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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

**FISH NORTHWEST, a Washington non-profit corporation,**

**Plaintiff,**

**v.**

**BARRY THOM, in his official capacity as Regional Administrator of the National Marine Fisheries Service; CHRIS OLIVER, in his official capacity as the Assistant Administrator for Fisheries of the National Marine Fisheries Service; NATIONAL MARINE FISHERIES SERVICE; GINA RAIMONDO, in her official capacity as Secretary of the United States Department of Commerce; DARRYL LaCOUNTE, in his official capacity as Director of the Bureau of Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF COMMERCE; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director of U.S. Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE; BYRON ADKINS, in his official capacity as Director of the U.S. Department of Interior; U.S. DEPARTMENT OF INTERIOR; KELLY SUSEWIND, in his official capacity as Director of the Washington Department of Fish and Wildlife; and WASHINGTON DEPARTMENT OF FISH AND WILDLIFE,**  
**Defendants.**

**Case No. 2:21-cv-00570**

**MOTION FOR A PRELIMINARY INJUNCTION**

**NOTING DATE: AUGUST 13, 2021**

**Oral Argument Requested<sup>1</sup>**

<sup>1</sup> Fish Northwest is requesting oral argument but wishes to alert the Court that this matter is time sensitive. The fisheries that Fish Northwest seeks to enjoin occur, in large part, in August and September.

1 **I. MOTION**

2 Plaintiff Fish Northwest hereby moves under Rule 65(a) for a preliminary injunction and  
3 requests that the Court enter an order staying the National Marine Fisheries Service’s (NMFS)  
4 authorizations of all fisheries taking Puget Sound Chinook authorized by the Endangered Species  
5 Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fisheries Conservation and  
6 Management Act Essential Fish Habitat Response (the “2021 BiOp”) and the Incidental Take  
7 Statement issued therewith. The 2021 BiOp is attached as Exhibit A to the Declaration of Joe  
8 Frawley dated July 22, 2021.

9 **II. INTRODUCTION**

10 Puget Sound Chinook salmon, which are listed as threatened under the ESA, continue a  
11 downward spiral. Despite being listed in 1999, no progress toward recovery has occurred. Many  
12 populations are routinely below the critical escapement threshold, which is the level at which the  
13 population is exposed to a heightened risk of extinction. In order to address recovery, NFMS has  
14 set maximum harvest rates and acknowledged that all available science requires that hatcheries be  
15 managed to minimize the risks posed to listed salmon. Shockingly, all of that is ignored.

16 As is detailed herein, with its 2021 BiOp, NMFS approved harvest that exceed the  
17 “maximum” harvest rate by as much as 222 percent. Despite undisputed scientific evidence  
18 indicating that hatchery fish must be managed to be a small proportion of the fish spawning in the  
19 wild, NMFS approves stray rates (the proportion of hatchery fish spawning in the wild) of over 95  
20 percent. Incredibly, because the scientifically defensible measures are not expedient, NMFS goes  
21 so far as to bless the extirpation of some natural origin populations of Puget Sound Chinook.

22 In enacting the ESA, Congress sought to “halt and reverse the trend toward species  
23 extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Congress  
24 has made clear that endangered species are to be afforded the highest of priorities. *Id.* at 168. Fish  
25 Northwest respectfully requests this Court enter a preliminary injunction to stop the further spiral  
26 toward the already-approved extirpation of the Puget Sound Chinook.

1 **III. FACTS**

2 **A. Puget Sound Chinook Salmon Are “In Crisis.”**

3 Puget Sound Chinook salmon were listed as threatened under the ESA in 1999.  
4 Declaration of Joe Frawley, July 22, 2021, Ex. A, p. 35. In the 2021 BiOp, which is the subject of  
5 this litigation, NMFS confirmed that:

6 Since 1999, most Puget Sound Chinook populations have mean natural-origin spawner  
7 escapement levels well below levels identified as required for recovery to low extinction  
8 risk (Table 5). Long-term, natural-origin mean escapements for eight populations are at or  
9 below their critical thresholds. Both populations in three of the five biogeographical  
regions are below or near their critical threshold: Georgia Strait, Hood Canal and Strait of  
Juan de Fuca (Table 5).

10 *Id.* at 44. NMFS further clarified that “[c]urrently, only five populations, in two regions, show long-term  
11 neutral to positive growth rates in natural-origin recruitment (Table 6). Additionally, most populations  
12 are consistently well below the productivity goals identified in the recovery plan (Table 5).” *Id.* at 48.

13 NMFS confirms that Puget Sound Chinook continue in a downward spiral:

14 Over the long-term trend (since 1990), there is a general declining trend in the proportion  
15 of natural-origin spawners across the ESU (Table 3). While there are several populations  
16 that have maintained high levels of natural-origin spawner proportions, mostly in the Skagit  
17 and Snohomish basins, many others have continued the trend of high proportions of  
18 hatchery-origin spawners in the most recent available period (Table 3). It should be noted  
19 that the pre-2005-2009 estimates of mean natural-origin fractions occurred prior to the  
20 widespread adoption of mass marking of hatchery produced fish. Estimates of hatchery and  
21 natural-origin proportions of fish since the implementation of mass marking are considered  
22 more robust. Several of these populations have long-standing or more recent conservation  
23 hatchery programs associated with them—NF and SF Nooksack, NF and SF Stillaguamish,  
24 White River, Mid-Hood Canal, Dungeness, and the Elwha. These conservation programs  
are in place to maintain or increase the overall abundance of these populations, helping to  
conserve the diversity and increase the spatial distribution of these populations in the  
absence of properly functioning habitat. With the exception of the Mid-Hood Canal  
program, these conservation hatchery programs culture the extant, native Chinook stock in  
these basins. With the exception of the NF and SF Stillaguamish, the remainder of the  
populations included in these conservation programs are identified in NMFS (2006b) as  
essential for the recovery of the Puget Sound Chinook ESU (Table 3).

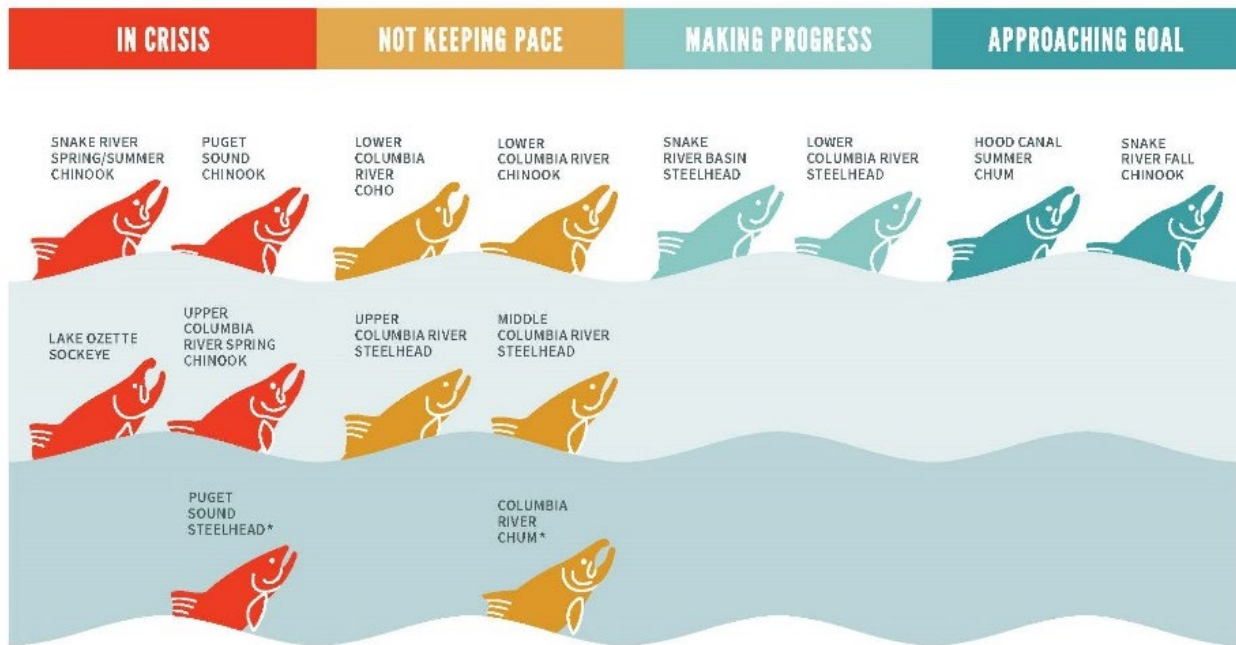
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1 *Id.* at 39-40. “Since 1999, most Puget Sound Chinook populations have mean natural-origin  
 2 spawner escapement levels well below levels identified as required for recovery to low extinction  
 3 risk.” *Id.* at 44.

4 Similarly, the recently published “State of Salmon in Watersheds” report, issued by the  
 5 Governor’s Salmon Recovery Office, confirms that “too many salmon remain on the brink of  
 6 extinction. And time is running out.” Frawley Decl., Ex. C, p. 3. The report lists Puget Sound  
 7 Chinook, among other salmon runs, as “in crisis.” *Id.* at 7. Indeed, many of Washington’s salmon  
 8 stocks are either “in crisis” or “not keeping pace” with recovery, as the following graphic from the  
 9 State of Salmon report demonstrates:

## 10 Salmon Abundance



22 \* Lacks complete data  
 23 Data Source: Washington Department of Fish and Wildlife

24 *Id.* at C, p. 7 (edited for size).

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1 **B. It Is Widely Accepted That Recovery of ESA Listed Puget Sound Chinook Will Require**  
2 **Addressing “All H’s,” including habitat, hydropower, hatcheries, and harvest.**

3 The United States Congress funded the Hatchery Reform Project in 2000 because it  
4 recognized that, in addition to providing harvest and aiding in conservation goals, the hatchery  
5 system was in need of comprehensive reform. *Id.*, Ex. D at 3. It was recognized that many  
6 hatchery programs were contributing to the risks facing endangered and threatened salmon. *Id.*  
7 As a result of that funding, the Hatchery Scientific Review Group (HSRG) was formed. HSRG  
8 worked with state, tribal and federal fisheries managers, along with others, to review over 200  
9 hatchery programs. *Id.* Relevant to this litigation, HSRG reached a number of broadly accepted  
10 conclusions regarding salmon management.

11 First and foremost, hatchery programs cannot replace lost habitat or the natural  
12 populations that rely on that habitat. *Id.* at 8. Consequently, hatcheries must be managed in concert  
13 with actions affecting habitat, harvest rates, water allocation and other important components of  
14 the human environment. *Id.*

15 Hatchery programs should be managed to achieve proper genetic integration. *Id.* at 9.  
16 HSRG noted that hatchery fish have a lower reproductive fitness in the wild than do natural origin  
17 fish and, as a result, they “represent a risk to a natural population when they spawn in the natural  
18 environment.” *Id.* Because of this, the HSRG developed standards that “must be met –or  
19 preferably exceed –regarding the level of hatchery influence on natural populations...” *Id.*

20 This standard is expressed in clear terms in Recommendation 8 of the Report to Congress,  
21 which recommends that managers “manage harvest, hatchery broodstock and natural spawning  
22 escapement to meet HSRG standards appropriate to the affected natural population’s designation.”  
23 *Id.* at 15. The specific recommended maximum proportion of hatchery fish spawning with wild  
24 fish varies depending on the biological significance and recovery phase of the natural population.  
25 *Id.* For primary populations, defined as the most important for recovery, hatchery fish should  
26 comprise no more than 5 percent of the spawning fish for segregated hatchery programs and should

1 comprise no more than 30 percent for integrated hatchery programs. *Id.* at 15-16. A segregated  
2 hatchery program is one that maintains a genetically distinct population of hatchery fish and uses  
3 only hatchery origin fish for reproduction. *Id.* at 9. An integrated hatchery program utilizes both  
4 hatchery and natural origin salmon for reproduction. *Id.* For a contributing population, hatchery  
5 salmon should comprise no more than ten percent of the spawning salmon for segregated hatchery  
6 programs and less than 30 percent for integrated programs. *Id.* at 16.

7         These genetic findings are widely accepted. NMFS' 2021 BiOp cites the 2009 Report to  
8 Congress, among other HSRG documents, as the basis for its analysis. *See Id.*, Ex. A at 57 (Report  
9 to Congress), 136 (HSRG 2000), and 137 (HSRG 2014). Similarly, in its biological opinions  
10 concerning Puget Sound salmon, NMFS acknowledges that HSRG's recommendations are sound  
11 science. *See, e.g., Id.*, Ex. E at 54 (stating "NMFS has not adopted Hatchery Scientific Review  
12 Group (HSRG) gene flow (i.e., pHOS, pNOB, PNI) standards per se. However, at present the  
13 HSRG standards and the 5% (or 0.05) stray standard (from segregated programs) from Grant  
14 (1997) are the only acknowledged quantitative standards available, so NMFS considers them a  
15 useful screening tool. For a particular program, NMFS may, based on specifics of the program,  
16 broodstock composition, and environment, consider a pHOS or PNI level to be a lower risk than  
17 the HSRG would but generally, if a program meets HSRG standards, NMFS will typically consider  
18 the risk levels to be acceptable.").

19         As is discussed below, the 2021 BiOp acknowledges that hatchery stray rates present a  
20 known risk to listed populations. NMFS also acknowledges that hatchery fish comprise up to over  
21 95 percent of the spawning salmon (Skokomish River). *Id.*, Ex A at 185 (table 23) (182 natural  
22 origin spawners and 3,787 total spawners). Despite this scientific evidence, NMFS allows harvest  
23 at a rate that it agrees presents a heightened risk of jeopardy, does not attempt to craft harvest to  
24 minimize straying of hatchery fish onto natural spawning grounds, and entirely fails to quantify  
25 the risk of overly high proportions of hatchery salmon spawning in the wild.

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1 **C. The Defendants Are Failing to Address Half the H’s: Hatcheries and Harvest.**

2 **1. Both WDFW and the Treaty Tribes Conduct Fisheries That Have Not Received**  
3 **Take Exemptions from NMFS.**

4 In 2020, the BiOp became effective on May 8, 2020. Frawley Decl., Ex. B, p. 2. Like  
5 previous biological opinions concerning Puget Sound Chinook, it expired on April 30 of the  
6 following year. The biological opinion is completed in mere weeks, without any doubt of the  
7 outcome. It is a check-the-box formality.

8 Indeed, in 2020, both the treaty tribes and WDFW conducted fisheries prior to the  
9 effective date of the biological opinion. The treaty ocean troll fishery, directly harvesting ESA  
10 listed chinook, opened on May 1, 2020. Frawley Decl., Ex. F, p. 4. The non-treaty troll fishery  
11 for the same area opened May 6, 2020. *Id.* p. 5. Treaty fishing occurred in the Nooksack River  
12 from April 5, 2020 through June 15, 2020. *Id.* p. 17. Skagit River Chinook were harvest from  
13 April 26, 2020 through May 10, 2020. *Id.* p. 21, 22, 23. Fishing occurred in the Stillaguamish and  
14 Snohomish terminal area beginning on May 4, 2020. *Id.*, 27. Stillaguamish River fishing occurred  
15 beginning on May 1, 2020. Other examples exist, including opening Area 13 (south Puget Sound)  
16 on May 1, 2020 to state fisheries. The same is largely true for 2021 with the exception that WDFW  
17 closed some fisheries after receiving Plaintiff’s 60 day notice of intent to sue and Plaintiff filing  
18 suit. *Id.*, Ex. G.

19 None of the defendants have a problem conducting fisheries when no biological opinion is  
20 written and no incidental take statement is in place to exempt take from the prohibitions of ESA. No  
21 enforcement action is taken by the state, which has police powers to enforce conservation and could  
22 invoke the provisions of *U.S. v. Washington* or NMFS whose obligation it is to ensure compliance with  
23 the ESA. Instead, the parties agree to look the other way in knowing violation of the ESA.

24 **2. The Parties’ Harvest Hugely Exceeds the Levels NMFS Has Determined Are**  
25 **Scientifically Defensible.**

26 The parties similarly agree to violate the ESA by intentionally overharvesting ESA listed  
salmon. In the 2021, NMFS acknowledges that it is managing based on “exploitation rate limits at the

1 total, Southern U.S. (SUS), or preterminal SUS level (table 21).” *Id.*, Ex. A at 176. In conducting this  
2 analysis, NMFS relies on rebuilding exploitation rates (“RER”) and explains as follows:

3 The Viable Risk Assessment Procedure (VRAP), detailed in Appendix A provides  
4 estimates of the maximum, population-specific exploitation rates (called Rebuilding  
5 Exploitation Rates or RERs) that are associated with a high probability of attaining  
6 escapement levels which will maximize the natural production for each population (the  
7 rebuilding escapement threshold) and a low probability of escapements falling below levels  
8 at which the population may become unstable (the critical escapement threshold) due to  
9 effects of fisheries. In that way, the RERs are consistent with survival and recovery of that  
10 specific population, under current environmental conditions. The RERs are an important  
11 reference for NMFS in determining the likely implications of a proposed fishery for the  
12 viability/recovery of a population. When the exploitation rate from a proposed fishery is  
13 likely to be at or below the RER, that results in reasonable confidence that the likely effects  
14 of the fisheries pose a low risk to that population.

15 *Id.* at 176-177. NMFS acknowledges that exceedance of the RER presents a heightened risk of  
16 jeopardy:

17 Total fishery exploitation rates on most Puget Sound Chinook populations have  
18 decreased substantially since the late 1990s when compared to years prior to listing  
19 (average reduction = -18%, range = -52 to +41%), (Fishery Regulation Assessment Model  
20 (FRAM) base period validation results, version 6.2) but weak natural-origin Chinook  
21 salmon populations in Puget Sound still require enhanced protective measures to reduce  
22 the risk of overharvest. The risk to the species’ persistence because of harvest remains the  
23 same since the last status review. **Further, there is greater uncertainty associated with  
24 this threat due to shorter term harvest plans and exceedance of rebuilding  
25 exploitation rates (RER) for many Chinook salmon populations essential to recovery.**

26 *Id.* at 50 (emphasis added). NMFS recently estimated RERs for all the (22) populations and (14)  
management units. *Id.*, p. 178 (Table 21).

NMFS acknowledges that exceedance of the RERs makes recovery uncertain and is a  
“threat” to the recovery of Puget Sound chinook. It acknowledges that harvest remains a problem.  
Rather than address the issue, NMFS attempts to explain away overharvest in order to maintain  
the status quo.

Indeed, in its 2020 BiOp, NMFS acknowledges that “[i]n summary, under the proposed  
action, the combined ocean and Puget Sound exploitation rates for the 2020 fishing year for one  
of the 14 management units (Skagit early) and 6 of 22 total populations (Lower Sauk, Upper Sauk,



1 Upper Cascade, Suiattle, NF Stillaguamish, and White) are expected to be under their RER or RER  
 2 surrogates (Table 34).” *Id.*, Ex. B at 243. In 2020, NMFS acknowledged that the RER are  
 3 exceeded in 13 of 14 management units but found that no jeopardy was likely.

4 The 2021 BiOp acknowledges that the RER is exceed for 11 of the 14 management units,  
 5 although conspicuously deleted from the 2021 BiOp is the summation found in the 2020 BiOp.  
 6 *See Id.*, Ex. A at 184-185.

7 Importantly, the level exceedance is often not small. For example, in 2021 Puyallup  
 8 River Chinook are harvested at a rate that exceeds the RER by 35 percent. *Id.* Nisqually River  
 9 Chinook are harvest at a rate that exceeds the RER by 36 percent, and Skokomish Chinook at rate  
 10 that exceeds the RER by 41 percent. *Id.* Most egregiously, Green River Chinook are harvested at  
 11 a rate that exceeds the RER by **222 percent**. *Id.* All of these are approved without any apparent  
 12 quantification or analyzing of the increased risk of exceeding the RERs.

13 It is clear that NMFS will approve any exceedance of the RER, and that the “maximum”  
 14 exploitation rate is meaningless. Harvest is approved at multiple times over what NMFS has  
 15 determined is the maximum allowable to avoid jeopardy. If a 222 percent overharvest is  
 16 acceptable, it is hard to imagine where NMFS would ever draw the line.<sup>2</sup>

17 **3. NMFS Relies on General Arguments to Justify the Overharvest but None of the**  
 18 **Arguments Are Quantified or Analyzed in Any Detail. NMFS Further Ignores the Adverse**  
 19 **Effects of Allowing Far Too Many Hatchery Fish Spawning in the Wild.**

20 NMFS argues broadly that “other information” justifies its finding of no jeopardy despite  
 21 the acknowledged exceedance of the RERs for the majority of the populations of Puget Sound  
 22 chinook. Those alleged mitigating factors are ill-defined, not quantified, and not certain to occur.

23 \_\_\_\_\_  
 24 <sup>2</sup> It also demonstrates that State of Washington is not ensuring conservation occurs. WDFW has a conservation  
 25 obligation and the ability to enforce conservation or withhold agreement. While WDFW relies on NMFS’ approval of  
 26 the overharvest, none of the parties have clean hands. *See, e.g., Department of Game of Wash. v. Puyallup Tribe*, 414  
 U.S. 44, 49 (1973) (“We do not imply that these fishing rights persist down to the very last steelhead in the river.  
 Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so  
 precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The  
 police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the  
 Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.”).

1 NMFS blatantly ignores the existing science concerning the risks posed by hatchery fish. Some  
2 examples of the glaring deficiencies of the BiOps are listed here.

3 **a. NMFS Fails to Differentiate Between Hatchery and Natural Origin Salmon.**

4 Perhaps the most egregious deficiency is NMFS' failure to differentiate between hatchery  
5 salmon and natural origin salmon. NMFS has the duty to conserve natural origin Chinook salmon.  
6 *Id.*, Ex. A at 36 (“[t]his Puget Sound ESU includes all naturally spawned Chinook salmon  
7 originating from rivers flowing in Puget Sound from the Elwha River (inclusive) eastward,  
8 including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia.”).  
9 Throughout the biological opinion, and despite acknowledging that the status of Puget Sound  
10 Chinook is not improving, NMFS claims that long-term abundance trends and recruitment of  
11 natural origin Chinook is positive. *See, e.g., Id.*, Ex. A at 48 (stating “[t]hirteen of 22 populations  
12 show a growth rate in the 18-year geometric mean natural-origin spawner escapement that is great  
13 than or equal to 1.00 (Table 6).”).

14 To make this logical leap, NMFS ignores any distinction between hatchery fish and  
15 natural origin fish. This decision is hidden in a footnote, stating “[t]otal natural escapement Trend  
16 is calculated based on all spawners (i.e., including both natural origin spawners and hatchery origin  
17 fish spawning naturally).,” *Id.* at 49 (table 6, footnote 1). To justify this approach, NMFS  
18 acknowledges that it is “assuming the reproductive success of naturally spawning hatchery fish is  
19 equivalent of that of natural-origin fish...” *Id.* (table 6, footnote 2).

20 The assumption that hatchery and natural origin salmon are equally genetically fit is not  
21 scientifically defensible, and NMFS acknowledges as much through the BiOp. *See, e.g., Id.*, at 50  
22 (“Salmon and steelhead released from Puget Sound hatcheries operated for harvest augmentation  
23 purposes pose ecological, genetic, and demographic risks to natural-origin Chinook salmon  
24 populations”). It is settled science that hatchery fish are less effective at spawning in the wild than  
25 natural origin fish. *See Id.*, Ex. D at 9 (Ex. D is cited by NMFS in the BiOp and is widely accepted,  
26 including by NMFS, as sound science). NMFS provides no analysis or quantification to support

1 this assumption, and provides no analysis of the risk of considering hatchery and natural origin  
2 salmon interchangeable. NMFS blatantly ignores its duty to conserve natural origin Chinook.

3 NMFS knows that hatchery fish are not as successful at spawning as are natural origin  
4 fish. Because there is no plausible way to address the issue while maintaining the status quo,  
5 NMFS ignores the issue entirely. This deficiency alone requires that the entire BiOp be  
6 invalidated, as the very baseline for all of NMFS' analysis fails to differentiate between hatchery  
7 origin and natural origin salmon.

8 **b. Skokomish River.**

9 Skokomish River Chinook, which NMFS considers essential to recovery, are harvested  
10 at a rate that exceed the RER by 41% (49% harvest rate to 35% RER). To justify the overharvest,  
11 NMFS argues that that plans exist to replace the existing population of Skokomish River Chinook  
12 salmon with a different population of Chinook salmon by developing "a late-timed hatchery fall  
13 Chinook stock..." *Id.*, Ex. A at 202. Not only is this effort not quantified or detailed in the 2021  
14 BiOp, but it in essence argues that NMFS can allow the current population of Skokomish River  
15 natural origin Chinook to go extinct because there are plans to create some other population of  
16 hatchery Chinook, sometime in the future, to take its place. *Id.* NMFS again ignores the  
17 requirement that it address recovery of listed natural origin Chinook. NMFS acknowledges the  
18 effort to create a new hatchery run of salmon to take the place of the existing natural origin Chinook  
19 salmon, which is not even certain to occur, is being coordinated "with corresponding habitat and  
20 hatchery actions..." *Id.* at 203. What is not being addressed, of course, is harvest and hatchery  
21 effects on existing natural origin Chinook salmon.

22 NMFS essentially approves the writing off of the existing Skokomish River natural origin  
23 Chinook. No curtailing of harvest is addressed and no change to the hatchery practices affecting  
24 existing natural origin Chinook is addressed. In 2021, the downward spiral of natural origin  
25 Skokomish Chinook continues, over 95% of all spawning Chinook are predicted to be hatchery  
26 origin, and NMFS ignores the genetic effects on the existing listed Chinook. *Id.* at 185 (182 natural

1 origin spawners and 3,787 total spawners). In sum, the 2021 BiOp makes no attempt to recover  
2 the existing natural origin Skokomish River Chinook population. Allowing a population to go  
3 extinct to hopefully be replaced by some other, speculative hatchery population is clearly not  
4 consistent with Congress' mandate under the ESA, and there is no legal justification for simply  
5 approving the extirpation of a listed species in order to approve harvest of a threatened species.

6 **c. Nisqually River**

7 Nisqually River Chinook are harvested at a rate that exceeds the RER by 36% (47.7% v.  
8 35%). *Id.*, Ex. A at 184. Like the Skokomish River Chinook, the Nisqually population is essential  
9 to recovery. *Id.*, Ex. A at 286. To justify the overharvest, NMFS argues that four considerations  
10 balance the overharvest: 1) the extirpated status of the indigenous Chinook, 2) the increasing  
11 overall trend in escapement and growth in natural origin escapement, 3) the natural-origin  
12 escapement anticipated in 2021 exceeds the critical threshold, and 4) the implementation of the  
13 long-term transitional strategy for the population. *Id.* at 286.

14 There are a number of problems with NMFS' reliance on these "other consideration."  
15 First, NMFS includes hatchery fish in its calculations of the alleged increasing trend in overall  
16 escapements." *Id.* at 49 (table 6, footnotes 1 and 2). This deficiency is discussed above. This  
17 assumption that hatchery fish and natural origin fish are interchangeable is not quantified or  
18 analyzed and is contrary to all available science. Indeed, NMFS acknowledges the risks posed by  
19 hatchery fish spawning with natural origin salmon. *Id.*, Ex. A at 50.

20 Second, NMFS' concludes that "stable growth rate for natural-origin escapement" offsets  
21 a harvest rate exceeding their estimate of the Nisqually RER by 36% (47.7% compared to 35%),  
22 but NMFS' calculations of natural-origin growth rates show no increasing trend for either  
23 recruitment or escapement. *Id.* at 49 (table 6). This conclusion is factually wrong and ignores the  
24 downward trend of natural origin Chinook, and the data in the BiOp demonstrates as much.

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1 **d. Puyallup River**

2 Puyallup River chinook are harvested at a rate that exceeds the RER by 35% (47.3% v.  
3 35%). *Id.*, Ex. A at 184. NMFS conclusion that “fisheries may provide some stabilizing influence  
4 to abundance and productivity thereby reducing demographic risks” is inconsistent with  
5 calculations showing the natural escapement trend for the Puyallup River is declining (Table 6),  
6 and natural-origin growth rates for both recruitment and escapement are negative (less than 1.00,  
7 Table 6). *Id.* at 49. There is no analysis or quantification of why harvest “may” provide “some”  
8 stabilizing influence. And, the language used by NMFS confirms the alleged stabilizing influence  
9 is uncertain (it “may” occur) and that no quantification of the stabilizing influence has been  
10 conducted (there may be “some” influence). Just as importantly, the assumptions about  
11 recruitment and escapement indefensibly include hatchery fish as “natural” escapement.<sup>3</sup>

12 **e. Green River**

13 Green River Chinook are harvested at a rate that **exceeds the RER by 222%**. *Id.* at 184.  
14 NMFS’ statement on page 286 of the 2021 BiOp that “[n]atural-origin returns for the Green River  
15 have substantially increased in recent years” is denied by calculations of trends in overall  
16 escapement and growth rates for both recruitment and escapement that are negative or non-  
17 positive. *See Id.* at 49 (table 6). Even including hatchery fish, which is not defensible, the  
18 escapement trend is negative. *Id.* The existence of growth rates for natural origin escapement  
19 consistently higher than growth rates for natural-origin recruitment in the Green River ignores the  
20 fact that the calculated growth rates for each category clearly demonstrate the lack of any growth  
21 (1.00 or less in Table 6). Again, NMFS reached this tortured conclusion by ignoring any  
22 distinction between hatchery and natural origin Chinook.

23 //

24  
25 <sup>3</sup> However tortured, this data also proves that hatchery fish are genetically inferior. Table 6, in the column titled  
26 “Recruitment (Recruits),” demonstrates that each Chinook spawning in the Puyallup River is producing .96  
returning salmon. The vast majority of those spawning salmon are hatchery fish, and they are incapable of replacing  
themselves. If each spawning salmon produces less than one returning salmon, the population will continue its  
spiral to extinction.

1 **4. The BiOps Fail To Address The Need to Coordinate Hatcheries With Harvest.**

2 The well accepted “All H” approach to salmon management is nearly completely  
3 ignored. The BiOp makes no discussion of the potential positive effects of selectively harvesting  
4 hatchery origin salmon and minimizing straying. The BiOp makes no recommendation for  
5 modification of the proposed action to utilize selective harvesting or other methods with the  
6 potential to reduce the known risk of hatchery origin salmon straying, and instead approves many  
7 non-selective fisheries that target natural origin and hatchery fish together. The failure to even  
8 address selective harvest is a glaring deficiency which results in the problems, discussed above,  
9 concerning overharvest of natural origin salmon (up to 222% of the “maximum” harvest rate) and  
10 the obvious risk associated with exceedingly high stray rates (up to over 95 percent compared to  
11 the scientifically accepted maximum of roughly five to thirty percent, depending on population  
12 and type of hatchery program).

13 **IV. ARGUMENT**

14 **A. Legal Standards for Preliminary Injunction**

15 A plaintiff seeking a preliminary injunction must show: “(1) it is likely to succeed on the  
16 merits; (2) it is likely to suffer irreparable harm if the preliminary injunction is not granted; (3) the  
17 balance of equities tips in its favor; and (4) an injunction is in the public’s interest.” *Conservation*  
18 *Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013) (citing *Winter v. Nat. Res. Def.*  
19 *Council*, 555 U.S. 7, 20 (2008)). The moving party bears the burden of persuasion and must make  
20 a clear showing it is entitled to such relief. *Winter*, 555 U.S. at 22.

21 As an alternative to this test, a preliminary injunction may also be appropriate if “serious  
22 questions going to the merits were raised and the balance of the hardships tips sharply” in the  
23 moving party’s favor, thereby allowing preservation of the status quo when complex legal  
24 questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d  
25 1127, 1134-35 (9th Cir. 2011). Nevertheless, the “serious questions” approach supports a court’s  
26

1 entry of a preliminary injunction only if the moving party also shows there is a likelihood of  
2 irreparable injury and that the injunction is in the public interest. *Id.* at 1135.

3 “When considering an injunction under the ESA, we presume . . . that the balance of  
4 interests weighs in favor of protecting endangered species, and that the public interest would not  
5 be disserved by an injunction.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803,  
6 817 (9th Cir. 2018); *see also Wash. Toxics Coal. v. Env’tl. Prot. Agency*, 413 F.3d 1024, 1035 (9th  
7 Cir. 2005) (“Congress has decided that under the ESA, the balance of hardships always tips sharply  
8 in favor of the endangered or threatened species.”).

### 9 **B. Overview of the Endangered Species Act.**

10 The purpose of the ESA is to conserve endangered and threatened species and the  
11 ecosystems upon which they depend. 16 U.S.C. § 1531(b). The Secretary of the Interior must list  
12 species that are endangered or threatened with extinction. *Id.* § 1533(a).

13 Section 9 of the ESA prohibits the "take" of any species listed as "endangered" under the  
14 ESA. 16 U.S.C. § 1538(a)(1). The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot,  
15 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).  
16 The ESA's implementing regulations further define "harm" as an "act which actually kills or injures  
17 wildlife" and "may include significant habitat modification or degradation where it actually kills  
18 or injures wildlife by significantly impairing essential behavioral patterns, including breeding,  
19 feeding or sheltering." 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*,  
20 515 U.S. 687, 696-700 (1995) (upholding the regulatory definition of "harm").

21 Section 9, on its face, does not provide a blanket protection from take to "threatened"  
22 species. However, § 4(d) of the ESA provides that NMFS shall "issue such regulations ... necessary  
23 and advisable to provide for the conservation of such [threatened] species." 16 U.S.C. § 1533(d).  
24 Pursuant to § 4(d), § 9's take prohibition has been extended to threatened anadromous fish,  
25 including the species at issue in this case. Endangered and Threatened Species; Final Rule  
26 Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units, 65 Fed.

1 Reg. 42, 422, 47, 475-81 (July 10, 2000); 70 Fed. Reg. at 37,194 (amending 2000 rule) (codified  
2 at 50 C.F.R. § 223.203).

3 Section 7 of the ESA imposes affirmative duties on federal administrative agencies to  
4 conserve listed species and to prevent violations of § 9. Section 7(a)(2) of the ESA requires federal  
5 agencies to "insure that any action authorized, funded, or carried out by such agency ... is not likely  
6 to jeopardize the continued existence of any endangered or threatened species or result in the  
7 destruction or adverse modification" of such species' critical habitat. 16 U.S.C. § 1536(a)(2).  
8 Whenever a federal agency determines that a proposed action "may affect listed species or critical  
9 habitat," that agency must prepare a biological assessment on the effects of the action. 50 C.F.R.  
10 § 402.14(a); 16 U.S. C. § 1536(c). If the agency determines that the proposed action is likely to  
11 adversely affect a listed species or critical habitat, the agency must consult with a consultation  
12 agency (NMFS or the Fish and Wildlife Service) to determine whether the agency action is likely  
13 to jeopardize that species or adversely modify its critical habitat. *Id.*; 16 U.S.C. § 1536(c).

14 Once formal consultation is initiated, NMFS must review all relevant information and  
15 formulate a biological opinion regarding whether the action is likely to result in jeopardy to a listed  
16 species. 50 C.F.R. § 402.14(g). NMFS "shall use the best scientific and commercial data available" in  
17 determining whether an agency action is likely to result in jeopardy to a listed species. 16 U.S.C. §  
18 1536(a)(2); 50 C.F.R. § 402.14(a). If NMFS determines that an agency action is likely to jeopardize  
19 the continued existence of a listed species, NMFS must suggest reasonable and prudent alternatives to  
20 the proposed action, if any exist, that would not result in such jeopardy. *Id.* § 1536(b)(3).

21 If NMFS concludes that a proposed action is not likely to jeopardize the continued  
22 existence of a listed species or result in the destruction or adverse modification of critical habitat,  
23 but determines that the action will nevertheless result in the take of listed species, NMFS must  
24 issue an incidental take statement (ITS). 16 U.S.C. § 1536(b)(4). An ITS authorizes the limited  
25 take of listed species that would otherwise violate § 9's "take" prohibition. *Id.*; 50 C.F.R.  
26 §402.14(i). The ITS must specify measures to limit and measure take. *Id.* If during the course of



1 the subject action, the conditions of the ITS are exceeded, the action agency must reinitiate formal  
2 consultation pursuant to § 7(a)(2). 50 C.F.R. § 402.16(a).

3 **C. Fish Northwest Will Prevail.**

4 As detailed herein, the 2021 BiOp ignores the harvest limits set by NMFS, ignores stray  
5 rates, and ignores any distinction between hatchery and natural origin Puget Sound Chinook  
6 salmon. Given the glaring deficiencies of the 2021 BiOp, NMFS cannot overcome the  
7 Administrative Procedure Act’s presumptive remedy requiring that the 2021 BiOp be set aside.  
8 *See* 5 U.S.C. § 706(2)(A); *Pollinator Stewardship Council v. U.S. Env’tl. Prot. Agency*, 806 F.3d  
9 520, 532 (9th Cir. 2015) (vacatur standard); *Coal. to Protect Puget Sound Habitat v. U.S. Army*  
10 *Corps of Eng’rs*, 417 F. Supp. 3d 1354, 1368–69 (W.D. Wash. 2019).

11 **D. The Section 7 Process Used to Allow Taking of ESA Listed Puget Sound Chinook is**  
12 **Unlawful.**

13 **1. Section 7 of the ESA Requires Consultation For Federal Actions Affecting Listed**  
14 **Species.**

15 Section 7 of the ESA requires all federal agencies to “insure that any action authorized,  
16 funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any  
17 endangered or threatened species or result in the destruction or adverse modification of” habitat  
18 that has been designated as critical for such species. 16 U.S.C. § 1536(a)(2). “Jeopardize the  
19 continued existence of” is defined as “to engage in an action that reasonably would be expected,  
20 either directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery  
21 of a listed species in the wild by reducing the reproduction, numbers, or distribution of that  
22 species.” 50 C.F.R. § 402.02. Recovery is defined as “improvement in the status of listed species  
23 to the point at which listing is no longer appropriate.” *Id.*

24 Consultation under Section 7 is intended to aid federal agencies in complying with the  
25 substantive requirements of the ESA and Section 7. Consultation is required any time a federal  
26 agency determines its proposed action “may affect a listed species.” 50 C.F.R. § 402.14. A federal

1 action includes “all activities or programs of any kind authorized, funded, or carried out, in whole  
2 or in part, by Federal agencies...” Pursuant to 50 CFR 402.03, section 7 applies to all “actions in  
3 which there is discretionary federal involvement or control.”

4 Not every federal action can trigger Section 7 consultation. “Section 7 and the  
5 requirements of this part apply to all actions in which there is discretionary federal involvement or  
6 control.” 50 CFR § 402.03. “Where an agency has no ability to prevent a certain effect due to its  
7 limited statutory authority over the relevant actions, the agency cannot be considered a legally  
8 relevant ‘cause’ of the effect, and the agency action therefore should not be considered  
9 “discretionary” actions subject to Section 7.” *Defenders of Wildlife v. U.S. Environmental*  
10 *Protection Agency*, 420 F.3d 946, 963 (quoting *Dep’t. of Transp. v. Public Citizen*, 541 U.S. 752,  
11 770 (2004)) (overruled on other grounds).

## 12 **2. BIA Has No Authority to Regulate the Taking of ESA Listed Puget Sound Salmon.**

13 Since 2014, NMFS has consulted on alleged single year actions of BIA. Frawley Decl.,  
14 Ex. A at 22. The process was set up entirely to allow harvest to continue because the treaty tribes  
15 and the state had not timely submitted a multi-year fisheries plan. This year, NMFS also allegedly  
16 conducted its Section 7 consultation based on the federal actions that were the subject of Fish  
17 Northwest’s 60 day notice and complaint. *Id.* at 25-29. That has not been the case in the past and  
18 was the result of Plaintiff’s notice of intent to sue being issued. *See, e.g., Id.*, Ex. B at 23-25.

19 The ESA’s Section 7 consultation process aids federal agencies in complying with its  
20 substantive provisions. Consultation is required any time a federal agency determines that its  
21 proposed action “may affect a listed species.” 50 C.F.R. § 402.14. Thus, “federal action” under  
22 Section 7 refers to actions by federal agencies including “all activities or programs of any kind  
23 authorized, funded, or carried out, in whole or in part, by Federal agencies. ” Not any action will  
24 suffice, however; only actions where “there is discretionary federal involvement or control.” 50  
25 C.F.R. § 402.03.

1 The Supreme Court interprets “discretion” under Section 7 as the ability to exert statutory  
2 authority to prevent some action. In other words, discretion is the ability to stop something from  
3 happening. Thus, “where an agency has no ability to prevent a certain effect due to its limited  
4 statutory authority over the relevant actions,” as with BIA regarding state fishing management,  
5 “the agency cannot be considered a legally relevant ‘cause’ of the effect, and the agency action  
6 therefore should not be considered ‘discretionary’ actions subject to Section 7.” *Defenders of*  
7 *Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 963 (quoting *Dep’t of Transp. V.*  
8 *Public Citizen*, 541 U.S. 752, 770 (2004) (overruled on other grounds).

9 Yet, despite this requirement that agencies seeking consultation demonstrate discretion,  
10 BIA, since 2014, continues to request and receive single-year consultations based on its claim that  
11 it takes discretionary action with respect to Washington State salmon fishing. The purpose, of  
12 course, is to allow continued fishing where there is no other convenient path around the take  
13 prohibitions of the ESA.

14 *Environmental Protection Agency* and its progeny instruct that BIA must be able to stop  
15 something from occurring with respect to state or tribal fishing to demonstrate discretion within  
16 the meaning of Section 7. However, BIA does not have such discretion, and BIA has been unable  
17 to cite to any specific relevant discretion, as discussed below.

18 Nowhere in BIA’s letters to NMFS requesting consultation, or in the ensuing BiOps for  
19 2020 or 2021, does either NMFS or BIA specify any action or discretion regarding BIA and  
20 Washington State salmon fishing. For example, the 2020 Section 7(a)(2) Biological Opinion refers  
21 to the BIA as an “action agency” based only on a vague allusion to “BIA’s authority to assist with  
22 the development and implementation of the co-managers 2020-2021 Puget Sound Harvest Plan.”  
23 Frawley Decl., Ex. B at 18, 22. But such authority, assuming *arguendo* it exists, does not equal  
24 discretionary action to trigger Section 7 consultation.

25 Instead, NMFS asserts that BIA “assists” with the Puget Sound Harvest Plan without  
26 identifying how. The Puget Sound Harvest Plan merely “describes the framework within which

1 the tribal and state jurisdictions jointly manage all recreational, commercial ceremonial,  
2 subsistence and take-home salmon and steelhead fisheries.” *Id.*, Ex. A at 22. But such a vague  
3 allusion to “assisting” within an already established state-level framework does not demonstrate  
4 discretionary action.

5 The Puget Sound Chinook Harvest Plan also “considers the total fishery-related impacts  
6 on Puget Sound Chinook salmon and steelhead from those fisheries within the greater Puget Sound  
7 area.” *Id.*, Ex. B at 22. Yet again, there is no reference to any discretionary action by BIA regarding  
8 “total fishery-related impacts” on either Puget Sound salmon or steelhead derived from BIA  
9 decisions or actions.

10 While there is a joint management framework and there are fishery-related impacts as  
11 outlined in the Puget Sound Chinook Harvest Plan, these background facts do not demonstrate  
12 discretionary action by BIA. BIA’s ongoing inability to cite any specific discretionary control  
13 relative to Washington State fishing is not surprising considering that BIA was not created to deal  
14 with fishing harvest issues and therefore has no such statutory mandate or power. For instance,  
15 25 USC Chapter 1 governs the Bureau of Indian Affairs. That Chapter enumerates BIA’s powers,  
16 as exercised through four units. First, The Office of Indian Services manages and implements  
17 various tribal programs, such as related to child welfare, disaster relief, and roads programs.  
18 Second, the Office of Justice Services concerning law enforcement and tribal courts. Third, The  
19 Office of Trust Services carries out trust responsibilities. And, fourth, the Office of Field  
20 Operations, administers various tribal objectives such as drug enforcement, corrections, and  
21 highway safety. None of these units has anything to do with Washington State salmon and  
22 steelhead fishing in Washington State. Thus, BIA has no discretionary involvement or control and  
23 therefore cannot be considered a legally relevant “cause” of the taking for Section 7 consultation  
24 purposes. Because of this, any BIA nexus is insufficient to trigger a consultation.

25 The remedy is to vacate the 2021 BiOp. Procedural violations of Section 7 are not mooted  
26 by a finding that a substantive violation has not occurred (although in this case there are glaring

1 substantive violations). A court, in absence of “unusual circumstances,” will issue an injunction  
 2 to halt an agency action where there is a substantial procedural violation. *Sierra Club v. Marsh*,  
 3 816 F.2d 1376, 1389 (9th Cir. 1987).

4 **E. NMFS Has Failed to Ensure No Jeopardy.**

5 **1. The BiOp Fails To Ensure No Jeopardy Because It Authorizes the Harvest of**  
 6 **Listed Salmon at a Rate That Exceeds the Maximum Rate of Harvest That Can Occur**  
 7 **Without Jeopardizing The Existence of the Listed Species.**

8 Section 7 of the ESA requires that each federal agency “insure” that any action it funds or  
 9 authorizes “is not likely to jeopardize” a protected species. 16 U.S.C. § 1536(a)(2). To determine  
 10 whether an agency decision is arbitrary and capricious, the court should “consider whether the  
 11 decision was based on a consideration of the relevant factors and whether there has been a clear  
 12 error of judgment.” *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

13 After considering the relevant factors, the agency must articulate a satisfactory explanation  
 14 for its action, including a rational connection between the facts found and the agency's conclusions.  
 15 *Ctr. for Biological Diversity*, 538 F.3d 1172, 1193 (9<sup>th</sup> Cir. 2008). Review under this standard is  
 16 narrow, and the court may not substitute its judgment for the judgment of the agency. *Lands*  
 17 *Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2011). A decision is arbitrary and capricious if  
 18 the agency:

19 [H]as relied on factors which Congress has not intended it to consider, entirely failed to  
 20 consider an important aspect of the problem, offered an explanation for its decision that  
 21 runs counter to the evidence before the agency, or is so implausible that it could not be  
 22 ascribed to a difference in view or the product of agency expertise.

23 *O’Keeffe’s, Inc. v. U.S. Consumer Product Safety Comm.*, 92 F.3d 940, 942 (9th Cir. 1996)  
 24 (quoting *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43).

25 NMFS has authorized harvest that exceeds the RER it has determined as the maximum  
 26 allowable rate without increasing the risk of extinction. That, in and of itself, is arbitrary and  
 capricious. While NMFS attempts to explain away the exceedance, the fact remains that NMFS  
 has already determined that exceeding the RERs poses a risk of extinction (or at the very least

1 recovery). Worse, to reach the conclusion that exceeding the RERs poses no risk of jeopardy,  
2 NMFS without explanation adopts the position that it can ignore the distinction between hatchery  
3 fish and natural origin fish. NMFS has not provided an sufficient explanation for the various  
4 assumptions and logical leaps it takes.

5 **2. The BiOp Fails To Ensure No Jeopardy Because It Fails to Coordinate Harvest**  
6 **With Hatchery Genetic Management.**

7 As discussed in detail above, NMFS' analysis fails to differentiate between hatchery and  
8 natural origin salmon, and NMFS treats the two as interchangeable. This is very clearly not  
9 permissible in light of the law requiring recovery of natural origin Chinook, which are included in  
10 Puget Sound ESU, and the requirement to consider all relevant factors in reaching its conclusion.  
11 Frawley Decl., Ex. A at 36 (“[t]his Puget Sound ESU includes all naturally spawned Chinook  
12 salmon originating from rivers flowing in Puget Sound from the Elwha River (inclusive) eastward,  
13 including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia.”).

14 Further, the “other factors” relied on by NMFS are not quantified or analyzed, and they are  
15 not certain to occur. Many, such as those on the Skokomish, Green, Puyallup, and Nisqually  
16 Rivers, rely on future hatchery changes or the development of some other population of fish. There  
17 is no analysis, no timeline for completion of the mitigation, or any quantification of the genetic  
18 effects of the proposed mitigation.

19 While NMFS may rely on mitigation or conservation measures in issuing a no jeopardy  
20 BiOp, those measures must be "reasonably specific, certain to occur, and capable of  
21 implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most  
22 important, they must address the threats to the species in a way that satisfies the jeopardy and  
23 adverse modification standards." *Ctr. for Biol. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139,1152  
24 (D. Ariz. 2002) (*citing Sierra Club v. Marsh*, 816 F.2d 1376, 1379-80 (9th Cir. 1987)); *see also*  
25 *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008) ("even a sincere general  
26 commitment to "implement conservation measures is insufficient" absent specific and binding

1 plans"). As discussed in detail above, NMFS has failed to articulate why the alleged mitigation  
 2 measures are sufficiently certain, sufficient in quantity or scientifically sound.

3 **3. The BiOp Fails to Ensure No Jeopardy Because It Fails to Account for the**  
 4 **Increased Risk of Single Year Fisheries Authorizations.**

5 NMFS acknowledges that the use of single year fisheries authorizations presents an  
 6 increased risk, especially when paired with constantly exceeding the RERs, and states as follows:  
 7 “[f]urther, there is greater uncertainty associated with this threat due to shorter term harvest plans  
 8 and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations  
 9 essential to recovery.” Frawley Decl., Ex. A, at 50. Incredibly, after acknowledging the risk of  
 10 single year fisheries plan, the BiOp does not further discuss the risk presented. There is no  
 11 mitigation or explanation. NMFS simply identifies the risk and ignores it. Blatantly failing to  
 12 account for a known risk is arbitrary and capricious, and activities authorized by the 2021 BiOp  
 13 must be enjoined.

14 **F. The Requested Injunction is Needed to Prevent Likely Irreparable Injury.**

15 To remedy the specific harm at issue, the Fish Northwest requests an order staying NMFS’s  
 16 take authorization of the seasons approved by the 2021 BiOp and directing NMFS to take any  
 17 additional steps needed to halt such fisheries. *See Park Vill. Apartment Tenants Ass’n v. Mortimer*  
 18 *Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). Irreparable injury is likely absent such relief.  
 19 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018).

20 Courts should evaluate irreparable injury with reference to the statute being enforced. *Id.*  
 21 “The ‘plain intent’ of Congress in enacting the ESA was ‘to halt and reverse the trend toward  
 22 species extinction, whatever the cost.’” *Id.* (citation omitted). This is achieved through  
 23 “incremental steps” that include protecting individual members of species; “[h]arm to those  
 24 members is irreparable because ‘once a member of an endangered species has been injured, the  
 25 task of preserving that species becomes all the more difficult.’” *Id.* (citation omitted). An  
 26 extinction-level threat is not required for an injunction. *Id.* at 819. “In light of the stated purposes

1 of the ESA . . . , establishing irreparable injury should not be an onerous task for plaintiffs.”  
2 *Cottonwood Env't'l Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). Further,  
3 the activity to be enjoined need not be the exclusive cause of harm, and a showing that the  
4 requested injunction would forestall the irreparable injury is sufficient. *Nat'l Wildlife Fed'n III*,  
5 886 F.3d at 819.

6 Here, the NMFS acknowledges that more natural origin Chinook will be killed (through direct  
7 take, no less) than can be taken without increasing the risk of extinction or to recovery. NMFS further  
8 acknowledges, but does not address, that the stray rate is far too high. The only way to prevent this  
9 injury to listed species is to not kill them in fisheries and to allow them to spawn.

#### 10 **G. Public Interest Favors an Injunction.**

11 The balance of hardships and public interests always favor an injunction for ESA  
12 violations. *Nat'l Wildlife Fed'n III*, 886 F.3d at 817. The Ninth Circuit has “held that the public  
13 interest in preserving nature and avoiding irreparable environmental injury outweighs economic  
14 concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim.”  
15 *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008).

16 The economic injury in this case will be real, but so too is the economic injury of the ever  
17 dwindling numbers of Puget Sound Chinook salmon. Billions of dollars are being spent on habitat  
18 restoration, and those gains are being wiped out by overharvest and ignoring hatchery influence.  
19 *See, e.g.*, Frawley Decl. Ex. C at 8 (the cost of implementing habitat improvements is estimated at  
20 \$4.7 billion, with \$1 billion having already been spent). Business that rely on Puget Sound salmon  
21 will continue to suffer and, eventually, die out. The economic benefit of the status quo is dwarfed  
22 by the economic harm of the status quo. The HSRG recommendations have made clear that harvest  
23 and hatchery reform cannot wait until habitat efforts are complete.

24 Just as importantly, the public interest is best served by ensuring the continued existence  
25 of Puget Sound salmon. All parties acknowledge they are “in crisis.” The law is clear that when  
26 balancing the equities, the threatened or endangered species should win out.



**H. No Bond Is Appropriate**

It is within the Court’s discretion to order no bond (or a small bond) be required “where requiring security would effectively deny access to judicial review.” *See Cal. ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *see Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975). It is “well established” that, in cases like this, no or a small bond is appropriate because forcing Fish Northwest, a small non-profit organization, to post a large bond would effectively deny access to judicial review and have a chilling effect on future efforts to vindicate public interests. *See Cent. Or. Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012); *Van de Kamp*, 766 F.2d at 1325–26. Accordingly, Fish Northwest respectfully requests that the bond requirement be waived.

**V. CONCLUSION**

Puget Sound Chinook are “in crisis.” They are being harvested at a rate that is up to 222 percent higher than is needed for recovery, hatchery salmon now comprise more than 95 percent of the spawning salmon in some streams, and the distinction between hatchery and natural origin salmon is being admittedly ignored. The very purpose of all of the deficiencies in the 2021 BiOp is to allow for the direct take of species that all parties agree needs protecting. Fish Northwest respectfully requests the Court grant its motion and force the parties to make an honest effort at saving Puget Sound Chinook.

Dated this 22nd day of July 2021.

JOEL MATTESON

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