

The Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY, 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; WILBUR ROSS, JR., in his official
capacity as Secretary of the United States
Department of Commerce; and UNITED
STATES DEPARTMENT OF COMMERCE,

Defendants.

and

ALASKA TROLLERS ASSOCIATION,

Intervenor-Defendant.

No. 2:20-cv-0417-MLP

**DEFENDANT-INTERVENOR ALASKA
TROLLERS ASSOCIATION'S BRIEF IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

ORAL ARGUMENT REQUESTED

Plaintiff Wild Fish Conservancy's motion for the issuance of a preliminary injunction to stay the Defendant National Marine Fisheries Service's (NMFS) authorizations of commercial Chinook salmon fisheries in federal waters off the coast of southeast Alaska, which is set to commence on July 1, 2020, is without merit and should be denied.

INTRODUCTION

This is the second of two separate lawsuits brought in this Court by the plaintiff, Wild

1 Fish Conservancy (WFC), to further restrict or eliminate Pacific coastal commercial salmon
2 fisheries, ostensibly in order to prevent starvation of the endangered Southern Resident Killer
3 Whale (SRKW) that frequents the waters of the Salish Sea (Puget Sound and the Strait of
4 Georgia in British Columbia). The first such lawsuit, also filed against the National Marine
5 Fisheries Service (NMFS) in this same Court last year, was joined by the Center for Biological
6 Diversity (CBD).¹ CBD did not join in this lawsuit, however. Curiously, plaintiff Wild Fish
7 Conservancy makes no mention of the earlier companion filing despite the fact it is still pending.
8 The 2019 lawsuit targeted commercial salmon fisheries in federal waters off Washington,
9 Oregon, and California, and was stayed by Order of the Court, dated July 19, 2019, until May 1,
10 2020, to allow NMFS to re-initiate consultation and issue a new 2020 Biological Opinion (BiOp)
11 for the Pacific Fishery Management Council Salmon Fishery Management Plan for SRKW,
12 relating to salmon fisheries in the Exclusive Economic Zone (EEZ) (3-200 miles) off the coasts
13 of California, Oregon, and Washington. The BiOp was completed and issued on April 29, 2020.
14 Following issuance of the new BiOp, NMFS is seeking dismissal of the case as now moot.²

15 A copy of the newly issued BiOp is attached as Exhibit “A” to the Declaration of Thane
16 Tienson. As will be observed (see pages 90-99), salmon fisheries in federal (EEZ) waters off
17 Washington, Oregon, and California are all being further reduced this year to make greater
18 numbers of Chinook salmon available to the SRKW as they ply their traditional feeding grounds,
19 especially those from Cape Falcon on the northern Oregon coast (North of Falcon or “NOF”) to
20 the Canadian border of the Salish Sea and other measures including increased hatchery salmon
21 production, efforts to improve salmon habitat and further restriction on vessel traffic near whales
22 are also being undertaken to assist the SRKW population. *Id.* p. 95. Canada, too, just announced
23 additional protective measures for the SRKW for this year and beyond

24
25 ¹ See *Center for Biological Diversity and Wild Fish Conservancy v. National Marine Fisheries Service, et al.*, Case No. 2:19-cv-00487-MJP.

26 ² *Id.*, Dkt. #27, April 30, 2020.

1 (<https://www.coastalnewstoday.com/post/canada-government-of-canada-announces-second-year->
2 [of-enhanced-measures-to-protect-southern-resident-killer-whales](https://www.coastalnewstoday.com/post/canada-government-of-canada-announces-second-year-)) (Tienson Decl., Ex. "B". Not
3 content with the substantial reductions in all west coast commercial salmon fisheries that have
4 been instituted this year, and in past years, to in part protect the SRKW and in part to protect
5 Endangered Species Act (ESA) listed salmon species, the Wild Fish Conservancy, acting alone
6 in this lawsuit, now seeks to close entirely southeast Alaska's commercial summer salmon troll
7 fishery. That fishery is located many hundreds of miles away from SRKW traditional feeding
8 areas in the Salish Sea and off the coast of British Columbia, Washington, Oregon, and
9 California. (See April 29, 2020 BiOp, pp. 90-91, 97, Thane Tienson Decl., Ex. "A"; Deborah
10 Lyons Decl. ¶¶ 15, 28).

11 As explained by Dr. Daniel Schindler in his Declaration, there is no credible scientific
12 basis for closing this year's southeast Alaska summer salmon troll fishery. As a biologist with
13 great expertise in the relationship between Pacific Coast salmon fisheries and the SRKW (Dr.
14 Schindler is a co-author of the Final Report of Independent Scientific Panel on the Effects of
15 Salmon Fisheries on the Southern Resident Killer Whales, attached as Exhibit "B" to his
16 Declaration), Dr. Schindler states that closure of the fishery would have no more than a "trivial"
17 impact upon Chinook salmon numbers in SRKW feeding grounds and not appreciably aid in
18 SRKW survival. (Schindler Decl. ¶ 9) Moreover, closure of the fishery would wreak economic
19 havoc on southeast Alaska troll fishermen and women and all of southeast Alaska's remote
20 fishing-dependent communities, especially this year, when the COVID-19 pandemic has forced
21 cancellation of cruise ships to southeast Alaska resulting in an accompanying dramatic reduction
22 in tourism revenue, a large source of livelihood for many of these beautiful but remote
23 communities. (Decl. of James Calvin ¶¶ 9-11).

24 None of the criteria applicable to preliminary injunction motions can be satisfied by the
25 plaintiff. There is no immediate threat of irreparable injury, little likelihood the plaintiff will
26 prevail at trial, and the balance of hardships tips decidedly against the plaintiff. Accordingly, the

1 Motion should be denied.

2 **STANDARD FOR PRELIMINARY INJUNCTION**

3 The traditional equitable criteria for granting preliminary injunctive relief in the Ninth
4 Circuit are:

- 5 (1) A strong likelihood of success on the merits;
- 6 (2) The likelihood of irreparable injury to the plaintiff if preliminary relief is not
7 granted;
- 8 (3) A balance of hardships favoring the plaintiff; and
- 9 (4) Advancement of the public interest by granting the requested injunction.

10 *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010); *Winter v. NRDC, Inc.*, 555 U.S.
11 7, 20 (2008). Here, Plaintiff, Wild Fish Conservancy, fails to meet those standards.

12 **LEGAL ARGUMENT**

13 **A. WFC is Not Likely to Succeed on the Merits.**

14 **1. NMFS Complied with the Endangered Species Act.**

15 "A preliminary injunction is an extraordinary remedy never awarded as of
16 right." *Winter, supra*, 555 U.S. at 9, 24. In its Complaint, Plaintiff contends Defendants violated
17 § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by adopting and implementing the 2019 Southeast
18 Alaska (SEAK) BiOp and its Incidental Take Statement (ITS), and by continuing to authorize
19 and manage salmon fisheries in southeast Alaska without ensuring that such fisheries will not
20 jeopardize the continued existence of the endangered SRKW and the threatened Puget Sound,
21 Lower Columbia River, Upper Willamette River, and Snake River fall-run Chinook salmon
22 Evolutionarily Significant Units (ESUs) or destroy or adversely modify the endangered SRKW
23 critical habitat. Second, Plaintiff contends the NMFS 2019 BiOp is arbitrary, capricious and an
24 abuse of discretion and not in accordance with the law and, finally, that NMFS violated the
25 National Environmental Policy Act (NEPA) by adopting and implementing the 2019 SEAK
26 BiOp and its Incidental Take Statement (ITS) or, alternatively, by failing to prepare a new or
supplemental Environmental Assessment (EA) to determine whether an Environmental Impact
Statement (EIS) is required. See Complaint pp. 27-28, ¶¶ 114-119.

1 The Defendants have extensively briefed the issue of whether Plaintiff is likely to
2 succeed on the merits on any of its claims and concluded it will not. Defendant-Intervenor ATA
3 agrees and joins with Defendants' analysis of Plaintiff's claims and incorporates it by reference.
4 Significantly, southeast Alaska is not even identified as part of the "critical habitat" of the
5 SRKW in conjunction with its listing under the ESA. (Tienson Decl., Ex. "A", pp. 36-37).

6 The salmon of the Pacific west coast are managed to benefit fisheries from southeast
7 Alaska to the central California coast. This was first formally recognized in the Stipulation and
8 Order entered into by tribes and states in *Confederated Tribes and Bands of the Yakama Indian
9 Nation, et al. v. Malcolm Baldrige, et al.*, 605 F. Supp. 833, 834 (W.D. WA 1985). That
10 Stipulated Order expressly provides "for a fair interstate domestic allocation of Chinook salmon
11 resources originating in Washington, Oregon and Idaho and migrating to waters in and adjacent
12 to Alaska". Shortly thereafter that same year (1985), the first U.S./Canada Pacific Salmon
13 Treaty was signed after over a decade of negotiation providing a detailed framework for
14 allocating salmon harvest between the U.S. including Alaska and Canada. *Confederated Tribes
15 and Bands of the Yakama Indian Nation, et al. v. Malcolm Baldrige, et al.*, 898 F. Supp. 1477,
16 1481 (W.D. WA 1995); Deborah Lyons Decl. ¶¶ 10-19. Plaintiff's contention that the Pacific
17 Northwest states have an implied possessory right to all salmon that was spawned or reared in
18 hatcheries (most of them federal) and natal streams in their waters is thus completely meritless.
19 Those salmon were produced with the intent and clear understanding that Alaskan fisheries
20 should benefit from their production, especially since these salmon spend the vast majority of
21 their lives feeding in Alaskan waters. Lyons Decl. ¶ 15.

22 The Pacific Salmon Treaty has been renegotiated several times over the past 35 years,
23 most recently just last year in 2019. Significantly, each such renegotiation has resulted in
24 reductions in the allocation of Chinook salmon to southeast Alaska fishermen and women. In
25 2019, yet another 7.5% reduction was imposed, on top of a 15% reduction from the earlier 2009
26 Treaty. Deborah Lyons Decl. ¶¶ 10, 27-30. As both the 2019 SEAK BiOp and the newly issued

1 April 29, 2020 Pacific Salmon Fishery BiOp for SRKW make very clear, the management of
2 Pacific Salmon harvest is an ongoing, extremely complicated, and scientifically informed
3 process. Conservation is an overriding concern. Annual allocation of salmon harvest between
4 all competing user groups is always subject to in-season adjustments depending upon catch
5 results and abundance when compared to pre-season projections in order to ensure escapement
6 goals are met and that fisheries are sustainable.

7 With the listing of the Southern Resident Killer Whale in 2005 as an endangered species
8 under the Endangered Species Act (ESA), beginning in 2009, NMFS and fisheries managers first
9 consulted on the effects of west coast salmon fisheries on the SRKW population and the needs of
10 that particular Distinct Population Segment (DPS) of killer whales together with its preferred diet
11 of Chinook salmon into their management and allocation decision-making process. Tienson
12 Decl., Ex. "A" p. 6. In April 2019, NMFS reinitiated consultation in the wake of new
13 information regarding SRKW and their primary prey, Chinook salmon, and the Pacific Fishery
14 Management Council (PFMC) formed the ad-hoc SRKW workgroup to reassess the relationship
15 between Chinook and SRKW and develop a long-term management approach. *Id.* On April 29,
16 2020, less than two weeks ago, a new BiOp was issued by Defendant NMFS setting forth its
17 recommendations for additional restrictions on the salmon fishery and additional measures to
18 help meet dietary needs of the SRKW. *See* Tienson Decl., Ex. "A" pp. 8-11, 90-99.

19 Despite Plaintiff's claim that a shut-down of the southeast Alaska summer Chinook troll
20 fishery will translate into substantially more Chinook salmon for the SRKW and that such a
21 closure is necessary to meet the requirements of the ESA, the best available science now
22 indicates that there is no clear relationship between salmon abundance and the health of the
23 SRKW population. Tienson Decl., Ex. "A" p. 84; Schindler Decl. ¶ 8.i.). As set forth in the
24 attached Declaration of Dr. Daniel Schindler, the most likely beneficiaries of a closure of the
25 southeast Alaska summer troll fishery will be the Northern Resident Killer Whale (NRKW) and
26 Alaska killer whale populations, which swim in the same waters off British Columbia and the

1 Washington coast frequented by the SRKW, except that their populations are healthy and
2 growing rapidly. (Schindler Decl., ¶ 8.c.). Importantly, the NRKW and the Alaska killer whale
3 populations prefer the same large, mature Chinook salmon as do the SRKW and feed largely in
4 the same grounds. *Id.*, ¶ 8.b. This fact alone suggests the absence of a relationship between
5 salmon abundance and SRKW health.

6 As Dr. Schindler states, the analysis performed by Plaintiff's expert Dr. Lacy is
7 "misleading" and his opinions regarding the relationship between the southeast salmon troll
8 fishery and SRKW health are "speculative." *Id.* ¶ 8.i. In addition to the "natural mortality", *i.e.*,
9 Chinook salmon eaten by other mammals including the robust NRKW and Alaska killer whale
10 populations, any Chinook salmon "saved" by closing the southeast Alaska summer Chinook troll
11 fishery must then survive the long gauntlet of other commercial, recreational, and tribal fisheries
12 off the coasts of southeast Alaska, Vancouver Island, and Washington before they can be fairly
13 considered an available food source for the SRKW in their traditional feeding grounds during the
14 summer months in the Salish Sea and off the coast of Washington. *Id.*, ¶ 8.h. Dr. Schindler
15 opines that, as a consequence, only a "trivial amount" of Chinook salmon foregone in the
16 southeast summer troll fishery would be likely available for SRKW consumption. *Id.* ¶ 9.

17 Here, the best scientific and commercial data available is very recent and reliable and
18 simply does not support Plaintiff's contention that closing southeast Alaska's summer Chinook
19 troll fishery will confer any meaningful benefit upon the SRKW population nor appreciably aid
20 in their survival or recovery. That is particularly true during years like this one when Chinook
21 salmon abundance is projected to be well above critical abundance thresholds. In sum, the 2019
22 SEAK BiOp provides ample scientific support for NMFS to authorize this summer's troll fishery.

23 Courts assess a federal agency's compliance with the ESA under the Administrative
24 Procedure Act (APA) 5 USC §§ 7011-706 standard of review. *See Western Watersheds Project*
25 *v. Kraayenbrink*, 632 F. 3d 472, 496 (9th Cir. 2011) *cert. den. sub nom, Public Lands Council v.*
26 *Western Watersheds Project*, 132 565 U.S. 928 (2011); *Village of False Pass v. Clark*, 733 F. 2d

1 605, 609-10 (9th Cir. 1984). As discussed, "this standard is highly deferential, presuming the
2 agency action to be valid." *Ca. Wilderness Coalition v. DOE*, 631 F. 3d 1072, 1084 (9th Cir.
3 2011). The ESA requires that agencies "ensure that any [agency] action . . . is not likely to
4 jeopardize the continued existence of any endangered species or threatened species or result in
5 the destruction or adverse modification of [critical] habitat of such species." 16 USC
6 § 1536(a)(2). To accomplish this, NMFS must use "the best scientific and commercial data
7 available". 16 USC § 1536(c)(1). This requirement means that agencies must support their
8 conclusions with accurate and reliable data. So long as an agency considers all relevant data, it
9 may rely on that evidence even when it is imperfect, weak, and not necessarily dispositive. *See*
10 *Greenpeace Action v. Franklin*, 14 F. 3d 1324, 1336-37 (9th Cir. 1992).

11 The court is required to grant "considerable discretion to agencies on matters requiring a
12 high level of technical expertise". *Ecology Center v. Castaneda*, 574 F. 3d 652, 658-59 (9th Cir.
13 2009). It is not the court's role to weight competing scientific analyses. *Id.* In essence, a court
14 determines whether the agency "considered the relevant factors and articulated a rational
15 connection between the facts found and the choice made." *Pac. Coast Fed. of Fishermen's Assn*
16 *v. NMFS*, 265 F. 3d 1028, 1034 (9th Cir. 2001). Deference to the agency's considered judgment
17 is especially appropriate where, as here, the issues involved are scientific matters within NMFS's
18 area of expertise. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989); *Earth*
19 *Island Institute v. U.S. Forest Service*, *supra*, 351 F. 3d at 1301. Plaintiff is not therefore likely
20 to prevail on its ESA claim .

21 **2. NMFS Did Not Violate NEPA or the APA.**

22 NEPA claims are also reviewed under the APA. Under the deferential
23 standard applied to APA cases, a court will uphold an agency's decision unless it is "arbitrary,
24 capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 USC
25 § 706(2)(A). Federal agencies must undertake a "full and fair" analysis of the environmental
26 impacts of their activities. 40 CFR § 1502.1. In order to accomplish this, NEPA imposes

1 procedural requirements designed to force agencies to take a single "hard look" at environmental
2 consequences. *Earth Island Institute v. U.S. Forest Service*, 351 F. 3d 1291, 1300 (9th Cir.
3 2003). NMFS did that.

4 Plaintiff contends that the agency was required to prepare a new or supplemental EA or
5 even an EIS. There is no reliable evidence to show that the studies and information relied upon
6 by NMFS were likely incorrect or that the studies and information NMFS relied upon regarding
7 the SRKW population changed sufficiently to allow this Court to conclude that NMFS' actions
8 were arbitrary, capricious, or an abuse of discretion or not in accordance with the law. To the
9 contrary, the studies and information referenced in the 2019 SEAK BiOp including the 2012
10 Independent Scientific Panel Study of the Effects of Salmon Fisheries on the SRKW Population
11 that Dr. Schindler co-authored, demonstrate that the BiOp and ITS are not just supported by
12 evidence, but by the best available scientific evidence. In sum, Plaintiff has not shown that it is
13 likely to prevail on any of its claims.

14 **B. Neither the Plaintiff nor the SRKW nor the identified Chinook Salmon ESUs**
15 **will Suffer Irreparable Injury if Preliminary Relief is not Granted.**

16 Irreparable harm is harm that the court could not remedy even if the moving party
17 ultimately prevailed on the merits on the action. *See Amoco Production Company v. Village of*
18 *Gambell*, 480 U.S. 531, 545 (1987). To show irreparable harm, the moving party must show
19 more than inconvenience or speculative injury. *Younger v. Harris*, 401 U.S. 37, 46 (1971),
20 *Caribbean Marine Services Company v. Baldrige*, 844 F. 2d 668, 674-76 (9th Cir. 1988)
21 (reversing grant of preliminary injunction). The moving party must instead present facts
22 demonstrating immediate threatened injury. *Id.* As set forth in the declarations of Dr. Daniel
23 Schindler, and those submitted by Defendants, the closure of the southeast Alaska salmon troll
24 fishery and the accompanying foregone harvest of Chinook salmon, at best, translates into a
25 "trivial amount" of that projected foregone harvest becoming available for consumption by the
26 SRKW. (Schindler Decl. ¶ 9). Virtually none of the Chinook salmon that would otherwise be

1 caught in the troll fishery (a relatively small number migrating Chinook) would likely survive the
2 "gauntlet" of predators between southeast Alaska and their natal streams to successfully spawn,
3 including the healthy, 310-member NRKW population, which is not endangered and has "more
4 than doubled" and, indeed, almost tripled in size in recent years and which frequents the waters
5 of southeast Alaska and British Columbia, and also targets large, mature Chinook salmon for its
6 diet. Schindler Decl. ¶¶8.c., h.

7 Plaintiff has thus not demonstrated a likelihood of irreparable harm. In the Ninth Circuit,
8 the standard for such a showing considers whether the action sought to be enjoined "will reduce
9 appreciably [the species'] likelihood of survival or recovery or appreciably diminish the value of
10 their critical habitat. *Pac. Coast Federal of Fishermen's Assn. v. Gutierrez*, 606 F. Supp. 2d
11 1195, 1207 (E.D. Cal. 2008) (citing *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Service*,
12 524 F. 3d 917, 931 (9th Cir. 2007)). In that case, the court accepted the FWS' definition of
13 "appreciably diminish" to mean "considerably reduce". *Id.* at 1208 (citing USFWS/NMFS, ESA
14 Section 7C Consultation Handbook (March 1998) at 4-34). That same definition should apply
15 here. Defendant-Intervenor submits that Plaintiff has failed to carry its burden of proof to
16 demonstrate that the southeast Alaska summer troll fishery will "appreciably diminish" or
17 "considerably reduce" SRKW's likelihood of survival or recovery or appreciably diminish the
18 value of their critical habitat. If a plaintiff fails to demonstrate a reasonable likelihood of
19 irreparable harm, the court need not address the remaining elements of the preliminary injunction
20 standard. *Center for Food Safety v. Vilsack*, 636 F. 3d 1166, 1174 (9th Cir. 2011). Accordingly,
21 Plaintiff's Motion for Preliminary Injunction should be denied.

22 C. Balance of Hardships and the Public Interest.

23 Contrary to Plaintiff's position, the law does not allow the court to "abandon a balance of
24 harms analysis just because a potential environmental injury is at issue." *The Lands Council v.*
25 *McNair*, 537 F. 3d 981, 1005 (9th Cir. 2008) "Injunctive relief is an equitable remedy, requiring
26 the court to engage in the traditional balance of harms analysis, even in the context of

1 environmental litigation." *Forest Conservation Council v. US Forest Service*, 66 F. 3d 1489,
2 1496 (9th Cir. 1995). Balancing the equities in this case requires comparison between the
3 environmental harms claimed by the plaintiff on the one hand, the public interest as asserted by
4 NMFS, and the economic interests of Intervenor.

5 Defendant-Intervenor submits the environmental injuries claimed by Plaintiff to result
6 from allowing the SEAK summer troll fishery to proceed are at best speculative. All but a
7 "trivial amount" (Schindler Decl. ¶8.i.) of that foregone troll fishery harvest would be consumed
8 by other predators, including very healthy killer whale populations in British Columbia and
9 southeast Alaska, and the commercial and sport fisheries that the "saved" salmon would have to
10 contend with to survive their long, perilous journey south before they could fairly be considered
11 an available food source for the SRKW. Plaintiff's claim of irreparable environmental injury,
12 harm to the SRKW because of the Chinook salmon caught in the southeast Alaska troll fishery,
13 has not been proven and would be unlikely to occur anyway given both the projected abundance
14 of salmon off the west coast this year and the dubious relationship between such high salmon
15 abundance levels and the SRKW population health.

16 The injuries suffered by Defendant-Intervenor Alaska Trollers Association if the
17 requested injunction is granted, on the other hand, will be hard, certain, and substantial economic
18 losses – particularly the loss of jobs and the harm to local, fragile economies in southeast Alaska.
19 It would have devastating consequences on the 1,400 participants in the southeast Alaska
20 summer salmon troll fishery who would be thrown out of work and cause an additional 250 job
21 losses on fish processing employment with more job losses and/or reduced wages for others
22 economically dependent upon the troll fishery, such as fuel dock operators, vessel repair yards,
23 bait suppliers, and others. (*See* Decls. of James Calvin ¶¶ 4, 5, 8-11; Matthew Donohoe ¶¶ 3-5,
24 Paul Olson ¶¶ 17-20; Deborah Lyons ¶ 46; and Dennis Watson, ¶¶ 3-5. Senior economist James
25 Calvin estimates the total economic loss to the narrow-based southeast Alaska economy resulting
26 from closure of this summer's troll fishery at \$85 million – in a region already likely to be hard

1 hit this year by the loss of its only other large source of summer revenue – cruise ships and
2 tourism.

3 In *Amoco Production Company v. Village of Gambell, supra*, the Supreme Court
4 concluded that economic concerns – the loss of \$70 million dollars that an oil company had
5 committed to exploration – outweighed environmental concerns when the claimed injury to
6 subsistence resources from exploration "was not at all probable" in upholding the trial court's
7 denial of injunctive relief. 480 U.S. at 545. The same is equally true here and the same result
8 should obtain.

9 **D. THE BOND REQUIREMENT SHOULD NOT BE WAIVED.**

10 The purpose of the preliminary injunction bond requirement is to cover the costs and
11 damages suffered by the party wrongfully enjoined. See Fed. R. Civ. Pro. 65(c); *Grupo*
12 *Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999). ATA, its
13 members and fellow troll fishers and the Alaska communities in which they live will suffer a
14 direct economic loss of \$37.4 million if a preliminary injunction issues. James Calvin Decl. ¶¶
15 6, 11. Any bond amount should cover this economic damage.

16 Further, Plaintiff has not shown, as it must, that posting a bond would cause undue
17 hardship. See *Earth Island Inst. v. U.S. Forest Serv.*, No. 2:05-cv-1608, 2006 WL 3359192, *1
18 (E.D. Cal. Nov. 20, 2006); *Save Our Sonoran v. Flowers*, 408 F. 3d 1113, 1126 (9th Cir. 2005);
19 see also *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F. 3d 453, 459-60 (7th Cir. 2010) (no
20 blanket bond waiver for nonprofits).

21 **CONCLUSION**

22 For all the foregoing reasons, Plaintiff's Motion for Preliminary Injunction should be
23 denied.

24 Dated this 11th day of May 2020.

25 s/ Thane W. Tienson

Thane W. Tienson, WSBA #13310

Email: ttienson@lbbblawyers.com

Attorneys for Alaska Trollers Association

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, I served the foregoing **DEFENDANT-INTERVENOR ALASKA TROLLERS ASSOCIATION'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** on the following individual(s):

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- by the Court's CM/ECF system to the email addresses listed above
- by facsimile pursuant to the fax numbers listed above
- by email to the email addresses listed above
- by overnight delivery to the addresses listed above
- by first class mail to the addresses listed above.

s/ Kathy Baker
Kathy Baker, Legal Assistant to Thane W. Tienson
Of Attorneys for Intervenor-Defendant Alaska
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