



March 24, 2025

The Honorable Bruce Westerman  
Chairman  
House Committee on Natural Resources  
Washington, DC 20515

Dear Chairman Westerman,

On behalf of the Skagit Drainage and Irrigation Districts Consortium LLC and its member Districts,<sup>1</sup> we are writing to express our strong endorsement of and support for the legislative revisions introduced in the *Endangered Species Act Amendments Act of 2025*.

The Endangered Species Act (“ESA”) has been in place for over 50 years and has not been meaningfully updated in decades. While we support the original intent of the ESA to conserve and protect plant and wildlife species from extinction, in more recent years, the ESA has been used to obstruct projects needed to protect the public safety and welfare, impede the lawful use of land and property, and undermine public infrastructure. Accordingly, the ESA requires targeted amendments that will address some of the difficulties and inefficiencies that have been observed during the decades of its implementation. We support effective and balanced legislative enhancements that will modernize the ESA and that will continue to both protect threatened and endangered species and promote responsible land, water, and resource management.

Key elements of the ESA that we believe need to be addressed include: (1) ensuring that past, present, and future effects of existing structures are included in the environmental baseline for Section 7 consultation; (2) clarifying that reasonable and prudent measures can minimize, but not mitigate, the impacts of incidental take; (3) making sure that reasonable and prudent alternatives (“RPAs”) are economically and technologically feasible for project proponents to implement; (4) preventing the use of uncertainty or precautionary measures from being

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<sup>1</sup> The member districts include: Skagit County Diking District No. 3; Skagit County Dike, Drainage, and Irrigation Improvement District No. 5; Skagit County Dike, Drainage, and Irrigation Improvement District No. 12; Skagit County Drainage and Irrigation Improvement District No. 14; Skagit County Drainage and Irrigation Improvement District No. 15; Skagit County Drainage and Irrigation Improvement District No. 16; Skagit County Drainage and Irrigation Improvement District No. 17; Skagit County Drainage and Irrigation Improvement District No. 18; Skagit County Drainage and Irrigation Improvement District No. 19; Skagit County Consolidated Diking, Drainage, and Irrigation Improvement District No. 22; Skagit County Drainage and Irrigation District No. 22; and Skagit County Dike and Drainage District No. 25.

incorporated under the guise of the best available science; (5) limiting the role and involvement of third parties in consultations; and (6) restricting the ability of third parties to bring self-serving lawsuits that unnecessarily inhibit project development activities. The remaining sections of this letter provide an overview of some of the challenges that the Districts are facing as a result of the current ESA framework and its implementation, and provide real world examples of why the commonsense changes proposed in *Endangered Species Act Amendments Act of 2025* are necessary.

## **Background**

Skagit County is a rural community located in northwest Washington. Agricultural viability in Skagit County, Washington is vital to meet the demand for food in growing communities throughout Puget Sound and more broadly throughout the nation. Local, sustainable food is of concern to the long-term health and security of our nation. Skagit Valley is the largest and most diverse agricultural economy remaining in Puget Sound and home to some of the world's best agricultural soil; and our farmers produce a significant amount of the nation's and the world's vegetable seeds, supporting agriculture far beyond Skagit County.

For more than 140 years, there has been significant agricultural production in Skagit County. The citizens of this area have continually prioritized agriculture over other uses because of our unique soils and farming legacy. Approximately 60,000 acres of farmland relies on diking and drainage infrastructure, including tidegates, to be viable. In addition, the diking system also protects rural communities and a network of critical transportation and water, oil and gas utility corridors from coastal flooding, including rail and road access to a major west coast oil refinery complex and the water supply to Naval Air Station Whidbey. This system of dikes and drainage infrastructure has been in place since the late 1800s and has been continuously operated and maintained by Skagit Dike, Drainage, and Irrigation Special Purpose Districts ("Districts") that were formed near the time of Washington statehood. Largely due to ESA-related restrictions, these Districts have been unable to secure federal authorizations for the maintenance, repair, and replacement of critical diking and drainage infrastructure since 2020.

## **Overview of the ESA in Puget Sound and the Skagit Watershed**

In 1999, Puget Sound Chinook Salmon were listed as threatened under the ESA. Following this listing, any work requiring a federal permit (such as a U.S. Army Corps of Engineers ("Corps") permit for work below the high tide line ("HTL") required consultation with NMFS prior to authorization. The Skagit Chinook Recovery Plan was published in 2005 and adopted by NMFS in 2007 as part of the broader Puget Sound Chinook Recovery Plan. The Skagit Chinook Recovery Plan identified goals for the conversion of private farmland to habitat and identified several specific habitat restoration projects. Unfortunately, there was little to no coordination between the authors of the Skagit Chinook Recovery Plan and the local community, and there was no clear understanding of how the goals related to the conversion of private farmland to habitat would be achieved.

At the time of the ESA listing, the Skagit watershed was one of the last strongholds of all five native species of salmonids and, despite clear deficiencies in the 2005 Skagit Chinook Recovery Plan, significant progress has been made toward salmon recovery goals through cooperative agreements and voluntary actions. Accordingly, an estimated 90 percent of the habitat restoration goals have been achieved in the first 20 year of the 50-year recovery plan. During this same time period, between 2004–2019, there has been overall increase in exploitation and harvest of Puget Sound salmonids. Notwithstanding, NMFS’s own technical work demonstrates that, based on natural origin spawner counts, five of the six Skagit populations have experienced significant, positive increases.

Yet, as demonstrated below, despite the improvement of Skagit Chinook, this best available science is being ignored in ESA Section 7 consultations, and the ESA as currently conceived is being misinterpreted and misapplied to the detriment of urgent and necessary public infrastructure repair projects.

### **Representative Issues Experienced by Skagit Districts Regarding ESA Coverage for Operation and Maintenance of Tidegates**

#### **District 12 – No Name Slough Tidegate Replacement Project**

District 12’s experience with ESA consultation for its No Name Slough tidegate replacement project provides a stark example of how the current ESA framework has enabled NMFS to unduly delay completion of consultation, improperly attribute the effects of existing structures to the effects of the action, use uncertainty or precautionary measures as a substitute for best available science, and impose mitigation measures that are neither reasonable nor feasible.

District 12 has an urgent need to replace a failed tidegates. The project is simple: it involves replacing existing tidegates that have been continuously operated and maintained for 140 years, with a tidegate that will improve fish passage. The affected area comprises just 89 feet in length and 66 feet in width. NMFS initially authorized the project in 2019 by relying on an existing programmatic ESA Section 7 consultation under which no mitigation for the project was required. Unfortunately, that programmatic biological opinion was withdrawn before the Corps completed permitting for the project.

As a result, in accordance with the Corp’s directive, District 12 submitted a project-specific biological evaluation to the Corps. The Corps concurred with the District’s finding that the replacement project would not likely adversely affect or would have no effect on listed species, and the Corps requested *informal* consultation with NMFS in April of 2022. NMFS did not consult or issue a biological opinion within the mandatory timeframes established by the ESA.

In October of 2023, District 12 sent NMFS a 60-day notice of intent to sue for failure to complete the ESA consultation. NMFS was non-responsive and in December 2023, District 12 filed suit in federal court seeking relief. In February 2024, the U.S. District Court for the Western

District of Washington ruled in favor of District 12 and mandated that NMFS issue the biological opinion.

NMFS ultimately issued a final biological opinion for the District 12 tidegate project, which largely ignored District 12's comments and the best available science, and reversed NMFS's previous decision authorizing the tidegate replacement under a programmatic biological opinion. NMFS's new biological opinion concluded that District 12's replacement of the tidegates jeopardizes the continued existence of Puget Sound Chinook Salmon and Southern Resident Killer Whales and results in the destruction or adverse modification of their critical habitat. In reaching these conclusions, NMFS improperly attributed the existence of the tidegates to the "effects of the action" and evaluated an "action area" that was inaccurate and greatly exceeded the geographic scope of the effects of the project. The jeopardy and adverse modifications are also irreconcilable with best available science that shows that, despite the existence of the tidegates, Skagit Chinook populations are increasing.

NMFS recommended RPAs to avoid jeopardy to the species and adverse modification, which District 12 would be required to adopt if it wanted to move forward with the tidegate replacement. Notwithstanding that the existing tidegates have been in place for approximately 140 years, NMFS's RPAs would require District 12 to restore a minimum of 8.6 acres of estuary habitat and to generate a minimum of 275 credits at an estimated cost of \$1.6 million. Thus, the RPAs are not economically feasible. Comparatively, under the prior programmatic biological opinion, the tidegate replacement was considered an "operational improvement" project that did not necessitate any mitigation or habitat credits because it would improve conditions for ESA-listed species.

On July 1, 2024, District 12 filed an amended complaint that challenged NMFS's biological opinion and argued that the biological opinion and associated RPAs were arbitrary and capricious. The case has been fully briefed before the district court and a decision on the merits is pending. It is axiomatic that a District should not be forced to initiate expensive and time-consuming litigation for the approval of a simple project that would replace an existing tidegate on terms that are just and reasonable.

Unfortunately, District 12's experience is emblematic of the significant problems associated with ESA implementation in Puget Sound and Skagit County, Washington.

### **District 19 – Emergency Minor Repair**

District 19's experience reinforces the extreme delays that the Districts are experiencing in completing ESA consultation. District 19 had to declare an emergency in August of 2024 to complete minor immediate repairs to prevent pipe failure while waiting for NMFS to complete ESA consultation on a project that was submitted in June of 2023. Without a pathway for reasonable, predicable and timely federal permits, the Districts have increasing risks of drainage infrastructure failure, which would impact high value private farmland and important transportation and utility corridors.

## **District 5 – Padilla Bay Dike Repair**

District 5's experience, like District 12, illustrates how the current ESA framework is leading to the improper treatment of existing structures and resulting in disproportionate and unreasonable mitigation requirements. District 5 was formed in the late 1800's, serves approximately 3,000 acres of primarily agricultural land, and is responsible for the operation and maintenance of approximately 7.5 miles of marine dikes and 4.0 miles of river levees. District 5 has an annual budget of approximately \$46,000. In January of 2021, portions of District 5's existing marine dike along the east shore of Padilla Bay were damaged during an extreme coastal flood event. This event was declared a Presidential Disaster (DR-4593-WA) and District 5 was determined to be eligible for disaster relief through the Washington State Military Department and FEMA Public Assistance Grant Program.

In 2021 and 2022, District 5 worked with FEMA to complete emergency repairs to the damaged dike and to design permanent repairs, including work to restore damaged portions of the dike below the HTL. The estimated cost for the permanent repairs approved by FEMA was approximately \$380,000, and those repairs were planned for the summer of 2023.

In January 2023, District 5 applied for a Corps' Nationwide Permit 3 authorization to complete the repair of the damaged dike below the HTL. District 5 was informed by Corps staff that the repair project qualified for ESA consultation under the Salish Sea Near-shore Programmatic Biological Opinion ("SSNP"), which would streamline the process. The SSNP requires the use of NMFS's Salish Sea "Conservation Calculator" to quantify habitat loss and resulting mitigation credits.

Based on the results of the Conservation Calculator, District 5 determined that they would need to obtain 5,280 conservation credits, which the Puget Sound Partnership (the only approved source of credits) estimated would cost approximately \$7.92 Million.

Believing that this was an error, District 5 worked with NMFS to review the Conservation Calculator for the project and submitted calculations to FEMA and the Corps for review. All agencies confirmed that the calculations were correct and that the mitigation burden, to restore the dike to pre-disaster conditions, would be \$7.92 Million. While FEMA informed District 5 that it would pay for a portion of the mitigation necessary to be in compliance with the ESA, District 5 could not pay their portion of the mitigation burden under the cost-share agreement with FEMA. Furthermore, FEMA had concerns about purchasing conservation credits from the Puget Sound Partnership due to the lack of transparency and accountability in terms of how the money would be put to use for specific habitat project implementation. In addition, the Corps informed District 5 that the estimated credit burden of 5,280 credits was "more than half of the total credits allocated to the Corps for the NWP3" program and that District 5 would need to perform individual project consultation, instead of relying on the SSNP.

The SSNP and Conservation Calculator are resulting in the imposition of a significantly disproportionate conservation burden. The required conservation credits are being calculated based on an assumed environmental baseline that reflects pre-development conditions and not

the current environment with existing infrastructure. In the case of District 5, the referenced time period is pre-1880s when the dike was originally built. The District 5 repair project has been postponed and, in the absence of ESA legislative and regulatory reform, damaged dikes will continue to be vulnerable to failure during winter storms.

### **Conclusion**

In sum, since 2020, NMFS has unilaterally revised and reconsidered its approach to ESA implementation in Puget Sound, and elsewhere, resulting in the Districts being unable to obtain these important authorizations to protect their infrastructure that is essential to communities in the Skagit Valley. The maladministration of the ESA in the Puget Sound region in recent years has resulted in significant delays for critical infrastructure maintenance and repair and the imposition of mitigation that require the Districts to mitigate for the existence of structures that already exist and have existed since the late 1800's. The cost of the mitigation is orders of magnitude greater than the total project cost, making it financially impossible to perform work. In addition, administrative burden and uncertainty create additional costs and project delays. The net result is that there is more long-term damage to infrastructure, increased expenses for flood prevention, and greater potential for damage to private property, threats to public transportation, and interruption of access to emergency services.

In absence of ESA legislative and regulatory reform, we anticipate that necessary consultation with NMFS will continue to be plagued by significant delays and the imposition of unreasonable and disproportionate mitigation requirements, which will result in on-going and significant financial and practical impacts to our communities associated with failed infrastructure and delayed maintenance. We believe that passage of the Endangered Species Act Amendments Act of 2025 will address many of our concerns, and stand ready to offer our assistance as the bill moves through the legislative process.

Sincerely,

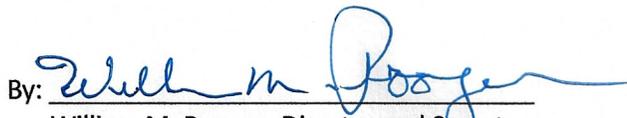
Skagit County Drainage and Irrigation Districts Consortium LLC, a Washington limited liability company



By: \_\_\_\_\_  
John Wolden, Director and Chair



By: \_\_\_\_\_  
Norm Hoffman, Director and Vice-Chair



By: \_\_\_\_\_  
William M. Roozen, Director and Secretary



By: \_\_\_\_\_  
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