

# Aquaculture

## Perspectives on its Benefits and Drawbacks

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KAMPMEIER & KNUTSEN, PLLC

ATTORNEYS AT LAW

# What is an Atlantic Salmon Farm?



# What is an Atlantic salmon net pen?

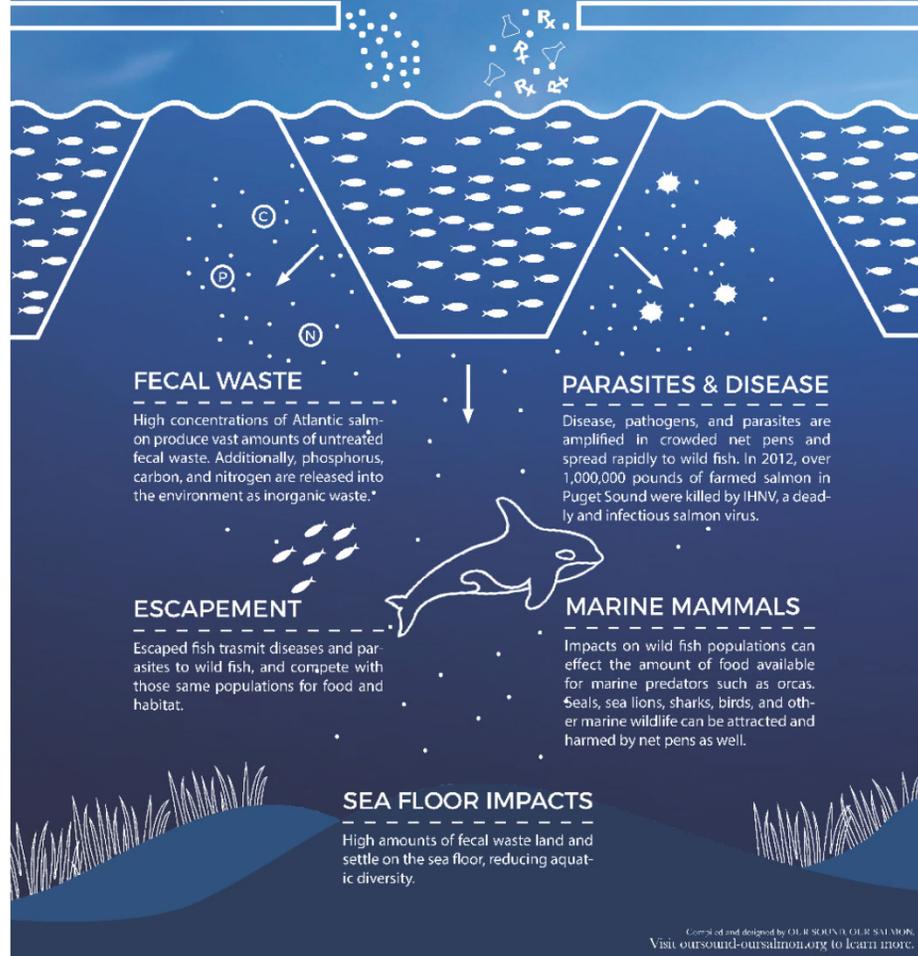
A net pen is an open containment cage in the ocean designed with the purpose of raising Atlantic salmon from egg to adult for retail sale. Net pens are floating feedlots that can hold hundreds of thousands of Atlantic salmon at a time. This graphic demonstrates their known impacts on the marine environment.

## FISH MEAL & FISH OIL

Using wild-caught fish to feed farmed fish puts pressure on wild fish populations and can impact other wildlife that depend on them for food.

## DRUGS & CHEMICALS

Antibiotics, parasiticides, and other chemicals often used in net pen aquaculture flow out of the pens and can harm the broader marine ecosystem.





**X**  
PORT ANGELES

**LOCATION**

Currently, there are **eight** Atlantic salmon net pen complexes in Puget Sound. Three are located within Cypress Island Bay; one off Hope Island near the mouth of the Skagit River; one in Port Angeles Harbor; and three just off Bainbridge Island, minutes from downtown Seattle. **Seven** of these net pens are located in or near marine protected areas. All of them are located in the middle of wild salmon rearing and migration habitat.

SEATTLE

OLYMPIA

**SEA LICE**  
**NEARLY 1 IN EVERY 4**



wild juvenile salmon near Atlantic salmon net pens off the Broughton Archipelago are infected with lethal loads of sea lice (Bateman et al 2016). If salmon net pens in Washington have similar effects, sea lice could have a dramatic impact on wild salmon populations that are already in steep decline.

**IMPACTS ON ENDANGERED AND THREATENED SPECIES**

Atlantic salmon net pens are known to adversely impact the ecosystems in which they are located. In Puget Sound, net pens share the water with the northwest's most iconic species, several of which are threatened or endangered under the Endangered Species Act.

**ENDANGERED**

- Orca
- Bocaccio rockfish
- Northern humpback whale
- Short tailed albatross
- North pacific loggerhead
- Sperm whale

**THREATENED**

- Wild Chinook
- Wild steelhead
- Summer chum
- Bull trout
- Marbled murrelet
- Green sea turtle
- Yelloweye rockfish
- Western snowy plover

**WILD FEED**

For every ton of farmed seafood produced globally,

**1,100 LBS**

of wild fish contribute to their feed. This means that in 2016, an estimated

**3.15 MILLION TONS**

of already depleted wild fish populations were used in fish feed.

Source: FAO and NOAA

**SAY NO**

TO THE EXPANSION OF

**ATLANTIC SALMON NET PENS**

IN PUGET SOUND

One of the world's largest aquaculture companies is threatening to expand Atlantic salmon aquaculture in Puget Sound, putting wild Pacific salmon at risk. Atlantic salmon net pens pose an unacceptable health risk to ESA-listed wild salmon in Puget Sound; they pollute the nearby ecosystem and create an environment in which diseases, pathogens, and parasites can multiply and rapidly spread to wild fish. Washington spends millions of public dollars every year to save wild salmon, yet we allow risky business practices to threaten our investment.

**DISEASE**

In 2012, at the exact time wild salmon juveniles were migrating through Puget Sound, three Atlantic salmon net pens suffered from an outbreak of Infectious Hematopoietic Necrosis virus (IHNV). During the outbreak, over

**1,000,000 LBS**

of Atlantic salmon were killed by the disease.

Source: Wild Fish Conservancy

**ATLANTIC SALMON NET PENS ARE BANNED IN EVERY WEST COAST STATE**



**EXCEPT WASHINGTON STATE**

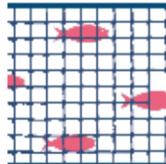


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# OUR SOUND, OUR SALMON'S ATLANTIC SALMON NET PEN FACT SHEET

Washington's Atlantic salmon net pen issue can be difficult to navigate. Most have heard of the August 2017 Cypress Island spill. But what else is there to know about the way the Atlantic salmon net pen industry operates in Puget Sound, and around the world?

## 1. OVER TIME, FREQUENT ESCAPES FROM ATLANTIC SALMON NET PENS CAUSE **ECOLOGICAL HARM**



Puget Sound net pens occasionally have large escapes, but they experience **smaller, persistent escapes** as well.<sup>4</sup>

Atlantic salmon escapes act as **vectors for disease**<sup>1</sup>

Atlantic salmon have **successfully reproduced** in British Columbia rivers.<sup>2</sup>

In the North Atlantic, scientists have studied the stomach contents of escaped Atlantic salmon, and found the diets of **farmed and wild** to be similar.<sup>3</sup>

## 2. ATLANTIC SALMON AQUACULTURE AMPLIFIES AND SPREADS **DISEASES AND PARASITES** IN THE MARINE ENVIRONMENT

In 2012, at the exact time wild juvenile salmon were migrating through Puget Sound, three Atlantic salmon net pens suffered from an outbreak of Infectious Hematopoietic Necrosis virus (IHNV). During the outbreak, over

**1,000,000 LBS**

of adult Atlantic salmon were killed by the disease.<sup>5</sup> Because of Washington State's lax regulations, no assessment of the outbreak's impact was conducted.

In a 2004 study, **90%** of juvenile pink and chum salmon sampled near salmon farms in the Broughton Archipelago were infected with lethal amounts of sea lice<sup>6</sup>

**45%** of wild salmon highly exposed to salmon farms are infected with piscine orthoreovirus in British Columbia, compared to 5% in regions furthest from the farms<sup>7</sup>

## 3. THE NET PEN INDUSTRY'S **80 JOBS**<sup>8</sup> IN PUGET SOUND PUT 28,665 WASHINGTON STATE JOBS AT RISK

Washington's commercial and sport fishing industries employ an estimated 28,655 people.<sup>9</sup> The damage to Northwest fisheries from Atlantic salmon net pens **puts those jobs at risk**



## 5. UNLIKE LAND-BASED AQUACULTURE, OPEN-WATER ATLANTIC SALMON NET PENS **DO NOT CAPTURE FISH WASTE**

Over a 20-month period, net pens in Puget Sound discharge an estimated **2.5 million lbs of nitrogen** and **554,244 lbs of phosphorus** in the form of fish waste.<sup>11</sup>

High nutrient levels in aquatic environments can cause **algal blooms** resulting in low oxygen levels and mortality among aquatic animals.<sup>12</sup>

## 4. LAND-BASED AQUACULTURE PRESENTS A **SUSTAINABLE** ALTERNATIVE

The practice of aquaculture isn't inherently harmful, but the way it's currently practiced is. It's possible for the net pen industry to transition from water to land.

Land-based aquaculture filters and recycles its water. There's no pollution, parasites, viruses, or threat of escaped fish into public waters.<sup>10</sup>



## 6. COOKE AQUACULTURE IS A **BAD CORPORATE ACTOR**

In addition to an attempt to pay the Lummi Nation for their silence earlier this year,<sup>13</sup> Cooke Aquaculture owns a long history of industry transgressions, including an illegal pesticide use case in which the company **pleaded guilty** and was required to pay one of the **largest environmental fines in Canadian history**.<sup>14</sup>

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# Puget Sound Net Pen Litigation

- *Wild Fish Conservancy v. U.S. Env'tl. Prot. Agency, et al.*, W.D. Wash No. 2:15-cv-01731-BJR
  - Challenge to the Endangered Species Act consultation on the effects to threatened Puget Sound salmonids from commercial salmon farms
- *Wild Fish Conservancy v. Cooke Aquaculture Pac., LLC*, W.D. Wash. No. 2:17-cv-01708-JCC
- Clean Water Act citizen suit for violations of the NPDES permits for the eight net pen facilities in Puget Sound



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# Events Leading to Current Litigation

- 1972: Clean Water Act requires NPDES permits for point source discharges of pollutants
- 1978: EPA regulations define “point source” to include “concentrated aquatic animal production facilities” that produce certain amounts of fish (40 C.F.R. § 122.24)
  - For cold water species, more than 20,000 pounds per year



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# Events Leading to Current Litigation (cont.)

- 1996: Washington submits revised water quality standards to EPA for approval under section 303(c) of CWA
  - To enable issuance of NPDES permits to Puget Sound commercial salmon farms
  - EPA does not act on submission
- 1996: First NPDES permits issued to Puget Sound commercial salmon farms
  - Permits incorporated the revised water quality standards
  - Subsequent permits issued in 2002 and 2007



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# Events Leading to Current Litigation (cont.)

- 2008: Wild Fish Conservancy sued EPA for failing to act on revised water quality standards
  - EPA and NOAA Fisheries conclude that salmon farms are “not likely to adversely affect” threatened salmonids
  - Court rules that EPA and NOAA Fisheries “failed to use the best scientific and commercial data available” (2010)
- 2011: EPA and NOAA Fisheries conclude again that commercial salmon farms “are not likely to adversely affect” threatened Puget Sound salmonids
  - EPA reapproves the revised water quality standards



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# Current ESA Litigation

- Two categories of claims:
  1. Challenge to agencies' 2011 conclusion that salmon farms are “not likely to adversely affect” threatened Puget Sound salmonids
  2. Assert that agencies must reinitiate the prior consultation in light of subsequent events



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# Duty to Reinitiate ESA Consultation

## 50 C.F.R. § 402.16

- Where discretionary Federal involvement or control over the action has been retained or is authorized by law; and
- A triggering event occurs:
  - the amount or extent of take specified in an incidental take statement is exceeded;
  - new information reveals effects to listed species or critical habitat in a manner or to an extent not previously considered;
  - the action is modified in a manner that causes an effect to listed species or critical habitat that was not considered; or
  - where a new species is listed or critical habitat designated that may be affected by the action.



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# Events Triggering Duty to Reinitiate

- 2012 outbreak of IHNv at three net pens in Rich Passage
- 2016 designation of critical habitat for Puget Sound steelhead
- 2017 failure of Cypress Site 2



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### Washington State Agencies Findings:

1. Collapse due to Cooke's failure to adequately clean its nets (Cooke fined for negligent release)
2. Between 186,000 and 206,000 escaped Atlantic Salmon were not recovered

# Order on Motions to Dismiss

1. Consultation on EPA's approval of the revised standards must evaluate effects of salmon farms
2. The duty to reinitiate consultation applies to state water quality standards previously approved by EPA
  - Sufficient “discretionary Federal involvement or control... has been retained or is authorized by law”
  - Notably, EPA can issue a revised standard if necessary to avoid jeopardizing protected species
    - 33 U.S.C. § 1313(c)(4)(B)



# Agencies Reinitiate Consultation

- October 1, 2018, EPA requests reinitiation with NOAA Fisheries
  - “...EPA continues to disagree with the reasoning and outcome” of Court’s order applying the duty to reinitiate to previously approved state water quality standards
  - EPA requests formal ESA consultation



# CWA Litigation

Two categories of NPDES permit violations alleged:

1. Violations related to collapse of Cypress Site 2
2. Violations related to failure to prepare and implement plans at all eight Puget Sound net pen facilities



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# Violations Specific to Cypress Site 2

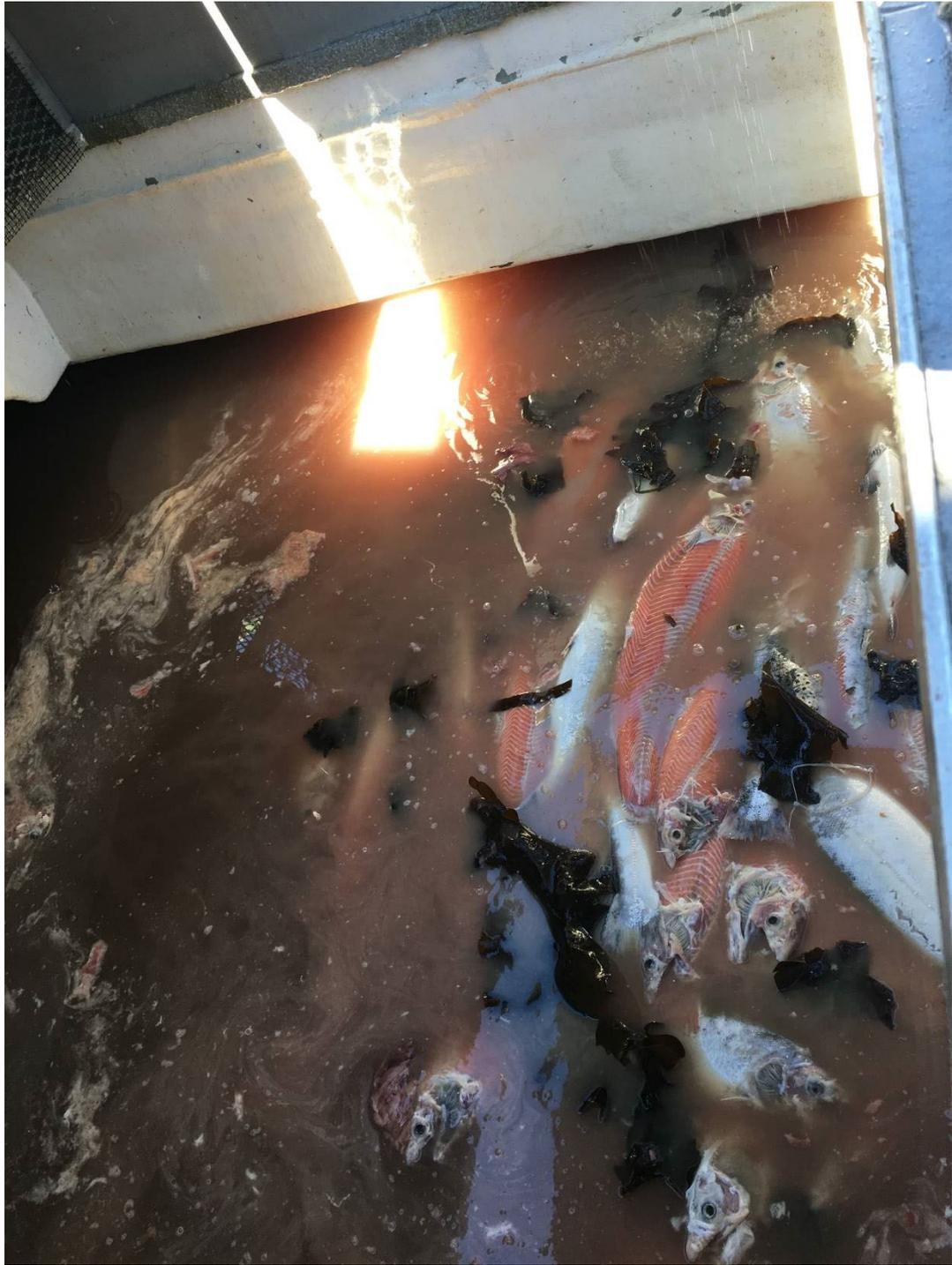
- Prohibition on negligent releases of Atlantic salmon
- Prohibition on disposing of carcasses in surface waters
- Prohibition on discharging floating solids, visible foam, or oily wastes



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# Violations at All Eight Puget Sound Net Pen Facilities

- Violations of the Pollution Prevention Plan Requirements
  - Duties to inspect/repair/replace all anchoring components and cage structures
- Violations of the Fish Release Prevention and Monitoring Plan Requirements
  - Duties to track and report all fish lost to mortality, predation, and escape



# Washington State Response

- Legislature prohibited new leases for commercial salmon farms in Puget Sound
- Department of Natural Resources terminated leases for four of the net pen facilities
- Department of Ecology issued a penalty of \$332,000 for negligent release of Atlantic salmon



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 155  
Seattle, WA 98101-3123

OCT - 1 2018

OFFICE OF  
WATER AND WATERSHEDS

Mr. Kim Kratz  
Assistant Regional Administrator  
National Marine Fisheries Service  
Oregon & Washington Coastal Area Office  
510 Desmond Drive Southeast, Suite 103  
Lacey, Washington 98503-1263

Re: Request to Reinitiate Endangered Species Act Section 7 Consultation on the Environmental Protection Agency's Approval of Washington State Department of Ecology's Sediment Management Standards (WAC 173-204-412) Regarding Marine Finfish Rearing Facilities

Dear Mr. Kratz:

On April 8, 2011, the Environmental Protection Agency and National Marine Fisheries Service completed consultation on the above-referenced matter pursuant to Section 7(a)(2) of the Endangered Species Act. At that time, NMFS concurred with the EPA's conclusion that its approval of revisions to Washington State's sediment management standards would not likely adversely affect listed species or their designated critical habitat. Prompted by the collapse of net pens near Cypress Island in August 2017, on December 14, 2017, Michael Lidgard, the Acting Director of the EPA Region 10's Office of Water and Watersheds, sent NMFS a letter explaining the EPA's determination that it did not have a legal duty pursuant to 50 C.F.R. § 402.16 to reinitiate ESA consultation on the 2011 approval action.

On August 7, 2018, in *Wild Fish Conservancy v. EPA et al.*, Case No. 2:15-cv-01731 (W.D. Wash), the Court issued an order addressing the legal duty of both agencies with regard to reinitiation and the scope of the action subject to consultation. While the EPA continues to disagree with the reasoning and outcome of that decision, in light of the August 7 ruling, the EPA now requests that NMFS reinitiate consultation on the above-referenced matter pursuant to 50 C.F.R. § 402.16.

Based on informal discussions with NMFS and the information available at this time, the EPA requests formal consultation. The EPA understands that NMFS has a significant amount of information related to this action that was used to inform the previous consultation and may be relevant for purposes of reinitiation of formal consultation, including a description of the action, and a description of the area that may be affected by the action. The EPA will coordinate with your staff to determine what additional information is needed.

If you would like to discuss further, please feel free to contact me at (206) 553-1855, or have your staff contact Matthew Szelag, Water Quality Standards Coordinator, at (907) 271-1208 or at [szelag.matthew@epa.gov](mailto:szelag.matthew@epa.gov).

Sincerely

A handwritten signature in blue ink, appearing to read "Daniel D. Opalski".

Daniel D. Opalski  
Director

THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

WILD FISH CONSERVANCY,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Defendants, and

COOKE AQUACULTURE PACIFIC,

Defendant-Intervenor

NO. 15-CV-1731 BJR

ORDER DENYING (1) FEDERAL  
DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS  
AND (2) COOK AQUACULTURE'S  
MOTION TO DISMISS

**I. INTRODUCTION**

This matter comes before the Court on (1) a Motion for Judgment on the Pleadings filed by Defendants U.S. Environmental Protection Agency ("EPA" or "the Agency") and National Marine Fisheries Service ("NMFS" or "the Service") and the named individual Defendants (collectively, "Federal Defendants"); and (2) a Motion to Dismiss filed by Intervenor-Defendant Cooke Aquaculture Pacific ("Cooke"). Both motions seek dismissal of all claims set out in the Second Amended and Supplemental Complaint filed by Plaintiff Wild Fish Conservancy ("WFC" or "the Conservancy"), Dkt No. 57. Having reviewed the briefs,

1 declarations, and exhibits filed in support of and opposition to these motions, and having heard  
2 oral argument by the parties, the Court finds and rules as follows.

3 **II. BACKGROUND**

4 **A. Summary of Issues**

5 This case involves the intersection of two federal statutes, the Clean Water Act, 33  
6 U.S.C. §§ 1251, *et seq.* (“CWA”) and the Endangered Species Act, 16 U.S.C.A. §§ 1531 *et*  
7 *seq.* (“ESA”). At issue is whether the Federal Defendants in this case have met their  
8 consultation obligations under Section 7 of the ESA in their review of Washington’s sediment-  
9 related water quality standards adopted under the CWA. In particular, Plaintiff’s complaint  
10 focuses on the potential effects of those standards, and the commercial salmon farms Plaintiff  
11 alleges they enable, on threatened salmonid species in Puget Sound. Plaintiff’s claims can be  
12 grouped into two independent theories of recovery: (1) that the Federal Defendants’  
13 consultation in 2011 regarding the effects of Washington’s revisions to its water quality  
14 standards did not meet the requirements of the ESA and must be performed again; and (2) that  
15 regardless of the adequacy of the 2011 consultation, events since 2011 have occurred that  
16 trigger the Federal Defendants’ duty to reinitiate a consultation regarding those same  
17 standards. Plaintiff’s objective in this lawsuit is to obtain a court order directing the Federal  
18 Defendants to consult, using the best science currently available, on the potential effects of  
19 Washington’s revisions to its sediment quality standards on species listed as threatened or  
20 endangered under the ESA. The Defendants deny that the 2011 consultation was inadequate,  
21 and claim they lack authority to reinitiate consultation.

22 Under the CWA, states are directed to develop, adopt, implement, and periodically, to  
23 revise, a variety of standards governing the waters within their boundaries; EPA in turn is  
24 directed to review those standards and revisions, approve or disapprove them, or in some  
25 circumstances promulgate its own. 33 U.S.C. § 1313(c), 40 C.F.R. § 131.20. Section 7 of the  
ESA requires EPA (and all federal agencies) engaging in an action that may affect listed

1 species to consult with the relevant service—the Fish and Wildlife Service where terrestrial  
2 and freshwater species may be involved, and NMFS for marine species, including the listed  
3 salmonids at issue in this case—on the effects of that action. 50 C.F.R. § 402.14. If the  
4 consultation indicates that the proposed activity is likely to jeopardize a listed species, the  
5 agency must identify reasonable alternatives to avoid the action’s negative impacts. 16 U.S.C.  
6 § 1536(a)(2) & (b)(3)(A).

7         The CWA-mandated water quality standards governing Washington waters include,  
8 among other things, standards related to the management of sediment, which Washington first  
9 adopted in 1991. Sec. Am. Compl., ¶ 52. In 1996, Washington revised those sediment  
10 management standards, creating an exemption for salmon farms in Puget Sound from  
11 compliance with generally applicable sediment management guidelines. *Id.* ¶¶ 53-54. The  
12 EPA, after a long delay, litigation detailed below, and an informal consultation with NMFS,  
13 provided its approval of the revisions in 2008 and after Plaintiff’s successful legal challenge to  
14 that approval, again in 2011. *Id.* ¶¶ 54-61.

15         Plaintiff Wild Fish Conservancy is a nonprofit advocacy organization, “dedicated to the  
16 preservation and recovery of the Northwest’s native fish species and the ecosystems upon  
17 which those species depend.” *Id.* ¶ 8. The Conservancy alleges that the salmon farms in Puget  
18 Sound jeopardize the continued existence of listed wild salmonids in Washington. *Id.* ¶¶ 47-  
19 49. It argues that EPA should not have approved the revised standards, exempting salmon  
20 farms from compliance with sediment standards, and challenges both the procedure EPA and  
21 NMFS followed in the review, consultation, and approval of those revisions, and the  
22 substantive result of that process.

23         The Conservancy’s complaint contains four causes of action. In the first, the  
24 Conservancy claims that EPA’s consultation with NMFS in 2011 regarding revisions to  
25 Washington’s water quality standards was inadequate, and that NMFS’s concurrence in EPA’s  
approval was arbitrary, capricious, and an abuse of discretion. Sec. Am. Suppl. Compl., ¶¶ 80-

1 83. Plaintiff's second and third causes of action claim that EPA and NMFS, respectively,  
2 violated the ESA by failing to reinitiate consultation regarding the likely effects of the approval  
3 of the 1996 revisions, in light of recent events related to the salmon farms. *Id.* ¶¶ 84-88. The  
4 fourth cause of action alleges that EPA failed to meet its substantive duty under the ESA to  
5 ensure its actions in approving the standards would not jeopardize listed species. *Id.* ¶¶ 89-91.

6 Defendants seek dismissal of all four causes of action. The Federal Defendants claim  
7 they had no duty to consult on approval of the 1996 revisions, and that the scope of the  
8 consultation in any event would not extend to the potential effects of salmon farms on listed  
9 species. Intervenor-Defendant Cooke also argues the Conservancy's first and fourth causes of  
10 action are barred by *res judicata*, based on a 2010 decision of this Court involving the same  
11 parties and similar claims at issue here. All Defendants argue that the federal agencies have no  
12 duty to reinitiate consultation because EPA lacks the "discretionary involvement and control"  
13 over the approval action necessary to trigger such duty, and NMFS lacks the authority to  
14 reinitiate consultation under any circumstances.

## 15 B. Legal Framework

### 16 1. *The Clean Water Act*

17 The purpose of the Clean Water Act was "to restore and maintain the chemical,  
18 physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA  
19 established a cooperative process between state and federal regulators, whereby each state is  
20 required to adopt and periodically revise water quality standards applicable to waters within its  
21 borders, including water quality goals and pollution controls, which it must then submit to EPA  
22 for review. *See* 33 U.S.C. § 1313(c). Under the CWA, EPA then has 60 days to review the  
23 proposed standards or revisions for consistency with the CWA's requirements and either  
24 approve them, or disapprove them and notify the state of required changes. *Id.* § 1313(c)(3). If  
25 the EPA rejects a state's proposed water quality standards and the state fails to adopt the  
required changes within 90 days, the Agency itself promulgates the standards. *Id.* § 1313(c)(4).

1 The Agency also has the discretion *sua sponte* to promulgate new or revised standards for a  
2 state if it determines such standards are necessary to meet the requirements of the CWA. 33  
3 U.S.C. § 1313(c)(4)(B).

#### 4 2. *Endangered Species Act*

5 Congress enacted the Endangered Species Act in 1973 “to provide a means whereby  
6 the ecosystems upon which endangered species and threatened species depend may be  
7 conserved[.]” 16 U.S.C. § 1531(b). The ESA was enacted in 1973 to prevent the extinction of  
8 fish, wildlife, and plant species that have been so depleted in numbers that they are in danger  
9 of, or threatened with, extinction. 16 U.S.C. § 1531(a), (b); *see generally Tennessee Valley*  
10 *Auth. (“TVA”) v. Hill*, 437 U.S. 153 (1978). The Endangered Species Act declares it “to be the  
11 policy of Congress that all Federal departments and agencies shall seek to conserve endangered  
12 species and threatened species and shall utilize their authorities in furtherance of the purposes”  
13 of the ESA. 16 U.S.C. § 1531(c). The legislative history of the ESA “reveals an explicit  
14 congressional decision to require agencies to afford first priority to the declared national policy  
15 of saving endangered species” and “a conscious decision by Congress to give endangered  
16 species priority over the ‘primary missions’ of federal agencies.” *TVA v. Hill*, 437 U.S. at 185.

17 In furtherance of these objectives, Section 7(a) of the ESA imposes on every federal  
18 agency a substantive duty “to insure that any action authorized, funded, or carried out by such  
19 agency is not likely to jeopardize the continued existence of any endangered species or  
20 threatened species, or result in the destruction or adverse modification of [critical] habitat.” 16  
21 U.S.C. § 1536(a)(2). The ESA also imposes a procedural duty on the “action agency” to  
22 consult with the “consultation agency,” meaning either FWS or NMFS depending on the  
23 species involved, if the agency’s action “may affect” a listed species. 50 C.F.R. § 402.14(a);  
24 *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9<sup>th</sup> Cir.  
25 2003); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8 (9<sup>th</sup> Cir.1994). The ESA  
generally requires a formal consultation, which includes a study and a biological evaluation of

1 the agency action and its potential effects, and the development and adoption of methods for  
2 avoiding or mitigating such effects. 50 C.F.R. § 402.14. A formal consultation is not required,  
3 however, if after informal consultation, which may include conversations and correspondence  
4 between the agencies, both agencies determine that the proposed action may affect but “is not  
5 likely to adversely affect” the listed species. 50 C.F.R. § 402.14(b)(1). If the agencies do not  
6 agree that the agency action “is not likely to adversely affect such species,” the regulations  
7 require that the agencies undertake formal consultation, and identify reasonable and prudent  
8 alternatives that will avoid the action’s anticipated adverse effects. *See* 16 U.S.C. §  
9 1536(b)(3)(A); 50 C.F.R. § 402.13(a); *Turtle Island v. Nat’l Marine Fisheries Serv.*, 340 F.3d  
10 at 974.

11 Relevant to this case, ESA regulations also place additional, ongoing obligations on the  
12 action agency and—Plaintiff argues—the consulting agency, to reinitiate consultation under  
13 certain circumstances. Specifically, “[r]einitiation of formal consultation is required and shall  
14 be requested by the Federal agency or by the Service, where discretionary Federal involvement  
15 or control over the action has been retained or is authorized by law” if, among other potential  
16 triggering events, “a new species is listed or critical habitat designated,” or “new information  
17 reveals effects of the action that may affect listed species or critical habitat in a manner or to an  
18 extent not previously considered.” 50 C.F.R. § 402.16.

### 19 C. Factual and Procedural Background

20 The EPA first approved Washington’s sediment management standards, one element of  
21 the state’s comprehensive network of water quality standards, in 1991. Sec. Am. Compl., ¶ 52,  
22 *citing* Wash. Admin. Code ch. 173-204. The regulations provided, among other things, for the  
23 establishment of quality standards, management, and cleanup of contaminated sediments in  
24 Washington’s waterways. Wash. Admin. Code ch. 173-204. In 1995, Washington adopted  
25 revisions to its 1991 water quality standards, which it submitted to EPA for approval in 1996.  
These 1996 revisions amended sediment source control provisions to exclude “Marine Finfish

1 Rearing Facilities”—or net pens operated by commercial salmon farms in Puget Sound—from  
2 generally applicable sediment management standards. Wash. Admin. Code 173-204-412.  
3 Plaintiff alleges that “[t]his regulation was intended to enable the issuance of permits to  
4 commercial salmon farms in Puget Sound that would not require the facilities to implement  
5 what was perceived as costly pollution control measures.” Sec. Am. Compl., ¶ 53.

6 Although EPA was required under the CWA to review and approve or disapprove the  
7 1996 Washington revisions within 60 days of submission, for reasons that are not clear from  
8 the record, it did not do so until some twelve years later, and only after the Conservancy filed a  
9 lawsuit in 2008 to enforce that requirement. *Id.* ¶ 54. In the interim, (although Plaintiff claims  
10 it should not have), Washington has treated the 1996 revisions as the applicable water quality  
11 standards of the state, issuing permits to salmon farms under the exemption from generally  
12 applicable sediment quality guidelines. *Id.* ¶ 55. After the Conservancy filed suit in 2008, EPA  
13 approved Washington’s revised standards within a matter of months, after informal  
14 consultation with NMFS and a determination that an approval was “not likely to adversely  
15 affect” any listed species, including the three salmonid species in Puget Sound listed as  
16 threatened under the ESA: the Puget Sound Chinook salmon, Hood Canal summer-run chum  
17 salmon, and Puget Sound steelhead. *See Wild Fish Conservancy v. U.S. Env’tl. Prot. Agency*,  
18 No. C08-156 JCC, 2010 WL 1734850 (W.D. Wash. 2010) (“*WFC I*”).

19 In *WFC I*, the Conservancy challenged EPA’s 2008 informal consultation and approval  
20 of the 1996 revisions. In 2010, in a ruling on cross motions for summary judgment, Judge  
21 Coughenour held that EPA and NMFS had violated the ESA by failing to use the “best  
22 available scientific and commercial data” in their informal consultation process. Judge  
23 Coughenour ruled on narrow grounds, finding that the agencies’ failure to consider two NMFS  
24 studies, the Salmon Recovery Plan and Orca Recovery Plan, was sufficient grounds for setting  
25 aside EPA’s 2008 consultation and approval. He ordered the federal agencies to reconsider  
their concurrence that a formal consultation was not required, “this time taking into account the

1 best available science.” *Id.* at \*8. Because the narrow finding was sufficient basis for setting  
2 aside the approval and requiring EPA to conduct the process anew, Judge Coughenour declined  
3 to rule on the parties’ remaining arguments. *Id.* at \*7.

4 In 2011, this time incorporating the two additional studies (and several other documents  
5 not considered in 2008), EPA again approved the 1996 revisions. EPA did so having again  
6 found, in informal consultation with and concurrence from NMFS, that the revisions were “not  
7 likely to adversely affect listed species.” Sec. Am. Compl., ¶¶ 60-63. Again, EPA concluded it  
8 was not necessary to conduct a formal consultation as to whether its approval of Washington’s  
9 1996 sediment management revisions would affect threatened Puget Sound salmonids. It is this  
10 informal consultation, and EPA’s approval resulting from it, that Plaintiff challenges in this  
11 lawsuit.

12 As a distinct, independent theory of recovery, Plaintiff also challenges the Federal  
13 Defendants’ failure to reinitiate consultation under the ESA, as discussed above, in response to  
14 events that have occurred since the 2011 approval. The events include, in 2012, an outbreak of  
15 an infectious virus (“IHNV”) at several of the salmon farms which, Plaintiff alleges, served to  
16 amplify transmission to and among wild salmon populations. Sec. Am. Compl. ¶¶ 64-48. A  
17 second event that Plaintiff alleges should have triggered the Federal Defendants’ duty to  
18 reinitiate consultation was the collapse of one of Defendant-Intervenor’s net pens in August  
19 2017, resulting in the release of between 160,000 and 305,000 Atlantic salmon into Puget  
20 Sound. *Id.* ¶¶73-77. Plaintiff alleges the escaped Atlantic salmon, and efforts to recover them,  
21 threatened the food source, habitat, and health of listed salmonids. *Id.* ¶¶ 74-75. Additionally, in  
22 2016 NMFS designated a critical habitat for listed Puget Sound Steelhead; Plaintiff claims this  
23 action too should have triggered reinitiation of consultation. *Id.* ¶ 70.

### III. DISCUSSION

#### A. Standard on a Motion for Judgment on the Pleadings and Motion to Dismiss

Defendant-Intervenor Cooke’s Motion to Dismiss is presumably brought under Fed. R. Civ. P. 12(b)(6), which authorizes dismissal for failure to state a claim upon which relief can be granted. Federal Defendants make their motion based on Fed. R. Civ. P. 12(c), which similarly, authorizes a party to move for a judgment on the pleadings after pleadings are closed. (“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.”)<sup>1</sup> Analysis under Rule 12(c) is “substantially identical” to analysis under Rule 12(b)(6) because, under both rules, “a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

Under both rules, a motion shall be granted when, “accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law.” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). A court must assess whether the complaint “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under either rule, a court may consider documents outside the pleadings that are matters of public record based on “sources whose accuracy cannot reasonably be questioned.” *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9<sup>th</sup> Cir. 1986).

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<sup>1</sup> Defendants have answered Plaintiff’s complaint and first amended complaint. Defendants have not answered Plaintiff’s most recent Second Amended and Supplemental Complaint, which was filed on December 17, 2017, based on this Court’s direction that they need do so only if, and within 14 days after, this Court denies the Defendants’ motions to dismiss. Given this unusual order of proceedings, Federal Defendants make their 12(c) motion, in the alternative, under Fed. R. Civ. P. 12(b)(6). The Court need not decide the appropriate governing rule, however, as the standard is the same.

1           B. *The Doctrine of Res Judicata Does Not Bar Plaintiff's Claims*

2           Intervenor-Defendant Cooke Aquaculture argues that the claims articulated in the  
3 Conservancy's First and Fourth Causes of Action "were litigated to a final judgment in 2009  
4 [sic] and are barred by *res judicata*." Cooke Mot. to Dismiss at 17. Those two causes of action  
5 challenge, respectively, NMFS's "informal consultation with EPA that concluded with  
6 NMFS's April 8, 2011, concurrence letter" and EPA's alleged failure to ensure no jeopardy to  
7 listed species based, in part, on its 2011 approval of the Washington water quality standards.<sup>2</sup>  
8 Sec. Am. Supp. Compl., ¶¶ 80-83; 90-91. Cooke argues that these claims were settled by Judge  
9 Coughenour in *WFC I*, in which Wild Fish Conservancy, the same plaintiff in this case, sued  
10 EPA and NMFS, the same defendants in this case. *See Wild Fish Conservancy v. U.S. E.P.A.*,  
11 No. C08-0156-JCC, 2010 WL 1734850.

12           In *WFC I*, the Conservancy argued that EPA and NMFS had "violated the Clean Water  
13 Act and the Endangered Species Act by approving Washington State regulations which exempt  
14 Puget Sound salmon farms from general sediment-management standards." *Id.* at \*1. The  
15 claims in that amended complaint related to EPA's 2008 approval of revisions to the standards,  
16 and challenged the approval on multiple grounds. Ultimately, Judge Coughenour found it  
17 necessary to rule on only one, finding that "the Fisheries Service and EPA ignored a salmon  
18 recovery plan and an orca recovery plan" constituting the best available science at the time,  
19 and holding that in doing so, "the agencies thereby ran afoul of the Endangered Species Act."  
20 *Id.* at \*6. Based on this finding, Judge Coughenour set aside EPA's 2008 approval, and ordered  
21 the defendants "to re-consider whether formal consultation is required"—in other words, to  
22 conduct an informal consultation again to determine whether EPA's approval would be likely  
23 to adversely affect listed species—"this time taking into account the best available science." *Id.*

24  
25           <sup>2</sup> The Court notes that Plaintiff's Fourth Cause of Action is also based in part on EPA's alleged failure to  
reinitiate consultation in light of 2012, 2016, and 2017 events, which Cooke does not (and could not) argue was  
resolved in 2010; a ruling in Cooke's favor on the *res judicata* issue at this stage would not, therefore, result in  
dismissal of this claim. *See* Sec. Am. Compl. ¶ 90.

1 at \*8. Because the agencies' failure to use the best available science decided the case, Judge  
2 Coughenour explicitly declined to rule on any of the Conservancy's remaining claims, "none  
3 of which affects the Court's holding." *Id.* at \*7. Cooke claims the case now before the Court  
4 "raises all the same claims [the Conservancy] brought in 2008 and litigated to a final  
5 judgment." Cooke Mot. to Dismiss at 4.

6 The doctrine of *res judicata*, also referred to as claim preclusion, serves as an  
7 affirmative defense where a party can demonstrate that in the two cases at issue, there are "(1)  
8 an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *See*  
9 *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917–18 (9th Cir.  
10 2012)(citations omitted). Cooke's *res judicata* argument fails for lack of the first two of these  
11 three essential elements.

12 First, the claims in *WFC I* and the case now before the Court are not identical. In  
13 determining whether there is an identity of claims for claim preclusion purposes, the operative  
14 criteria for consideration are: "(1) whether rights or interests established in the prior judgment  
15 would be destroyed or impaired by prosecution of the second action; (2) whether substantially  
16 the same evidence is presented in the two actions; (3) whether the two suits involve  
17 infringement of the same right;" and, mostly importantly, "(4) whether the two suits arise out  
18 of the same transactional nucleus of facts." *Id.* at 918. The inquiry into the fourth criterion "is  
19 essentially the same as whether the claim could have been brought in the first action," and  
20 "whether they could conveniently be tried together." *Id.*

21 While from 30,000 feet it can be said that both cases relate to the adequacy of the  
22 interagency consultation regarding Washington's 1996 revisions to its water quality standards,  
23 and EPA's subsequent approvals of those standards, it cannot be denied that the two cases have  
24 sought this Court's judgment on two entirely separate and distinct agency actions: the first that  
25 occurred in 2008, and the second in 2011. While Cooke attempts to elide the two events—"As  
it does here, [in *WFC I*] Plaintiff challenged EPA's 2008 approval of the net pen sediment

1 management standards”—it simply cannot be said that the claims here “arise out of the same  
2 transactional nucleus of facts.” Plaintiff is *not* challenging the EPA’s 2008 approval in the case  
3 now before this Court. There are certainly overlapping facts and law involved in the two cases.  
4 But without a time machine, the instant case, which challenges a 2011 action, could not have  
5 been brought in 2008. *See* Sec. Am. Supp. Compl. ¶¶ 60&61 (“EPA submitted an updated  
6 biological evaluation to NMFS dated December 13, 2010 . . . . By letter and findings dated  
7 April 8, 2011, NMFS concurred with EPA’s conclusion.”); *cf. Turtle Island*, 673 F.3d at 918  
8 (Plaintiff “could have conveniently brought claims for NEPA and ESA violations when it filed  
9 its complaint in *Earth Island III* in 1998.”).

10 Critically, as Cooke points out, in response to Judge Coughenour’s 2010 order, “EPA  
11 *updated* its 2008 biological evaluation.” Cooke Mot. at 6 (emphasis added). The 2011  
12 consultation was not a mere *pro forma* repeat of the 2008 consultation, with the added  
13 consideration of two discrete studies as ordered by Judge Coughenour. According to Cooke,  
14 the second consultation was in fact a materially different process. Distinct from the 2008  
15 consultation, the 2011 consultation included a review of the two recovery plans, plus “the  
16 science concerning the risk of sea lice infestations in Puget Sound” and “217 publications  
17 related to marine finfish rearing collected by Plaintiff that it submitted *after NMFS had*  
18 *rendered its concurrence in 2008*. . . . It also considered potential impacts on species listed on  
19 the endangered species list *after its 2008 decision*.” *Id.* (emphases added). The two  
20 “transactional nuclei of facts” related to the consultations at issue in *WFC I* and in this case are  
21 not only distinct in time, but in substance as well.

22 Second, and independently fatal to Cooke’s *res judicata* argument, Cooke also cannot  
23 demonstrate that there was “a final judgment on the merits” in *WFC I* of the claims raised in  
24 this case. Other than the narrow question of whether the agencies used the best available  
25 science in the 2008 consultation by failing to rely on the salmon and orca recovery plans, none  
of the Conservancy’s other claims in *WFC I* can be said to have been litigated to final

1 judgment. Cooke asserts that “[f]ollowing production of a 2,677-page record, Judge  
2 Coughenour ruled . . . that EPA’s consultation with NMFS under the ESA was inadequate for a  
3 single reason,” and “[a]fter a full review of the extensive record . . . Judge Coughenour found  
4 only one flaw with that earlier approval,” implying he rejected the Conservancy’s other claims.  
5 Cooke Mot. at 5; Cooke Reply at 8-9. In *WFC I*, however, the Conservancy did not “fail[] to  
6 persuade Judge Coughenour on any other issue,” as Cooke characterizes the ruling. Cooke  
7 Reply at 10. On the contrary, Judge Coughenour took pains to clarify that he was *not* holding  
8 that aside from the omission of the two recovery plans, the agencies’ consultation was based on  
9 the best available science and therefore legally adequate. Instead, Judge Coughenour explicitly  
10 declined to rule on the Conservancy’s other claims because additional rulings would not have  
11 affected the Court’s decision to set aside the consultation. *WFC I* at \*7 (“The parties’ lengthy  
12 briefs contain many other arguments, none of which affects the Court’s holding. . . . Principles  
13 of judicial forbearance counsel against further discussion.”).<sup>3</sup> Because Judge Coughenour’s  
14 judicial restraint concerning Plaintiff’s remaining claims cannot be construed as a final  
15 judgment against them, Cooke’s *res judicata* argument fails.

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20 <sup>3</sup> On a related issue, the Conservancy has filed a surreply, asserting that Cooke has raised an estoppel  
21 argument for the first time in its Reply, and asking the Court to strike this argument or allow the Conservancy an  
22 opportunity to respond. In its surreply, the Conservancy claims “Cooke argues for the first time in its Reply that a  
23 1998 order from the Washington’s [*sic*] Pollution Control Hearings Board, [(“PCHB”),] precludes ‘issues’ in this  
24 case.” Pl. Surreply at 2. In its Reply, Cooke does refer to a “1997 PCHB Decision,” which the Court understands  
25 to be a reference to the PCHB “Findings of Fact, Conclusions of Law and Order” entered in 1998, filed as Exhibit  
2 to the Spencer Declaration at Dkt. No. 73. *See* Cooke Reply at 9. Cooke claims that the “PCHB heard multiple  
expert witnesses over eighteen days of hearings, and ruled against Plaintiff on all issues.” The Conservancy  
objects to Cooke raising this argument for the first time on reply, which is appropriate grounds for this Court to  
strike it. *See, e.g., Bach v. Forever Living Prod. U.S., Inc.*, 473 F. Supp. 2d 1110, 1122 n.6 (W.D. Wash.  
2007)(“It is well established in this circuit that courts will not consider new arguments raised for the first time in a  
reply brief.”). The Court finds Cooke’s intention in referencing the PCHB decision, however, unclear. Cooke does  
not cite specific language in the 45-page document, or propose any legal framework by which it may be asking  
the Court to assess the import of the decision, and the Court declines to wade through the decision to discern one.

1 C. EPA Had a Duty to Consult With NMFS Regarding Review and Approval of the 1996  
2 Revisions to Washington’s Sediment Management Standards

3 Defendant EPA argues that although it did consult with NMFS in 2011 (and in 2008)  
4 regarding the 1996 revisions to the Washington sediment management standards, it did not  
5 have a duty to do so, and that absent such duty, all four of Plaintiff’s claims must fail. The  
6 Agency’s position that it had no duty to consult appears to be based on two distinct premises:  
7 (1) there was no “agency action” for ESA purposes because the approval did not “authorize,  
8 fund, or carry out the permitting or licensing of net pens, [or] establish specific requirements  
9 for net pens,” Fed. Defs. Motion at 18-20; and (2) “the applicable standard was set in 1996 and  
10 there was no change to the environmental baseline when EPA made its 2011 approval.” Fed.  
11 Defs. Reply at 7. The Agency also claims that any duty to consult would not have included a  
12 review of the potential effects of net pens, including disease and escapement, on listed species.

13 The Court rejects all of these flawed arguments. That EPA has a duty to consult under  
14 Section 7 of the ESA on its review of state water quality standards is a settled issue, as the  
15 Agency’s own regulations have observed. *See EPA Review and Approval of State and Tribal*  
16 *Water Quality Standards*, 65 Fed. Reg. 24641-01 (2000) (“EPA’s approval of new and revised  
17 State and Tribal water quality standards is a Federal action subject to the consultation  
18 requirements of section 7 of the Endangered Species Act.”). Judge Coughenour’s ruling in  
19 *WFC I* confirmed that “[u]nder the Clean Water Act, the EPA has the responsibility of  
20 approving or disapproving proposed state water-quality standards. Because the proposed  
21 standards in this case potentially affected certain endangered wild salmon populations, the  
22 Endangered Species Act required that the EPA consult with the Fisheries Service, either  
23 formally or informally, before reaching a final decision.” *WFC I*, 2010 WL 1734850, at \*2.

24 More specifically, in this case, the scope of the required consultation with NMFS  
25 regarding the 1996 revisions to Washington’s sediment management standards includes the  
effects of net pens, as EPA previously acknowledged in *WFC I*. *See* Fed. Defs. Combined  
Cross Mot. for Summ. Judgment, *Wild Fish Conservancy v. U.S. E.P.A.*, JCC 08-156, Dkt. No.

1 59 at 1 (“As required by the ESA, the agencies consulted and considered the possible adverse  
2 effects of net pen operations on threatened or endangered species in Puget Sound.”). And  
3 more specifically still, the effects of net pens include potential disease and escapement—again,  
4 as EPA has previously acknowledged, both in judicial proceedings before Judge Coughenour,  
5 and by its actions. *Id.* at 8 (“EPA’s Biological Evaluation specifically analyzed the potential  
6 adverse effects of water quality degradation related to net pen operations, the transfer of sea  
7 lice from farmed salmon to wild salmon, and the impacts of escaped farmed salmon on  
8 competition for food and other resources.”); *see also* Fed. Defs.’ Ex. A, EPA Approval Letter  
9 re: Washington’s Revised Sediment Management Standards and Technical Justification,  
10 September 18, 2008 at 9 (“An increased incidence of disease among wild fish in Puget Sound  
11 is considered a low risk by NOAA and there have been few documented cases of this actually  
12 occurring. . . .”); *id.* at 10 (“There has been only one escapement event in Puget Sound since  
13 2000 as best management practices have helped prevent the unintentional release of Atlantic  
14 salmon from netpens. . . .”). These observations reflect EPA’s position that the effects of net  
15 pens, including potential disease and escapement, are properly within the scope of a  
16 consultation, which the regulations provide shall include the “direct and indirect effects of an  
17 action,” including “activities that are interrelated or interdependent with the action.” 50 C.F.R.  
18 § 402.02. The Agency’s *post hoc* claim in this litigation that its prior consultations were  
19 “voluntary,” and that it had no duty to review the effects of net pens, including disease and  
20 escapement—and in fact, no duty to conduct a consultation at all—is simply not credible.

21 The Agency argues that (1) its approval did not change the “environmental baseline,”  
22 which was set in 1996 when Washington adopted the revisions, and therefore it had no duty to  
23 consult; and (2) the approval was not a “but for cause of net pens because those facilities  
24 existed before EPA’s approval action.” Fed. Defs. Reply at 8. The Agency, however, has failed  
25 to articulate why the Court should disregard EPA’s two prior consultations, the aforementioned

1 admissions, and Judge Coughenour’s previous holding in *WFC I*.<sup>4</sup> Furthermore, the  
2 fundamental flaw in EPA’s “baseline” and “but-for cause” arguments is that under the CWA,  
3 EPA must review and approve *or disapprove* the revisions. While an approval may not have  
4 changed the standards governing Washington waters, a disapproval certainly would have. The  
5 Agency’s position—which would have the question of whether or not an agency has a duty to  
6 consult turn on the outcome of a consultation—borders on the frivolous. The Court therefore  
7 reaffirms that EPA’s review and approval process of the 1996 revisions was an “agency  
8 action” under the ESA, triggering EPA’s duty to consult with NMFS pursuant to Section 7(a)  
9 of the ESA, and that such consultation necessarily includes the effects of net pens, including  
10 potential disease and escapement.

11 D. EPA Retained Sufficient “Discretionary Involvement or Control” Over the Action to  
12 Implement Measures to Benefit Listed Species

13 In addition to the duty to consult on any discretionary action that may affect a listed  
14 species, the ESA also imposes a duty to reinstate consultation of prior actions under certain  
15 circumstances, including, of relevance to this case, when “new information reveals effects of  
16 the action that may affect listed species or critical habitat in a manner or to an extent not  
17 previously considered,” or “a new species is listed or critical habitat designated that may be  
18 affected by the identified action.” 50 C.F.R. § 402.16(a)&(d). If one (or more) such triggering  
19 event occurs, the reinstatement “of formal consultation is required and shall be requested by the  
20 Federal agency or by the Service,” but only “where discretionary Federal involvement or  
21 control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16.  
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25 <sup>4</sup> EPA’s reliance on *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644  
(2007), is misplaced. That case concerned EPA’s obligation to consult on a matter in which, the Court found, EPA  
had no discretion. *Id.* at 665 (finding obligation to consult only on “actions in which there is discretionary Federal  
involvement or control”), *citing* 50 CFR § 402.03. Here, the parties do not dispute that EPA had (and has)  
discretion in the process of reviewing and approving, or disapproving, a state’s water quality standards.

1 Plaintiff's Second and Third Causes of Action allege a failure by EPA, in the Second  
2 Cause of Action, and NMFS, in the Third, to reinstate a required consultation concerning the  
3 2011 approval of the 1996 revisions, in light of events that have occurred since the approval.  
4 Sec. Am. Compl. ¶¶ 84-88. As discussed above, those events include a viral outbreak among  
5 farmed salmon in Puget Sound in 2012, and the failure and collapse of a net pen in 2017,  
6 resulting in the release of potentially hundreds of thousands of Atlantic salmon into Puget  
7 Sound. *Id.* ¶¶ 64-79. In addition, NMFS designated critical habitat for Puget Sound steelhead  
8 in 2016, also triggering, Plaintiff alleges, the Federal Defendants' duty to reinstate  
9 consultation. *Id.* Defendants seek dismissal of the Second and Third Causes of Action, arguing  
10 that neither EPA nor NMFS has a duty to reinstate consultation on the 2011 approval of the  
11 1996 revisions, because EPA lacks the requisite "discretionary involvement or control" over  
12 the process of reviewing and approving the 1996 revisions.

13 The parties disagree on the standard that should govern this case. Defendants ask the  
14 Court to look to *Environmental Protection Information Center v. Simpson* ("EPIC") and *Sierra*  
15 *Club v. Babbitt*. 255 F.3d 1073 (9th Cir. 2001); 65 F.3d 1502 (9th Cir. 1995). The "agency  
16 action" in both *EPIC* and *Sierra Club* involved discrete agreements—an incidental take permit  
17 and a right-of-way agreement over federal land, respectively—that gave rise to a private  
18 party's rights. Plaintiff relies on *Pacific Rivers Council v. Thomas and Cottonwood*  
19 *Environmental Law Center v. U.S. Forest Service*. 30 F.3d 1050 (9th Cir. 1994); 789 F.3d 1075  
20 (9th Cir. 2015). The "agency action" in *Pacific Rivers* and *Cottonwood* involved multi-year,  
21 comprehensive forest plans over which the federal agency had ongoing, plenary control.

22 The Clean Water Act, as the parties note, grants "primary" responsibility to the states to  
23 design and implement their own water standards, while also reserving to EPA a great deal of  
24 ongoing authority over those standards. 33 U.S.C.A. §§ 1251(b), 1313. Thus, the facts before  
25 the Court are distinguishable from both *EPIC* and *Pacific Rivers*. The Court need not decide  
which line of cases most closely resembles this case because in all of the cited cases, the

1 essential question under the ESA is the same, regardless of the character of the agency action  
2 at issue: whether the federal agency retains some discretionary involvement or control over the  
3 action at issue, such that it has “the ability to implement measures that inure to the benefit of  
4 the listed species.” *EPIC*, 255 F.3d at 1080, citing *Sierra Club*, 65 F.3d at 1509; *see also*  
5 *Cottonwood*, 789 F.3d at 1087, citing *Washington Toxics Coalition v. Environmental*  
6 *Protection Agency*, 413 F.3d 1024 (9th Cir. 2005) (“[I]t was EPA’s discretion to take actions  
7 that ‘inure to the benefit’ of protected species that placed the registrations within the ambit of  
8 Section 7.”); *Id.*, citing *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014)  
9 (“Whether an agency must consult does not turn on the degree of discretion that the agency  
10 exercises regarding the action in question, but on whether the agency has any discretion to act  
11 in a manner beneficial to a protected species or its habitat.”). Whether the involvement or  
12 control is authorized by the enabling statute, or is retained in a contract with a private party, is  
13 not the determining issue before this Court. Moreover, as both *EPIC* and *Cottonwood* make  
14 clear, the “agency action” cannot be defined, as EPA urges, as the discrete moment of  
15 approval. *See, e.g., Cottonwood*, 789 F.3d at 1086 (“[T]here is nothing in the ESA or its  
16 implementing regulations that limits reinitiation to situations where there is ‘ongoing agency  
17 action.’”); *EPIC*, 255 F.3d at 1080 (looking to “various permit documents” to determine  
18 whether agency retained authority “to make *new requirements* to protect species that  
19 subsequently might be listed as endangered or threatened”) (emphasis added).

20 Thus, the question here is whether EPA retains discretionary involvement or control  
21 over its approval of the sediment management standards such that in the event a jeopardy to a  
22 listed species arises, EPA has authority to take action that will inure to the benefit of that  
23 species. To answer that, the Court need look no further than the Federal Defendants’ own  
24 internal documents construing the EPA’s ongoing discretionary involvement and control under  
25 the CWA. *See, e.g., “Memorandum of Agreement,”* Fish and Wildlife Serv., 66 Fed. Reg.  
11,202-01 (2001); “Policy Memo on Water Quality Standards,” Third Knutsen Decl., Ex. 3.

1 These documents contain explicit, unequivocal statements by the agencies that the CWA  
2 authorizes EPA to remain involved in both the drafting and implementation of state water  
3 quality standards, even after a state gains EPA's approval, including for the specific purpose of  
4 protecting a listed species. *Id.*

5 In particular, the Conservancy refers the Court to a "Memorandum of Agreement  
6 Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine  
7 Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and  
8 Endangered Species Act" ("MOA"), a document that was "designed to enhance coordination  
9 between our agencies so that we can best carry out our responsibilities under the CWA and  
10 ESA." 66 Fed. Reg. at 11,203. Perhaps most damaging to Defendants' position is the single  
11 observation, made in response to public commentary, that could hardly be more on point:  
12 "EPA and the Services have agreed that where information indicates an existing standard is not  
13 adequate to avoid jeopardizing listed species, or destroying or adversely modifying designated  
14 critical habitat, EPA will work with the State/Tribe to obtain revisions in the standard or, if  
15 necessary, revise the standards through the promulgation of federal water quality standards  
16 under section 303(c)(4)(B) of the CWA." *Id.* at 11,206. In addition, the agencies *rejected*  
17 public comments on the draft MOA that "it is not appropriate for EPA to compel a State to  
18 reopen an existing water quality standard to avoid "jeopardy" because that threshold is not  
19 contained in the CWA, and nothing in the CWA requires that water quality be improved  
20 whenever doing so would benefit listed species." *Id.* In response, the agencies reiterated that  
21 "water-dependent endangered and threatened species are an important component of the  
22 aquatic environment that the CWA is designed to protect, and steps to ensure the protection of  
23 those species are well within the scope of the CWA." *Id.*

24 Additional provisions from the MOA more fully outline this ongoing "discretionary  
25 involvement" over approved standards. They include the following excerpts from the MOA:

- 1 • “[T]he MOA [does not] call[] for States and Tribes to “consult” with the Services  
2 under section 7 of the ESA. . . . The MOA cannot, and does not, impose any  
3 requirements of section 7 on States and Tribes. Those requirements apply solely to  
4 Federal agencies, and EPA continues to be responsible for fulfilling any applicable  
5 requirements of section 7 [of the ESA] in its administration of the CWA.” 66 Fed.  
6 Reg. at 11,203.
- 7 • “[W]e agree with the comment that the MOA should put greater emphasis on the  
8 development of programs by EPA, in consultation with the Services, for the  
9 conservation of listed species under section 7(a)(1) of the ESA. The CWA is a  
10 powerful vehicle for improving the quality of the aquatic environment on which  
11 many endangered and threatened species depend. EPA’s mission under the CWA  
12 includes reducing the risks to aquatic life and wildlife due to water quality  
13 degradation. Reducing those risks can also help facilitate the recovery of listed  
14 species. While the MOA will help ensure that EPA actions meet the substantive  
15 requirements of section 7(a)(2) of the ESA, we believe the MOA should also help  
16 identify affirmative steps under section 7(a)(1) of the ESA that EPA can take pursuant  
17 to its CWA authorities to facilitate the recovery of listed species.” *Id.* at 11,204.
- 18 • “We have also retained in the final MOA an oversight panel that will consist of  
19 regional and headquarters personnel to provide oversight and coordination on all  
20 aspects of the agreement. In addition, we have amended the draft MOA to specify  
21 that the oversight panel, with input from the regional review teams will conduct a  
22 ‘proactive conservation review’ [under the ESA].” *Id.*
- 23 • “The draft MOA indicated that EPA would propose to amend EPA’s water quality  
24 standards regulations to provide that water quality shall be not likely to jeopardize  
25 the continued existence of a listed species. We stated that such a rule would  
essentially codify existing protection for endangered and threatened species under  
the CWA since water quality that is so poor it would likely jeopardize a listed species  
or destroy or adversely modify critical habitat fails to meet the fundamental  
requirements of the CWA.” *Id.*

In light of these statements, EPA’s current position in this litigation—that it doesn’t  
retain “discretionary involvement” in its approval of Washington’s 1996 revisions to the extent  
that it could take action, if necessary, to benefit listed species—is unsupportable. The MOA  
demonstrates that in the event a consultation with NMFS were to reveal a potential jeopardy,  
EPA has the authority to confer with a state on standards EPA has approved; to unilaterally  
revise that state’s standards in the event the state refused to do so; and even, EPA claims, to  
revise criteria enumerated in the regulations for deciding whether to approve or disapprove

1 proposed standards in the first place. *Id.* at 11,205. (EPA could “revise the criteria if it  
2 determines that more stringent criteria were in fact needed to protect endangered and  
3 threatened species.”). While it is true that the CWA grants individual states a great deal of  
4 discretion in implementing water standards, it is undeniable that the statute also reserves  
5 substantial “discretionary involvement and control” for EPA. The Court is unable to discern a  
6 reasonable, material distinction between the involvement and control outlined in EPA’s own  
7 documents, and the ability to “revisit” an approval that EPA now disclaims in this litigation.

8 Other EPA documents confirm EPA’s understanding of its own authority under the  
9 CWA to continue to influence state water quality standards to the benefit of listed species, even  
10 after the approval process is complete. The “Policy Memo on Water Quality Standards  
11 Approvals and Endangered Species Act (ESA) Consultations” was intended as a guide for  
12 circumstances in which EPA has approved a standard but explicitly reserved the right to revise  
13 the approval pending the results of an ESA consultation—a situation that is not presented here.  
14 The memo indicates, however, that “[a]s a general matter,” EPA has the authority to make use  
15 of the “full range of options available under Section 303(c) of the CWA for ensuring water  
16 quality standards are protective of threatened and endangered species,” including “work[ing]  
17 with the State or authorized Tribe to obtain revisions to the standards in the next triennial  
18 review . . . [or] facilitat[ing] a more narrow set of revisions to the standards in the short term.”  
19 Third Knutsen Decl., Ex. 3 at 3. The memo emphasizes that EPA should “make [] clear” that  
20 “EPA approval of water quality standards is not irreversible or irretrievable because the  
21 Agency retains substantial discretion to revise its decision based on the results of the  
22 consultation,” and “[i]f clear and compelling information from the consultation indicates more  
23 immediate action is necessary to prevent a loss of threatened or endangered species, EPA can  
24 make a determination under CWA Section 303(c)(4)(B) that a revised or new standard is  
25 necessary” or change an approval to a disapproval. *Id.* The memo does not reflect a position  
that this discretion exists only under limited circumstances, as Defendants argue; it directs its

1 water division directors to “make clear” that the authority over a prior approval exists “as a  
2 general matter.”

3 Taken together, the MOA and Policy Memo clearly demonstrate EPA’s ongoing  
4 “discretionary involvement” in state water quality standards under the CWA—including  
5 standards it has already approved—and EPA’s explicit reservation of the right to influence  
6 those standards for the benefit of listed species. These documents confirm that EPA is not  
7 limited to sitting helplessly by if a consultation were to reveal that in fact EPA’s approval of  
8 Washington’s revisions may adversely affect listed species. The Agency—in its own  
9 estimation—has a host of options at its disposal, ranging from “working with” Washington to  
10 develop new standards, to promulgating new regulations governing the CWA approval  
11 process. Defendants object that these documents are not statutes or regulations. They clearly  
12 reflect, however, the reasonable construction of statutes and regulations, by the agencies  
13 charged with their implementation. The Court is bound to defer to these determinations.  
14 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Nat’l Ass’n of*  
15 *Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 647 (2007).

16 Consistent with the standard articulated in the case law and with the Federal  
17 Defendants’ own interpretations of the governing laws, the Court holds that EPA retains the  
18 requisite “discretionary involvement and control” over its approval of Washington’s sediment  
19 management standards such that, in the event one or more of the triggering events listed in the  
20 ESA regulations occurs, EPA has the duty to reinitiate consultation. Defendants’ request to  
21 dismiss Plaintiff’s Second and Third Causes of Action on this basis is denied.

22 E. NMFS Has the Authority to Reinitiate Consultation

23 Finally, Defendants argue that Plaintiff’s Third Cause of Action must be dismissed  
24 because whatever may be the obligations of EPA to reinitiate consultation, NMFS has, at most,  
25 authority only to “request” a consultation—a request that EPA is free to ignore. The regulation  
outlining the duty to reinitiate consultation, as referenced above, provides “[r]einitiation of

1 formal consultation is required and shall be requested by the Federal agency or by the Service,  
2 where discretionary Federal involvement or control over the action has been retained or is  
3 authorized by law” and one of four triggering events occurs. 50 C.F.R. § 402.16.

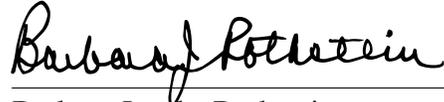
4 Because by its plain language the provision that obligates EPA to reinitiate consultation  
5 applies equally to NMFS, and because this question appears to be amply settled in this Circuit,  
6 the Court denies Defendants’ motion to dismiss Plaintiff’s Third Cause of Action on this basis  
7 as well. *See Hoopa Valley Tribe v. Nat’l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1116–  
8 17 (N.D. Cal. 2017) (“While the federal agencies’ arguments might be compelling if this was  
9 an issue of first impression, the Ninth Circuit has already addressed this precise issue multiple  
10 times and confirmed that both the action agency and the consulting agency have a duty to  
11 reinitiate consultation.”), *citing Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220,  
12 1229 (9th Cir. 2008) (“The duty to reinitiate consultation lies with both the action agency and  
13 the consulting agency.”); *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1076–77 (9th  
14 Cir. 2004) (holding that discovery of new facts “mandates reinitiating formal consultations”  
15 and that “[the consulting agency] was obligated to reinitiate consultation”); *EPIC*, 255 F.3d at  
16 1076 (“The duty to reinitiate consultation lies with both the action agency and the consultation  
17 agency.”); *see also Pacificans for a Scenic Coast v. Cal. DOT*, 204 F.Supp.3d 1075, 1093  
18 (N.D. Cal. 2016) (“Consistent with the plain text of [50 C.F.R. Section 402.16], the Ninth  
19 Circuit has stated that the duty to reinitiate consultation lies with both the action agency and  
20 the consulting agency. . . . The federal defendants’ effort to distinguish this clear precedent is  
21 wholly unpersuasive. Formal consultation is a collaborative process that requires the  
22 participation of both the Bureau and NMFS. The purpose of reinitiating formal consultation is  
23 not simply to check off a procedural box, but to complete a formal consultation process that  
24 ensures to the extent possible that there are no substantive violations of the ESA. Both the  
25 NMFS and Bureau have a clear obligation to participate in and complete this reinitiation  
process. As the Ninth Circuit has already held, ‘[t]he duty to reinitiate consultation lies with

1 both the action agency and the consulting agency.’ The defendants’ claim that a reinitiation  
2 claim is not cognizable against NMFS fails.”), *citing Salmon Spawning*, 545 F.3d at 1229.  
3 Whether or not these statements are *dicta*, as Defendants claim, the overwhelming weight of  
4 authority is that the consulting agency’s duty to reinitiate consultation is coterminous with that  
5 of the action agency, and Defendants have not cited a single case holding to the contrary. The  
6 Court denies Defendants’ motions to dismiss Plaintiff’s Third Cause of Action as well.

7 **IV. CONCLUSION**

8 For the foregoing reasons, the Court DENIES Federal Defendants’ Motion for  
9 Judgment on the Pleadings. The Court also DENIES Defendant-Intervenor’s Motion to  
10 Dismiss.

11 Signed this 7th day of August, 2018.

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15 Barbara Jacobs Rothstein  
16 U.S. District Court Judge  
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