HONORABLE RICHARD A. JONES
HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, Plaintiff, v. JENNIFER QUAN, *et al.*,[1] Defendants, and ALASKA TROLLERS ASSOCIATION, Defendant-Intervenor, and STATE OF ALASKA, Defendant-Intervenor.	Case No. 2:20-cv-417-RAJ-MLP DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR INJUNCTION PENDING APPEAL

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Jennifer Quan, in her official capacity as Regional Administrator, is automatically substituted for Scott Rumsey.

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TABLE OF ACRONYMS

BiOp	Biological Opinion
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
pHOS	Proportion of Hatchery-Origin Spawners
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whales

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INTRODUCTION

Plaintiff's request for an injunction pending an appeal should be denied. *See* Dkt. # 177 (Mot.). In its motion, Plaintiff repeats many of the mistakes it has made in its previous efforts to shutter a National Marine Fisheries Service (NMFS) prey increase program that provides a needed increase in the food supply for Southern Resident Killer Whales (SRKW). Most notably, Plaintiff continues to ignore the harm that will flow to SRKW if NMFS cannot implement the prey increase program and continues to misconstrue NMFS's site-specific analyses of the hatcheries that have received funds as part of that program. Contrary to Plaintiff's assertions, the disruptive consequences of shutting down the prey increase program outweigh the seriousness of the errors. Moreover, NMFS plans to fully address the deficiencies identified by the Court by offering better reasoning on remand. Thus, Plaintiff is not likely to succeed on the merits. In addition, Plaintiff fails to demonstrate a likelihood of irreparable harm to wild, threatened salmon or its members that would warrant injunctive relief lasting for the pendency of any appeal. Nor do the equities tip in favor of an injunction; indeed, the program specifically and directly benefits an endangered species and therefore the public interest decidedly favors denying injunctive relief.

The work that began in 2019 to increase prey availability for SRKW is now producing real, in-ocean results for SRKW. Plaintiff, an organization that purports to protect SRKW as a part of its mission and whose own experts say that prey abundance is the single most limiting factor for SRKW health, seeks to shut down the very program that addresses this limiting factor. That request should be denied.

ARGUMENT

I. Plaintiff Has Not Met the Standard for an Injunction Pending Appeal.

Before turning to the flaws in Plaintiff's assertions, Plaintiff's request blurs the line between the remedies of injunctive relief and vacatur. At various points, Plaintiff asks this Court for an "injunction pending appeal that vacates those portions of the 2019 biological

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opinion [(BiOp)]" that pertain to the prey increase program.[2] Mot. at 7, 17; Dkt. # 177-1 at 1. Elsewhere, Plaintiff describes "[v]acating this program" and "[e]njoining the prey increase program." Mot. at 7, 15. It is not clear if this obfuscation is simply the result of poor drafting or is intended to carry some significance, but it is relevant because these are distinct forms of relief with different standards. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). An injunction pending appeal is akin to a preliminary injunction, which commands or prevents action "to prevent an irreparable injury from occurring before the court has a chance to decide the case." Black's Law Dictionary (11th ed. 2019); *see Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006) (noting that a court reviewing a request to grant an injunction pending appeal "balances the plaintiff's likelihood of success against the relative hardship to the parties") (internal quotation marks and citations omitted). By contrast, vacatur is the "act of annulling or setting aside." Black's Law Dictionary (11th ed. 2019). An injunction pending appeal is not compatible with vacatur because if the agency action is vacated, it cannot resume at the end of the appeal, unless the Ninth Circuit overturns the vacatur.[3]

Regardless of how the motion is styled, an injunction pending appeal is "an extraordinary and drastic remedy" that should be granted in only extraordinary circumstances. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). To obtain an injunction pending appeal, Plaintiff must establish (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of injunctive relief; (3) "that the balance of equities tips in [its] favor"; and (4) "that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The equities inquiry merges with the public interest analysis

[2] Plaintiff's prior requests sought two separate forms of relief related to the prey increase program, namely vacatur of those portions of the BiOp that cover the prey increase program and a permanent injunction of the program. *E.g.*, Dkt. # 127 at 10.

[3] Moreover, to the extent that Plaintiff's request is focused on vacatur, then it appears to be a motion for reconsideration of this Court's prior decision on remedy. Under Local Rule 7(h), motions for reconsiderations will ordinarily be denied "in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority." Neither of those circumstances is present here and thus the Court should decline any invitation to revisit its remedy decision by vacating through a motion for injunction pending appeal.

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when the government is a party. *Drakes Bay Oyster Co. v. Jewell,* 747 F.3d 1073, 1092 (9th Cir. 2014).

The Ninth Circuit has allowed a movant to satisfy this standard by demonstrating "serious questions" on the merits, but only when the movant carries its burden on the other three elements and has shown that balance of hardships "tips *sharply*" in its favor. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added). In any case, because an injunction is "never awarded as of right," *Winter*, 555 U.S. at 24, the moving party must make a "clear showing" that it has met all four requirements of the standard, *id.* at 22; *see also Cottrell*, 632 F.3d at 1134-35 (explaining that movants must still "make a showing on all four prongs").

As described in greater detail below, Plaintiff has not come close to meeting this standard, and thus the Court should not issue an "injunction that vacates" the portions of the 2019 BiOp that relate to the prey increase program.[4] *See* Dkt. # 133 (Resp. to Mot. for Remedy); Dkt. # 153 (Resp. to Plaintiff's Objections).

II. Plaintiff Is Not Likely to Succeed on the Merits.

Plaintiff disputes the Court's decision to remand the BiOp without vacating the portions that analyze the prey increase program, Mot. at 8-14, but the Court correctly concluded that vacatur is not warranted given the "serious and certain risk to prey abundance and availability that would result to the SRKW." Dkt. # 144 at 37. On appeal, this decision not to vacate the prey increase program pending remand is likely to be affirmed. The determination of "[w]hether agency action should be vacated depends on how serious the agency's errors are and the disruptive consequences of an interim change that may itself be changed." *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (quotation omitted)). As part of the analysis, courts look to "whether the agency would likely be able to offer better reasoning" on remand. *Nat'l Family Farm Coal. v. U.S. EPA*, 966 F.3d 893, 929 (9th Cir. 2020) (quotation omitted). When the consequences of vacatur would be "severe,"

[4] Nor should the Court grant any kind of injunction that prohibits the agency from implementing the prey increase program.

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especially for endangered species, courts have remanded without vacatur. *See*, *e.g.*, *Cal. Cmtys. Against Toxics*, 688 F.3d at 992; *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (declining to vacate an agency's rule because vacatur would have risked the extirpation of a species of snail).

Here, vacating the BiOp that addressed the prey increase program would prevent NMFS from implementing "a critical tool to help address a primary threat to SRKW." Fourth Barre Decl. ¶ 27. The resulting disruptive and harmful consequences of vacatur far outweigh the seriousness of the agency's errors and Plaintiff is accordingly unlikely to show on appeal that this Court abused its discretion in remanding without vacatur. *See Nat'l Wildlife Fed. v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) (holding that "equity can authorize the district court to keep an invalid [action] in place during any remand if it provides protection for listed species"); *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1146 (C.D. Cal. 2002) ("The strong public policy in favor of environmental protection indicates that the Court should resolve uncertainties in estimating the risk of harm from habitat conversion during remand, in the absence of viable critical habitat designations, in favor of retaining the disputed rules.").

A. Plaintiff Is Wrong About the Seriousness of the Errors.

Plaintiff's attempt to characterize the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) violations as "egregious" is misguided. Mot. at 10. With respect to the prey increase program, the Court identified an ESA violation (NMFS's failure to consider the impact of the prey increase program on threatened Chinook salmon) as well as a NEPA violation (NMFS's failure to conduct a NEPA analysis on the prey increase program). Dkt. # 111 at 31-33, 37-38. Yet, with the passage of time since this suit was commenced, NMFS has completed a series of site-specific ESA and NEPA analyses, or identified existing ESA and NEPA analyses, which evaluate the effects of increased hatchery production on ESA-

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listed salmon. Fourth Purcell Decl. ¶¶ 9-11. These analyses minimize, if not mitigate, these ESA and NEPA "errors" in the 2019 BiOp.[5]

B. Plaintiff Severely Underestimates the Disruptive Consequences of Vacatur.

Plaintiff's argument about disruptive consequences misunderstands how the prey increase program operates and lacks record support. *See* Mot. at 11-14. Thus, Plaintiff is unlikely to succeed on the merits.

Plaintiff's argument relies on the misplaced assertion that one form of remedy mitigates another, *i.e.*, that the additional prey resulting from vacatur of the incidental take statement (ITS) covers the prey that will be lost by vacating the parts of the parts of the BiOp that cover the prey increase program. *Id.* at 12. This approach suffers from multiple flaws. First, it overestimates the amount of prey to be gained from vacatur of the ITS. The Court's decision regarding vacatur of the ITS rested largely on the flawed analysis presented by Dr. Lacy. Dkt. # 144 at 29. But, as explained by Lynne Barre, the Lacy analysis is outdated and oversimplified. Fourth Barre Decl. ¶¶ 8, 10. It also fails to account for seasonal and spatial variability. *Id.* ¶ 11. Stated simply, "not all of the Chinook salmon caught in SEAK troll fisheries would migrate south into SRKW habitat and those that would migrate south would not all survive or be intercepted by the whales." *Id.* ¶ 10. An accurate description of the most relevant impacts from SEAK fishing is captured in the 2019 BiOp, which indicates that the full operation of all SEAK fisheries would decrease Chinook salmon prey by an average of 0.5% in coastal waters during winter and an average of 1.8% in inland waters during the summer. *Id.* ¶ 11. Because the Court's order vacated the ITS covering the winter and summer commercial troll fisheries, which represent a smaller part of all fishing, the prey reductions would therefore be even lower. *Id.* Moreover, the pre-season estimates indicate that this will not be a low-abundance year for Chinook salmon, and thus prey reduction resulting from SEAK fishing is less of a concern than it would be in a year of critically low abundance. *Id.* ¶ 19.

[5] These errors are also procedural in nature and remand without vacatur provides the agency the opportunity to correct procedural errors or provide further explanation. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

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Second, even assuming this minimal level of impact from the SEAK troll fisheries, Plaintiff fails to properly characterize how the prey increase program works. Plaintiff contends that the harm from vacating the prey increase program is "negated by the Court's partial vacatur of the ITS." Mot. at 14. This assertion fundamentally misunderstands the biology of Chinook salmon. Because these fish do not become available as prey to SRKW until the age of three at the earliest, fish produced using funds disbursed in 2023 and beyond will not be available to SRKW as prey until 2026 and beyond. Thus, stopping the prey increase program through vacatur in 2023 does not mean hatchery fish will be unavailable as prey in 2023; it means that smaller numbers will be returning and available as prey in 2026 and beyond; a timeframe beyond the agency's anticipated completion of the remand (no later than November 2024). The prey increase for the 2023 and 2024 fisheries is already in the water.

Plaintiff further weakens its position by mischaracterizing the harm to the prey increase program as "hypothetical." *Id.* The declarations submitted by NMFS clearly show that the consequences to SRKW will be substantial. Shuttering the program through vacatur "could manifest in the whales foraging for longer periods, traveling to alternate locations, or abandoning foraging efforts." Fourth Barre Decl. ¶ 21. This impact "could result in SRKWs not consuming sufficient prey to meet their energetic needs, which could affect the health of individual whales, reproduction and the status and growth of the population." *Id.* This type of harm to a species led the Ninth Circuit to remand without vacatur in *Idaho Farm Bureau*. In that case, the U.S. Fish and Wildlife Service (FWS) had determined that the Springs Snail was endangered, but FWS committed "a significant procedural error" in promulgating the rule. *Idaho Farm Bureau*, 58 F.3d at 1405. Rather than vacate the rule, which provided protection for the snail, a simple remand to the agency was deemed the appropriate remedy. *Id.* at 1405-06.

Moreover, vacatur could lead the hatchery operators to release fish early, "in which case they would have [a] lower chance of survival, reducing their potential contribution to SRKW diet." Fourth Purcell Decl. ¶ 18. Further biological concerns include the probability that if fish are released early, they would not be externally marked or tagged, which would limit the

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ability to "monitor and manage genetic risks" to wild fish. *Id.* These are the same types of disruptions that led the courts to remand without vacatur in *Native Fish Society v. NMFS*, No. 3:12-cv-00431-HA, 2014 WL 1030479 (D. Or. Mar. 14, 2014) and *Institute for Fisheries Resources v. U.S. Food & Drug Administration*, 499 F. Supp. 3d 657 (N.D. Cal. 2020). In the former, the court found that "vacatur would also be disruptive to the future operation of the Sandy Hatchery by potentially eliminating the possibility of collecting future broodstock, and to the short-term interests of amici in a sport and harvest fishery." *Native Fish Soc'y*, 2014 WL 1030479, at *4. In the latter, the court found that "revoking the approval would presumably require the current stock of salmon to be destroyed, a significant loss of property and animal life that would be wasteful given the real possibility that the [agency] will be able to cure the NEPA and ESA errors on remand." *Inst. for Fisheries Res.*, 499 F. Supp. 3d at 670.

Next, Plaintiff takes aim at the benefits of the prey increase program, but this argument misses the mark. Mot. at 12. Here, too, the evidence shows that an increase in fish from the hatcheries funded by the program will result in more prey. Indeed, SRKW "do not distinguish between hatchery produced or wild fish." Fourth Barre Decl. ¶ 13. The Court itself recognized that the prey increase program "has also now been funded and begun providing prey the past three years." Dkt. # 144 at 31; *see also id.* at 36 (noting that with the program "funded and in place," the impacts "can be better quantified and qualified"). It is also telling that Plaintiff attacks the declarations as containing "unsupported conclusory assertions" rather than engaging with the contents of the declarations. Mot. at 12. The declarants have decades of experience on protected species and hatcheries and the Court should reject Plaintiff's red herring argument. *See* Dkt. # 144 at 17-20 (rejecting a request to strike the Barre and Purcell Declarations and noting their qualifications and reliance on "relevant factual support").

Plaintiff cannot salvage its position by invoking Dr. Luikart's misstatements about the impacts of the prey increase program on wild fish. Mot. at 12-13. Though hatchery-origin fish can pose a risk, the proportion of hatchery-origin spawners (pHOS) "will depend upon multiple factors, such as the importance of the population to ESA recovery and the fitness differences between hatchery-origin and natural-origin fish." Fourth Purcell Decl. ¶ 16. This explains why

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NMFS has considered the following factors when conducting its site-specific ESA evaluations: where the fish are being released; the origin of the broodstock being used by the hatchery program; how many wild fish are incorporated into the broodstock; whether surplus hatchery fish will be removed at weirs to control pHOS; and the role of the affected populations in the recovery of an evolutionarily significant unit. *Id.* ¶ 11. NMFS has also been working with the hatchery operators to implement tools that allow it to increase prey for SRKW while simultaneously reducing genetic risks to ESA-listed salmon. *Id.* ¶ 17. For example, during development of a BiOp on hatchery programs in the Green/Duwamish River Basins, NMFS "worked with the hatchery operators to implement some key changes in the fall Chinook hatchery program" that the agency expects will substantially increase proportionate natural influence.[6] *Id.*

These site-specific analyses countervail Plaintiff's assertions that the Court's findings about NMFS's analysis lack record support. *See* Mot. at 13. The record shows that NMFS has analyzed each disbursement to ensure compliance with the ESA and NEPA. Fourth Purcell Decl. ¶¶ 9-11. This analysis takes different forms depending on the type of ESA and NEPA analysis that has already been completed for each hatchery. In some cases, the effects of an increase in production at the selected hatchery has been fully evaluated in previously completed ESA and NEPA documents: either the prior analysis considered a range of production and the increase falls within that range, or the hatchery has reduced production following the original reviews and thus the increase falls within the bounds of the previous analysis. *Id.* ¶ 10. In other cases, NMFS has supplemented previous analysis and/or reinitiated consultation. *Id.* In every scenario, NMFS has conducted a site-specific analysis to ensure that the increased production *at each facility* fully complies with the ESA and NEPA.

Plaintiff not only misconstrues the site-specific analyses, but also mischaracterizes them as "piecemeal." Mot. at 13. Plaintiff ignores the fact that NMFS has considered some of the aggregate effects as part of its site-specific analyses. *See* Fourth Purcell Decl. ¶ 16. ("[W]e

[6] A population's proportionate natural influence (PNI) is determined based on pHOS and the proportion of natural-origin fish incorporated into the broodstock (pNOB).

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consider the cumulative impacts of all other hatchery programs that may be contributing to pHOS for a particular population."). Moreover, site-specific analyses like those that have occurred will continue to occur, which ensures ESA and NEPA compliance while the new programmatic analysis is completed on remand.

III. Plaintiff Has Not Demonstrated a Likelihood of Irreparable Harm.

A plaintiff seeking injunctive relief pending appeal has the burden of showing that it—not the environment—is likely to suffer irreparable harm during the pending appeal. *Cf. Winter*, 555 U.S. at 20 (plaintiff must establish "that *he* is likely to suffer irreparable harm") (emphasis added). That harm must be immediate, individualized, and substantiated with evidence. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiff offers the following sentence as the only evidence: "These ecological impacts harm the Conservancy and its members." Mot. at 15 (citing Dkt. # 91-6 – 91-8). Neither this statement nor the declarations it cites provide an articulation of how the prey increase program will irreparably harm Plaintiff pending appeal.

A closer look at Plaintiff's declarations reveals statements such as "I find it very discouraging to fish where there are aggressive hatchery programs because I know the harm these programs cause to the dwindling wild populations." Dkt. # 91-7 ¶ 17. The same declarant attests: "I do wish I could angle more frequently." *Id.* ¶ 20. Discouragement and desire may be enough to establish standing, but more is needed to demonstrate irreparable harm. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, … a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm."). Another declarant offers: "I intend to return to the Columbia River and its tributaries to fish for Chinook and steelhead, because even though wild populations are low here, there are still fishing opportunities—opportunities that no longer exist in many rivers in Puget Sound." Dkt. # 91-8 ¶ 10. Here, there is evidence that fishing for wild Chinook is not foreclosed, thus weakening any claim of harm that cannot be repaired. Moreover, Plaintiff's concession, that it seeks to harm the species it purports to protect through an injunction, is nothing less than extraordinary.

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Plaintiff's remaining assertions are insufficient to move the needle to show irreparable harm warranting an injunction pending appeal. First, Plaintiff makes generalized assertions of harm to wild fish that are wholly inadequate. *E.g.*, Mot. at 14 ("NMFS's continued implementation of the prey increase program is harming threatened Chinook salmonids and impeding their ability to recover. . ."). Next, Plaintiff quotes Dr. Luikart, who said that the prey increase program "will likely further increase pHOS levels and thereby further inhibit the prospects for the continued survival, much less recovery," of Chinook salmon. *Id.* at 15. This argument is undermined by the evidence showing that NMFS carefully evaluated the effects of the prey increase program on threatened Chinook salmon to avoid jeopardy to these fish. Fourth Purcell Decl. ¶¶ 9-11. The unsupported allegations contained in Dr. Luikart's sentence do not rise to the level of imminent, irreparable harm that warrants injunctive relief.

Irreparable harm is not likely to occur to threatened Chinook salmon during the pendency of this appeal. *Contra* Mot. at 14-16. "There is an inherent conflict in this case from the Chinook salmon, a threatened species, serving as priority prey for the endangered SRKW." Dkt. # 144 at 34. Following this statement, the Court determined that although "it is clear that hatchery production poses some risk to wild salmon populations . . . such risks can be mitigated to limit any potential negative impacts." *Id.* at 35. And that is exactly what NMFS accomplishes through the site-specific analyses. From the perspective of the SRKW, shuttering NMFS's prey abundance efforts will only exacerbate a well-established vulnerability and thereby put them at greater risk. *Defs. of Wildlife v. U.S. Army Corps of Eng'rs*, 730 F. App'x 413, 415-16 (9th Cir. 2018) (reversing the district court's irreparable harm findings where the project was designed to aid in recovery of the species).

Plaintiff has failed to show irreparable harm.

IV. The Equities and Public Interest Counsel that the Motion Be Denied.

Plaintiff compounds its previous errors by suggesting that the equities and public interest support an injunction pending appeal. Mot. at 16-17. The prey increase program is one part of a complex regulatory regime that is designed to help the survival and recovery of SRKW. Fourth Barre Decl. ¶¶ 23-25, 27. To remove this part would be to interfere with an

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action designed by NMFS to benefit SRKW. And such an effort runs counter to the public interest. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citation omitted); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) ("the balance of hardships and the public interest tip heavily in favor of endangered species") (citation omitted).

Plaintiff tries to avoid this result by arguing that there is no risk to SRKW in light of vacatur of the ITS. Mot. at 16. This argument is derivative of Plaintiff's prior arguments and thus fails. *See supra.* However, it is critical to note that NMFS, which is one of the two agencies tasked with implementing the ESA, has determined that both endangered SRKW and threatened Chinook salmon will not be subject to undue harm during the remand, which is expected to be completed no later than November 2024. *See Nw. Env't Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1315 (D. Or. 2011) (deferring to NMFS in the context of a preliminary injunction).

CONCLUSION

Plaintiff's Motion is without merit and the Court should deny the requested relief.

Dated: May 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on May 22, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Washington by using the CM/ECF system, which will serve a copy of the same on the counsel of record.

I hereby certify that this response contains 4,069 words, in compliance with the Local Civil Rules.

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