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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF FISH & WILDLIFE; KELLY SUSEWIND, in his official capacity as the Director of the Washington Department of Fish & Wildlife; LARRY CARPENTER, in his official capacity as Chair of the Washington Fish & Wildlife Commission; BARBARA BAKER, in her official capacity as Vice Chair of the Washington Fish & Wildlife Commission; JAMES ANDERSON, in his official capacity as a member of the Washington Fish & Wildlife Commission; LORNA SMITH, in her official capacity as a member of the Washington Fish & Wildlife Commission; FRED KOONTZ, in his official capacity as a member of the Washington Fish & Wildlife Commission; MOLLY LINVILLE, in her official capacity as a member of the Washington Fish & Wildlife Commission; DONALD MCISAAC, in his official capacity as a member of the Washington Fish & Wildlife Commission; and KIM THORNBURN, in her official capacity as a member of the Washington Fish & Wildlife Commission,

Defendants.

Case No. 2:21-cv-00169

COMPLAINT

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INTRODUCTION

1. The State of Washington declared steelhead the official state fish in 1969. Despite that designation, wild Puget Sound steelhead have declined precipitously since that time. The average region-wide abundance between 1980 and 2004 was less than four percent of levels present in 1900. Puget Sound steelhead have continued to decline since being listed as a threatened species under the Endangered Species Act ("ESA") in 2007. The most recent five-year average puts Puget Sound steelhead abundance at less than three percent of historical levels.

2. It was once believed that hatchery production could replace salmonid-sustaining ecosystems and provide an abundance of fish. It is now understood that, not only have hatcheries failed to meet those expectations, but they have contributed to the decline of wild salmonids. Hatchery fish harm wild salmonid populations and their ability to recover through a variety of mechanisms, including genetic introgression and ecological interactions. Genetic introgression occurs when hatchery fish spawn with wild fish and thereby transfer their maladapted (domesticated) genetic traits to the wild salmonid populations. Ecological interactions occur when hatchery fish compete with wild fish for resources, such as food and territory.

3. Defendants the Washington Department of Fish and Wildlife, its Director, and the members of the Washington Fish and Wildlife Commission (collectively, "WDFW") implement hatchery programs in the Puget Sound region using highly domesticated stocks known as "Skamania" summer steelhead and "Chambers Creek" winter steelhead. The National Marine Fisheries Service ("NMFS") excluded those stocks when it listed the Puget Sound steelhead distinct population segment ("DPS") as a threatened species under the ESA in 2007 because those hatchery stocks are genetically diverged from the local native populations. 72 Fed. Reg. 26,722, 26,722 (May 11, 2007). This divergence increases the potential for passing on maladaptive traits to ESA-listed Puget Sound steelhead, thereby undermining recovery efforts. NMFS also found that efforts to prevent natural spawning of those hatchery fish is unlikely to be completely effective, "with significant potential to reduce natural productivity." *Id*. at 26,728.

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Despite these findings, WDFW continued to implement hatchery programs using these out-of-basin stocks and without undergoing review, approval, and restrictions required by the ESA.

4. Wild Fish Conservancy sued WDFW for operating these programs in violation of the ESA; first in 2014 for the Chambers Creek winter steelhead programs and then in 2019 for the Skamania summer steelhead programs. The consent decree reached in the latter of those lawsuits required WDFW to, *inter alia*, discontinue releases of Skamania summer steelhead in Puget Sound watersheds that are not authorized under the ESA with the exception of one final release in 2019 to the North Fork Stillaguamish River and several releases to the Skykomish River. For the Skykomish River, the consent decree allows for decreasing annual releases that terminate with a release of 40,000 fish in 2022, after which releases are prohibited unless they have been approved under the ESA.

5. Apparently determined to maintain an artificial steelhead propagation program on the Skykomish River to support recreational fishing, WDFW submitted a hatchery and genetic management plan ("HGMP") dated April 12, 2019 to NMFS proposing to implement an "integrated" South Fork Skykomish River summer steelhead program. As WDFW's HGMP for this new hatchery program recognizes, this hatchery program will "take" ESA-listed salmonids. WDFW nonetheless commenced its new summer steelhead hatchery program on the South Fork Skykomish River before NMFS reviewed the HGMP and before NMFS or the United States Fish and Wildlife Service ("FWS") authorized the new program to "take" ESA-listed species.

6. WDFW's implementation of this program in the absence of ESA-review or approval follows a long and disconcerting pattern of the agency's willingness to violate the ESA's prohibition on unauthorized "take" of protected species when it comes to artificial fish propagation.

7. Plaintiff Wild Fish Conservancy is concerned that the continued implementation of the South Fork Skykomish River summer steelhead hatchery program, along with other WDFW hatchery programs in the Puget Sound region, are harming wild salmonids and their

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ability to recover, including threatened Puget Sound steelhead. Moreover, Wild Fish Conservancy is disconcerted by WDFW's pattern showing the agency's willingness to violate the ESA's prohibition against unauthorized "take" of protected species within the context of artificial fish propagation.

8. This action challenges WDFW's failure to comply with the ESA in its implementation of the South Fork Skykomish River summer steelhead program. Wild Fish Conservancy seeks declaratory and injunctive relief requiring WDFW to comply with the ESA and an award of litigation expenses, including fees and costs.

JURISDICTION AND VENUE

9. This Court has jurisdiction under section 11(g) of the ESA, 16 U.S.C. § 1540(g) (citizen suit), and 28 U.S.C. § 1331 (federal question). The requested relief is also proper under 28 U.S.C. § 2201 (declaratory relief) and 28 U.S.C. § 2202 (injunctive relief). As required by the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), Wild Fish Conservancy provided 60 days' notice of its intent to sue to WDFW and the Secretaries of the United States Department of Commerce and the United States Department of the Interior through a letter dated and postmarked December 2, 2020. A copy of that letter is attached as **Exhibit 1** to this complaint and incorporated herein by this reference.

10. The Western District of Washington is the proper venue under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A) because the violations alleged, and/or substantial parts of the events and omissions giving rise to the claim, occurred and are occurring within such District. This matter is properly assigned to a District Judge in Seattle under LCR 3(d) because a substantial part of the events and omissions that give rise to the claim occurred within a county for which actions are assigned to a district judge in Seattle. Specifically, the challenged hatchery program is implemented primarily in Snohomish County.

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PARTIES

11. Plaintiff Wild Fish Conservancy is a membership-based 501(c)(3) nonprofit organization incorporated in the State of Washington with its principal place of business in Duvall, Washington. Wild Fish Conservancy is dedicated to the preservation and recovery of Washington's native fish species and the ecosystems upon which those species depend. Wild Fish Conservancy brings this action on behalf of itself and its approximately 2,400 members. Wild Fish Conservancy changed its name from "Washington Trout" in 2007. As an environmental watchdog, Wild Fish Conservancy actively informs the public on matters affecting water quality, fish, and fish habitat in the State of Washington through publications, commentary to the press, and sponsorship of educational programs. Wild Fish Conservancy also conducts field research on wild fish populations and has designed and implemented habitat restoration projects. Wild Fish Conservancy advocates and publicly comments on federal and state actions that affect the region's native fish and ecosystems. Wild Fish Conservancy routinely seeks to compel government agencies to follow the laws designed to protect native fish species, particularly threatened and endangered species.

12. Wild Fish Conservancy's members regularly spend time in areas in and around Puget Sound and its tributaries, including the Skykomish and Snohomish Rivers and other watersheds where WDFW's hatchery steelhead programs are implemented. Wild Fish Conservancy's members intend to continue to visit these areas on a regular basis, including in the summer of 2021 and beyond. These members observe, study, photograph, and appreciate wildlife and wildlife habitat in and around these waters. These members also fish, hike, camp, swim, and snorkel in and around these waters. Wild Fish Conservancy's members would like to fish in these waters for wild Puget Sound steelhead, wild Puget Sound Chinook salmon, and wild bull trout, or increase opportunities for such activities, if those species were able to recover to a point where such activities would not impede the species' conservation and restoration.

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13. Wild Fish Conservancy's members derive scientific, educational, recreational, health, conservation, spiritual, and aesthetic benefits from Puget Sound, its tributaries, the surrounding areas, and from wild native fish species in those waters and from the existence of natural, wild, and healthy ecosystems.

14. The past, present, and future enjoyment of Wild Fish Conservancy's interests and those of its members, including the recreational, aesthetic, spiritual, and scientific interests, have been, are being, and will continue to be harmed by WDFW's failures to comply with the ESA as described herein and by Wild Fish Conservancy's members' reasonable concerns related to WDFW's violations. These injuries include reduced enjoyment of time spent in and around the waters described above, fewer visits to those areas than would otherwise occur, and refraining from engaging in certain activities while visiting these areas, such as fishing, than would otherwise occur. These injuries also include an inability to fish for wild salmonids due to their depressed status.

15. Wild Fish Conservancy's injuries and those of its members are actual, concrete and/or imminent, and are fairly traceable to WDFW's violations of the ESA as described herein that the Court may remedy by declaring that WDFW's omissions and actions are illegal and issuing injunctive relief requiring WDFW to comply with its statutory obligations. Wild Fish Conservancy's members will benefit from increased enjoyment of time spent in and around the waters described above and/or will visit the areas more frequently if WDFW is required by the Court to comply with the ESA.

16. Defendant Washington Department of Fish and Wildlife is an agency of the State of Washington that owns and implements the South Fork Skykomish River summer steelhead hatchery program challenged herein.

17. Defendant Kelly Susewind is the Director of the Washington Department of Fish and Wildlife and is being sued in that official capacity. As the Director of the agency, Mr. Susewind is responsible for ensuring that the agency complies with applicable laws, is

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responsible for overseeing the implementation of the challenged South Fork Skykomish River summer steelhead hatchery program, and could respond to injunctive relief orders from this Court related to the challenged hatchery program.

18. Defendants Larry Carpenter, Barbara Baker, James Anderson, Lorna Smith, Fred Koontz, Molly Linville, Donald McIsaac, and Kim Thornburn are the Commissioners of the Washington Fish and Wildlife Commission and are being sued in that official capacity. As the Commissioners of the Washington Fish and Wildlife Commission, they are responsible for ensuring that the Washington Department of Fish and Wildlife complies with applicable laws, are responsible for overseeing the implementation of the challenged South Fork Skykomish River summer steelhead hatchery program, and could respond to injunctive relief orders from this Court related to the challenged hatchery program.

BACKGROUND

I. The Endangered Species Act.

19. The ESA is a federal statute enacted to provide a program to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). "Conserve," as used is in the ESA, means to use all methods and procedures necessary to bring threatened and endangered species to a point where the protections afforded by the statute are no longer necessary. 16 U.S.C. § 1532(3).

20. The ESA assigns certain implementation responsibilities to the Secretaries of the United States Department of the Interior and the United States Department of Commerce, which have delegated these duties to the Director of FWS and the Assistant Administrator for Fisheries of NMFS, respectively.

21. Section 4 of the ESA requires FWS and NMFS to determine whether species are threatened or endangered of extinction and to list species as such under the statute. 16 U.S.C. §§ 1533(a)(1) and (c)(1). Such a listing triggers various protective measures intended to

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conserve the species, including the designation of critical habitat and the preparation of a recovery plan. 16 U.S.C. §§ 1533(a)(3) and (f).

22. Section 9 of the ESA makes it unlawful for any person to "take" species listed under the statute as endangered. 16 U.S.C. § 1538(a)(1). The take prohibition has been applied to certain species listed as threatened under the statute though regulations promulgated under section 4(d) of the ESA, 16 U.S.C. § 1533(d). 50 C.F.R. §§ 223.102, 223.203(a); 50 C.F.R. §§ 17.21, 17.31(a). Section 9 of the ESA prohibits a violation of those regulations. 16 U.S.C. § 1538(a)(1)(G).

23. "Take" is defined broadly under the ESA to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

24. "Harass" is defined to include an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3.

25. "Harm" is defined to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3; 50 C.F.R § 222.102.

26. Section 10 of the ESA provides a mechanism by which NMFS and FWS may issue permits exempting from liability under section 9 of the ESA the take of threatened or endangered species associated with activities intended to enhance the propagation or survival of the affected species. 16 U.S.C. § 1539(a)(1)(A). Such permits are issued upon consideration of several factors, including the effects the activity would have on wild populations and whether the proposed activity would conflict with other programs intended to enhance the survival probabilities of the species. 50 C.F.R. § 17.22(a)(2); 50 C.F.R. § 222.308(c).

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27. Section 10 of the ESA also allows for the issuance of permits exempting from liability under section 9 the take of threatened or endangered species incidental to projects determined by NMFS or FWS not to appreciably reduce the likelihood of survival and recovery of the protected species. 16 U.S.C. § 1539(a)(2)(B)(iv); 50 C.F.R. § 222.307(c)(2)(iii); 50 C.F.R. § 17(b)(2)(i)(D). Parties seeking such a permit are required to develop a habitat conservation plan that will minimize adverse effects to ESA-listed species. 16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. § 17.22(b)(1)(iii); 50 C.F.R. § 222.307(b)(5).

28. NMFS has promulgated regulations under section 4(d) of the ESA that apply the take prohibition of section 9 of the ESA to certain salmonid species—known as the "4(d) Rule"—while also providing exemptions from that take prohibition—known as the "4(d) Limits." 50 C.F.R. § 223.203. One such exemption is for artificial propagation programs for which a HGMP has been approved by NMFS as meeting detailed criteria. 50 C.F.R. § 223.203(b)(5). Another exemption exists for joint State-Tribe resource management plans implementing treaty fishing rights that have undergone a NMFS review and approval process. 50 C.F.R. § 223.203(b)(6).

29. Section 7 of the ESA imposes substantive and procedural requirements on federal actions. *See* 50 C.F.R. § 402.03. Substantively, it mandates that federal agencies "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification" of such species' critical habitat. 16 U.S.C. § 1536(a)(2); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

30. Procedurally, section 7 of the ESA requires an agency planning an action that "may affect" listed species (the "action agency") to consult with NMFS and/or FWS (the "consulting agency"). 50 C.F.R. § 402.14(a). Such consultation is intended to facilitate compliance with the substantive mandate. *See Thomas v. Peterson*, 753 F.2d 754, 763–65 (9th

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Cir. 1985), *abrogated on other grounds*, *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091–92 (9th Cir. 2015).

31. Consultation under section 7 of the ESA results in the consulting agency's issuance of a biological opinion ("BiOp") determining whether the action is likely to jeopardize listed species or adversely modify critical habitat. 50 C.F.R. § 402.14(h)(3); *see id.* § 402.02. If jeopardy and adverse modification are not likely, the BiOp includes an incidental take statement ("ITS") defining the "take" anticipated from the action. 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(*i*)(1)(i). The ITS also includes requirements to minimize impacts to species and to monitor the take that occurs. 16 U.S.C. § 1536(b)(4)(C)(iii), (iv); 50 C.F.R § 402.14(*i*)(1)(ii), (*i*)(1)(iv), (*i*)(3); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531–32 (9th Cir. 2010). Take in compliance with an ITS is exempt from liability under section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(*i*)(5).

32. NMFS's approval of an HGMP under the 4(d) Rule for salmonids is an action that requires consultation under section 7 of the ESA and therefore generally requires a BiOp.

33. NMFS's issuance of a take permit under section 10 of the ESA is also an action that generally requires consultation under section 7 of the ESA and therefore generally requires a BiOp.

34. NMFS's 4(d) Rule for salmonids that provides for the 4(d) Limits specifies that those limits provide an affirmative defense to a claim alleging that the activity is causing "take" in violation of section 9 of the ESA. 50 C.F.R. § 223.203(c). Specifically, the regulation provides: "Affirmative Defense. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section (which applies the ESA section 9 "take" prohibition) with respect to the threatened West Coast salmon ESUs and steelhead DPSs . . . , any person claiming the benefit of any limit listed in paragraph (b) of this section or § 223.204(a) shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an

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affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation." *Id.*

35. Parties claiming an exemption from liability for take of ESA-listed species through an incidental take statement issued under section 7 of the ESA or a take permit issued under section 10 of the ESA have a similar burden to that under the salmonid 4(d) Rule. Section 10(g) of the ESA provides: "Burden of Proof. In connection with any action alleging a violation of [section 9 of the ESA], any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation." 16 U.S.C. § 1539(g).

II. Factual Background.

A. ESA-Listed Species and Designated Critical Habitat.

36. The Puget Sound DPS of steelhead was listed as a threatened species in 2007. 72 Fed. Reg. 26,722 (May 11, 2007); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014) (revision to listing); 50 C.F.R. § 223.102. NMFS has applied the ESA section 9 take prohibition to this species. 50 C.F.R. §§ 223.102, 223.203(a).

37. The Puget Sound Chinook salmon evolutionarily significant unit ("ESU") is listed as a threatened species. 64 Fed. Reg. 14,308 (Mar. 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014) (revision to listing); 50 C.F.R. § 223.102. NMFS has applied the ESA section 9 take prohibition to this species. 50 C.F.R. §§ 223.102, 223.203(a).

38. The coterminous United States bull trout population is listed as a threatened species. 64 Fed. Reg. 58,910 (Nov. 1, 1999). FWS has applied the ESA take prohibition to this species. 50 C.F.R. §§ 17.21, 17.31(a).

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B. South Fork Skykomish River summer steelhead hatchery program.

39. WDFW's HGMP for the new South Fork Skykomish summer steelhead hatchery program explains that WDFW will develop stock by collecting up to 30% of the wild, natural-origin, summer steelhead returning to the Sunset Falls fishway, or up to 120 fish, during the first 4 years of the program. Those adult steelhead will be trapped from July through October and held in captivity at Reiter Ponds and/or Wallace River hatchery facilities until ready to be spawned. Once ripe, WDFW will lethally or live spawn the fish at those hatcheries.

40. The new hatchery program will target an annual release of 116,000 yearling steelhead from Reiter Ponds and/or the Wallace River hatchery facilities. Once adult hatchery summer steelhead begin to return to the Skykomish River from this new program, WDFW will incorporate those hatchery-origin fish into the broodstock, along with the natural-origin steelhead.

41. WDFW's HGMP provides that South Fork Skykomish summer steelhead are not recognized as a demographically independent population ("DIP") and asserts that they are therefore not included in the ESA-listed Puget Sound steelhead DPS.

42. However, the HGMP also explains that an objective of this program is to conserve and recover the immediately adjacent North Fork Skykomish River summer steelhead DIP, which is included within the ESA-listed Puget Sound steelhead DPS. Further, the South Fork Skykomish River, above and below Sunset Falls, is designated as critical habitat for threatened Puget Sound steelhead. *See* 50 C.F.R. § 226.212(a)(15), (u)(7)(i). Salmonids generally, and summer steelhead especially, stray to non-natal freshwater bodies before spawning in their natal streams.

43. It is therefore almost certain that some of the fish trapped at Sunset Falls are North Fork Skykomish River summer steelhead or another DIP recognized as part of the threatened Puget Sound steelhead DPS protected under the ESA. WDFW admitted as much

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when it identified broodstock collection activities at Sunset Falls as an activity that may lead to take of ESA-listed species.

44. WDFW nonetheless commenced this new hatchery program, catching and killing wild summer steelhead for broodstock, prior to NMFS reviewing and approving the HGMP and prior to NMFS or FWS providing an authorization for WDFW to "take" ESA-listed species.

45. Available data indicate that WDFW began removing wild steelhead from the South Fork Skykomish River for this new program in the summer of fall of 2019. Data obtained from WDFW's In-Season Hatchery Escapement Reports indicate the following transfers (capture and live-ship via truck) of "wild, W" steelhead were made from the South Fork Skykomish Sunset Falls Fishway to the Reiter Ponds, a Summer Steelhead Program located on the Skykomish River:

- April 16, 2020 report: 52 W (final in-season estimate); and
- November 25, 2020 report: 36 W.

46. Of the wild steelhead held in Reiter Ponds between October 2019 and March 2020, 29 were lethally spawned on or about March 19, 2020 and 101,300 eggs were taken.

47. Further, the WDFW Escapement Reports document one additional wild steelhead mortality at Reiter Ponds. It is presumed that the 36 "W" transferred to Reiter Ponds documented in the November 25, 2020 report are currently being held in captivity there, and those still alive will be lethally or live spawned in early 2021.

48. Data are not available to Wild Fish Conservancy on mortalities of juvenile steelhead offspring resulting from the spawning and rearing of wild Skykomish summer steelhead at Reiter Ponds.

C. The Take Caused by WDFW's Unauthorized South Fork Skykomish River Summer Steelhead Program.

49. WDFW's new integrated South Fork Skykomish River summer steelhead program, as described in the April 12, 2019 HGMP, causes take through a variety of mechanisms

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and activities. These include the broodstock collection activities, genetic introgression, ecological interactions, and increased fishing pressures.

i. Take Through Broodstock Activities.

50. All or some of the wild adult summer steelhead captured by WDFW, beginning in 2019, and taken to Reiter Ponds, Wallace River hatchery, and/or other hatchery facilities as part of broodstock collection activities, are threatened Puget Sound steelhead protected under the ESA.

51. WDFW does not have any applicable authorization or exemption for the taking of these ESA-listed fish.

52. WDFW's trapping, collection, transferring, holding, rearing, spawning, and killing of these fish constitute take of an ESA-listed species.

ii. Take Through Genetic Introgression.

53. WDFW's new integrated South Fork Skykomish River summer steelhead hatchery program will cause take through genetic introgression. Fish become domesticated in a hatchery environment and thereby less fit to survive and reproduce in the wild. Genetic and epigenetic adaptation to captivity can occur rapidly in a single generation even when wild steelhead are used for broodstock in a pure "conservation" hatchery program.

54. This presents significant threats to wild populations even for purportedly integrated programs like that described in the HGMP. Genetic analysis indicates that many of the natural origin South Fork Skamania River summer steelhead have Skamania hatchery summer steelhead ancestry. This Skamania genetic connection means that hatchery fish produced by this integrated South Fork Skykomish River summer steelhead program have out-of-basin genetically heritable life history traits that contrast with most populations within the Puget Sound steelhead DPS.

55. Take of Puget Sound steelhead through genetic introgression occurs when summer steelhead produced in the new hatchery program spawn in the wild with wild fish, and

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thereby pass their maladaptive genes to the wild populations within the Puget Sound steelhead DPS. The resultant offspring have markedly reduced fitness, dying at a much higher rate before spawning than would occur with two wild parents and producing on average significantly fewer surviving offspring than two wild parents when they do survive to spawn.

56. The genetic impacts from the new integrated South Fork Skykomish River summer steelhead hatchery program will most immediately and directly impact the ESA-listed North Fork Skykomish summer steelhead DIP; however, based on documented straying of the current Reiter Ponds Hatchery summer steelhead program, other steelhead DIPs within the Puget Sound steelhead DPS will likewise be impacted.

iii. Take Through Ecological Interactions.

57. WDFW's new integrated South Fork Skykomish River summer steelhead hatchery program will cause take of ESA-listed Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through ecological interactions. Such take occurs through a variety of mechanisms.

58. WDFW's hatchery program causes take of ESA-listed salmonids through increased competition for resources such and food and habitat, including rearing and spawning territory.

59. Take of ESA-listed salmonids also occurs through predation. This occurs when the hatchery fish, including smolts and residualized fish, prey on protected fish.

60. The program also causes take when hatchery fish—less fit for survival in the wild having been raised in the absence of predators—attract predators that then consume ESA-listed fish.

61. The program also causes take of Puget Sound steelhead through increased competition for spawning mates.

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iv. Take Through Fishery Effects.

62. WDFW's new integrated South Fork Skykomish River summer steelhead hatchery program will cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through lethal and sub-lethal fishery effects. WDFW's HGMP explains that all the fish released from this program will be marked by clipping the adipose fin, making these fish available for angling. The resulting summer steelhead recreational angling enabled through this program will cause immediate and latent impacts to ESA-listed fish.

63. Research conducted in British Columbia found an estimated 15.0% of wild summer steelhead caught and released in a summer-run steelhead fishery did not survive to spawn. It is likely the immediate and latent mortality of summer steelhead caught and released in the Skykomish River watershed is greater given the physiological post-release stress caused by the Skykomish River's relatively warmer water temperatures.

64. WDFW's new integrated South Fork Skykomish River summer steelhead hatchery program will exacerbate these effects by increasing the angling pressure far above what it would otherwise be for the few remaining wild steelhead that exist, inhibiting recovery of the natural origin population to levels which could support a sustainable sport fishery in absence of a hatchery program.

D. <u>WDFW's Violations of Section 9 of the ESA</u>

65. As of the filing of this complaint, WDFW does not have any applicable authorization or exemption from NMFS or FWS for "take" of ESA listed Puget Sound steelhead, Puget Sound Chinook salmon, or bull trout resulting from the new integrated South Fork Skykomish River summer steelhead hatchery program described in the HGMP.

66. WDFW is in violation of section 9 of the ESA, 16 U.S.C. § 1538, for implementing and funding the new integrated South Fork Skykomish River summer steelhead hatchery program described in the HGMP. As described above, this program causes take of ESA-listed Puget Sound steelhead, Puget Sound Chinook salmon, and bull trout.

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67. Wild Fish Conservancy's concerns regarding WDFW's new integrated South Fork Skykomish River summer steelhead program extend far beyond the lack of authorization for this program. This unauthorized hatchery program is currently affecting ESA-listed salmonids and their ability to recovery to a point where the protections of the ESA would not be necessary.

68. Even if NMFS and/or FWS approve WDFW's HGMP or issue take statements or permits for the new hatchery program, WDFW will likely remain in violation of section 9 of the ESA because the South Fork Skykomish River summer steelhead program cannot satisfy the requirements imposed by NMFS and/or FWS.

69. The congressionally-chartered Hatchery Science Review Group has made clear recommendations regarding the maximum acceptable level of gene flow from integrated hatchery programs to wild conspecific populations and regarding the introgression of natural-origin fish into the broodstock along with hatchery-origin fish. NMFS relies on these recommendations when approving an HGMP to craft requirements with which hatchery programs must comply.

70. These and/or similar requirements, including requirements intended to reduce take of ESA-listed species through ecological interactions, would be imposed on WDFW's new integrated South Fork Skykomish River summer steelhead hatchery program through any exemption from liability under section 9 of the ESA that may be granted, along with monitoring and evaluation requirements necessary to ensure compliance with such requirements.

71. It is unlikely that WDFW would be able to fully comply with these requirements, and the hatchery program will contribute to the continued decline of ESA-listed salmonids.

72. Further, WDFW is likely to continue to violate the ESA by implementing and operating other hatchery programs throughout the State of Washington, and thereby impeding recovery of ESA-listed salmonids, without securing necessary ESA reviews and approvals from NMFS and FWS absent relief from this Court.

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73. Wild Fish Conservancy sued WDFW in 2002 and 2003 for operating hatcheries throughout Puget Sound that "take" ESA-listed salmonids without any ESA authorization. The parties settled that litigation in 2003 with WDFW committing to apply for the required ESA reviews and authorizations and to encourage NMFS to complete the approval process in a timely manner. Remarkably, WDFW continues, more than thirteen years later, operating numerous hatcheries without NMFS's authorization and in violation of the ESA and, for many of the programs, WDFW has not even submitted the plan required for NMFS's review and approval. *See* Exhibit 1, Notice Letter, Attachment.

74. Given WDFW's pattern and practice of ESA violations with respect to its implementation and operations of hatchery programs, it is likely that these and similar violations will continue to recur unless and until sufficient relief is entered against the agency.

CAUSE OF ACTION

75. Wild Fish Conservancy re-alleges and incorporates by reference each and every allegation set forth above;

76. WDFW's new South Fork Skykomish River summer steelhead hatchery program causes "take" of threatened Puget Sound steelhead, threatened Puget Sound Chinook salmon, and threatened bull trout. Take caused by this program violates section 9 of the ESA and regulations promulgated under section 4(d) of the ESA;

77. WDFW is in violation of section 9 of the ESA and regulations promulgated under section 4(d) of the ESA for causing take of threatened Puget Sound steelhead, threatened Puget Sound Chinook salmon, and threatened bull trout through its implementation and funding of the South Fork Skykomish River summer steelhead program. These violations are ongoing;

78. These violations of the ESA are reviewable under section 11(g) of the ESA, 16 U.S.C. § 1540(g).

REQUEST FOR RELIEF

WHEREFORE, Wild Fish Conservancy requests that this Court:

KAMPMEIER & KNUTSEN, PLLC
1300 S.E. Stark Street, Suite 202
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A. Issue a declaratory judgment declaring that WDFW is in violation of section 9 of the ESA and regulations promulgated under section 4(d) of the ESA for causing "take" of threatened Puget Sound steelhead, threatened Puget Sound Chinook salmon, and threatened bull trout through the implementation and funding of the unreviewed and unpermitted South Fork Skykomish River summer steelhead program;

B. Issue a mandatory injunction requiring WDFW to comply with the ESA;

C. Enjoin WDFW from implementing and funding the South Fork Skykomish River summer steelhead hatchery program, unless and until compliance with the ESA is achieved;

D. Grant such preliminary and/or permanent declaratory and/or injunctive relief as Wild Fish Conservancy may request during the pendency and resolution of this case, including relief as may be warranted to ensure WDFW's violations of the ESA do not continue to recur;

E. Award Wild Fish Conservancy its reasonable litigation expenses, including attorney fees, expert witness fees, Court costs, and other expenses as necessary for the preparation and litigation of this case under section 11(g)(4) of the ESA, and/or as otherwise authorized by law; and

F. Grant such additional relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 10th day of February, 2021.

KAMPMEIER & KNUTSEN, PLLC

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By: s/ Emma Bruden
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Attorney for Plaintiff Wild Fish Conservancy

EXHIBIT 1

KAMPMEIER & KNUTSEN PLLC

ATTORNEYS AT LAW

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December 2, 2020

Via Certified Mail – Return Receipt Requested

Director Kelly Susewind
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Olympia, Washington 98504-3200

Commission Chair Larry Carpenter
Washington Fish & Wildlife Commission
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Commissioner Bradley Smith
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Commissioner Kim Thorburn
Washington Fish and Wildlife Commission
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Olympia, Washington 98504-3200

RE: Notice of Intent to Sue WDFW for Violations of Section 9 of the Endangered Species Act Resulting from Skykomish River Steelhead Hatchery Program

Dear Director Susewind and Washington Fish & Wildlife Commissioners:

This letter provides notice of Wild Fish Conservancy's ("Conservancy") intent to sue the Washington Department of Fish and Wildlife and, in their official capacities, Director of the Washington Department of Fish and Wildlife Kelly Susewind and Commissioners of the Washington Fish and Wildlife Commission Larry Carpenter, Barbara Baker, James Anderson, David Graybill, Robert Kehoe, Molly Linville, Donald McIsaac, Bradley Smith, and Kim Thorburn (collectively, "WDFW") for violations of section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538. This letter is provided pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g).

In 1969, wild steelhead were declared Washington's official "state fish." Despite that recognition, wild steelhead populations have been depressed for some time and remain diminished. Wild Puget Sound steelhead have declined precipitously over the past thirty years: the average region-wide abundance between 1980 and 2004 was less than 4% of what it was in 1900. Since being listed as threatened under the ESA in 2007, Puget Sound wild steelhead abundance has continued to decline. The recent five-year average is less than 3% of what it was in 1900.

The National Marine Fisheries Service ("NMFS") excluded "Chambers Creek" winter steelhead and "Skamania" summer steelhead from the 2007 ESA-listing of the Puget Sound steelhead distinct population segment ("DPS") because those hatchery stocks are genetically diverged from the local native populations. 72 Fed. Reg. 26,722, 26,722 (May 11, 2007). This divergence in Chambers Creek stock is due to decades of domestication in hatchery environments while Skamania steelhead are both highly domesticated and from an out-of-DPS increasing the potential for passing on maladaptive traits to the native Skykomish steelhead population. *See* Letter to Director Unsworth (WDFW) from Bary Thom (NMFS) (July 21, 2017). NMFS also found that efforts to prevent natural spawning of those hatchery fish is unlikely to be completely effective, "with significant potential to reduce natural productivity." *Id.* at 26,728. Despite these findings, WDFW continued to implement hatchery programs using these stocks and without undergoing review, approval, and restrictions required by the ESA. Wild Fish Conservancy sued WDFW for operating these programs in violation of the ESA; first in 2014 for the Chambers Creek steelhead programs and then in 2019 for the Skamania steelhead programs.

The consent decree entered in the latter of those lawsuits required, *inter alia*, that WDFW discontinue releases of Skamania steelhead in Puget Sound watersheds that are not authorized under the ESA with the exception of releases to the Skykomish River. For the Skykomish River, the consent decree allows for decreasing annual releases that terminate with a release of 40,000 fish in 2022, after which releases are prohibited unless they have been approved under the ESA.

Apparently determined to maintain artificial steelhead propagation in the Skykomish River to support recreational fisheries, WDFW submitted a hatchery and genetic management plan ("HGMP") dated April 12, 2019 to NMFS proposing to implement an integrated South Fork Skykomish River summer steelhead program. The HGMP explains that the program will develop stock by collecting up to 30% of the wild, natural-origin, summer steelhead returning to the Sunset Falls fishway, or up to 120 fish, during the first four years of the program. Those adult steelhead will be trapped from July through October and held in captivity at Reiter Ponds and/or Wallace River hatchery facilities until ready to be spawned. Once ripe, WDFW will lethally or live spawn the fish at those hatcheries. The program will target an annual release of 116,000 yearling steelhead from Reiter Ponds and/or the Wallace River hatchery facilities. Once adult hatchery summer steelhead begin to return to the Skykomish River from this new program, WDFW will incorporate those hatchery-origin fish into the broodstock, along with the natural-origin steelhead.

WDFW's HGMP provides that South Fork Skykomish summer steelhead are not recognized as a demographically independent population ("DIP") and asserts that they are therefore not included in the ESA-listed Puget Sound steelhead distinct population segment ("DPS"). HGMP 3. However, the HGMP also explains that an objective of this program is to conserve and recover the North Fork Skykomish River summer steelhead DIP, which is included within the ESA-listed Puget Sound steelhead DPS. Further, the South Fork Skykomish River, above and below Sunset Falls, is designated critical habitat for threatened Puget Sound steelhead. *See* 50 C.F.R. § 226.212(a)(15), (u)(7)(i). Salmonids generally, and summer steelhead especially, stray to non-natal fresh water bodies before spawning in their natal streams. It is therefore almost certain that some of the fish trapped at Sunset Falls are North Fork Skykomish River summer steelhead or another DIP recognized as part of the threatened Puget Sound steelhead DPS. *See*, *e.g.*, Kassler, Todd W., et al., Summer-Run Hatchery Steelhead Have Naturalized in the South Fork Skykomish River, Washington, 137 Transactions of the Am. Fisheries Soc'y 763–771, 768 (2008) (indicating a portion of adult summer steelhead encountered at Sunset Falls are North Fork Skykomish steelhead). WDFW admitted as much when it identified broodstock collection activities at Sunset Falls as an activity that may lead to take of ESA-listed species. HGMP 19. Moreover, this new integrated steelhead propagation program will harm and otherwise "take" ESA-listed fish through various genetic and ecological interactions, as recognized by WDFW in its April 12, 2019 HGMP. *See* HGMP 19–22.

WDFW nonetheless commenced this new hatchery program prior to NMFS reviewing and approving the HGMP and prior to NMFS or the U.S. Fish and Wildlife Service ("FWS") providing an authorization for WDFW to "take" ESA-listed species. WDFW also developed and implemented this program without evaluating and disclosing to the public the environmental impacts in violation of the State Environmental Policy Act ("SEPA").

Available data obtained from WDFW's In-Season Hatchery Escapement Reports indicate the following transfers (capture and live-ship via truck) of "wild, W" steelhead from the South Fork Skykomish Sunset Falls Fishway to Reiter Ponds were made:

- April 16 2020 report: 52 W (final in-season estimate);
- November 25 2020 report: 36 W.

Of the wild steelhead held in Reiter Ponds between October 2019 and March 2020, 29 were lethally spawned on or about March 19 and 101,300 eggs were taken. Further, the WDFW Escapement Reports document one additional wild steelhead mortality at Reiter Ponds. We presume that the 36 "W" transferred to Reiter Ponds documented in the November 25 2020 report are currently being held in captivity there, and those still alive will be spawned in early 2021. We have no data on mortalities of juvenile steelhead offspring resulting from the spawning of wild Skykomish summer steelhead at Reiter Ponds.

WDFW's implementation of this program in the absence of ESA-review or approval follows a long and disconcerting pattern of the agency willing to violate the ESA's prohibition on unauthorized "take" of protected species when it comes to artificial fish propagation. The Conservancy sued WDFW in 2002 and 2003 for operating hatcheries

throughout Puget Sound that "take" ESA-listed salmonids without any ESA authorization. The parties settled that litigation in 2003 with WDFW committing to apply for the required ESA reviews and authorizations and to encourage NMFS to complete the approval process in a timely manner. Remarkably, WDFW continues, more than thirteen years later, operating numerous hatcheries without NMFS's authorization and in violation of the ESA and, for many of the programs, WDFW has not even submitted the plan required for NMFS's review. *See* Attachment.

I. Legal Framework.

Section 9 of the ESA prohibits the "take" of endangered species by any person. 16 U.S.C. § 1538(a). This prohibition has generally been applied to species listed as "threatened" through regulations promulgated under section 4(d) of the ESA, 16 U.S.C. § 1533(d). Section 9 of the ESA prohibits violations of those regulations. 16 U.S.C. § 1538(a)(1)(G).

"Take" includes actions that harass, harm, pursue, wound, kill, trap, capture, or collect a protected species. 16 U.S.C. § 1532(19). "Harass" is defined to include acts that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include breeding, feeding, or sheltering. 50 C.F.R. § 17.3. "Harm" includes significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. *Id.*; 50 C.F.R. § 222.102.

II. Affected Species.

The Puget Sound DPS of steelhead was listed as a threatened species in 2007. 72 Fed. Reg. 26,722 (May 11, 2007); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014) (revision to listing); 50 C.F.R. § 223.102. NMFS has applied the ESA section 9 take prohibition to this species. 50 C.F.R. §§ 223.102, 223.203(a).

The Puget Sound Chinook salmon evolutionary significant unit ("ESU") is listed as a threatened species. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014) (revision to listing); 50 C.F.R. § 223.102. NMFS has applied the ESA section 9 take prohibition to this species. 50 C.F.R. §§ 223.102, 223.203(a).

The coterminous United States bull trout population is listed as a threatened species. 64 Fed. Reg. 58,910 (Nov. 1, 1999). FWS has applied the ESA take prohibition to this species. 50 C.F.R. §§ 17.21 and 17.31(a).

III. Take Caused by WDFW's Unauthorized Integrated South Fork Skykomish River Summer Steelhead Program.

WDFW's new integrated South Fork Skykomish River summer steelhead program, as described in the April 12, 2019 HGMP, causes take through a variety of mechanisms and

activities. These include the broodstock collection activities, genetic introgression, ecological interactions, and increased fishing pressures.

A. Take Through Broodstock Activities.

All or some of the wild adult summer steelhead captured by WDFW, beginning in 2019, and taken to Reiter Ponds, Wallace River hatchery, and/or other hatchery facilities as part of brookstock collection activities are threatened Puget Sound steelhead protected under the ESA. WDFW is not authorized to take these fish.[1] WDFW's trapping, collection, transferring, holding, rearing, spawning, and killing of these fish constitute take of an ESA-listed species.

B. Take Through Genetic Introgression.

WDFW's new integrated South Fork Skykomish River summer steelhead program will cause take through genetic introgression. Fish become domesticated in a hatchery environment and thereby less fit to survive and reproduce in the wild. Genetic adaptation to captivity can occur rapidly, in a single generation even when wild steelhead are used for broodstock in a pure "conservation" hatchery program. This presents significant threats to wild populations even for purportedly integrated programs like that described in the HGMP. *See*, *e.g.*, Christie, Mark R., et al., Genetic Adaptation to Captivity Can Occur in a Single Generation, 109 Proceedings of the Nat'l Academy of Sciences 238–42 (2011); Willoughy, Janna R., et al., Long-term Demographic and Genetic Effects of Releasing Captive-Born Individuals into the Wild, 33 Conservation Biology 377–88 (2019); Willoughy, Janna R., et al., Captive Ancestry Upwardly Biases Estimates of Relative Reproductive Success, 108 Journal of Heredity 583–87 (2017). Moreover, genetic analysis indicates that many of the South Fork Skamania River summer steelhead have Skamania hatchery summer steelhead ancestry. Kassler, Todd W., et al., Summer-Run Hatchery Steelhead Have Naturalized in the South Fork Skykomish River, Washington, 137 Transactions of the Am. Fisheries Soc'y 763–771, 768 (2008). Hatchery fish produced by WDFW's integrated South Fork Skykomish River summer steelhead program have out-of-basin genetically heritable life history traits that contrast with most populations within the Puget Sound steelhead DPS.

Take of Puget Sound steelhead through genetic introgression occurs when summer steelhead produced in the new hatchery program spawn in the wild with wild fish, and thereby pass their maladaptive genes to the wild populations within the Puget Sound steelhead DPS. The resultant offspring have markedly reduced fitness, dying at a much higher rate before spawning than would occur with two wild parents and producing on average significantly fewer surviving offspring than two wild parents when they do survive to spawn. The genetic impacts from the new integrated South Fork Skykomish River summer steelhead program will most immediately and directly impact the ESA-listed North Fork Skykomish summer

[1] NMFS has issued an ESA section 10 permit, NMFS section 10 permit number 14433, for the trap and haul operations, whereby fish are collected at the Sunset Fall fishway and hauled 3.5 miles upstream above three falls. The broodstock collection activities are not included in and hence are not covered by this permit.

steelhead DIP; however, based on documented straying of the current Reiter Ponds Hatchery summer steelhead program, the Tolt summer steelhead DIP will likewise be impacted.

C. Take Through Ecological Interactions.

WDFW's new integrated South Fork Skykomish River summer steelhead program will cause take of ESA-listed Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through ecological interactions. Such take occurs through a variety of mechanisms.

WDFW's hatchery program causes take of ESA-listed salmonids through increased competition for food and space, including rearing and spawning territory. Take of ESA-listed salmonids also occurs through predation. This occurs when the hatchery fish, including smolts and residualized fish, prey on protected fish. The programs also cause take when hatchery fish—less fit for survival in the wild—attract predators that then consume ESA-listed fish. The program also causes take of Puget Sound steelhead through increased competition for spawning mates.

D. Take Through Fishery Effects.

WDFW's new integrated South Fork Skykomish River summer steelhead program will cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through lethal and sub-lethal fishery effects. WDFW's HGMP explains that all of the fish released from this program will be marked by clipping the adipose fin, making these fish available for angling. The resulting summer steelhead recreational angling enabled through this program will cause immediate and latent impacts to ESA-listed Puget Sound steelhead and bull trout. Research conducted in British Columbia found an estimated 15.0% of wild summer steelhead caught and released in a summer-run steelhead fishery did not survive to spawn. It is likely the immediate and latent mortality of summer steelhead caught and released in the Skykomish River watershed is greater given the physiological post-release stress caused by warmer water temperatures. The unpermitted integrated summer steelhead hatchery program will exacerbate these effects by increasing the angling pressure far above what it would otherwise be for the few remaining wild steelhead that exist, inhibiting recovery of the natural origin population to levels which could support a sustainable sport fishery in absence of a hatchery program.

IV. WDFW's Violations of Section 9 of the ESA.

WDFW is in violation of section 9 of the ESA, 16 U.S.C. § 1538, for implementing and funding the new integrated South Fork Skykomish River summer steelhead program described in the HGMP. As described above, these programs cause take of ESA-listed Puget Sound steelhead, Puget Sound Chinook salmon, and bull trout. This take is not authorized or exempt from liability under section 9 of the ESA. The descriptions provided above of take and of the hatchery program are based upon the information currently available to the Conservancy. The Conservancy intends to sue WDFW for all take of ESA-listed salmonids resulting from this new hatchery program.

The Conservancy's concerns regarding WDFW's new integrated South Fork Skykomish River summer steelhead program extend far beyond the mere lack of authorization for this program. This unauthorized hatchery program is currently affecting ESA-listed salmonids and their ability to recovery to a point where the protections of the ESA would not be necessary.

The congressionally-chartered Hatchery Science Review Group ("HSRG") has made clear recommendations regarding the maximum acceptable level of gene flow from integrated hatchery programs to wild conspecific populations and regarding the introgression of natural-origin fish into the broodstock along with hatchery-origin fish. These and/or similar requirements, including requirements intended to reduce take of ESA-listed species through ecological interactions, would be imposed on WDFW's new integrated South Fork Skykomish River summer steelhead program through any exemption from liability under section 9 of the ESA that may be granted, along with monitoring and evaluation requirements necessary to ensure compliance with such requirements. It is unlikely that WDFW would be able to fully comply with these requirements and the hatchery program will contribute to the continued decline of ESA-listed salmonids. And in any case, WDFW does not have such authorization now, and therefore their 2019 and 2020 take of unmarked and/or wild steelhead from the South Fork of the Skykomish and transfer to Reiter Ponds violated the ESA.

Accordingly, the Conservancy provides notice of its intent to sue WDFW to bring its new integrated South Fork Skykomish River summer steelhead program described in the HGMP into compliance with section 9 of the ESA. This includes complete compliance with any exemption from ESA liability for take that may be lawfully issued in accordance with the requirements of the ESA, the National Environmental Policy Act, and any other applicable statutes and regulations.

V. Party Giving Notice of Intent to Sue.

The full name, address, and telephone number of the party giving notice is:

Wild Fish Conservancy
P.O. Box 402
Duvall, WA 98019
Tel: (425) 788-1167

VI. Attorney Representing Wild Fish Conservancy.

The attorney representing Wild Fish Conservancy in this matter is:

Brian A. Knutsen
Kampmeier & Knutsen, PLLC
1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
Tel: (503) 841-6515
Email: brian@kampmeierknutsen.com

VII. Conclusion.

This letter provides notice under section 11(g) of the ESA, 16 U.S.C. § 1540(g), of Wild Fish Conservancy's intent to sue WDFW for violations of the ESA discussed herein. Unless the ongoing and imminent violations described herein are fully corrected within sixty days, Wild Fish Conservancy intends to file suit against WDFW to enforce the ESA. Wild Fish Conservancy is available during the sixty-day notice period to discuss effective remedies and actions that will assure future compliance with the ESA.

Very truly yours,

Kampmeier & Knutsen PLLC

By: _____
Brian A. Knutsen

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the United States that I am counsel for Wild Fish Conservancy and that on December 2, 2020, I caused copies of the foregoing to be served on the following by depositing them with the U.S. Postal Service, postage prepaid, via certified mail, return receipt requested:

Director Kelly Susewind
Washington Department of Fish & Wildlife
P.O. Box 43200
Olympia, Washington 98504-3200

Commission Chair Larry Carpenter
Commission Vice Chair Barbara Baker
Commissioner James Anderson
Commissioner David Graybill
Commissioner Robert Kehoe
Commissioner Molly Linville
Commissioner Donald McIsaac
Commissioner Bradley Smith
Commissioner Kim Thorburn
Washington Fish & Wildlife Commission
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Secretary Wilbur L. Ross, Jr.
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Secretary David Bernhardt
U.S. Department of the Interior
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Director Aurelia Skipwith
U.S. Fish & Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Brian A. Knutsen

ATTACHMENT

HGMP Submission Legend

ESA Permitting Complete
Currently In Consultation
Not ESA Listed
Not Submitted
Pre-Consultation
Under Co-Manager Review

Appendix 3. Status and Schedule for Completion of Hatchery Genetic Management Plans for Washington State Hatcheries Applicable to revised Policy.

Status and Schedule for Completion of Hatchery Genetic Management Plans for Washington State Hatcheries

Region	Program/Facility	Species	Run	Consultation Status
1	Lyons Ferry	Chinook	Fall	Complete
1	Lyons Ferry - Wallowa Stock	Steelhead	Summer	Complete
1	Lyons Ferry - Wallowa Stock - On-Station	Steelhead	Summer	Complete
1	Lyons Ferry/Dayton Pond - Wallowa Stock	Steelhead	Summer	Complete
1	Tocuhet Spring Chinook	Chinook	Spring	Complete
1	Touchet Endemic (Wild Brood Program)	Steelhead	Summer	Complete
1	Tucannon	Chinook	Spring	Complete
1	Tucannon	Steelhead	Summer	Complete
1	Wallowa/Cottonwood Creek	Steelhead	Summer	Complete
2	Carlton Pond - MEOK	Chinook	Summer	Complete
2	Chiwawa	Chinook	Spring	Complete
2	Dryden Pond	Chinook	Summer	Complete
2	Methow	Chinook	Spring	Complete
2	Methow - Chewuch Acclimation Ponds	Chinook	Spring	Complete
2	Methow - Wells	Steelhead	Summer	Complete
2	Nason Creek	Chinook	Spring	Complete
2	Twisp	Steelhead	Summer	Complete
2	Twisp	Chinook	Spring	Complete
2	Wells - Chelan River Releases	Chinook	Summer	Complete
2	Wells - Mainstem releases	Chinook	Summer	Complete
2	Wenatchee - Chiwawa	Steelhead	Summer	Complete
3	Priest Rapids URB	Chinook	Fall	Complete
3	Ringold Springs - Wells stock	Steelhead	Summer	Complete
3	Ringold Springs Coho	Coho	Type-N	Complete
3	Ringold Springs URB	Chinook	Fall	Complete
4	Green River	Steelhead	Late Winter	Complete
4	Kendall Creek	Steelhead	Winter	Complete
4	Skykomish	Steelhead	Winter	Complete
4	Soos Creek	Steelhead	Summer	Complete
4	Soos Creek (& TU Des Moines Net Pen Co-op)	Coho	NA	Complete
4	Soos Creek - Marine Tech Lab (Ed Co-op)	Coho	NA	Complete
4	Soos Creek/Icy Creek	Chinook	Fall	Complete
4	Tokul	Steelhead	Winter	Complete
4	Wallace River	Chinook	Summer	Complete
4	Wallace River	Coho	NA	Complete
4	Wallace River - (Everett SSC (see Mukilteo) Net Pen (Co-op)	Coho	NA	Complete
4	Whitehorse Pond	Steelhead	Winter	Complete
5	Beaver Creek	Steelhead	Summer	Complete
5	Beaver Creek	Steelhead	Winter	Complete
5	Cathlamet Channel Net Pens	Chinook	Spring	Complete
5	Coweeman Ponds (Co-op)	Steelhead	Winter	Complete
5	Deep River Net Pen	Coho	Type-N	Complete
5	Elochoman River	Coho	Type-N	Complete
5	Grays River	Coho	Type-N	Complete
5	Kalama Falls	Chinook	Fall	Complete
5	Kalama Falls	Chinook	Spring	Complete
5	Kalama Falls	Coho	Type-N	Complete
5	Kalama Falls	Steelhead	Winter	Complete
5	Kalama Falls	Steelhead	Summer	Complete
5	Kalama Falls	Steelhead	WL	Complete
5	NF Toutle Hatchery	Chinook	Fall	Complete
5	NF Toutle Hatchery	Coho	Type-S	Complete
5	Salmon Creek (Klineline Pond)	Steelhead	Winter	Complete
5	SF Toutle (Coop)	Steelhead	Summer	Complete
5	Skamania - Rock Cr outplant	Steelhead	Winter	Complete
5	Skamania -onstation	Steelhead	Summer	Complete
5	Skamania -onstation	Steelhead	Winter	Complete
5	Washougal	Chinook	Fall	Complete
5	Washougal	Coho	Type-N	Complete
6	Dungeness	Chinook	Spring	Complete
6	Dungeness	Coho	NA	Complete
6	Dungeness	Steelhead	Winter	Complete
6	Dungeness/Hurd Creek	Pink	NA	Complete
6	Elwha	Chinook	Fall	Complete
6	Hood Canal Wild Steelhead Supplementation-McKernan	Steelhead	Winter	Complete
6	Hoodsport	Chinook	Fall	Complete
6	Hoodsport	Chum	Fall	Complete

HGMP Submission Legend

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Appendix 3. Status and Schedule for Completion of Hatchery Genetic Management Plans for Washington State Hatcheries Applicable to revised Policy.

Status and Schedule for Completion of Hatchery Genetic Management Plans for Washington State Hatcheries

6	Hoodsport	Pink	NA	Complete
4	Baker Lake	Coho	NA	In Consultation
4	Baker Lake	Sockeye	NA	In Consultation
4	Cedar River	Sockeye	NA	In Consultation
4	Issaquah	Chinook	Fall	In Consultation
4	Issaquah	Coho	NA	In Consultation
4	Marblemount	Chinook	Fall	In Consultation
4	Marblemount	Chinook	Spring	In Consultation
4	Marblemount	Chinook	Summer	In Consultation
4	Marblemount	Coho	NA	In Consultation
4	Marblemount Chum	Chum	NA	In Consultation
4	Reiter Ponds	Steelhead	Summer	In Consultation
4	UW Portage Bay	Chinook	Fall	In Consultation
4	UW Portage Bay	Coho	Fall	In Consultation
4	Wallace River	Chum	Fall	In Consultation
6	Bingham Creek	Chinook	Fall	Non-ESA Listed
6	Bingham Creek	chum	Fall	Non-ESA Listed
6	Bingham Creek	Coho	Fall	Non-ESA Listed
6	Bingham Creek	Coho	Late Winter	Non-ESA Listed
6	Bingham Creek	Steelhead	Winter	Non-ESA Listed
6	Bogachiel	Steelhead	Summer	Non-ESA Listed
6	Bogachiel	Steelhead	Winter	Non-ESA Listed
6	Bogachiel	Steelhead	Early winter	Non-ESA Listed
6	Forks Creek	Chinook	Fall	Non-ESA Listed
6	Forks Creek	Chinook	spring	Non-ESA Listed
6	Forks Creek	Chum	Fall	Non-ESA Listed
6	Forks Creek	Coho	Fall	Non-ESA Listed
6	Forks Creek	Coho	Late Winter	Non-ESA Listed
6	Forks Creek	Steelhead	Early winter	Non-ESA Listed
6	Humptulips	Chinook	Fall	Non-ESA Listed
6	Humptulips	Coho	Fall	Non-ESA Listed
6	Humptulips	Coho	Late Winter	Non-ESA Listed
6	Humptulips	Steelhead	Summer	Non-ESA Listed
6	Humptulips	Steelhead	Early winter	Non-ESA Listed
6	Lk Aberdeen	Chinook	Fall	Non-ESA Listed
6	Lk Aberdeen	Coho	Fall	Non-ESA Listed
6	Lk Aberdeen	Steelhead	Winter	Non-ESA Listed
6	Lk Aberdeen	Steelhead	Summer	Non-ESA Listed
6	Mayr Brothers	Chinook	Fall	Non-ESA Listed
6	Mayr Brothers	chum	Fall	Non-ESA Listed
6	Mayr Brothers	Coho	Fall	Non-ESA Listed
6	Naselle	Chinook	Fall	Non-ESA Listed
6	Naselle	chum	Fall	Non-ESA Listed
6	Naselle	Coho	Fall	Non-ESA Listed
6	Naselle	Coho	Late Winter	Non-ESA Listed
6	Naselle	Steelhead	Early winter	Non-ESA Listed
6	Nemah	Chinook	Fall	Non-ESA Listed
6	Nemah	chum	Fall	Non-ESA Listed
6	Satsop Springs	Chinook	Fall	Non-ESA Listed
6	Satsop Springs	chum	Fall	Non-ESA Listed
6	Satsop Springs	Coho	Fall	Non-ESA Listed
6	Satsop Springs	Coho	Late Winter	Non-ESA Listed
6	Satsop Springs	Steelhead	Winter	Non-ESA Listed
6	Skookumchuck	Chum	Fall	Non-ESA Listed
6	Skookumchuck	Coho	Fall	Non-ESA Listed
6	Skookumchuck	Coho	Late Winter	Non-ESA Listed
6	Skookumchuck	Steelhead	Winter	Non-ESA Listed
6	Sol duc	Chinook	Summer	Non-ESA Listed
6	Sol duc	Coho	Summer	Non-ESA Listed
6	Sol duc	Coho	Fall	Non-ESA Listed
4	Kendall Creek	Coho	NA	Not Submitted
4	Whatcom Creek	Chinook	Fall	Not Submitted
5	Deep River Net Pen (SAFE)	Coho	Type-N	Not Submitted
5	Grays River	Chum	Fall	Not Submitted
5	Washougal (Duncan Creek)	Chum	Fall	Not Submitted
6	Deschutes (Squaxin Is) Tumwater Falls	Coho	NA	Not Submitted
5	Cowlitz	Chinook	Spring	Pre Consultation
5	Cowlitz	Coho	Type-N	Pre Consultation
5	Cowlitz	Cutthroat	Sea-Run	Pre Consultation

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5	Cowlitz	Steelhead	Summer	Pre Consultation
5	Cowlitz (lower + Mayfield NP)	Chinook	Fall	Pre Consultation
5	Cowlitz (lower Cowlitz/upper Cowlitz/Tilton)	Steelhead	WL	Pre Consultation
5	Lewis River	Coho	Type-N	Pre Consultation
5	Lewis River	Coho	Type-S	Pre Consultation
5	Lewis River (I-205 wild)	Chum	Fall	Pre Consultation
5	Lewis River (Speelyai)	Chinook	Spring	Pre Consultation
5	Merwin	Steelhead	Summer	Pre Consultation
5	Merwin	Steelhead	Winter	Pre Consultation
5	Merwin (Lewis)	Steelhead	WL	Pre Consultation
6	George Adams	Chinook	Fall	Pre Consultation
6	George Adams	Coho	NA	Pre Consultation
6	McKernan	Chum	Fall	Pre Consultation
4	Glenwood Springs (LLtK)	Chinook	Fall	Under Co-Manager Review
4	Kendall (Nooksack) Chum - integrated	Chum	Fall	Under Co-Manager Review
4	Kendall Creek (NF Nooksack)	Chinook	Spring	Under Co-Manager Review
4	Samish	Chinook	Fall	Under Co-Manager Review
4	Whatcom Creek	Pink	NA	Under Co-Manager Review
4	Whatcom Creek (Kendall Cr)	Chum	Fall	Under Co-Manager Review
6	Chambers Creek	Chinook	Fall	Under Co-Manager Review
6	Hupp Springs	Chinook	Spring	Under Co-Manager Review
6	Minter Creek	Chum	Fall	Under Co-Manager Review
6	Minter Creek	Coho	NA	Under Co-Manager Review
6	Minter Creek/Hupp Springs	Chinook	Fall	Under Co-Manager Review
6	South Sound Net Pens	Chinook	Fall	Under Co-Manager Review
6	South Sound Net Pens	Coho	NA	Under Co-Manager Review
6	Tumwater Falls	Chinook	Fall	Under Co-Manager Review
6	Voights Creek	Chinook	Fall	Under Co-Manager Review
6	Voights Creek	Coho	NA	Under Co-Manager Review