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September 8, 2025

Via U.S. Mail (and email where indicated)

Secretary Howard Lutnick
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

United States Department of Commerce
1401 Constitution Ave., N.W.
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Assistant Administrator Eugenio Piñeiro Soler
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National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

Re: Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act Associated with Funding Lower Columbia River Hatcheries Under the Mitchell Act

Dear Honorable Civil Servants,

This letter provides notice of violations of section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, related to hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) that are funded under the Mitchell Act. This letter further provides notice under section 11(g) of the ESA, 16 U.S.C. § 1540(g), of Wild Fish Conservancy's and Wild Salmon Rivers d/b/a The Conservation Angler's (collectively, the "Conservation Groups") intent to sue for the violations described herein to enforce the ESA. The United States Department of Commerce and Secretary Howard Lutnick (in his official capacity as the Secretary of the United States Department of Commerce) (collectively, "Commerce") and the National Marine Fisheries Service and Assistant Administrator Eugenio Piñeiro Soler (in his official capacity as the Assistant Administrator for Fisheries) (collectively, "NMFS") are violating the ESA by funding these hatchery programs in a manner inconsistent with the substantive mandates of section 7 of the ESA.

I. Legal Framework.

When the ESA was passed in 1973 it "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*,

437 U.S. 153, 180 (1978). The purpose of the statute is to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b).

The ESA assigns implementation responsibilities to the Secretaries for Commerce and the U.S. Department of the Interior, who have delegated duties to NMFS and the United States Fish and Wildlife Service ("FWS"), respectively. *See* 50 C.F.R. § 402.01(b). NMFS generally has ESA authority for marine and anadromous species, while FWS has jurisdiction over terrestrial and freshwater species. *See id.* §§ 17.11, 223.102, 224.101.

Section 4 of the ESA prescribes mechanisms by which NMFS and FWS list species as endangered or threatened and designate "critical habitat" for such species. 16 U.S.C. §§ 1532(16), 1533(a). Species is defined to include "any distinct population segment of any vertebrate species that interbreeds when mature." 50 C.F.R. § 424.02. Section 9 of the ESA makes it unlawful to "take" ESA-listed species. *See* 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 223.203(a). "Take" is defined broadly to include harass, harm, wound, kill, trap, or capture a protected species. 16 U.S.C. § 1532(19).

Section 7 of the ESA imposes a substantive obligation on federal agencies to "*insure* that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" that has been designated as critical for such species. 16 U.S.C. § 1536(a)(2) (emphasis added); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). Such jeopardy results where an action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat occurs where there is a "direct or indirect alteration that appreciably diminishes the value of critical habitat" for both the survival and recovery of a listed species. *Id.*

In fulfilling the substantive mandates of section 7 of the ESA, federal agencies planning to fund or undertake an action (the "action agency") that "may affect" ESA-listed species or their critical habitat are required to consult with NMFS and/or FWS (the "consulting agency") regarding the effects of the proposed action. *See id.* § 402.14(a). Actions that are likely to adversely affect a listed species or its critical habitat require formal consultation, which concludes with the consulting agency's issuance of a biological opinion ("BiOp") determining whether the action is likely to jeopardize ESA-protected species or result in adverse modification of critical habitat. *See id.* § 402.14(a), (b), (h)(1).

If the consulting agency concludes the action will not jeopardize listed species or adversely modify their critical habitat, the consulting agency will include with the BiOp an incidental take statement ("ITS"). 16 U.S.C § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). An ITS must specify the impact of the action by setting a numeric limit on take (or an appropriate surrogate if a numeric cap is impractical to establish), identify "reasonable and prudent measures" that will minimize impacts to protected species, and outline "terms and conditions" to implement these measures. 50 C.F.R. § 402.14(i)(1). The ITS must also include monitoring and reporting requirements for the take resulting from the action. *See id.* § 402.14(i)(4); *Wild Fish*

Conservancy v. Salazar, 628 F.3d 513, 531–32 (9th Cir. 2010). Take of ESA-listed species in compliance with a valid ITS is not prohibited under section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(6).

After a BiOp is issued, federal agencies have a continuing duty under section 7 of the ESA to ensure that their actions will not jeopardize the continued existence of listed species nor adversely modify designated critical habitat. *Wild Fish Conservancy v. Salazar*, 628 F.3d at 525. An agency must reinitiate consultation whenever "the amount or extent of taking specified in the incidental take statement is exceeded," "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," the action in question is "subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion," or "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(a).

II. Factual Background.

A. Affected Species and Critical Habitat.

The Lower Columbia River Chinook salmon ESU was listed as a threatened species in 1999. 64 Fed. Reg. 14,308 (Mar. 24, 1999); *see also* 70 Fed. Reg. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

The Lower Columbia River coho salmon ESU was listed as a threatened species in 2005. 70 Fed. Reg. 37,160 (June 28, 2005); *see also* 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 81 Fed. Reg. 9252 (Feb. 24, 2016).

The Lower Columbia River steelhead DPS was listed as a threatened species in 1998. 63 Fed. Reg. 13,347 (Mar. 19, 1998); *see also* 71 Fed. Reg. 834 (Jan. 5, 2006); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

The Columbia River chum salmon ESU was listed as a threatened species in 1999. 64 Fed. Reg. 14,508 (Mar. 25, 1999); *see also* 70 Fed. Reg. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

The Upper Willamette River Chinook salmon ESU was listed as a threatened species in 1999. 64 Fed. Reg. 14,308 (Mar. 24, 1999); *see also* 70 Fed. 37,160 (June 28, 2005); 79 Fed. Reg. 20,802 (Apr. 14, 2014); 50 C.F.R. § 223.102(e). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

The Upper Willamette River steelhead DPS was listed as a threatened species in 1999. 64 Fed. Reg. 14,517 (Mar. 25, 1999); *see also* 71 Fed. Reg. 834 (Jan. 5, 2006); 79 Fed. Reg. 20,802

(Apr. 14, 2014). Critical habitat has been designated for this species. 50 C.F.R. § 226.212; *see also* 70 Fed. Reg. 52,630 (Sep. 2, 2005).

The Southern Resident killer whale was listed as an endangered species under the ESA in 2005. 70 Fed. Reg. 69,903 (Nov. 18, 2005); *see also* 50 C.F.R. § 224.101(h). Critical habitat has been designated for this species. 50 C.F.R. § 226.206; *see also* 71 Fed. Reg. 69,054 (Nov. 29, 2006).

B. Hatchery Programs Funded Under the Mitchell Act.

Congress enacted the Mitchell Act on May 11, 1938, in an effort to mitigate adverse effects to salmonids in the Columbia River Basin resulting from the construction of dams, water diversions, logging, and pollution. The statute includes the following authorization:

> The Secretary of Commerce is authorized and directed to establish one or more salmon-cultural stations in the Columbia River Basin in each of the States of Oregon, Washington, and Idaho.
>
> *** *** *** *** *** ***
>
> The Secretary of Commerce is further authorized and directed . . . to perform all other activities necessary for the conservation of fish in the Columbia River Basin in accordance with law.

16 U.S.C. §§ 755–756. Congress has appropriated funds under the Mitchell Act on an annual basis since 1946.

Commerce and NMFS distribute funds appropriated by Congress under the Mitchell Act. Available information indicates that Mitchell Act funding totals $15 to $25 million per year and funds all or parts of around 50 hatchery programs operated by the Washington State Department of Fish and Wildlife ("WDFW"), the Oregon State Department of Fish & Wildlife ("ODFW"), and others. Mitchell Act funds support operation of hatchery facilities and programs and maintenance of hatchery facilities and associated equipment.

C. Take and Other Adverse Effects from Hatchery Programs Funded Under the Mitchell Act.

ODFW's and WDFW's hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) funded by Commerce and/or NMFS under the Mitchell Act take the ESA-listed species identified above and otherwise adversely affect the species and their critical habitat through a variety of mechanisms.

NMFS has summarized some of the adverse impacts to ESA-listed salmonid species and their critical habitat in the following document: Effects of Hatchery Programs on Salmon and Steelhead Populations: Reference Document for NMFS ESA Hatchery Consultations (March 7, 2011) (Revised July 29, 2020) ("Hatchery Effects Document"). NMFS analyzes hatchery

impacts using six factors:

(1) The hatchery program does or does not remove fish from the natural population and uses them for hatchery broodstock,

(2) Hatchery fish and the progeny of naturally spawning hatchery fish on spawning grounds and encounters with natural-origin and hatchery fish at adult collection facilities,

(3) Hatchery fish and the progeny of naturally spawning hatchery fish in juvenile rearing areas, the migration corridor, estuary, and ocean,

(4) Research, monitoring, and evaluation ("RM&E") that exists because of the hatchery program,

(5) Operation, maintenance, and construction of hatchery facilities that exist because of the hatchery program, and

(6) Fisheries that would not exist but for the hatchery program, including terminal fisheries intended to reduce the escapement of hatchery-origin fish to spawning grounds.

The fish removal factor considers "whether broodstock are of local origin and the biological benefits and risks of using ESA-listed fish (natural or hatchery-origin) for hatchery broodstock. It considers the maximum number of fish proposed for collection and the proportion of the donor population collected for hatchery broodstock. 'Mining' a natural population to supply hatchery broodstock can reduce population abundance and spatial structure[.]" Hatchery Effects Document p. 2.

NMFS assesses three aspects for the second factor: genetic effects, ecological effects, and encounters at adult collection facilities. *Id.* NMFS "generally view[s] the genetic effects of hatchery programs as detrimental to the ability of a salmon population's ability to sustain itself in the wild." *Id.* "Ecological effects" means "effects from competition for spawning sites and redd superimposition, contributions to marine-derived nutrients, and the removal of fine sediments from spawning gravels" and may be negative where increased competition or redd superimposition occurs. *Id.* at p.23. The last aspect considers "effects from encounters with natural-origin fish that are incidental to broodstock collection," including from sorting, holding, and handling natural-origin fish during broodstock collection. *Id.* at p. 24.

The third factor similarly addresses the potential for competition, predation, and disease when the progeny of naturally spawning hatchery fish and releases share juvenile rearing areas. *Id.* NMFS has found that:

> A proportion of the smolts released from a hatchery may not migrate to the ocean but rather reside for a time near the release point. These non-migratory smolts (residuals) may compete for food and space with natural-origin juvenile salmonids of similar age (Bachman 1984; Tatara and Berejikian 2012). Although this behavior has been studied and observed, most frequently in the case of

> hatchery steelhead, residualism has been reported as a potential issue for hatchery coho and Chinook salmon as well (Parkinson et al. 2017). Adverse impacts of residual hatchery Chinook and coho salmon on natural origin salmonids can occur, especially given that the number of smolts per release is generally higher; however, the issue of residualism for these species has not been as widely investigated compared to steelhead.

Id. at p. 26.

NMFS also analyzes proposed research, monitoring, and evaluation caused by the hatchery for resulting impacts to listed species and critical habitat. *Id.* at p. 32. "Negative effects on the fish from RM&E are weighed against the value or benefit of new information, particularly information that tests key assumptions and that reduces uncertainty. RM&E actions can cause harmful changes in behavior and reduced survival." *Id.*

For the fifth factor, NMFS has stated, "The construction/installation, operation, and maintenance of hatchery facilities can alter fish behavior and can injure or kill eggs, juveniles, and adults. These actions can also degrade habitat function and reduce or block access to spawning and rearing habitats altogether." *Id.* at p. 35. In applying this factor, NMFS analyzes changes to riparian habitat, channel morphology, habitat complexity, in-stream substrates, and water quantity and quality resulting from operation, maintenance, and construction activities and determines whether water diversions and fish passages meet NMFS criteria. *Id.*

For the sixth factor regarding impacts from fisheries existing solely due to hatchery programs, NMFS has found that, "Many hatchery programs are capable of producing more fish than are immediately useful in the conservation and recovery of an ESU and can play an important role in fulfilling trust and treaty obligations with regard to harvest of some Pacific salmon and steelhead populations." *Id.* "In any event, fisheries must be carefully evaluated and monitored based on the take, including catch and release effects, of ESA-listed species." *Id.*

ODFW's and WDFW's hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) funded by Commerce and/or NMFS under the Mitchell Act cause take of Southern Resident killer whales ("SRKW") and otherwise adversely affect this species and its critical habitat by reducing the Chinook salmon and other salmonids otherwise available as prey for the whales.

D. ESA Consultations on Hatchery Programs Funded Under the Mitchell Act.

NMFS issued a BiOp on March 29, 1999, that addressed various federal and non-federal hatchery programs in the Columbia and Snake River Basins, including programs funded by NMFS under the Mitchell Act. That 1999 BiOp concluded that hatchery programs jeopardized the continued existence of Lower Columbia River steelhead and Snake River steelhead and identified reasonable and prudent alternatives to avoid such jeopardy.

Following that 1999 consultation, numerous additional salmonid species affected by the hatchery programs became protected under the ESA. In 2016, Wild Fish Conservancy filed suit

against NMFS for failure to consult and/or reinitiate consultation on hatchery programs funded by NMFS under the Mitchell Act to address, *inter alia*, information developed and species listed under the ESA since the 1999 BiOp. *See Wild Fish Conservancy v. Nat'l Marine Fisheries Serv.*, Dkt. 1, No. 3:16-CV-00553-MO (D. Or. Mar. 31, 2016). On January 15, 2017, NMFS issued a new BiOp with an ITS ("2017 Mitchell Act BiOp") on hatchery programs funded under the Mitchell Act, resulting in a settlement agreement and voluntary dismissal of Wild Fish Conservancy's lawsuit. *See Wild Fish Conservancy v. Nat'l Marine Fisheries Serv.*, Dkt. 37, No. 3:16-CV-00553-MO (D. Or. June 30, 2017).

The 2017 Mitchell Act BiOp sought to address Mitchell Act funding from 2016 through 2025 and contemplated implementation of measures—broken into three phases—intended to reduce harm to ESA-listed species. Phase I covered funding for fiscal year 2016 and generally followed prior funding practices. Phase II addressed funding for fiscal years 2017 through 2022 and required, *inter alia*, reduced production levels for specific hatchery programs and implementation of weirs in specific tributaries. Phase III addressed funding during fiscal years 2023 through 2025 and sought to implement an adaptive management strategy for further reducing harmful impacts to ESA-listed species.

The 2017 Mitchell Act BiOp found that "take" of ESA-listed species will result from the hatchery programs funded under the Mitchell Act when:

(1) fish are encountered at weirs and their survival, reproductive success, or spatial distribution is affected and when fish are handled while collecting hatchery fish for broodstock purposes—the Proposed Action does not include the take of ESA-listed natural-origin fish for hatchery broodstock;

(2) hatchery fish spawn naturally and when they spawn on top of (i.e., superimposition) spawning areas of fish from a natural population;

(3) post-release juvenile hatchery fish use limited food and habitat resources or prey on ESA-listed natural-origin or non-marked hatchery fish;

(4) construction, operation, and maintenance of hatchery facilities cause harm (e.g., affect fish habitat);

(5) RM&E activities handle, injure, or otherwise effect the survival, reproductive fitness, and spatial distribution of the fish; and

(6) prey availability to SRKW is reduced.

The 2017 Mitchell Act BiOp included an ITS that exempted from liability under section 9 of the ESA "take" resulting from the hatchery programs. The ITS set various take limits and imposed terms and conditions to reduce and monitor take of ESA-listed species.

On August 7, 2023, NMFS notified WDFW that it was reinitiating consultation with respect to the 2017 Mitchell Act BiOp following WDFW's failure to implement certain

measures required by the 2017 Mitchell Act BiOp. On September 28, 2023, NMFS issued a letter to WDFW, Yakama Nation Tribal Council, Nez Perce Tribal Executive Committee, FWS, ODFW, and Idaho Department of Fish and Game to signal its reinitiation of consultation. In this letter, NMFS stated, "It is our belief at this time that the conditions have been met for continuing coverage for grant awards through 2025, except for a set of operations by [WDFW] . . . ."

The Conservation Groups issued a pre-suit notice letter to NMFS, Commerce, WDFW, ODFW, and others dated January 26, 2024, that, *inter alia*, identified numerous violations of the 2017 Mitchell Act BiOp. The Conservation Groups filed suit on April 17, 2024. *Wild Fish Conservancy, et al. v. Nat'l Marine Fisheries Serv., et al.*, W.D. Wash. No. 3:24-cv-05296-BHS. The violations at issue included a failure to implement weirs as required by the 2017 Mitchell Act BiOp and exceedances of "take" limits set for harm caused through genetic interactions—i.e., pHOS limits—for numerous ESA-listed salmonid populations in the Lower Columbia River Basin. NMFS notified the Court and the parties to that lawsuit on December 31, 2024, that it had issued a new BiOp for its funding of Mitchell Act hatcheries that supplanted the 2017 Mitchell Act BiOp.

The new Mitchell Act BiOp is dated December 30, 2024 ("2024 Mitchell Act BiOp"), and purports to apply to distributions of future Mitchell Act funds. The 2024 Mitchell Act BiOp indicates that funds are currently provided to 50 hatchery programs operated at 25 hatchery facilities within the Columbia River Basin. The 2024 Mitchell Act BiOp found that "take" of ESA-listed species will result from the hatchery programs through a variety of mechanisms, including:

1. Broodstock collection activities will intentionally remove ESA-listed salmonids to incorporate them into hatchery broodstock and will incidentally harm ESA-listed salmonids when collecting hatchery fish for broodstock;

2. Genetic effects of hatchery-origin fish interbreeding with natural spawners;

3. Ecological effects of adult hatchery-origin fish competing for spawning sites with natural-origin spawners or superimposing redds;

4. Weir operations will harm ESA-listed salmonids by affecting distribution and productivity, including by impeding upstream migration and causing fish to spawn in lower-quality downstream habitats;

5. Ecological effects from interactions between juvenile hatchery-origin fish and natural-origin salmonids in rearing and migratory areas, including predation, competition, and pathogen transmission;

6. Research, monitoring, and evaluation activities intended to monitor and evaluate the hatchery programs and their impacts will cause direct and incidental take of ESA-listed salmonids; and

7. Construction, operation, and maintenance of hatchery facilities will cause take of ESA-

listed species, including water withdrawals, and intake structures.

III. Commerce's and NMFS's Violations of Section 7 of the ESA.

Commerce and NMFS are in violation of section 7(a)(2) of the ESA by disbursing funds under the Mitchell Act for WDFW's and ODFW's operations and maintenance of, and improvements and upgrades to, hatchery programs in the Lower Columbia River Basin. Specifically, Commerce and NMFS have failed to ensure that these funded activities are not likely to jeopardize the continued existence of the ESA-listed species identified above or destroy or adversely modify their critical habitat. The funding addressed by this Notice Letter encompasses each and every distribution of funds under the Mitchell Act during the last six years for operations, maintenance, improvements, and/or upgrades for WDFW's and/or ODFW's Lower Columbia River Basin (i.e., below Bonneville Dam) hatchery programs and/or hatchery facilities and any such distributions that occur after the issuance of this Notice Letter.[1]

WDFW's and ODFW's salmonid hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) funded by NMFS and/or Commerce under the Mitchell Act "take" and otherwise adversely modify the ESA-listed species and critical habitat identified above in section II.A of this Notice Letter through the mechanisms described herein and in the Hatchery Effects Document. These programs release tens of millions of hatchery fish into the Lower Columbia River Basin every year and conduct extensive operations in and around salmonid-bearing waterbodies that inflict extensive harm on struggling ESA-listed salmonids. This harm to ESA-listed salmonids reduces prey availability for endangered Southern Resident killer whales, contributing to the species' decline.

Commerce and NMFS violated their substantive duty under section 7(a)(2) of the ESA to ensure that activities they fund will not jeopardize ESA-listed species or adversely modify their critical habitat by funding these hatchery programs and facilities under the 2017 Mitchell Act BiOp despite extensive violations of, and noncompliance with, that BiOp. Since December 30, 2024, Commerce and NMFS have continued to violate that substantive duty under Section 7(a)(2) of the ESA by disbursing funds under the Mitchell Act for these hatchery programs and facilities in reliance on the legally deficient 2024 Mitchell Act BiOp.

A. Commerce and NMFS Violated Section 7 of the ESA by Funding the Hatcheries Under the 2017 Mitchell Act BiOp Despite Extensive Violations of that BiOp.

The 2017 Mitchell Act BiOp found that the hatchery programs and activities at issue would not jeopardize ESA-listed species or adversely modify their critical habitat provided that

[1] Appended hereto as the Appendix is a table that identifies WDFW's and ODFW's hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) that are funded by Commerce and/or NMFS under the Mitchell Act based upon currently available information. The allegations in this Notice Letter cover all funding by Commerce and/or NMFS under the Mitchell Act during the last six years or subsequent to this Notice Letter for any of WDFW's and/or ODFW's salmonid hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam), including any such programs not identified in the Appendix.

the activities were implemented in the manner described in the BiOp and complied with the BiOp's take limits and other terms and conditions. That did not occur, as there was extensive non-compliance with the 2017 Mitchell Act BiOp with respect to WDFW's and ODFW's Lower Columbia River Basin hatchery programs. These violations included exceedances of authorized take limits for take of ESA-listed species. Commerce and NMFS nonetheless continued to fund those programs. Commerce and NMFS thereby violated section 7(a)(2) of the ESA by continuing to fund WDFW's and ODFW's Lower Columbia River Basin hatchery programs in a manner that failed to ensure that the programs will not jeopardize ESA-listed species or adversely modify their critical habitat.

The violations of the 2017 Mitchell Act BiOp are detailed in the Conservation Groups' First Amended Complaint, Dkt. No. 61 ¶¶ 113–47, filed in *Wild Fish Conservancy, et al. v. Nat'l Marine Fisheries Serv., et al.*, W.D. Wash. No. 3:24-cv-05296-BHS. Those extensive allegations are not repeated herein but are instead incorporated by this reference. These violations included a failure to implement weirs by September 30, 2022, as required to reduce the number of hatchery fish reaching upstream spawning areas in the following tributaries: Skamokawa River, Mill Creek, Abernathy Creek, Germany Creek, and South Fork Toutle River.

The violations also included exceedances of limits set for the amount of take of ESA-listed salmonids that could occur through genetic interactions with hatchery fish. Most of these limits did not even become effective until several years after the 2017 Mitchell Act BiOp was issued. That is because the BiOp required that the number of fish released from various programs be reduced by Spring 2022 and the genetic take limits were based on three- and four-year running means that only included data generated after the reductions in hatchery program sizes. Nonetheless, hatchery programs exceeded the take limits—which typically use the metric "pHOS"—for many ESA-listed salmon populations. The hatchery programs exceeded the pHOS take limits for threatened Lower Columbia River Chinook salmon populations in the following tributaries: Coweeman River, Elochoman/Skamokawa Rivers, Mill/Abernathy/Germany Creeks, Toutle River, Lewis River, and Grays/Chinook Rivers. The hatchery programs violated the pHOS take limits for threatened Lower Columbia River coho salmon populations in the following tributaries: Coweeman River, Clatskanie River, Washougal River, and Grays/Chinook Rivers. The hatchery programs violated the pHOS take limits for threatened Lower Columbia River steelhead populations in the Washougal River and in the Kalama River.

B. Commerce and NMFS Are Violating Section 7 of the ESA by Funding the Hatcheries Under the Legally Deficient 2024 Mitchell Act BiOp.

NMFS reinitiated consultation on its funding of Mitchell Act hatcheries in 2023 because of noncompliance with the 2017 Mitchell Act BiOp. NMFS specifically identified the failure to implement weirs to reduce upstream migration of hatchery fish onto spawning grounds as requiring reinitiation. Instead of taking action against noncompliance with the 2017 Mitchell Act BiOp to reduce the illegal harm caused by the hatcheries, NMFS issued the 2024 Mitchell Act BiOp that purports to wipe away ongoing violations of the prior BiOp by allowing even more time to implement required measures and to come into compliance with pHOS take limits.

As described further below, the 2024 Mitchell Act BiOp is inconsistent with the ESA and

otherwise legally deficient. Commerce and NMFS are violating their substantive duty under section 7(a)(2) of the ESA to ensure that activities they fund will not jeopardize ESA-listed species or adversely modify their critical habitat by funding ODFW's and WDFW's Lower Columbia River Basin hatchery programs and facilities in reliance on that legally deficient BiOp. *See Wild Fish Conservancy v. Salazar*, 628 F.3d at 532 (reliance on a legally faulty BiOp violates section 7(a)(2) of the ESA). Some of the legal deficiencies with the 2024 Mitchell Act BiOp are summarized below; however, this description is not meant to be exhaustive.

The 2024 Mitchell Act BiOp is arbitrary and capricious because it is inconsistent with the requirements of 50 C.F.R § 402.14(h). The BiOp lacks an adequate summary of the information upon which it was based. The BiOp does not include proper detailed discussions of the environmental baseline of the listed species and critical habitat or of the effects of the action. The 2024 Mitchell Act BiOp fails to address the effects of the entire action as required by the ESA because it did not address activities that would not occur but for the actions addressed. The 2024 Mitchell Act BiOp does not sufficiently address or support NMFS's opinion that actions are not likely to jeopardize ESA-listed species or adversely modify their critical habitat.

The 2024 Mitchell Act BiOp's ITS is arbitrary and capricious because it is inconsistent with the requirements of 50 C.F.R § 402.14(i). The ITS is legally deficient because, *inter alia*, it does not adequately specify the impact or extent of the incidental taking of species, relies on inappropriate surrogates in lieu of numeric take limits, does not include appropriate reasonable and prudent measures to minimize impacts, does not include adequate terms and conditions to implement reasonable and prudent measures, does not include sufficient requirements to monitor the incidental take of ESA-listed species or to trigger the reinitiation of consultation if the anticipated impacts are exceeded, and does not specify the procedures to be used to handle or dispose of individual ESA-listed salmonids actually taken.

The 2024 Mitchell Act BiOp is arbitrary and capricious because NMFS failed to provide a sufficient explanation for various changes in its position from the 2017 Mitchell Act BiOp. For example, the 2017 Mitchell Act BiOp required certain measures be implemented by the Spring of 2022 to reduce take caused through genetic interactions, including reductions in the number of fish released from certain hatchery programs and implementation of weirs in specific tributaries. The 2017 Mitchell Act BiOp imposed pHOS take limits that became effective only after those measures were implemented; specifically, the pHOS limits were based on three- or four-year running means that only included pHOS data post-dating implementation of the reductions in hatchery releases and weirs. Accordingly, the 2017 Mitchell Act BiOp provided a lengthy compliance schedule for those pHOS take limits, with many becoming effective, if at all, near the termination of the 2017 Mitchell Act BiOp. The 2024 Mitchell Act BiOp abandons that approach and adopts another lengthy compliance schedule, with Lower Columbia River Basin hatchery programs not being subject to pHOS (and PNI (proportional natural influence) for steelhead) take limits until 2028 to 2034. NMFS failed to explain this dramatic change in position as to when these programs must comply with pHOS take limits in order to avoid jeopardizing ESA-listed salmonids.

The 2024 Mitchell Act BiOp is arbitrary and capricious because it relies on mitigation measures that are not subject to specific and binding plans and that are not subject to NMFS's

control or otherwise reasonably certain to be fully and timely implemented. For example, the BiOp assumes that weirs will be implemented in Abernathy and Germany Creeks. However, the 2017 Mitchell Act BiOp required implementation of those weirs by 2022, and NMFS does not explain why that did not occur or why it assumes it will now occur under the 2024 Mitchell Act BiOp.

The 2024 Mitchell Act BiOp fails to use the best scientific and commercial data available as required under the ESA. For example, the BiOp found that 75% of Spring Chinook salmon populations in the Lower Columbia River are increasing, while available data indicates that 75% of those populations are actually decreasing. Similarly, the 2024 Mitchell Act BiOp finds that the use of non-native Chambers Creek winter-run steelhead broodstock has been eliminated at the hatcheries. However, information dating back to 2009 indicates that WDFW's Beaver Creek/Elochoman River winter-run steelhead hatchery program has continuously used out-of-basin Chambers Creek steelhead broodstock. *See* Review & Recommendations, Elochoman River Winter Steelhead Population, Population & Related Hatchery Programs, Hatchery Scientific Review Group (Jan. 31, 2009). The 2024 Mitchell Act BiOp fails to adequately evaluate the ongoing genetic impacts of that program, including the impacts associated with continuing to utilize non-native Chambers Creek steelhead broodstock and the associated impact these fish have when they stray onto the spawning grounds of ESA-listed Lower Columbia River steelhead.

The 2024 Mitchell Act BiOp's jeopardy analyses are arbitrary and capricious. For example, the BiOp uses an inconsistent baseline for the jeopardy analysis that assumes ongoing releases at historic levels when assessing harms from the hatchery programs, but assumes no ongoing releases when assessing the supposed benefits of the hatchery programs. Similarly, the BiOp indicates that it is not possible to determine the risk status for the threatened Lower Columbia River steelhead but nonetheless makes a "no jeopardy" finding. Further, the 2024 Mitchell Act BiOp improperly includes hatchery steelhead in the abundance data for Lower Columbia River steelhead.

The 2024 Mitchell Act BiOp is arbitrary and capricious because it fails to fully and adequately assess the predicted impacts to ESA-listed species from climate change and determine whether the hatchery programs will jeopardize those species under predicted climate change scenarios.

The 2024 Mitchell Act BiOp, and NMFS's and Commerce's adoption of the 2024 Mitchell Act BiOp for their continued funding of Lower Columbia River Basin hatchery programs under the Mitchell Act, is arbitrary, capricious, and inconsistent with required procedures because the BiOp was issued and adopted without any of the notices, procedures, or reviews required by the National Environmental Policy Act ("NEPA"). New or supplemental NEPA processes were required because, since the 2014 final environmental impact statement ("FEIS") on Mitchell Act funding was completed, there have been substantial changes to the funded activities and because there are substantial new circumstances and information about the significance of the adverse effects of the funded activities. For example, some of the impacted ESA-listed species have significantly decreased in population sizes since the 2014 FEIS, including the threatened Mill/Abernathy/Germany Chinook salmon populations that are now

functionally or near functionally extinct. Similarly, much of the data and analyses in the 2014 FEIS pertaining to climate change and how it will impact ESA-listed species and their ecosystems is out of date and no longer reflects current knowledge. Also, the 2014 FEIS relied upon inaccurate data and/or misread data because, *inter alia*, it failed to apply correct expansion factors based on the number of hatchery fish released from certain programs that were coded wire tagged and thereby significantly underestimated the number of hatchery fish on spawning grounds.

The 2024 Mitchell Act BiOp is legally deficient because it includes assumptions and take limits that lack a sufficient basis. For example, the BiOp requires that certain programs limit the number of natural-origin returning adults used for hatchery broodstock to 33% of the total natural-origin returning adults. However, the BiOp provides no rationale for that limit or analysis as to whether it could result in excessive take of ESA-listed salmonid populations. Similarly, the 2024 Mitchell Act BiOp relies on PNI to limit take of threatened Lower Columbia River steelhead caused by ecological interactions without adequate explanation for how that limit will be implemented or whether it is adequate.

The 2024 Mitchell Act BiOp is inconsistent with the ESA because it provides take authorization for direct and intentional take of ESA-listed species. For example, the BiOp and ITS authorize take of ESA-listed salmonids for incorporation of those salmonids into the hatchery broodstock. The BiOp also authorizes direct and intentional take associated with research, monitoring, and evaluation activities.

The 2024 Mitchell Act BiOp is arbitrary and capricious because terms and conditions and other requirements are impermissibly vague and unenforceable. For example, the BiOp imposes a take limit for impacts from weirs that is no more than a 10% change in spawner distribution or no more than a 10% change in productivity from pre-weir conditions, whichever can be most reliably monitored and reported. This is impermissibly vague because it is unclear what limit applies, and it is unenforceable because pre-weir data is not available for all populations. Similarly, the BiOp prohibits any effluent discharges that exceed any applicable water quality standard, but the BiOp does not identify those standards or prescribe monitoring and reporting for this prohibition.

IV. Party Giving Notice of Intent to Sue.

The full names, addresses, and telephone numbers of the parties giving notice are:

Wild Fish Conservancy
15629 Main Street N.E.
Duvall, Washington 98019
Tel: (425) 788-1167

Wild Salmon Rivers d/b/a The Conservation Angler
P.O. Box 13121
Portland, Oregon 97213
Tel: (971) 235-8953

V. Attorneys Representing Wild Fish Conservancy and The Conservation Angler.

The attorneys representing Wild Fish Conservancy and The Conservation Angler in this matter are:

Brian A. Knutsen
Emma Bruden
Kampmeier & Knutsen, PLLC
1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
Telephone: (503) 841-6515

Erica Proulx
Kampmeier & Knutsen, PLLC
705 Second Avenue, Suite 901
Seattle, Washington 98104
Telephone: (206) 739-5184

VI. Conclusion.

This letter provides notice under section 11(g) of the ESA, 16 U.S.C. § 1540(g), of Wild Fish Conservancy and Wild Salmon Rivers d/b/a The Conservation Angler's intent to sue Commerce and NMFS for the violations of the ESA discussed herein. Unless the ongoing and imminent violations described herein are corrected within sixty days, the Conservation Groups intend to file suit to enforce the ESA. Wild Fish Conservancy and The Conservation Angler are available during the sixty-day notice period to discuss effective remedies and actions that will assure future compliance with the ESA.

Very truly yours,

KAMPMEIER & KNUTSEN, PLLC

By: _____
Brian A. Knutsen

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the United States that I am counsel for Wild Fish Conservancy and The Conservation Angler and that on September 8, 2025, I caused copies of the foregoing Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act Associated with Funding Lower Columbia River Hatcheries Under the Mitchell Act to be served on the following by depositing it with the U.S. Postal Service, postage prepaid, via certified mail, return receipt requested:

Secretary Howard Lutnick
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

Assistant Administrator Eugenio Piñeiro Soler
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

EXECUTED this 8th day of September, 2025 in Portland, Oregon.

By: _____
Brian A. Knutsen

APPENDIX

Hatchery Program	Program Operator	Integrated or Segregated	Production Goals	Five Year Average Production Level	Annual Maximum Production Level
Bonneville coho salmon	ODFW	Segregated	250,000	255,000	262,500
Bonneville fall Chinook salmon (tule)	ODFW	Segregated	6,000,000	6,120,000	6,300,000
Big Creek Chinook salmon (tule)	ODFW	Segregated	1,400,000	1,428,000	1,470,000
Big Creek coho salmon	ODFW	Segregated	735,000	749,700	771,750
Big Creek chum salmon	ODFW	Integrated	1,690,000	1,723,800	1,774,500
Big Creek (combined with Gnat Creek and Klaskanine) winter steelhead	ODFW	Segregated	147,000	149,940	154,350
Youngs Bay fall Chinook salmon (tule) (formerly Klaskanine, Big Creek Stock)	ODFW	Segregated	2,300,000	2,346,000	2,415,000
Clackamas summer steelhead	ODFW	Segregated	175,000	178,500	183,750
Clackamas winter steelhead	ODFW	Integrated	265,000	270,300	278,250
Clackamas spring Chinook salmon	ODFW	Integrated	1,100,000	1,122,000	1,155,000

Sandy River spring Chinook salmon	ODFW	Integrated	300,000	306,000	315,000
Sandy River winter steelhead	ODFW	Integrated	170,000	173,400	178,500
Sandy River summer steelhead	ODFW	Segregated	80,000	81,600	84,000
Sandy River coho salmon	ODFW	Segregated	300,000	306,000	315,000
Clatskanie River Tule Fall Chinook Supplementation Program	ODFW	Segregated	200,000	204,000	210,000
North Fork Toutle fall Chinook salmon (tule)	WDFW	Integrated	1,100,000	1,122,000	1,155,000
North Fork Toutle coho salmon	WDFW	Integrated	90,000	91,800	94,500
Kalama fall Chinook salmon (tule)	WDFW	Segregated	2,000,000	2,040,000	2,100,000
Kalama coho salmon - Type N	WDFW	Segregated	300,000	306,000	315,000
Kalama summer steelhead (integrated)	WDFW	Integrated	90,000	91,800	94,500
Kalama winter steelhead (integrated)	WDFW	Integrated	45,000	45,900	47,250

Kalama winter steelhead (KEWS)	WDFW	Segregated	90,000	91,800	94,500
Washougal fall Chinook salmon (tule)	WDFW	Integrated	1,200,000	1,224,000	1,260,000
Washougal coho salmon	WDFW	Integrated	108,000	110,160	113,400
Beaver Creek summer steelhead	WDFW	Segregated	30,000	30,600	31,500
Beaver Creek winter steelhead	WDFW	Segregated	130,000	132,600	136,500
Beaver Creek (Elochoman R) coho salmon	WDFW	Integrated	225,000	229,500	236,250
South Toutle summer steelhead	WDFW	Segregated	25,000	25,500	26,250
Coweeman winter steelhead	WDFW	Segregated	12,000	12,240	12,600
Klineline winter steelhead (Salmon Creek)	WDFW	Segregated	40,000	40,800	42,000
Washougal summer steelhead (Skamania Hatchery)	WDFW	Segregated	70,000	71,400	73,500
Washougal winter steelhead (Skamania Hatchery)	WDFW	Integrated	60,000	61,200	63,000

Rock Creek winter steelhead	WDFW	Segregated	20,000	20,400	21,000
Kalama Spring Chinook salmon	WDFW	Segregated	750,000	765,000	787,500
Grays River Fall Chinook Conservation Hatchery Program	WDFW	Integrated	361,000	368,220	379,050
Abernathy Fall Chinook Conservation Hatchery Program	WDFW	Integrated	113,000	115,260	118,650
		Totals:	**21,971,000**	**22,410,420**	**23,069,550**