



# Wild Fish Conservancy

N O R T H W E S T

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## **Comments on the Alaska Troller Association’s White Paper (“AWP”) concerning Wild Fish Conservancy’s lawsuit affecting the Southeast Alaska Chinook Salmon Troll Fishery**

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We respond to the AWP to inform the general public regarding the nature of our litigation and the reasons why the Southeast Alaska (SEAK) Chinook troll fishery is the focus of the litigation. In addition, we note several basic falsehoods and mischaracterizations regarding the importance of Chinook abundance to the survival and recovery of the ESA-listed endangered Southern Resident killer whale (SRKW) population (also referred to under the ESA as the SRKW DPS (“distinct population segment”).

Our focus is to provide a general and factual perspective on the substantive issues for the interested public, both in and outside of southeast Alaska, that is being mischaracterized by the AWP and related actions of the Association.

### Why we legally challenged the NMFS 2019 Biological Opinion.

First and foremost, we firmly believe that we are a nation of laws and that state and federal management agencies have a responsibility to lead by example in upholding the rule of law. We expect agencies to vigorously enforce the laws they are responsible for upholding. For federal agencies such as the National Marine Fisheries Service (NMFS), these laws include the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). Importantly, both of these environmental laws include strong provisions for citizen involvement in enforcing them, through both provisions for public comment on proposed rules and agency actions and for bringing legal action to enforce these laws under citizen law suit provisions.

The ESA requires that NMFS consult with “action agencies” (including itself) when agency actions may cause harm (known broadly as “take”) to ESA-listed species, populations, or population segments (known as “evolutionarily significant units”, ESUs, or “distinct population segments”, DPSs). Under this requirement, NMFS was required to consult with itself following the renewal of the Pacific Salmon Treaty (PST) in 2019. This

consultation was because it chose to provide federal funding to, and delegate its (NMFS') management authority to the State of Alaska in managing the conduct of PST salmon fisheries. The purpose of such consultation is to assure that ESA-listed entities are not "jeopardized" by NMFS' approval of the federal action. The result of that self-consultation was the issuance in April 2019 of a Biological Opinion ("BiOp") that must *credibly* explain whether or not the action poses jeopardy to affected, ESA-listed entities. If NMFS determines that the action does pose jeopardy, it may approve the action provided that it identifies "reasonable and prudent" measures that, when implemented, will prevent or avoid the jeopardy. In either case, one of the components of the BiOp is the issuance of an "incidental take statement" (ITS) that states the conditions that the action agency (here, the State of Alaska) must comply with in order to avoid illegal take of the ESA-listed entities while conducting the otherwise approved action (here, the conduct of the SEAK troll and net Pacific Salmon Treaty Chinook fisheries).

It is important to recognize and understand that the Treaty Chinook are Chinook that originate from rivers in British Columbia and the southern United States ("SUS") states of Washington, Oregon, Idaho, and California. Among the ESA-listed entities identified in the BiOp that are or may be affected by SEAK Treaty Chinook fisheries are four SUS Chinook populations (listed as "threatened") and the Southern Resident killer whale DPS, listed as "endangered". While the Pacific Salmon Treaty is one treaty these fish are subject to, many other treaties and court proceedings also govern how SUS Chinook are managed. Additionally, several new petitions to list Chinook have recently been filed and are in review by NMFS.

Crucially, in the Pacific Salmon Treaty BiOp, NMFS admitted that the US and Canadian parties to the renewal of the Treaty were unable to agree on sufficient reductions in Chinook harvest for Treaty fisheries, including the SEAK troll fisheries, to avoid causing jeopardy to the listed Chinook populations and to the SRKW population. NMFS was clear that cause of the potential jeopardy to the SRKW included the harvest in SEAK of Chinook salmon that were required as prey for SRKW. NMFS nonetheless issued an ITS that was contingent on several conjectural and unfunded actions that NMFS claimed would mitigate the harm posed by PST fisheries in SEAK and thus avoid jeopardy (primarily expansions of Chinook hatchery production in Puget Sound and the Columbia River). Under this approach, the SEAK Treaty Chinook fisheries could continue as provided under the renewed treaty while the proposed mitigation actions were undertaken in the SUS. Reliance on such conjectural and/or un-funded "mitigation" actions to avoid concluding jeopardy has in the past consistently been deemed a violation of the ESA by US courts.

Careful examination of the detailed arguments in the BiOp supported our initial assessment that the BiOp lacked adequate justification for its claims that the proposed mitigation actions would avoid jeopardy. In other words, in issuing the BiOp and the incidental take statement, NMFS had violated the ESA. Further, by not providing the public with the opportunity to review and comment on the proposed Chinook fishery management policies contained in the new Treaty, NMFS violated NEPA.

It was on this basis that the WFC brought suit against NMFS and asked the federal District Court in Washington to declare the BiOp and ITS in violation of the ESA and NEPA and remand the BiOp to NMFS to revise in such as way as to avoid these violations. The Court agreed with the Wild Fish Conservancy and remanded the BiOp to NMFS. Importantly, the Court arrived at this decision despite counter-arguments by NMFS, and Intervenor the State of Alaska, and the Alaska Trollers Association.

In order achieve this legal victory, WFC had to provide not only valid legal arguments, but expert testimony (via written, signed expert Declarations) as to the probable adverse effects of the SEAK Treaty Chinook troll fishery on one or more of the ESA-listed Chinook ESUs and the SRKW DPS. Our experts' testimony was convincing to the Court and the testimony provided by NMFS' experts and by the alleged expert opinions provided by the intervenors were not. Moreover, several statements in the Declarations provided to the Court on behalf of the Trollers' Association were disallowed by the Court because the authors lacked the scientific qualifications required of expert witnesses to provide opinions to the Court; in addition none of these so-called experts provided any of the requisite personal information attesting to their expertise and credibility to provide the opinions

contained in their Declarations. The same can be said about the white paper produced by the Alaska Trollers Association, which claims to summarize data and facts regarding causes of the decline in the abundance of Chinook salmon of importance to SRKW and other contributing factors responsible for the failure of SRKW to rebuild, but provides no information about the authorship and expertise of the white paper.

Contrary to the exaggerated and erroneous claim of the materials produced by the Trollers' Association itself, WFC was and is not motivated by a desire to destroy southeast Alaska Chinook salmon fisheries and wreak financial havoc on SEAK fishing communities. On the contrary, our decision to litigate NMFS' 2019 BiOp is motivated by our deep concern for the depressed status of numerous British Columbian and SUS Chinook populations and the dire condition of the SRKW population that is threatened by PST Chinook fisheries in general and the SEAK Chinook troll fishery in particular. The fact that NMFS' BiOp and ITS are clear violations of federal law should cause concern to all citizens who aim to protect threatened and endangered plant and animal populations and the ecosystems on which they depend.

This legal action is far from the only action WFC and many of its fellow environmental organizations have taken to support policies and actions that would provide more sustainable and risk-averse salmon fisheries management and more effective actions to prevent the extinction of SRKW and other species dependent on healthy and resilient freshwater and marine ecosystems. Our website provides numerous examples of our conservation research and advocacy actions, as well as a list of the several peer-reviewed scientific publications our staff has authored or co-authored.

The AWP resorts to asking the rhetorical question of why we did not initiate other lawsuits on Chinook from Pacific coast, Puget Sound, and Columbia River harvest actions. We have done so in the recent past and we have also provided substantive scientific comments on both southern US (Pacific Fishery Management Council, Washington State and Columbia River) fisheries and ESA-recovery plans. But NMFS 2019 SEAK BiOp is particularly vulnerable to a well-crafted and scientifically well-supported litigation. This is because of the fact that NMFS admits in the BiOp that it would have had to conclude that its delegation of authority to the State of Alaska to manage SEAK PST fisheries and its provision of federal funding to support that management would cause jeopardy to four SUS Chinook ESUs and the SRKW DPS absent the mitigation measures proposed in the BiOp. As we believed upon careful examination of the BiOp that the mitigation measures NMFS proposed to avoid concluding jeopardy were both poorly described and justified and violated the ESA, we believed we were obligated to bring the litigation. Moreover, despite the long list of questionable and misleading assertions regarding Chinook harvest and abundance, and the factors affecting the dire conditions of the SRKW DPS contained in the AWP (which we briefly discuss below), the federal District Court agreed with us in regard to the role of the impact of Chinook harvest in the SEAK PST troll fishery on SRKW and ESA-listed SUS Chinook.

#### Why we have asked the Court to close the SEAK Winter and Summer troll seasons until NMFS produces a revised BiOp and provides an EIS.

When a court finds that a BiOp violated the ESA and must be remanded, it is standard procedure to *vacate* (nullify) the associated Incidental Take Statement (ITS). This means that any harvest of Chinook in PST fisheries subject to the BiOp is considered an illegal take of a threatened species. Vacature is generally understood to be required in order that the illegal take not continue until a new BiOp and ITS has been provided to and approved by the court. It would have been contradictory for WFC to argue the ESA violation (and prevail in court as we have) but ignore the continuing unpermitted take of Chinook in the SEAK PST troll fishery during the year or more time required by NMFS to produce a new BiOp and to comply with NEPA (and to have the court review and approve those actions). Accordingly, we narrowly focused our Remedy request on the two SEAK troll seasons (Winter and Summer) that encounter the greatest number of non-Alaska Chinook. Additionally, we limited this

vacatur to only Chinook salmon, rather than other species encountered under the ITS (this is called “partial vacature”).

We did not take requesting this remedy lightly, especially with respect to the economic impact on fishers and processors, and local communities. Prior to asking the courts for remedy, we contracted with expert fishery economists to evaluate and quantify the expected economic impact to the region. Our remedy request to the Court was supported by a careful economic impacts analysis provided in a declaration by a well-known fisheries economist very familiar with Alaska fisheries. Unfortunately, economic disruption is unavoidable given the appropriateness of such a remedy request in ESA contexts. Again, all of the relevant legal documents for the case are provided on our website for anyone who may be interested to obtain.

We believe that this remedy in the context of NMFS’ failed BiOp qualifies as a federal fishing disaster and thus provides for the provision of federal economic assistance to the locally affected parties. This would not be the first such salmon fishery disaster declaration in Alaska in the recent past. But this requires an application to NMFS by the Governor of Alaska. The process of applying for disaster relief, or at least preparing such an application in anticipation of the granting of our remedy request by the Court, would be prudent. We are also interested in helping in any way we may to improve the statute governing fishery disaster declaration to make the process more efficient so as to deliver the economic relief as quickly as possible.

#### Concerns with the PST.

Nonetheless, we do acknowledge that we have deep concerns about the Pacific Salmon Treaty and the equity of the fishery management policies it currently embodies. And we are particularly (though certainly not exclusively) concerned with the SEAK Treaty Chinook fishery, and the troll fishery in particular, in that it primarily targets and catches non-Alaska-origin Chinook, including depressed British Columbia Chinook along the West Coast of Vancouver Island (WCVI) and in the Fraser River, as well as SUS Chinook stocks. At the same time we also have similar concerns about the other two Aggregate Abundance Based Management (AABM) fisheries: North and Central Coast BC (NBC) and WCVI, and well as SUS fisheries managed by the states and the PFMC. We do believe that the PST should be re-negotiated and revised in such a manner as to provide considerably more risk-averse, precautionary management of mixed stock marine fisheries and a more equitable distribution of the sustainably harvestable portion of salmon stocks, particularly Chinook. The 2019 SEAK BiOp provides important evidence as to the failings of the PST in this regard.

We clearly acknowledge that the kind of revision of the PST that we (and many of our conservation-minded colleagues in British Columbia and SUS) have in mind will require significant reductions (if not total elimination) of Chinook interceptions in the EEZ of SEAK. This would undoubtedly require significant adjustment of fishing practices in SEAK, both in the EEZ and in Alaska state waters.

We also believe that one of the primary sources of the ire of the Trollers’ Association (and the State of Alaska) with our lawsuit and proposed remedy during remand is that it threatens to place the troll and other Alaska salmon fisheries in an unfavorable and strongly public light. The SEAK PST troll fishery in particular has been subsidized by the adverse impacts on several BC and SUS Chinook stocks and affected local fishing economies (and other salmon species stocks as well, such as Skeena/North BC Coast chum and sockeye stocks), and SRKW. These impacts have contributed to the costs of salmon recovery efforts in BC and south of the US/Canada border. Of course, we are fully aware that these fisheries are not the only or even the most important causes contributing to the decline of Chinook and SRKW. But they are a non-trivial component.

It is also relevant to note that Alaska’s own Chinook populations are not as healthy as Alaska’s fishery management and marketing associations would have the general public believe. Chinook populations in the AYK

(Arctic, Yukon, Kuskokwim) have been depressed for over a decade and the subject of much research, and ADF&G recently (March 30 2023) announced limitations to harvest of Chinook from seven SEAK Alaska and Transboundary stocks currently identified as “Stocks of Management Concern”. This appears to beg the question of why this is the case, given claims by Alaska fisheries managers and marketing firms that Alaskan freshwater salmon habitats are pristine and its harvest management of its own Chinook stocks highly sustainable.

#### AWP claims regarding the factors for the decline of SRKW and non-Alaska Chinook.

Finally, we provide some brief responses to the many misleading and erroneous assertions that constitute the bulk of the AWP. At the outset, we note that we will not be drawn into a lengthy rebuttal of the majority of misleading claims and factual distortions. The AWP is not a credible scientific document, nor as we have noted is any author or authors identified whose qualifications a reader could judge. The document relies on a strategy that may be characterized as “scholarship by gathering signatures”, providing hundreds of repetitive citations (endnotes) to its numerous claims regarding the causes for declines of Chinook in BC and the SUS and the factors for the failure of the SRKW DPS to rebuild. This is intended to give the uninformed reader the illusion that these are all scientifically credible and well supported statements. Many are not.

Given the character of the Declarations presented in the case on behalf of the Trollers’ Association’s we are doubtful that member of the Association are the authors of the majority of the AWP. As we noted previously, many key elements of the Declaration were rejected by the Court for lack of verification of appropriate scientific credentials. Among these rejected elements are the assertions regarding the number of Chinook on the Pacific Coast and allegedly available to SRKW and related statements regarding the Chinook stocks important to SRKW and the Chinook stocks that are harvested in the SEAK troll fishery. These same assertions are relied upon in the AWP; specifically, the Declaration referred to in AWP Endnote #360 is precisely one of the Declarations whose claims about Chinook stock abundances and coastal fisheries were rejected by the Court for lack of verified expert qualifications.

Further, if the many claims in the AWP to the effect that Chinook abundance is not a primary (or even a) factor in the decline of SRKW and their failure to rebuild were credible they would have been relied upon in the 2019 BiOp itself and in legal briefs and supporting Declaration by the Defendant NMFS. This was not the case.

In point of fact, however, the abundance of Chinook salmon is a major factor in the decline and failure of SRKW to rebuild. This is clearly stated by NMFS in the 2019 BiOp. In particular, among the peer-reviewed scientific papers addressing the status of SRKW, the BiOp cites a population viability analysis by Dr. Robert Lacy and colleagues (Nature Scientific Reports 2017) identifying Chinook prey availability as a critical factor affecting the productivity and resilience of the SRKW DPS *in the context of* two other relevant factors: vessel noise and toxics contamination. This analysis was updated by Dr. Lacy in two expert Declarations on behalf of WFC in our litigation. The analysis was further updated in 2021 by Murray and colleagues (Murray et al Biological Conservation 2021). The authors of the paper included Dr. Lacy and several scientists from Canada’s Department of Fisheries and Oceans’ (CDFO) Pacific Biological Station and Institute of Ocean Sciences. All of these analyses provide strong support for the conclusion that Chinook abundance is the critical factor in the productivity of SRKW given the levels of vessel noise and contaminant load of members of the SRKW DPS. None of these or related population viability publications are cited in the AWP. In any case, the record is clear that WFC has never claimed that Chinook abundance is the only factor negatively affecting the viability and rebuilding of SRKW.

In addition, the claim by the AWP that no SRKW have starved to death and/or that there is no evidence that the SRKW are starving or are in poor physical condition as a result of lack of prey is simply false. There is robust observational evidence obtained by NMFS and CDFO researchers (as well as independent marine mammal scientists) that many SRKW members are in poor body condition indicative of starvation, Most of these

individual disappear within a year or less of being observed (especially younger, juvenile whales), usually during the winter when whales are very difficult to observe and so likely die and decompose without being observed. This is commonly acknowledged by whale experts.

Another factor that is relevant to the issue of the number of Chinook that are needed to stop the downward spiral of SRKW and permit a sustained positive growth rate is the foraging efficiency of SRKW. This refers to the proportion of Chinook present in the vicinity of SRKW that are likely to be successfully preyed upon by SRKW. Foraging efficiency will, of course, vary with the age, sex, and maturation status of individual SRKW, but overall the several factors negatively affecting this population, especially vessel noise, toxic contamination, inbreeding depression resulting from the small size of the population will result in below average foraging efficiency compared to less disturbed foraging environments. In combination all of these factors mean that more Chinook need to be made available as potential prey for SRKW.

We also draw attention to the erroneous statement in the Executive Summary of the AWP that the catches in the SEAK Treaty Chinook troll “[f]ishery managers have been successful at keeping catches below pre-season catch limits, consistent with Treaty obligations.” This is a bit of an exaggeration. The Chinook Technical Committee (CTC) of the Pacific Salmon Commission (PSC) annually reports pre-season total allowable catches (“allowable catch levels”, ACLs) for each AABM Treaty fishery, together with the actual numbers caught and the post-season-adjusted ACL. The most recent such report (TCCHINOOK-22-04, Table 3-1, pages 14-15, publicly available on the PSC website) shows that between 2001 and 2020 (the most recent year for which complete data are available) 9 years had actual troll catches that exceeded the pre-season ACL, the most recent such years being 2013 and 2015 in which catches exceed the pre-season ACL by 15,388 and 96,026, respectively. The average exceedence in these 20 years was 21,754. Over these same years, actual troll fishery catches exceeded the post-season-adjusted ACL in 12 of the 20 years, including 6 of the 10 years since 2010. The average exceedence in the 20 year period was 33,414; and in the 6 years since 2010, was 39,716. So, as is generally expected in mixed stock marine salmon fisheries, actual catches are generally greater or less than the pre-season (or post-season) ACLs. It is simply not the case that management of the SEAK Treaty Chinook troll fishery never exceeds (over-harvests) its ACL. Mixed stock salmon fisheries in general are never this perfect. Finally, though not mentioned in the AWP nor addressed in our BiOp litigation, but important for interested readers to know, incidental mortality in Chinook troll and net fisheries, including the SEAK and other Treaty AABM fisheries, is significant and represents a complete waste to both fisheries and salmon stock recovery. Again, the CTC provides annual estimates of both “legal and sublegal incidental mortality (LIM and SIM, respectively). These are Chinook of legal and sublegal size (length) that are landed but not retained or drop off the gear before being brought to the boat. The most recent such data for the SEAK Treaty Chinook troll fishery is reported in TCCHINOOK-22-04, Appendix A, Table A1, page 162. Since 2010 the total incidental mortality (LIM plus SIM) of the troll fishery has ranged between 22,000 and 32,000, which amounted to 7% to 23% of the total catch. The average total incidental mortality for year 2010 to 2021 was 22,871, which was equivalent to 15.3% of the average total Treaty troll Chinook catch. The estimate total allowable Treaty troll catch for 2023 is 149,100. Applying the 2010 to 2021 average total incidental mortality rate of 15.3% to the allowable troll catch of 149,100 results in an estimated total incidental mortality of 22,871 Chinook. Thus, if the SEAK Treaty Chinook troll fishery were allowed to occur, the total mortality of Treaty Chinook in 2023 would be 149,100 plus 22,871 = 171,971 Canadian and southern US Chinook.