must be  
11 addressed in order to achieve the desired growth rate for the population. AR 29605-06. With  
12 respect to prey availability, the record acknowledges "many potential reasons why not all  
13 foregone Chinook salmon catch would be available to SRKW." AR 38564. Those reasons  
14 include, in part, other predators of Chinook salmon, the fact that harvests are not exclusively of  
15 those stocks most important to SRKW, and low ocean harvest rates of Chinook salmon.  
16 AR 38563. Thus, the link between prey availability and the SRKW population is not as concrete  
17 and linear as WFC implies. *See* Tienson Decl. (Dkt. No. 42), Ex. A, p. 84; Schindler Decl. (Dkt.  
18 No. 36), ¶ 8.i. The manner in which the SEAK troll fishery affects prey availability and the  
19 SRKW population is even less certain. With the exception of the Columbia River brights that  
20 have relatively large run sizes, the [SRKW's] priority stocks are not a high proportion of the  
21 SEAK fisheries catch. AR 47508. The 2019 SEAK BiOp determined that the most important  
22 stocks to the SRKWs, Puget Sound Chinook salmon and lower Columbia River fall stocks, make  
23 up roughly 2 to 3 percent of the total southeast Alaska fishery catch and that catch is "a relatively  
24 lower proportion of the total run size of those stocks." AR 47506.

1 **E. WFC’s Alleged Standing Regarding SRKW’s.**

2 In its motion for summary judgment, WFC attempts to cure the defects of its standing  
 3 arguments during the preliminary injunction briefing with an additional set of declarations. *See*  
 4 WFC MSJ, 46. The declarations submitted by WFC purport to include the “magic words” that  
 5 will satisfy the standing requirements. First, WFC alleges that the health of the SRKW  
 6 population is “germane” to its organizational purposes. WFC MSJ, 46; 2nd Beardslee Decl.,  
 7 ¶¶ 8-10. Second, WFC submits member declarations that allege injuries related to the health of  
 8 SRKW population. One member, William John McMillan, asserts that one of his goals in life,  
 9 seeing an SRKW, remains unfulfilled. 2nd McMillan Decl. (Dkt. No. 91-7), ¶ 7. As alleged by  
 10 McMillan, if the SRKW “population[] increased, [his] chance of seeing one would increase.”  
 11 2nd McMillan Decl., ¶ 7. Another member, Peter W. Soverel, expressed the enjoyment he gets  
 12 from seeing SRKWs at his home or on his annual trip to the San Juan Islands. 2nd Soverel Decl.  
 13 (Dkt No. 91-8), ¶¶ 14-15. In the words of Soverel, he fears there will be “a time in the near  
 14 future” when he will no longer be able to see SRKWs, and if the SRKW “populations  
 15 recovered,” [he] could enjoy them more.” 2nd Soverel Decl., ¶¶ 15-16. Therefore, with respect to  
 16 SRKWs, the gist of the injury alleged by WFC is that if there were more SRKWs, its members  
 17 would be able to see them and enjoy them more in the wild. Here, WFC asserts that that injury  
 18 will be redressed by shutting down the SEAK troll fishery.

19 In addition to the member declarations, WFC also submits declarations of two experts  
 20 retained by WFC to explain the connection between prey availability and the SRKW population.  
 21 *See* Giles Decl. (Dkt. No. 91-3) and 2nd Lacy Decl. (Dkt. No. 91-4). While Dr. Giles explains  
 22 that it would be “impossible” for the SRKW to achieve an average growth rate of 2.3 percent  
 23 without an increase in prey availability, she does not conclude that increasing prey is, alone,  
 24 sufficient to reach the desired growth rate. Giles Decl., ¶ 10. In his declaration, Dr. Lacy  
 25 acknowledges a recent report that identified Chinook abundance as the largest threat the SRKW  
 26 population but found that “relationships of Southern Resident Killer Whale birth and death rates

1 to Chinook abundance ... are weaker than had been reported previously.” 2nd Lacy Decl., ¶ 6.f.  
2 Dr. Lacy, concludes that, due to those weaker relationships, *more* actions are needed to increase  
3 Chinook availability. 2nd Lacy Decl., ¶ 6.f. As an example of how uncertain the analysis  
4 presented by WFC is, a year ago during the preliminary injunction briefing, Dr. Lacy estimated  
5 that there was a 59 percent chance that the population would become “functionally extinct”  
6 within the next 100 years. 2nd Lacy Decl., ¶ 8. Dr. Lacy now estimates that that chance has  
7 dropped to 21 percent. 2nd Lacy Decl., ¶ 8. Dr. Lacy also concludes the 7.5 percent reduction in  
8 catch by the SEAK fishery will “result[] in less than 0.5% increase in the Southern Resident  
9 Killer Whale prey.” 2nd Lacy Decl., ¶ 11. Thus, Dr. Lacy concludes that although increased prey  
10 could support growth of the SRKW population, faster recovery will require focus on reductions  
11 in noise and contamination than focusing on prey abundance alone. 2nd Lacy Decl., ¶¶ 12, 17.  
12 Notably, neither Dr. Giles nor Dr. Lacy conclude that closing the SEAK troll fishery, alone,  
13 would be sufficient to increase the SRKW population, or prevent further declines in that  
14 population.

#### 15 IV. STANDARD OF REVIEW

16 A “court shall grant summary judgment if the movant shows that there is no genuine  
17 dispute as to any material fact and the movant is entitled to the judgment as a matter of law.”  
18 FRCP 56(a). When undertaking such a review, a court will “view[] the evidence in the light most  
19 favorable to the nonmoving party.” *L. F. v. Lake Washington Sch. Dist. #414*, 947 F.3d 621, 625  
20 (9th Cir. 2020).

#### 21 V. ARGUMENT

22 As the moving party, WFC must demonstrate that, viewing the evidence “in the light  
23 most favorable to the nonmoving party,” there are not “genuine issues of material fact” that it has  
24 standing for its ESA claim concerning SRKWs. *United States v. Phatthey*, 943 F.3d 1277, 1280  
25 (9th Cir. 2019) (explaining general standard of review of a summary judgment). Contrary to  
26 WFC’s motion, however, the ATA submits that there are no issues of general material fact that

1 WFC does *not* have standing for that claim. With respect to the remaining portions of WFC’s  
2 motion, WFC has not demonstrated that the vacatur remedy is warranted at the summary  
3 judgment stage.

4 **A. WFC Does Not Have Standing for Its Substantive ESA Claim Pertaining to the**  
5 **SRKW No Jeopardy Determination in the 2019 SEAK BiOp.**

6 Here, viewing the evidence in the light most favorable to WFC, there is no genuine issue  
7 of material fact that WFC’s alleged injury is neither sufficiently causally related to the SEAK  
8 troll fishery nor redressable by the relief sought with WFC’s claim.<sup>3</sup> Thus, WFC does not have  
9 standing to challenge the no jeopardy finding in the 2019 SEAK BiOp with respect to the SRKW  
10 population.

11 The Ninth Circuit has acknowledged that the causation and redressability requirements  
12 “overlap and are two facets of a single causation requirement.” *Washington Env’tl. Council*, 732  
13 F.3d at 1146. Nevertheless, they are distinct in that “causality examines the connection between  
14 the alleged misconduct and injury, whereas redressability analyzes the connection between the  
15 alleged injury and the requested judicial relief.” *Id.*

16 **1. The Link Between the SEAK Troll Fishery and the Health of the SRKW**  
17 **Population is Not Fairly Traceable.**

18 To support its standing, WFC briefly asserts that its members “derive recreational and  
19 aesthetic enjoyment from Puget Sound and its wildlife, and their use and enjoyment are  
20 diminished by NMFS’s violations and by the members’ reasonable concerns about NMFS’s  
21 violation.” WFC MSJ, 46. Thus, according to WFC, its injuries “stem from NMFS’s conduct  
22 addressed herein and are therefore ‘fairly traceable’ to the violations.” WFC MSJ, 46. That  
23 conclusory statement neither supports its motion for summary judgment, nor, in light of the  
24 discussion below, refutes this cross-motion.

25 <sup>3</sup> Because WFC’s arguments are based on injuries to its members and fail to satisfy the causation and redressability  
26 requirements for standing, WFC necessarily does not have organizational standing because its members would not  
have standing to bring a suit on their own for the same reasons.

1            “[T]he causal connection put forward for standing purposes cannot be too speculative, or  
2 rely on conjecture about the behavior of other parties, but need not be so airtight... as to  
3 demonstrate that the plaintiffs would succeed on the merits.” *Ecological Rights Found. v. Pac.*  
4 *Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000). Standing does not require that the challenged  
5 action “be the sole source of injury,” and “[a] causal chain does not fail simply because it has  
6 several links, provided those links are not hypothetical or tenuous and remain plausible.”  
7 *Washington Env'tl. Council*, 732 F.3d at 1141-42. Further, “a litigant challenging an agency  
8 action need not eliminate any other contributing causes to establish its standing.” *WildEarth*  
9 *Guardians*, 795 F.3d at 1157 (9th Cir. 2015). But “where the causal chain involves numerous  
10 third parties whose independent decisions collectively have a significant effect on plaintiffs’  
11 injuries, the causal chain is too weak to support standing.” *Washington Env'tl. Council*, 732 F.3d  
12 at 1142 (ellipses omitted).

13            In *Washington Env'tl. Council*, the Ninth Circuit determined that the plaintiffs did not  
14 have standing because plaintiffs had relied on “an attenuated chain of conjecture” to satisfy the  
15 causality requirement. *Id.* at 1143. In that case, the plaintiffs challenged an agency’s lack of  
16 regulation of five oil refineries in Washington, alleging that the greenhouse gas pollution from  
17 those refineries caused recreational, aesthetic, economic, and health injuries. *Washington Env'tl.*  
18 *Council*, 732 F.3d at 1135, 1139-40. The court noted that, although the challenged conduct may  
19 have demonstrated environmental injury, that alone was insufficient to establish that the  
20 plaintiffs’ localized injuries were “fairly traceable” to the challenged conduct. *Id.* at 1144. The  
21 court emphasized that the five oil refineries were responsible for nearly six percent of  
22 Washington’s emissions, an amount that was “scientifically indiscernible” in the context of  
23 global climate change. *Id.* at 1143-44. Ultimately, “the causal chain [was] too tenuous to support  
24 standing” because “a multitude of independent third parties [were] responsible for the changes  
25 contributing to Plaintiffs’ injuries.” *Id.* at 1144. In cases where the Ninth Circuit has concluded  
26 there is sufficient causation when there are multiple causes to the injury, the court has

1 emphasized the traceability of the injury to the challenged conduct. *See WildEarth Guardians*,  
2 795 F.3d at 1158 (noting that there were “at most two causes” to the alleged injury and the  
3 conduct at issue “contribute[d] very discernibly to that injury”); *Ocean Advocates v. U.S. Army*  
4 *Corps of Engineers*, 402 F.3d 846, 860 (9th Cir. 2005) (acknowledging that “other factors may  
5 also cause additional tanker traffic and increase the attendant risk of an oil spill” but emphasizing  
6 that “the link between the new [oil] platform and increased traffic [was] not tenuous or  
7 abstract”).

8 Here, the record reflects the tenuous connection between the ability for WFC members to  
9 view SRKWs and the operations of the SEAK troll fishery. According to WFC’s expert, Dr.  
10 Giles, in addition to the natural threats affecting the SKRW population, the primary  
11 anthropogenic threats include prey limitation, acoustic and physical disturbance, and PCB  
12 contamination. AR 29607. The ATA does not dispute that salmon abundance is a key factor  
13 affecting SRKW population dynamics. *See* AR 29607. Rather, the ATA challenges WFC’s  
14 characterization of the relationship between Chinook salmon, the SEAK troll fishery, and the  
15 SRKW population. The 2019 Pacific Salmon Treaty reduced the SEAK troll fishery catch up to  
16 7.5 percent from the catch allowed in the previous decade under the prior agreement. AR 47445.  
17 The 2019 SEAK BiOp concludes that that harvest reduction will “reduce[] effects to prey  
18 availability under the 2019 Agreement than under the previous regime.” AR 47504. That  
19 reduction comes on the heels of previous significant reductions in prior iterations of the Treaty—  
20 the allowable catch for SEAK troll fishery has reduced by 45 percent since the Treaty first took  
21 effect. Lyons Decl., ¶ 28. Thus, this is not an instance where the SEAK troll fishery is recklessly  
22 harvesting unchecked. Rather, WFC seeks the extreme outcome of closing the SEAK troll  
23 fishery, and that does not align with the sacrifices already made and the actual effects that such  
24 harvests have on the SRKW.

25 In light of the other threats affecting the SRKW population and salmon abundance, any  
26 influence that the SEAK troll fishery has on prey availability for the sustainability and growth of

1 the SRKW population is scientifically indiscernible for the purposes of standing. The record  
2 details other factors that affect the link between the SEAK troll fishery and the SRKW  
3 population. The SRKW compete for prey with northern resident killer whales, seals, and sea  
4 lions. AR 38558. Further, the long-term viability of salmon is affected by habitat impacts such as  
5 floods, landslides, and droughts. AR 47345. There are also many other anthropogenic activities  
6 that may reduce prey to SRKW in addition to harvests, including agriculture, forestry, marine  
7 construction, levy maintenance, shoreline armoring, dredging, and hydropower operations and  
8 new development. AR 47347. With respect to harvests, salmon abundance is affected by fishing  
9 in Alaska State waters, Canadian fisheries, and fisheries in the Pacific Northwest. Schindler  
10 Decl., ¶ 8.h.

11 In the context of those factors, the SEAK troll fishery catch has a tenuous link to the  
12 SRKW population. As mentioned, the SEAK troll fishery catch is a relatively lower proportion  
13 of the total run size of the stocks most valued by SRKW. AR 47506. WFC emphasizes that the  
14 2019 SEAK BiOp estimates that the SEAK fisheries may reduce SRKW prey by 12.9 percent.  
15 WFC MSJ, 19. However, the 2019 SEAK BiOp presents a broad range of potential effects,  
16 estimating that the effects of SEAK fishery harvests could reduce SRKW prey in coastal waters  
17 by as little as 0.2 percent, or as much as 12.9 percent in an extreme scenario. WFC MSJ, 19;  
18 AR 47439-40. Additionally, the 2019 SEAK BiOp estimated that the potential reductions of prey  
19 in inland waters could range from 0.1 percent to 2.5 percent. AR 47440. The 2019 SEAK BiOp  
20 also explains that “[a]lthough the proposed SEAK fisheries could result in up to 12.9% reduction  
21 in the prey available to the whales in their coastal range, this would likely occur rarely and  
22 during a time period when the whales are more often observed in inland waters.” AR 47445.  
23 “Furthermore, these greater prey reductions in coastal waters would be spread across a larger  
24 portion of the geographic range of Southern Residents.” AR 47445. Thus, given the many factors  
25 affecting salmon abundance and the specific stocks that the SEAK troll fishery targets, the  
26 challenged NMFS action pertaining to the SEAK troll fishery has an attenuated connection to the

1 population of the SRKW. Stated differently, WFC has failed to demonstrate that the  
2 indiscernible number of salmon that may be SRKW prey if not for SEAK troll fishery, let alone  
3 summer troll fishery, harvests is fairly traceable to the alleged injuries regarding the ability to see  
4 SRKWs in the wild.

5 **2. WFC’s Alleged Injury Will Continue Unabated Even if the SEAK Troll**  
6 **Fishery is Closed.**

7 In asserting that it has met the redressability requirement, WFC identifies that it must  
8 show a likelihood that its injury will be redressed by a favorable decision. WFC MSJ, 46.  
9 However, WFC only argues that its “injuries are redressable by an order from the Court because  
10 proper ESA and NEPA analysis could influence agency actions.” *Id.* Importantly, that standard is  
11 the required showing for redressability for a procedural claim. *See WildEarth Guardians*, 795  
12 F.3d at 1155. Thus, like the causation requirement, WFC’s arguments are insufficient to establish  
13 standing or to refute a lack of standing.

14 As mentioned, the redressability analysis effectively mirrors the causation analysis. *See*  
15 *Washington Env’tl. Council*, 732 F.3d at 1146 (concluding that the plaintiffs failed to meet the  
16 redressability requirement “for many of the same reasons they fail[ed] to meet the causality  
17 requirement”). In *Washington Env’tl. Council*, the court concluded that the plaintiffs’ injuries  
18 were “likely to continue unabated” even if the plaintiffs had received the remedy that they  
19 sought. *Id.* at 1147. Thus, in order for a plaintiff to satisfy the redressability requirement, there  
20 must be evidence in the record that demonstrates a “substantial likelihood” that the injury will be  
21 redressed if the plaintiffs receive a favorable decision. *Id.* at 1146. In the same case, the Ninth  
22 Circuit emphasized that the agency did not pursue the actions desired by the plaintiffs, but  
23 “decided to use its limited resources to pursue other efforts” to address the emissions issues  
24 implicated by the plaintiffs’ alleged injuries. *Id.*

25 Here, the record is devoid of evidence demonstrating a “substantial likelihood” that the  
26 Plaintiffs may be more likely to see SRKW if the SEAK troll fishery is closed. Dr. Giles states



1 that “[i]t is essentially impossible to meet NMFS’ recover goal of an average growth rate of  
 2 2.3% in the Southern Resident killer whale population without increasing the abundance of  
 3 Chinook available to the Southern Residents as prey.<sup>4</sup> Giles Decl., ¶ 10. Assuming that  
 4 conclusion is true, it does not mean that closing the SEAK troll fishery will necessarily result in a  
 5 meaningful increase in prey for the SRKW. In fact, the record reflects that reducing Chinook  
 6 salmon fisheries will not achieve that desired growth rate for the SRKWs. *See* AR 38558. If the  
 7 fishery was closed, the Chinook that would have otherwise been caught by the fishery would still  
 8 have to survive fishing efforts in Alaska state waters, Canadian fisheries, northern resident killer  
 9 whales, fisheries in the Pacific Northwest, and other threats in order to be available prey to the  
 10 SRKW. Schindler Decl., ¶ 8.h. Only a “trivial amount” of Chinook may become SRKW prey if  
 11 the SEAK troll fishery was closed. Schindler Decl., ¶¶ 8-9. Ultimately, the 2019 SEAK BiOp  
 12 represents an effort by NMFS to use its limited resources to address the SRKW population while  
 13 maintaining the SEAK troll fishery. Even if the SEAK troll fishery was shut down in response to  
 14 WFC’s claims, WFC’s injuries related to the inability to see SRKW in the wild would continue  
 15 unabated. Accordingly, shutting down the SEAK troll fishery could not redress WFC’s injuries  
 16 so that its members could see more SRKWs in the wild.

17 **B. WFC’s Remaining Claims Do Not Warrant Shutting Down the Southeast Alaska**  
 18 **Troll Fishery.**

19 Regardless of whether WFC has demonstrated sufficient standing on its remaining  
 20 claims, the ATA submits that the relief sought by WFC at the summary judgment stage is not  
 21 warranted. WFC alleges that the 2019 BiOp and the Incidental Take Statement should be vacated  
 22 as unlawful actions under the Administrative Procedure Act (“APA”) due to NMFS’s ESA and  
 23 NEPA violations. WFC MSJ, 40. “A federal court is not required to set aside every unlawful  
 24

25 <sup>4</sup> The actions contemplated by the 2019 SEAK BiOp are not required to achieve a 2.3 percent growth rate or  
 26 guarantee recovery for the SRKW. Rather, the ESA requires NMFS to ensure that an action does not “[j]eopardize  
 the continued existence” of a species—meaning it will not “reduce appreciably the likelihood of both the survival  
 and recovery of a listed species.” 50 C.F.R. § 402.02.

1 agency action and the decision to grant or deny injunctive or declaratory relief under [the] APA  
2 is controlled by principles of equity.” *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d  
3 1105, 1121 (9th Cir. 2018). Here, the equities do not warrant the extreme relief sought by WFC’s  
4 remaining claims and WFC has not established that there are no issues of genuine material fact  
5 that would preclude a summary judgment.<sup>5</sup>

6 WFC alleges that NMFS did not properly consider potential harm from the hatchery prey  
7 increase program in reaching a “no jeopardy” determination in the 2019 SEAK BiOp for  
8 threatened salmonids. WFC MSJ, 30-34. WFC acknowledges that NMFS considered salmon  
9 harvests, including from the SEAK troll fishery, in reaching a “no jeopardy” conclusion. WFC  
10 MSJ, 31. Thus, to the extent that WFC seeks additional analysis related to the prey increase  
11 program, closing the SEAK troll fishery will not redress WFC’s procedural injury that is  
12 unrelated to the troll fishery.

13 WFC also alleges a procedural claim that NMFS violated NEPA by failing to conduct  
14 any NEPA analysis for authorizing take under the 2019 Pacific Salmon Treaty and failing to  
15 conduct a NEPA analysis for the prey increase program. WFC MSJ, 35. Similarly, the prey  
16 increase program is unrelated to the SEAK troll fishery and, thus, any potential procedural errors  
17 related to that analysis cannot justify shutting down the SEAK troll fishery. That is particularly  
18 true in light of the equities in this case. WFC maintains that any harms from vacatur would not  
19 significantly outweigh the magnitude of NMFS’s error in this case in light of the SRKW’s  
20 endangered status. WFC MSJ, 41-42. That argument, however, overstates the tenuous link  
21 between the SEAK troll fishery and the SRKW and fails to appreciate the severe impacts a  
22 vacatur would have on the communities of southeast Alaska. Only a “trivial amount” of the  
23 foregone SEAK troll fishery may end up becoming prey for the SRKW. Schindler Decl., ¶ 8.i.  
24 On the contrary, the effects of vacatur on the communities of southeast Alaska would be direct

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26 <sup>5</sup> The ATA incorporates and adopts the State of Alaska’s and NMFS’s arguments as to why WFC has failed to demonstrate that summary judgment is warranted on its remaining claims.

1 and severe. Closing the SEAK troll fishery would affect over 1,400 men and women who fish for  
2 a living, and another 250 seafood processing plant workers. Calvin Decl. (Dkt. No. 41), ¶¶ 4-5;  
3 Donohoe Decl. (Dkt. No. 37), ¶¶ 3-5; Watson Decl. (Dkt. No. 40), ¶¶ 3-5. The total economic  
4 impact of closing the SEAK troll fishery on the local community has been estimated to be  
5 approximately \$85 million. Olson Decl., ¶ 19. Accordingly, the equities do not support vacatur to  
6 remedy a procedural error of a fully informed agency decision.

7 Further, for the reasons laid out by the State of Alaska and NMFS, NMFS was not  
8 required to conduct a NEPA analysis before issuing its Incidental Take Statement. Accordingly,  
9 WFC cannot establish that there are no genuine issues of material fact that it has procedural  
10 standing to vacate the Incidental Take Statement. The redressability requirement for standing, in  
11 the context of a procedural injury, “is satisfied when the relief requested—that the agency follow  
12 the correct procedures—may influence the agency’s ultimate decision.” *WildEarth Guardians*,  
13 795 F.3d at 1156. Here, WFC has not successfully demonstrated that, under the summary  
14 judgment standard, NMFS did not follow the correct procedures. As a result, the vacatur that  
15 WFC seeks is not appropriate at the summary judgment stage.

## 16 VI. CONCLUSION

17 WFC’s motion for summary judgment overstates the connection between the SEAK troll  
18 fishery and the health of the SRKW population. In doing so, WFC does not have standing to seek  
19 the relief identified in its motion. Additionally, the relief that WFC seeks is inappropriate at the  
20 summary judgment stage because the equities do not weigh in favor of vacating the 2019 SEAK  
21 BiOp and ITS. Accordingly, the ATA respectfully submits that the Court deny WFC’s motion  
22 for summary judgment and grant the ATA’s cross-motion.

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DATED this 26th day of May, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Western District of Washington using the CM/ECF system. Participants who are registered with CM/ECF will be served by the CM/ECF system.

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DEFENDANT-INTERVENOR ALASKA TROLLERS  
 ASSOCIATION'S CROSS-MOTION FOR SUMMARY  
 JUDGMENT AND RESPONSE -- 18

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I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge.

DATED May 26, 2021, in Seattle, Washington.

/s Eliza Hinkes  
Eliza Hinkes, Paralegal