

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

JENNIFER QUAN, *et al.*,

Defendants,

and

ALASKA TROLLERS ASSOCIATION and
STATE OF ALASKA,

Defendant-Intervenors.

Case No. 2:20-cv-00417-RAJ

**ORDER DENYING THE
PARTIES' MOTIONS TO STAY**

I. INTRODUCTION

This matter comes before the Court on the parties' motions for a stay pending appeal of this Court's May 2, 2023 Order. (Dkt. ## 172, 177.) Having carefully considered the written arguments on both sides, and the record in this action, the Court **DENIES** the motions for the reasons set forth below.

II. BACKGROUND

The background of this case is detailed extensively in the Reports & Recommendations issued by Magistrate Judge Michelle L. Peterson dated September 27,

1 2021 and December 13, 2022. (*See* Dkt. # 111 at 2-14; Dkt. # 144 at 3-12.) The Court
2 will provide a brief summary of the issues for purposes of the current motions.

3 The Court determined that the 2019 biological opinion for southeast Alaska
4 salmon fisheries (“2019 BiOp”) violated the Endangered Species Act because (1) it relied
5 on uncertain mitigation to find no jeopardy to the Southern Resident Killer Whales
6 (“SRKW”) and (2) it failed to evaluate whether the prey increase program would
7 jeopardize the Chinook salmon. (Dkt. # 111 at 34.) The Court also found violations of the
8 National Environmental Policy Act (“NEPA”) because the National Marine Fisheries
9 Service issued and adopted the 2019 BiOp without conducting proper NEPA procedures.
10 (*Id.* at 38.) On May 2, 2023, the Court adopted several recommendations, including that
11 (1) the 2019 BiOp be remanded to the National Marine Fisheries Service and (2) the
12 portions of the 2019 BiOp authorizing “take” of SRKW and Chinook salmon during the
13 winter and summer seasons be vacated. (Dkt. # 165.) The Court further adopted the
14 recommendation that the prey increase program for the SRKW be remanded without
15 vacatur. (*Id.*) Thereafter, the parties filed notices of appeal with the Ninth Circuit along
16 with current motions to stay the May 2, 2023 Order pending appeal. (Dkt. ## 170, 171,
17 172, 177.)

18 III. DISCUSSION

19 The State of Alaska, one of the Intervenor Defendants, asks the Court to stay the
20 portion of its May 2, 2023 Order that vacates the 2019 SEAK BiOp’s incidental take
21 statement pending appeal. (Dkt. # 172.) Plaintiff Wild Fish Conservancy
22 (“Conservancy”) also seeks a stay but asks the Court to stay the portion of the Order
23 regarding the prey increase program. (Dkt. # 177.)

24 A stay pending appeal is not a matter of right, but rather “an exercise of judicial
25 discretion” that depends upon “the circumstances of the particular case.” *Nken v. Holder*,
26 556 U.S. 418, 433 (2009). The question of whether a stay pending appeal is warranted
27 requires consideration of four factors: “(1) whether the stay applicant has made a strong

1 showing that he is likely to succeed on the merits; (2) whether the applicant will be
2 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure
3 the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at
4 426 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The party requesting a
5 stay bears the burden of showing that the circumstances justify an exercise of [this
6 Court’s] discretion.” *Id.* at 433-34.

7 **A. Intervenor Defendant Alaska’s Motion for a Stay**

8 The State of Alaska argues that the Court erred by not considering the
9 consequences of vacating part of the incidental take statement. (Dkt. # 172 at 2.)
10 Specifically, Alaska claims that the Court erred by focusing on the potential
11 environmental harm while failing to account for the certain economic, cultural, and social
12 harm to the troll fleet and the Southeast Alaskan communities that are dependent on these
13 fisheries. (*Id.*) Alaska adds that any additional increases in wild Chinook salmon will not
14 immediately impact the SRKW population and that staying any reduction in harvest
15 benefits the public interest. (*Id.*)

16 As this Court and other district courts have noted, “the Ninth Circuit has only
17 found remand without vacatur warranted by equity concerns in limited circumstances,
18 namely serious irreparable environmental injury.” *Ctr. for Food Safety v. Vilsack*, 734 F.
19 Supp. 2d 948, 953 (N.D. Cal. 2010). Nonetheless, the Court undertook an extensive
20 analysis of the economic consequences raised by Defendants and did not take those
21 economic consequences lightly in adopting vacatur as the remedy. (*See* Dkt. # 144 at 30.)
22 Ultimately, the Court concluded those consequences did not overcome the seriousness of
23 National Marine Fisheries Service’s violations given the presumption of vacatur, the
24 harm posed to the SRKW by leaving the incidental take statement in place, and the
25 Court’s mandate to protect the endangered species. (*Id.*) Accordingly, the Court finds that
26 Alaska will not succeed on the merits. Alaska has also failed to show the other factors
27 warrant a stay. As the Report and Recommendation notes, and as Defendants have

1 conceded, vacatur of the incidental take statement does not result in a prohibition on
2 fishing in and of itself in federal or state waters; rather, it means there is no exemption
3 from liability under Section 9 of the Endangered Species Act in the event that take
4 occurs. (Dkt. # 144 at 30 n. 17.) For these reasons, the Court denies Alaska's motion to
5 stay.

6 **B. The Conservancy's Motion to Stay**

7 The Conservancy argues for a stay on the ground that the presumption of vacatur
8 has not been overcome with respect to prey increase program. (Dkt. # 177 at 8.) In
9 support of its motion, the Conservancy claims that withholding vacatur will result in
10 significant adverse ecological impacts, threatening the survival and recovery of Chinook
11 salmon. (*Id.* at 15.) The Conservancy claims that the requested stay would reduce harm to
12 threatened Chinook salmon without risking harm to SRKWs. (*Id.* at 16.)

13 For several reasons, the Court finds that the Conservancy has not made the
14 required showing for a stay. First, the Conservancy's argument contradicts the findings
15 made by both parties that a significant interruption of the prey increase program would
16 result in a certain environmental harm to the SRKW by eliminating a targeted source of
17 prey. (Dkt. # 144 at 30-31.) The Conservancy's own expert stated that under existing
18 conditions, SRKW are not getting enough Chinook salmon and require a rapid increase to
19 avoid functional extinction. (Dkt. # 127-1, ¶ 18.) The potential extinction of an animal
20 species—an irreparable environmental injury—has been sufficient for courts to order
21 remand without vacatur. *See Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392,
22 1405 (9th Cir. 1995). The Court has also considered the setback to any future resumption
23 of the prey increase program while National Marine Fisheries Service attempts to cure
24 the violations with the 2019 BiOp as exacerbating environmental harm. (Dkt. # 144 at 30-
25 31.)

26 The Court also found that enjoining the prey increase program would likely have
27 further cascading impacts to commercial and recreational fisheries off the coast of

1 Washington, in Puget Sound and other areas. (*See* Dkt. # 144 at 33.) Thus, vacatur of the
2 prey increase program would increase the prospect that Chinook salmon abundances
3 would fall below thresholds specified in other BiOps authorizing fisheries not at issue in
4 this action. (*Id.* at 32.) And while hatchery production poses some risk to wild salmon
5 populations, the Court determined that those risks can be mitigated to minimize negative
6 effects on the threatened Chinook salmon. (*Id.* at 35.) For these reasons, the Court finds
7 that the Conservancy is unlikely to show a likelihood of success on the merits, irreparable
8 injury absent a stay, or that a stay is in the public interest.

9 IV. CONCLUSION

10 For the reasons above, the Court **DENIES** the parties' motions to stay. (Dkt. ##
11 172, 177.) Nothing in this Order precludes the parties from applying to the Ninth Circuit
12 for a stay of the May 2, 2023 Order. *See* Fed. R. App. P. 8(a)(2).

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14 DATED this 26th day of May, 2023.

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17 The Honorable Richard A. Jones
18 United States District Judge
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