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Via Certified Mail – Return Receipt Requested

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National Marine Fisheries Service
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U.S. Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

Secretary Wilbur L. Ross, Jr.
U.S. Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

RE: Notice of Intent to Sue U.S. Department of Commerce and National Marine Fisheries Service for Failing to Ensure that their Authorization of the Southeast Alaska Salmon Fisheries does not Jeopardize the Continued Existence of the Southern Resident Killer Whale and Four Chinook Salmon Species

Dear Honorable Civil Servants:

This letter provides notice of Wild Fish Conservancy’s (“Conservancy”) intent to sue the United States Department of Commerce and its Secretary (collectively, “Commerce”) and the National Marine Fisheries Service, its Assistant Administer for Fisheries, and its West Coast Regional Administrator (collectively, “NMFS”) for violations of section 7 of the Endangered Species Act (“ESA”).¹ Commerce and NMFS are violating section 7 of the ESA by failing to ensure that the salmon fisheries in the Exclusive Economic Zone of Southeast Alaska are not likely to jeopardize the continued existence of the Southern Resident Killer Whale, Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon or destroy or adversely modify the Southern Resident Killer Whale’s critical habitat. This letter is provided under section 11(g) of the ESA.² If the ESA violations described herein are not remedied before the expiration of the sixty day notice period, the Conservancy intends thereafter to file suit to protect these species.

¹ 16 U.S.C. § 1536.

² *Id.* § 1540(g).

I. Legal Framework.

When the ESA was passed in 1973 it “represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”³ The purpose of the statute is to conserve threatened and endangered species and to protect the ecosystems upon which those species depend.⁴

The ESA assigns implementation responsibilities to the Secretaries for Commerce and the U.S. Department of Interior, who have delegated duties to NMFS and the United States Fish and Wildlife Service (“FWS”), respectively.⁵ NMFS generally has ESA authority for marine and anadromous species, while FWS has jurisdiction over terrestrial and freshwater species.⁶

Section 4 of the ESA prescribes mechanisms by which NMFS and FWS list species as endangered or threatened and designate “critical habitat” for such species.⁷ Species is defined to include “any distinct population segment of any vertebrate species that interbreeds when mature.”⁸ Section 9 of the ESA makes it unlawful to “take” ESA-listed species.⁹ “Take” is defined broadly to include harass, harm, wound, kill, trap, or capture a protected species.¹⁰

Section 7 of the ESA imposes a substantive obligation on each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species.¹¹ Jeopardy results where an action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.¹² Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.¹³

In fulfilling the substantive mandates of section 7 of the ESA, federal agencies planning to fund, authorize, or undertake an action (the “action agency”) that “may affect” ESA-listed species or their critical habitat are required to consult with NMFS (the “consulting agency”) regarding the effects of the proposed action.¹⁴ Formal consultation concludes with

³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

⁴ 16 U.S.C. § 1531(b).

⁵ *See* 50 C.F.R. § 402.01(b).

⁶ *See id.* §§ 17.11, 223.102, 224.101.

⁷ 16 U.S.C. §§ 1532(16), 1533(a).

⁸ 50 C.F.R. § 424.02.

⁹ *See* 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 223.203(a).

¹⁰ 16 U.S.C. § 1532(19).

¹¹ *See id.* § 1536(a)(2) (emphasis added); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

¹² 50 C.F.R. § 402.02.

¹³ *Id.*

¹⁴ *Id.* § 402.14(a).

NMFS's issuance of a biological opinion determining whether the action is likely to jeopardize ESA-protected species or result in the destruction or adverse modification of critical habitat.¹⁵ If NMFS determines that jeopardy is not likely, or that reasonable and prudent alternatives to the proposed action will avoid jeopardy and that any taking of listed species incidental to the proposed action will not violate section 7(a)(2) of the ESA, NMFS must issue an incidental take statement with its biological opinion.¹⁶ The incidental take statement includes reasonable and prudent measures considered by NMFS as necessary or appropriate to minimize impacts on ESA listed species.¹⁷

Federal agencies have a continuing duty under section 7 of the ESA after consultation is concluded to insure that their actions will not jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. The agencies must reinstate consultation whenever “the amount or extent of taking specified in the incidental take statement is exceeded,” “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” where the action in question is “subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion,” or where “a new species is listed or critical habitat designated that may be affected by the identified action.”¹⁸ “The duty to reinstate consultation lies with both the action agency and the consulting agency.”¹⁹

II. Factual Background.

A. Affected Species and its Critical Habitat.

NMFS listed the Southern Resident Killer Whale distinct population segment as an endangered species under the ESA in 2005.²⁰ Critical habitat was designated for this species the following year.²¹ NMFS is currently proposing a rule that would expand critical habitat for the endangered Southern Resident Killer Whale.²²

“[T]he Southern Resident [Killer Whale] population has declined to historically low levels.”²³ The three pods that make up this species—the J, K, and L pods—consist of only 74 whales as of December 2018.²⁴ “There are currently 26 reproductive age females (aged 11–42

¹⁵ *Id.* § 402.14(h)(3).

¹⁶ 16 U.S.C. § 1536(b)(4).

¹⁷ *Id.* § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii).

¹⁸ 50 C.F.R. § 402.16(a)–(d).

¹⁹ *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

²⁰ 70 Fed. Reg. 69,903 (Nov. 18, 2005).

²¹ 71 Fed. Reg. 69,054 (Nov. 29, 2006).

²² 84 Fed. Reg. 49,214 (Sept. 19, 2019).

²³ Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response, Consultation on the Delegation of Management Authority for Specified Salmon Fisheries to the State of Alaska, NMFS Consultation Number: WCR-2018-10660, p. 84 (April 5, 2019) (“2019 SEAK BiOp”).

²⁴ *Id.*

years), of which only 14 have successfully reproduced in the last 10 years, and there have been no viable calves since the beginning of 2016.”²⁵

A primary limiting factor for this species is prey availability.²⁶ In addition to contributing to premature mortality, limited prey availability reduces fecundity of Southern Resident Killer Whales.²⁷ Southern Resident females are producing a low number of surviving calves over the course of their reproductive life span, with late onset of sexual maturity and a long average reproductive interval of 6.1 years.²⁸ “[T]his reduced fecundity is largely due to nutritional limitation.”²⁹ Indeed, a recent population viability assessment found that “the effects of prey abundance on fecundity and survival had the largest impact on the population growth rate” for this species.³⁰

While Southern Resident Killer Whales consume a variety of fish species and one species of squid, Chinook salmon are their primary prey.³¹ Available data indicate that salmon and steelhead make up to 98 percent of the whales’ diet.³² Moreover, the whales consume mostly larger (i.e., older) Chinook salmon; with upwards of around 80 to 90 percent of the species’ diet consisting of Chinook salmon.³³ This preference for Chinook salmon persists despite much lower abundance than other salmonids in some areas and during certain periods.³⁴

The Puget Sound Chinook salmon evolutionary significant unit (“ESU”), the Lower Columbia River Chinook salmon ESU, and the Upper Willamette River Chinook salmon ESU were each listed as threatened species in 1999.³⁵ NMFS listed the Snake River fall-run Chinook salmon ESU as a threatened species in 1992.³⁶ NMFS has applied the ESA’s take prohibition to each of these four Chinook salmon ESUs.³⁷

B. Commerce’s and NMFS’s Management of Salmon Fisheries in the Exclusive Economic Zone of Southeast Alaska.

The Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act”) was enacted to “conserve and manage the fishery resources found off the coasts of the United States.”³⁸ The statute establishes exclusive federal management over fisheries

²⁵ *Id.* at 242.

²⁶ *Id.* at 90.

²⁷ *Id.* at 84, 94–95, 242.

²⁸ *Id.* at 84.

²⁹ *Id.*

³⁰ *Id.* at 86.

³¹ *Id.* at 90–91.

³² *Id.* at 91.

³³ *Id.*

³⁴ *Id.*

³⁵ 64 Fed. Reg. 14,308 (March 24, 1999); *see also* 70 Fed. Reg. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (April 14, 2014); 50 C.F.R. § 223.102(e).

³⁶ 57 Fed. Reg. 14,653 (April 22, 1992); *see also* 70 Fed. Reg. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (April 14, 2014); 50 C.F.R. § 223.102(e).

³⁷ *See* 50 C.F.R. § 223.203(a).

³⁸ 16 U.S.C. § 1801(b)(1).

within the Exclusive Economic Zones of the United States.³⁹ The Exclusive Economic Zone, sometimes referred to as “federal waters,” generally consists of those waters from 3 nautical miles from the coastline to 200 nautical miles from the coastline.⁴⁰

The statute assigns various implementation responsibilities to the Secretary of Commerce.⁴¹ The Secretary has generally delegated such responsibilities to NMFS, a division of the National Oceanic and Atmospheric Administration, which is itself an agency within the U.S. Department of Commerce.⁴² The Magnuson-Stevens Act also provides for the creation of Regional Fishery Management Councils, including the North Pacific Fishery Management Council.⁴³

The Councils are to prepare fishery management plans and amendments to such plans for each fishery under their respective jurisdiction and submit the plans to NMFS.⁴⁴ The fishery management plans must contain, *inter alia*, management measures necessary to prevent overfishing and that are consistent with other applicable laws.⁴⁵ NMFS must review all fishery management plans, including amendments thereto, to determine whether they are consistent with the Magnuson-Stevens Act “and any other applicable law.”⁴⁶ The fishery management plans are to be approved, disapproved, or partially approved by NMFS.⁴⁷ The statute also directs the Councils to submit proposed regulations to NMFS to implement the fishery management plans, which NMFS will promulgate if it deems them to be consistent with the plans and other applicable laws.⁴⁸ The statute assigns primary responsibility in carrying out and implementing fishery management plans to NMFS.⁴⁹

The Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone Off Alaska, developed by the North Pacific Fishery Management Council, provides for two salmon fisheries: a commercial troll salmon fishery and a sport fishery.⁵⁰ Both fisheries are conducted in Southeast Alaska; there are no longer commercial salmon fisheries in the Western Alaska area.⁵¹ The Fishery Management Plan has been amended numerous times, most recently in October 2018, and approved by NMFS.⁵² The Fishery Management Plan delegates management authority over these fisheries in the Exclusive Economic Zone of

³⁹ *Id.* at § 1811(a).

⁴⁰ *See id.* at § 1802(11); Presidential Proclamation 5030 (March 10, 1983); 48 Fed. Reg. 10,605 (March 14, 1983).

⁴¹ *See, e.g., id.* at §§ 1854, 1855(d).

⁴² *See* U.S. Dep’t of Commerce, *Department Organization Order* 10-15, § 3.01(aa) (Dec. 12, 2011), available at http://www.osec.doc.gov/opog/dmp/doos/doo10_15.html; U.S. Dep’t of Commerce, *NOAA Organizational Handbook Transmittal No. 61*, Part II(C)(26), available at http://www.corporateservices.noaa.gov/ames/delegations_of_authority/.

⁴³ *Id.* at § 1852(a)(1)(F).

⁴⁴ *Id.* at § 1852(h)(1).

⁴⁵ *Id.* at § 1853(a)(1).

⁴⁶ *Id.* at § 1854(a)(1)(A).

⁴⁷ *Id.* at § 1854(a)(3).

⁴⁸ *Id.* at §§ 1853(c), 1854(b).

⁴⁹ *See id.* at § 1855(d).

⁵⁰ Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone Off Alaska 8–9 (Oct. 2018) (“2018 Fishery Management Plan”).

⁵¹ *Id.* at 9.

⁵² *E.g., id.* at 1–5; 2019 SEAK BiOp 6.

Southeast Alaska to the State of Alaska.⁵³ NMFS, however, retains ongoing oversight authority of the State of Alaska’s management of these federal fisheries.⁵⁴ The State of Alaska must provide NMFS with information on the State’s fishery management measures, NMFS must determine whether the measures are consistent with the Fishery Management Plan, the Magnuson-Stevens Act, and other applicable laws, and NMFS is to take appropriate corrective action, if necessary.⁵⁵ NMFS also provides funds to the State of Alaska to manage and monitor the fisheries.⁵⁶

The commercial troll fishery harvests primarily Chinook and coho salmon, although chum, sockeye, and pink salmon are also harvested.⁵⁷ The commercial Chinook salmon fishery is divided into two seasons: a winter season and a general summer season; the summer season is further divided into a spring fishery and a summer fishery.⁵⁸ The winter troll season is defined as October 11 through April 30 and is managed not to exceed a guideline harvest level of 45,000 Chinook salmon.⁵⁹ The spring troll fishery, which begins after the winter season closes, does not occur within the Exclusive Economic Zone and is not subject to the Fishery Management Plan.⁶⁰ The summer troll fishery opens on July 1 and targets all remaining Chinook salmon available under the annual quota set pursuant to the Pacific Salmon Treaty between the United States and Canada.⁶¹ The regulatory period for coho salmon retention in the troll fishery is June 15 through September 20.⁶²

C. NMFS’s 2019 Biological Opinion on Southeast Alaska Salmon Fisheries.

NMFS recently prepared a biological opinion to consider the effects of its ongoing management over, and delegation of authority to Alaska for, the salmon fisheries within the Exclusive Economic Zone of Southeast Alaska: the Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response, Consultation on the Delegation of Management Authority for Specified Salmon Fisheries to the State of Alaska, NMFS Consultation Number: WCR-2018-10660 (April 5, 2019) (“2019 SEAK BiOp”). Those fisheries harvest wild- and hatchery-origin salmon originating in rivers from Oregon to Alaska, including Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon.⁶³ These four Chinook salmon ESUs are failing to meet recovery standards, including those set for spawning escapement, and the fisheries in the Exclusive Economic Zone of Southeast Alaska will continue to contribute to that failure.

⁵³ *E.g.*, 2018 Fishery Management Plan 14.

⁵⁴ *E.g.*, *id.* at 54–58

⁵⁵ *Id.* at 54–58.

⁵⁶ 2019 SEAK BiOp 6.

⁵⁷ 2018 Fishery Management Plan 33.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 34.

⁶² *Id.*

⁶³ *See, e.g.*, 2019 SEAK BiOp 12.

The 2019 SEAK BiOp explains that attempts were made during the recent negotiations that culminated in the current iteration of the Pacific Salmon Treaty, entered into in 2019 between the United States and Canada, to reduce harvests to conserve Puget Sound Chinook salmon and the Southern Resident Killer Whale.⁶⁴ Those efforts were unable to achieve the reductions needed to protect those species:

[T]here was a practical limit to what could be achieved through the bilateral negotiation process. As a consequence, and in addition to the southeast Alaska, Canada, and SUS fishery measures identified in the 2019 [Pacific Salmon Treaty], the U.S. Section generally recognized that more would be required to mitigate the effects of harvest and other limiting factors that contributed to the reduced status of Puget Sound Chinook salmon and [Southern Resident Killer Whales]⁶⁵

NMFS repeatedly explains in the 2019 SEAK BiOp that the Pacific Salmon Treaty merely sets an upper limit on harvest limits and that NMFS can further restrict harvests in the Exclusive Economic Zone of Southeast Alaska to protect imperiled species under the ESA.⁶⁶ NMFS nonetheless continues to authorize and manage the fisheries in the Exclusive Economic Zone of Southeast Alaska in a manner that enables the full extent of Chinook salmon harvest allowed under the Pacific Salmon Treaty.

Unfortunately, the 2019 SEAK BiOp does not adequately disclose or analyze the impact of the fisheries on the spawning escapement for the four threatened Chinook salmon ESU's. It is therefore unclear in the 2019 SEAK BiOp the extent to which these fisheries are harming the survival and recovery of Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon.

NMFS's 2019 SEAK BiOp found that the Southern Resident Killer Whale has a high risk of extinction due largely to low fecundity rates.⁶⁷ This reduced fecundity is primarily attributed to reduced prey abundance; primarily, Chinook salmon.⁶⁸ "Under the existing management and recovery regimes over the last decade, salmon availability has not been sufficient to support Southern Resident population growth."⁶⁹ A recent population viability assessment indicated that effects of prey abundance has the largest impact on the population growth rate and that **Chinook abundance would need to increase by 15%** to achieve the recovery target growth rate set for the Southern Resident Killer Whale.⁷⁰

The 2019 SEAK BiOp indicates that the fisheries in the Exclusive Economic Zone of Southeast Alaska will continue to **reduce Chinook salmon prey available** to the Southern

⁶⁴ *Id.* at 9–10.

⁶⁵ *Id.* at 10.

⁶⁶ *E.g., id.* at 2, 20

⁶⁷ *E.g., id.* at 84–86, 242.

⁶⁸ *Id.* at 84, 242.

⁶⁹ *Id.* at 311.

⁷⁰ *Id.* at 86, 311.

Resident Killer Whale in various seasons and locations.⁷¹ NMFS estimates such reductions of prey available in coastal waters to range from 0.2% to 12.9%, with the greatest reductions occurring in July through September.⁷² Reductions in the inland waters are estimated to range from 0.1% to 2.5%, with the greatest reductions similarly occurring from July through September.⁷³ Some of the Chinook salmon caught in the fishery are identified by NMFS as priority stocks for the Southern Resident Killer Whale.⁷⁴ NMFS estimates that the fisheries in the Exclusive Economic Zone of Southeast Alaska reduce the larger Chinook salmon—those from 3 to 5 years old—from the Southern Resident’s critical habitat by 0.1% to 2.5%.⁷⁵ Available data indicate that Southern Resident Killer Whales consume mostly these larger and older Chinook salmon.⁷⁶

NMFS’s 2019 SEAK BiOp nonetheless concludes that the Southeast Alaska fisheries are not likely to jeopardize the continued existence of the Southern Resident Killer Whale or result in the adverse modification or destruction of its critical habitat.⁷⁷ NMFS similarly found that the fisheries are not likely to jeopardize Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon.⁷⁸ In reaching these conclusions, NMFS relies on mitigation in the form of funding proposed for increased hatchery production and habitat restoration, both of which are supposed to eventually increase salmon, including Puget Sound Chinook salmon, available to the Southern Resident Killer Whale.⁷⁹ However, no decisions have been made as to location, timing, or scope of these supposed mitigation efforts, required authorizations have not been issued, and there is uncertainty as to whether Congress will fund them.⁸⁰ Moreover, the hatchery programs proposed as mitigation will themselves have harmful impacts on wild salmon populations, including the four threatened Chinook salmon ESU’s, which NMFS has yet to analyze; such “mitigation” may result in greater harm than benefit.

Additionally, even though the 2019 SEAK BiOp acknowledges that “salmon availability has not been sufficient to support Southern Resident population growth,”⁸¹ the mitigation effects “will not take place for at least four to five years.”⁸² Instead of accounting for this delay in mitigation, and the un-mitigated reduction in prey availability during the first few years of the proposed action, the 2019 SEAK BiOp does not anticipate heightened negative impacts during the first few years of the proposed action.⁸³ As the Southern Resident Killer Whales continue to be adversely affected by prey availability, Commerce and NMFS have failed to announce the location, timing, or scope of the supposed mitigation and delayed effects.

⁷¹ *E.g., id.* at 244.

⁷² *Id.* at 247–48.

⁷³ *Id.* at 248.

⁷⁴ *Id.* at 251–53.

⁷⁵ *Id.* at 315.

⁷⁶ *Id.* at 91.

⁷⁷ *Id.* at 310–16, 325.

⁷⁸ *Id.* at 298, 302, 305, 309.

⁷⁹ *Id.* at 305–16.

⁸⁰ *See, e.g., id.* at 11, 255.

⁸¹ *Id.* at 311.

⁸² *Id.* at 11.

⁸³ *Id.* at 314–16.

NMFS provided an incidental take statement with the 2019 SEAK BiOp allowing take of Southern Resident Killer Whales, Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, Snake River fall-run Chinook salmon, and two other species resulting from the Southeast Alaska fisheries.⁸⁴

III. Commerce's and NMFS's Violations of the ESA.

Commerce and NMFS are in violation of section 7(a)(2) of the ESA for failing to insure that their ongoing actions on the Southeast Alaska salmon fisheries are not likely to jeopardize the endangered Southern Resident Killer Whale, Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon or destroy or adversely modify the Southern Resident Killer Whale's critical habitat. Such actions include all those by Commerce and NMFS authorizing, managing, funding, and enabling the salmon fisheries in the Exclusive Economic Zone of Southeast Alaska, including: (1) implementation, funding, and oversight of the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone Off Alaska; (2) delegation of management over the fisheries to the State of Alaska; and (3) issuance of an incidental take statement with the 2019 SEAK BiOp authorizing take from the fisheries.

Commerce and NMFS are in violation of their substantive obligation under Section 7 of the ESA to *insure* that their actions on the Southeast Alaska salmon fisheries do not jeopardize ESA-listed species or adversely modify their critical habitat.⁸⁵ The agencies cannot abrogate this obligation merely by relying on a biological opinion; rather, their decision to rely on NMFS's 2019 SEAK BiOp must not itself be arbitrary or capricious.⁸⁶ The 2019 SEAK BiOp is legally deficient in manners that are readily discernable and Commerce and NMFS's reliance on that biological opinion is therefore itself arbitrary and capricious.⁸⁷ Some of those legal deficiencies are summarized below; however, this description is not meant to be exhaustive.

Perhaps the most egregious deficiency with the 2019 SEAK BiOp is NMFS's reliance on supposed future mitigation—funding for increases in hatchery production and habitat restoration—that is entirely speculative, undefined, and that does not adequately address the immediate threats to protected species from the Southeast Alaska fisheries.⁸⁸ The 2019 SEAK BiOp also fails to use the best available scientific and commercial data available and it does not fully and adequately evaluate the effects of the entire action, interrelated and interdependent actions, and the cumulative actions. For example, NMFS fails to appropriately address climate change impacts and impermissibly assumes the benefits from proposed increases to hatchery production without also addressing the harmful impacts to ESA-listed species from such increases. NMFS also fails to adequately evaluate whether the fisheries will

⁸⁴ *Id.* at 325–32.

⁸⁵ See 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02; *Pyramid Lake Paiute Tribe of Indians*, 898 F.2d at 1415.

⁸⁶ See *Pyramid Lake Paiute Tribe of Indians*, 898 F.2d at 1415.

⁸⁷ See *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010).

⁸⁸ See, e.g., *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008) (“absent specific and binding plans,” proposed mitigation may not be considered to offset “certain immediate negative effects”).

harm the Southern Resident Killer Whale by threatening the survival and recovery of Chinook salmon populations that spawn in Canadian waters, such as those in the Fraser River. The 2019 SEAK BiOp does not adequately evaluate whether the Southeast Alaska salmon fisheries will, directly or indirectly, reduce appreciably the likelihood of both the survival and recovery of ESA-listed species in the wild by reducing the reproduction, numbers, or distribution of the species. The 2019 SEAK BiOp does not adequately summarize the information on which the opinion is based or adequately detail the effects the Southeast Alaska salmon fisheries have on listed species and their critical habitat. NMFS failed to draw a rational connection between the facts found and its determination that the salmon fisheries are not likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of their critical habitat.

The incidental take statement included in the 2019 SEAK BiOp is legally deficient because, *inter alia*, it does not adequately specify the impact or extent of the incidental taking of species, relies on inappropriate surrogates in lieu of numeric take limits, does not include appropriate reasonable and prudent measures to minimize impacts, does not include adequate terms and conditions to implement reasonable and prudent measures, and does not include requirements sufficient to monitor the incidental take of ESA-listed species or to trigger the reinitiation of consultation if the anticipated impacts are exceeded. For example, NMFS impermissibly set the take limit for the Southern Resident Killer Whale to be coextensive with the Southeast Alaska salmon fisheries themselves such that even if more take than anticipated occurred, the safe harbor provisions of the incidental take statement would remain in effect and there would not be an obligation to reinitiate consultation.⁸⁹ The incidental take statement was also issued without compliance with the National Environmental Policy Act; i.e., without preparing or supplementing an environmental assessment, a finding of no significant impact, an environmental impact statement, or an alternative analysis.

In sum, Commerce and NMFS have failed to insure that their actions on the Southeast Alaska salmon fisheries are not likely to jeopardize the continued existence of the Southern Resident Killer Whale, Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon, or adversely modify or destroy the Southern Resident Killer Whale's critical habitat.

IV. Party Giving Notice of Intent to Sue.

The full name, address, and telephone number of the party giving notice is:

Wild Fish Conservancy
15629 Main Street N.E.
P.O. Box 402
Duvall, WA 98019
Tel: (425) 788-1167

⁸⁹ See 2019 SEAK BiOp 327; *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1039–40 (9th Cir. 2007).

V. Attorneys Representing Wild Fish Conservancy.

The attorneys representing Wild Fish Conservancy in this matter are:

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VI. Conclusion.

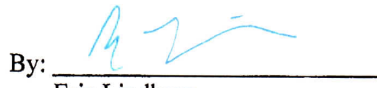
This letter provides notice under section 11(g) of the ESA⁹⁰ of the Conservancy's intent to sue Commerce and NMFS for the violations of the ESA discussed herein. Unless these ongoing and imminent violations described herein are corrected within sixty days, the Conservancy intends to file suit to protect the Southern Resident Killer Whale, Puget Sound Chinook salmon, Lower Columbia River Chinook salmon, Upper Willamette River Chinook salmon, and Snake River fall-run Chinook salmon and to enforce the ESA.

Very truly yours,

KAMPMEIER & KNUTSEN, PLLC

CORR CRONIN, LLP

By: 
Brian A. Knutsen

By: 
Eric Lindberg

⁹⁰ 16 U.S.C. § 1540(g).

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the United States that I am counsel for Wild Fish Conservancy and that on January 9, 2020, I caused copies of the foregoing to be served on the following by depositing them with the U.S. Postal Service, postage prepaid, via certified mail, return receipt requested:

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National Marine Fisheries Service
1201 Northeast Lloyd
Portland, OR 97232
Email: barry.thom@noaa.gov

Assistant Administrator for Fisheries Chris Oliver
National Marine Fisheries Service
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