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

WILD FISH CONSERVANCY,

Plaintiff,

v.

JENNIFER QUAN, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION,

Defendant-Intervenor,

and

STATE OF ALASKA,

Defendant-Intervenor.

Case No. 2:20-cv-417-RAJ-MLP

DEFENDANTS' RESPONSE TO
DEFENDANT-INTERVENOR'S
MOTION FOR PARTIAL STAY
PENDING APPEAL

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ESA	Endangered Species Act
ITS	Incidental Take Statement
NMFS	National Marine Fisheries Service
SEAK	Southeast Alaska
SRKW	Southern Resident Killer Whales

1 **INTRODUCTION**

2 Defendant-Intervenor State of Alaska moved for a partial stay pending appeal. Dkt. #
3 172 (Mot.). Specifically, the State of Alaska requested that the Court stay the decision to
4 vacate in large part the incidental take statement (ITS) that applies to the Chinook commercial
5 troll fishery in Southeast Alaska (SEAK). *Id.* at 1. Defendant-Intervenor Alaska Trollers
6 Association joined that motion. Dkt. # 173. Defendants file this response in support of the
7 motion.

8 **STANDARD OF REVIEW**

9 When deciding whether to issue a stay, courts consider the four factors established in
10 *Nken v. Holder*, 129 S. Ct. 1749 (2009): “(1) whether the stay applicant has made a strong
11 showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably
12 injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties
13 interested in the proceeding; and (4) where the public interest lies.” *Sierra Club v. Trump*, 929
14 F.3d 670, 687 (9th Cir. 2019) (citations omitted). In applying this four-factor test, the first two
15 “are the most critical.” *Id.* (citation omitted). “The third and fourth factors, harm to the
16 opposing party and the public interest, merge when the Government is the opposing
17 party.” *Nken*, 129 S. Ct. at 1753.

18 **ARGUMENT**

19 A stay is warranted and appropriate here because success on the merits of the State of
20 Alaska’s appeal of the district court’s remedy order is likely, irreparable harm will result absent
21 a stay pending appeal, and the public interest favors a stay. The Ninth Circuit is likely to find
22 that the Court abused its discretion when it vacated the portion of the ITS as it applies to the
23 winter and summer seasons of the Chinook commercial troll fishery. As an initial matter, the
24 Court erroneously assumed that it should presumptively vacate an agency’s action when that
25 action violates the Administrative Procedure Act. Vacatur remains an equitable remedy and
26 therefore should not be granted unless the relevant equitable considerations tip in favor of
27 relief. *See Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Cal. Cmty.*
28 *Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam). To the extent the

1 court put a thumb on the scale in favor of vacatur, rather than fairly weighing the specific facts
2 before it, that was error.

3 And when balancing the seriousness of the agency’s errors with the disruptive
4 consequences of vacatur, the Court inappropriately elevated the small and largely speculative
5 impacts to Southern Resident Killer Whales (SRKW) resulting from operation of the
6 commercial Chinook troll fishery over the significant and very real harm that will occur in
7 SEAK fishing communities. In reaching its decision on vacatur of the ITS, the Court stated that
8 “no party here suggests that there would not be at least some benefit to the SRKW from
9 additional prey availability.” Dkt. # 144 at 34. But the rub lies in the scope of “some benefit.”
10 The National Marine Fisheries Service (NMFS) estimated that *all* the SEAK fisheries would
11 reduce SRKW prey availability by an average of 0.5% in coastal waters during the winter and
12 by an average of 1.8% in inland waters during the summer, Fourth Barre Decl. ¶ 11, which
13 means that the reductions in prey expected from a part of those fisheries—the winter and
14 summer seasons of commercial troll fishing—would necessarily be lower. Thus, the benefit of
15 effectively closing those fisheries would be even smaller.

16 The Court compounded this mismeasurement because it did not consider the actual
17 benefits flowing from the prey increase program, which its decision left in place. The record
18 evidence shows the prey increase program has been funded and implemented since 2020 and is
19 more than compensating for the summer and winter Chinook fishery. *Id.* ¶¶ 7, 15. More
20 specifically, the program has already produced fish that will serve as additional prey for
21 SRKW as adults in 2023, 2024, and beyond. Fourth Purcell Decl. Att. 1. The years 2023 and
22 2024 are particularly important because NMFS is on track to complete its remand no later than
23 November 2024. Dkt. # 150 ¶ 5. This means that prey from the program will be available to
24 SRKW during the pendency of this remand. The Court acknowledged that “a certain and
25 definite increase in prey is available to the SRKW,” Dkt. # 144 at 31, but erroneously did not
26 take this information into account when evaluating the disruptive consequences of vacating the
27 ITS.

1 NMFS’s implementation of the prey increase program also means that with the passage
2 of time, one of the primary errors the Court identified (that NMFS relied on mitigation that was
3 too uncertain) has been effectively remedied. NMFS has also been ensuring that each hatchery
4 program receiving funds under the program is covered by site-specific analyses under both the
5 Endangered Species Act (ESA) and the National Environmental Policy Act, which means that
6 the agency has been considering the impacts of hatchery fish on wild fish. Fourth Purcell Decl.
7 ¶¶ 9-11. This analysis suggests that NMFS will be able to offer better reasoning on remand in
8 support of its decision in the 2019 Biological Opinion and adopt the same decision.

9 The agency’s relatively minor procedural deficiencies and the minimal benefit to
10 SRKW pale in comparison to the impacts of closing the lifeblood of the small Alaska fishing
11 communities and the attendant harm. In assessing the disruptive consequences, the Court
12 discounted the economic impacts of vacatur, which NMFS estimates will be approximately \$29
13 million *per year*, if those engaged in commercial troll fishing in the winter and summer do not
14 fish in the absence of the “take” coverage provided by the ITS.¹ Harrington Decl. ¶ 40. In
15 *California Communities Against Toxics*, the court decided not to vacate in part because
16 stopping construction of a “much needed power plant” employing 350 workers would be
17 “economically disastrous.” 688 F.3d at 993-94. Here, too, the impacts of vacating the ITS
18 would be economically disastrous. There are over 1,000 active permit holders who participate
19 in the troll fisheries annually, and many of the participants are small-scale participants who
20 rely heavily on income from the troll fisheries. Harrington Decl. ¶¶ 32, 41. The troll fisheries
21 support over 23 SEAK communities, most of which are small and isolated, some of which are
22 Alaska Native communities, and some of which are heavily dependent on the commercial troll
23 fishery. *Id.* ¶ 41.

24 The economic impact includes ex-vessel prices, which represents the value of the
25 commercial landings of fish. *Id.* ¶ 33. NMFS has estimated that the average annual ex-vessel
26 value of the Chinook salmon fishery is \$11,462,827.60 and represents, on average, 10.91% of
27

28 ¹ The State of Alaska has indicated that “[v]acatur of the ITS would result in closure of the winter and summer
Chinook troll fishery.” Dkt. # 134 at 7; *see* Dkt. # 94 at 24.

1 the total annual ex-vessel value of all SEAK salmon fisheries. *Id.* ¶¶ 34, 35. There are
2 additional economic factors, such as skipper and crew income, and the secondary spending of
3 that income. *Id.* ¶ 36. These economic impacts will affect individual people and the rural
4 fishing communities that are dependent on the troll fleet, which in SEAK harvests 67% of all
5 Chinook salmon, the highest value salmon. *Id.* ¶¶ 26, 32.

6 For the same reasons that this Court abused its discretion in concluding that vacatur
7 would not be overly disruptive, the State of Alaska can demonstrate that irreparable harm will
8 result absent a stay and that the public interest weighs in favor of a stay pending appeal. As
9 explained above, there is no indication that economic disruptions to those engaged in SEAK
10 fishing could be repaired, and the impacts to SRKW prey abundance will be minimal. A stay is
11 also in the public interest because, without it, the complex regulatory framework for managing
12 fisheries and broader efforts to promote the recovery of ESA-listed species will be frustrated.
13 Within that framework, NMFS works with its regional partners, including the States of
14 Washington, Oregon, Alaska, and Tribes with treaty fishing rights, to manage fisheries and
15 mitigate the effects of the fisheries and to establish a suite of restoration and recovery actions
16 that benefit species such as endangered SRKW and threatened Chinook salmon. Vacating the
17 ITS would interfere with this regulatory framework and would not engender public support for
18 SRKW recovery efforts. NMFS, with its regional partners, has worked very hard to promote
19 actions that will recover SRKW, and this remedy will frustrate those efforts by creating tension
20 between SRKW and fishing communities. Pitting an endangered species against unnecessary
21 economic dislocation harms NMFS, and more importantly, SRKW.

22 CONCLUSION

23 Defendants agree with the State of Alaska that a stay pending appeal is warranted
24 because the Court gave undue weight to any conservation benefits from the cessation of the
25 commercial troll Chinook salmon fishery in SEAK, ignored the increased prey now available
26 to SRKW through the prey increase program, and underestimated the severe economic
27 consequences of vacatur.

1 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 1,488 words, in compliance with the Local Civil Rules.

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