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 SUMMARY JUDGMENT

NOTING DATE: MAY 6, 2022

Oral Argument Requested

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

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SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

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SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

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SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

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SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

I. MOTION

Plaintiff Fish Northwest hereby moves for summary judgment and respectfully requests the Court: 1) determine that the National Marine Fisheries Service's ("NMFS") biological opinion for salmon fisheries in Puget Sound ("2021 BiOp") is not in accordance with law; 2) determine NMFS is violating section 7(a)(2) of the Endangered Species Act ("ESA") by failing to ensure its actions identified in the 2021 BiOp do not jeopardize listed species; 3) vacate the 2021 BiOp; and 5) enjoin NMFS's issuance of future biological opinions until NMFS complies with the ESA.

II. INTRODUCTION

Puget Sound Chinook salmon, which are listed as threatened under the ESA, continue a downward spiral. Despite being listed in 1999, no progress toward recovery has occurred. Many populations are routinely below the critical escapement threshold, which is the level at which the population is exposed to a heightened risk of extinction. In order to address recovery, NFMS has defined maximum harvest rates and acknowledged that all available science requires that hatcheries be managed to minimize the risks posed to listed salmon. The Puget Sound Salmon Management Plan ("PSSMP") includes basic and critical management principles, which were reduced to Court order in *U.S. v. Washington*, CV-70-9212 (W.D. Wash) (hereinafter "*U.S. v. Washington*"). These basic management principles, such as determining how many harvestable fish exist each year as a prerequisite to setting salmon seasons, were and are intended to preserve Washington's salmon and ensure harvest is not a factor preventing recovery.

All of that is ignored. Indeed, the facts and the record demonstrate that NMFS ignores science and the law in pursuit of non-selective harvest. The PSSMP's provisions are consistently ignored, and NMFS makes no attempt to ensure the resource management plans it approves comply with the court orders in *U.S. v. Washington* despite a clear legal requirement to do so. As is detailed herein, with its 2021 BiOp, NMFS approved harvest that exceed the "maximum" harvest rate by as much as 221 percent. Despite undisputed scientific evidence indicating that hatchery fish must be managed to be a small proportion of the fish spawning in the wild, ideally less than 10 percent but no more than 30

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

percent, NMFS approves stray rates (the proportion of hatchery fish spawning in the wild) of over 95 percent and makes no effort to encourage or require use of selective harvest to manage stray rates. Incredibly, because the scientifically defensible measures are not convenient for the approved non-selective harvest levels, NMFS goes so far as to support the extirpation of some natural origin populations of Puget Sound Chinook.

NMFS admits that it did not seek to ensure "recovery" when it issued the 2021 BiOp. ECF 35 at 16. Maybe unaware of the contradiction, but clearly in line with the legal requirements, NMFS' expert witness Ms. Susan Bishop, the Branch Chief for National Marine Fisheries Services West Coast Region's Anadromous Harvest Management Branch, acknowledges that "NMFS must determine if a proposed action would reduce appreciably the survival and recovery of the species in the wild." ECF 36 at 7.

Failing to fulfill its obligation to ensure recovery is clearly contrary to Congress' intent. In enacting the ESA, Congress sought to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Congress has made clear that endangered species are to be afforded the highest of priorities. *Id*. at 168. This Court is respectfully requested to make clear to NMFS that recovery is, in fact, a requirement of the ESA and that compliance with federal court orders is not optional.

III. FACTS

A. Puget Sound Chinook Salmon Are "In Crisis."

Puget Sound Chinook salmon were listed as threatened under the ESA in 1999. AR 003180. In the 2021 BiOp, which is the subject of this litigation, NMFS confirmed that:

> Since 1999, most Puget Sound Chinook populations have mean natural-origin spawner escapement levels well below levels identified as required for recovery to low extinction risk (Table 5). Long-term, natural-origin mean escapements for eight populations are at or 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).

AR 003189. NMFS further clarified that "[c]urrently, only five populations, in two regions, show long-term neutral to positive growth rates in natural-origin recruitment (Table 6). Additionally, most

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

populations are consistently well below the productivity goals identified in the recovery plan (Table 5)." AR 03193.

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

> Over the long-term trend (since 1990), there is a general declining trend in the proportion of natural-origin spawners across the ESU (Table 3). While there are several populations that have maintained high levels of natural-origin spawner proportions, mostly in the Skagit and Snohomish basins, many others have continued the trend of high proportions of hatchery-origin spawners in the most recent available period (Table 3). It should be noted that the pre-2005-2009 estimates of mean natural-origin fractions occurred prior to the widespread adoption of mass marking of hatchery produced fish. Estimates of hatchery and natural-origin proportions of fish since the implementation of mass marking are considered more robust.

AR 003184-003185. "Since 1999, most Puget Sound Chinook populations have mean natural-origin spawner escapement levels well below levels identified as required for recovery to low extinction risk." AR 003189. The State of Washington confirms that Puget Sound Chinook are "In Crisis." AR 010085. While NMFS took issue with Fish Northwest's "hyperbole" in its Motion for a Preliminary Injunction, it is NMFS and the State of Washington that have determined Puget Sound Chinook are "In Crisis."

B. NMFS Has Been Consulting on Single Season Management Plans Since 2014. Those Consultations are Based on a Resource Management Plan That Expired in 2014, and NMFS Acknowledges That Single Year Fisheries Plans Pose a Risk to Listed Puget Sound Salmon.

Since 2014, NMFS has consulted under Section 7 of the ESA on single-year fishery plans. AR 003167. These consultations considered the effects of Puget Sound salmon fisheries based "on the general management framework described in the 2010-2014 RMP…" *Id*. Since 2014, "NMFS has consulted under ESA section 7 and issued biological opinions on its 4(d) determinations for each of these RMPs and related federal actions including BIA planning and implementation assistance for Puget Sound tribal fisheries, for USFWS Hood Canal Salmon Plan-related actions, and U.S. Fraser Panel fishery actions." *Id*. NMFS issued one-year biological opinions for the 2014, 2015, 2016, 2017, 2018, 2019, 2020 and 2021 Puget Sound fishery cycles that considered BIA's, USFWS's and NMFS'

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

actions related to the planning and authorization of the Puget Sound fisheries based on the 2010-2014 RMP framework. *Id.*

On April 26, 2021, the BIA formally requested consultation on its authority to assist with the development and implementation of the co-managers 2021-2022 Puget Sound Harvest Plan, and expenditure of funding to support implementation of federal court decisions including *U.S. v. Washington*, as described in (Mercier 2021). *Id*. The request "included a joint plan produced by the WDFW and the PSIT, as an amendment to the 2010-2014 Puget Sound RMP, for the proposed 2021-2022 Puget Sound salmon and hatchery steelhead fisheries." *Id*.

NMFS acknowledges in the 2021 BiOp that single year fisheries plans create risk to listed Puget Sound salmon. NMFS acknowledges that "there is greater uncertainty associated with this threat due to shorter term harvest plans and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations essential to recovery." AR 003195. Typically, NMFS is required to reinitiate consultation if the harvest plans result in more take of a listed species than was approved. That never occurs, however, because the fisheries are approved each year under a new plan. In effect, NMFS never addresses the failures of past fisheries management plans.

C. The Seasons Approved by NMFS Do Not Comply with the Court's Orders in *U.S. v. Washington*.

50 C.F.R. § 223.203(b)(6)(ii) requires that management plans intended to exempt take from the prohibitions of the ESA "be implemented and enforced within the parameters set forth in *U.S. v. Washington* or *U.S. v. Oregon*." 50 C.F.R. § 223.203(b)(6)(ii). The 2010 RMP, which serves as the basis for the 2021 BiOp, acknowledges that NMFS is required to ensure compliance with the Court's orders in *U.S. v. Washington*. AR 015942-015944. Indeed, Table 1 of NMFS' Evaluation of and Recommended Determination on a Resource Management Plan (RMP), Pursuant to the Salmon and Steelhead 4(d) Rule, dated May 27, 2011, acknowledges that an RMP must be "consistent with other plans and conditions established in any Federal court proceeding with continuing jurisdiction over tribal harvest allocations." AR 015944. Incredibly, NMFS made no effort to conduct any analysis

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

concerning the RMP's compliance with the Court's orders in *U.S. v. Washington*. Instead, NMFS' entire discussion of the issue is as follows:

> The RMP explicitly states in its general principles that it will comply with the requirements of U.S. v. Washington Case No CV-70-9213 (W.D. Wash., U.S. v. Oregon, Case No. CV-68-512 (D. Or., other applicable court orders, and the Pacific Salmon Treaty (see page 6 of the RMP).

AR 016118. NMFS did not ensure compliance with *U.S. v. Washington* or even attempt to.[1] As discussed below, the Court should require that NMFS do so for any future fishery management plans, BiOps, or ITS issued for Puget Sound salmon fishing.

Further, the fisheries covered by the 2021 BiOp and ITS do not come close to complying with the PSSMP. First, NMFS conducted no analysis regarding the PSSMP, which is not in the record before the Court. Second, as described below, very basic provisions such as calculating the number of harvestable fish, the scheduling deadlines, the post-season catch calculations, and allocation were either not analyzed by any party (including the state and treaty tribes) or did not comply with the PSSMP. The PSSMP is a Court-ordered plan that was intended to conserve Puget Sound salmon, and, as discussed below and in the Declaration of Curt Smitch, enforcing the PSSMP would remedy many of the management deficiencies that currently exist.

D. It Is Widely Accepted That Recovery of ESA Listed Puget Sound Chinook Will Require Addressing "All H's," Including Habitat, Hydropower, Hatcheries, and Harvest.

The United States Congress funded the Hatchery Reform Project in 2000 because it recognized that, in addition to providing harvest and aiding in conservation goals, the hatchery system was in need of comprehensive reform. AR 005084. It was recognized that many hatchery programs were contributing to the risks facing endangered and threatened salmon. AR 005084-005089. As a result of that funding, the Hatchery Scientific Review Group (HSRG) was formed. HSRG worked with state, tribal and federal fisheries managers, along with others, to review over 200 hatchery programs. *Id.*

[1] Could NMFS provide the same analysis of the other requirements of the ESA? Could an assertion in the RMP that the RMP's general principles state that harvest levels will not endanger listed species be given the same level of analysis and deference? The answer is clearly no, and NMFS is unlikely to make such an argument.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

Relevant to this litigation, HSRG reached a number of broadly accepted conclusions regarding salmon management. One of the largest, if not the largest, conclusions is that "[t]o be successful, hatcheries should be used as part of a comprehensive strategy where habitat, hatchery management and harvest are coordinated to best meet resource management goals that are defined for each population in the watershed." AR 049131.

Hatchery programs should be managed to achieve proper genetic integration with or segregation from natural populations. AR 049127. HSRG noted that hatchery fish have a lower reproductive fitness in the wild than do natural origin fish and, as a result, they "represent a risk to a natural population (if present) when they spawn in the natural environment." AR 049127-049128.

HSRG developed standards for the percent of hatchery fish that should be allowed to spawn in the wild, and those standards are expressed in clear terms in Recommendation 8 of the Report to Congress. The HSRG also recommended that harvest and hatcheries need to be managed together in order to ensure that brood stock and natural spawning escapement meet HSRG standards appropriate to the affected natural population's designation. AR 049135-049136. The specific recommended maximum proportion of hatchery fish spawning with wild fish varies depending on the biological significance and recovery phase of the natural population. *Id*. For primary populations, defined as the most important for recovery, hatchery fish should comprise no more than 5 percent of the spawning fish that spawn in the wild if there is a segregated hatchery program and should comprise no more than 30 percent if there is an integrated hatchery program. AR 049135. A segregated hatchery program is one that maintains a genetically distinct population of hatchery fish and uses only hatchery origin fish for reproduction. AR 059128. An integrated hatchery program utilizes both hatchery and natural origin salmon for reproduction. AR 049128-049129. For a contributing population, hatchery salmon should comprise no more than ten percent of the spawning salmon that spawn in the wild for segregated hatchery programs and less than 30 percent for integrated programs. AR 049136.

These genetic findings are widely accepted. NMFS' 2021 BiOp cites the 2009 Report to Congress, among other HSRG documents, as the basis for its analysis. *See* AR 003202 (HSRG 2009

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

Report to Congress); AR 003281. The 2021 BiOp acknowledges that hatchery stray rates present a known risk to listed populations. NMFS also acknowledges that hatchery fish comprise up to over 95 percent of the spawning salmon (Skokomish River). AR 003330 (table 23) (182 natural origin spawners and 3,787 total spawners). Despite this scientific evidence, NMFS allows harvest at a rate that it agrees presents a heighted risk of jeopardy, does not attempt to craft harvest to minimize straying of hatchery fish onto natural spawning grounds, and entirely fails to quantify the risk of overly high proportions of hatchery salmon spawning in the wild.

E. NMFS is Failing to Address Half the H's: Hatcheries and Harvest.

1. The Salmon Harvest of the Treaty Tribes and State of Washington Hugely Exceeds the Levels NMFS Has Determined Are Scientifically Defensible.

NMFS, the Treaty Tribes and the State of Washington agree to violate the ESA by intentionally overharvesting ESA listed salmon. In the 2021 BiOp, NMFS acknowledges that it is managing based on "exploitation rate limits at the total, Southern U.S. (SUS), or preterminal SUS level (table 21)." AR 003321. In conducting this analysis, NMFS relies on rebuilding exploitation rates ("RER") and explains as follows:

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

AR 003321-003322. NMFS acknowledges that exceedance of the RER presents a heightened risk of jeopardy:

> Total fishery exploitation rates on most Puget Sound Chinook populations have decreased substantially since the late 1990s when compared to years prior to listing (average reduction = -18%, range = -52 to +41%), (Fishery Regulation Assessment Model (FRAM)

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

> base period validation results, version 6.2) but weak natural-origin Chinook salmon populations in Puget Sound still require enhanced protective measures to reduce the risk of overharvest. The risk to the species' persistence because of harvest remains the same since the last status review. Further, there is greater uncertainty associated with this threat due to shorter term harvest plans and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations essential to recovery.

AR 003195. NMFS recently estimated RERs for all the (22) populations and (14) management units. AR 003323-003324 (Table 21).

NMFS acknowledges that exceedance of the RERs makes recovery less certain 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. The 2020 BiOp acknowledged that the RERs are exceeded in 13 of 14 management units but found that no jeopardy was likely.[2] The 2021 BiOp acknowledges that the RER is exceeded for 11 of the 14 management units, although conspicuously deleted from the 2021 BiOp is the summation found in the 2020 BiOp. AR 003329-003330 (Table 23).

Importantly, the level of exceedance is often not small. For example, in 2021 Puyallup River Chinook are harvested at a rate that exceeds the RER by 35 percent. *Id*. Nisqually River Chinook are harvest at a rate that exceeds the RER by 36 percent, and Skokomish Chinook at rate that exceeds the RER by 41 percent. *Id*. Most egregiously, Green River Chinook are harvested at a rate that exceeds the RER by **221 percent**. *Id.* All of the RER exceedances, with the exception of the Skokomish River, are approved without any apparent quantification or analyzing of the increased risk of exceeding the RERs.

The only RER exceedance that appears to have been analyzed in any detail is the RER exceedance for the Skokomish River. NMFS quantified the effects of exceeding the RER on the Skokomish River and found that "a 50 percent exploitation rate, if implemented over a 25 year period, would reduce the probability of the current Skokomish population exceeding the re-building escapement threshold by half (-50%), in that time frame, compared with achieving the RER of 35

[2] This is relevant to risk to recovery created by the single year analysis conducted by NMFS. There is no consideration given to, or analysis of the effects of, exceeding the RERs for the majority of the management units each year or the failures of past year's fishery management plans.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

percent." AR 003349. This is a clear admission that exceeding the RER reduces the probability of recovery. NMFS blatantly ignores the issue for nearly all of Puget Sound.

It is clear that NMFS will approve any exceedance of the RER, and that the "maximum" exploitation rate is meaningless. Harvest is approved at multiple times over what NMFS has determined is the maximum allowable to avoid jeopardy. If a 221 percent overharvest is acceptable, it is hard to imagine where NMFS would ever draw the line.

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

In conducting its jeopardy analysis, the standard is to not "…reduce appreciably the likelihood of survival and recovery …" 50 C.F.R. § 402.02. NMFS describes the RERs as follows:

> VRAP provides estimates of population-specific exploitation rates (called Rebuilding Exploitation Rates or RERs) that are designed to be consistent with ESA-related survival and recovery requirements. Proposed fisheries are then evaluated, in part, by comparing the RERs to rates that can be anticipated as a result of the proposed harvest plan. Where impacts of the proposed plan are less than or equal to the RERs, NMFS considers the harvest plan to present a low risk to that population (the context and basis of NMFS' conclusions related to RERs is discussed in more detail below). The results of this comparison, together with more qualitative considerations for populations where RERs cannot be calculated, are then used in making the jeopardy determination for the ESU as a whole. A brief summary of VRAP and how it is used to estimate an RER is provided below. For a more detailed explanation see NMFS (2000) and NMFS (2004).
>
> ….
>
> The result of applying the VRAP to an individual population is an RER which is the highest allowable ("ceiling") exploitation rate that satisfies specified risk criteria related to survival and recovery.

AR 003541. By NMFS' own definition, the RER is a maximum "ceiling" exploitation rate "designed to be consistent with ESA-related survival and recovery requirements." *Id.* Logically, if the maximum "ceiling" is exceeding, the harvest rate no longer "satisfies specified risk criteria related to survival and recovery."

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

NMFS argues broadly that "other information" mitigates the impact of overharvest and justifies its finding of no jeopardy despite the acknowledged exceedance of the RERs for the majority of the populations of Puget Sound Chinook.[3] Those alleged mitigating factors are ill-defined, not quantified, and not certain to occur. NMFS blatantly ignores the existing science concerning the risks posed by hatchery fish. Some, but not all, examples of the glaring deficiencies of the BiOp are listed here.

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

Perhaps the most egregious deficiency is NMFS' failure to differentiate between hatchery salmon and natural origin salmon. NMFS has the duty to conserve natural origin Chinook salmon. AR 003181 ("[t]his Puget Sound ESU includes all naturally spawned Chinook salmon originating from rivers flowing in Puget Sound from the Elwha River (inclusive) eastward, including rivers in Hood Canal, South Sound, North Sound and the Strait of Georgia."). Throughout the biological opinion, and despite acknowledging that the status of Puget Sound Chinook is not improving, NMFS claims that long-term abundance trends and recruitment of natural origin Chinook is positive. *See* AR 003193.

To make this logical leap, NMFS ignores any distinction between hatchery fish and natural origin fish. This decision is hidden in a footnote to Table 6, stating "[t]otal natural escapement Trend is calculated based on all spawners (i.e., including both natural origin spawners and hatchery origin fish spawning naturally).." AR 003194 (table 6, footnote 1). To justify this approach, NMFS acknowledges that it is "assuming the reproductive success of naturally spawning hatchery fish is equivalent of that of natural-origin fish…" *Id*. (Table 6, footnote 2).

The assumption that hatchery and natural origin salmon have equivalent reproductive potential is not scientifically defensible, and NMFS acknowledges as much throughout the BiOp. *See, e.g.*, AR 003195 ("Salmon and steelhead released from Puget Sound hatcheries operated for harvest augmentation purposes pose ecological, genetic, and demographic risks to natural-origin Chinook

[3] NMFS does not call the mitigation a mitigation plan. Instead, NMFS simply states that "other information," including but not limited to unspecified hatchery changes, considering hatchery salmon spawning in the wild beneficial, and assuming that hatchery fish are as genetically fit as wild salmon dictates that overharvest will not jeopardize listed species. The 2021 BiOp does not analyze these mitigating factors or quantify the benefit or harm each mitigating factor produces.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

salmon populations"). It is settled science that hatchery fish are less effective at spawning in the wild than natural origin fish. AR 049128 ("hatchery fish have lower reproductive fitness (even when they come from well-integrated programs), they represent a fitness risk to a natural population … when they spawn in the natural environment."). NMFS provides no analysis or quantification to support this assumption, and provides no analysis of the risk of considering hatchery and natural origin salmon interchangeable. This deficiency alone requires that the 2021 BiOp be invalidated, as the very baseline for all of NMFS' analysis fails to differentiate between hatchery origin and natural origin salmon.

b. Skokomish River.

Skokomish River Chinook, which NMFS considers essential to recovery, are harvested at a rate that exceed the RER by 41% (49% harvest rate to 35% RER). To justify the overharvest, NMFS argues that plans exist to replace the existing population of Skokomish River Chinook salmon with a different population of Chinook salmon by developing "a late-timed hatchery fall Chinook stock…". AR 003347. Not only is this effort not quantified or detailed in the 2021 BiOp, but it in essence argues that NMFS can allow the current population of Skokomish River natural origin Chinook to go extinct because there are plans to create some other population of hatchery Chinook, sometime in the future, to take its place. *Id.* Worse, the record refutes NMFS' assertion that the planned new hatchery program has some (undetermined) future benefit, and the Finfish Manager for the Skokomish Tribe acknowledges that the program is a failure and should be discontinued. AR 000168 (stating that "I believe it is time to re-evaluate this program's effectiveness or lack of and seek discontinuation.").

NMFS again ignores the requirement that it address recovery of listed natural origin Chinook. NMFS acknowledges the effort to create a new hatchery run of salmon to take the place of the existing natural origin Chinook salmon, which is not certain to occur and is currently a failure, is being coordinated with some unidentified "corresponding habitat and hatchery actions…" AR 003348. What is not being addressed, of course, is harvest and hatchery effects on existing natural origin Chinook salmon.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

NMFS essentially approves the extinction of the existing Skokomish River natural origin Chinook. No constraint of harvest to comport with the only estimate of an RER for Skokomish River Chinook is addressed or even suggested, much less required, and no change to the hatchery practices affecting existing natural origin Chinook is addressed. In 2021, the downward spiral of natural origin Skokomish Chinook continues, over 95% of all spawning Chinook are predicted to be hatchery origin, and NMFS ignores the genetic effects on the existing listed Chinook. AR 003330 (182 natural origin spawners and 3,787 total spawners). In sum, the 2021 BiOp makes no attempt to recover the existing natural origin Skokomish River Chinook population. Allowing fishing at a level that NMFS calculates will reduce the likelihood of recovery by 50%, while hoping an unsuccessful, speculative hatchery program creates a new population to replace the extant natural population, is clearly not consistent with Congress' mandate under the ESA, and there is no legal justification for simply approving the extirpation of a listed species in order to approve harvest of a threatened species.

c. Nisqually River

Nisqually River Chinook are harvested at a rate that exceeds the RER by 36% (47.7% v. 35%). AR 003329. Like the Skokomish River Chinook, the Nisqually population is essential to recovery. AR 003431. To justify the overharvest, NMFS argues that four considerations balance the overharvest: 1) the extirpated status of the indigenous Chinook[4], 2) the increasing overall trend in escapement and growth in natural origin escapement, 3) the natural-origin escapement anticipated in 2021 exceeds the critical threshold, and 4) the implementation of the long-term transitional strategy for the population. *Id*.

There are a number of problems with NMFS' reliance on these "other considerations." First, NMFS includes hatchery fish in its calculations of the alleged increasing trend in overall escapements and the number of salmon anticipated to spawn in 2021. AR 003194 (table 6, footnotes 1 and 2). This deficiency is discussed above. This assumption that hatchery fish and natural origin fish are

[4] It should not be lost on the Court that the argument appears to be that fisheries managers should not be concerned about whatever wild salmon remain because those same fisheries managers have already extirpated the original population of wild salmon. At minimum, NMFS is required to recover the populations of wild salmon that currently exist.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

interchangeable is not quantified or analyzed and is contrary to all available science. Indeed, NMFS acknowledges the risks posed by hatchery fish spawning with natural origin salmon. AR 003195; *see also* AR 049134 ("Many current hatchery programs have been responsible for loss of fitness and genetic diversity through the influence of maladapted hatchery-origin fish on the spawning grounds. Hatchery fish on the spawning grounds always represent a compromise between the demographic benefits and the genetic risk, even when they come from a well-integrated program.").

Second, NMFS concludes that "stable growth rate for natural-origin escapement" offsets a harvest rate exceeding their estimate of the Nisqually RER by 36% (47.7% compared to 35%), but NMFS' calculations of natural-origin growth rates show no increasing trend for either recruitment or escapement. AR 003194 (table 6). This conclusion is factually wrong and ignores the downward trend of natural origin Chinook, and the data in the BiOp demonstrates as much.

d. Puyallup River

Puyallup River Chinook are harvested at a rate that exceeds the RER by 35% (47.3% v. 35%). AR 003329. NMFS' conclusion that "fisheries may provide some stabilizing influence to abundance and productivity thereby reducing demographic risks" is inconsistent with calculations showing the natural escapement trend for the Puyallup River is declining (Table 6), and natural-origin growth rates for both recruitment and escapement are negative (less than 1.00, Table 6). AR 003194. There is no analysis or quantification of why harvest "may" provide "some" stabilizing influence. And, the language used by NMFS confirms the alleged stabilizing influence is uncertain (it "may" occur) and that no quantification of the stabilizing influence has been conducted (there may be "some" influence). Just as importantly, the assumptions about recruitment and escapement indefensibly include hatchery fish as "natural" escapement.[5]

[5] However tortured, this data also proves that hatchery fish are genetically inferior. Table 6, in the column titled "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, no increase in natural origin salmon is possible.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

e. Green River

Green River Chinook are harvested at a rate that **exceeds the RER by 221%.** AR 003329. NMFS' statement on page 286 of the 2021 BiOp that "[n]atural-origin returns for the Green River have substantially increased in recent years" is denied by calculations of trends in overall escapement and growth rates for both recruitment and escapement that are negative or non-positive. AR 003194. Even including hatchery fish, which is not defensible, the escapement trend is negative. *Id*. The claimed existence of growth rates for natural origin escapement consistently higher than growth rates for natural-origin recruitment in the Green River ignores the fact that the calculated growth rates for each category clearly demonstrate the lack of any growth (1.00 or less in Table 6). Again, NMFS reached this tortured conclusion by ignoring any distinction between hatchery and natural origin Chinook.

3. The BiOps Fail to Address the Need to Coordinate Hatcheries with Harvest.

The well accepted "All H" approach to salmon management is completely ignored. The BiOp makes no discussion of the potential positive effects of selectively harvesting hatchery origin salmon, as recommended by the HSRG, in order to minimize straying. The BiOp makes no recommendation for modification of the proposed action to utilize selective harvesting or other methods with the potential to reduce the known risk of hatchery origin salmon straying, and instead approves many non-selective fisheries that target natural origin and hatchery fish together. The failure to even address selective harvest is a glaring deficiency which results in the problems, discussed above, concerning overharvest of natural origin salmon (up to 221% of the "maximum" harvest rate) and the obvious risk associated with exceedingly high stray rates (up to over 95 percent compared to the scientifically accepted maximum of roughly five to thirty percent, depending on population and type of hatchery program). NMFS has already admitted that its analysis of harvest management plans ignores all issues surrounding hatchery fish. ECF 36 at 7-9. This is clearly contrary to what is required. *See* AR 049131 ("To be successful, hatcheries should be used as part of a comprehensive strategy where habitat, hatchery management and harvest are coordinated to best meet resource management goals that are

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

defined for each population in the watershed."); AR 049127 ("Hatchery management must be aligned with harvest management and vice versa.").

IV. ARGUMENT

A. Legal Standards.

Summary judgment is generally the appropriate mechanism for resolving the merits of ESA claims. *See e.g., Occidental Eng'g Co. v. Immigr. & Naturalization Serv.*, 753 F.2d 766, 769-70 (9th Cir. 1985). Summary judgment in such case is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (citing *Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007)). Because this matter is a record review case, the Court may direct summary judgment be granted to either party based upon review of the administrative record. *Id.* (citing *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)).

Federal agencies' compliance with the ESA is reviewed under the APA. *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 779-80 (9th Cir. 2019); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under the APA, "an agency action must be upheld on review unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Jewell*, 747 F.3d at 601 (quoting 5 U.S.C. § 706(2)(A)). A reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation and quotation marks omitted). Courts will "reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1074-75 (9th Cir. 2011).

B. Overview of the Endangered Species Act.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S. C. § 1531(b). Section 9 of the ESA prohibits the "take" of any species listed as "endangered" under the ESA. 16 U.S.C. § 1538(a)(1). The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The ESA's implementing regulations further define "harm" as an "act which actually kills or injures wildlife" and "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 696-700 (1995) (upholding the regulatory definition of "harm").

Section 9, on its face, does not provide a blanket protection from take to "threatened" species. However, § 4(d) of the ESA provides that NMFS shall "issue such regulations ... necessary and advisable to provide for the conservation of such [threatened] species." 16 U.S.C. § 1533(d). Pursuant to § 4(d), § 9's take prohibition has been extended to threatened anadromous fish, including the species at issue in this case. Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionary Significant Units, 65 Fed. Reg. 42, 422, 47, 475-81 (July 10, 2000); 70 Fed. Reg. at 37,194 (amending 2000 rule) (codified at 50 C.F.R. § 223.203).

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

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

to determine whether the agency action is likely to jeopardize that species or adversely modify its critical habitat. *Id*.; 16 U.S.C. § 1536(c).

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

If NMFS concludes that a proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, but determines that the action will nevertheless result in the take of listed species, NMFS must issue an incidental take statement (ITS). 16 U.S.C. § 1536(b)(4). An ITS authorizes the limited take of listed species that would otherwise violate § 9's "take" prohibition. *Id*.; 50 C.F.R. §402.14(i). The ITS must specify measures to limit and measure take. *Id*. If during the course of the subject action, the conditions of the ITS are exceeded, the action agency must reinitiate formal consultation pursuant to§ 7(a)(2). 50 C.F.R. § 402.16(a).

C. NMFS Has Failed to Ensure No Jeopardy.

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

Section 7 of the ESA requires that each federal agency "ensure" that any action it funds or authorizes "is not likely to jeopardize" a protected species. 16 U.S.C. § 1536(a)(2). "Jeopardize" is defined as an action that "would be expected, either directly or indirectly, to reduce appreciably the likelihood of both the survival **and recovery** of a listed species in the wild by reducing the reproduction, numbers or distribution of that species." 50 C.F.R. § 402.02 (emphasis added). "Recovery" is defined as "improvement in the status of listed species to the point at which listing is no longer appropriate." *Id*. In this case, NMFS' analysis must ensure that the fisheries plan it provides

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

an ITS for does not "reduce appreciably" the likelihood that the status of Puget Sound Chinook improves "to the point at which listing is no longer appropriate." Contrary to its prior assertion, NMFS must seek to recover Puget Sound Chinook when evaluating fisheries plans. *See* ECF 35 at 16 (arguing that NMFS does not have to ensure recovery); *see also* ECF 36 at 7 (Ms. Susan Bishop, the Branch Chief for National Mariner Fisheries Services West Coast Region's Anadromous Harvest Management Branch, acknowledging that "NMFS must determine if a proposed action would reduce appreciably the survival and recovery of the species in the wild.").

To determine whether an agency decision is arbitrary and capricious, the court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). A decision is arbitrary and capricious if the agency:

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

O'Keeffe's, Inc. v. U.S. Consumer Product Safety Comm., 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43). In the context of the ESA, the "problem" is whether a proposed project will cause jeopardy to a listed species and "any effect that is likely to adversely affect the species is plainly an important aspect of this problem." *S. Yuba River Citizens League v. NMFS*, 723 F. Supp. 2d 1247, 1270 (E.D. Cal. 2010) (citing 50 C.P.R.§§ 402.13(a), 402.14(b)(l)).

Interpretations that are "first articulated in a legal brief [are] not categorically 'unworthy of deference,'" and "'post hoc rationalization advanced ... to defend past agency action against attack'" is not sufficient. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 780 (9th Cir.2006) (quoting *Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (second alteration in original). "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983) "It is well established that an agency's action must be upheld, if

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

at all, on the basis articulated by the agency itself." *Id*. In short, this Court must evaluate the Federal Defendants' actions based on the reasoning articulated in the 2021 BiOp. In conducting its analysis, NMFS must consider the best available science. 16 U.S.C. 1536(a)(2). It "cannot ignore available biological information." *Connor v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

Here, NMFS has authorized harvest that exceeds the RER it has itself determined as the maximum allowable rate without producing jeopardy. The sole quantification of the effects of exceeding the RER was done for the Skokomish River, and it was determined that the exceedance reduced the probability of recovery by 50%. Approving widespread exceedance of the RERs, in and of itself, is arbitrary and capricious and ignores an important aspect of the problem.

While NMFS attempts to explain away the exceedance, the fact remains that NMFS has already determined that exceeding the RERs creates jeopardy. Worse, to reach the conclusion that exceeding the RERs poses no risk of jeopardy, NMFS without explanation adopts the position that it can ignore the distinction between hatchery fish and natural origin fish. NMFS has not provided a sufficient explanation for the various assumptions and logical leaps it takes.

2. The BiOp Fails To Ensure No Jeopardy Because It Fails to Coordinate Harvest with Hatchery Genetic Management.

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

Further, the "other factors" relied on by NMFS are not quantified or analyzed, and they are not certain to occur. Many, such as those on the Skokomish, Green, Puyallup, and Nisqually Rivers, rely on future hatchery changes or the development of some other population of fish. There is no analysis, no

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

timeline for completion of the mitigation, or any quantification of the genetic effects of the proposed mitigation. Often, NMFS simply makes the claim that a population of fish is either extirpated or about to be and simply asserts that a new one is on the way. In other words, as NMFS stated in its prior briefing and the 2021 BiOp, recovery of existing listed fish is not a goal. Maintaining the harvest status-quo is the goal.

While NMFS may rely on mitigation or conservation measures in issuing a no jeopardy BiOp, those measures must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Ctr. for Biol. Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (*citing Sierra Club v. Marsh*, 816 F.2d 1376, 1379-80 (9th Cir. 1987)); *see also Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008). As discussed in detail above, NMFS has failed to articulate why the alleged mitigation measures (such as hatchery programs) are sufficiently certain, sufficient in quantity or scientifically sound. The 2021 BiOp does not contain any analysis of the alleged other factors to allow the Court to determine whether the other factors would make up for the quantity of salmon that are overharvested annually under NMFS' BiOp and ITS.

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

NMFS acknowledges that the use of single year fisheries authorizations presents an increased risk, especially when paired with constantly exceeding the RERs, and states as follows: "[f]urther, there is greater uncertainty associated with this threat due to shorter term harvest plans and exceedance of rebuilding exploitation rates (RER) for many Chinook salmon populations essential to recovery." AR 003195. Incredibly, after acknowledging the risk of single year fisheries plan, the 2021 BiOp does not further discuss the risk presented. There is no mitigation, explanation or analysis. NMFS simply identifies the risk and ignores it.

D. The Appropriate Remedies for NMFS' Violations.

1. Vacate the 2021 BiOp

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

The 2021 BiOp, including the ITS, should be vacated, for NMFS's ESA violations. The APA instructs that a "reviewing court shall . . . set aside agency action" that is "arbitrary . . . or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (emphasis added). This provision demands a "presumption of vacatur." *E.g., All. for the Wild Rockies v. U.S. Forest Serv. (Wild Rockies)*, 907 F.3d 1105, 1121–22 (9th Cir. 2018); *see also E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 856–57 (9th Cir. 2020) ("[O]ur obligation . . . is to vacate the unlawful agency action."). The Court should vacate the 2021 BiOp based on NMFS clear violations of the ESA.

2. Enjoin Single Year BiOps.

NMFS acknowledges that conducting single-year fisheries BiOps presents a heightened risk but does not quantify or mitigate the risk. Because conducting single-year fisheries BiOps presents a risk, in and of itself, doing so logically reduces the likelihood of recovery. Accordingly, the Court should enjoin the use of single-year biological opinions, including in 2022.

3. Enjoin Future BiOps related to Puget Sound Chinook and Affected Fisheries Until NMFS Includes Only Natural Origin Spawners in Its Analysis of Escapement and Recovery of Natural Origin Spawners.

As discussed above, NMFS is required to differentiate between natural origin and hatchery origin salmon. In addition to be legally required to make that differentiation, it is also scientifically indefensible to assume that hatchery origin salmon have the same genetic fitness as natural origin salmon. The Court should require that NMFS differentiate between hatchery origin and natural origin salmon.

4. Enjoin Future BiOps related to Puget Sound Chinook and Affected Fisheries Until NMFS Addresses Hatchery Fish Straying by Requiring Responsible and Prudent Alternatives Including Selective Fishing.

NMFS admits that it does not take the effects of hatchery fish into account when reviewing harvest plans submitted by the State of Washington and the treaty tribes. ECF 36 at 7-9. There is overwhelming evidence that hatchery fish must be removed from the spawning grounds. Selective harvest, which removes hatchery fish from the population while allowing natural origin fish to be released to spawn, must be implemented.

Indeed, HSRG found as follows:

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

> Hatchery management must be aligned with harvest management and vice versa. The HSRG has demonstrated that increasing selective harvest on hatchery-origin fish can have a conservation benefit (population fitness and productivity), economic benefit (increased harvest) and increase the value of current habitat and habitat improvements.

AR 049126. NMFS admits it has made no attempt to consider selective harvest and the benefits it provides to both fisheries and, most importantly for this motion, conservation of listed species. The Court should enjoin future biological opinions until NMFS requires the implementation of reasonable and prudent alternatives, including increased selective fishing.

5. Enjoin Future BiOps Related to Puget Sound Chinook and Affected Fisheries Until NMFS Adequately Addresses Meeting the RERs.

Except for the Skokomish River, the 2021 BiOp does not analyze the consequences of exceeding the RERs. NMFS clearly has the ability to do so. In the single instance where the consequences of exceeding the RERs was analyzed, the approved fishery plans are predicted to reduce the prospect of recovery by 50%. The alleged other factors are not analyzed in any detail, and the effects are not quantified anywhere in the 2021 BiOp. Instead, NMFS simply argues that the other factors "may" provide "some" benefit. The Court must evaluate NMFS' decision based solely on the 2021 BiOp, and not unspecified "other" considerations that "may" provide "some" benefit. The Court should enjoin future BiOps until NMFS quantifies the effects of the RER exceedances and provides a meaningful, detailed analysis and quantification of the effects of the alleged "other" factors.

6. Enjoin Future BiOps Related to Puget Sound Chinook and Affected Fisheries Until NMFS Ensures Compliance with the PSSMP.

The court in *U.S. v. Washington* entered orders, including the PSSMP, that were and are intended to dictate how salmon fisheries in Washington are developed and prosecuted. The Court's orders were developed in order to address conflicts over allocation and, most importantly for this case, to address conservation concerns that arose as the State of Washington and treaty tribes jockeyed to maximize their harvest at the expense of the other.

To address the competing interests of the State of Washington and treaty tribes, the parties developed, at the direction of the court, the Puget Sound Salmon Management Plan (the "PSSMP").

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

NMFS, the State of Washington, and the treaty tribes purport to develop the annual seasons based on that framework. AR 003167.

Indeed, the treaty tribes and State of Washington submitted a proposed 10 year management plan in February of 2022. Declaration of Curt Smitch, Exhibit C. Section 2.7 of the proposed plan states as follows:

> The Puget Sound Salmon Management Plan (PSSMP) remains the guiding framework for jointly agreed management objectives, allocation of harvest, information exchange among the co-managers, and processes for negotiating annual harvest regimes. At its inception, the Plan implemented the court order to provide equal access to salmon harvest opportunity to Indian tribes, but its enduring principle is to "promote the stability and vitality of treaty and non-treaty fisheries of Puget Sound… and improve the technical basis for …management."

Id. at 21. While it is correct that the PSSMP remains the court-ordered framework for the formulation of Puget Sound salmon fisheries, the plan has been nearly entirely disregarded by the parties and the NMFS.

The PSSMP has very specific framework for enacting seasons. Smitch Decl., Ex. A. It begins by recognizing that escapement goals "must be preserved and protected sufficiently to ensure the perpetual existence and maximize the benefits derived from their protection." *Id*. at 10. During pre-season planning, the PSSMP required "predicted levels of harvest and/or harvestable numbers…" *Id*. at 18. The requirement to calculate the amount of salmon available for harvest was specifically negotiated as a starting point to crafting seasons in order to ensure escapement goals were reached.

The PSSMP further required in-season run size updates and methods to apportion catches from areas having a mixture of stocks. *Id*. at 19. Again, this was intended to ensure escapement goals were met. The PSSMP went further, and required a "post-season audit report" in "order to permit an assessment of the parties' annual management performance in achieving spawning escapement, enhancement, harvest and allocation objectives." *Id*. at 20. Again, this was negotiated and intended to ensure that escapement goals were met by ensuring fishery plans were performing as intended. Section 6 specifically dictated a schedule by which various steps were to be done. *Id*. at 21.

To ensure that the allowable harvest levels were not exceeded, the PSSMP contained specific terms that dictated the harvest allocation between the State of Washington and treaty tribes. Shares were

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

to "be calculated annually post-season" and deficiencies in shares shall be adjusted annually unless neither party exceeded its share by more than 5% of the total of both parties' shares." *Id*. at 26. This "pay-back" provision was specifically negotiated to provide a disincentive to any party to overharvest.

At the time, the State of Washington had been overharvesting in marine fisheries and then arguing that the treaty tribes' seasons (who fished predominantly in the rivers) had to be closed in order to meet escapement goals. Smitch Decl., p. 3. The pay-back provision was negotiated to put a stop to such practices. *Id*. at 3-5. If the state fisheries overharvest one year, the treaty tribes would be paid back for the fish they did not catch as a result of the state's overharvest. The intent was to create a disincentive, for both parties, to attempt to game the system. It also ensures that the parties adhered to the conservation constraints required to maintain salmon stocks and, if they did not, they would be penalized the following year.

Presently, the State of Washington and the treaty tribes do not follow the PSSMP. *Id*. at 5. They do not calculate harvestable shares, which is required to be the starting point of season setting. Allocation of the salmon stocks at the presumed rate of 50/50 does not occur. No post season calculation is made, past failures of the single year fisheries plans are never addressed, and there is no disincentive to overharvest.

The decision to disregard the Court's order in *U.S. v. Washington* was made for expedience. Harvest has once again taken precedence over conservation. Escapement goals have not been met in years, and fisheries plans are not crafted with any intention of doing so. The current process ignores basic requirements, such as differentiating between natural origin and hatchery origin salmon, for one reason: to maintain the status quo of non-selective harvest. This Court should enforce the Court's order in *U.S. v. Washington*, as required by 50 C.F.R. § 223.203(b)(6)(ii), and force the parties to put conservation first as was intended in 1985 when the Court ordered the PSSMP.

V. CONCLUSION

For the foregoing reasons, Fish Northwest respectfully requests the Court enter an order granting summary judgment and the relief requested herein.

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax

Dated this 25th day of March, 2022.

JOEL MATTESON

s/ Joel Matteson
JOEL MATTESON
WSBA No. 40523
Attorney for Plaintiff

SCHEFTER & FRAWLEY

s/ Joe Frawley
JOE D. FRAWLEY
WSBA No. 41814
Attorney for Plaintiff

SCHEFTER & FRAWLEY
Attorneys at Law
1415 College Street SE
Lacey, Washington 98503
(360) 491-6666 * (360) 456-3632 fax