

Honorable Richard A. Jones
Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

SCOTT RUMSEY, in his official capacity as
Acting Regional Administrator for the National
Marine Fisheries Service, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

CASE NO: 2:20-cv-00417-RAJ-MLP

**MOTION FOR PARTIAL STAY
PENDING APPEAL**

NOTE ON MOTION CALENDAR:
May 26, 2023

The Court should stay pending appeal the portion of its May 2, 2023 Order that vacates the 2019 SEAK BiOp’s incidental take statement and effectively closes the upcoming summer and winter seasons of the Southeast Alaska Chinook salmon troll fishery. Given the immediate and irreparable harm to the troll fleet and Southeast Alaskan communities if the upcoming summer and winter seasons are closed, the Court should grant this stay to give Alaska an

1 opportunity to seek appellate review.

2 Along with this motion, Alaska has filed a notice of appeal. Alaska respectfully requests
3 that the Court rule on this Motion no later than **May 26, 2023**, because, absent relief, Alaska will
4 need to seek a stay pending appeal from the court of appeals and will need relief from the court
5 of appeals by June 23, 2023, in advance of the July 1, 2023 opening of the fishery.

6 The State has conferred with counsel for the other parties regarding the stay pending
7 appeal. Plaintiff opposes, the Federal Defendants take no position, and the Alaska Trollers
8 Association support the motion.

9 STANDARD

10 Courts apply a standard like that used to review a motion for a preliminary injunction
11 when considering a request for a stay pending appeal. *Lair v. Bullock*, 697 F.3d 1200, 1202, 1203
12 n.2 (9th Cir. 2012). The relevant factors are:

13 (1) whether the stay applicant has made a strong showing that he is likely to succeed
14 on the merits; (2) whether the applicant will be irreparably injured absent a stay;
15 (3) whether issuance of the stay will substantially injure the other parties interested
in the proceeding; and (4) where the public interest lies.

16 *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418,
17 434 (2009)). Alaska, as the party requesting the stay, bears the burden of showing that the
18 circumstances warrant such a request. *Id.*

19 ARGUMENT

20 Alaska can satisfy each of the four factors warranting a stay.

21 *First*, Alaska is likely to prevail on its appeal. The Court erred by not giving adequate
22 consideration to the consequences of vacating part of the incidental take statement, not only on
23 the trolling fleet, but also on the communities that it supports. In adopting the report and
24 recommendation, the Court erred by focusing on the potential environmental harm while failing
25 to account for the certain economic, cultural, and social harm such a closure will cause to the
26 troll fleet and the Southeast Alaskan communities that are dependent on these fisheries. Dkt. 144
27 at 28. The Ninth Circuit has said that “[a] flawed rule need not be vacated.” *Cal. Comm Against*

1 *Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). “[W]hen equity demands, the regulation can
2 be left in place while the agency follows the necessary procedures’ to correct its action.” *Id.*
3 (quoting *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). And equity
4 requires courts to consider the “delay and trouble vacatur would cause,” including the
5 “economically disastrous” consequences. *Id.* at 994; *see also Am. Water Works Ass’n v. EPA*, 40
6 F.3d 1266, 1273 (D.C. Cir. 1994) (stating that the court may also consider “disrupt[ion] to the
7 [affected] industries”).

8 *Second and third*, the equities here sharply tip in Alaska’s favor. Based on the data
9 offered by Plaintiff, the Court has no way to determine how much, if any, additional prey will
10 reach the SRKW population if the fishery is closed. Dkt. 144 at 29 (recognizing that “there is
11 uncertainty as to how much prey would ultimately reach the SRKW”). Moreover, Plaintiff
12 admits that this additional increase in prey will not immediately impact the population.
13 According to Dr. Lacy, if the fishery is closed, it is *possible* that the SRKW population will see
14 an increase of 4.8% in Chinook availability and that this would “allow the population to stabilize
15 — that is, the projected *long-term* mean population growth rate would be 0.00%.” Dkt. 127-2 ¶¶
16 8-9 (emphasis added). Dr. Lacy gives no indication what will happen to the whale population if
17 the 2023 summer and winter seasons proceed while NFMS considers a new BiOp on remand.

18 Not only is Plaintiff’s data speculative and uncertain, but it is also contested. The State
19 asked for an evidentiary hearing on the causes that are harming the SRKW, which the magistrate
20 denied. Dkt. 141. And to the extent the Court accepts the proposition that prey diminution from
21 the SEAK troll fishery is one of the many causes of the SRKW’s decline, the mitigation program
22 has increased prey to offset that diminution.

23 The Court failed to weigh the mitigating benefits of the prey increase program in its
24 analysis of what remedy is appropriate, even though the Court recognized that the program has
25 been “providing prey the past three years.” Dkt. 144 at 26-30, 31. The Court concluded there was
26 an ESA violation because whether the mitigation plan would be funded and whether it would
27 work was “uncertain and indefinite.” *Id.* at 31. But when considering the remedy for this
28

1 violation, the Court failed to consider that “the mitigation is no longer ‘uncertain and
2 indefinite.’” Dkt. 162 at 6. Moreover, as outlined by Alaska’s congressional delegation, the
3 continuation of the Southeast Alaska salmon troll fishery is “vital to the success of the [Pacific
4 Salmon] Treaty’s negotiated approach to management.” *Id.* at 2. As the delegation explained,
5 “the Treaty controls harvest limits for SEAK fisheries and [] Congress has reviewed and still
6 continues to fully fund the prey increase program.” *Id.* at 6. The Court’s decision to vacate
7 “undermine[s] Congress’s complementary objectives under the Treaty, which distinguishes this
8 case from any other case on which the R&R relies.” *Id.* at 8.

9 In comparison to the uncertain harms to the SRKW population from closing the SEAK
10 troll fishery, harms for which Congress has already independently mitigated in order to keep the
11 SEAK troll fishery open, if the summer and winter troll fishery seasons are closed, this will have
12 a direct, immediate, and irreparable impact on the economic, cultural, and social fabric of
13 Southeast Alaska. “On average, Chinook salmon harvested in winter and summer fisheries alone
14 compromise over a third (\$11.7 million), and in some years close to half, of the overall exvessel
15 value of the troll fishery.” Dkt. 136 ¶ 3. A loss of this value would have devastating impacts on
16 the many small communities in Southeast Alaska that rely on the troll fishery to support their
17 economy, communities such as Craig, Elfin Cove, Meyers Chuck, Pelican, Point Baker, Port
18 Alexander, Tenakee and Yakutat. *Id.* ¶ 4.

19 *Fourth*, a stay of the Court’s vacatur order would also be in the public interest. The Ninth
20 Circuit has previously recognized the broad harm a reduction in harvest causes to communities.
21 Not only does it limit a community member’s ability to earn a living by fishing, but it also causes
22 “cultural and social harm” to the communities as a whole. *See United States v. Washington*, 853
23 F.3d 946, 961 (9th Cir. 2017). Alaska outlined the harm these closures would cause in the
24 Second Declaration of Commissioner Vincent-Lang:

25 Processing facilities may have to close resulting in more job loss. Families may
26 have to relocate to make a living. Less families means less children of school age.
27 In Alaska, when school enrollment dips below a threshold of 10 students, the
28 schools lose state funding typically resulting in closure.

1 Dkt. 136 ¶ 4. This may seem like an unreasonable concern for a Court sitting in Seattle,
2 Washington, but for communities like Craig (population 1,036), Elfin Cove (population 24), and
3 Port Alexander (population 78) this is a real and substantial concern.¹

4 A stay pending appeal is therefore in the public’s interest. *See Ctr. For Biological*
5 *Diversity v. Raimondo*, No. 18-cv-112-JEB, 2022 WL 17039193, at *2 (D.D.C. Nov. 17, 2022)
6 (holding vacatur of BiOp in abeyance to “allow the federal lobster fishery some stability to keep
7 operating, while all stakeholders continue their shared work of implementing corrective
8 measures to secure the future of the right whale in the long term”).

9
10 **CONCLUSION**

11 For these reasons, and the other reasons provided in Alaska’s briefing on this issue, this
12 Court should grant a stay pending appeal.

13 Dated: May 8, 2023

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1 ¹ See U.S. Census Bureau, available at <https://data.census.gov/>.

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2023, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Brian Ferrasci-O'Malley
Brian Ferrasci-O'Malley

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