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VIA EMAIL AND FIRST-CLASS MAIL

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Director Wallace and Acting Assistant Secretary Fosgren,

The undersigned organizations, including the Skagit Drainage and Irrigation Districts Consortium LLC, Pacific Northwest Waterways Association, Family Farm Alliance, the Washington State Water Resources Association, the Idaho Water Users Association, the National Water Resources Association, the Oregon Water Resources Congress, and the National Hydropower Association,[1] write to request that the National Marine Fisheries Service ("NMFS") and the U.S. Army Corps of Engineers ("USACE")[2] prioritize and expeditiously rescind:

(1) the January 6, 2022 Joint Resolution Memorandum for Evaluating the Effects of Projects Involving Existing Structures in Endangered Species Act Section 7 Consultations (the "Memo"); and

[1] Descriptions of the signatory organizations are set forth in Attachment A.
[2] The U.S. Fish and Wild Service is copied on this correspondence. Although the subject guidance documents are not USFWS documents, the undersigned organizations request that USFWS also takes action to align its policies and practices regarding existing structures to the purpose and intent of the ESA as further described in this letter.

(2) the April 18, 2018 West Coast Region's Guidance on Assessing the Effects of Structures in Endangered Species Act Section 7 Consultation ("2018 WCR Guidance").

When applicants seek authorization from USACE to maintain, repair, or replace aspects of existing structures, and NMFS consults on that action under the Endangered Species Act ("ESA"), the Memo and the 2018 WCR Guidance purportedly authorize NMFS to treat the future effects from an *existing* structure as a consequence of the action. This approach is: (1) inconsistent with the ESA; and (2) significantly burdens the Nation's existing infrastructure—including infrastructure used to generate energy and protect agricultural land of regional and national significance and the use of the Nation's waterways for commerce—by requiring the imposition of minimization and mitigation measures to retrospectively address impacts of infrastructure that already exists.

This Administration has unambiguously and repeatedly directed federal agencies to: (1) align their regulations and policies with the best interpretation of the statute; and (2) eliminate regulations and policies that burden critical infrastructure, including energy infrastructure. The Memo and the 2018 WCR Guidance clearly meet the criteria for agency policies that must be expeditiously rescinded.

1. The Memo Is Inconsistent with the Best Reading of the ESA.

Recission of the Memo and the 2018 WCR Guidance is consistent with, and required by, Executive Order ("EO") 14219, which directs agencies to review regulations (including guidance documents) for consistency with lawful "delegations of legislative power" and to ensure such regulations "are based on . . . the best reading of the underlying statutory authority or prohibition."[3]

Contrary to the best reading of the ESA, the Memo and the 2018 WCR Guidance suggest that NMFS may count the effects of an existing structure as an effect of an action that merely repairs/maintains/replaces aspects of what is already there. The ESA, on the other hand, is clear that the Section 7 consultation process is meant to consider the forward-looking effects of the *action*, not the effects of existing structures projected forward:

> Each Federal agency shall, . . . 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 of such species[.][4]

The use of the word "action" in Section 7 refers to a discrete prospective act, just as "jeopardize," "destruction," and "modification" require an active change in status.[5] Congress reinforced this intent by exempting structures that were under construction prior to November 10, 1978 from

[3] 90 Fed. Reg. 10,583 (Feb. 25, 2025).
[4] 16 U.S.C. § 1536(a)(2).
[5] As NMFS explained in its 2019 rulemaking, "the statute and regulations do not contain any provisions under which a species should be found to be already (pre-action) in an existing status of being 'in jeopardy,' 'in peril,' or 'jeopardized' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for 'jeopardize the continued existence of' or 'destruction or adverse modification.'" Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 44,987 (Aug. 27, 2019).

Section 7 consultation requirements,[6] making it clear that it expected NMFS and USFWS (collectively, the "Services") to focus on prospective actions, not structures that were already partially or fully constructed.

The Memo and the 2018 WCR Guidance do not represent the best reading of the ESA because the ESA directs agencies to ensure that the effects of their *actions* do not jeopardize listed species, not to ensure that the effects of structures already in place do not jeopardize listed species. Simply put, a proposal to repair/maintain/replace aspects of existing infrastructure does not cause a previously constructed structure to exist.

The inconsistency between the Memo and the 2018 WCR Guidance, on one hand, and the ESA, on the other, is reinforced by other guidance documents and prior regulations, which directly contradict the interpretation set forth in the Memo and the 2018 WCR Guidance. The ESA Section 7 regulations adopted during President Trump's first term were clear that the effects of the action are limited to the consequences that would not occur "but for" the proposed action, and are distinct from existing conditions of the environmental baseline.[7] In almost all instances, an existing structure would continue to exist irrespective of an action to maintain/repair/replace aspects of the existing structure. Thus, the maintenance/repair/replacement action cannot be the "but for" cause of the consequences from the existing structure.

The Memo and 2018 WCR Guidance are irreconcilable with the Services' Endangered Species Consultation Handbook ("Handbook").[8] Using the example of a federal agency approving a new turbine at an existing dam, the Handbook states: "[o]ngoing effects of the existing dam are already included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation."[9] In a second example, the Handbook explains that when making safety upgrades to an existing dam, the dam is not considered an effect of those upgrades because "it does not depend upon the proposed action for its existence."[10] The test is whether the structure would exist "but for" the new federal action, "not whether the [federal action] in some way assists or facilitates in the continued operation of the pre-existing project."[11]

The approach set forth in the Memo and the 2018 WCR Guidance results in several scientific and analytical issues, which NMFS can only resolve through speculation and guesswork:

(1) To account for the existing structure as an effect of the "action," NMFS must speculate as to what conditions would or could exist absent the existing structure. In other words, it

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[6] *See* 16 U.S.C. § 1536(c); *Idaho Dep't of Fish & Game v. NMFS*, 850 F. Supp. 886, 894 (D. Or. 1994) (the ESA "exempts any construction projects predating November 10, 1978 from *consultation* requirements under § 7(a)(2)") (emphasis in original), *remanded on other grounds*, 56 F.3d 1071 (9th Cir. 1995).

[7] *See* "Effects of the Action[:] all consequences to listed species or critical habitat that are caused by the proposed action[.]"; *cf.* "Environmental Baseline[:] the condition of the listed species or its designated critical habitat . . . , without the consequences to the listed species or designated critical habitat caused by the proposed action." 50 C.F.R. § 402.02.

[8] U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook (Mar. 1998), *available at* https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.

[9] *Id.* at 4-28.

[10] *Id.*

[11] *Id.*

guides NMFS to consider the effects of the action *and* the existing structure compared to a hypothetical environment in which the existing structure *never existed* or would not exist in the future.

(2) To account for the existing structure as an effect of the "action," NMFS must either assume that the existing structure would simply fail to exist (i.e., disappear instantaneously, without deterioration or consequence) or speculate about how the existing structure would degrade and decay overtime.

This is contrary to the ESA requirement to use the "best scientific and commercial data available,"[12] and EO 14303, which directs the restoration of gold standard science.[13]

As a recent example, a drainage district in Washington proposed to replace a tidegate which has existed since the 1880s. Instead of merely relining pipes in the existing tidegate (one option available to the district), the district proposed to replace the existing tidegate with a tidegate designed to improve fish passage as compared to the status quo. NMFS, citing the Memo, found that this action would cause jeopardy to Chinook salmon and Southern Resident killer whales because NMFS counted the continued existence of the tidegate as an effect of the proposed action. In doing so, NMFS concluded that replacement of a structure that already exists would prevent habitat from returning to pre-1880 conditions. This required NMFS to: (1) assume that the existing structure could not persist in the current environment; (2) guess how the existing structure would degrade overtime or assume that it would disappear instantaneously without the proposed action; and (3) speculate regarding the habitat conditions that would exist in the absence of the existing structure. This biological opinion, including its reliance on the Memo, has been the subject of litigation and is currently the subject of an appeal to the U.S. Court of Appeals for the Ninth Circuit.

Including a structure that already exists as an effect of a proposed action artificially inflates the effects of a proposed action and neither comports with reality nor the analytical framework mandated by the ESA.

2. The Memo Imposes Unreasonable Burdens on Existing Infrastructure, Including Energy Infrastructure.

Recission of the Memo and the 2018 WCR Guidance is consistent with and required by EOs 14181, 14154, and 14156, which direct agencies, including the Department of Commerce, to review regulations and procedures, including those related to the ESA, and to revise or rescind any regulations that impose undue burdens or are contrary to law.[14]

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[12] 16 U.S.C. § 1536(a)(2); *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) ("The obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.").

[13] 90 Fed. Reg. 22,601 (May 29, 2025).

[14] *See* 90 Fed. Reg. 8747, 8748 (Jan. 31, 2025) (EO 14181, § 2(e)); 90 Fed. Reg. 8353, 8354 (Jan. 29, 2025) (EO 14154, § 3(c)); 90 Fed. Reg. 8433, 8436 (Jan. 29, 2025) (EO 14156, § 6(c)).

The Memo and the 2018 WCR Guidance result in ESA consultations that are unreasonably burdensome to the maintenance of infrastructure, including energy generation facilities, flood risk reduction, irrigation, and drainage structures, and infrastructure that facilitates the use of the nation's waterways for commerce. By attributing the impacts of an existing structure to a proposed action, the Memo and 2018 WCR Guidance increase the likelihood that NMFS will determine that simply maintaining existing infrastructure will jeopardize ESA-listed species. In turn, these documents increase the likelihood that those consultations will result in significant financial burdens on the applicant to minimize and mitigate impacts of a structure that already exists and that very well may have already undergone ESA consultation and been mitigated for in the past.

For example, a port in Puget Sound proposed a port maintenance project, which is critical for use by coast guard vessels, law enforcement, and tribal fishermen. The port now faces an $800,000 mitigation price tag for its maintenance action, constituting 80% of the total project cost, to mitigate the entirety of the port's existing infrastructure as a consequence of attempting to carry out the proposed maintenance action.

The massive and disproportionate financial burden of mitigating for structures that already exist disincentivizes the maintenance and repair of the Nation's infrastructure, including infrastructure used to generate energy, such as dams, as well as port and maritime commerce infrastructure, docks, tidegates, and flood risk reduction infrastructure. Critical maintenance will be delayed to avoid significant costs associated with duplicative and improper mitigation requirements. This has the cascading effect of harming the Nation's infrastructure resilience as well as economic and regional security.

Additionally, the approach in the Memo and the 2018 WCR Guidance makes the analysis more complex, which drives up cost and processing time. That results in unacceptable delays as permit applicants wait for the agencies to take action. It also results in inefficient use of agency time and resources. In short, the Memo and the 2018 WCR Guidance impose an undue burden on the regulated community.

Accordingly, the undersigned organizations request that NMFS and USACE rescind the Memo and the 2018 WCR Guidance expeditiously and that the Services acknowledge in any future rulemaking that the environmental baseline includes the present and future impacts of existing structures.

Sincerely,

/s/ *Dan Keppen*
Dan Keppen, Executive Director
Family Farm Alliance

/s/ Paul Arington
Paul Arington. Executive Director &
General Counsel
Idaho Water Users Association

/s/ Michael Purdie
Michael Purdie, Director of Regulatory Affairs and Markets
National Hydropower Association

/s/ Greg Morrison
Greg Morrison, Executive Vice President
National Water Resources Association

/s/ April Snell
April Snell, *Executive Director*
Oregon Water Resources Congress

/s/ Neil Maunu
Neil Maunu
Pacific Northwest Waterways Association

/s/ Jenna Friebel
Jenna Friebel, Executive Director
Skagit Drainage and Irrigation Districts Consortium LLC

/s/ John Stuhlmiller
John Stuhlmiller, Executive Director
Washington State Water Resources Association

CC: Paul Souza, U.S. Fish and Wildlife Service

Attachment A

Family Farm Alliance

The Family Farm Alliance ("FFA") is a non-profit grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 17 Western states, including Washington state. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

Idaho Water Users Association

The Idaho Water Users Association ("IWUA") is a nonprofit agricultural organization that promotes, aides and assists the development, control, conservation, preservation, and utilization of the water resources of the State of Idaho and cooperates with similar organizations in other states. IWUA represents irrigation water users, municipalities, hydropower, aquaculture, agri-businesses and businesses interested in the perpetuation of wise water use in Idaho and our nation. IWUA consists of approximately 300 irrigation districts and canal companies, agri-businesses, public water supply organizations, professional firms and individuals from around the state that manage water supplies for more than 2 million acres of irrigated Idaho farmland. Since 1937, IWUA has earned the reputation for being the go-to source for water information, education, and advocacy in Idaho. Idaho's congressional delegation, the Governor's office, and legislature all rely on IWUA for straightforward representation on critical water issues.

National Hydropower Association

National Hydropower Association ("NHA") is a nonprofit national association dedicated to promoting the growth of clean, affordable United States hydropower. NHA seeks to secure hydropower's place as a climate friendly, renewable, and reliable energy source that services environmental, energy, and economic policy obligations. NHA represents over 320 member organizations in the North American hydropower industry, from Fortune 500 companies to family-owned small businesses. These members include both public- and investor-owned hydropower utilities, as well as independent power producers. Further, these members range from large power generators—i.e., the companies that produce hydroelectricity—to service and equipment providers that provide the goods and services used throughout the entire industry supply chain.

National Water Resources Association

The National Water Resources Association ("NWRA") is a nonprofit federation of agricultural and municipal water providers, state associations, and individuals dedicated to the conservation, enhancement, and efficient management of the Nation's water. The NWRA's mission is to promote the best use of the Nation's water resources for the benefit of the people and the environment. To fulfill this mission, the NWRA cooperates with and assists federal, state, and local agencies in securing prompt approval of and funding necessary for the construction, operation, maintenance, and replacement of water projects. The NWRA also works to ensure that

the environmental and economic impacts of existing and proposed water resources development projects are presented in an objective factual record. The NWRA also assists, as appropriate and justified, in the defense of water resource development projects.

Oregon Water Resources Congress

The Oregon Water Resources Congress ("OWRC") is a nonprofit trade association that represents irrigation districts, water control districts, drainage districts, water improvement districts and other agricultural water providers across the State of Oregon. Its district members deliver water to more than 594,143 acres of farmland statewide, over one-third of all irrigated land in Oregon. The OWRC's mission is to promote the protection and use of water rights and the wise stewardship of water resources.

Pacific Northwest Waterways Association

Pacific Northwest Waterways Association is a nonprofit trade organization that represents over 150 organizations across Washington, Oregon, and Idaho, including public ports, terminal operators, tug and barge companies, cruise ship companies, and agricultural producers. PNWA works to ensure that our waterways are efficient, reliable, and environmentally sustainable.

Skagit Drainage and Irrigation Districts Consortium LLC

The Skagit Drainage and Irrigation Districts Consortium LLC is a governmental entity comprised of diking, drainage and irrigation improvement special purpose districts. The Consortium was formed under the authority of the Interlocal Cooperation Act (Revised Code of Washington 39.34.030), and represents shared interests and mutual objectives of member districts. 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.

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. The Consortium member districts are responsible for diking and drainage infrastructure that makes approximately 60,000 acres this farmland viable. In addition, our infrastructure also protects rural communities and a network of critical transportation and water, oil and gas utility corridors from coastal flooding,

including I-5, rail and road access to a major west coast oil refinery complex and the water supply to Naval Air Station Whidbey.

Washington State Water Resources Association

The Washington State Water Resources Association ("WSWRA") is an association of agricultural water providers delivering water to farms and for other beneficial uses, enabling billions of dollars of food production annually. The WSWRA strives to ensure that water continues to flow to its customers by informing policy makers and the public on the critical role irrigation plays in maintaining food security for the Nation and the world. The WSWRA serves as a key resource for legislators, legislative staff, and agencies at the state and federal level by informing these policymakers on the matters and issues of concern to WSWRA members. The WSWRA represents and further the interests of irrigated agriculture in various public and administrative decision-making processes involving water resources and related natural resources; such decision making includes issues such as water rights, water quality standards, fisheries and wildlife regulations and hydroelectric development.