COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

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The Honorable Doug Burgum
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

The Honorable Howard Lutnick
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230

RE: Docket No. FWS-HQ-ES-2025-0034

Dear Secretary Burgum and Secretary Lutnick:

The Columbia River Inter-Tribal Fish Commission (CRITFC) recommends that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("the Services") withdraw the proposed rule rescinding the regulatory definition of "harm" under the Endangered Species Act (ESA).[1] Removing habitat modification with the definition of "harm" from ESA regulations not only contradicts statutory intent on the "take" of endangered species[2], but it would also eliminate one of the most effective means for addressing the habitat loss and degradation that has decimated our treaty-protected fishery populations. The ESA's purpose is to protect and recover imperiled species and the ecosystems on which they depend, and the federal government has a responsibility to carry out this law, as well as a duty to do so in a manner consistent with treaty obligations, tribal sovereignty, and co-stewardship.

CRITFC is a tribal organization wholly owned and governed by four sovereign treaty tribes: the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Warm Springs Reservation of Oregon. Since formed in 1977, CRITFC has worked to protect and restore tribal treaty fishing rights through coordination, technical assistance, and management.

Over the past five decades, the ESA has served as a backstop to protect treaty-reserved fishery resources. Restricting what constitutes "harm" to a species narrows the legal scope of protections that ensure fish can survive, reproduce, and return to tribal fisheries.

[1] Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16102 (April 17, 2025).
[2] 16 U.S.C. § 1532(19).

Without enforceable protections for habitat, the United States risks violating the trust obligations embedded in the treaties with CRITFC's member tribes. The tribes' treaties with the United States, including the 1855 Treaties, reserved the right to fish at usual and accustomed places. These rights are meaningless if there are no fish to catch, and there will be no fish without habitat. The federal government has a legal and moral obligation to uphold its trust responsibilities and to manage fish and wildlife resources in a way that does not compromise tribal access, use, and benefit. This proposed rule moves in the opposite direction.

Congress has previously recognized the danger of weakening ESA protections through regulatory reinterpretation and acted decisively in the 2009 Appropriations Act § 429 to prevent such overreach.[3] That provision served as a clear statement of Congressional authority over ESA implementation and reflected bipartisan concern about administrative actions that undermine the statute's conservation mission. We urge the Services to similarly withdraw the proposed rule here, which repeats many of the same mistakes.

This Rulemaking Will Leave Lasting Impacts on the Columbia River Basin

The Columbia River basin is home to diverse and imperiled populations of anadromous salmonids and Pacific lamprey, many of which are listed as threatened or endangered under the ESA. Unfortunately, the basin faces the threat of increased habitat degradation. The proposed regulation would weaken the basis for biological opinions and the designation of critical habitat, undermining the enforceability of essential protections tied to current and future programs, including the Columbia River System Operations (CRSO), Federal Energy Regulatory Commission (FERC) relicensing, and the Northwest Forest Plan (NWFP) amendment.

By removing the definition of "harm," the rule would curtail the government's ability to address indirect but significant threats, such as sedimentation and rising water temperatures, that impair habitat and species survival. This reduced regulatory reach would accelerate cumulative, unregulated habitat loss, resulting in piecemeal degradation or "death by a thousand cuts" across the basin. In doing so, the rule disregards decades of scientific consensus and administrative findings, including Biological Opinions and listing decisions that identify habitat degradation as a primary driver of species decline.

The proposed changes conflict with the federal government's duty to manage shared natural resources in a manner that sustains tribal access and benefit. By enabling actions that diminish fish abundance and recovery potential, the rule violates trust responsibilities and undermines treaty obligations to Columbia Basin tribes. These fish populations are not only critical to tribal economies and cultures, they are central to long-standing legal commitments that the federal government must uphold. The CRSO Biological Opinion heavily relies on habitat actions to mitigate effects on ESA-listed species and avoid

[3] Omnibus Appropriations Act (Pub. L. 111-8), § 429 (2009).

jeopardy operating of the hydropower system. If harm to habitat no longer constitutes take, more substantive structural or operational modifications will be required to address direct impacts at dams and improve fish passage survival. The proposed changes will result in an unfair allocation of the conservation burden where some activities that impact salmon are treated differently compared to other activities.

The Columbia Basin Partnership Relies on Habitat Management

The Columbia Basin Partnership's abundance goals go beyond minimal ESA compliance, aiming for meaningful, sustainable recovery. These goals are undermined by the proposed rule, which removes one of the few legal tools available to address habitat degradation, the primary limiting factor for native fish recovery. By weakening habitat protections, the rule risks reducing the ESA to a procedural formality and promotes reliance on hatcheries rather than habitat-based solutions.

The Proposed Rule Misinterprets Legal Precedent

The proposed rule misinterprets legal precedent by attempting an end-run around the Supreme Court's decision in *Sweet Home*[4], reviving a narrow interpretation of "harm" that the Court explicitly rejected. It also misapplies the decision in *Loper Bright*[5], a prospective ruling that does not overturn *Sweet Home*'s core statutory interpretation. Further, the proposed rule conflicts with the 1982 ESA amendments, which recognized habitat-related take through mechanisms like §7 consultations and Incidental Take Permits under §10. By weakening the definition of harm, the rule undermines the legal foundation of these critical permitting tools, stripping them of both legal authority and practical efficacy.

This reinterpretation oversteps congressional intent and violates oversight authority granted under § 429[6], which allows Congress to halt agency actions inconsistent with legislative purpose. The proposal also stands in stark contrast to other major environmental policy decisions, such as EPA's March 2025 guidance on the *Sackett decision*[7], which favor case-by-case determinations over rigid, reductive definitions. Ultimately, the rule disregards decades of scientific and administrative findings by the Services themselves, including numerous biological opinions and listing decisions that identify habitat degradation as a clear form of harm.

Scientific Consensus on Habitat Loss as a Primary Driver of Extinction

The proposed rule contradicts overwhelming scientific consensus that habitat loss is the leading cause of species endangerment and extinction, indeed in some situations habitat loss can directly kill or injure listed species. For example, the distinctness of anadromous fish is closely tied to their natal habitat, to which they locally adapted to through time. This

[4] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).
[5] *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024).
[6] Omnibus Appropriations Act (Pub. L. 111-8), § 429 (2009).
[7] *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). *See also* https://www.epa.gov/wotus

concept is the basis for the evolutionary significant unit (ESU), the central point of the NMFS species policy to identify and conserve important genetic resources in nature.

By removing the current definition of "harm" from the regulations, it erodes the legal basis for addressing habitat degradation, the very threat most responsible for species decline. This shift undermines billions of dollars in federal, tribal, and state investments in habitat restoration, stripping these programs of their regulatory and funding rationale. It also breaks the foundational balance of the ESA, which was designed to enable lawful development while requiring habitat protections to avoid extinction. This will significantly reduce protection for listed species on non-federal lands, particularly in states that do not have their own endangered species protections.

This rulemaking invites legal chaos and implementation uncertainty. It destabilizes existing permitting frameworks such as Habitat Conservation Plans (HCPs) and Incidental Take Permits and will likely result in increased litigation as courts are asked to reinterpret what constitutes harm on a case-by-case basis. The rule disincentivizes restoration-based mitigation tools, such as Reasonable and Prudent Alternatives, and threatens to invalidate them altogether. It weakens biological opinions and critical habitat determinations essential to major federal processes such as the Columbia River System Operations and FERC relicensing. Indirect but consequential threats like temperature increases, sedimentation, and altered flows would go unaddressed. In turn, the rule undermines regional habitat initiatives (e.g., Fish Accords, HCPs) and strips tribes and co-managers of vital ESA-based tools used to protect treaty-reserved fisheries for salmon, lamprey, and steelhead.

Policy Contradictions

The proposed rule defies common sense. If destroying essential habitat no longer constitutes "harm," it raises fundamental questions about how the ESA can be effectively enforced. This change undermines the integrity of ESA implementation and complicates potential future reforms, such as the proposed NOAA-FWS merger. By eliminating a clear standard, the rule invites a patchwork of enforcement approaches across agencies and regions, fostering confusion rather than consistency. It also weakens intergovernmental partnerships with tribes that depend on a stable regulatory framework to co-manage and protect species collaboratively. Finally, if the Services move forward with this rule, they must fully analyze its environmental impacts under NEPA and engage in interagency consultation under § 7 of the ESA, requirements conspicuously absent from the proposed action.

Conclusion

The proposed rule is legally indefensible, and ecologically dangerous. It disregards decades of scientific consensus, undermines core provisions of the ESA, and threatens the integrity of intergovernmental and tribal partnerships. We urge the Services to immediately withdraw the proposal and recommit to conservation goals that are grounded in law, science, and practical, cooperative governance.

Effective ESA implementation must uphold treaty rights, respect tribal sovereignty, and be rooted in transparent, science-based decision-making. We call for clear, transparent answers to the concerns outlined here and insist that any future regulatory changes be developed through open dialogue, rigorous analysis, and genuine partnership with those most impacted.

Sincerely,

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Aja K. DeCoteau
Executive Director

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