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November 17, 2026

Via Certified Mail — Return Receipt Requested (And Email Where Indicated)

Secretary Howard Lutnick
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230
Email: thesec@doc.gov

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 Associated with the 12-Month Finding Not to List Olympic Peninsula Steelhead

Dear Honorable Civil Servants,

This letter provides notice of Wild Fish Conservancy's (the "Conservancy") intent to sue the National Marine Fisheries Service and Assistant Administrator Eugenio Piñeiro Soler (in his official capacity as the Assistant Administrator for Fisheries) (collectively, "NMFS") and 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") for violations related to their decision to not list the Olympic Peninsula ("OP") steelhead distinct population segment ("DPS") as threatened or endangered under Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533. As further detailed below, NMFS's and Commerce's 12-Month Finding on a Petition to List the Olympic Peninsula Steelhead Distinct Population Segment Under the Endangered Species Act ("12-Month Finding" or "'not-warranted' finding"), 91 Fed. Reg. 1449 (Jan. 14, 2026), is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, including 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 requires NMFS to determine, "solely on the basis of the best scientific and commercial data available," whether species should be listed as endangered or threatened and designate "critical habitat" for such species. 16 U.S.C. §§ 1532(16), 1533(a), (b). The statute defines species to include "any distinct population segment of any vertebrate species that interbreeds when mature." 50 C.F.R. § 424.02.

A species is endangered when it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is threatened if it is "likely to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20). NMFS must determine the status of a species based on one or more of the following factors: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(a)(1).

Interested persons may petition NMFS to list a species. 16 U.S.C. § 1533(b)(3)(A). Within 90 days of receiving a petition to list a species under the ESA, NMFS must make "a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* ESA-implementing regulations issued jointly by NMFS and FWS define "substantial scientific or commercial information" as "credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted." 50 C.F.R. § 424.14(h)(i).

If NMFS determines listing may be warranted, it must conduct a scientific review of the "status of the species concerned." 16 U.S.C. § 1533(b)(3)(A). Then, within 12 months of the date that NMFS received the petition, NMFS must make one of the following determinations: (1) listing is "not warranted"; (2) listing is "warranted"; or (3) listing is "warranted but precluded." 16 U.S.C. § 1533(b)(3)(B). A "not warranted" finding "shall be subject to judicial review." 16 U.S.C. § 1533(b)(3)(C)(ii).

NMFS must consider the relevant factors and articulate, within the 12-month finding, a rational connection between the facts found and the ESA listing decision made. *See Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1069 (9th Cir. 2018). Agency action is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider, failed entirely to consider an important aspect of the problem, offered an explanation that runs

counter to the evidence, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *State Farm*, 463 U.S. at 43; *see also* 5 U.S.C. § 706(2)(A) (courts must "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]". In the context of ESA listing decisions, failure to utilize the best available science or reliance on factors outside of those in the statute is arbitrary and capricious. *See, e.g.*, 50 C.F.R. § 424.11(b), (c).

II. Factual Background.

A. Olympic Peninsula Steelhead.

OP steelhead are a DPS of steelhead occupying river basins of the Olympic Peninsula, Washington, west of the Elwha River and South to Grays Harbor on the Washington coast. 91 Fed. Reg. 1449, 1452–54 (Jan. 14, 2026). Steelhead are the anadromous form of *Oncorhynchus mykiss*, which exhibit the most complex suite of life history traits of any species of Pacific salmonid. *Id.* at 1450.

The OP steelhead DPS includes eleven summer-run and thirty winter-run populations. *Id.* at 1451. OP steelhead are substantially isolated from other populations in the region due to physical and ecological factors. *Id.* at 1452. The loss of the DPS would be a significant loss to the genetic diversity of the taxon. *Id.*

NMFS has been concerned about the overall health of OP steelhead populations since 1996. 88 Fed. Reg. 8774, 8776 (Feb. 10, 2023). The summer-run component is nearly extinct, and the winter-run component is declining and losing its life history diversity. The fate of the species rests on a depressed and contracted mid- to late-spring component of wild fish whose productivity is limited or declining. The remnants of these runs face declining freshwater and marine habitat conditions, inadequate regulation, increased recreational fishing pressure, and ongoing commercial harvest.

B. Petition, Scientific Review, and Listing Decision.

On August 1, 2022, the Conservancy and The Conservation Angler petitioned NMFS to list the OP steelhead DPS as threatened or endangered under the ESA. On February 10, 2023, NMFS published a positive 90-day finding that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted. 88 Fed. Reg. 8774 (Feb. 10, 2023).

On January 17, 2025, the Conservancy and The Conservation Angler sued NMFS for failing to make the statutorily required 12-month finding on the petition. The parties entered a settlement agreement, and consistent with the terms of that agreement, on January 14, 2026, NMFS published the 12-Month Finding, concluding that listing the OP steelhead DPS as threatened or endangered under the ESA is not warranted. 91 Fed. Reg. 1449 (Jan. 14, 2026).

As required because of its positive 90-day finding, NMFS initiated a status review to determine whether the OP steelhead DPS is threatened or endangered. 88 Fed. Reg. 8774. In

October 2024, the Status Review Team ("SRT") published the Biological Status of the Olympic Peninsula Steelhead Distinct Population Segment report ("SRT Report"). The SRT's key takeaways were as follows: there was a "strong decline in the number of steelhead returning to the rivers of the Olympic Peninsula"; "[u]ntil recently, a large fraction of returning steelhead had been harvested before they could spawn"; information available indicates there are "very few" summer-returning steelhead remaining in the DPS; hatchery fish could put OP steelhead at risk; habitat outside of Olympic National Park is compromised; and climate change "will increasingly be a threat" to OP steelhead. SRT Report at x, xiv.

The majority of SRT members concluded that the OP steelhead DPS was at a moderate risk of extinction, meaning "it exhibits a trajectory indicating that it is more likely than not to reach a high level of extinction risk in the foreseeable future." *Id.* at x, 106. Such scientific reviews that conclude the species faces a moderate risk of extinction typically result in listing under the ESA. The SRT identified the "top threats" to OP steelhead as climate change (ESA listing factor E), inadequate regulation (ESA listing factor D), and overutilization (ESA listing factor B). *Id.* at xv.

Specifically, the SRT Report concluded that, for the populations of OP steelhead for which trends could be calculated, zero are increasing, one is stable, and thirteen are declining with ten declining significantly. *Id.* at xvi, 110. The SRT also concluded that kelt survival rates have declined, harvest rates have historically been excessive with recent decreases too new to evaluate demographic response, and impacts of climate change on habitat may negate improvements in land management and restoration efforts. *Id.* at xvi, 27–28, 77, 81–88, 103, 112, 119. Regarding listing factor D, the inadequacy of existing regulatory mechanisms, the SRT noted, "there are many existing regulations that provide a generalized protection of freshwater/salmonid habitat, but none specifically directed at steelhead." *Id.* at 90. The SRT also found that "failure to meet the escapement goals suggests a management deficiency" and "[i]n the face of a declining run size, it is unclear if current management goals and strategies will allow for restoration of the runs." *Id.* at 94.

Despite the SRT's findings, NMFS concluded listing the DPS as threatened or endangered under the ESA was not warranted. 91 Fed. Reg. 1449, 1451, 1460 (Jan. 14, 2026). NMFS identified the primary factors it relied on in reaching this conclusion as follows: "habitat quality and connectivity are generally good within the DPS and are benefitting from ongoing restoration efforts; spatial distribution is good; State and Tribal co-managers have implemented improved harvest and hatchery practices and reduced harvest significantly in recent years; abundance trends suggest declining populations, but the response to recent management actions has yet to be seen; and while environmental variation is expected to have some negative impacts on the DPS, there could also be positive impacts while the precise localized effects are unclear." *Id.* at 1461.

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

NMFS's 12-Month Finding is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, including the ESA. Commerce and NMFS are violating their duty to conserve endangered and threatened species. 16 U.S.C. § 1531; 50 C.F.R. § 402.01(b). Some of

the legal deficiencies with the 12-Month Finding are summarized below; however, this description is not meant to be exhaustive.

The 12-Month Finding is arbitrary, capricious, and inconsistent with law because it fails to use the best available science, offers explanations that run counter to the evidence, fails to articulate a rational connection between the facts found and the choice made, fails to consider important aspects of the problem, and relies on improper factors. *Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Desert Survivors v. U.S. Dep't of the Interior*, 321 F. Supp. 3d 1011, 1039 (N.D. Cal. 2018).

The 12-Month Finding is arbitrary, capricious, and inconsistent with law because it fails to use the best available science and offers explanations that run counter to the evidence. For example, NMFS rejects, without legally sufficient explanation, the SRT majority's moderate risk finding. 91 Fed. Reg. at 1460 ("we are unable to find the DPS faces a high or moderate risk of extinction now or in the foreseeable future"). The 12-Month Finding does not disavow the SRT Report and in fact claims to rely on it as "the best available scientific and commercial information on OP steelhead." 91 Fed. Reg. at 1451; *see also id.* ("We subsequently reviewed the status review, its cited references, and peer review comments, and concluded that the same status review upon which this determination is based . . . provides the best available scientific and commercial information on OP steelhead. Much of the information discussed below on the DPS configuration, demographics, threats, and extinction risk is attributable to the status review."). Nonetheless, the "primary factors" NMFS cites as supporting a not warranted finding conflict with the SRT Report on several key issues without adequate evidence or explanation.

As one example, despite uncertainties in abundance estimates, the SRT concluded there is a strong decline in OP steelhead populations that is likely to continue and gave a moderate risk score to abundance under its viable salmonid population assessment. SRT Report at x, xv, 109–10, 117. The 12-Month Finding similarly describes OP steelhead populations as low and declining, but concludes uncertainties in abundance estimates and potential, future changes support a not warranted finding. *See* 91 Fed. Reg. at 1455, 1457, 1460–61. NMFS's explanation that recent or future changes may have a positive impact on OP steelhead populations is not a lawful basis for determining the DPS is not threatened or endangered. *See, e.g.*, 91 Fed. Reg. at 1460 (listing as a primary factor for its negative listing decision: "abundance trends suggest declining populations, but the response to recent management actions has yet to be seen"); 16 U.S.C. § 1533(b)(1)(A) ("best scientific and commercial data *available*" (emphasis added)); 68 Fed. Reg. 15100, 15114 (Mar. 28, 2003) (listing decisions must be based on the status of the species as of the date of NMFS's determination). NMFS's explanation that "DPS abundance is still relatively moderate compared to other steelhead DPSs" is also deficient. 91 Fed. Reg. at 1460. In short, NMFS's explanations, which do not offer anything to refute available abundance data or the SRT's findings related to abundance, are arbitrary, capricious, and inconsistent with law.

As another example, the SRT Report found that improvements in land management and habitat restoration efforts, for which positive impacts may not be felt for decades, may be further delayed or prevented by climate change. SRT Report at 77. Failing to acknowledge or refute this

finding, NMFS identifies good quality habitat as a primary reason not to list OP steelhead. 91 Fed. Reg. at 1451, 1456, 1461.

The 12-Month Finding is also arbitrary, capricious, and inconsistent with law because NMFS fails to explain why uncertainties justify a not warranted finding. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072–73 (9th Cir. 2018). For example, NMFS fails to explain why several uncertainties, including the uncertain effects of climate change, existing regulatory mechanisms, and harvest rates, support its decision not to list OP steelhead. *See* 91 Fed. Reg. at 1461 (citing as "primary factors" in support). In contrast, the SRT identified climate change, inadequacy of existing regulatory mechanisms, and overutilization (*i.e.*, harvest) as top threats to the DPS. SRT Report at xv, xvi, 77, 82, 90–95, 98–101.

NMFS also ignores evidence that these uncertainties disfavor a not warranted finding. For example, the 12-Month Finding does not discuss historical issues with State of Washington and Tribal Co-Manager annual management plans, which set harvest rates each year. The SRT Report describes errors and biases behind those rates, leading the SRT to conclude current management under these required plans is inadequate. SRT Report at 85, 92–94, 104.

The 12-Month Finding is also arbitrary, capricious, and inconsistent with law because it relies on improper factors. For example, the conservation efforts NMFS relied on in reaching its not warranted decision are insufficient. "[C]onservation efforts that are not sufficiently certain to be implemented and effective cannot contribute to a determination that listing is unnecessary." 68 Fed. Reg. at 15115. The conservation efforts cited in the 12-Month Finding do not meet the implementation and effectiveness certainty required under FWS's and NMFS's Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE"). To support a not warranted finding, conservation efforts must improve the species' status, "*at the time of the listing decision*," such that the species no longer meets the statutory definitions of threatened or endangered. 68 Fed. Reg. at 15101, 15114 (emphasis added).

The conservation efforts the 12-Month Finding cites are vague, informal, speculative, and insufficiently timed. They are therefore an improper basis for NMFS's determination that listing OP steelhead as threatened or endangered is not warranted. As one example, in its analysis of ESA listing factor D, NMFS describes the Washington State Statewide Steelhead Management Plan and the Anadromous Salmon and Steelhead Hatchery Policy C–3624. 91 Fed. Reg. at 1458. As NMFS describes, these are guiding policies and are not enforceable. *Id.* Under these policies, Hatchery Monitoring Plans ("HMPs") are supposed to be developed for all state hatcheries. However, as NMFS acknowledges, there were no complete HMPs as of the date of the 12-Month Finding. *Id.*

The 12-Month Finding is also arbitrary, capricious, and inconsistent with law because the significant portion of its range ("SPR") analysis is deficient. Specifically, neither the SRT nor NMFS cite any support for the assertion that the risk to OP steelhead populations in rivers that drain to the Strait of Juan de Fuca ("Strait") is "tempered by the presence of coastal winter-run populations" that could recolonize these rivers. *See* SRT Report at 120; 90 Fed. Reg. at 1460. The SRT otherwise found that Strait populations "may express distinct life-history strategies and their loss would increase diversity risk as well as spatial structure risk to the DPS." SRT Report

at 120. Without any support in the record, the conclusion that these Strait populations are not biologically significant is arbitrary, capricious, and inconsistent with law. *Zinke*, 900 F.3d at 1072.

In short, NMFS's decision not to list the OP steelhead DPS as threatened or endangered under the ESA is unlawful and should be set aside because it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, including the ESA. 5 U.S.C. § 706(2)(A).

IV. Party Giving Notice of Intent to Sue.

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

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

V. Attorneys Representing Wild Fish Conservancy.

The attorneys representing Wild Fish Conservancy in this matter are:

Brian A. Knutsen
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Telephone: (206) 739-5184

VI. Conclusion.

This letter provides notice of Wild Fish Conservancy's intent to sue Commerce and NMFS for the violations discussed herein. Unless the violations described herein are corrected within sixty days, Wild Fish Conservancy intends to file suit.

Thank you for your attention to this matter,

KAMPMEIER & KNUTSEN, PLLC

By: Erica L Proulx
Erica L. Proulx

CERTIFICATE OF SERVICE

I, Erica L. Proulx, declare under penalty of perjury of the laws of the United States that I am counsel for Wild Fish Conservancy and that on November 17, 2026, I caused copies of the foregoing Notice of Intent to Sue for Violations Associated With the 12-Month Finding Not to List Olympic Peninsula Steelhead 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 17th day of November, 2026 in Seattle, Washington.

By: Erica L. Proulx
Erica L. Proulx