December 15, 2025

Via Email

The Honorable Bruce Westerman
Chairman, Committee on Natural Resources
U.S. House of Representatives

Re: Support for ESA Amendments Act of 2025

Dear Chairman Westerman:

We write to express our strong support of your proposed bill titled "Amendment in the Nature of a Substitute to H.R. 1897," short-titled the "ESA Amendments Act of 2025" (referred to herein as the "Bill"). The Bill would make important amendments to improve and clarify the Endangered Species Act ("ESA"), and we appreciate your pursuit of long-overdue ESA reform.

The undersigned trade associations represent many of our Nation's great fisheries, ranging from Maine to Hawaii, as well as the hard-working men and women that make our fisheries succeed. But success is becoming harder to achieve for *all* U.S. fisheries in an increasingly burdensome regulatory environment. And for the fisheries that compete with large, subsidized foreign fleets, these regulatory challenges create distinct disadvantages that are almost impossible to overcome. We help our fleets and fishermen navigate the maze of federal laws and regulations that govern U.S. fisheries, as well as engage in advocacy, education, stewardship, marketing, and collaborative research to support our fleets. In addition to expressing our general support for the Bill, we write to emphasize two issues that are indispensable to any ESA reform effort.

First, over at least the last three decades, the National Marine Fisheries Service ("NMFS")[1] has—as a matter of internal practice and longstanding policy—violated the ESA's express requirement that agency decisions must be based on the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Almost three decades ago, the Supreme Court explained that the "obvious purpose" of that requirement "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise" and "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." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

Unfortunately, NMFS repeatedly violates this longstanding ESA mandate by applying precautionary assumptions and worst-case scenarios when faced with uncertainty rather than objectively applying the best available data. NMFS claims it must do so because it believes the ESA requires it to "give the benefit of the doubt to the species." But this is exactly the type of "speculation and surmise" prohibited by the Supreme Court in *Bennett v. Spear*. Moreover, NMFS's position was recently and unconditionally rejected by the D.C. Circuit Court of Appeals in *Maine Lobstermen's Association v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023) ("*MLA v. NMFS*").

MLA v. NMFS involved a biological opinion based on speculative modeling and other analyses that were intentionally biased with precautionary assumptions to assume the worst impacts. The D.C. Circuit Court held that NMFS's decision to "indulge in worst-case scenarios and pick 'pessimistic' values in order to give 'the benefit of the doubt' to the species" was "not just wrong; it was egregiously wrong." *MLA v. NMFS*, 70 F.4th at 595, 598. The Court explained that NMFS "misconceived the law, wrongly claiming the legislative history of the ESA had ordained—if legislative history could ever ordain—a precautionary principle in favor of the species." *Id*. at 599. The Court further reasoned that "[w]hen the Service applies a substantive presumption to distort the analysis, the public can have no confidence that economic dislocation is needed to protect a species and is not the result of speculation or surmise by overly zealous agency officials." *Id*. at 599-600. In so holding, the Court observed that NMFS had improperly used this presumption in "other biological opinions" and had "even enshrined this reading of legislative history in its *Endangered Species Consultation Handbook* 1-7 (1998)." *Id*. at 597.

Despite the D.C. Circuit Court's clear holding, NMFS has subsequently and inexplicably decided that *MLA v. NMFS* is "limited to the facts of the case" and, thus, the agency continues to inject precautionary assumptions into its ESA decisions a matter of policy. To make matters worse, NMFS does so deceptively (knowing its position is at odds with *MLA v. NMFS*), such as by conveniently omitting terms like "benefit of the doubt," "worst case," and "conservative" from its documents while still using and applying the *same* biased analyses that are intentionally designed to be precautionary or reflect worst-case scenarios.[2]

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[1] As used in this letter, "NMFS" refers to NMFS's Protected Resources Division. NMFS's Protected Resources Division is distinct from NMFS's Sustainable Fisheries Division. The former is statutorily responsible managing federally protected species, such as ESA-listed species. The latter is responsible for managing federal fisheries (along with regional fishery management councils).

[2] For example, after being alerted to the *MLA v. NMFS* case, NMFS surreptitiously edited a draft biological opinion for the Hawaii longline deep-set fishery to omit the term "worst case analysis" while

NMFS's blatant recalcitrance requires Congress to act. We therefore strongly support Section 2(e) of the Bill, which would codify the holdings in *Bennett v. Spear* and *MLA v. NMFS* to require that the "best scientific and commercial data available" must be "impartially gathered and objectively applied without reliance on precautionary assumptions in favor of a species or other assumptions or policy prescriptions that bias the application." This language would prohibit agencies from applying the "precautionary principle," "precautionary" or "pessimistic" assumptions, and "worst-case scenarios" when evaluating actions and making decisions under the ESA—just as Congress intended. For similar reasons, we support Section 503 of the Bill, which would make clear that, when conducting Section 7 consultations, agencies may only consider effects that are "caused by the action itself," "reasonably certain to occur," and based on "clear and substantial information." *See MLA v. NMFS*, 70 F.4th at 600 (when the agency "lacks a clear and substantial basis for predicting an effect is reasonably certain to occur, . . . the effect must be disregarded in evaluating the agency action").

Second, Section 7(b) of the ESA has been exploited by environmental activists and misapplied by judges, causing significant uncertainty for the regulated community and administrative obstacles for agencies. Specifically, Section 7(b)(4) requires NMFS to issue an incidental take statement ("ITS") when it completes a "no jeopardy" biological opinion. 16 U.S.C. § 1536(b)(4). One prerequisite in Section 7(b)(4) states that, for any ESA-listed marine mammals involved, NMFS must "conclude[] that . . . the taking is authorized pursuant to section 101(a)(5) of the [Marine Mammal Protection Act ("MMPA")]." *Id*. § 1536(b)(4)(C). To receive an incidental take authorization under Section 101(a)(5) of the MMPA, a fishery must first obtain a "negligible impact determination" ("NID") from NMFS. 16 U.S.C. § 1371(a)(5)(E)(i)(I). However, through biased and unreasonable guidance, NMFS has made it almost impossible for a fishery that has incidental take of marine mammals to obtain a NID. For example, NMFS has admitted that issuing a NID for Northeast lobster fisheries would require "massive shutdowns of federal fisheries."[3]

But shutting down federal fisheries—or any other human activities essential to a thriving society—was never the intent of Congress. In fact, in 1979, Congress amended the ESA's "jeopardy" standard to make that clear. Before 1979, the Act's poorly worded "jeopardy" standard led to the infamous "snail darter" case, where the Supreme Court halted work on the Tellico dam based on the ESA listing of a small fish (which has since been delisted). *See TVA v. Hill*, 437 U.S. 153, 172 (1978). Congress's legislative response to that decision in 1979 was intended to "lighten[] the load to avoid paralysis" by requiring any "jeopardy" determination to be supported by a finding of *likely* jeopardizing effects. *MLA v. NMFS*, 70 F.4th at 596.

Environmental activists eager to shutdown fisheries and other important societal activities have subsequently looked to other provisions of the ESA to create the "paralysis" they desire. In fact, that is exactly what those groups tried to accomplish in two lawsuits challenging NMFS's biological opinions applicable to Northeast lobster fisheries. In those lawsuits, the plaintiffs argued that the biological opinions were unlawful because NMFS had not issued a Section

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making *no changes* to the substantive analysis (which was intentionally designed to be precautionary and reflect a worst-case scenario).

[3] *Ctr. for Biological Diversity v. Raimondo*, No. 18-cv-112, Dkt. 228 at 26 (D.D.C.).

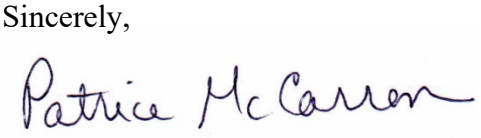
101(a)(5) authorization under the MMPA for incidental take of right whales. In two consecutive opinions from Judge James Boasberg of the federal district court for the District of Columbia, the plaintiffs obtained favorable rulings—one criticizing NMFS for *not* including an ITS for right whales in the biological opinion (because no MMPA authorization had issued) and another criticizing NMFS *for including* right whales in the ITS (also because no MMPA authorization had issued). *See Ctr. for Biological Diversity v. Ross*, 613 F. Supp. 3d 336 (D.D.C. 2020); *Ctr. for Biological Diversity v. Raimondo*, 610 F. Supp. 3d 252 (D.D.C. 2022). The court therefore invalidated both biological opinions.

Although NMFS's approach to the ITS in those biological opinions was reasonable and the district court's rulings were wrong, the fact remains that Section 7(b)(4) of the ESA is poorly written and creates ambiguity that can be exploited by environmental activists, allowing them to obtain illogical court opinions that whipsaw the agency and allow for no reasonable solution—creating the very "paralysis" Congress wanted to avoid. And, as a general matter of good policy, there is no compelling reason why NMFS should have to demonstrate compliance with the MMPA in order to achieve compliance with an entirely separate federal statute, the ESA. Linking the two statutes in this way provides *no additional substantive protections* for species—because each statute's protections continue to separately apply—and, instead, only creates administrative barriers, opportunities for litigation mischief, and, ultimately, paralysis.

Accordingly, we strongly support Section 501 of the Bill, which would amend Section 7(b)(4) of the ESA to eliminate the provisions in that subsection that unnecessarily refer to Section 101(a)(5) of the MMPA—*i.e.* 16 U.S.C. § 1536(4)(C) and (4)(iii). This administrative change would not reduce or otherwise change the fundamental protections provided by the ESA or the MMPA. This is a commonsense reform that will allow NMFS to administer and independently comply with both the ESA and MMPA without the cloud of "gotcha" litigation filed by environmental activists seeking to capitalize on technicalities to achieve their policy goals of curtailing or shutting down U.S. fisheries and other industries.

We strongly support the ESA Amendments Act of 2025 and appreciate your consideration of these comments.

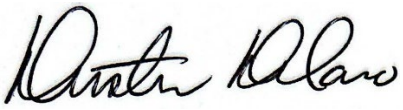
Sincerely,



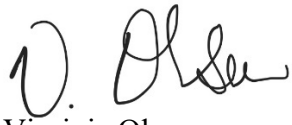
Patrice McCarron
Executive Director
Maine Lobstermen's Association

Erik K. Kingma, Ph.D.
Executive Director
Hawaii Longline Association

Beth Casoni
Executive Director
Massachusetts Lobstermen's Association



Dustin Delano
Chief Operating Officer
New England Fishermen's Stewardship Association



Virginia Olsen
Executive Liaison and Political Director
Maine Lobstering Union

Sheila Dassatt
Executive Director
Downeast Lobstermen's Association

Jake Eaton
Secretary
New Hampshire Commercial Fishermen's Association

Hank Soule
Deputy Director
Atlantic Offshore Lobstermen's Association

Lisa Damrosch
Executive Director
Pacific Coast Federation of Fishermen's Associations