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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

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

PLAINTIFF’S MOTION FOR A FINAL
ORDER ON RELIEF AND FOR A
TEMPORARY RESTRAINING ORDER
AND/OR A PRELIMINARY
INJUNCTION PENDING ENTRY OF A
FINAL ORDER ON RELIEF

NOTE ON MOTION CALENDAR:
October 14, 2022

ORAL ARGUMENT REQUESTED

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APA	Administrative Procedure Act
AR	Administrative Record
BiOp	Biological Opinion
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
ESU	Evolutionarily Significant Unit
FWS	United States Fish and Wildlife Service
HSRG	Hatchery Scientific Review Group
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
pHOS	Proportion of Hatchery-Origin Spawners
PVA	Population Viability Analysis
RPA	Reasonable and Prudent Alternative
SEAK	Southeast Alaska
SRKW	Southern Resident killer whale

1 Plaintiff Wild Fish Conservancy (“Conservancy”) respectfully moves for a final order
 2 remanding the National Marine Fisheries Service’s (“NMFS”) 2019 biological opinion (“BiOp”)
 3 for southeast Alaska salmon fisheries (“2019 SEAK BiOp”) to remedy the Endangered Species
 4 Act (“ESA”) and National Environmental Policy Act (“NEPA”) violations found by the Court.
 5 *See* Dkts. 111, 122. The Conservancy further requests that, until those violations are remedied,
 6 the final order: (1) narrowly vacate those portions of the 2019 SEAK BiOp that authorize “take”
 7 of endangered Southern Resident killer whale (“SRKW”) and threatened Chinook salmon
 8 resulting only from commercial harvests of Chinook salmon during the winter and summer
 9 seasons (excluding the spring season) of the troll fisheries; (2) vacate those portions of the 2019
 10 SEAK BiOp that adopt, and purport to consult under section 7 of the ESA on, the prey increase
 11 program; and (3) enjoin NMFS’s implementation of the prey increase program.

12 Finally, the Conservancy respectfully moves the Court for a temporary restraining order
 13 and/or preliminary injunction vacating the 2019 SEAK BiOp in the manner described above and
 14 enjoining the prey increase program until the Court enters its final order on relief.
 15

16 I. INTRODUCTION.

17 The requested relief is urgently needed to protect imperiled species while NMFS
 18 addresses the significant ESA and NEPA violations that pervaded its approval of the salmon
 19 fisheries. The Conservancy has narrowly limited the relief requested to minimize disruptive
 20 consequences, while still protecting ESA-listed species from NMFS’s unlawful decisions.
 21

22 In 2016, the SRKW population was comprised of 83 whales and identified by NMFS as
 23 among those species most at risk of extinction. AR 15988–89. There are only 73 members today.
 24 Third Decl. of Dr. Deborah Giles, Ph.D. (“Third Giles Decl.”) ¶ 4. Insufficient prey—namely,
 25 Chinook salmon—is the primary cause of the decline. Dkt. 14-3 ¶ 6.b. Dr. Deborah Giles, a
 26 conservation biologist focused on SRKWs, estimates that 69% of SRKW pregnancies are
 27 aborted due to insufficient Chinook salmon, with females suffering physical and emotional stress
 28 from chronic pregnancies ending in miscarriage. Third Giles Decl. ¶ 7; Dkt. 14-2 ¶¶ 2–5. The
 29 species’ current conditions are “unprecedented,” with more than a fifth of the population likely

1 in a vulnerable state due to emaciated body conditions. Third Giles Decl. ¶¶ 11, 14. Two males
 2 are presumed to have recently died, a 29-year-old that should have been prime age for
 3 reproduction and an 11-year-old that had not even reached sexual maturity. *Id.* ¶¶ 8–9.

4 Salmon populations throughout the Pacific Northwest “are at fractions of their historic
 5 levels,” due primarily to harvests, hatcheries, hydroelectric projects, and habitat loss. *See* AR
 6 47306. While the 2019 Pacific Salmon Treaty included some reductions in harvests from prior
 7 agreements, it was recognized that more is needed to conserve Chinook salmon and SRKWs. *See*
 8 AR 47201–02. NMFS could have reduced harvests further to protect these imperiled species and
 9 sought to mitigate any associated economic impacts; e.g., by purchasing and retiring fishing
 10 licenses. *See* AR 47436; Third Giles Decl. Ex. B. Instead, NMFS decided to spend millions of
 11 dollars annually on increased hatchery production in a supposed effort to offset the fisheries and
 12 to approve harvest levels that continue to starve SRKWs. The increased hatchery production
 13 would pose severe genetic risks to threatened Chinook salmon and thereby further harm SRKWs
 14 that depend on the fish as prey. Yet, NMFS did not even evaluate whether this scheme would
 15 jeopardize salmonids when it approved the actions. Nor did NMFS provide any processes
 16 required by NEPA, such as considering and disclosing to the public alternative approaches.

17
 18 These are not technical or minor errors; they are violations that undermine key
 19 Congressional objectives of the ESA and NEPA. The Conservancy respectfully requests that the
 20 Court impose the interim and final relief requested to protect SRKWs and Chinook salmon and
 21 ensure that NMFS remedies its violations before further implementing its unlawful actions.

22 **II. STATUTORY FRAMEWORK.**

23
 24 When the ESA was passed it “represented the most comprehensive legislation for the
 25 preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437
 26 U.S. 153, 180, 184 (1978) (“The plain intent of Congress in enacting this statute was to halt and
 27 reverse the trend toward species extinction, **whatever the cost.**” (emphasis added)). To this end,
 28 section 9 of the ESA makes it unlawful to “take” listed species. *See* 16 U.S.C. § 1538(a)(1)(B).

29 Section 7 of the ESA imposes substantive and procedural requirements on federal

1 agencies. Substantively, agencies must “insure” their actions “[are] not likely to jeopardize the
 2 continued existence of . . . [listed] species or result in the destruction or adverse modification of
 3 [their critical] habitat” 16 U.S.C. § 1536(a)(2); *Pyramid Lake Paiute Tribe of Indians v.*
 4 *U.S. Dep’t of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). ESA Section 7’s procedural
 5 requirements are intended to facilitate compliance with that substantive mandate. *See Thomas v.*
 6 *Peterson*, 753 F.2d 754, 763–65 (9th Cir. 1985), *abrogated on other grounds, Cottonwood Env’t*
 7 *Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091–92 (9th Cir. 2015). Specifically, agencies
 8 planning an action that “may affect” listed species (“action agency”) must consult with NMFS
 9 and/or the U.S. Fish and Wildlife Service (“FWS”) (“consulting agency”). 50 C.F.R. § 402.14(a).

10 Consultation results in the consulting agency’s issuance of a biological opinion (“BiOp”)
 11 determining whether the action is likely to jeopardize listed species or adversely modify their
 12 critical habitat. *Id.* § 402.14(h)(1). If so, the BiOp will suggest “reasonable and prudent
 13 alternatives” that avoid jeopardy or adverse modification. *San Luis & Delta-Mendota Water*
 14 *Auth. v. Jewell*, 747 F.3d 581, 634 (9th Cir. 2014); 16 U.S.C. § 1536(b)(3)(A). If jeopardy and
 15 adverse modification are not likely, or if reasonable and prudent alternatives are identified, the
 16 BiOp will include an incidental take statement (“ITS”) defining the amount of take anticipated.
 17 *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1158–59 (9th Cir. 1999); 16
 18 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(i)(1)(i). Take in compliance with an ITS is exempt
 19 from liability under ESA section 9. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

20
 21 “NEPA ‘is our basic national charter for protection of the environment.’ . . . The statute
 22 provides environmental protection not by mandating ‘particular results,’ but by prescribing the
 23 process that an agency must follow to evaluate and approve an action that will have
 24 environmental consequences.” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th
 25 Cir. 2020) (citations omitted). As such, NEPA requires the environmental information be
 26 available *before* decisions are made and *before* actions are taken. *See* 40 C.F.R. § 1500.1(b), (c)¹;

27
 28
 29 ¹ The 1978 NEPA regulations, as amended, were in effect when NMFS made the relevant decisions here. *See* 85
 Fed. Reg. 43,304, 43,305 (July 16, 2020). All citations to the NEPA regulations herein are to that version.

1 *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988).

2 An environmental impact statement (“EIS”) is required for “major Federal actions
 3 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C)(i). The
 4 EIS “serves NEPA’s ‘action-forcing’ purpose in two important respects. . . . It ensures that the
 5 agency, in reaching its decision, will have available, and will carefully consider, detailed
 6 information concerning significant environmental impacts; it also guarantees that the relevant
 7 information will be made available to the larger audience that may also play a role in both the
 8 decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley*
 9 *Citizens Council*, 490 U.S. 332, 349 (1989) (citation omitted). An environmental assessment
 10 (“EA”) must be prepared to determine whether an action will have significant environmental
 11 impacts if the action is neither one that normally requires an EIS nor one that is excluded from
 12 NEPA review. *Hale v. Norton*, 476 F.3d 694, 700 (9th Cir. 2007); 40 C.F.R. § 1501.4.

14 Whether an EIS or EA is prepared, NEPA requires agencies fully consider alternatives to
 15 the proposal. *See* 42 U.S.C. § 4332(2)(C)(iii), (2)(E); *see also, e.g., Bob Marshall All. v. Hodel*,
 16 852 F.2d 1223, 1228–29 (9th Cir. 1988); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893,
 17 915 (9th Cir. 2012). “The consideration of alternatives requirement furthers [NEPA’s goals] by
 18 guaranteeing that agency decisionmakers ‘have before them and take into proper account all
 19 possible approaches to a particular project . . . which would alter the environmental impact and
 20 the cost-benefit balance Informed and meaningful consideration of alternatives . . . is thus
 21 an integral part of the statutory scheme.” *Hodel*, 852 F.2d at 1228 (citation omitted).

22 **III. STATEMENT OF FACTS.**

23 **A. Endangered Southern Resident Killer Whales.**

24 The SRKW is one of the eight most at-risk species. AR 15988–89. “[T]he . . . population
 25 has declined to historically low levels” AR 47276. “A primary limiting factor . . . is prey
 26 availability, which has contributed to premature mortality and reduced fertility.” Dkt. 111 at 8;
 27 *see also* Dkt. 14-3 ¶¶ 6.b, 33.b–c. “While the SRKW consume a wide variety of fish species, 80
 28 to 90 percent of the SRKW’s diet consists of older and larger Chinook salmon.” Dkt. 111 at 8.

1 Dr. Robert Lacy is a conservation scientist that has developed tools to guide species
 2 conservation and management, including the Vortex population viability analysis (“PVA”). Dkt.
 3 14-3 ¶¶ 2, 8–13. Dr. Lacy’s models are used in countries all over the world. *See, e.g., id.* p. 47. In
 4 fact, NMFS’s 2019 SEAK BiOp and Canada both “have relied on analyses completed with
 5 Vortex for assessing the status of [SRKW].” *Id.* ¶ 13; *see also* AR 47278, 47282, 47502–03. Dr.
 6 Lacy “is among the world’s most experienced, respected, and sought-after modelers for
 7 conducting [PVA] for the management and conservation of threatened species.” Dkt. 91-5 ¶ 23.

8 Dr. Lacy conducted PVA modeling for the SRKW for this litigation. Dkt. 14-3 ¶ 16; Dkt.
 9 91-4 ¶ 8; Third Decl. of Dr. Robert Lacy, Ph.D. (“Third Lacy Decl.”) ¶ 4. Dr. Lacy confirms that
 10 “prey abundance is the factor that has the largest impact on [SRKW] population growth or
 11 decline.” Dkt. 14-3 ¶ 6.b; *see also* Dkt. 91-4 ¶¶ 17–22; Third Lacy Decl. ¶ 7. The most recent
 12 modeling from March 2022 predicts that “[t]he long-term . . . trend continues to be a slide toward
 13 extinction.” Third Lacy Decl. ¶ 5. The modeling indicates that prey needs to increase by around
 14 5% to merely stop the SRKW’s decline, “with much greater increases . . . or the addition of other
 15 protective measures . . . required to achieve good population growth toward recovery.” *Id.* ¶ 6.

16 Current conditions of SRKWs are likely worse than that reflected in Dr. Lacy’s March
 17 2022 modeling. It is presumed that two whales recently died: a 29-year-old male that was of
 18 “prime age” and “important for future breeding success” and an 11-year-old male that was not
 19 yet sexually mature. Third Giles Decl. ¶¶ 8–9. In June 2022, Washington State identified 12
 20 whales as vulnerable because their “body condition is assessed as falling into the lowest 20% of
 21 measurements for age and sex, including showing signs of emaciation.” *Id.* ¶ 11. Dr. Giles
 22 estimates that “well over” one-fifth of the population may qualify as vulnerable. *Id.* ¶ 14. The
 23 poor condition of this species “is simply unprecedented,” prompting Washington State and
 24 Canada to take emergency responsive actions. *See id.* ¶¶ 10–14, 18. “[A]n immediate increase in
 25 the abundance of Chinook [salmon] . . . [is needed] to avoid functional extinction.” *Id.* ¶ 18.

26
 27
 28 **B. Threatened Chinook Salmon.**

29 The Puget Sound, the Lower Columbia River, the Upper Willamette River, and the Snake

1 River fall-run evolutionarily significant units (“ESU”) of Chinook salmon are listed as threatened
2 species under the ESA. Dkt. 111 at 8; 50 C.F.R. § 223.102(e). “The primary limiting factors for
3 the Chinook salmon ESUs’ decline include harvests, loss of habitat, and hatcheries.” Dkt. 111 at
4 8–9 (citing AR 1729, 14492, 15761, 15891, 47422-24). Chinook salmon in these four ESUs are
5 harvested in Southeast Alaska, Canada, and other fisheries. *See* AR 47319, 47373–419.

6 Dr. Gordan Luikart is a wildlife geneticist and is recognized as “one of the world’s most
7 influential scientific minds” for his research. Dkt. 91-5 ¶¶ 6–8. He explains:

8 Hatchery domestication results from a process analogous to natural selection, but
9 occurring under unnatural conditions (i.e., the hatchery rearing environment)—the
10 individual fish (and genes) that are “selected” are those better adapted to life in
11 unnatural conditions The process results in reduced ability to avoid predation,
reduced disease resistance, reduced ability to forage and spawn efficiently, etc.

12 *Id.* ¶ 24 (citations omitted); *see also* AR 47423, 39742–46, 13519–20. This domestication harms
13 wild fish when hatchery fish, released *en masse*, mate with wild fish and thereby transfer their
14 maladapted genes, reducing productivity of wild populations. AR 47422–24, 30274.

15 Congress established the Hatchery Scientific Review Group (“HSRG”) to, *inter alia*,
16 develop guidelines to conserve wild salmonids. *See, e.g.*, AR 30242; AR 10419. To limit harm
17 through genetic introgression, the HSRG developed criteria using the metric pHOS—the
18 “proportion of hatchery-origin spawners”—representing the percentage of adult fish on spawning
19 grounds that are hatchery origin. *See, e.g.*, AR 30260; Dkt. 91-5 ¶ 32. Generally, the productivity
20 of wild populations decreases as pHOS increases. *E.g.*, AR 13546. According to NMFS, pHOS
21 levels that exceed HSRG criteria are acceptable only where a wild salmon population is at a high
22 risk of extinction and the hatchery is used to reduce the short-term extinction risk. AR 10419.

23 The HSRG recommends that pHOS not exceed 5% for some salmon populations and
24 10% for others. Dkt. 91-5 ¶ 35. The pHOS estimates for Chinook salmon populations in most
25 rivers in Puget Sound, the Lower Columbia River, and the Washington coast “are well in excess
26 of levels recommended by the HSRG;” ranging from 12% to 97%. Dkt. 95-1 ¶¶ 51–53; Third
27 Decl. of Gordon Luikart, Ph.D. (“Third Luikart Decl.”) ¶¶ 6–7. Dr. Luikart explains “that it is
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imperative to significantly and rapidly *reduce*” these pHOS levels “if these Chinook populations are to have a reasonable chance of surviving and recovering. Third Luikart Decl. ¶ 18.

C. NMFS’s 2019 SEAK BiOp.

A “key objective” of the United States in negotiating the 2019 Pacific Salmon Treaty was to reduce harvests to “help address ongoing conservation concerns” for Puget Sound Chinook salmon and SRKWs. AR 47201–02. While some reductions were achieved, it was “generally recognized that more would be required to mitigate the effects of harvests” AR 47202. Southeast Alaska harvests will continue to significantly reduce SRKW prey, including larger Chinook salmon preferred by SRKWs from critical habitat. AR 47283, 47439–40, 47507.

NMFS could have reduced harvests under the ESA to protect these species. *See, e.g.*, AR 47212, 47368, 47436. NMFS found that, absent other measures, the salmon fishery “**is likely to adversely affect designated critical habitat**” for SRKWs. AR 47507 (emphasis added). A finding that an action is likely to adversely modify critical habit or jeopardize species typically requires that the BiOp prescribe reasonable and prudent alternatives to the proposed action that would avoid such a result. *See* 16 U.S.C. § 1536(b)(3)–(4); *Thomas*, 753 F.2d at 763; *Greenpeace v. Nat’l Marine Fisheries Serv.*, 237 F. Supp. 2d 1181, 1185 (W.D. Wash. 2002).

Instead of imposing alternative harvests limits that meet the standards of section 7 of the ESA, NMFS announced a federal “funding initiative” as a new action supposedly consulted on in the 2019 SEAK BiOp alongside the salmon fisheries. AR 47201–03. The initiative includes three elements. AR 47202. First, \$3.06 million per year is to be spent on four Puget Sound Chinook salmon “conservation” hatcheries. AR 47202, 47419–20. Second, \$31.2 million is to fund (unidentified) habitat projects to benefit Chinook salmon populations in Puget Sound. AR 47202, 47419–20. Third, NMFS seeks to spend “no less than \$5.6 million per year” on a SRKW “prey increase program” that would increase Chinook salmon hatchery production in Puget Sound, the Columbia River, and on the Washington coast. AR 47202–03. NMFS predicts that the new funding initiative will eventually produce sufficient benefits such that the Southeast Alaska salmon fisheries will not jeopardize ESA-listed species or adversely modify their critical habitat.

1 See AR 47500–01, 47506–08. The 2019 SEAK BiOp thus includes an ITS authorizing take of
2 SRKWs and four threatened Chinook salmon ESUs resulting from the Southeast Alaska salmon
3 fisheries up to the harvest limits of the 2019 Pacific Salmon Treaty. AR 47518–19.

4 **D. The Court’s Summary Judgment Order.**

5 The Report and Recommendation on summary judgment was issued on September 27,
6 2021 and adopted by the Court on August 8, 2022. Dkts. 111, 122. The Court first rejected
7 arguments that the Conservancy lacks standing to pursue its ESA claims. Dkt. 111 at 16–25.

8 Turning to the merits, the Court emphasized that “absent the mitigation from the prey
9 increase program, NMFS would be unable to conclude that the proposed actions would not
10 destroy or adversely modify critical habitat for the SRKW.” *Id.* at 28. The Court held that
11 NMFS’s reliance on the funding initiative was inconsistent with ESA standards because all three
12 components lacked sufficient detail as to how they would be implemented to mitigate harm to
13 species, were not subject to deadlines or other enforceable obligations, and were not subject to
14 NMFS’s control or otherwise reasonably certain to occur. *Id.* at 28–31.

15 The Court found that the 2019 SEAK BiOp was also inconsistent with the ESA because,
16 despite identifying the prey increase program as an “action” subject to the consultation, NMFS
17 failed to determine whether the program is likely to jeopardize threatened Chinook salmon. *Id.* at
18 31–33. NMFS thereby unlawfully segmented consultation on this program by including the
19 supposed benefits in its jeopardy analysis for SRKWs, while omitting the harmful impacts from
20 its jeopardy analysis on threatened salmonids. *Id.*

21 The Court held that NMFS violated its substantive obligation under section 7(a)(2) of the
22 ESA to ensure that its actions do not jeopardize ESA-listed species by relying on the 2019 SEAK
23 BiOp, which suffers from the legal deficiencies identified above. *Id.* at 33–34.

24 With respect to the NEPA claims, the Court initially noted that NMFS had changed its
25 position, without explanation, on whether NEPA procedures are needed for an ITS authorizing
26 take associated with Southeast Alaska salmon fisheries. *Id.* at 36. The Court then held that,
27 regardless of its change in position, NMFS’s complete failure to provide any NEPA process for
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1 its ITS approving take associated with the salmon fisheries under the 2019 Pacific Salmon Treaty
 2 was unlawful. *Id.* at 36–37. Finally, the Court held that NMFS violated NEPA by adopting the
 3 prey increase program without preparing an EIS or EA. *Id.* at 37–38.

4 **IV. ARGUMENT.²**

5 **A. The Court Should Narrowly Vacate Specific Items in the 2019 SEAK BiOp.**

6 The Conservancy requests that the Court narrowly vacate the 2019 SEAK BiOp’s ITS to
 7 the extent that it authorizes take of SRKWs and threatened Chinook salmon resulting from
 8 commercial harvests of Chinook salmon in Southeast Alaska’s troll fishery (excluding the spring
 9 season). The Conservancy further requests that the Court vacate those portions of the 2019
 10 SEAK BiOp that adopt, and purport to consult under section 7 of the ESA on, the prey increase
 11 program. Such relief is warranted and urgently needed under applicable standards.

12 **1. Vacatur under the Administrative Procedure Act.**

13 The Administrative Procedure Act (“APA”) provides that a “reviewing court shall . . . set
 14 aside” unlawful agency actions. 5 U.S.C. § 706(2). As such, “vacatur is the presumptive remedy
 15 under the APA . . .” *350 Mont. v. Haaland*, 29 F.4th 1158, 1177 (9th Cir. 2022); *see also All.*
 16 *for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Courts regularly
 17 vacate actions for violations of NEPA and the ESA. *E.g., Bernhardt*, 982 F.3d at 751; *Ctr. for*
 18 *Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1128 (9th Cir. 2012).

19 “The burden is on the parties opposing invalidation of unlawful agency action to rebut the
 20 APA’s ‘presumption of vacatur.’” *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of*
 21 *Eng’rs*, 466 F. Supp. 3d 1217, 1219, 1226 (W.D. Wash. 2020), *aff’d* 843 F. App’x 77 (9th Cir.
 22 2021); *see also W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020);
 23 *All. for the Wild Rockies*, 907 F.3d at 1121–22. Courts order the unusual remedy of remand
 24 without vacatur “only in limited circumstances . . . when equity demands that [a court] do so.”
 25 *Pollinator Stewardship Council v. U.S. Env’t Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015)

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 29 ² The Conservancy previously demonstrated standing to seek the relief requested and incorporates by this reference the prior arguments and materials cited. Dkt. 91 at 46; Dkt. 96 at 38–44; Dkt. 111 at 16–25.

1 (quotations and citations omitted); *see also Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040,
 2 1053 n.7 (9th Cir. 2010); *Wood v. Burwell*, 837 F.3d 969, 975–76 (9th Cir. 2016). In considering
 3 a request for remand without vacatur, courts weigh the seriousness of the agency’s errors against
 4 the disruptive consequences that might result from the interim change that vacatur would impose.
 5 *Cal. Cmty. Against Toxics v. U.S. Env’t Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (citing
 6 *Allied-Signals, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

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 8 Violations that undermine important congressional objectives of the underlying statute
 9 are serious. *See, e.g., Zinke*, 441 F. Supp. 3d at 1083 (“[T]he seriousness of . . . deficiencies . . .
 10 ‘should be measured by the effect the error has in contravening the purposes of the statutes in
 11 question’” (citation omitted)); *League of Wilderness Defs./Blue Mountains Biodiversity*
 12 *Project v. U.S. Fish & Wildlife Serv.*, No. 3:10-cv-01397-SI, 2012 U.S. Dist. LEXIS 190899, at
 13 *10 (D. Or. Dec. 10, 2012) (“Cumulative impacts analysis is at the heart of [NEPA’s] process,
 14 and a failure to analyze cumulative impacts will rarely—if ever—be so minor an error as to
 15 satisfy this first *Allied-Signal* factor.”); *Se. Alaska Conservation Council v. U.S. Forest Serv.*,
 16 468 F. Supp. 3d 1148, 1151–52 (D. Alaska 2020). Violations are also serious where the agency
 17 may reach a different result on remand. *E.g., Pollinator Stewardship*, 806 F.3d at 532–33
 18 (obtaining adequate studies may lead to different conclusions); *Klamath-Siskiyou Wildlands Ctr.*
 19 *v. Nat’l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1243–45 (N.D. Cal. 2015); *Cook*
 20 *Inletkeeper v. Raimondo*, 541 F. Supp. 3d 987, 991–92 (D. Alaska 2021) (violations were serious
 21 where it was possible, but not likely, the agency would reach the same decision); *League of*
 22 *Wilderness Defs./Blue Mountains Biodiversity Project v. Peña*, No. 3:12-cv-02271-HZ, 2015
 23 U.S. Dist. LEXIS 46279, at *8–12 (D. Or. Apr. 6, 2015); *see also Nat. Res. Def. Council v. U.S.*
 24 *Dep’t of the Interior*, 275 F. Supp. 2d 1136, 1145 (C.D. Cal. 2002). “Technical” errors may be
 25 less serious because it is more likely the same conclusion will be reached on remand. *Nat’l*
 26 *Family Farm Coal. v. U.S. Env’t Prot. Agency*, 966 F.3d 893, 929 (9th Cir. 2020); *see also*
 27 *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017) (“Courts
 28 generally only remand without vacatur when the errors are minor procedural mistakes”).
 29

1 For “disruptive consequences,” the “court largely should focus on potential
 2 environmental disruption, as opposed to economic disruption.” *N. Plains Res. Council v. U.S.*
 3 *Army Corps of Eng’rs*, 460 F. Supp. 3d 1030, 1038 (D. Mont. 2020); *see also In re Clean Water*
 4 *Act Rulemaking*, 568 F. Supp. 3d 1013, 1028 (N.D. Cal. 2021).

5 “The cases in which remand without vacatur was deemed appropriate ‘highlight the
 6 **significant disparity** between the agencies’ relatively minor errors, on the one hand, and the
 7 damage that vacatur could cause the very purpose of the underlying statutes, on the other.”
 8 *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 U.S. Dist. LEXIS 199358, at *16–
 9 17 (W.D. Wash. Nov. 26, 2018) (citation omitted, emphasis added); *see also Klamath-Siskiyou*,
 10 109 F. Supp. 3d at 1242 (“[C]ourts may decline to vacate . . . when vacatur would cause serious
 11 and irremediable harms that **significantly outweigh** the . . . agency’s error.”) (citation omitted,
 12 emphasis added); *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1226 (ordering partial
 13 vacatur where “the equities [were] unclear”). For example, vacatur was not imposed for technical
 14 errors—failure to disclose certain documents considered on a nearly-completed power plant—
 15 where it would threaten a “billion-dollar venture” and risk blackouts that increase air pollution
 16 from generators, “the very danger the Clean Air Act aims to prevent.” *Cal. Cmty. Against*
 17 *Toxics*, 688 F.3d at 992–94; *see also Klamath-Siskiyou*, 109 F. Supp. 3d at 1242–43 (discussing
 18 *Cal. Cmty. Against Toxics*); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th
 19 Cir. 1995) (failure to make a report available during rulemaking did not warrant vacatur where
 20 concern existed for the potential extinction of a species); *Nat’l Family Farm Coal.*, 966 F.3d at
 21 929–30 (failure to consider harm to a butterfly from killing milkweed under the Federal
 22 Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) did not warrant vacatur where there was
 23 “full compliance with the ESA and substantial compliance with FIFRA”).

24 Further, “[t]he ESA . . . ‘did not seek to strike a balance between competing interests’ but
 25 rather ‘singled out the prevention of species [extinction] . . . as an overriding federal policy
 26 objective.’” *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 891 (9th Cir. 2022)
 27 (citation omitted). Courts thus tip the scale in favor of protecting listed species in considering
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1 vacatur. *Klamath-Siskiyou*, 109 F. Supp. 3d at 1242; *see also N. Plains*, 460 F. Supp. 3d at 1037–
 2 38; *Aquall. v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 883 (E.D. Cal. 2018).

3 **2. The Conservancy’s request for partial vacatur is narrow.**

4 The partial vacatur requested focuses on the most harmful aspects of NMFS’s unlawful
 5 actions, while minimizing disruptive consequences. Courts look favorably on such efforts. *See*,
 6 *e.g.*, *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1225–27 (adopting plaintiff’s “suggested
 7 compromise” to complete vacatur), *aff’d*, 843 F. App’x at 80 (“Full vacatur is the ordinary
 8 remedy Here, the court ordered briefing from the parties on the appropriate remedy and
 9 carefully crafted a hybrid remedy that reasonably balanced the competing risks of environmental
 10 and economic harms.”); *League of Wilderness Defs.*, 2012 U.S. Dist. LEXIS 190899, at *13
 11 (“Applying the *Allied-Signal* standard, this Court believes that full vacatur would be warranted.
 12 [Plaintiff], however, is only seeking partial vacatur, and the Court agrees that a more tailored
 13 remedy would be preferable.”); *Wild Fish Conservancy v. Nat’l Park Serv.*, 2014 U.S. Dist.
 14 LEXIS 105689, No. C12-5109-BHS, at *9–10 (W.D. Wash. July 31, 2014) (“Plaintiffs’ proposal
 15 of partially vacating the [action] provides the most reasonable interim process.”).

17 The request for partial vacatur of take authorization narrowly focuses on the fisheries that
 18 have the most impact on ESA-listed SRKWs and Chinook salmon. Specifically, the winter troll
 19 season targets 45,000 Chinook salmon and the summer troll season targets the remaining
 20 “Treaty” Chinook salmon available under the Pacific Salmon Treaty. AR 47318. These fisheries
 21 reduce prey available to SRKWs and harvest fish from the four threatened Chinook salmon
 22 ESUs. *See, e.g.*, AR 47319, 47366–47419, 47433–49. The Conservancy seeks to vacate the ITS
 23 only to the extent it authorizes take resulting from commercial harvests of Chinook salmon in
 24 these two seasons of the troll fishery. Available information indicates that halting these harvests
 25 would increase prey available to SRKWs by around 4.8%. *See Third Lacy Decl.* ¶ 8. That
 26 increase “would provide just enough benefit to [SRKWs] to allow the population to stabilize—
 27 that is, the projected long-term mean population growth rate would be 0.00%.” *Id.* ¶ 9.

28 Much of the ITS would remain untouched. For example, this relief would not affect any
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1 subsistence, recreational, or sport fishing addressed in the 2019 SEAK BiOp. *See* AR 47318–19,
 2 47471–79, 47523. The spring season of the troll fishery, which catches mostly Chinook salmon
 3 released from Alaska hatcheries, would not be impacted. *See* AR 47318. The Conservancy does
 4 not seek relief against coho salmon harvests.³ Take authorization would remain for Chinook
 5 salmon incidentally caught in net fisheries targeting other species. *See* AR 47318–19. Coverage
 6 for take of marine mammals caused by gillnet and purse seine fisheries would be unaffected. *See*
 7 AR 47519–24. The requested relief would not impact terminal Chinook salmon fisheries, which
 8 target fish primarily from Alaskan rivers. *See* AR 47318–19. In economic terms, the Chinook
 9 salmon fisheries affected by the proposed relief represent less than 2.6 percent of Southeast
 10 Alaska’s seafood industry. *See* First Decl. of Hans Radtke, Ph.D. (“Radtke Decl.”) ¶ 31.

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 12 The Conservancy also requests vacatur of those portions of the 2019 SEAK BiOp that
 13 adopt, and purport to consult on, the prey increase program. This relief is warranted because,
 14 despite labeling the program an “action” covered by the 2019 SEAK BiOp, NMFS did not
 15 evaluate whether it would jeopardize threatened salmon or comply with NEPA. Dkt. 111 at 31–
 16 33, 37–38. Such vacatur is also needed because NMFS is assuming the supposed benefits of the
 17 program into the environmental baseline in consultations on other fisheries based on its unlawful
 18 position that the program underwent consultation in the 2019 SEAK BiOp. *See* AR 47202.

19 **3. The limited vacatur requested is warranted.**

20 NMFS’s violations are exceedingly serious and the risks to ESA-listed species absent
 21 vacatur greatly outweigh any disruptive consequences posed by vacatur. This is not the “rare
 22 circumstance” where NMFS can show that there is “significant disparity” between “relatively
 23 minor [agency] errors, on the one hand, and the damage that vacatur could cause the very
 24 purpose of the underlying statutes, on the other.” *See Locke*, 626 F.3d at 1053 n.7; *Puget*
 25 *Soundkeeper All.*, 2018 U.S. Dist. LEXIS 199358, at *16–17. Thus, vacatur is warranted.

26 **a. NMFS’s violations are plainly serious.**

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 29 ³ To the extent any party is concerned that the relief may affect some coho fisheries, it could propose terms that maintain some take authorization for Chinook salmon incidentally caught in fisheries targeting coho salmon.

1 NMFS’s violations are plainly serious. Indeed, they undermine primary objectives of the
2 ESA and NEPA and preclude any assumption that identical decisions will result on remand.

3 The SRKWs are at a severe and worsening risk of extinction due primarily to inadequate
4 Chinook salmon for prey. *See* Third Giles Decl. ¶¶ 4–14, 18; Third Lacy Decl. ¶¶ 5–7. The 2019
5 Pacific Salmon Treaty set harvest levels that will continue to substantially reduce prey. *See* AR
6 47283, 47439–40, 47507. Dr. Lacy and NMFS agree that SRKWs will continue to decline
7 towards extinction under existing management regimes. *See* Third Lacy Decl. ¶ 5; AR 47502.
8 NMFS found that, absent other measures, the fishery “is likely to adversely affect [SRKW’s]
9 designated critical habitat.” *See* AR 47507. That finding should have triggered the imposition of
10 reasonable and prudent alternatives to harvest levels that satisfy ESA section 7. *See* 16 U.S.C. §
11 1536(b)(3)–(4); *Thomas*, 753 F.2d at 763 (“If the [BiOp] concludes that the proposed action
12 would jeopardize the species or . . . adversely modify critical habitat, . . . then the action may not
13 go forward unless the [consulting agency] can suggest an alternative that avoids such . . . [a
14 result].” (citations omitted)); *Greenpeace*, 237 F. Supp. 2d at 1185 (“When jeopardy or adverse
15 modification is found, the expert agency must purpose ‘reasonable and prudent alternatives’
16 (RPAs), by which the action can proceed without causing” that result. (citation omitted)).

17 Instead, NMFS violated the ESA by relying on undeveloped future mitigation to
18 authorize harvests that will continue to starve SRKWs into extinction. *See* Dkt. 111 at 27–31.
19 Magnifying these errors, NMFS failed to determine whether the prey increase program will itself
20 jeopardize species—i.e., threatened Chinook salmon—thereby unlawfully segmenting
21 consultation on the program by assuming the supposed benefits to SRKWs without consulting on
22 the harm it will cause to threatened salmonids. These serious violations of the consultation
23 requirements undermine the ESA’s substantive mandate for federal agencies to **insure** that their
24 actions do not jeopardize species or adversely modify their critical habitat. *See* 16 U.S.C. §
25 1536(a)(2); *Wash. Toxics Coal. v. Env’t Prot. Agency*, 413 F.3d 1024, 1034 (9th Cir. 2005)
26 (“The purpose of the consultation process . . . is to prevent later substantive violations . . .”).
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29 Courts regularly find similar and less substantial ESA violations serious; e.g., where an

1 agency failed to fully explain its determinations on effects to species or where the errors call into
 2 question the “no jeopardy/no adverse modification” decision. *See, e.g., Ctr. for Biological*
 3 *Diversity v. Haaland*, No. CV 20-181-M-DWM, 2022 U.S. Dist. LEXIS 94822, at *12–14 (D.
 4 Mont. May 26, 2022); *Defs. of Wildlife v. U.S. Fish & Wildlife Serv.*, No. 21-cv-00344-JSW,
 5 2022 U.S. Dist. LEXIS 30123, at *55, ___ F. Supp. 3d ___ (N.D. Cal. Feb. 10, 2022); *Klamath-*
 6 *Siskiyou*, 109 F. Supp. 3d at 1243–45; *N.M. Farm & Livestock Bureau v. U.S. Dep’t of Interior*,
 7 Civ. No. 15-428 KG/CG, 2021 U.S. Dist. LEXIS 15220, at * 23–24 (D.N.M. Jan. 27, 2021); *N.*
 8 *Plains*, 460 F. Supp. 3d at 1037–38; *Sovereign Iñupiat for a Living Arctic v. Bureau of Land*
 9 *Mgmt.*, 555 F. Supp. 3d 739, 795–804 (D. Alaska 2021) (“[A]s to the errors found by the Court,
 10 [which include reliance on uncertain mitigation in violation of the ESA], they are serious.”).

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 12 For example, in *Cook Inletkeeper*, NMFS violated the ESA, NEPA, and Marine Mammal
 13 Protection Act by failing to explain its determination that tugboat noise from oil and gas
 14 activities would not harm beluga whales. 541 F. Supp. 3d at 990–91. The errors were serious and
 15 “particularly troublesome” because the whales are endangered and have a declining population.
 16 *Id.* at 991. While it was “possible” NMFS could reach the same conclusion, additional mitigation
 17 may be needed and it was thus not “likely” that the “exact same determinations” would result on
 18 remand. *Id.* at 991–92. NMFS’s violations therefore warranted partial vacatur. *Id.* at 992.

19 NMFS’s ESA violations here are as or more severe because they undermine the finding
 20 of “no jeopardy/no adverse modification,” which is a prerequisite to issuance of an ITS for the
 21 fisheries. *See Thomas*, 753 F.2d at 763; 16 U.S.C. § 1536(b)(4). Notably, the Court explained
 22 that, “absent the mitigation from the prey increase program, NMFS would be unable to conclude
 23 that the proposed actions would not destroy or adversely modify critical habitat for the SRKW,”
 24 and held that the mitigation is not reasonably certain to occur. *See Dkt.* 111 at 28, 31. Moreover,
 25 NMFS did not even evaluate whether the prey increase program will itself jeopardize threatened
 26 Chinook salmon and thereby cause more long-term harm, than benefit, to SRKWs. *See id.* at 31–
 27 33. These are extremely serious violations that go to “the heart of the ESA” and pose severe risks
 28 to some of the most precarious species. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d
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1 472, 495 (9th Cir. 2011) (“The heart of the ESA is section 7(a)(2)”).

2 NMFS’s failure to provide any NEPA processes for the ITS or the prey increase program
3 independently calls for vacatur. *See* Dkt. 111 at 35–38. NMFS failed to prepare an EIS or EA
4 evaluating the impacts of the Southeast Alaska salmon harvests and the prey increase program,
5 or of the cumulative impacts of those actions with other salmon harvests and hatchery programs.
6 NMFS did not provide any opportunity for public input. Nor did NMFS consider alternatives to
7 its decision to fund increased hatchery production as supposed mitigation to allow authorization
8 of the full harvest levels identified in the 2019 Pacific Salmon Treaty—a decision to federally
9 subsidize commercial fisheries by increasing hatchery production that will harm wild salmonids.

10 Notably, NMFS seeks to spend \$8.6 million annually on increased hatchery production to
11 mitigate the Chinook salmon harvests, while the Southeast Alaska commercial harvests of
12 Chinook salmon provide around \$9.5 million in annual income. *See* AR 47202–03; Radtke Decl.
13 ¶ 26. Alternatives could include paying licensees to refrain from fishing for Chinook salmon or
14 purchasing and retiring fishing licenses, like Canada is doing now. *See* Third Giles Decl. Ex. B.
15 NMFS violated NEPA by failing to consider such reasonable alternatives and, when “giv[ing]
16 full and *meaningful* consideration” to alternatives on remand, NMFS may elect a different
17 approach. *See Wild Fish Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *7–8.

18 These most-serious NEPA violations warrant vacatur. *See, e.g., League of Wilderness*
19 *Defs.*, 2012 U.S. Dist. LEXIS 190899, at *10 (“[A] failure to analyze cumulative impacts will
20 rarely—if ever—be so minor an error as to satisfy this first *Allied-Signal* factor.”); *Wild Fish*
21 *Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *7–8 (failure to consider a viable alternative was
22 a serious NEPA violation, despite agency’s protestation that “further evaluation will not change
23 the outcome of its determination”); *Se. Alaska Conservation Council*, 468 F. Supp. 3d at 1151–
24 54 (violations were serious because the “EIS’s lack of site-specificity and inadequate comparison
25 of alternatives precluded . . . the requisite hard look at the Project’s potential impacts and
26 deprived the public of the opportunity to comment on those impacts, thus undermining ‘the two
27 fundamental objectives’ of NEPA: the agency’s careful consideration of ‘detailed information
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1 concerning significant environmental impacts’ and the public’s ability to participate in the
 2 decision-making process.”); *Sovereign Inūpiat*, 555 F. Supp. 3d at 804 (failure to “adequately
 3 analyze a reasonable range of alternatives . . . — a process that is at ‘the heart of [NEPA’s EIS],”
 4 was a serious violation (citation omitted)); *Peña*, 2015 U.S. Dist. LEXIS 46279, at *8–12.

5 **b. Any disruptive consequences from vacatur are far outweighed**
 6 **by the risks posed by leaving the 2019 SEAK BiOp intact.**

7 There will be some economic disruption associated with the requested vacatur of the ITS.
 8 However, those consequences are substantially limited by the narrow request for limited vacatur.
 9 Further, the Court should reject arguments that vacatur on the prey increase program poses risks
 10 to SRKWs given NMFS’s failure to provide details on how that program will be implemented to
 11 mitigate harm and its failure to evaluate whether the program would jeopardize threatened
 12 Chinook salmon and thereby increase risks to SRKWs. Moreover, the requested partial vacatur
 13 of the ITS for fisheries would provide immediate prey increases to SRKWs that more than offset
 14 any hypothetical future benefits from NMFS’s increased funding to hatcheries. Overall, any
 15 disruptive consequences cannot overcome the presumption of vacatur attached to NMFS’s
 16 pervasive and severe violations, especially given the substantial threat posed to endangered
 17 SRKWs and threatened Chinook salmon from allowing the unlawful actions to remain in place.

18 As noted, the court should “largely should focus on potential environmental disruption, as
 19 opposed to economic disruption, under the second [vacatur] . . . factor.” *N. Plains*, 460 F. Supp.
 20 3d at 1038. The SRKW is at a high and increasing risk of extinction that requires rapid and
 21 meaningful responsive measures. *See* Third Giles Decl. ¶¶ 4–18. Remand without vacatur of the
 22 ITS would pose severe risks to the species by allowing the harvests to continue at levels that are
 23 contributing significantly to the SRKW’s decline. *See* Third Lacy Decl. ¶¶ 5, 11. The mitigation
 24 NMFS relied on to approve those harvests is undeveloped and not reasonably certain to occur.
 25 Dkt. 111 at 27–31. Further, NMFS failed to properly consult under the ESA on the impacts to
 26 salmonids from the prey increase program and failed to comply with NEPA for that mitigation
 27 component. *Id.* at 31–33, 37–38. It is entirely unclear how long it will take NMFS to complete
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1 ESA and NEPA processes for the prey increase program and whether NMFS will ultimately elect
 2 an entirely different approach. *See, e.g.*, Dkt. 14 at 25–26 (describing NMFS’s delays of more
 3 than ten years to conduct NEPA and ESA reviews for hatchery programs); *Wild Fish*
 4 *Conservancy*, 2014 U.S. Dist. LEXIS 105689, at *7–8 (on remand, NMFS must “give full and
 5 *meaningful* consideration to all reasonable alternatives” under NEPA). “[A]bsent the mitigation
 6 from the prey increase program, NMFS would be unable to conclude that the proposed actions
 7 would not destroy or adversely modify critical habitat for the SRKW.” Dkt. 111 at 28. Under
 8 these circumstances, it is imperative that the ITS be vacated to prevent substantial environmental
 9 disruption; i.e., adverse modification of SRKW critical habitat. *See Thomas*, 753 F.2d at 763.

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 11 There will be economic consequences. However, the Conservancy has limited its request
 12 to the extent possible, despite vacatur of the entire decision being the typical remedy. *See Coal.*
 13 *to Protect Puget Sound*, 843 F. App’x at 80 (“Full vacatur is the ordinary remedy . . .”). The
 14 requested relief focuses narrowly on the authorization of take for commercial harvests of
 15 Chinook salmon during the troll fisheries’ summer and winter seasons. “The potential economic
 16 impact from closing the Chinook salmon component winter and summer seasons would be about
 17 \$9.5 million income.” Radtke Decl. ¶ 26. For comparison, the Southeast Alaska commercial
 18 seafood industry generates an average annual income of \$411 million. *Id.* ¶ 14. The region’s total
 19 labor earnings in 2020 were \$2.155 billion and the total personal income was \$3.592 billion. *Id.*
 20 ¶ 12. The commercial Chinook salmon troll fishery (including the spring season) represents
 21 “about 2.6 percent of the [Southeast Alaska] seafood industry and 0.5 percent of [Southeast
 22 Alaska] total labor earnings in 2020.” *Id.* ¶ 31. Further, closure of a fishery does not necessarily
 23 translate to an economic loss equal to the value of the closed fishery, as some vessels will move
 24 into other fisheries. *See Fourth Decl. of Brian A. Knutsen* (“Fourth Knutsen Decl.”) 815–24.

25
 26 These economic impacts, while meaningful, do not overcome the presumption of vacatur
 27 for NMFS’s severe violations, especially given the harm posed by leaving the ITS in place. *See,*
 28 *e.g., Nat’l Family Farm Coal. v. U.S. Env’t Prot. Agency*, 960 F.3d 1120, 1144–45 (9th Cir.
 29 2020) (vacating pesticide registration for FIFRA violations despite significant economic impact

1 on farmers across the country); *Coal. to Protect Puget Sound*, 466 F. Supp. 3d at 1226; *Se.*
 2 *Alaska Conservation Council*, 468 F. Supp. 3d at 1154–56; *Zinke*, 441 F. Supp. 3d at 1087–89.
 3 Most importantly, such economic impacts cannot justify the continuation of an unlawful action
 4 that is starving SRKWs into extinction. *See Klamath-Siskiyou*, 109 F. Supp. 3d at 1245–47; *N.*
 5 *Plains*, 460 F. Supp. 3d at 1038–41; *Sovereign Iñupiat*, 555 F. Supp. 3d at 804–05. In enacting
 6 the ESA, Congress sought to “halt and reverse the trend toward species extinction, **whatever the**
 7 **cost.**” *Hill*, 437 U.S. at 184 (emphasis added). Congress intended for “endangered species to be
 8 afforded the highest of priorities” and, as the Supreme Court explained, “courts . . . [should]
 9 enforce [such Congressional priorities] when enforcement is sought.” *See id.* at 168, 174, 194.

10
 11 The Court should reject arguments that relief against the prey increase program poses
 12 risks to SRKWs. “NMFS failed to create a binding mitigation measure that described ‘in detail
 13 the action agency’s plan to offset the environmental damage caused by the program’ for the prey
 14 increase program.” Dkt. 111 at 28 (citation omitted).⁴ NMFS’s post hoc rationalizations
 15 attempting to show that the program will actually provide mitigation for SRKWs are not entitled
 16 to deference and should be viewed with skepticism. *See Sierra Forest Legacy v. Sherman*, 646
 17 F.3d 1161, 1185–86 (9th Cir. 2011) (“Deference to agency experts [on remedy issues] is
 18 particularly inappropriate when their conclusions rest on a foundation tainted by procedural
 19 error.”); *Audubon Soc’y of Portland v. Jewell*, 104 F. Supp. 3d 1099, 1102 (D. Or. 2015).

20 Further, NMFS violated ESA section 7 by failing to evaluate whether the prey increase
 21 program will jeopardize threatened salmon. Dkt. 111 at 31–33. Chinook salmon populations
 22 throughout the Lower Columbia River and Puget Sound are declining and face extinction risks.
 23 *See AR 15904–05, 15911, 01741–42, 01747.* Hatcheries are a primary factor impeding their
 24 recovery. *See Dkt. 111 at 8–9.* “The levels of pHOS in the majority of [rivers and streams in
 25 Puget Sound and the Lower Columbia River] . . . pose a significant threat to the survival and
 26 recovery of the wild Chinook populations.” Dkt. 91-5 ¶¶ 17, 51; *see also* Third Luikart Decl. ¶¶

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 28
 29 ⁴ The Conservancy also explained that the prey increase program may increase salmon abundance estimates that allow for greater harvests of Chinook salmon, resulting in almost no benefit to SRKWs. Dkt. 91 at 29–30.

1 6–7. The pHOS levels for these Chinook salmon populations already far-exceed the criteria set
 2 by the Congressionally chartered HSRG. *See* Third Luikart Decl. ¶¶ 6–7; Dkt. 91-5 ¶¶ 29–40,
 3 51–53. This substantially reduces productivity of wild populations. *See, e.g.*, Dkt. 91-5 ¶¶ 18.c.,
 4 38, 63. Indeed, NMFS recently required significant reductions in hatchery releases into the
 5 Columbia River to protect threatened Chinook salmon. *See* AR 13267–72, 13666, 13677.

6 “NMFS’s proposal to increase Chinook salmon hatchery production in an effort to offset
 7 impacts to [SRKWs] from salmon harvests will lead to even higher pHOS levels, thereby
 8 exacerbating adverse genetic impacts to ESA-listed wild Chinook salmon populations.” Dkt. 91-
 9 5 ¶¶ 17, 52–54, 62–64. pHOS criteria “should not be interpreted as ‘benchmarks’ or
 10 ‘goals’ . . . [;] violation of any of those guidelines on a sustained basis over many generations
 11 will pose long-term genetic risks to the future viability of naturally-spawning population.” Dkt.
 12 91-5 ¶ 36; *see also* AR 10419 (NMFS allows for exceedances of pHOS criteria only when the
 13 hatchery program is being used to conserve a salmon population at a high risk of extinction to
 14 “reduce extinction risk in the short-term”). Yet, “the prey increase program is NMFS’s essential
 15 long-term mitigation solution” for the Southeast Alaska salmon harvests. *See* Dkt. 111 at 28.
 16 This will “further inhibit the prospects for the continued survival, much less recovery,” of
 17 threatened Chinook salmon. Dkt. 91-5 ¶ 64; *see also* Third Luikart Decl. ¶¶ 20–21. This poses
 18 long-term threats to SRKWs that depend on healthy Chinook salmon populations for prey.
 19

20 Moreover, while NMFS optimistically predicts that the unlawful prey increase program
 21 will someday increase SRKW prey by four to five percent, even NMFS concedes the program “is
 22 not anticipated to be implemented immediately” and would then “take several [more] years” to
 23 actually produce adult salmon available as prey. AR 47202, 47435. The requested vacatur of the
 24 ITS for the fisheries would produce rapid prey increases of around five percent, which Dr. Lacy
 25 states would be just sufficient to halt the species’ downward trend. *See* Third Lacy Decl. ¶¶ 5–
 26 11. Any hypothetical disruption posed by relief against the prey increase program is therefore
 27 more than offset by the requested partial vacatur of take authorization for the fisheries.
 28

29 In sum, this is not a rare case that “highlight[s] the **significant disparity** between the

1 agencies' relatively minor errors, on the one hand, and the damage that vacatur could cause the
 2 very purpose of the underlying statutes, on the other[,]” such that vacatur is unwarranted. *See*
 3 *Puget Soundkeeper All.*, 2018 U.S. Dist. LEXIS 199358, at *16–17 (citation omitted, emphasis
 4 added); *see also Klamath-Siskiyou*, 109 F. Supp. 3d at 1242; *Coal. to Protect Puget Sound*, 466
 5 F. Supp. 3d at 1226. NMFS’s severe and pervasive ESA and NEPA errors warrant partial vacatur
 6 to avoid exacerbating the risks to already imperiled SRKWs and Chinook salmon. *See, e.g.*,
 7 *Klamath-Siskiyou*, 109 F. Supp. 3d at 1241–47; *N. Plains*, 460 F. Supp. 3d at 1036–41;
 8 *Sovereign Inūpiat*, 555 F. Supp. 3d at 804–05; *Cook Inletkeeper*, 541 F. Supp. 3d at 990–96.

9
 10 **B. The Court Should Enjoin Implementation of the Prey Increase Program.**

11 The Court should enjoin the prey increase program. This relief is needed to prevent
 12 NMFS’s implementation of the program until it remedies the violations found by the Court.

13 “If a less drastic remedy [than an injunction] (such as partial or complete vacatur . . .) was
 14 sufficient to redress [plaintiff’s] injury, no recourse to the additional and extraordinary relief of
 15 an injunction was warranted.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66
 16 (2010). NMFS has represented that, if the Court vacates the 2019 SEAK BiOp, the agency
 17 “could not continue implementing the . . . prey increase programs.” Dkt. 93 at 43.

18 However, vacatur of a BiOp does not ensure NEPA compliance. Further, the 2019 SEAK
 19 BiOp’s ITS does not cover the prey increase program and it is therefore unclear whether NMFS
 20 would implement the program without preparing a new BiOp. *See* AR 47518–19. NMFS has
 21 sought to determine, for individual disbursements of funds, the level of ESA and NEPA
 22 compliance required. Through this process, NMFS has determined that the ESA and NEPA are
 23 inapplicable to some disbursements and, for others, that funding for increased hatchery
 24 production does not require ESA or NEPA review because of pre-existing reviews under those
 25 statutes. *See* Dkt. 93-4 ¶ 10 & pp. 189–90; *see also* Dkt. 43-5 ¶ 10; Dkt. 96–2; Fourth Knutsen
 26 Decl. 4–814. This piecemeal approach violates the ESA and NEPA and is inconsistent with the
 27 Court’s summary judgment order. *See* Dkt. 111 at 37–38; *Env’t Def. Ctr.*, 36 F.4th at 891;
 28 *Conner*, 848 F.2d at 1453–58. An injunction is therefore warranted. *See Env’t Def. Ctr.*, 36 F.4th
 29

1 at 882 (vacating EA and enjoining permitting activities until NEPA compliance is achieved).

2 **1. Standards for permanent injunctions.**

3 Generally, a party seeking an injunction must show: success on the merits; that it has
4 suffered or is likely to suffer an irreparable injury; that remedies available at law are inadequate;
5 that the balance of hardships justify a remedy in equity; and that the public interest would not be
6 disserved by an injunction. *See Monsanto*, 561 U.S. at 156–57. However, “[w]hen considering an
7 injunction under the ESA, we presume . . . that the balance of interests weighs in favor of
8 protecting endangered species, and that the public interest would not be disserved by an
9 injunction.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 817–18 (9th Cir.
10 2018). Thus, courts decide only whether there is irreparable injury for ESA violations. *Id.*

11 **2. The requested permanent injunction is warranted.**

12 The prey increase program should be enjoined for NMFS’s ESA and NEPA violations.
13 Such relief is warranted under applicable standards and needed to fulfill statutory objectives.

14 NMFS violated the ESA by failing to determine whether the prey increase program will
15 jeopardize salmonids, thereby unlawfully segmenting consultation on the program by assuming
16 the supposed benefits to SRKWs, without consulting on the threats to salmonids. Dkt. 111 at 31–
17 33. An injunction of the program is warranted for these violations to prevent irreparable injury.
18 *See Nat’l Wildlife Fed’n*, 886 F.3d at 817–19 (explaining that an “extinction-level threat” is not
19 required for an injunction under the ESA; rather, “[h]arm to [individual] members is irreparable
20 because ‘once a member of an endangered species has been injured, the task of preserving that
21 species becomes all the more difficult’”) (citation omitted); *Env’t Def. Ctr.*, 36 F.4th at 891
22 (“[P]otential harm to endangered species supports a finding of irreparable injury . . .”). As
23 explained above, the program will “further inhibit the prospects for the continued survival, much
24 less recovery,” of threatened Chinook salmon. Dkt. 91-5 ¶ 64; *see also* Third Luikart Decl. ¶ 20.

25 NMFS’s NEPA violations also, and independently, necessitate the injunction. *See* Dkt.
26 111 at 37–38 (NMFS violated NEPA by failing to prepare an EIS or EA on the prey increase
27 program); *Env’t Def. Ctr.*, 36 F.4th at 882 (remanding with instructions to enjoin actions until
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29

1 agency prepares an EIS and “fully and fairly evaluated all reasonable alternatives). “In the NEPA
 2 context, irreparable injury flows from the failure to evaluate the environmental impact of a major
 3 federal action.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). “The
 4 NEPA duty is more than a technicality; it is an extremely important statutory requirement to
 5 serve the public and the agency *before* major federal actions occur.” *Found. on Econ. Trends v.*
 6 *Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). NMFS’s failure to consider alternatives to the prey
 7 increase program—such as smaller harvests—or to consider the cumulative effects of the
 8 program with other hatchery programs constitutes irreparable injury for which there is no
 9 adequate remedy at law. *See, e.g., Env’t Def. Ctr.*, 36 F.4th at 882; *League of Wilderness*
 10 *Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014)
 11 (“Environmental injury . . . can seldom be adequately remedied by money damages and is often
 12 permanent or at least of long duration, i.e., irreparable.”) (quotations and citations omitted).

14 The balance of harms and interests supports an injunction because of the public “interest
 15 in careful consideration of environmental impacts before major federal projects go forward”
 16 *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011); *see also Amoco Prod.*
 17 *Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (When environmental injury is likely, “the
 18 balance of harms will usually favor the issuance of an injunction to protect the environment.”);
 19 *Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009). “[S]uspending such projects
 20 until that consideration occurs ‘comports with the public interest.’” *Cottrell*, 632 F.3d at 1138
 21 (citation omitted); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (“[T]he
 22 public interest favor[s] . . . an injunction because . . . allowing . . . [a] damaging program to
 23 proceed without an adequate record of decision [is] contrary to . . . NEPA.”).

25 Enjoining the prey increase program is necessary to ensure that NMFS fully evaluates the
 26 program’s ecological impacts and meaningfully considers and discloses alternatives to increased
 27 hatchery production, as opposed to merely “rationaliz[ing] or justify[ing] decisions already
 28 made.” *See Metcalf v. Daley*, 214 F.3d 1135, 1142, 1146 (9th Cir. 2000) (NMFS’s preparation of
 29 an EA after deciding to support a whaling proposal required a new NEPA process “done under

1 circumstances that ensure an objective evaluation free from the previous taint.” (citation
2 omitted)). Accordingly, the Conservancy respectfully requests the Court enjoin the program.

3 **C. The Court Should Impose a Temporary Restraining Order and/or**
4 **Preliminary Injunction until a Final Order on Relief is Issued.**

5 The Conservancy respectfully requests that the Court issue a temporary restraining order
6 and/or preliminary injunction imposing the partial vacatur described above and enjoining the
7 prey increase program until such time as the Court issues a final order on relief.

8 The standards for temporary restraining orders and preliminary injunctions are
9 substantially identical to that for a permanent injunction, except the latter requires a showing of
10 actual success on the merits instead of “a likelihood” of success. *See Amoco Prod. Co.*, 480 U.S.
11 at 546 n.12; *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013); *Stuhlberg*
12 *Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). As
13 described above, these standards are satisfied, and the requested relief is warranted.

14 Further, the relief is urgently needed. The condition of SRKWs is “unprecedented,” with
15 much of the population vulnerable and emaciated. Third Giles Decl. ¶¶ 4–14. The “immediate
16 increase” in prey provided by the requested vacatur of the ITS is needed to “avoid functional
17 extinction,” not unsubstantiated promises to develop mitigation in the future. *See id.* ¶ 18.
18 Immediate relief against the prey increase program is also needed to stop NMFS’s diversion of
19 funds to an unlawfully adopted program that harms imperiled species. *See, e.g., W. Watersheds*
20 *Project v. Zinke*, 336 F. Supp. 3d 1204, 1339–41 (D. Idaho 2018) (preliminary injunction issued
21 to halt “bureaucratic momentum” while NEPA violations are remedied). No bond should be
22 imposed for this relief. *See Cal. ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d
23 1319, 1325–26 (9th Cir. 1985); Dkt. 14-4 ¶¶ 3–9; Third Decl. of Kurt Beardslee ¶¶ 3–7.

24 **V. CONCLUSION.**

25 For the forgoing reasons, the Conservancy respectfully requests that the Court enter an
26 order granting the relief described herein.
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28
29

1 Respectfully submitted this 7th day of September 2022.

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