Brian A. Knutsen, OSB No. 112266
Emma Bruden, OSB No. 163525
KAMPMEIER & KNUTSEN, PLLC
1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
(503) 841-6515 (Knutsen)
(503) 719-5641 (Bruden)
brian@kampmeierknutsen.com
emma@kampmeierknutsen.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

WILD FISH CONSERVANCY; and **WILD SALMON RIVERS d/b/a THE CONSERVATION ANGLER**,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE; **EUGENIO PIÑEIRO SOLER**, in his official capacity as the Assistant Administrator for Fisheries; **UNITED STATES DEPARTMENT OF COMMERCE**; and **HOWARD LUTNICK**, in his official capacity as the United States Secretary of Commerce,

Defendants.

Case No. 3:25-cv-02163

COMPLAINT

[ENVIRONMENTAL MATTER]

INTRODUCTION

1. The Columbia River was once one of the most productive salmon rivers in the world, with an estimated 7.5 to 16 million wild adult salmon and steelhead returning annually. Only around 660,000 adult salmon and steelhead have returned to the basin annually over the last couple decades, the majority of them hatchery-origin. Thirteen salmon and steelhead species in the Columbia River Basin are listed by the National Marine Fisheries Service ("NMFS") as endangered or threatened under the Endangered Species Act ("ESA"). It is unlawful to "take"—e.g., to harass, harm, pursue, wound, kill, trap, capture, or collect—any fish that are part of one of the thirteen listed salmonid species absent an applicable exception or authorization.

2. Congress passed the Mitchell Act, Public Law 75-502, in 1938 to "provide for the conservation of the fishery resources of the Columbia River." The statute authorized and directed the Secretary of Commerce to establish one or more salmon hatcheries and it provided that funds appropriated under the Mitchell Act may be expended to operate and maintain such hatcheries. 16 U.S.C. § 755. The Mitchell Act also provided for habitat restoration, as it authorized and directed the Secretary of Commerce to investigate measures needed to conserve fishery resources in the Columbia River Basin and to implement measures "for the improvement of feeding and spawning conditions for fish." *Id.* § 756. Congress has appropriated funds under the Mitchell Act on an annual basis since 1946. The Secretary of Commerce, through NMFS, has disbursed the vast majority of those funds for hatchery production and related activities and not for habitat restoration.

3. It was once believed that hatchery production could replace salmonid-sustaining ecosystems and provide an abundance of fish. It is now understood that, not only have hatcheries failed to meet those expectations, hatcheries are a primary cause of the decline of wild

salmonids. Hatchery fish harm wild salmonid populations and their ability to recover through a variety of mechanisms, including through genetic introgression and ecological interactions. Genetic introgression occurs when hatchery-origin fish mate in the wild with wild fish and thereby transfer their maladapted (domesticated) genetic traits to the wild salmonid populations. Such genetic transfers can substantially reduce the productivity of wild salmonid populations. Ecological interactions occur when hatchery fish compete with wild fish for resources, such as food and territory. Today, NMFS recognizes that salmon and steelhead hatchery production is one of the primary factors contributing to the decline of threatened salmonid populations in the Columbia River Basin, along with harvests, hydropower projects, and habitat degradation and loss.

4. Hatchery production in the Lower Columbia River Basin (i.e., below Bonneville Dam) has been particularly problematic. The Secretary of Commerce, through NMFS, funds much of that production under the Mitchell Act. Threatened wild salmonid populations in the region suffer from excessive numbers of hatchery fish on spawning grounds and in juvenile rearing and migration habitats. In 2024, Plaintiffs Wild Fish Conservancy and The Conservation Angler brought a lawsuit against Oregon State officials, Washington State officials, NMFS, and others because, inter alia, Oregon and Washington's hatchery programs in the Lower Columbia River Basin were causing more "take" of ESA-listed salmonids than NMFS had authorized through two biological opinions ("BiOps") issued under the ESA. Even though NMFS issued one of those BiOps in 2017, many take limits had only recently come into effect because the BiOp provided lengthy compliance schedules that gave the hatcheries many years to meet the limits. NMFS responded by rapidly issuing two new BiOp that purported to wipe away violations of the take limits and—again—provide the hatcheries with many additional years to

come into compliance with take limits needed to conserve threatened salmonid populations in the Lower Columbia River Basin.

5. Plaintiffs Wild Fish Conservancy and The Conservation Angler responded by issuing a new 60-day pre-suit notice letter dated September 8, 2025 that, inter alia, identified numerous deficiencies in one of the hastily issued new BiOps for Lower Columbia River Basin hatchery programs. In what appears to be a further attempt to delay review of its actions, NMFS replied after the expiration of the notice period with a letter conceding that "some clarification to the [BiOp] may be advisable" and asserting that NMFS therefore intends to "re-issue the [BiOp] with added clarification." However, NMFS did not identify what, if any, deficiencies delineated in the notice letter it intends to address or when it will "re-issue" the BiOp. Moreover, NMFS did not withdraw the deficient BiOp and it therefore appears that NMFS and the hatchery operators will continue to rely on the deficient BiOp for their implementation of hatchery programs.

6. Plaintiffs Wild Fish Conservancy and Wild Salmon Rivers d/b/a The Conservation Angler bring this action against Defendants for funding the release of tens of millions of hatchery fish into the Lower Columbia River Basin every year in a manner that jeopardizes the continued existence of threatened and endangered species in violation of section 7(a)(2) of the ESA. This lawsuit also challenges NMFS's ESA evaluations of Lower Columbia River Basin hatcheries and NMFS's authorizations for those hatcheries to "take" ESA-listed species provided through two BiOp. Finally, this lawsuit challenges NMFS's failure to undertake any new or supplemental review under the National Environmental Policy Act ("NEPA") for its funding under the Mitchell Act and its adoption of a new BiOp related to such funding. Plaintiffs Wild Fish Conservancy and The Conservation Angler seek declaratory and injunctive relief, and the recovery of litigation expenses, including attorney and expert witness fees.

JURISDICTION AND VENUE

7. This Court has jurisdiction under section 11(g) of the ESA, 16 U.S.C. § 1540(g) (citizen suit), the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331 (federal question). The requested relief is proper under the ESA, 16 U.S.C. § 1540(g)(1)(A), the APA, 5 U.S.C. § 706, 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief).

8. As required by the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), Plaintiffs Wild Fish Conservancy and The Conservation Angler provided 60 days' notice of their intent to sue, prior to filing the complaint, to the Defendants, including the Secretary of the United States Department of Commerce, through a letter dated and postmarked September 8, 2025 ("Notice Letter"). A copy of that Notice Letter is attached as **Exhibit 1** to this complaint.

9. The District of Oregon is a proper venue under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A) because many of the violations alleged, and/or substantial parts of the events and omissions giving rise to the claims, occurred and are occurring within such District.

PARTIES

10. Plaintiff Wild Fish Conservancy is a membership-based 501(c)(3) nonprofit organization incorporated in the State of Washington with its principal place of business in Duvall, Washington. Wild Fish Conservancy is dedicated to the preservation and recovery of the Northwest's native fish species and the ecosystems upon which those species depend. Wild Fish Conservancy brings this action on behalf of itself and its approximately 2,400 members. As an environmental watchdog, Wild Fish Conservancy actively informs the public on matters affecting water quality, fish, and fish habitat in the Northwest through publications, commentary to the press, and sponsorship of educational programs. Wild Fish Conservancy also conducts

field research on wild fish populations and designs and implements habitat restoration projects. Wild Fish Conservancy advocates and publicly comments on federal and state actions that affect the region's native fish and ecosystems. Wild Fish Conservancy seeks to compel government agencies to follow the laws designed to protect native fish species and their ecosystems, particularly threatened and endangered species. Wild Fish Conservancy considers the Southern Resident killer whale to be an integral part of the ecosystem for wild salmonids throughout the Northwest. Wild Fish Conservancy therefore considers protection of the Southern Resident killer whale to be a key part of its mission, and it has undertaken extensive efforts in furtherance thereof.

11. Plaintiff Wild Salmon Rivers, d/b/a The Conservation Angler, is a 501(c)(3) nonprofit organization incorporated in Washington with its principal place of business in Edmonds, Washington. The Conservation Angler works to protect and restore wild salmon, steelhead, trout, and char throughout their Pacific range, including the States of Washington and Oregon. The Conservation Angler educates the public about matters affecting wild salmonids and advocates for policies that protect these fish. The Conservation Angler regularly comments on federal and state actions related to salmon and steelhead hatchery operations and, when necessary, pursues litigation to protect threatened and endangered salmonid species and their habitat from hatchery operations.

12. Plaintiffs Wild Fish Conservancy and The Conservations Angler have representational standing through the procedural and substantive injuries caused by Defendants. Wild Fish Conservancy's and The Conservation Angler's members, supporters, and/or board members regularly spend time in areas in and around the Lower Columbia River and its tributaries. Wild Fish Conservancy's and The Conservation Angler's members, supporters,

and/or board members also spend time interacting with the ecosystems that depend on ESA-listed salmonids from the Lower Columbia River Basin, such as Southern Resident killer whale watching in Puget Sound and the Pacific Ocean. These members and/or constituents intend to continue to visit these areas and engage with these ecosystems on a regular basis. The members and/or constituents observe, study, photograph, and appreciate wildlife and wildlife habitat in and around these waters. The members and/or constituents also fish, hike, boat, swim, and snorkel in, on, and around these waters. The members and/or constituents would like to fish in these waters for wild salmon and steelhead or to increase opportunities for such activities, if those species were able to recover to a point where such activities would not impede the species' conservation and recovery.

13. Wild Fish Conservancy's and The Conservation Angler's members, supporters, and/or board members derive scientific, educational, recreational, health, conservation, spiritual, and aesthetic benefits from the Lower Columbia River and its tributaries, from the surrounding areas, from wild native fish species in those waters, and from the existence of natural, wild, and healthy ecosystems.

14. The past, present, and future enjoyment of Wild Fish Conservancy's and The Conservation Angler's interests and those of their members, supporters, and/or constituents, including the recreational, aesthetic, spiritual, and scientific interests, have been, are being, and will continue to be harmed by Defendants' failures to comply with the ESA and NEPA as described herein and by the members', supporters', and/or constituents' reasonable concerns related to Defendants' violations. These injuries include reduced enjoyment of time spent in and around the waters described above, fewer visits to those areas than would otherwise occur, and refraining from engaging in certain activities while visiting these areas, such as fishing, than

would otherwise occur. These injuries also include an inability to fish for wild salmonids due to their depressed status. These injuries also include reduced opportunities to observe, enjoy, and otherwise interact with Southern Resident killer whales due to their depressed status.

15. Wild Fish Conservancy's and The Conservation Angler's injuries and those of their members, supporters, and constituents are actual, concrete and/or imminent. The injuries that relate to substantive rights are fairly traceable to Defendants' violations described herein that the Court may remedy by declaring that Defendants' omissions and actions are illegal and/or issuing injunctive relief requiring Defendants to comply with their statutory obligations. For the injuries to Wild Fish Conservancy's, The Conservation Angler's, and those of their members, supporters, and constituents' procedural rights, requiring Defendants to comply with their statutory obligations could protect their concrete interests in wild salmonids and Southern Resident killer whales. Wild Fish Conservancy's and The Conservation Angler's members, supporters, and/or constituents will benefit from increased enjoyment of time spent in and around the waters described above and/or will visit the areas more frequently if Defendants are required by the Court to comply with the ESA and NEPA.

16. For example, one member of Wild Fish Conservancy lives in Portland, Oregon, and owns property on Hood River and the Wind River, both tributaries to the Columbia River, and is adversely affected by Defendants' conduct. This member has worked in the field of conservation in the Pacific Northwest for many years and cares deeply about protecting wild salmonids. This member regularly and currently uses many of the watersheds impacted by Defendants' unlawful conduct, such as when they boat on the Clackamas and Sandy Rivers, and fondly remembers catching wild steelhead as a child on the Toutle River (before Mount Saint Helens erupted) and the Lewis River. Defendants' conduct and this member's knowledge of the

current condition of ESA-listed species throughout the Lower Columbia River Basin adversely impact the member's use and enjoyment of the Clackamas and Sandy Rivers, and other watersheds throughout the area.

17. As another example, another member of Wild Fish Conservancy lives in Portland, Oregon, and has fished in the rivers throughout the Columbia River Basin since at least the 1970s. This member has founded several environmental groups aimed at native fish conservation and has led petitions to list various wild salmonids under the ESA. This member historically fished in the Elochoman River, Skamokawa River, Clatskanie River, Germany Creek, Toutle River, Coweeman River, Kalama River, East Fork Lewis River, Grays River, Washougal River, Sandy River, and Clackamas River, but they have not fished in a lot of these areas since the 1980s because of concern over declining populations of wild salmonids. If populations of wild fish recovered, this member would be able to fish in these rivers again. This member is distressed that they no longer can do the activities they love because of, in part, Defendants' conduct adversely impacting wild salmonids in the Lower Columbia River Basin.

18. Wild Fish Conservancy and The Conservation Angler each have organizational standing to bring this lawsuit for both procedural and substantive injuries caused by Defendants. Each organization has been actively engaged in a variety of educational, advocacy, and watchdog efforts to reduce hatchery impacts and improve salmon habitat in Washington in Oregon. Each organization has sought to educate the public and state and federal government officials throughout Washington and Oregon on the impacts of hatcheries on wild salmon, Southern Resident killer whales, and/or the greater ecosystem. Defendants' failures to comply with NEPA requirements—including, but not limited to, the failure to provide public notice, to seek public comment, and to disclose the actions, alternatives to the actions, and the impacts of

the actions and alternatives—has deprived each organization of opportunities for public input and of information that otherwise would be available and used by each organization in its educational, advocacy, and watchdog efforts. This information would be subject to public disclosures and public comment and would have assisted each organization in its ongoing efforts to educate and advocate for greater wild fish and environmental protection. Each organization and the public are deprived of this information, and each organization's ability to use and disclose such information to the public influences the public's ability to become members and supporters of each organization. Additionally, each organization has suffered injury because Defendants' violations have frustrated each organization's mission, and each organization has had to divert resources from other work to combat Defendants' unlawful conduct.

19. Thus, each organization's interests have been and are being adversely affected by Defendants' violations. These injuries, as related to substantive rights, are fairly traceable to the violations and redressable by the Court because they are a direct result of Defendants' conduct and because a Court order finding the Defendants liable for the violations and/or compelling compliance with the ESA and NEPA will remedy the injuries. Further, ordering Defendants to comply with the law could protect each organization's interests related to procedural rights, like those under NEPA.

20. Defendant National Marine Fisheries Service is an agency of the United States within the United States Department of Commerce. The Secretary for the United States Department of Commerce has delegated authority and responsibility to the National Marine Fisheries Service to disburse funds under the Mitchell Act. The National Marine Fisheries Service is responsible for the Mitchell Act disbursements at issue. The Secretary for the United States Department of Commerce has also delegated authority and responsibility to the National

Marine Fisheries Service to implement the ESA with respect to marine species, including anadromous salmonids and the Southern Resident killer whale. The National Marine Fisheries Service issued the two BiOps challenged herein.

21. Defendant Eugenio Piñeiro Soler is the Assistant Administrator for Fisheries at the National Marine Fisheries Service and is sued in that official capacity. Assistant Administrator Piñeiro Soler is responsible for ensuring that the National Marine Fisheries Service complies with the ESA and NEPA and could respond to injunctive relief orders from this Court related to the challenged funding of hatchery programs and BiOp. Defendants the National Marine Fisheries Service and Assistant Administrator Piñeiro Soler are hereafter collectively referred to as "NMFS."

22. Defendant United States Department of Commerce is an agency of the United States, of which NMFS is a sub-agency. The Mitchell Act authorizes and directs the Secretary of the United States Department of Commerce to implement its provisions, including those pertaining to the disbursement of funds appropriated under the Act. The ESA authorizes and directs the Secretary of the United States Department of Commerce to implement its provisions with respect to marine species, including anadromous salmonids and the Southern Resident killer whale.

23. Defendant Howard Lutnick is the Secretary of the United States Department of Commerce and is sued in that official capacity. Secretary Lutnick is responsible for ensuring that the United States Department of Commerce and NMFS comply with the ESA and NEPA with respect to their funding under the Mitchell Act and their issuance and adoption of BiOps. Secretary Lutnick could respond to injunctive relief orders from this Court related to the challenged funding of hatchery programs and the challenged BiOps. Defendants the United

States Department of Commerce and Secretary Lutnick are hereafter collectively referred to as "Commerce."

BACKGROUND

I. The Endangered Species Act.

24. The ESA is a federal statute enacted to provide a program to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). "Conserve," as used is in the ESA, means to use all methods and procedures necessary to bring threatened and endangered species to a point where the protections afforded by the statute are no longer necessary. *Id.* § 1532(3).

25. The ESA assigns certain implementation responsibilities to the Secretaries of the United States Department of the Interior and the United States Department of Commerce, who have delegated these duties to the Director of the United States Fish and Wildlife Service ("FWS") and the Assistant Administrator for Fisheries of the National Marine Fisheries Service, respectively.

26. Section 4 of the ESA requires NMFS and FWS to determine whether species are threatened or endangered and to list species as such under the statute. *Id.* § 1533(a)(1), (c)(1). Such a listing triggers various protective measures intended to conserve the species, including the designation of critical habitat and the preparation of a recovery plan. *Id.* § 1533(a)(3), (f).

27. Section 9 of the ESA makes it unlawful for any person to "take" species listed under the statute as endangered. *Id.* § 1538(a)(1). The take prohibition has been applied to certain species listed as threatened under the statute though regulations promulgated under section 4(d) of the ESA, *id.* § 1533(d). 50 C.F.R. §§ 17.21, 17.31(a), 223.102, 223.203(a). Section 9 of the ESA prohibits a violation of those regulations. 16 U.S.C. § 1538(a)(1)(G).

28. "Take" is defined broadly under the ESA to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. *Id.* § 1532(19).

29. "Harass" is defined to include an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3.

30. "Harm" is defined to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. *Id.* §§ 17.3, 222.102.

31. Section 7 of the ESA imposes substantive and procedural requirements on federal actions. *See id.* § 402.03. Substantively, it mandates that federal agencies "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification" of such species' critical habitat. 16 U.S.C. § 1536(a)(2); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

32. 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.

33. Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of listed species. *Id.*

34. Procedurally, section 7 of the ESA requires a federal agency planning an action that "may affect" listed species (the "action agency") to consult with NMFS and/or FWS (the "consulting agency"). *Id.* § 402.14(a). Such consultation is intended to facilitate compliance with the substantive mandate to avoid jeopardizing species or adversely modifying their critical habitat. *See Thomas v. Peterson*, 753 F.2d 754, 763–65 (9th Cir. 1985), *abrogated on other grounds*, *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091–92 (9th Cir. 2015).

35. Consultation under section 7 of the ESA results in the consulting agency's issuance of a BiOp determining whether the action is likely to jeopardize listed species or adversely modify critical habitat. 50 C.F.R. § 402.14(h)(3); *see id.* § 402.02. If jeopardy and adverse modification are not likely, or if the consulting agency proposes reasonable and prudent alternatives that will avoid jeopardy and adverse modification, the BiOp includes an incidental take statement ("ITS") defining the "take" anticipated to result from the action. 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. § 402.14(*i*)(1)(i). The ITS also includes requirements to minimize impacts to species and to monitor the take that occurs. 16 U.S.C. § 1536(b)(4)(C)(iii), (iv); 50 C.F.R § 402.14(*i*)(1)(ii), (*i*)(1)(iv), (*i*)(3); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 531–32 (9th Cir. 2010). Take in compliance with a BiOp and its ITS is exempt from liability under section 9 of the ESA. *See* 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(*i*)(5).

II. The National Environmental Policy Act.

36. The purpose of NEPA is, inter alia, to declare a national policy that will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate

the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 U.S.C. § 4321.

37. The NEPA regulations promulgated by the Council on Environmental Quality were rescinded in 2025. *See* 90 Fed. Reg. 10,610 (Feb. 25, 2025). However, the NEPA regulations in effect in 2024 apply to agency actions taken at that time.

38. NEPA requires federal agencies to undertake processes to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken" and that are "intended to help public officials make decisions that are based on understanding of environmental consequences." 40 C.F.R. § 1500.1(b) & (c) (2024)

39. To accomplish these purposes, NEPA requires federal agencies to prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

40. The "detailed statement," commonly known as an environmental impact statement ("EIS"), must describe the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

41. The EIS ensures that the agency considers detailed information on environmental impacts when reaching decisions and that the information will be made available to the larger audience that may also play a role in the decision-making process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

42. If a proposed action is neither one that normally requires an EIS nor one that normally does not require an EIS, the agency must prepare an environmental assessment ("EA") to determine whether an EIS is required. 40 C.F.R. § 1501.4(a), (b) (2024).

43. If the agency determines through the EA process that an EIS is not required for the proposed action, then the agency is required to issue a finding of no significant impact ("FONSI"). *Id.* § 1501.4(e) (2024).

44. Agencies are to consider certain factors when determining whether a particular proposed action requires preparation of an EIS, including, inter alia, whether the action may adversely affect an endangered or threatened species listed under the ESA or its critical habitat. *Id.* § 1508.27 (2024).

45. NEPA further provides that agencies "shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

46. Agencies must supplement a prior EIS or EA if there are "substantial changes in the proposed action that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on the action or its impacts." 40 C.F.R. § 1502.9(c)(1); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998), *overruled on other grounds*, *Lands Council v. McNair*, 537 F.3d 981, 997 (9th Cir. 2008). "As a rule of thumb . . . , if the EIS concerns an ongoing problem, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in [the NEPA regulations on supplementation] compel preparation of an EIS supplement." Council on Env't Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981).

III. Factual Background.

A. ESA-Listed Species and Designated Critical Habitat.

47. The Lower Columbia River Chinook salmon evolutionarily significant unit ("ESU") was listed as a threatened species under the ESA 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 (Sept. 2, 2005).

48. The Lower Columbia River coho salmon ESU was listed as a threatened species under the ESA 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. 9,251 (Mar. 25, 2016).

49. The Lower Columbia River steelhead distinct population segment ("DPS") was listed as a threatened species under the ESA 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 (Sept. 2, 2005).

50. The Columbia River chum salmon ESU was listed as a threatened species under the ESA 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 (Sept. 2, 2005).

51. The Upper Willamette River Chinook salmon ESU was listed as a threatened species under the ESA 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 (Sept. 2, 2005).

52. The Upper Willamette River steelhead DPS was listed as a threatened species under the ESA 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 (Sept. 2, 2005).

53. 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. Lower Columbia River Salmonid Hatchery Programs Funded by NMFS and Commerce Under the Mitchell Act.

54. Congress enacted the Mitchell Act, 16 U.S.C. §§ 755–757 (Public Law 75-502), on May 11, 1938, in an effort to mitigate adverse impacts to salmonids in the Columbia River Basin resulting from the construction of dams, water diversions, logging, and pollution.

55. 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.

56. Congress has appropriated funds under the Mitchell Act on an annual basis since 1946.

57. Commerce and NMFS distribute funds that Congress has appropriated 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.

58. Available information indicates that there are 36 salmon and steelhead programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) that are currently funded by Commerce and/or NMFS under the Mitchell Act. Appendix A to the Notice Letter, a copy of which is attached hereto as **Exhibit 1**, identifies those hatchery programs based upon the information currently available to Plaintiffs Wild Fish Conservancy and The Conservation Angler.

C. The SAFE Hatchery Programs.

59. Clatsop County (Oregon) Fisheries, ODFW, and/or WDFW currently implement three Select Area Fisheries Enhancement ("SAFE") hatchery programs in the Lower Columbia River Basin: the SAFE Coho Salmon Program; the SAFE Spring Chinook Salmon Program; and the SAFE Type-N Coho Salmon Program.

60. ODFW previously operated a fourth SAFE hatchery program producing Select Area Bright ("SAB") fall Chinook salmon using an out-of-basin/ESU Rogue River stock. ODFW has represented that it terminated this program following releases in 2024. However, fish released from this program will continue to return for two to five years following their release—through 2029.

61. The SAFE hatchery programs are isolated hatchery programs intended to benefit commercial and recreational fishing. These programs are not intended for conservation or recovery of at-risk or ESA-listed salmon populations and the hatchery stock used are not included within the ESA-listed ESUs.

D. The Lower Columbia River Basin Mitchell Act Hatchery Programs and the SAFE Hatchery Programs "Take" and Otherwise Harm ESA-Listed Species.

62. The 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 "take" the ESA-listed species identified above and otherwise adversely affect those species and their critical habitat.

63. The SAFE hatchery programs implemented in the Lower Columbia River Basin by Clatsop County Fisheries, ODFW, and/or WDFW "take" the ESA-listed species identified above and otherwise adversely affect those species and their critical habitat.

64. Section II.C of the Notice Letter, attached hereto as **Exhibit 1** and incorporated herein by this reference, describes certain ways in which the hatchery programs cause "take" of the ESA-listed species identified above and otherwise adversely affect those species and their critical habitat.

1. Broodstock Collection Activities Cause Take.

65. The hatchery programs take ESA-listed salmonids through broodstock collection activities. Broodstock collection activities are those associated with the capture of returning adults to supply the programs' broodstock; i.e., mature fish used for breeding. These activities can include employing a weir or barrier that forces migrating adults to enter a ladder or a trap or capturing adult fish using a net or a hook and line.

66. These activities take ESA-listed salmonids, for instance, by delaying their migration to natural spawning habitat or inflicting physical injury or causing death from capture or handling.

67. The programs take ESA-listed salmonids when the broodstock collection activities result in incidental or intentional collection, capture, trapping, and/or removal of ESA-listed salmonids.

68. Take also occurs when the broodstock collection activities, and/or structures or devices associated therewith, harm, harass, injure, and/or kill protected fish.

69. Broodstock collection activities also take ESA-listed salmonids when they affect the ability of ESA-listed salmonids to migrate, including when spawning migration is delayed or prevented.

2. Genetic Interactions Cause Take.

70. The hatchery programs cause take of ESA-listed salmonids through genetic introgression when reproduction between hatchery-origin and wild fish occurs, causing genes from hatchery fish to be transferred into wild salmonid populations.

71. Fish become domesticated in a hatchery environment and are thereby less fit to survive and reproduce in the wild. Genetic and epigenetic adaptation to captivity can occur rapidly—in a single generation—even when wild stocks are used for broodstock in a pure "conservation" hatchery program. This presents significant threats to wild populations even for purportedly integrated programs. *See*, *e.g.*, Mark R. Christie, et al., *Genetic Adaptation to Captivity Can Occur in a Single Generation*, 109 PROC. NAT'L ACAD. SCIENCES 238–42 (2011); Janna R. Willoughy, et al., *Long-term Demographic and Genetic Effects of Releasing Captive-Born Individuals into the Wild*, 33 CONSERVATION BIOLOGY 377–88 (2019); Janna R.

Willoughy, et al., *Captive Ancestry Upwardly Biases Estimates of Relative Reproductive Success*, 108 J. HEREDITY 583–87 (2017).

72. Take through genetic introgression occurs when hatchery fish spawn with ESA-listed salmonids and thereby pass maladaptive genes to the wild ESA-listed salmonid populations. The resultant offspring have markedly reduced fitness, dying at a much higher rate before spawning than would occur with two wild parents and producing on average significantly fewer of their own surviving offspring than wild parents do when they do survive to spawn. Introgression undermines wild populations' local adaptations to the watersheds where they evolved, with hatchery-wild hybrids also less resilient to climate change impacts (e.g., altered streamflow and temperature).

3. Ecological Interactions Cause Take.

73. The hatchery programs cause take of ESA-listed salmonids through ecological interactions between hatchery and wild fish.

74. The hatchery programs cause take of ESA-listed salmonids by increasing competition for food and space, including rearing and spawning territory.

75. The hatchery programs cause take of ESA-listed salmonids through predation. This occurs when the hatchery fish, including smolts and residualized fish, prey on protected fish. The hatchery programs also cause take when hatchery fish—less fit for survival in the wild and released en masse—attract predators that then consume ESA-listed salmonids. Predation also occurs when predators are attracted to fish reared in net pens under the SAFE programs or other hatchery programs, resulting in increased predation on ESA-listed fish in and around the net pens.

76. The hatchery programs cause take of ESA-listed salmonids through increased competition for spawning mates and redd superimposition.

4. Hatchery Facility Effects and Monitoring Activities Cause Take.

77. The hatchery programs cause take of ESA-listed salmonids through various facility effects and through program monitoring and evaluation activities.

78. For example, the hatchery programs cause take because the hatcheries create a false attractant for ESA-listed salmonids. Take occurs when the ESA-protected fish are harmed, injured, delayed, or killed when attempting to enter hatchery facilities, including facility outfalls and fish ladders. Take also occurs when the protected fish enter hatchery facilities and are thereby captured, trapped, or collected by the hatchery. Additional take occurs when ESA-listed salmonids that have entered hatchery facilities are injured or killed in the hatchery environment or during attempts to return them to the wild and when their spawning migration is delayed or prevented.

79. The hatchery programs also cause take because the effluent, including pathogens, pharmaceuticals, and other pollutants, discharged from the hatcheries adversely affects ESA-listed salmonids.

80. The water withdrawals at the hatcheries also cause take of ESA-listed salmonids by reducing water flow in the rivers and streams and because protected fish are harmed, injured, killed, trapped and/or captured (i.e., entrained) by the surface water intake structures.

81. The hatchery programs also cause take when weirs and other in-stream structures delay or prevent ESA-listed salmonids' migration abilities, including their ability to migrate to upstream spawning habitats.

82. Activities designed for research, monitoring, and evaluation ("RM&E") of the effectiveness and of the impacts of hatchery programs cause take of ESA-listed salmonids. For example, such activities can adversely affect the behavior of wild fish and reduce their survival.

5. The Hatchery Programs Harm and Take Southern Resident Killer Whales by Reducing Their Prey Availability.

83. The hatchery programs cause take of Southern Resident killer whales 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.

84. Such take occurs in a variety of ways, including by: reducing the productivity of wild salmonid populations; increasing fishing pressure in the marine and freshwater environments; reducing the average size of Chinook salmon (Southern Resident killer whales evolved to prey primarily on larger, older wild Chinook); increasing the abundance of smaller hatchery-origin Chinook salmon that also have lower energetic levels (primarily lipids) per pound than wild Chinook salmon, requiring Southern Resident killer whales to expend more time and energy chasing and capturing these fish and thereby also ingesting greater amounts of persistent organic pollutants (POPs) than if they were able to forage on larger wild Chinook salmons; and, hampering the recovery of wild Chinook salmon and other salmon populations.

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

85. Plaintiffs Wild Fish Conservancy and The Conservation Angler, along with other plaintiffs, filed suit against NMFS and others in 2016 because NMFS was continuing to rely on a severely outdated 1999 BiOp for its funding of Mitchell Act hatchery programs.

86. NMFS responded by issuing a BiOp with an ITS on January 15, 2017 for hatchery programs it funds under the Mitchell Act ("2017 Mitchell Act BiOp"). The 2017 Mitchell Act BiOp sought to address Mitchell Act funding for fiscal years 2016 through 2025.

87. The 2017 Mitchell Act BiOp 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*, reductions in the number of hatchery fish produced at certain facilities and implementation of weirs in specific tributaries to reduce the number of hatchery fish reaching upstream spawning habitats used by ESA-listed species. 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.

88. NMFS commonly uses the metric of "pHOS" when imposing limits on the amount of take caused by genetic interactions between hatchery salmonids and ESA-listed salmonids. "pHOS," or "proportion of hatchery-origin spawners," represents the percentage of adult salmon present on spawning grounds that are hatchery-origin fish.

89. The 2017 Mitchell Act BiOp required that the Phase II measures be implemented by 2022 to reduce genetic risks to certain ESA-listed salmonid populations and to achieve certain pHOS take limits. The pHOS take limits for those ESA-listed salmonid populations did not go into effect under the 2017 Mitchell Act BiOp until the effects of the Phase II measures would be reflected in the pHOS data; i.e., until the impacts of the weirs and the reductions in the number of hatchery fish released would have been seen in the number of adult hatchery fish on spawning grounds. Juvenile salmon and steelhead released from hatcheries (or spawned naturally) do not return to streams as adult spawners for several years. Moreover, the BiOp's take limits were not based on a single year of pHOS data, but instead were three-year and four-year (depending on the species) running arithmetic means that required three- and four-years' worth of data. As a result, several pHOS take limits did not go into effect until many years after the 2017 Mitchell

Act BiOp was issued; some take limits never went into effect for the entire life of the 2017 Mitchell Act BiOp.

90. On August 7, 2023, NMFS notified WDFW that NMFS was reinitiating ESA consultation with respect to the 2017 Mitchell Act BiOp following WDFW's failure to implement certain weirs required as Phase II measures. NMFS issued another letter dated September 28, 2023, to WDFW, ODFW, and others reiterating NMFS's intent to reinitiate ESA consultation due to WDFW's failure to comply with requirements of the 2017 Mitchell Act BiOp.

91. Plaintiffs Wild Fish Conservancy and The Conservation Angler issued a notice of intent to sue letter dated January 26, 2024 and filed a complaint on April 17, 2024 alleging numerous ESA violations related to Mitchell Act hatchery programs in the Lower Columbia River Basin. The alleged ESA violations included those related to WDFW's failure to implement weirs as required and violations of pHOS take limits that had finally come into effect.

92. NMFS issued a new BiOp for its funding of hatchery programs under the Mitchell Act dated December 30, 2024 ("2024 Mitchell Act BiOp"). The 2024 Mitchell Act BiOp indicated that funds are currently provided to 50 hatchery programs operated at 25 hatchery facilities within the Columbia River Basin.

93. The 2024 Mitchell Act BiOp found that "take" of ESA-listed species will result from the hatchery programs through a variety of mechanisms, including:

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

- Ecological effects of adult hatchery-origin fish competing for spawning sites with natural-origin spawners or superimposing redds;
- 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;
- Ecological effects from interactions between juvenile hatchery-origin fish and natural-origin salmonids in rearing and migratory areas, including predation, competition, and pathogen transmission;
- 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
- Construction, operation, and maintenance of hatchery facilities will cause take of ESA-listed species, including water withdrawals, and intake structures.

94. The 2024 Mitchell Act BiOp concluded that the hatchery programs will not jeopardize ESA-listed species or adversely modify their critical habitat, and it includes an ITS authorizing take associated with the hatchery programs subject to various take limits and terms and conditions.

95. The 2024 Mitchell Act BiOp backtracked from certain requirements of the 2017 Mitchell Act BiOp. For example, while the 2017 Mitchell Act BiOp required that weirs be installed and implemented in specific tributaries by 2022, the 2024 Mitchell Act BiOp extended that deadline to 2026 and 2027 for Germany Creek and Abernathy Creek, respectively. The wild Chinook salmon populations in those two creeks are now functionally extirpated due, in large part, to hatchery introgression. Similarly, while the 2017 Mitchell Act BiOp imposed pHOS take

limits that became effective after there was three or four years' worth of pHOS data that was representative of the Phase II measures (which were to be implemented by 2022), the 2024 Mitchell Act BiOp wiped away ongoing violations of those take limits and further delayed deadlines to comply with pHOS take limits.

96. Plaintiffs Wild Fish Conservancy and The Conservation Angler issued the new Notice Letter on September 8, 2025, notifying NMFS of numerous deficiencies in the hastily prepared 2024 Mitchell Act BiOp. NMFS responded after the 60-day notice period with a letter dated November 19, 2025, in which NMFS conceded that "some clarification to the [2024 Mitchell Act BiOp] may be advisable" and NMFS asserted that it intends to "re-issue the [2024 Mitchell Act BiOp] with added clarification." NMFS did not identify what issues it will address or when it will "re-issue" the BiOp. NMFS did not indicate that it was withdrawing the 2024 Mitchell Act BiOp and it therefore appears that NMFS, WDFW, and ODFW will continue to rely on that BiOp, despite the conceded deficiencies, for their implementation of Lower Columbia River Basin hatchery programs.

F. <u>ESA Consultations on SAFE Hatchery Programs</u>.

97. NMFS issued a BiOp for the SAFE hatchery programs on May 3, 2021 ("2021 SAFE BiOp"). The 2021 SAFE BiOp addressed the three SAFE hatchery programs that are currently operated by WDFW, ODFW, and Clatsop County Fisheries: the SAFE Coho Salmon Program; the SAFE Spring Chinook Salmon Program; and the SAFE Type-N Coho Salmon Program. The 2021 SAFE BiOp did not evaluate or authorize take resulting from ODFW's SAB Fall Chinook SAFE hatchery program.

98. The 2021 SAFE BiOp imposed pHOS take limits to protect ESA-listed salmonid populations in several Lower Columbia River tributaries consistent with the pHOS take limits of the 2017 Mitchell Act BiOp for those same tributarie.

99. In addition to addressing Mitchell Act hatchery programs, Plaintiffs Wild Fish Conservancy and The Conservation Angler's 2024 ESA lawsuit discussed above alleged that the SAFE hatchery programs were violating requirements of the 2021 SAFE BiOp, including pHOS take limits.

100. Plaintiffs Wild Fish Conservancy and The Conservation Angler issued another notice of intent to sue letter dated April 9, 2024, alleging that NMFS had a duty to reinitiate ESA consultation on the 2021 SAFE BiOp because the SAFE hatchery programs were causing violations of certain pHOS take limits imposed by that BiOp. NMFS responded via letter dated June 10, 2024, indicating that it was reinitiating ESA consultation.

101. NMFS issued a new BiOp for the SAFE hatchery programs dated March 5, 2025 ("2025 SAFE BiOp"). As with the 2021 SAFE BiOp, the 2025 SAFE BiOp addressed the three SAFE hatchery programs that are currently operated by WDFW, ODFW, and Clatsop County Fisheries: the SAFE Coho Salmon Program; the SAFE Spring Chinook Salmon Program; and the SAFE Type-N Coho Salmon Program. The 2025 SAFE BiOp did not evaluate or authorize take resulting from ODFW's SAB Fall Chinook SAFE hatchery program.

102. The 2025 SAFE BiOp found that "take" of ESA-listed species will result from the SAFE hatchery programs through a variety of mechanisms, including:

- Genetic interactions between adult hatchery fish and ESA-listed salmonids on spawning grounds;

- Ecological interactions between hatchery fish and ESA-listed salmonids in juvenile rearing areas, including predation and competition for resources;
- 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;
- Construction, operation, and maintenance of the SAFE hatchery facilities, including net pens, will cause take of ESA-listed species, including due to water withdrawals, intake structures, and impacts on water quality.

103. The 2025 SAFE BiOp concluded that the SAFE hatchery programs will not jeopardize ESA-listed species or adversely modify their critical habitat, and it included an ITS authorizing take associated with the hatchery programs subject to various take limits and terms and conditions.

104. Plaintiffs Wild Fish Conservancy and The Conservation Angler voluntarily dismissed their suit related to the 2017 Mitchell Act BiOp and the 2021 SAFE BiOp following NMFS's issuance of the 2024 Mitchell Act BiOp and the 2025 SAFE BiOp.

G. The 2024 Mitchell Act BiOp and 2025 SAFE BiOp Are Inconsistent with the ESA.

105. The 2024 Mitchell Act BiOp and the 2025 SAFE BiOp (collectively, the "Hatchery BiOps") are inconsistent with 50 C.F.R. § 402.14(h). The Hatchery BiOps lack an adequate summary of the information upon which they were based. The Hatchery BiOps do not include proper and detailed discussions of the environmental baselines of the listed species and critical habitat or of the effects of the actions. The Hatchery BiOps fail to address the effects of the entire actions as required by the ESA because they do not address all activities that would not occur but for the actions addressed, including overexploitation of ESA-listed salmonids in

fisheries targeting hatchery fish. The Hatchery BiOps do not sufficiently address or support NMFS's opinions that actions are not likely to jeopardize ESA-listed species or adversely modify their critical habitat.

106. For example, the 2024 Mitchell Act BiOp uses an inconsistent baseline for the jeopardy analysis where the baseline includes ongoing hatchery releases at historic levels when assessing harms from the hatchery programs but excludes ongoing hatchery releases when assessing the supposed benefits of the hatchery programs. Similarly, the 2024 Mitchell Act 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 for that species. The 2024 Mitchell Act BiOp improperly includes hatchery steelhead in the abundance data for Lower Columbia River steelhead. Further, the 2024 Mitchell Act BiOp requires that certain hatchery programs limit the number of natural-origin returning adults used for hatchery broodstock to 33% of the total natural-origin returning adults, but NMFS fails to provide an adequate rationale for that limit or an adequate analysis as to whether the limit could result in excessive take of ESA-listed salmonids.

107. The Hatchery BiOps fail to adequately address the ongoing harm caused by ODFW's SAB Fall Chinook SAFE hatchery program. That program will continue to contribute out-of-basin/ESU adult hatchery fish to spawning grounds through 2029, including to spawning grounds where hatchery fish released under the Hatchery BiOps are also present.

108. The ITSs included in the Hatchery BiOps are inconsistent with 50 C.F.R. § 402.14(i). The ITSs are legally deficient because, inter alia, they do not adequately specify the impact or extent of the incidental taking of species, rely on inappropriate surrogates in lieu of numeric take limits, do not include appropriate or timely reasonable and prudent measures to

minimize impacts, do not include adequate terms and conditions to implement reasonable and prudent measures, do 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 do not specify the procedures to be used to handle or dispose of individual ESA-listed salmonids actually taken.

109. As one example, the ITS in the 2025 SAFE BiOp used pHOS as a surrogate for take caused by genetic interactions, but only fish from the SAFE hatchery programs were to be counted towards the limits even though other hatchery fish are likely to be present and contributing to the actual pHOS levels experienced by ESA-listed salmonids. Such a limit could allow unacceptable levels of take of ESA-listed salmonids and NMFS failed to adequately explain how the limit is sufficiently protective. For example, under this limit, increasing the number of Mitchell Act hatchery fish on spawning grounds would increase the permissible number of SAFE hatchery fish allowed on spawning grounds where the number of wild fish remained constant, allowing increasingly more harm to wild salmonids without exceeding the 2025 SAFE BiOp's pHOS take limits. Similarly, the 2025 SAFE BiOp did not provide any rational basis for excluding hatchery fish produced by ODFW's SAB Fall Chinook SAFE hatchery program from the pHOS take limit. Further, NMFS failed to include adequate terms and conditions in the 2025 SAFE BiOp for monitoring and reporting pHOS data under these take limits and NMFS failed to even explain how such pHOS data limited to SAFE hatchery fish could be sufficiently monitored.

110. Similarly, the ITS in the 2024 Mitchell Act BiOp relied on the metric PNI—proportion of natural influence—as a surrogate to limit the amount of take of threatened Lower Columbia River steelhead caused by ecological interactions without adequate explanation for

whether that limit is adequately protective. The 2024 Mitchell Act BiOp failed to adequately explain how the PNI take limit will be implemented and the ITS lacked sufficient terms and conditions for monitoring and reporting PNI data under the take limit. Further, the 2024 Mitchell Act BiOp prohibited any effluent discharges that exceed any applicable water quality standard, but the ITS in the 2024 Mitchell Act BiOp did not prescribe monitoring and reporting requirements for this prohibition.

111. The 2024 Mitchell Act BiOp 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 in 2024. 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 for steelhead) take limits until 2028 to 2034. NMFS failed to explain its dramatic change in position as to when these programs must comply with pHOS take limits in order to avoid jeopardizing ESA-listed salmonids.

112. The Hatchery BiOps impermissibly relied 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 2024 Mitchell Act 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 that timely implementation will now occur under the 2024 Mitchell Act BiOp.

113. The Hatchery BiOps failed to use the best scientific and commercial data available as required under the ESA. For example, the Hatchery BiOps indicated that 75% of Spring Chinook salmon populations in the Lower Columbia River are increasing, while the best available data indicates that 75% of those populations are actually decreasing. Similarly, the 2024 Mitchell Act BiOp indicated that the use of non-native Chambers Creek winter-run steelhead broodstock has been eliminated at Mitchell Act hatcheries. However, available information indicates that WDFW's Beaver Creek/Elochoman River winter-run steelhead hatchery program continues to use out-of-basin Chambers Creek steelhead broodstock. The 2024 Mitchell Act BiOp failed 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.

114. The 2024 Mitchell Act BiOp failed to adequately evaluate impacts using the best scientific and commercial data available for WDFW's Abernathy Creek Fall Chinook salmon hatchery program. That was previously a segregated hatchery program; i.e., one that seeks to maintain a hatchery population that is separate/isolated from the wild population. Such segregation was important because the previous hatchery stock became introgressed with out-of-basin/ESU SAB Chinook salmon genetics. WDFW recently converted this hatchery program to a

"conservation" hatchery program in an effort to rebuild the now functionally-extirpated Chinook salmon population with natural-origin tule Chinook salmon from the Elochoman River. The 2024 Mitchell Act BiOp failed to adequately evaluate this new program, including whether or not the new hatchery program triggers an ESA listing of this hatchery stock under NMFS's hatchery listing policy.

115. The Hatchery BiOps failed 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.

116. The ITSs in the Hatchery BiOps are inconsistent with the ESA because they authorize direct and intentional (and not merely incidental) take of ESA-listed salmonids. For example, both ITSs authorize direct and intentional take associated with research, monitoring, and evaluation activities. The ITS in the 2024 Mitchell Act BiOp further authorizes direct and intentional take of ESA-listed salmonids associated with broodstock collection activities for certain hatchery programs.

117. The Hatchery BiOps included provisions that are impermissibly vague and unenforceable. For example, the 2024 Mitchell Act BiOp imposed a take limit for impacts associated with 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 take surrogate is impermissible because it is unclear what limit applies and because it is unenforceable because pre-weir data are not available for all relevant salmonid populations. Similarly, the 2024 Mitchell Act BiOp prohibits any effluent discharges that exceed any applicable water quality standard, but the 2024 Mitchell Act BiOp does not identify those standards.

H. The 2024 Mitchell Act BiOp Was Adopted and Issued Without NEPA Compliance.

118. NMFS prepared a programmatic EIS under NEPA for its funding of Mitchell Act hatchery programs dated August 27, 2014 ("2014 Mitchell Act EIS"). The 2014 Mitchell Act EIS explained that "NMFS anticipates that the resource effects analyzed in this EIS will be informative for policy decisions for approximately 10 years."

119. A federal agency's adoption of a BiOp and ITS requires compliance with NEPA procedures, as does NMFS's issuance of an ITS where there is not another federal agency that will undertake NEPA compliance. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 643–46 (9th Cir. 2014).

120. Commerce and NMFS did not undertake any NEPA procedures before issuing and adopting the 2024 Mitchell Act BiOp. Commerce and NMFS did not provide any public notice or opportunity for public comment. Commerce and NMFS did not prepare an EIS or an EA and FONSI for the 2024 Mitchell Act BiOp. Commerce and NMFS did not develop, disclose, or otherwise consider alternatives under NEPA for the 2024 Mitchell Act BiOp. Instead, the 2024 Mitchell Act BiOp indicated that new or supplemental NEPA procedures were not needed given the 2014 Mitchell Act EIS.

121. Since the 2014 Mitchell Act EIS was issued, there have been substantial changes to Mitchell Act funded activities and there are substantial new circumstances, science, and information about the significance of the adverse effects of the funded activities that warrant new or supplemental NEPA analysis. For example, some of the impacted ESA-listed species have significantly decreased in population sizes since the 2014 Mitchell Act EIS, 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 Mitchell Act EIS

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. There are also much more data and information on the ineffectiveness of weirs in decreasing pHOS and on the adverse unintended consequences of weirs. Also, it is now known that the 2014 Mitchell Act EIS relied on insufficient or inaccurate data (and/or NMFS misread the 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 the 2014 Mitchell Act EIS thereby significantly underestimated the number of hatchery fish on spawning grounds. There have also been significant changes to the hatchery programs that are funded since the 2014 Mitchell Act EIS was issued. For example, WDFW's Abernathy Creek Fall Chinook salmon hatchery program recently converted from a mitigation hatchery program intended to benefit fisheries to a conservation hatchery program; moreover, that change occurred without an adequate evaluation of whether the new hatchery program conflicts with NMFS's current ESA-listing decision for Lower Columbia River Chinook salmon per NMFS's hatchery listing policy.

CAUSES OF ACTION

Claim I: NMFS and Commerce Are Violating Section 7 of the ESA by Failing to Ensure that Lower Columbia River Basin Mitchell Act Hatcheries Will Not Jeopardize Species.

122. Plaintiffs Wild Fish Conservancy and The Conservation Angler re-allege and incorporate by reference each and every allegation set forth above.

123. The salmonid hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) funded by NMFS and Commerce under the Mitchell Act "take" and otherwise adversely affect the ESA-listed species and critical habitat identified above in the manners described herein and in Section II.C of the Notice Letter, attached hereto as **Exhibit 1** and incorporated herein by this reference. 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 that species' decline.

124. Since the 2024 Mitchell Act BiOp was issued, NMFS and Commerce have funded and are continuing to fund Lower Columbia River Basin (i.e., below Bonneville Dam) salmonid hatchery programs and associated activities in reliance on the 2024 Mitchell Act BiOp despite that BiOp's legal deficiencies. NMFS and Commerce have thereby failed to ensure that their funding of salmonid hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam) under the Mitchell Act is not likely to jeopardize the continued existence of the ESA-listed species identified above or result in the destruction or adverse modification of their critical habitat identified above in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).

125. These violations are reviewable under section 11(g) of the ESA, 16 U.S.C. § 1540(g).

Claim II: The 2024 Mitchell Act BiOp Is Arbitrary and Not in Accordance With Law.

126. Plaintiffs Wild Fish Conservancy and The Conservation Angler re-allege and incorporate by reference each and every allegation set forth above.

127. The 2024 Mitchell Act BiOp is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

128. These violations are reviewable under the APA, 5 U.S.C. §§ 701–706.

Claim III: The 2025 SAFE BiOp Is Arbitrary and Not in Accordance With Law.

129. Plaintiffs Wild Fish Conservancy and The Conservation Angler re-allege and incorporate by reference each and every allegation set forth above.

130. The 2025 SAFE BiOp is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

131. These violations are reviewable under the APA, 5 U.S.C. §§ 701–706.

Claim IV: NMFS and Commerce Violated NEPA in Issuing and Adopting the 2024 Mitchell Act BiOp.

132. Plaintiffs Wild Fish Conservancy and The Conservation Angler re-allege and incorporate by reference each and every allegation set forth above.

133. NMFS and Commerce violated NEPA by adopting and/or issuing the 2024 Mitchell Act BiOp, including the ITS included therein, without preparing a new or supplemental EIS or, alternatively, without preparing a new or supplemental EA and FONSI.

134. NMFS and Commerce violated NEPA by adopting and/or issuing the 2024 Mitchell Act BiOp, including the ITS included therein, without studying, developing, and describing appropriate alternatives.

135. These violations are reviewable under the APA, 5 U.S.C. §§ 701–706.

REQUESTS FOR RELIEF

WHEREFORE, Wild Fish Conservancy and The Conservation Angler request that this Court:

A. Issue a declaratory judgment declaring that NMFS and Commerce are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for failing to ensure that their funding of salmonid hatchery programs in the Lower Columbia River Basin (i.e., below Bonneville Dam)

under the Mitchell Act is not likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of their critical habitat;

B. Issue a declaratory judgment declaring that the 2024 Mitchell Act BiOp, including the ITS provided therewith, does not comply with ESA standards and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

C. Issue a declaratory judgment declaring that the 2025 SAFE BiOp, including the ITS provided therewith, does not comply with ESA standards and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

D. Issue a declaratory judgment declaring that NMFS and Commerce violated NEPA in adopting and/or issuing the 2024 Mitchell Act BiOp, including the ITS provided therein, without preparing a new or supplemental EIS, or, alternatively, without preparing a new or supplemental EA and FONSI, and without developing, studying, and describing alternatives;

E. Issue a mandatory injunction requiring NMFS and Commerce to comply with the ESA and NEPA;

F. Set aside the 2024 Mitchell Act BiOp, including the ITS provided therein, with respect to Lower Columbia River Basin (i.e., below Bonneville Dam) hatchery programs;

G. Set aside the 2025 SAFE BiOp, including the ITS provided therein;

H. Grant such preliminary and/or permanent declaratory, injunctive, or other relief as Plaintiffs Wild Fish Conservancy and The Conservation Angler may from time to time request during the pendency and resolution of this case;

I. Award Plaintiffs Wild Fish Conservancy and The Conservation Angler their reasonable litigation expenses, including attorney fees, expert witness fees, Court costs, and other expenses as necessary for the preparation and litigation of this case under section 11(g)(4)

of the ESA, 16 U.S.C. § 1540(g)(4), the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and/or as otherwise authorized by law; and

J. Grant such additional relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 21st day of November 2025.

KAMPMEIER & KNUTSEN, PLLC

By: s/ Brian A. Knutsen
Brian A. Knutsen, OSB No. 112266

By: s/ Emma Bruden
Emma Bruden, OSB No. 163525

1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
Telephone: (503) 841-6515 (Knutsen)
(503) 719-5641 (Bruden)
Email: brian@kampmeierknutsen.com
emma@kampmeierknutsen.com

Attorneys for Plaintiffs Wild Fish Conservancy and Wild Salmon Rivers d/b/a The Conservation Angler

EXHIBIT 1

KAMPMEIER & KNUTSEN, PLLC

ATTORNEYS AT LAW

BRIAN A. KNUTSEN
Licensed in Oregon & Washington
503.841.6515
brian@kampmeierknutsen.com

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.
Washington, D.C. 20230

Assistant Administrator Eugenio Piñeiro Soler
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910
Email: eugenio.e.pineirosoler@noaa.gov

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**