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HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,)	No. 2:14-CV-00465-JLR
)	
Plaintiff,)	CONSENT DECREE
v.)	
)	
PHILIP ANDERSON, in his official)	
capacity as the Director of Washington)	
Department of Fish and Wildlife, <i>et al.</i> ,)	
)	
Defendants.)	
)	

This matter comes before the Court on the parties' joint motion for entry of a consent decree. Having considered the joint motion and the relevant record, the Court hereby GRANTS the motion and ENTERS the following Consent Decree:

WHEREAS, on January 23, 2014, plaintiff Wild Fish Conservancy (the "Conservancy") issued a sixty (60) day notice of intent to sue defendants Philip Anderson, in his official capacity as the Director of the Washington Department of Fish and Wildlife; Miranda Wecker, in her official capacity as Chair of the Washington Fish and Wildlife Commission; Bradley Smith, in his official capacity as Vice Chair of the Washington Fish and Wildlife Commission; Larry

CONSENT DECREE - 1
No. 2:14-CV-00465-JSR

Smith & Lowney, p.l.l.c.
2317 East John Street
Seattle, Washington 98112
(206) 860-2883

1 Carpenter, in his official capacity as a member of the Washington Fish and Wildlife
2 Commission; Jay Holzmilller, in his official capacity as a member of the Washington Fish and
3 Wildlife Commission; Jay Kehne, in his official capacity as a member of the Washington Fish
4 and Wildlife Commission; Robert Kehoe, in his official capacity as a member of the Washington
5 Fish and Wildlife Commission; Conrad Mahnken, in his official capacity as a member of the
6 Washington Fish and Wildlife Commission; and Rolland Schmitten, in his official capacity as a
7 member of the Washington Fish and Wildlife Commission (collectively, "WDFW"), for alleged
8 violations of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538;

9 WHEREAS, on March 31, 2014, the Conservancy filed a Complaint against WDFW for
10 alleged violations of Section 9 of the ESA, 16 U.S.C. § 1538;

11 WHEREAS, the Conservancy's notice letter and Complaint allege that WDFW is in
12 violation of Section 9 of the ESA, 16 U.S.C. § 1538, for their implementation of hatchery
13 programs in the Puget Sound region that use a hatchery stock commonly known as Chambers
14 Creek steelhead or early-winter run steelhead;

15 WHEREAS, WDFW denies any fault, wrongdoing, or liability for the claims and alleged
16 violations;

17 WHEREAS, the Conservancy and WDFW agree that resolution of this matter without
18 further litigation is in the best interests of the parties and the public and that entry of this Consent
19 Decree is the most appropriate means of resolving this matter; and
20

21 WHEREAS, the Conservancy and WDFW, without trial, adjudication, or admission of
22 any issues of fact or law with respect to the Conservancy's claims or allegations and without
23 admission of any fact, allegation, or legal argument contained in the Conservancy's notice or
24 Complaint in this action, consent to the entry of this Consent Decree.
25

1 NOW, THEREFORE, upon consent of the Conservancy and WDFW, and upon the
2 consideration of mutual promises contained herein, IT IS HEREBY ORDERED, ADJUDGED,
3 AND DECREED as follows:

4 **I. DEFINITIONS**

5 1. The term "Conservancy" refers to plaintiff Wild Fish Conservancy.

6 2. The term "WDFW" refers collectively to defendants Philip Anderson, in his
7 official capacity as the Director of the Washington Department of Fish and Wildlife; Miranda
8 Wecker, in her official capacity as Chair of the Washington Fish and Wildlife Commission;
9 Bradley Smith, in his official capacity as Vice Chair of the Washington Fish and Wildlife
10 Commission; Larry Carpenter, in his official capacity as a member of the Washington Fish and
11 Wildlife Commission; Jay Holzmilller, in his official capacity as a member of the Washington
12 Fish and Wildlife Commission; Jay Kehne, in his official capacity as a member of the
13 Washington Fish and Wildlife Commission; Robert Kehoe, in his official capacity as a member
14 of the Washington Fish and Wildlife Commission; Conrad Mahnken, in his official capacity as a
15 member of the Washington Fish and Wildlife Commission; and Rolland Schmittten, in his official
16 capacity as a member of the Washington Fish and Wildlife Commission.

17 3. The term "Parties" refers collectively to the Conservancy and WDFW.

18 4. The term "ESA" refers to the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

19 5. The term "Puget Sound region" refers to Puget Sound, the Strait of Juan de Fuca,
20 Hood Canal, and the Strait of Georgia and their tributaries, bounded to the west by the Elwha
21 River (inclusive) and to the north by the Nooksack River and Dakota Creek (inclusive).

22 6. The term "Chambers Creek hatchery steelhead" refers to the hatchery stock of
23 steelhead sometimes referred to as early-winter steelhead that was originally derived from
24 Chambers Creek in southern Puget Sound near Tacoma, Washington, including any hatchery
25 stock derived entirely or partially from Chambers Creek steelhead.
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1 7. The term “notice letter” refers to the sixty (60) day notice of intent to sue issued
2 by the Conservancy to WDFW on January 23, 2014.

3 8. The term “Complaint” refers to the Complaint the Conservancy filed in this matter
4 on March 31, 2014.

5 9. The term “NMFS” refers to the National Marine Fisheries Service (also known as
6 NOAA Fisheries Service).

7 10. The term “HGMP” refers to Hatchery and Genetic Management Plans prepared
8 under 50 C.F.R. §§ 223.203(b)(5) and/or (6).

9
10 **II. GENERAL TERMS**

11 11. The Court has jurisdiction over the Parties and the subject matter of this action.

12 12. This Consent Decree applies to, is binding on, and inures to the benefit of the
13 Parties and their successors and assigns.

14 13. This Consent Decree is a settlement of disputed facts and law and shall not
15 constitute evidence in any proceeding, an admission or adjudication with respect to any
16 allegation of the Complaint or notice letter, any fact or conclusion of law with respect to any
17 matter alleged in or arising out of the Complaint or notice letter, or admissions or evidence of
18 any wrongdoing or misconduct on the part of WDFW.

19 14. This Consent Decree is a full and complete settlement and release of the
20 allegations and claims in the notice letter and Complaint.

21 **III. SPECIFIC TERMS**

22 15. WDFW shall take all actions necessary to ensure that no Chambers Creek
23 hatchery steelhead are released from any hatchery facility and/or hatchery program owned and/or
24 operated by WDFW and/or the State of Washington, with the exceptions below, into any waters
25 in the Puget Sound region from which the Chambers Creek hatchery steelhead could potentially
26

1 migrate to Puget Sound, including the Strait of Juan de Fuca, for a period of two and one-half
2 (2½) years commencing upon entry of this Consent Decree, except that:

3 a. Up to 180,000 Chambers Creek hatchery steelhead fish may be released
4 each year in 2014 and 2015 into the Skykomish River watershed, which includes the Skykomish
5 River main stem and any tributaries thereof; and

6 b. Chambers Creek hatchery steelhead may be released from a hatchery
7 facility and/or hatchery program owned and/or operated by WDFW and/or the State of
8 Washington into waters in the Puget Sound region on and after the date of NMFS's issuance of
9 an exemption from liability under Section 9 of the ESA, 16 U.S.C. § 1538, for the specific
10 facility and/or program from which the Chambers Creek hatchery steelhead are released. The
11 provisions of this subparagraph apply to the Skykomish River watershed such that releases of
12 Chambers Creek hatchery steelhead fish into that watershed may occur in excess of 180,000 in
13 2014 and/or 2015 on and after the date of NMFS's issuance of an exemption from liability under
14 Section 9 of the ESA, 16 U.S.C. § 1538, for those releases. The provisions of this subparagraph
15 do not apply to releases of Chambers Creek hatchery steelhead into the Skagit River watershed,
16 which includes the Skagit River main stem and tributaries thereof, for a period of twelve (12)
17 years commencing upon the entry of this Consent Decree.

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19 16. WDFW shall take all actions necessary to ensure that no Chambers Creek
20 hatchery steelhead are released from any hatchery facility and/or hatchery program owned and/or
21 operated by WDFW and/or the State of Washington into waters in the Skagit River watershed,
22 which includes the Skagit River main stem and any tributaries thereof, from which the Chambers
23 Creek hatchery steelhead could potentially migrate to Puget Sound, including the Strait of Juan
24 de Fuca, for a period of twelve (12) years commencing upon the entry of this Consent Decree.

25
26 17. WDFW shall provide the Conservancy with fourteen (14) days' advanced written
27 notice of WDFW's intent to release any Chambers Creek hatchery steelhead from any hatchery

1 facility and/or hatchery program in the Puget Sound region owned and/or operated by WDFW
2 and/or the State of Washington for a period of two and one-half (2½) years commencing upon
3 the entry of this Consent Decree. Such notice shall include the: (a) name of the hatchery
4 program(s) providing the fish to be released; (b) number of hatchery fish to be released; (c) name
5 of the water body in which the hatchery fish are to be released; and (d) location of the water body
6 in which the hatchery fish are to be released. This notice provision shall not apply to any
7 Chambers Creek hatchery steelhead released pursuant to Section III.15.a or b.

8 18. WDFW and the Conservancy shall work cooperatively and in good faith in an
9 effort to study and evaluate whether development and implementation of an integrated steelhead
10 hatchery program using native steelhead (not Chambers Creek hatchery steelhead) is warranted
11 and/or appropriate, and if so, the appropriate parameters of such a program, in the Skagit River
12 watershed, including the Skagit River main stem and tributaries thereof, except that no such
13 program shall be considered for the Sauk River. WDFW reserves the right to seek ESA
14 evaluations and liability exemptions for such a program and to implement such a program
15 irrespective of these efforts. The Conservancy reserves the right to challenge any such
16 evaluations and exemptions for the program and the program's implementation. WDFW and the
17 Conservancy shall work cooperatively under the requirements of this paragraph for a period of at
18 least six (6) months commencing upon the entry of the Consent Decree and WDFW shall not
19 seek ESA evaluations or liability exemptions for such a program nor implement such a program
20 during that period (but nothing shall prevent submission of a plan to NMFS for evaluation prior
21 to the expiration of six (6) months if agreement on such a submission is reached at an earlier
22 date).

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25 19. For a period of two and one-half (2½) years, WDFW shall provide the
26 Conservancy with an opportunity to comment on any HGMPs for any hatchery facility and/or
27 hatchery program owned and/or operated by WDFW and/or the State of Washington before such

1 HGMPs are submitted to NMFS for review and approval and WDFW shall provide the
2 Conservancy with an opportunity to comment on the HGMPs that WDFW recently submitted to
3 NMFS for the Chambers Creek steelhead hatchery programs in the Puget Sound region as
4 follows:

5 a. For any HGMP application intended for submission to NMFS following
6 entry of this Consent Decree, WDFW shall provide the Conservancy with written notice of
7 WDFW's intent to submit the HGMP to NMFS along with a copy of the HGMP and, in addition,
8 within seven (7) days of entry of this Consent Decree, WDFW shall provide the Conservancy
9 with copies the HGMPs that WDFW recently submitted to NMFS for the Chambers Creek
10 steelhead hatchery programs in the Puget Sound region;

11 b. The Conservancy shall provide WDFW written comments, if any, within
12 thirty (30) days of WDFW providing copies of an HGMP for comment;

13 c. WDFW shall thereafter consider the Conservancy's written comments, if
14 any, in good faith, and decide whether to make any appropriate revisions prior to submission to
15 NMFS. WDFW retains complete discretion over the content of the HGMPs it submits to NMFS;

16 d. WDFW shall submit copies of the Conservancy's written comments, if
17 any, with its submission of the HGMP to NMFS for review and approval; and

18 e. WDFW shall not submit any HGMPs to NMFS for its review and
19 approval until the thirty (30) day comment period provided for herein expires.
20

21 20. The Conservancy shall not sue WDFW for any alleged violation of Section 9 of
22 the ESA, 16 U.S.C. § 1536, associated with any hatchery facilities and/or hatchery programs
23 owned and/or operated by WDFW and/or the State of Washington in the Puget Sound region for
24 a period of two and one-half (2½) years beginning upon the entry of this Consent Decree except
25 that the Conservancy may sue WDFW for such alleged violations associated with a hatchery
26 facility and/or hatchery program that NMFS has issued an exemption from liability under
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1 Section 9 of the ESA upon issuance of the exemption. This exception allows for suit only related
2 to the facilities and/or programs for which NMFS's exemption applies. Nothing in this provision
3 is intended to waive any claims or defenses for actions allowed to be brought in the future, nor is
4 it a waiver of any pre-suit notice requirement established by law.

5 21. Within seven (7) days entry of this Consent Decree, WDFW shall pay the
6 Conservancy forty-five thousand dollars (\$45,000) for litigation expenses, including costs and
7 fees (including attorneys' and expert fees), incurred in this matter. Such payment shall be made
8 by check payable and mailed to Smith & Lowney, PLLC, 2317 E. John St., Seattle, Washington
9 98112, Attn: Brian Knutsen. WDFW's payment shall be in full and complete satisfaction of any
10 claims that the Parties may have, either legal or equitable, and of any kind or nature whatsoever,
11 for expenses, including costs and fees, incurred in this litigation. By signing this Consent
12 Decree, WDFW waives any right that it may have to contest these expenses. This Consent
13 Decree embodies the provisions of an agreed settlement and is thus subject to the provisions of
14 Federal Rule of Evidence 408.
15

16 **IV. RETENTION OF JURISDICTION AND DISPUTE RESOLUTION**

17 22. The Court will retain jurisdiction over this matter and allow this case to be
18 reopened without filing fee for the purpose of enabling the Parties to apply to the Court for any
19 further order that may be necessary to construe, carry out, enforce compliance with, and/or
20 resolve any dispute regarding the terms or conditions of this Consent Decree until the Consent
21 Decree terminates under paragraph 25.

22 23. In the event of a dispute regarding implementation of, or compliance with, this
23 Consent Decree, the Parties will first attempt to informally resolve the dispute through conferral
24 between the Parties. The dissatisfied Party shall provide the other Party written notice of the
25 dispute and a request for conferral. The Parties shall thereafter confer in a good faith effort to
26 resolve the dispute within seven (7) days of the notice for any dispute related to whether a
27

1 proposed release of Chambers Creek hatchery steelhead could potentially result in fish migrating
2 to Puget Sound, including the Strait of Juan de Fuca and within ten (10) days of the notice for all
3 other disputes. If the Parties are unable to resolve the dispute during the applicable period, a
4 Party may thereafter file with the Court a motion to enforce the Consent Decree or seeking other
5 appropriate relief, provided that this Consent Decree embodies the provisions of an agreed
6 settlement and shall not, in the first instance, be enforceable through a proceeding for contempt
7 of Court.

8 **V. EFFECTIVE DURATION OF THE CONSENT DECREE**

9 24. This Consent Decree shall be effective upon its entry by the Court.

10 25. This Consent Decree and all obligations and agreements under it shall terminate
11 twelve (12) years after its entry by the Court.

12 **VI. NOTICE AND CORRESPONDENCE**

13 26. Any notice or correspondence made with respect to this Consent Decree shall be
14 in writing and shall be effective on the date it is delivered. Electronic mail shall be deemed
15 delivered when it is issued. Notice shall be provided as follows:

16 **Notice to the Conservancy:**

17 Kurt Beardslee
18 Wild Fish Conservancy
19 PO Box 402
20 Duvall, WA 98019
21 email: kurt@wildfishconservancy.org

22 Brian A. Knutsen
23 Smith & Lowney, PLLC
24 2317 E. John St.
25 Seattle, WA 98112
26 email: brian@igc.org

27 **Notice to WDFW:**

28 Philip Anderson, Director
29 Washington State Department of Fish and Wildlife
600 Capitol Way North
Olympia, WA 98501

1 Michael S. Grossmann
2 Office of the Attorney General
3 1125 Washington Street SE
4 PO Box 40100
5 Olympia, WA 98504-0100
6 email: mikegl@atg.wa.gov

7 Upon written notice to the other Party, any Party may designate a successor contact for
8 any matter relating to this Consent Decree;

9 **VII. RELEASE OF CLAIMS AND RESERVATION OF RIGHTS**

10 27. This Consent Decree is in full satisfaction of the Conservancy's allegations and
11 claims alleged in the notice letter and Complaint and this Consent Decree constitutes a full
12 release of such claims upon its entry by the Court.

13 28. Nothing in this Consent Decree affects the Conservancy's ability to challenge any
14 evaluation, authorization, or exemption from liability issued under the ESA, the National
15 Environmental Policy Act or otherwise for any hatchery facility and/or program owned and/or
16 operated by WDFW and/or the State of Washington.

17 29. Nothing in this Consent Decree affects the Conservancy's ability to challenge
18 WDFW's implementation of a hatchery facility and/or program owned and/or operated by
19 WDFW and/or the State of Washington in the Puget Sound region upon NMFS' issuance of an
20 exemption from liability under Section 9 of the ESA, 16 U.S.C. § 1538, for such facility and/or
21 program or upon two and one-half (2½) years from the entry of this Consent Decree, whichever
22 comes first.

23 **VIII. MUTUAL DRAFTING AND CONSTRUCTION**

24 30. It is expressly understood and agreed that this Consent Decree was jointly drafted
25 by the Parties. Accordingly, the Parties hereby agree that any and all rules of construction to the
26 effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute
27 concerning the terms, meaning, or interpretation of this Consent Decree.

1 31. This Consent Decree is the entire agreement between the Parties in this case. All
2 prior conversations, meetings, discussions, drafts, and writings of any kind are specifically
3 superseded by this Consent Decree.


4 **IX. EXECUTION OF CONSENT DECREE**

5 32. This Consent Decree may be executed in any number of counterpart originals,
6 each of which will be deemed to constitute an original agreement, and all of which shall
7 constitute one agreement. The execution of one counterpart by any Party shall have the same
8 force and effect as if that Party had signed all other counterparts.


9 33. Signature on a counterpart or authorization of an electronic signature shall
10 constitute a valid signature.

11 34. Each undersigned representative of the Parties to this Consent Decree certifies that
12 he or she is fully authorized by such Party to enter into and execute the terms and conditions of
13 this Consent Decree and to legally bind such Party to this Consent Decree. By signature below,
14 the Parties consent to entry of this Consent Decree.
15

16 **For the Conservancy:**

17 Signature: 
18 Title: Executive Director
19 Date: 4-25-14

20 **For WDFW:**

21 Signature: 
22 Title: Director
23 Date: 4-24-14

24 ENTERED and DATED this _____ day of _____, 2014.

25
26 _____
27 HONORABLE JAMES L. ROBERT
28 UNITED STATES DISTRICT JUDGE

1 Presented by:

2 SMITH & LOWNEY, PLLC

3
4 By: 

5 Brian A. Knutson, WSBA No. 38806
6 Attorneys for Plaintiff

7 OFFICE OF ATTORNEY GENERAL
8 OF WASHINGTON

9 By: 

10 Michael S. Grossmann, WSBA No 15293
11 Counsel for Defendants

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