

Hon. Haydee Vargas
Hearing Date: Dec. 12, 2025
Hearing Time: 9 a.m.

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WILD FISH CONSERVANCY,

Petitioner,

v.

WASHINGTON DEPARTMENT OF FISH &
WILDLIFE, KELLY SUSEWIND, in his
official capacity as Director of the Washington
Department of Fish & Wildlife, LISA WOOD,
in her official capacity as SEPA Coordinator for
the Washington Department of Fish & Wildlife,
BARBARA BAKER, in her official capacity as
Chair of the Washington Fish & Wildlife
Commission, MOLLY LINVILLE, in her
official capacity as Vice Chair of the
Washington Fish & Wildlife Commission,
DONALD MCISAAC, in his official capacity as
a Washington Fish & Wildlife Commissioner,
KIM THORBURN, in her official capacity as a
Washington Fish & Wildlife Commissioner,
JAMES ANDERSON, in his official capacity as
a Washington Fish & Wildlife Commissioner,
LORNA SMITH, in her official capacity as a
Washington Fish & Wildlife Commissioner,
JOHN LEHMKUHL, in his official capacity as a
Washington Fish & Wildlife Commissioner,
TIM RAGEN, in his official capacity as a
Washington Fish & Wildlife Commissioner, and
MELANIE ROWLAND, in her official capacity
as a Washington Fish & Wildlife Commissioner,
Respondents.

No. 21-2-13546-0 SEA

**PETITIONER'S CORRECTED
OPENING BRIEF**

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2. Did WDFW fail to consider the potential environmental impacts of its 2021 Policy in a manner sufficient to demonstrate prima facie compliance with SEPA’s requirements for a threshold determination?2

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1 **I. INTRODUCTION**

2 After a long, twisted, and sometimes confounding procedural path, it is finally time
3 for the Court to judge this case on its merits. And the merits are simple. Under the State
4 Environmental Policy Act (“SEPA”), the Washington Department of Fish and Wildlife
5 (“WDFW”) must complete at least a threshold determination to assess the potential
6 environmental impact of every non-exempt action, including both specific projects and
7 plans, policies, and programs. If WDFW finds a “reasonable probability” that an action will
8 have more than a “moderate effect on the quality of the environment,” it must complete an
9 environmental impact statement (“EIS”) to evaluate those effects before it can proceed.
10 *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wn.2d 267, 278 (1976).

11 Since at least as early as 2017, WDFW has engaged in an ambitious initiative to
12 increase state hatchery production by upwards of 50 million additional salmon every year.
13 As WDFW’s scientists understand well, hatcheries are a chief cause of the precipitous
14 decline of Washington’s wild salmon, and an increase of this magnitude could have
15 devastating effects on the remaining wild fish and the broader ecosystem. The actions to plan
16 and execute this increase are not exempt from SEPA. Yet for the first four years, WDFW did
17 not conduct a single SEPA threshold evaluation for any plan, policy, or action connected to
18 this initiative, which by 2021 had generated an additional 26 million hatchery salmon a year.
19 In 2021, WDFW finally performed its first threshold analysis, on a new hatchery policy that
20 lifted scientific guardrails to make it easier to flood Washington’s waters with increasing
21 numbers of hatchery fish. Astoundingly, it issued a Determination of Nonsignificance
22 (“DNS”).

23 For the past eight years, WDFW has flouted SEPA with impunity. But now its
24 gamesmanship to avoid a judgment on the merits is over. It is time for the Court to hold it
25 accountable.

1 **II. RELIEF REQUESTED**

2 Petitioner¹ asks the Court to declare that WDFW has illegally planned and
3 implemented a massive increase in salmon hatchery production without reviewing the
4 potential adverse consequences under SEPA. Specifically, Petitioner asks the Court to use
5 its inherent authority under the constitutional writ of certiorari to declare the following plans,
6 policies, and actions illegal:

- 7 • The September 7, 2018, decision by the Washington Fish and Wildlife Commission
8 (“Commission”) to increase hatchery production by 50 million salmon each year (“2018
9 Motion”), and subsequent connected actions to increase production;
- 10 • WDFW’s January 1, 2021, Hatchery Improvement Master Plan—Southern Resident
11 Killer Whale Prey Enhancement (“Master Plan”), and actions taken in accordance;
- 12 • WDFW’s April 9, 2021, Anadromous Salmon and Steelhead Hatchery Policy (C-3624)
13 (“2021 Policy”) and actions taken in accordance; and
- 14 • Increases to hatchery production in the wake of the 2021 Policy and the Master Plan,
15 including increases at the Naselle, Samish, Kendall Creek, Marblemount, Wallace River,
16 and Sol Duc hatcheries identified as the “30-Day Hatchery Actions” in the Third
17 Amended Petition (“Petition” or “TAP”). TAP ¶¶ 141-174.

18 **III. STATEMENT OF ISSUES**

- 19 1. Did WDFW violate SEPA by failing to perform a threshold environmental
20 analysis on a series of non-exempt actions related to its initiative to increase
21 hatchery production, including the 2018 Motion, the Master Plan, the 2021 Policy,
22 and project actions to raise and release more hatchery salmon?
- 23 2. Did WDFW fail to consider the potential environmental impacts of its 2021
24 Policy in a manner sufficient to demonstrate *prima facie* compliance with SEPA’s
25 requirements for a threshold determination?

26 _____
27 ¹ The Conservation Angler has experienced significant organizational changes and withdrawn as a petitioner. This brief uses “Petitioners” to refer to both former petitioners and “Petitioner” for Wild Fish Conservancy.

1 3. Must WDFW complete an EIS to examine the environmental impacts of the plans,
2 policies, and actions contributing to its initiative to increase salmon hatchery
3 production?

4 4. Has Petitioner met the standing and jurisdictional requirements necessary to raise
5 these questions through a constitutional writ of certiorari?

6 IV. EVIDENCE RELIED UPON

7 Petitioner relies upon the Petition and the pleadings, declarations, exhibits, and orders
8 in this case, including the Declaration of Peter Soverel (“Soverel Decl.”) (Dkt. 66) and the
9 Declaration of William McMillan (“McMillan Decl.”) (Dkt. 67). Petitioner also relies on the
10 administrative record (“AR”) filed May 24, 2024, its supplements and corrections, and
11 Appendix 1 to this brief, summarizing some of the data found there. Finally, Petitioner relies
12 on the Supplemental Declaration of Peter Soverel (“Supp. Soverel Decl.”) (Dkt. 190),
13 Supplemental Declaration of William McMillan (“Supp. McMillan Dec.”) (Dkt. 191), and
14 Declaration of Dave McCoy (“McCoy Decl.”) (Dkt. 132).

15 V. STATEMENT OF FACTS

16 A. Factual Background

17 1. *Hatchery Production Harms Endangered Wild Fish and Orcas*

18 Washington’s first fish hatchery opened in 1895. AR 14406. Washington now has
19 the largest system of fish hatcheries in the world, with more than 150 salmon and steelhead
20 hatchery programs operating out of 80 facilities. *Id.* As of 2019, state hatcheries released
21 about 135 million salmon, 6 million steelhead, and 16.5 million trout each year. *Id.*

22 Hatcheries were once considered a panacea for salmon runs damaged by overfishing
23 and habitat loss. *See* AR 5944 (2015 report by the Hatchery Science Review Group
24 (“HSRG”). However, for decades, scientists have understood that hatcheries pose
25 significant risks to wild salmon and have been a primary factor driving their decline. *Id.* (“It
26 is now clear that the widespread use of traditional hatchery programs has actually contributed
27

1 to the overall decline of wild populations.”); *Native Fish Soc’y v. Nat’l Marine Fisheries*
2 *Servs.*, 992 F. Supp. 2d 1095, 1104-05 (D. Or. 2014) (describing harmful impacts and
3 recognizing that “it is undisputed that hatchery operations can pose a host of risks to wild
4 fish”).

5 Fifteen different populations of Washington salmonids are listed as either threatened
6 or endangered under the federal Endangered Species Act (“ESA”), including runs of
7 Chinook, coho, chum, sockeye, and steelhead in the Puget Sound, Columbia River, Hood
8 Canal, and Snake River.²

9 NMFS listed the Southern Resident killer whale population (“Southern Residents”)
10 as endangered in 2005. 50 C.F.R. § 224.101(h); 70 Fed. Reg. 69,903 (Nov. 18, 2005). By
11 2018, the population had dwindled to only 76 whales. AR 430 (Executive Order 18-02).
12 Unlike other killer whales, Southern Residents eat only fish, with 80 to 90 percent of their
13 diet consisting of Chinook salmon. AR 284. Recovery of threatened and endangered salmon
14 populations has been identified as crucial to the recovery of Southern Residents. AR 284,
15 430, 8188.

16 *2. Hatcheries Pose Significant Risks to Wild Fish*

17 Hatcheries pose a variety of risks to wild fish populations, including those listed
18 under the ESA. *See, generally*, AR 14641-808 (2020 report by WDFW scientists). When
19 wild fish spawn with hatchery fish, it decreases their genetic fitness, adaptability,
20 reproductive success, and diversity. AR 14670-76. Influxes of hatchery fish may create
21 ecological risks by overloading the ecosystem’s carrying capacity, competing with wild fish
22 for scarce habitat and food resources, attracting more predators that eat both hatchery and
23 wild fish, eating wild fish, and amplifying or introducing new pathogens. AR 6014-16;
24 14677-85. Hatcheries may also harm wild fish directly by blocking passage to upstream

25
26 ² *See, e.g.*, 79 Fed. Reg. 20,802 (Apr. 14, 2014) (listing evolutionary significant units of Puget Sound Chinook
27 and steelhead; upper Columbia River spring-run Chinook and steelhead; middle Columbia River steelhead;
lower Columbia River steelhead, coho, and Chinook; Columbia River chum; Snake River steelhead,
spring/summer Chinook, and fall-run Chinook; Hood Canal summer-run chum; and Lake Ozette sockeye).

1 spawning habitats and by discharging effluent contaminated with pathogenic fungi, bacteria,
2 parasites, and medical treatments. AR 14686. Further, when managers increase hatchery
3 production, they also increase fishing opportunities and catch limits for commercial and
4 recreational fishing, leading to increased mortality for both hatchery and wild fish. AR
5 14667-70.

6 These harms are cumulative and proportionate to the abundance of hatchery fish
7 relative to the abundance of wild fish, intensifying as hatchery production continues to
8 increase and wild fish populations continue to decline. AR 14743-45 (program size “affects
9 virtually every aspect of hatchery risks”).

10 *3. WDFW Adopts Hatchery Reform Policy to Reduce Negative Impacts*

11 In 2009, the Commission adopted the Hatchery and Fishery Reform Policy (C-3619)
12 (“2009 Reform Policy”) in response to concerns about the negative impact of hatcheries. AR
13 14240-42. The 2009 Reform Policy provided a science-based approach to mitigate harm to
14 wild salmonid populations, based on recommendations from the HSRG, a congressionally
15 funded independent science review panel. *Id.* The policy included 11 guidelines, the first
16 three of which directed WDFW to use the principles, standards, and recommendations of the
17 HSRG to guide hatchery management; improve broodstock management to reduce the
18 genetic and ecological impacts of hatcheries; and develop watershed-specific action plans to
19 implement hatchery reform. *Id.*

20 *4. Governor Creates Orca Recovery Task Force*

21 On March 14, 2018, Governor Jay Inslee issued Executive Order 18-02, creating a
22 Southern Resident Killer Whale Recovery and Task Force (“Task Force”) to draft an action
23 plan for the recovery of the Southern Residents. AR 430-33. The order also directed WDFW
24 to “focus or adjust, as needed,” a variety of policies, including “restoration, protection,
25 incentives, hatcheries, harvest levels, and passage policies and programs.” AR 431. The Task
26 Force transmitted its first report in November 2018. Its sixth recommendation was to
27

1 “[s]ignificantly increase hatchery production and programs to benefit Southern Resident
2 orcas consistent with sustainable fisheries and stock management, available habitat, recovery
3 plans and the Endangered Species Act.” AR 548-49.

4 *5. WDFW Rejects Reform Policy and Ramps Up Hatchery Production*

5 By 2017, WDFW had already begun to ramp up hatchery production, without
6 formulating any public plan for doing so, obtaining the Commission’s approval, or
7 performing any SEPA analysis. In the 2018 supplemental operating budget, WDFW sought
8 and obtained \$825,000 for its hatcheries, including to “increase chinook production to
9 support the southern resident killer whale recovery.” AR 4. It used those funds to raise an
10 additional 8.1 million coho and Chinook salmon for release in 2019. AR 327-28.

11 On June 15, 2018, the Commission directed WDFW to initiate a review of “all
12 sections and aspects” of the 2009 Reform Policy, including an examination of the science
13 behind it and its performance since adoption. AR 14314, 14502.

14 At the same meeting, the Commission paved the way for rapid hatchery expansion
15 by suspending the first three guidelines in the 2009 Reform Policy for all salmonid species
16 except steelhead. AR 14246, 14315, 14502. The purpose was to “allow for full consideration
17 of the maintenance or enhancement of hatchery programs for chinook, coho, and chum
18 salmon[.]” AR 14315, 14501. WDFW did not provide the public with notice of this possible
19 change, allow comment, or conduct any SEPA review about its impacts. AR 19818 (agenda).

20 On September 7, 2018, the Commission approved the 2018 Motion, a resolution
21 declaring a “general policy intent and guidance” to increase salmon hatchery production by
22 50 million salmon smolts per year. AR 998-1003. It called for WDFW to release an
23 additional 30 million hatchery Chinook at sites that feed into Puget Sound, a 75% increase,
24 and 20 million additional Chinook into the lower Columbia River, a 52% increase. *Id.*; AR
25 5632. The 2018 Motion started an expansion program that came to be known as the “Orca
26 Prey Initiative.”

1 *6. WDFW Develops Master Plan to Guide Hatchery Expansion*

2 To help steer additional hatchery increases, WDFW requested funding to create a
3 master plan, which the legislature provided in its 2020 supplemental budget. AR 1085; Laws
4 of 2020, ch. 357, § 307(30). WDFW delivered the Master Plan to the legislature on January
5 15, 2021. AR 10510-11. It is designed to “identify actions to increase salmon production in
6 Puget Sound, on the Washington Coast, and in the Columbia River basin.” AR 9913. It
7 includes a list of proposed capital improvement projects to increase production at 20 existing
8 hatcheries, including the Samish, Naselle, Kendall Creek, Wallace River, Marblemount, and
9 Sol Duc hatcheries, as well as a proposal to construct two new hatcheries. AR 9920.

10 *7. WDFW Develops 2021 Hatchery Policy*

11 On February 6, 2020, WDFW scientists presented on the science of hatchery reform
12 in response to the Commission’s June 15, 2018, directive. AR 14581. They concluded that a
13 review of recent scientific evidence “supports the fundamental concepts and approach of
14 hatchery reform,” as articulated by the 2009 Policy and the HSRG. AR 14615; *see also* AR
15 14641-808 (staff paper). On April 9, 2020, WDFW staff provided the requested report on
16 the performance of the 2009 Reform Policy. AR 14828. Their conclusion was that policy
17 implementation had been incomplete, with one of the most glaring shortcomings WDFW’s
18 failure to implement an effective monitoring and evaluation program. AR 16620.

19 On April 9, 2021, the Commission replaced the 2009 Reform Policy with the 2021
20 Hatchery Policy. The 2021 Policy recognizes that hatcheries carry significant risks, and
21 directs WDFW to moderate these risks through the use of a structured decision-making
22 process. AR 14230-31. The policy indicates that WDFW aims to complete a technical
23 procedures document (“Procedures Document”) within a year to establish a science-based
24 risk management framework and guide the development of hatchery management plans
25 (“HMPs”). AR 14228, 14230-31. The policy provides that once the Procedures Document is
26 drafted, it will be submitted for SEPA review. AR 14231.

1 The 2021 Policy indicates that the HMPs should be completed within five years, and
2 until a hatchery has a new HMP, it will operate in accordance with the provisions of the 2009
3 Reform Policy. *Id.* However, it exempts from this requirement any modifications made under
4 policies or initiatives adopted by the Commission since June 15, 2018—most significantly,
5 the Orca Prey Initiative. *Id.* It further indicates that hatchery programs associated with the
6 Orca Prey Initiative shall have “high priority,” and instructs the director to “develop an
7 implementation plan for the SRO prey initiative.” AR 14231-32.

8 WDFW issued a DNS for the policy on March 9, 2021, as part of a “phased review”
9 process, with review of the Procedures Document as the next phase. AR 16054-56. The
10 Commission approved the new policy on April 9, 2021. AR 15480-81.

11 More than four years later, WDFW has not drafted the Procedures Document, any
12 HMPs, or an implementation plan for the Orca Prey Initiative.

13 *8. WDFW Ramps Up Hatchery Production*

14 In January 2021, the Master Plan indicated state hatcheries had already boosted
15 salmon production by 26.1 million over 2018 levels. AR 9913. WDFW prepared for another
16 large increase in the wake of the Master Plan and the 2021 Policy. For just the six hatcheries
17 featured in the Petition, WDFW increased eggtake by 8 million in 2021 over the prior year,
18 indicating it planned a significant increase in releases for 2022. Dkt. 81, Attachment 1.³ By
19 April 2022, WDFW reported that the state’s production of hatchery salmon was up roughly
20 34.5 million over 2018 levels. AR 15648 (increases of 24 million Chinook, 3.4 million coho,
21 and 8 million chum).

22 **B. Procedural History**

23 Petitioners filed their first petition on October 11, 2021. Dkt. 1. WDFW failed to
24 meet the statutory deadline of November 10, 2021, for filing the agency record. RCW

25 _____
26 ³ The data in Attachment I can be found in the AR as follows. Column 1: AR 1003 (Table 1, 2008 Motion);
27 Column 2: AR 9913, 9919-20 (Master Plan, ES-1 and Table ES-1); Column 3: AR 4176-4233 (2017-2018
Final Hatchery Escapement Report); Column 4: AR 15784-808 (Oct. 7, 2021 WDFW In-Season Escapement
Report); Column 5: AR 19908-944 (Jan. 27, 2022 WDFW In-Season Escapement Report).

1 34.05.566(1). When the Court extended that deadline to December 13, 2021, WDFW
2 defaulted. Dkt's 11, 20.

3 On December 22, 2021, Respondents filed their first motion to dismiss, claiming the
4 petition was untimely. Dkt 17 (motion); Dkt. 21 (opposition). On January 24, 2022, Judge
5 McDonald granted that motion. Dkt. 25. On February 22, Judge McDonald denied
6 Petitioners' motion to reconsider but granted leave to amend. Dkt's 35, 36. Petitioners filed
7 the Amended Petition on February 24, 2022 (Dkt. 38), and Respondents filed their second
8 motion to dismiss on April 14, 2022 (Dkt. 40). On June 17, Judge McDonald denied the
9 second motion to dismiss and granted the second motion to amend. Dkt. 52. On July 1,
10 Petitioners filed the Second Amended Petition. Dkt. 54.

11 Respondents filed a third motion to dismiss on July 29, 2022, claiming for the first
12 time that none of the challenged actions were "agency actions" under the Administrative
13 Procedure Act ("APA"). Dkt. 57 at 9-16. Petitioners opposed. Dkt's 60, 63. In an abundance
14 of caution, Petitioners also filed another motion to amend, to explicitly assert additional
15 grounds of jurisdiction in light of WDFW's new claim. Dkt. 59. WDFW agreed not to oppose
16 (Dkt. 73), and Petitioners filed the Third Amended Petition on September 2. (Dkt. 74). On
17 September 9, WDFW filed its fourth motion to dismiss. Dkt. 75.

18 On November 21, 2022, Judge McDonald granted WDFW's motion to dismiss
19 Petitioners' APA claims but denied without prejudice WDFW's motion to dismiss claims
20 brought pursuant to the statutory writs of prohibition and mandamus and the constitutional
21 writ of certiorari. Dkt. No. 87 at 8.

22 On March 1, 2023, Petitioners applied for a constitutional writ of certiorari and an
23 order to show cause why writs of mandamus and prohibition should not issue. Dkt's 91, 92.
24 In opposition, Respondents asked Judge McDonald to dismiss Petitioners' claims for a fifth
25 time, asserting new defenses against the statutory and constitutional writs, including the
26 affirmative defense of laches. Dkt. 99. Judge McDonald reserved ruling and ordered full
27

1 briefing. Dkt. 102. Respondents filed a motion for summary judgment on April 14, 2023.
2 Dkt. 105 (motion); Dkt. 112 (opposition).

3 On May 25, 2023, Judge McDonald granted summary judgment on the claims
4 brought under the writs of mandamus and prohibition, but denied summary judgment on the
5 constitutional writ of certiorari. Dkt. 122 (first order); Dkt. 135 (revised). On June 5, 2023, he
6 granted Petitioners' Second Application for Constitutional Writ of Certiorari to challenge the
7 2018 Expansion Motion, the 2021 Master Plan, the 2021 Policy and the "30-Day Hatchery
8 Actions." Dkt's 120, 126.

9 On June 14, 2023, Petitioners filed a notice asking the Court of Appeals to grant
10 discretionary review of the summary judgment ruling. Dkt. 130 (original notice), Dkt. 138
11 (amended notice). Respondents also filed for discretionary review. (Dkt. 137). Respondents
12 filed to stay this Court's proceedings pending a ruling, which Petitioners opposed. Mot. to
13 Stay Proceedings Below, *Wild Fish Conservancy v. Wash. Dep't of Fish & Wildlife*, No.
14 85452-6 (Wa. Ct. of Appeals, Aug. 8, 2023); Opp. to Mot. to Stay Proceedings Below, No.
15 85452-6 (Aug. 18, 2023). The court commissioner granted the stay. Ruling by Commissioner
16 Kanazawa, No. 85452-6 (Aug. 24, 2023). On Nov. 9, 2023, the Court of Appeals rejected
17 both parties' requests for discretionary review, entering a certificate of finality on Dec. 26,
18 2023. Commissioner's Ruling Denying Discretionary Review, No. 85452-6; Dkt. 139.

19 WDFW entered the agency record on May 24, 2024, with corrections on June 5,
20 2024. Dkt's 146, 162, 163.

21 On Dec. 2, 2024, Petitioners filed a motion to compel discovery related to
22 Respondents' equitable defense of laches. Dkt. 169. Judge McDonald denied the motion on
23 Dec. 23, 2024, without prejudice to Petitioners pursuing more tailored discovery. Dkt. 179
24 at 3. Following negotiations, the parties reached an agreement that eliminated the need for
25 additional discovery, memorialized on July 25, 2025. Dkt. 186. Under the agreement,
26 Petitioners agreed to limit their request for relief to the scope of their Second Application for
27

1 Constitutional Writ (Dkt. 120), while Respondents agreed that they would not pursue the
2 laches defense or assert other equitable defenses going forward. Dkt. 186 at 1.

3 VI. ARGUMENT

4 A. SEPA Requires Assessment of Impacts Before an Agency Takes Action

5 SEPA “is a procedural law that ensures state agencies...consider environmental
6 impacts and alternatives before taking certain actions.” *Cornelius v. Dep’t of Ecology*, 182
7 Wn.2d 574, 598 (2015). SEPA has been described as an “environmental full disclosure law.”
8 *Norway Hill*, 87 Wn.2d at 272. SEPA does not require any substantive decision-making
9 result, but is designed to ensure that agency decisionmakers give due consideration to
10 environmental impacts before deciding on a course of action. *Stempel v. Department of*
11 *Water Resources*, 82 Wn.2d 109, 118 (1973). By forcing agencies to fully examine the
12 environmental consequences of their actions, SEPA “is an attempt by the people to shape
13 their future environment by deliberation, not default.” *Id.*

14 SEPA requires agencies to analyze potential environmental consequences of its plans
15 and policies at the “earliest possible stage,” so decisionmakers can consider the
16 environmental consequences of a proposed action “before the project picks up momentum,
17 not after.” *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663-64 (1993)
18 (emphasis in original). The courts have recognized that allowing agencies to delay review
19 would “thwart” SEPA’s goal of ensuring that decisions are made with full awareness of their
20 environmental consequences, because after government action begins, it has a propensity to
21 “‘snowball’ and acquire virtually unstoppable administrative inertia.” *Id.*

22 Under SEPA, an agency must make a threshold determination for every action not
23 subject to a categorical exemption, to determine whether it “is likely to have a probable
24 significant adverse environmental impact[.]” WAC 197-11-330(1)(b). An “action” includes
25 both “project actions,” such as a construction project, and nonproject actions,” which are
26 “decisions on policies, plans, or programs,” including the adoption of “any policy, plan, or
27

1 program that will govern the development of a series of connected actions.” WAC 197-11-
2 704(2)(a), (2)(b)(iii).

3 SEPA requires the completion of an EIS for all “major actions significantly affecting
4 the quality of the environment.” RCW 43.21C.030(2)(c). For actions without significant
5 environmental effects, the agency may issue a DNS. But for any action that it determines
6 will have a “probable significant, adverse environmental impact,” it must issue a
7 determination of significance and develop an EIS. WAC 197-11-330(b).

8 This means an agency must prepare an EIS whenever there is a “reasonable probability”
9 that a policy or plan will have more than a “moderate effect on the quality of the
10 environment.” *Norway Hill*, 87 Wn.2d at 278.

11 **B. Petitioner Has Fulfilled Requirements to Bring Suit**

12 *1. Court Has Power to Review under a Constitutional Writ*

13 Article IV, section 6, of the Washington Constitution “expressly vests the superior
14 court with judicial power to review administrative decisions for illegal or manifestly arbitrary
15 acts.” *Torrance v. King County*, 136 Wn.2d 783, 795 (1998) (internal citation omitted).

16 Review under a constitutional writ is only appropriate where there is no “statutory
17 mechanism for judicial review.” *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d
18 840, 846 (2000). Typically, SEPA violations are reviewed under the APA, which establishes the
19 means of reviewing final agency action. *See* RCW 34.05.510. Judge McDonald removed that
20 statutory mechanism when he dismissed Petitioner’s APA claims. Dkt. 87 at 8. When there is
21 no alternate avenue of review, a court may issue a constitutional writ if the petitioning party
22 “can allege facts that, if verified, would establish that the lower tribunal’s decision was illegal
23 or arbitrary and capricious.” *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 533 (2003)
24 (internal citation omitted).

25 Judge McDonald granted Petitioner’s request for a constitutional writ. Dkt. 126. Under
26 the power of that writ, the Court may determine the legality of WDFW’s actions under SEPA
27

1 and grant appropriate relief. *See, e.g., Concerned Organized Women & People Opposed to*
2 *Offensive Proposals v. City of Arlington*, 69 Wn. App. 209, 221(1993) (suggesting courts could
3 grant relief for SEPA violations under a constitutional writ); *see Snohomish Cty Property*
4 *Rights. All. v. Snohomish Cty.*, 76 Wn. App. 44, 52 (1994), *review denied* at 125 Wn.2d 1025
5 (1995) (same).

6 2. *Petitioner Has Standing to Challenge Violation of SEPA*

7 Petitioner has standing because its members have demonstrated both a present and a
8 threatened injury to interests within the zone that SEPA seeks to protect. *See Lands Council*
9 *v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App. 787, 799 (2013) (exploring
10 similar claims).

11 The Washington Supreme Court has adopted the “firmly established” federal rule
12 recognizing the “standing of a nonprofit corporation to challenge government actions
13 threatening environmental damage.” *See Save a Valuable Env’t (SAVE) v. Bothell*, 89 Wn.2d
14 862, 866-68 (1978). For a group to have standing, (1) “the interest sought to be protected”
15 must be “arguably within the zone of interests to be protected or regulated by the statute or
16 constitutional guarantee in question” and (2) the challenged action must cause an “injury in
17 fact,” meaning an “organization must show that it or one of its members will be specifically
18 and perceptibly harmed by the action.” *Id.* at 868; *see Snohomish Cty Property Rights. All.*,
19 76 Wn. App. at 52 (articulating same test for SEPA challenge under a constitutional writ).

20 Petitioner’s members are uniquely interested in protecting Washington’s waterways,
21 wild salmon and steelhead, and Southern Residents. *See, generally, McMillan Decl., Supp.*
22 *McMillan Decl., Soverel Decl., Supp. Soverel Decl., McCoy Decl.* Petitioner’s members
23 have visited Washington’s rivers, streams, and coastlines regularly for decades to fish,
24 observe wildlife, survey fish, photograph, snorkel, hike, and boat, and have current plans to
25 do so again. *See McMillan Decl.* ¶¶ 5-7, 9-13, 15; *Soverel Decl.* ¶¶ 8, 11-12, 14, 16-18; *Supp.*
26 *McMillan Decl.* ¶¶ 3, 4, 6; *Supp. Soverel Decl.* ¶ 5; *McCoy Decl.* ¶¶ 3, 5. Some of Petitioner’s
27

1 members have their livelihoods attached to the health of Washington’s wild salmon
2 populations. McCoy Decl. ¶¶ 4, 5. WDFW-operated hatcheries have decreased the revenues
3 of businesses dependent upon wild salmon, and the enjoyment that Petitioner’s members
4 take from their recreation in Washington’s waterways by contributing to the decline of wild
5 salmon, and a continued increase in hatchery production will compound this damage. *See*
6 McMillan Decl. ¶¶ 6, 14-18; Soverel Decl. ¶¶ 9-15, 17, 20; McCoy Decl. ¶¶ 3, 8, 9. If the
7 Court granted the requested relief, Petitioner’s members reasonably believe WDFW would
8 remedy its illegal conduct by completing an EIS, which may cause decision-makers to shift
9 the state’s policy direction. *See* McMillan Decl. ¶ 20, Soverel Decl. ¶¶ 21-22; Supp.
10 McMillan Decl. ¶ 6; Supp. Soverel Decl. ¶ 8; McCoy Dec. ¶ 9-10. By helping stop the decline
11 of wild salmonids, and potentially contributing to their recovery, such changes would protect
12 the aesthetic, spiritual, emotional, and financial value that Petitioner’s members gain from
13 their connection to Washington’s waterways, wild fish, and Southern Residents. McMillan
14 Decl. ¶ 20; Soverel Decl. ¶ 22; Supp. McMillan Decl. ¶¶ 6; Supp. Soverel Decl ¶¶ 5, 6, 7;
15 McCoy Decl. ¶¶ 7-9.

16 The interest that Petitioner and its members have in protecting wild fish and the
17 environment are squarely within SEPA’s zone of interests. *See Lands Council*, 176 Wn. App.
18 at 799 (concerns about wildlife and habitat are within SEPA zone of interests); *Snohomish*
19 *Cty Property Rights. All.*, 76 Wn. App. at 52-53 (“SEPA is concerned with ‘broad questions
20 of environmental impact, identification of unavoidable adverse environmental effects,
21 choices between long and short term environmental uses, and identification of the
22 commitment of environmental resources.’”) (internal citation omitted).

23 WDFW’s unconsidered hatchery expansion has caused “injury in fact” to Petitioner’s
24 members by harming Washington’s wild fish populations, which has hurt them financially
25 and lessened the “aesthetic and recreational values” of the Washington waterways that they
26 enjoy. *See Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 14 Wn. App. 2d 945,
27

1 980 (2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S.
2 167, 183 (2000) (additional citation omitted) (such harms are sufficient for environmental
3 plaintiffs to allege injury in fact). “[T]he desire to use or observe an animal species, even
4 for purely esthetic purposes, is undeniably a cognizable interest for purposes of
5 standing.” *Id.* (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 562-63 (1992)).

6 Petitioner also satisfies the relaxed standing requirements the Washington Supreme
7 Court has held apply to alleged procedural injuries, such as the failure to comply with SEPA.
8 *Lands Council*, 176 Wn. App. at 801 (citing *Five Corners Family Farmers v. State*, 173
9 Wn.2d 296, 303 (2011)). Petitioner has satisfied the first prong of that standard by
10 establishing WDFW’s violation of SEPA. *Five Corners*, 173 Wn. 2d at 303 (first prong
11 requires a party to “identify a constitutional or statutory procedural right that the government
12 has allegedly violated”). Petitioner has satisfied the second requirement by showing
13 WDFW’s unconsidered expansion of hatchery production has threatened their financial,
14 aesthetic, and recreational interests. *Id.* (a party must “demonstrate a reasonable probability
15 that the deprivation of the procedural right will threaten a concrete interest”). There is no
16 doubt that interest is “one protected by the statute.” *Five Corners*, 173 Wn. 2d at 303; *see*
17 *Lands Council*, 176 Wn. App. at 799.

18 **C. WDFW Did Not Conduct a Threshold Determination of Hatchery Increases**

19 The agency record shows conclusively that WDFW never completed a SEPA
20 threshold determination to assess the potential environmental impact of its massive
21 expansion of salmon hatchery production through the “Orca Prey Initiative.” There is no
22 room for WDFW to escape this overarching obligation: SEPA is clear that an agency must
23 conduct at least a threshold determination on every SEPA “action” that is not categorically
24 exempt. *See Pub. Util. Dist. No. 1 of Clark County v. Pollution Control Hearings Bd.*, 137
25 Wn. App. 150, 158 (2007) (“SEPA and its implementing regulations *require* that the
26 government conduct environmental review, through at least a threshold determination,” for
27

1 any non-exempt proposal) (emphasis added).

2 Any step toward expanding hatchery production is a SEPA “action.” *See* WAC 197-
3 11-704(1)(a) (actions include “[n]ew and continuing activities...entirely or partly financed,
4 assisted, conducted, regulated, licensed, or approved by agencies”). Any plan, policy, or
5 initiative related to the expansion of hatchery production is a SEPA “nonproject action.”
6 WAC 197-11-704(2)(b) (“nonproject actions involve decisions on plans, policies, or
7 programs”). Any action taken to execute on such a plan, policy, or initiative is a SEPA
8 “project action.” WAC 197-11-704(2)(a) (project action involves a decision on a specific
9 project, such as to “fund, or undertake any activity that will directly modify the
10 environment”).

11 No SEPA exemption applies. Categorical exemptions are established by statute or
12 rulemaking by the Washington Department of Ecology, with some types that apply only to
13 specific agencies. *See, generally*, Chapter 43.21C RCW (statutory exemptions are scattered
14 throughout the chapter); WAC 197-11-800 (listing categorical exemptions applicable to all
15 agencies); WAC 197-11-835 (categorical exemptions specific to WDFW).

16 The only exemption WDFW has previously suggested might apply to its hatchery
17 expansion is WAC 197-11-835(5), which exempts “[t]he routine release of hatchery fish or
18 the reintroduction of endemic or native species into their historical habitat where only minor
19 documented effects on other species will occur.” *See* Dkt. 105 at 17 n. 20 (motion for
20 summary judgment) (indicating that if the case proceeds to the merits, WDFW “will
21 establish, in part” the applicability of WAC 197-11-835(5), because “WDFW has routinely
22 released chinook salmon from hatcheries for over half a century, at numbers far greater than
23 the current numbers being released after implementing the Orca Prey Initiative.”). Regardless
24 of how many hatchery fish were produced 30 years ago (see chart at AR 327), there is nothing
25 “routine” about increasing annual salmon hatchery production by 50 million smolts—which
26 represents a more than 70% increase over prior production levels. *See* WAC 197-11-835(5),
27

1 Dkt. 99 ¶ 6 (Declaration of Hatchery Division Manager Eric Kinne), AR 5632 (goal is a 75%
2 increase in Puget Sound). And, as WDFW’s own scientists have made abundantly clear,
3 doing so would have far more than “minor documented effects on other species.” *See* WAC
4 197-11-835(5); AR14667-86 (paper by WDFW scientists discussing hatchery risks); 14743-
5 45 (increased production heightens risks).

6 WDFW may quibble about the specifics of *when* it was required to perform a
7 threshold determination, but there is no doubt that it was required to do so *at some point*
8 before it began to raise and release additional hatchery fish. In fact, it was required to conduct
9 new threshold determinations at several points along the way as its plans changed, developed,
10 and expanded.

11 *1.2018 Motion*

12 The 2018 Motion is the first action for which Petitioner seeks review under the
13 constitutional writ. Dkt. 120. However, WDFW was obligated to perform its first SEPA
14 analysis at some unspecified and unknown point before this time, whenever it devised the
15 plan to dramatically expand hatchery production. Because WDFW management did not
16 bring this decision before the Commission or announce it to the public, Petitioner can only
17 speculate as to when it was made, but it was well prior to 2018. At just the six hatcheries
18 discussed in the Petition, for example, hatchery releases jumped by more than 2.3 million
19 salmon between 2016 and 2018. *See* Appendix 1 (showing increases of more than 9% in both
20 2017 and 2018 at Kendall Creek, Marblemount, Naselle, Samish, Sol Duc, and Wallace
21 River hatcheries).

22 Regardless, WDFW has left no question that a SEPA analysis for the 2018 Motion
23 was required. The Commission carefully characterized the motion as “general policy intent
24 and guidance” at a “high policy level,” with a table of proposed increases provided just for
25 “general reference.” AR 998. However, in its attempt to defeat Petitioner’s claims as
26 untimely, WDFW has repeatedly emphasized in its pleadings that the 2018 Motion was a
27

1 "final agency action." *See, e.g.*, Dkt. 82 at 3 (the 2018 motion "was more than a policy
2 statement and expressly obligated WDFW to significantly increase hatchery production");
3 Dkt. 105 at 12 (the Commission "directed an increase in chinook production in 2018,
4 and...WDFW immediately began to implement that directive").

5 Given these statements, it is difficult to imagine how WDFW could now claim that
6 the 2018 Motion was not a SEPA "action," that it was too high-level or vague for meaningful
7 SEPA review, or that it was subject to an exemption under WAC 197-11-835(5), as a
8 "routine release of hatchery fish." WDFW was thus required to complete a SEPA threshold
9 determination.

10 Indeed, if WDFW is correct that this vote was the final decision that spurred nearly
11 a decade of dramatic hatchery increases, it is a textbook example of the importance of SEPA.
12 The motion was approved in an atmosphere of near hysteria, with several commissioners
13 speaking of the pressure they felt to "do something big" for the Southern Residents. AR
14 1028-29. Commissioners discussed the need for "a big, bold step" to avoid "negativity" from
15 WDFW's "customer base" (AR1035), and their fear of "water cooler talk" by people who
16 "expect somebody to do something about" the Southern Residents (AR 1017). One
17 commissioner characterized the vote as "throwing a very large number against the wall,"
18 even though "a lot of it isn't going to stick" (AR 1038), while another advised the
19 Commission to "swing through the fences," "throw up big numbers," and let others "pick
20 and choose" later what would actually work. AR 1039. One commissioner challenged his
21 colleagues: "I guess I'm wondering what we're afraid of. Are we afraid to make a statement
22 about a critical scenario that we have with the Southern resident killer whales?" AR 1046.

23 Absent was any discussion of the complex question of whether increasing hatchery
24 production would help or hurt the Southern Residents, or any weighing of risks versus
25 benefits. *See* AR 9683-706; *see also* AR 9696 (HSRG letter noting that this "experiment"
26 may not help orcas, discussing risks, and opining that "there are a number of possible
27

1 outcomes”). Indeed, any hesitance was denigrated as an attempt to “nitpick this thing to
2 death.” AR 1039. Nor was there the opportunity for advance consideration or outside
3 consultation: The proposal was not on the agenda, WDFW had not circulated it for public
4 review or comment, and the Commission did not accept public testimony. AR 19827.

5 The purpose of SEPA is to prevent an agency from taking this kind of rash action
6 while refusing to consider the potentially devastating environmental impacts. *See Cheney v.*
7 *Mountlake Terrace*, 87 Wn.2d 338, 344 (1976) (“[An] agency cannot close its eyes to the
8 ultimate probable environmental consequences of its current action.”).

9 2.2021 Master Plan

10 By contrast, WDFW has minimized the importance of the 2021 Plan in its pleadings,
11 to assert that it could not be challenged under the APA. It has belittled it as just a “planning
12 report” or a “hypothetical exercise” completed to satisfy the legislature. Dkt. 115 at 2-3, Dkt.
13 75 at 20. But the truth is that WDFW lobbied hard to obtain funding for the plan as essential
14 to its expansion strategy. *See, e.g.*, AR 1085 (email regarding need for funding for the master
15 plan); 1217, 1221, 1227, 1236-37 (staff discussing “desperate” need for master plan to allow
16 a “full, comprehensive, understanding” of actions necessary to achieve production goals).

17 By its own language, the Master Plan contemplates that it will be subject to SEPA.
18 AR 10436 (“[u]pon finalization...the Master Plan would be subject to review under the State
19 Environmental Policy Act (SEPA)”). WDFW has asserted in litigation that this does not
20 apply because the Master Plan is only a “draft,” suggesting it may never be anything more.
21 *See* Dkt. 17 at 9; Dkt. 57 at 8-9. But WDFW staff have not treated the Master Plan as a
22 “draft.” To the contrary, they have presented to the Commission regarding their “continued
23 implementation” of the Plan. AR 15689. The record supports this, as WDFW has already
24 begun work on some of the projects described in the plan. AR 19692-705 (SEPA checklist
25 for construction at Kendall Creek); AR 19712-23 (same for Naselle); AR 19785-97 (Wallace
26 River). And, contrary to the Master Plan’s statement, the time to perform a SEPA analysis is
27

1 not *after* a plan is finalized, but while it is still a draft proposal. WAC 197-11-055(1) (the
2 “SEPA process shall be integrated with agency activities at the earliest possible time to
3 ensure that planning and decisions reflect environmental values, to avoid delays later in the
4 process, and to seek to resolve potential problems.”).

5 Far from being a meaningless exercise, the Master Plan is an ambitious proposal
6 outlining potential expenditures of more than \$250 million over 25 years, including \$9.1
7 million during fiscal year 2021-2023, \$8.6 million in 2023-2025, and \$26.1 million in 2025-
8 2027. AR 9921. With these funds, WDFW estimates it could release another 36.4 million
9 hatchery salmon each year. AR 9920. Added to the 26.1 million salmon the state was already
10 producing over 2018 levels, this equates to a total increase of over 62 million salmon, *more*
11 *than 12 million salmon* over the levels envisioned by the 2018 Motion. AR 998, 9913.

12 Even accepting WDFW’s assertion that the 2018 Motion was the final directive to
13 increase production, the Master Plan represented a significant escalation in this initiative,
14 which would still have required a new SEPA analysis. Although an additional SEPA process
15 for individual construction projects described by the plan is also necessary, that is not
16 sufficient. WDFW was obligated to perform a broader analysis of the impact of the entire
17 plan on Washington’s aquatic ecosystems, fish, and wildlife. *Eastlake Cmty. Council v.*
18 *Roanoke Assocs.*, 82 Wn.2d 475, 490 (1973) (SEPA “mandates governmental bodies to
19 consider the total environmental and ecological factors to the fullest in deciding major
20 matters.”) (emphasis in original).

21 *3. Hatchery Production Increases*

22 If WDFW had performed a SEPA analysis of plans directing increases at specific
23 hatcheries, it would not need to perform a new analysis each time it took action to implement
24 those plans. In the absence of such an evaluation, however, each new action to increase
25 production is a new violation of SEPA, including the “30-Day Hatchery Actions” identified
26 in the Petition. *See, e.g.*, TAP ¶¶ 147-174 (describing work done at six different hatcheries
27

1 in late 2021 in furtherance of the 2021 Policy and the Master Plan); AR 15697-808
2 (escapement reports showing challenged activities). WDFW cannot bypass the need for an
3 environmental analysis of these actions just by refusing to perform it at the planning stage.

4 **D. WDFW’s DNS on the 2021 Policy is Inadequate as a Matter of Law**

5 When WDFW finally did complete a SEPA threshold analysis on the 2021 Policy, it
6 fell far short of the “hard look” that both SEPA and its federal analog, the National
7 Environmental Policy Act (“NEPA”), require. *See Pub. Util. Dist. No. 1* 137 Wn. App. at
8 158 (discussing NEPA “hard look” standard and indicating state courts can look to federal
9 case law for SEPA interpretation).

10 *1. Standard for Checklist and Threshold Determination.*

11 An agency must base its threshold determination upon “information reasonably
12 sufficient to evaluate the environmental impact of a proposal.” WAC 197-11-335. In
13 describing its conclusions, an agency “must be able to demonstrate that environmental
14 factors were considered in a manner sufficient to amount to prima facie compliance with the
15 procedural requirements of SEPA.” *Juanita Bay Valley Cmty. Ass’n v. Kirkland*, 9 Wn. App.
16 59, 73(1973) (internal citation omitted). Specifically, when conducting a threshold analysis,
17 an agency must:

- 18 • Consider all environmental impacts that are likely or reasonably probable to occur,
19 rather than merely remote or speculative. WAC 197-11-060(4)(a); WAC 197-11-782.
- 20 • Obtain any missing information on significant adverse impacts that are “essential to
21 a reasoned choice” if it can do so without exorbitant cost. WAC 197-11-080(1).
- 22 • If “information relevant to adverse impacts is important to the decision and the means
23 to obtain it are speculative or not known,” weigh the “need for the action with the
24 severity of possible adverse impacts,” and if it proceeds, “generally indicate in the
appropriate environmental documents its worst case analysis and the likelihood of
occurrence.” WAC 197-11-080(3)(b).
- 25 • Look at “the range of probable impacts, including short-term and long-term effects,”
26 and “those that are likely to arise or exist over the lifetime of a proposal [or longer].”
WAC 197-11-060(4)(c).

1 • Weigh indirect impacts, including the likelihood that the proposal will be a precedent
2 for future actions. WAC 197-11-060(4)(d).

3 • Consider cumulative impacts. WAC 197-11-060(4)(e); *see Narrowsview Pres. Ass'n*
4 *v. Tacoma*, 84 Wn.2d 416, 423(1974) (agency should consider “the cumulative harm
5 that results from its contribution to existing adverse conditions”).

6 *2. WDFW Checklist Supplied Sparse, Incomplete, and Conclusory Information*

7 As the state SEPA administrator, the Department of Ecology provides a checklist to
8 help agencies consider the right information during threshold determinations. WAC 197-11-
9 315. Ecology warns that the checklist is the “first but not necessarily the only source of
10 information needed to make an adequate threshold determination.” AR 2454. The checklist
11 contains Parts A-D. For nonproject proposals, Ecology directs agencies to complete Part D
12 and the “applicable” parts of Parts A and B, indicating agencies may exclude questions in
13 Part B that “do not contribute meaningfully to the analysis.” AR 15996.

14 Kinne completed the SEPA Checklist for the 2021 Policy on March 8, 2021. He
15 described the 2021 Policy as a “complete revision” to the 2009 policy, which WDFW would
16 subject to phased review. AR 15997. He acknowledged the policy “makes clear that there
17 exist significant risks and benefits to hatchery programs.” AR 15998.

18 In response to the question about what environmental information WDFW had
19 prepared, or will prepare, “directly related to this proposal, ” Kinne did not indicate that
20 WDFW had prepared anything. *Id.* Instead, he listed a withdrawn DNS on an earlier version
21 of the policy, and promised WDFW “will file” missing Hatchery Genetic Management Plans
22 (“HGMPs”) for hatcheries covered by the ESA. *Id.*⁴

23 Kinne did not answer *any* questions in Part B of the Checklist. AR 15999-16009.
24 Instead, he noted at the top that “the policy itself is not project specific and does not call for

25 ⁴ WDFW is supposed to have HGMPs approved by the National Marine Fisheries Services (“NMFS”) *before*
26 starting hatchery operations. At the time it was developing this policy, WDFW had not heard back from NFMS
27 regarding HGMPs for 14 programs; had drafted but not submitted 16 other HGMPs that were under co-manager
review; and had not completed 51 others. AR 15174-76. This means 81 of WDFW’s hatchery programs were
operating illegally, without the required authorization under the ESA, including many where it was increasing
production.

1 any explicit department actions that would impact the environment.” AR 15999. To the rest
2 of the questions, Kinne responded: “Does not apply. Not site specific.” AR 15999-16009.
3 He even declined to answer questions about the impacts on fish, bodies of water, and
4 threatened and endangered species, as well as the measures the proposal included to
5 “preserve or enhance wildlife.” AR 16001-03 (questions 3a, 4c and 5a, b, and d).

6 In Part D for non-project actions, the Checklist encourages agencies to read the
7 questions “in conjunction with the list of elements of the environment,” and “be aware of the
8 extent the proposal, or the types of activities likely to result from the proposal, would affect
9 the item at a greater intensity or at a faster rate than if the proposal were not implemented.”
10 AR 16010. Kinne heeded none of this advice, opting to avoid answering any of the questions,
11 including about whether the policy would increase discharge to water or was “likely to affect
12 plants, animals, fish, or marine life.” *Id.* Instead, he answered that “Policy C-3624 provides
13 no direction in terms of changes in hatchery production.” AR 16010. But he also added big
14 caveat: “*except with* the possibility that production associated with the SRO prey initiative
15 may increase production.” *Id.* (emphasis added). Kinne refused to explore the implications
16 of this exception, indicating that “The environmental review associated with the technical
17 procedures documents will concern the likely effects to plants, animals, fish, or marine life.”
18 *Id.*

19 Kinne *knew* WDFW would use the policy to make significant production increases
20 through the Orca Prey Initiative, and he *knew* that doing so risked the serious adverse
21 consequences the policy described. *See* AR 14230. SEPA required him to elaborate on these
22 risks. But rather than doing so, he deferred to a later SEPA review of the Procedures
23 Documents, which, more than four years later, has yet to materialize. Meanwhile, the
24 “possible” increases under the Orca Prey Initiative has continued, facilitated by the policy’s
25 exemption from the safeguards imposed on other hatcheries while WDFW completes the
26 elusive HMPs. AR 14232.

1 WDFW issued a DNS for the 2021 Policy the day after the checklist was prepared,
2 on March 9, 2021. AR 16054-56. It consisted of roughly three pages, most of which is form
3 language, and a cut-and-paste of the proposal description. *Id.* WDFW’s decision and
4 rationale are contained in a single paragraph:

5 WDFW has determined that this proposal will likely not have a
6 significant adverse impact on the environment. Therefore, state law
7 does not require an environmental impact statement (EIS). WDFW
8 made this determination of nonsignificance (DNS) after we
9 reviewed the environmental checklist and other information on file
10 with us.

11 AR 16056.

12 *3. WDFW’s Checklist and Rationale Are Inadequate to Support DNS*

13 Last year, the Supreme Court upheld a finding that King County had violated SEPA
14 by basing a DNS on a similarly inadequate checklist, thus failing to establish even a *prima*
15 *facie* showing compliance. *King County v. Friends of Sammamish Valley*, 3 Wn.3d 793, 820,
16 825(Wash. 2024).

17 The case concerned a DNS for a zoning ordinance concerning businesses selling
18 alcohol in rural King County. *Id.* at 797. In the checklist supporting the DNS, King County
19 answered nearly every question under Part B, “Not applicable for this nonproject action.” *Id.*
20 at 817. Unlike WDFW, which discarded the entire section, King County did answer *some*
21 questions in Part B. *Id.* However, just like WDFW, the county failed to provide any analysis
22 of the proposal’s potential impacts on these elements. *Id.* at 817-18

23 Like WDFW, King County suggested its proposal would have some environmental
24 impacts; while WDFW simply ignored those risks, King County’s checklist relied on
25 existing laws to provide environmental protection. *Id.* at 818. Like WDFW, King County
26 refused to address future projects the proposal would allow or “consider impacts
27 of *any* future actions.” *Id.* Like WDFW, the county instead “deferred all environmental
review” to a later stage. *Id.* And, like WDFW, King County “failed to consider all reasonably
foreseeable impacts,” ignored cumulative impacts, and deferred all environmental review for

1 consideration at a later stage. *Id.* at 819-20.

2 As a result of these deficiencies, the Supreme Court was “left with the definite and
3 firm conviction that a mistake had been committed when the County issued the DNS.” *Id.* at
4 825 (finding checklist did not disclose or address any likely environmental impacts and
5 noting the “complete lack of engagement with the environmental portion of the SEPA
6 checklist”). The Court should reach the same conclusion here, where WDFW showed the
7 same refusal to “*meaningfully* engage in the SEPA process when making a threshold
8 determination.” *See id.* As in *Friends of Sammamish Valley*, WDFW’s DNS fails to meet the
9 requirements for *prima facie* compliance with SEPA.

10 **E. WDFW Must Complete an EIS on Hatchery Expansion**

11 The evidence in the record points in only one direction: WDFW’s massive increase
12 in hatchery production could have potentially devastating impacts on the region’s wild
13 salmon, and the Southern Residents that depend upon them. Such is the conclusion of:

- 14 • **A wide range of nonprofits dedicated to protecting wild fish and regional boards**
15 **charged with salmon recovery.** *See, e.g.,* AR 16152-55, 15217-25, 18569-73 (Wild
16 Fish Conservancy); AR 16137-47 (Native Fish Society); AR 15188-99 (Lower
17 Columbia Fish Recovery Board); AR 15200-01 (Wild Steelhead Coalition); and AR
18 15202-08 (Wild Salmon Center).
- 19 • **Dozens of preeminent experts in the field, including scientists, former**
20 **Commissioners, and former members of the HSRG.** *See, e.g.,* AR 15228-32 (letter
21 from 77 experts, including 21 Ph.D fisheries scientists, warning of consequences of
22 abandoning hatchery reform); AR 15226-27 (letter from four highly credentialed
23 former Commissioners involved with the 2009 Reform Policy, bemoaning the
24 decision to “suspend belief in the science and relax standard in place that protect wild
25 fish genetics”); AR 9693-703 (December 2018 letter from the HSRG, expressing
26 specific concern about expansion proposals for several hatcheries, and emphasizing
27 the need to monitor and examine the results).
- **WDFW’s own scientists.** *See, e.g.,* AR 14677-686 and 14743-45 (2020 WDFW
report on reform science); AR 18671 (email from WDFW’s Chief Fish Scientist
Ken Warheit explaining the Commission “deliberately removed the safeguards” to
protect wild fish); AR 5632-36 (draft staff report warning of a host of potential
negative impacts from the Orca Prey Initiative).

Even WFW’s own hatchery policy admits the existence of these risks. AR 14230. This

1 consensus reaches far beyond the threshold necessary to show a “reasonable probability” that
2 WDFW’s hatchery expansion will have more than a “moderate effect on the quality of the
3 environment.” *Norway Hill*, 87 Wn.2d at 278. With every year that WDFW refuses to
4 examine the potential environmental impacts of its reckless actions, the odds increase that
5 the consequences will be devastating and irreversible.

6 **VII. CONCLUSION**

7 Petitioner asks the Court to find that WDFW has committed arbitrary, capricious, and
8 illegal conduct, and to order it to remedy these violations by developing an EIS to examine
9 the environmental impacts of hatchery increases under the Orca Prey Initiative.

10
11 *I certify that this memorandum contains 8,397 words, in compliance with LCR 56(c)(3),*
12 *which the parties agree applies to the final briefs in this action.*

13 DATED: September 30, 2025

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APPENDIX I

Increases in Hatchery Production at Facilities Identified in the Third Amended Complaint¹

Hatchery	2016 Releases	2017 Releases	2018 Releases	2019 Releases	2020 Releases	2021 Releases	Change 2016-2021
Kendall Creek ²	1,638,540	1,379,516	1,861,374	3,010,052	2,763,025	4,319,373	2,680,833
Marblemount ³	1,132,333	1,076,565	1,078,777	1,379,923	1,979,062	2,115,605	983,272
Naselle ⁴	1,956,607	4,344,148	4,595,402	4,491,096	4,134,952	6,001,442	4,044,835
Samish ⁵	4,154,643	3,432,370	3,677,946	5,089,148	5,217,867	3,358,015	(796,628)
Sol Duc ⁶	939,696	822,960	927,978	1,338,359	1,380,264	1,359,643	419,947
Wallace River ⁷	1,723,184	1,585,907	1,717,017	1,669,749	2,251,564	2,259,559	536,375
Total	11,545,003	12,641,466	13,858,494	16,978,327	17,726,734	19,413,637	7,868,634
% Change		9.5%	9.6%	22.5%	4.4%	9.5%	68%

¹ See Third Amended Complaint, Dkt. 61, ¶¶ 147-174. Chart includes releases for all salmon, including Chinook, chum, and coho.

² AR 9919; AR 15861-62.

³ AR 9919; 15872-73.

⁴ AR 9919; 15918-19.

⁵ AR 9919; 15924-25.

⁶ AR 9919; 15937-38

⁷ AR 9919; 15988-89.