



March 24, 2025

The Honorable Bruce Westerman  
Chairman  
Committee on Natural Resources  
1324 Longworth House Office Building  
United States House of Representatives  
Washington, DC 20515

H.R. 1897 – “ESA Amendments Act of 2025”

Dear Chairman Westerman:

We write on behalf of our 320 member companies that represent over 80% of the hydropower fleet by capacity that employ 70,000 Americans and serve 30 million people in strong support of H.R. 1897 “ESA Amendments Act of 2025” (H.R. 1897 or the bill).

The National Hydropower Association (NHA) welcomes the House Committee on Natural Resources focus on improving federal environmental review and permitting in support of national energy goals. NHA’s members are uniquely positioned to benefit from long overdue modernization of the Endangered Species Act (ESA). These commonsense improvements will serve not only to ensure that the underlying mission of the ESA is maintained but improve the processes by which hydropower asset owners can undertake consultation that will improve certainty and lower costs for their customers.

### **About the National Hydropower Association**

NHA is a non-profit national association dedicated to securing hydropower as a baseload and reliable energy source. Its membership consists of more than 320 organizations, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the hydropower industry.

NHA looks forward to working with Congress to improve the permitting and regulatory processes for building and maintaining U.S. hydropower – a reliable, baseload, renewable energy resource. With accelerating load growth, including to support the surge in AI and data centers, and the need to build and expand upon our domestic electricity production, the time is now to modernize and finally resolve the complicated regulatory maze that is the licensing process for hydropower development in the United States. As detailed below, provisions in H.R. 1897 will continue to protect endangered species, while also providing project developers and owners greater certainty, more timely decision making with fewer delays, and reduced process costs.

## Improvements H.R. 1897 makes to the Endangered Species Act

NHA's members are uniquely positioned to provide recommendations to modernize the ESA. Not only is consultation required under the ESA, but the National Marine Fisheries Service and U.S. Fish and Wildlife Service (Services) may also provide recommendations for protection, mitigation, and enhancement of species (PMEs) under Section 10(j) of the Federal Power Act (FPA), which FERC shall accept unless inconsistent with law. The Services can also require mandatory fishway prescriptions under Section 18 of the FPA. Both the PMEs and fishway prescriptions are then ensconced in the license issued by the FERC. There is significant overlap in these authorities. NHA specifically identifies the following provisions from the bill that will improve the hydropower industry's implementation of the ESA:

- H.R. 1897 will require under Section 7 consultation, that the Services, define the past, present and future impacts from existing structures (e.g., dams) as part of the “environmental baseline.” The question of whether a structure is part of the environmental baseline should not depend on the extent of the action agency’s discretion to remove that structure, but rather on whether it in fact exists already. H.R. 1897 will clarify that the Services continued practice of not including existing structures as part of the environmental baseline fly in the face of both pragmatism and common sense, but also contradicts existing analogous caselaw that supports using the existing project baseline for relicensing hydropower projects under the FPA and evaluation of those impacts under the National Environmental Policy Act [*American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186, 1196 - 1201 (9th Cir. 2000)].
- The bill will clarify that under existing law when providing Reasonable and Prudent Measures (RPMs) in a no-jeopardy biological opinion the Services *cannot* (emphasis added) impose offsets or compensatory mitigation measures. RPMs should be limited to “minimizing” the effect of incidental take of a listed species as originally intended by the existing statute. This clarification is needed due to the Services’ final rule issued in 2024 that created an *ultra vires* provision allowing the Services to unilaterally impose compensatory mitigation measures, including offsite mitigation banking requirements, when there is a no-jeopardy finding.
- The bill also codifies that the Services should use best-available, not worst-case, science and analysis when evaluating the outcomes from a proposed action. This provision complements the holding in *Maine Lobstermen’s Association v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023). The question in front of the court was whether it was lawful for the Services to apply a conservative or “worst case” analysis when presented with a range of potential outcomes. The court held that the ESA requires evaluation of likely, not worst case, outcomes. If the best available science does not allow the Services to make a reasonable prediction regarding the likely outcome, then the “Service lacks a clear and substantial basis for predicting an effect is reasonably certain to occur, and so, the effect must be disregarded in evaluating the agency action.” The court made clear that its holding should be implemented broadly [“...we decide whether, in a biological opinion, the Service must, or even may, when faced with uncertainty, give the ‘benefit of the doubt’ to an endangered species by relying upon worst-case scenarios or pessimistic

assumptions. We hold it may not.” *Maine Lobstermen’s Association v. NMFS*, 70 F.4th 586 (D.C. Cir. 2023)]. Unfortunately, the previous Administrator of NMFS testified in front of Congress that the agency’s opinion is that the court’s holding was narrowly tailored to the facts of that case, contradicting the plain language reading of the court’s holding (Coit, Janet, Full Committee Hearing to Examine Federal Offshore Energy Strategy and Policies, Senate Committee on Energy & Natural Resources, Oct. 26, 2023, Video of Testimony, <https://www.energy.senate.gov/hearings/2023/10/full-committee-hearing-to-examine-federal-offshore-energy-strategy-and-policies>, Accessed March 17, 2025). Therefore, NHA believes it is imperative that the Congress codify the holding in statute.

Thank you for your consideration of these important matters critical to advancing America's energy interests for the hydropower sector. We look forward to working with the House Committee on Natural Resources and its Chairman to see this vital legislation enacted into law.

Sincerely,

A handwritten signature in dark ink, appearing to read 'MPurdie', with a long horizontal flourish extending to the right.

Michael Purdie  
Director of Regulatory Affairs and Markets  
National Hydropower Association