



The voice of fish and wildlife agencies

1100 First Street, NE, Suite 825  
Washington, DC 20002  
Phone: 202-838-3474  
Fax: 202-350-9869  
Email: [info@fishwildlife.org](mailto:info@fishwildlife.org)

## **Testimony before the Senate Committee on Environment and Public Works**

### **“Conservation, Consultation, and Capacity: States’ Views on the Need to Modernize the Endangered Species Act”**

**Nick Wiley, Executive Director, Florida Fish and Wildlife Conservation Commission and  
President, Association of Fish and Wildlife Agencies**

**May 10, 2017**

Chairman Barrasso, Ranking Member Carper, and members of the Committee I appreciate the opportunity to speak with you today. I want to start with some background about my professional experience. I have worked as a fish and wildlife conservation professional for over 31 years, most of that time in Florida. I have served as Executive Director for the Florida Fish and Wildlife Conservation Commission for over seven years. I have a bachelor’s degree in biology from Georgia Southern University and a master’s degree in wildlife science from Auburn University. I currently serve as President for the Association of Fish and Wildlife Agencies (AFWA). As you may know, AFWA represents the collective perspectives of the 50 state fish and wildlife agencies (state agencies) nationwide.

I have professional experience specific to the Endangered Species Act (ESA) in a number of ways including work to preclude listing of candidate species, listing and delisting species, coordination of ESA regulations with private landowners, and species recovery planning. I have worked closely with our state agency experts on management and recovery of high profile listed species including West Indian manatees, Florida panthers, snail kites, American crocodiles, red-cockaded woodpeckers, and Florida scrub jays. On the national level, I served as chair for the AFWA Threatened and Endangered Species Policy Committee for five years and currently serve as co-chair for the State-Federal Joint Task Force on ESA Implementation.

My remarks today will represent the views of AFWA and the Florida Fish and Wildlife Conservation Commission. I will cover 5 key points in this session including: 1) AFWA priorities for ESA improvement adopted by 50 state agencies; 2) the intended roles and authorities for state agencies as ESA was adopted and amended by Congress; 3) the degree to which these roles and authorities were actually realized; 4) a better path forward leveraging state agencies’

expertise and authority along with funding to address at risk species to preclude the need for ESA listing; and 5) examples of success stories illustrating why state agencies are well positioned to exercise much stronger roles and authorities in a new, modernized version of the ESA.

Let me pause on this last point to make something clear. The state agencies support and value the ESA as a strong and effective tool for protecting and recovering species that are on the brink of extinction. Most state agencies believe, however, that the ESA is not performing as it should and is not sufficiently leveraging cooperation between federal agencies and state agencies. We believe there are many areas where ESA needs to be improved, strengthened and refocused to perform as originally intended by Congress when enacted 44 years ago. The ESA simply has not adapted well to the tremendous changes across our nation's conservation landscape and needs to be modernized to effectively deal with the scope and scale of imperiled species challenges we face today. When we talk about modernizing the ESA, we are talking about improving how the ESA is administered and implemented; we are talking about recognizing the state agencies as full partners with concurrent authorities as originally intended by Congress; we are talking about more effectively leveraging the expertise and conservation delivery by the state agencies; and we are talking about keeping the ESA decisions in the hands of the conservation professionals in state and federal agencies rather than the Court system.

The federal agencies responsible for administering the ESA are working diligently to implement the law as adopted by Congress and interpreted by the Courts. But in spite of their best efforts, these agencies cannot keep pace with the growing number of species subject to petitions for federal listing. They simply do not have capacity to handle the growing workloads associated with the petition and listing process, regulatory responsibilities, take permitting, administering conservation incentives, assurances and mitigation programs, Section 7 consultations, addressing litigation, recovery planning, and managing through the recovery and delisting process. Moreover, many of these administrative responsibilities take their focus and funding away from the conservation work on the ground needed to actually recover listed species leaving much of this responsibility to the state agencies.

State agencies appreciate the value of the ESA as a landmark federal law to protect and recover the imperiled species listed under the Act. The ESA was last amended and authorized in 1988. Enacted in 1973, over the almost 44 years of implementation, we have learned much about the conservation of listed species and their recovery needs, such as how to facilitate, not proscribe, private landowner involvement. The AFWA General Principles for Improving Implementation of the ESA, approved by the State Agency Directors in March 2016, are in the Appendix, but below is a brief description of some of them and why we want to improve our ability to recover species under the ESA. These General Principles were developed through initial discussions with

state agencies' endangered species experts serving on AFWA's Threatened and Endangered Species Policy Committee and were further honed by the State Agency Directors. AFWA continues to participate in the Western Governors' Species Conservation and Endangered Species Act Initiative led by Governor Matt Mead (WY), and continues to coordinate with those staffs. Further, AFWA's principles are also consistent with the policy recommendations adopted by the National Governors Association. The modernization ideas are all congruent, and AFWA in cooperation with the Governors is utilizing all of these ideas as we contemplate future ways to improve implementation of the Act and more quickly recover species listed under the ESA.

### **Elevate the Role of State Fish and Wildlife Agencies**

Central to AFWA's General Principles is the recommendation to increase opportunities for state agencies to serve as equal partners with federal agencies and have a more formal, active role and more fully participate in ESA implementation actions as intended by Congress under Section 6 Cooperative Agreements. State agencies, as the trustees of fish and wildlife, should be full jurisdictional partners to implement ESA; not just one of many stakeholders in the process.

Legislative history of the ESA, excerpts from which are in the Appendix, substantiate that Congress intended approved Section 6 agreements to avoid preemption of state law. State agencies have broad expertise, experience and often comprehensive data sets and analyses on many species, but primarily for those species having secure and dedicated funding sources for management, because before they were listed, these species were solely under the state's management and jurisdiction. These data and state agencies' interpretations should be more readily utilized by our federal partners throughout the ESA processes. State agencies should be afforded the opportunity to participate in all implementation aspects of the ESA from listing decisions, to recovery plan development and conservation recovery efforts on the ground, to decisions regarding down-listing and delisting of recovered species.

Many state agencies particularly want a stronger role in providing guidance and support for private landowners on the use of state and federal conservation incentive programs. State agencies want to work with federal agencies to help engage private landowners as partners in conservation and provide them more certainty and less trepidation regarding ESA implementation. State agencies have the responsibility but have not been able to fully exercise the authority under the ESA because of misunderstanding and misinterpretation by the federal executive branch agencies and courts, of the comprehensive nature of Section 6 as intended by Congress.

The Florida Fish and Wildlife Conservation Commission enjoys a strong and productive working relationship with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries

Service (NMFS) with regard to ESA implementation, but current provisions and interpretations of the ESA still result in significant roadblocks limiting our ability to participate as a full jurisdictional partner. Recent work with ESA reclassification petitions regarding black bears and manatees provide examples where the state agency should have been more closely included as a full jurisdictional partner. We were critical in collecting and analyzing data but were not fully brought into the final decision making discussions and process for actions related to these two species even though it was our science and our conservation actions on the ground that were under consideration. Those decision making processes lasted more than a year, and the state was not kept fully apprised of progress or status of decisions other than being told it was being reviewed. These delays can impact the state agency's ability to implement state-based conservation actions, for example updating our state species management plans under review.

### **Restore the Distinction Between Threatened and Endangered Species**

A key recommendation in AFWA's General Principles is to restore the distinction between threatened and endangered species to provide greater flexibility for managing these categories differently and more effectively. Congress intended that the states have the opportunity to lead the management of threatened species, including the provision of "take" as a means of conservation of the species, as substantiated in the 1973 ESA Legislative history. Unfortunately, the USFWS promulgated a default rule (50 CFR 17.31) in the mid-1980s that applies all Section 9 restrictions for endangered species to threatened species unless the Secretary determines otherwise. This essentially eliminated the distinction between the two listing categories.

### **Improve the Listing Process**

AFWA General Principles recognize that the actual listing process is not working efficiently and effectively and the full value of state agency engagement and support is not being realized, particularly regarding statutory timelines for ESA listing decisions, how best available science generated by state agencies is utilized in the process, how preexisting state led conservation efforts are treated, and how state boundaries are considered. AFWA is recommending improvements to the listing process by establishing more realistic time frames for listing decisions so there is more time to work with state agencies, ensure the best available science is fully and accurately considered, and provide more flexibility for recognizing state boundaries, state agency led recovery efforts, and species with data deficiencies.

Adjustments of ESA listing decision time frames would provide opportunity to improve the quality of petitions submitted so they are more science informed and initial evaluation can more readily ascertain the need to move forward with further consideration. AFWA supports a provision authorizing a prioritization process for species considered for listing to focus resources and energy on the species most in need of immediate recovery efforts with a clear

path for other petitioned species. The process needs to insure that all state species data are utilized and considered, giving great weight to the state data and its interpretation by state agencies in decision-making. In some cases, this improvement can preclude the need to list a species under the ESA because of the quantity and quality of state data. Moreover, federal agencies should consult with state agencies, as a full jurisdictional partner, to assess recommendation of listing actions including 90 day findings and 12 month reviews. The current work plan recently designed by USFWS to address Multi-Species Listing Petitions is a step in the right direction and should be utilized to prioritize petitioned species. This system should help reduce the litigation over missed deadlines and allow the prioritization of species most in need of assistance while letting successful, ongoing state-led conservation efforts to continue uninterrupted.

Litigation, court decisions and a “preservation is the only way” attitude has moved the goal posts on what “endangered species” means. The goal posts need to be recalibrated to be more consistent with Congress’ intent with respect to what constitutes a threatened or endangered species. Currently, the threshold of what constitutes “endangered species,” in many circles and particularly with high-profile species, is inconsistent with the population status that is backed by science-informed fish and wildlife conservation. Testament to this problem is the negative reaction by some interests to down-listing the West Indian manatee from endangered to threatened. The species now numbers well over 6,000 individuals compared to 1,200 individuals in 1991. It is hard to argue on a scientific basis that the West Indian manatee is in “danger of extinction throughout all or a significant portion of its range,” which is the statutory definition of “endangered”. We seemed to have lost perspective for what constitutes an “endangered species.”

Species that are robust in population or that fully occupy their range should be maintained under state agencies’ management authority with a state-led conservation plan until the ESA would otherwise be triggered due to declining populations. The listing under the ESA of a population that is healthy today only ties the hands of and places unmanageable burdens on local communities and state agencies when there is nothing we can do today that will positively affect the status of a population 50 or 100 years from now.

These improvements in the listing process would be an important step toward leveraging the value of strong state based conservation efforts while reducing the cost and regulatory implications of federal listing under the ESA. For example, Florida’s state imperiled species listing process is robust and widely respected. It identifies and implements focused management for species well before the need for federal listing. Florida’s process requires development of management plans which should be considered in any listing decision by the USFWS. For example, there are 19 species included in Florida’s Imperiled Species Management

Plan that are petitioned for federal listing. Because these species have comprehensive science and stakeholder informed state plans and protection, there is a strong conservation program in place at the state level that should preclude the need for federal listing.

The gopher tortoise is a good example where flexibility is needed to recognize state boundaries under the ESA listing process. The gopher tortoise is a candidate for federal listing across its range east of the Mississippi River including the states of Alabama, Florida, Georgia and South Carolina. Florida has a comprehensive and successful gopher tortoise conservation program that includes listing it as state threatened species, a “no tortoise left behind” policy, legal protection of tortoises on both public and private lands, and a funding source that ensures long-term conservation and habitat protection. ESA listing decisions should give recognition of state conservation efforts, and federal listing should not be considered in states that have effective state-based conservation programs. This approach would further incentivize and reward state led conservation efforts rather than add even more workload, unneeded regulatory burden, and cost associated with federal listing.

### **Strengthen and Leverage State Cooperation in the Recovery Planning Processes**

AFWA Guiding Principles recommend statutory enhancement and clarification of state agencies’ role in the recovery planning process. It should be clarified under ESA that recovery teams should be established to develop science-informed recovery plans for prospectively listed species and that state agencies have the option to lead recovery planning and implementation. Whether a state agency leads recovery planning or not, it should be required that the state agency or agencies and the Secretary agree on the size and composition of the recovery team, with the state agency director deciding which state agency experts sit on the recovery team. Recovery can be expedited by supporting and continuing state level conservation initiatives, management plans and partnerships to recover listed species. Further, require that once an approved recovery plan’s population and/or habitat objectives established by the recovery team are reached, the Secretary must initiate the delisting process.

Iconic, high profile species are more likely to have recovery plans that are up to date; however, many plans for other species are not actively being implemented or updated or have never been written. State agency staff work on management and recovery while the federal focus is often regulatory. State agencies would prefer a more collaborative approach that focuses on biological recovery goals and implementation of strategies that achieve these goals. For example, the flatwoods salamander was listed in 2009, but a federal recovery plan has yet to be finalized. State agency biologists are currently forming a working group to address management and conservation of this species in the absence of a recovery plan.

## **Relocate Critical Habitat Designation to Recovery Plan Development**

Another area where ESA implementation can be improved and strengthened is to relocate the designation of critical habitat to recovery plan development and provide more discretion for the Secretary to designate or not designate critical habitat based comprehensively on continued implementation of state conservation plans or initiatives, state lessons learned, implications for communities, funding availability, and other aspects that directly impact the recovery of a species. The scope of critical habitat should be better defined and clear guidance given to when designations are needed or required. In Florida, designation of critical habitat for manatees and panthers was lengthy, controversial, and litigious and created barriers and delays to conservation and recovery.

## **Revise Down-listing and Delisting Processes**

AFWA General Principles recognize the need to address issues with the process for down-listing and delisting species once recovered. There should be increased reliance on and great weight given to actually achieving recovery plan population and habitat goals. One of our greatest challenges to delisting species after meeting recovery objectives continues to be the federal agencies' ongoing revision of a species' recovery goal once we have successfully reached or surpassed the recovery population and habitat goals. We need look no further than the ongoing saga to delist the Grizzly bear in the Greater Yellowstone Ecosystem -- years after state agencies have met the Grizzly bear population recovery goal in the recovery plan, the USFWS continues to increase the population threshold which changes the requirements for delisting. The ESA should be clear in specifying that achievement of recovery goals as determined by the recovery team should initiate the delisting or down-listing process. Also, the ESA should be clarified to create more ecological and geographical flexibility for down-listing and delisting regarding valid listable entities regardless of how they were originally listed. The ESA should emphasize timely execution of the down-listing and delisting process to realize conservation successes and reduce unnecessary regulatory burdens, reflecting the mirror image of the current 12-month listing timeline that allows for public comment. And finally, recovery and reclassification should acknowledge State boundaries as the state agencies are the trustees for fish and wildlife in the states. Federal agencies should be able to reclassify or delist species within a specific State, but the courts have interpreted ESA in a manner that limits this option.

ESA changes are needed to provide more specificity and flexibility in the delisting process to alleviate lengthy and unnecessary regulatory burdens on local communities by allowing both the listing and delisting of a species as a Distinct Population Segment (DPS), and other improvements. Unfortunately, there are less statutory details provided for the delisting process, and we deduce that Congress assumed that delisting, which is the objective of the ESA, would quickly follow the recovery of a species because protections of the ESA were no longer

required. That has not been the case with a number of species, and delisting can take decades and require overcoming many obstacles even after species' recovery goals are met. Further, once a species is delisted, it should return to state jurisdiction for sustainable conservation as designed by the state agency, with a report to the Secretary after 5 years and during which should be protected from judicial review. This will allow state agencies and local communities to work together to sustain and grow the recovered population without the lengthy uncertainty that accompanies litigation and jeopardizes further conservation on the ground.

These issues regarding recovery planning are important in Florida. For example, panthers cannot be delisted regardless of the success and sustainability of recovery within the state. Delisting is dependent on actions in other states. The ESA should specify flexibility for recovery success to be recognized within state boundaries thereby providing further incentives for states to invest more in recovery and foster greater cooperation for species recovery in partnership with private landowners. Additionally, manatee down-listing would have been faster and less controversial had the USFWS been able to consider the down-listing of just the Florida population, and not have been required to include the Puerto Rico population.

#### **Improve Implementation of Section 10(j), Experimental Introductions**

Changes and clarifications also are needed under Section 10(j) of ESA regarding use of experimental introductions of listed species to improve or accelerate recovery often under unique conditions. This ESA tool should be used in a more cooperative manner where state agencies are working in partnership and in agreement with federal agencies. For example, the Secretary and state agencies should share in decisions regarding boundaries of 10(j) releases, and it should be clarified that federal agencies must comply with state permitting authorities before 10(j) individuals are released. This will ensure better coordination between state and federal agencies and ensure that state conservation efforts for other high priority species are not compromised by the release of 10(j) individuals.

#### **Jurisdiction Authorities; State-Federal Relationship and ESA Section 6**

Let me briefly review the jurisdictional authorities for fish and wildlife in the state-federal relationship. Fish and wildlife conservation was one of "The powers not delegated to the United States by the Constitution, ... [and thus] are reserved to the States respectively, or to the people" (10th Amendment). In the United States, fish and wildlife are owned by the public and managed as trust resources by state agencies. State agencies have primacy for managing fish and wildlife within their borders and have concurrent management authority with federal agencies on migratory birds, inter-jurisdictional fishes, and the topic of today's discussion – threatened and endangered species. Just for clarification, candidate species are under the management authority of state agencies, not the federal agencies. Only Congress can give a

federal agency authority to preempt the states' authority for management of fish and wildlife, and then only for certain federal actions. The ESA is one example, but in doing this, Congress explicitly affirmed that the federal authority they gave the federal agencies exists concurrent with the pre-existing authority of the state agency (defined in the ESA as the state fish and wildlife agency) for listed fish and wildlife species.

Section 6 of the ESA gives the Secretary explicit direction on how Congress expected the federal-state jurisdictional relationship to work. It starts with Sec. 6.(a) GENERAL—" In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States". Section 6 goes on to describe agreements that the Secretary may enter into to allow a qualified state to implement the ESA. These cooperative agreements contemplated that the Secretary, upon the state's demonstration of the appropriate authority and adequate program design, would authorize an approved state to lead ESA activities by delegating his or her concurrent authority to the state. The state would then be directing research and management of listed species, not just applying the Secretary's program for each species.

Unfortunately, the Section 6 authorities available to the states have never been fully realized by the states. Admittedly in the first dozen or so years of the ESA, only a few states had the capacity and political support to realize the authorities under Section 6. Hence, the Secretary through the USFWS exercised through rule and policy, a very significant portion of the ESA authority. Since the mid-1980s, many states have enhanced their staff, expertise, habitat management techniques, science capability for listed species, relationships with private landowners and local communities, and political support that would enable them to more fully exercise their authorities and roles in implementing the ESA as Congress originally intended as substantiated in the 1973 Legislative history. We believe in implementing the ESA, the concept of "cooperation with the state agency" should apply to all actions under the entire Act and afford states of varying sizes and capacities the opportunity to opt into decision-making and recovery of species consistent with their capacity and authorities. We should we willing to accept any and all assistance state agencies are willing to provide to the federal agencies.

Clarification and validation of state authorities under Section 6 and through more comprehensive Section 6 agreements would provide a path forward for state agencies to opt into exercising more authority for ESA implementation tailored to the available capacity and interest of each state agency. Without more clarity in this regard, sharing ESA workload with state agencies is a major challenge. Working with the USFWS, the Florida Fish and Wildlife Conservation Commission was able to amend the standard Section 6 agreement to share workload regarding incidental take permitting through a set of mutually agreeable guidelines. Unfortunately due to questions about authority and threat of litigation, we have not exercised

this option in our Section 6 agreement that could provide much needed assistance to the USFWS.

### **Conservation Capacity in State Fish and Wildlife Agencies**

I would like to expand a bit on state agencies' growing capacity. In 2014-2015 under AFWA President Larry Voyles (AZ), we conducted a survey to better understand state agencies' individual and collective resources to manage fish and wildlife within their borders. We discovered that state agencies employ nearly 50,000 highly-trained and highly-motivated employees and leverage the efforts of 190,000 volunteers. Collectively, state agencies have about 11,000 degreed wildlife biologists, 10,100 law enforcement officers, and nearly 6,000 employees with advanced degrees. State agencies have 2,211 employees solely dedicated to educating and informing the public regarding wildlife and issues that affect conservation. Nationwide, state agencies coordinate the efforts of 189,393 volunteers who devote their time and energies to wildlife conservation, multiplying our full-time workforce by about 5.5 times.

State agencies are proud of their successes with recovering listed species and restoring declining species to sustainable populations so the provisions of the ESA are not necessary. For most state agencies, it has been a challenge building capacity, funding and staffing to do this necessary conservation work. Insufficient funding to federal agencies for recovering a listed species often thrusts an unfunded fiscal burden on state agencies to manage the federal regulatory requirements of a federally listed species. If the federal agencies believe there is a compelling need to list a species under the ESA then it should be followed by a specific congressional funding request under Section 6 or other programs to fund the execution of the new federal burden on its citizens, industries and communities. Because of the dearth of federal funding for the recovery of listed species, state agencies have been creative in developing new and innovative funding sources above and beyond the conservation funding contributed by sportsmen and sportswomen. Over the last few decades by stretching limited funding, state agencies have built considerable expertise and capacity in response to the growing need to address at-risk and imperiled species. Congress has provided a helping hand for these efforts by funding development of State Wildlife Action Plans through the State and Tribal Wildlife Grants Program. We are grateful for this recognition of the value of state based conservation, but we are only able to scratch the surface with this level of support and with the growing list of petitions and possible listings it is a growing federal and fiscal burden on state agencies.

AFWA recently convened a Blue Ribbon Panel on Sustaining America's Diverse Fish and Wildlife Resources co-chaired by Governor Dave Freudenthal and Bass Pro Shops founder and CEO John L. Morris and including executives from major corporations and leadership from the nation's leading non-governmental conservation organizations. This panel validated the serious need for

a more complete funding model that enables state agencies to more fully deliver conservation actions for all fish and wildlife. While the Wildlife Restoration Program and the Sport Fish Restoration and Boating Trust Fund are successful for providing reliable and dedicated funding to state agencies for the conservation and management of species that are hunted and fished, respectively, there is no concomitant, dedicated funding source to state agencies for the conservation and management of species that are neither hunted nor fished, which today are many of the species trending toward listing under the ESA. State agencies need a dedicated funding source commensurate with their conservation challenges to restore, conserve and manage these at-risk species that comprise state agencies' species of greatest conservation need. We are seeking a national funding solution to address a critical, nation-wide fish and wildlife conservation issue that is of national importance. To accomplish this goal, they recommended a sweeping initiative to dedicate \$1.3 billion annually to the Wildlife Conservation Restoration Program under the Wildlife Conservation and Restoration Program to state agencies to effectively implement State Wildlife Action Plans. In response to this recommendation during the last Congress, Representatives Don Young (AK) and Debbie Dingell (MI) introduced the Recovering America's Wildlife Act (HR 5650) that would fully fund this initiative. Further, this recognized need also is supported by section 1.4.1 Principles of the Environmental Protection policy position which was adopted by the National Governors Association in February 2017.

The Recovering America's Wildlife Act would provide critical resources equipping state agencies to sustainably lead proactive, voluntary, incentive-based conservation efforts that would preclude the need to list species under the ESA. As an observation, the state agencies believe that addressing the life needs and habitat requirements of declining species before they reach the point where ESA application is required, is the more prudent, economically and biologically sound approach to managing species trending toward listing. Through State Wildlife Action Plans, the state agencies have comprehensively identified species of greatest conservation need and outlined the key actions needed to conserve them.

### **Benefits of Leveraging Full ESA Partnership with State Agencies**

ESA issues are not restricted to the west, as these Appendix graphs and maps of listed species by state illustrates. Following the 2010 filing of the so called "mega-petition" and others that covered 404 aquatic species in the southeast, state agencies comprising the Southeastern Association of Fish and Wildlife Agencies (SEAFWA) developed the Southeast At-Risk Species (SEARS) program in partnership with the USFWS Southeast Region Office. The purpose of this program is to cooperate and coordinate among the states to address the conservation needs of at-risk species.

Implementation of this program has resulted in numerous beneficial actions to date. The state agencies categorized species into bins related to conservation and information needs associated with each species. This categorization approach later became the foundation of the system adopted by the USFWS for their own national work plan. The outcomes of this collaborative approach have been remarkable: a) 98 species do not require protection of the ESA because of existing conservation actions, updated surveys, and reevaluation of threats to their survival; b) five species have been “upgraded” from endangered to threatened; c) four species have been delisted; and d) five species were listed as threatened instead of endangered because of the overall efforts. The voluntary conservation efforts developed for these species also provide benefits for many more species (both imperiled and common) on the landscape. State agencies worked across state boundaries and cooperatively with the USFWS utilizing state agency funds and funding from ESA Section 6 grants and State Wildlife Grants.

The bottom line is state agencies are effective at leveraging partnerships, relationships, expertise, capacity and funding to conserve fish and wildlife. And while we may not be able to preclude the need to list every species, we can bring great value as a full partner in ESA implementation in many ways and could do much more with a more clarified and strengthened role through ESA modernization and additional resources.

State agencies often do the greatest share of work managing federally listed species and dealing with associated challenges. We are on the ground, in the communities, and on the front lines. Citizens, businesses and landowners are more likely to reach out to state agencies for assistance with listed species than our federal partners, and we find ways to step up and help; often finding innovative ways to fund our efforts like specialty license plates and donations.

Yet the way the ESA is constructed and interpreted, state agencies can be involved in key decisions in the listing process only at the discretion of the federal agencies. In many cases, rather than being an integral part of the decision-making process, state agencies are relegated to submitting comments along with all other stakeholders or members of the public who file comments. Even when we are invited to be more involved in the decision making process, there is a point where the federal curtain closes, and we are left outside as decisions are finalized and approved. In my seven years working with the State-Federal ESA Joint Task Force, it has become clear to me that most state agencies would like to have the option to be much more involved in ESA decisions and in some cases, exercise their concurrent authority for steps in the decision-making process because of impacts to other state managed species and conservation efforts.

### **States Serve as Essential Partners in Cooperative Conservation Success Stories**

I want to finish by offering some conservation success stories where federal and state partners worked closely together to implement ESA and the state agency played a key role by providing

the majority of funding, staff resources, and key regulatory and enforcement support. These conservation successes clearly demonstrate the essential leadership role state agencies have taken in species recovery and clearly validate the credibility of state agencies to have standing as full and equal partners under a modernized ESA.

Surveys of Florida manatees in recent years show their numbers at over 6,000, up from 1,200 back in 1991, and the highest numbers since the surveys began. Just last month, the USFWS reclassified the manatee as a threatened, and no longer an endangered species.

Florida hosts one of the largest nesting aggregations of loggerhead sea turtles in the world, and has seen a 32 percent increase in nests since 1989. The number of green sea turtle nests on our beaches has increased from less than 500 in the early 1980s to a record number of over 37,000 in 2015.

Florida has one of the highest populations of breeding bald eagles in the lower 48 states, with 1,499 active bald eagle nests in 2014, the last official estimate. This compares to only 88 bald eagle nests in 1973. Nationally, acting through regional recovery teams for bald eagles, many state agencies established activity zones to protect nesting bald eagles from activities that could be deleterious during the nesting and chick-rearing season, and some state agencies enforced those restrictions through county zoning laws. Most landowners are very proud to have bald eagles on their property and accommodate temporal restrictions on land management activities such as agriculture or timber harvest to retain the use of their land for bald eagles. Now, of course, the bald eagle has been delisted but is still protected.

Further, the Florida panther, our state's official mammal, is another sign of progress. Numbering as few as 20 to 30 in the 1970s and 1980s, there are now an estimated 120 to 230 adults. And the big news: Biologists recently documented a female panther and kittens north of the Caloosahatchee River, a natural barrier to panther habitat expansion. Just days later north of the river, trail cameras identified another female panther. This one engaged in mating behavior with a male panther. These are major milestones on the road to recovery for the Florida panther, with the kittens presumed to be the offspring of the first wild female panther documented north of the Caloosahatchee River since 1973!

Moving north along the East Coast, Delmarva Fox Squirrels in the Mid-Atlantic were recently delisted due to the great work of MD, DE, VA and PA. They worked closely with federal, industry, academic and conservation partners, and most importantly private landowners. In this case, a listed species was recovered predominately on private lands without the use of a Habitat Conservation Plan or Safe Harbor Agreements. In the 1980s in Maryland, incidental take for landowners, for example accidentally running over a Delmarva Fox Squirrel with their tractor, was authorized by the Maryland Department of Natural Resources under the authority

of their section 6 cooperative agreement with the USFWS. That is a testament to the trust and value of state agencies' relationships with families and communities when they work side-by-side to recover America's wildlife.

Eastern Peregrine falcons were recovered largely by state agencies and Cornell University under permits from the USFWS. This subspecies was extirpated in the wild, but through intense recovery efforts, is now restored throughout its historical range and beyond. Cornell University used a captive breeding program to breed several subspecies from around the world creating a hybrid Peregrine falcon with greater vigor and adaptability. State agencies located and constructed hacking boxes for the captive-bred fledglings and placed them on towers, mountain ledges, bridges and buildings where an adequate prey base existed. They also placed nesting trays in these same places as the fledged birds matured to breeding age. This included areas outside of historic Eastern subspecies range under the guidance of the recovery team. The result is that our eastern United States citizens now enjoy a robust and healthy population of Peregrine falcons. Differentiation of the subspecies can only be determined by certain anatomical measurements requiring the bird in hand, but in appearance, behavior, and hunting activity, it is a Peregrine falcon. North American Peregrine Falcons are now delisted and can once again under permit be used in falconry.

The New England Cottontail Regional Initiative is another excellent example of how multiple state agencies worked together in partnership with USFWS, other federal agencies and NGO partners across state boundaries to recover imperiled species and preclude the need for ESA listing. This was a heroic 10 year proactive conservation effort across six New England states. They coordinated and orchestrated implementation of habitat management regimes in 31 of 47 Focal Areas with targets as fine as the parcel level. More than \$41.6 million was dedicated to conserving this candidate species, and because of their conservation actions on the ground across the range of this species, the New England Cottontail Regional Initiative was successful, and protections of the ESA were not warranted. The New England Cottontail Regional Initiative was so successful that these conservation efforts are being expanded by the state agencies to all young forest species.

Thank you for the opportunity to share the perspectives of Florida and the 49 other state fish and wildlife agencies.

## Appendix



### **General Principles for Improving Implementation of the Endangered Species Act**

*Adopted March 18, 2016*

**Objective Statement:** Improve Endangered Species Act implementation to ensure its future by making it a more effective conservation program for fish and wildlife, and more acceptable to private landowners. This improved implementation would be directed and managed by state and federal fish, wildlife, and natural resource professionals.

#### **Principles for Improvement:**

- 1: Enables more effective and consistent conservation and protection of species.
- 2: Ensures fish, wildlife and natural resource professionals make Endangered Species Act decisions.
- 3: Facilitates the opportunity for robust utilization of state fish and wildlife agency concurrent jurisdictional authorities in Endangered Species Act implementation as Congress originally intended.
- 4: Focuses on management actions that will recover species to the point that provisions of the Endangered Species Act are no longer necessary, and the species can be delisted or down-listed.
- 5: The approach is apolitical and politically viable because it has bipartisan support.
- 6: Better incentivizes private landowner participation in application of the Endangered Species Act.

#### **Recommendations for Improvement:**

**I. Implement Preventive and Restorative Management:** improve cooperation between state and federal agencies to preclude the need to list species by addressing species life needs and habitat requirements, more fully recognize and integrate state-led conservation efforts, and improve processes and guidelines for listing decisions. Secure funding sources for these actions.

**II. Elevate the Role of State Fish and Wildlife Agencies:** increase opportunities for state fish and wildlife agencies to take a more formal and active role and fully participate in Endangered Species Act implementation actions as intended by Congress under Section 6 Cooperative Agreements.

**III. Improve the Listing Process:** make the best decision within a more realistic timeframe; prioritize species considered for listing; and insure all state fish and wildlife data are utilized and

fully considered in the listing determination whether such data are published or not; and include state agency expertise in the process of interpreting these data and drawing conclusions.

**IV. Require the Development of Science-Based Recovery Plans for Listed Species Directed by Recovery Teams:** enhance States' role including the opportunity to lead recovery planning and implementation, expedite recovery by supporting state level initiatives and partnerships; and increase flexibility and feasibility for recovery plan applicability.

**V. Relocate Critical Habitat Designation to Recovery Plan Development and Create More Flexibility:** create more flexibility for the Secretary to exercise discretion to designate or not designate critical habitat, better define the scope, scale and basis for critical habitat designations and include clear guidance on when such designations are needed or required.

**VI. Revise Down-listing and De-listing Processes:** increase reliance on and give great weight to recovery plan population and habitat objectives to inform the initiation of the delisting or down-listing process and create more ecological and geographic flexibility for downlisting and delisting valid listable entities, regardless of how they were originally listed; expedite down-listing and de-listing processes to realize conservation successes and reduce unnecessary regulatory burdens.

**VII. Restore the Distinction between Threatened and Endangered Species Categories:** return to Congressional intent providing greater flexibility to manage these listed species differently; afford state fish and wildlife agencies the opportunity to manage threatened species as Congress intended; and allow take as a possible means of "conservation" in the Act.

**VIII. Fully Utilize State Conservation Agreements, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, Safe Harbor Agreements and Habitat Conservation Plans:** provide consistency and guidance on utility.

**IX. Provide Certainty and Incentives for Private Landowners:** enhance clarity and increase conservation incentive options available; expedite the process for concluding these conservation agreements to enhance certainty to private landowners.

**X. Enhance Endangered Species Act Funding:** sufficient funding should facilitate successful conservation outcomes, species recovery, and delisting; enhance funding to states and federal agencies for all aspects of Endangered Species Act implementation.

**XI. Improve Implementation of 10(j) Experimental Populations to Enhance Species Recovery:** provide guidance on when the use of 10(j) experimental populations are appropriate and standardize post delisting monitoring plans.

**XII. Science and actual conservation work to recover species should drive Endangered Species Act decision making:** devolve the role of litigation and more fully realize Congressional intent for Endangered Species Act implementation.

**XIII. Establish more Consistent Implementation Procedures and Processes:** improve consistency and timeliness of administrative processes and actions implemented under the Act.

## **Legislative History of the 1973 ESA Bill On Passage: Excerpts**

### **Senate Consideration and Passage of S.1983, With Amendments, from the Congressional Record, July 24, 1973, pages 342-425**

Sen. John Tunney (CA):

“On the other hand, it was well established in the hearing record that most of the States possess much greater wildlife management resources than does the Federal government. Clearly any effort on the part of the Federal government to encourage the restoration of threatened or endangered species would fail without the assistance of the state agencies. This bill is designed to permit and encourage state endangered species programs that are in concert with the purposes of this Act.”

“Subject to the provisions of this Act which provide maximum protection for species on the brink of extinction, States with active endangered species programs are given full discretion to manage threatened species which reside in their boundaries.”

Sen. Ted Stevens (AK):

“Sections 6 and 16 provide for cooperation with the states. They provide the major backbone of the Act. Presently the states have an extensive network of endangered species legislation. Unfortunately, not all states have as yet implemented such programs. This bill will assist those states not yet involved to implement such programs and will, if the states do not, provide for Federal preemption.”

“As Dr. Ralph Mac Mullen, president of the International Association of Game, Fish, and Conservation Commissioners observed, state wildlife agencies employ over 5800 law enforcement officers across the Nation. Formal Endangered Species programs are being implemented in over 30 states.”

“Dr. Mac Mullen further observed that if the Federal government were to take away the right of the states to manage these species and to preempt the states, State Legislatures would not be willing to appropriate the necessary funds to protect endangered species.”

House Committee Report 93-412 (to accompany HR 37)

“The principal areas of discussion during the hearings and markup of legislation centered on the proper role of the state and Federal governments with regard to endangered species programs...”

“Any bill which is designed to deal with the complicated issues involved in the protection of endangered species must do so in light of least two competing considerations: first, protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies... Second however, the States are far better equipped to handle the problems of day to day management and enforcement of laws and regulations than is the Federal government...”

“Regulatory jurisdiction is given to the Federal government under this legislation and if a cooperative agreement is successfully negotiated and signed, to the states as well.”

“Where a cooperative agreement has been put in effect the bill allows concurrent jurisdiction over the species affected in both the state and federal judicial system.”

“In all other respects ... [than adherence to actions specifically permitted or prohibited by the Federal agencies]... the state law is not preempted but is merely subject to the “floor” of regulations under the Act.”

House Consideration and Passage of HR 37 with Amendments:

Cong. James Grover (NY):

“Second, we have adequately protected legitimate state interests, power, and authorities by providing for concurrent Federal/State jurisdiction...”

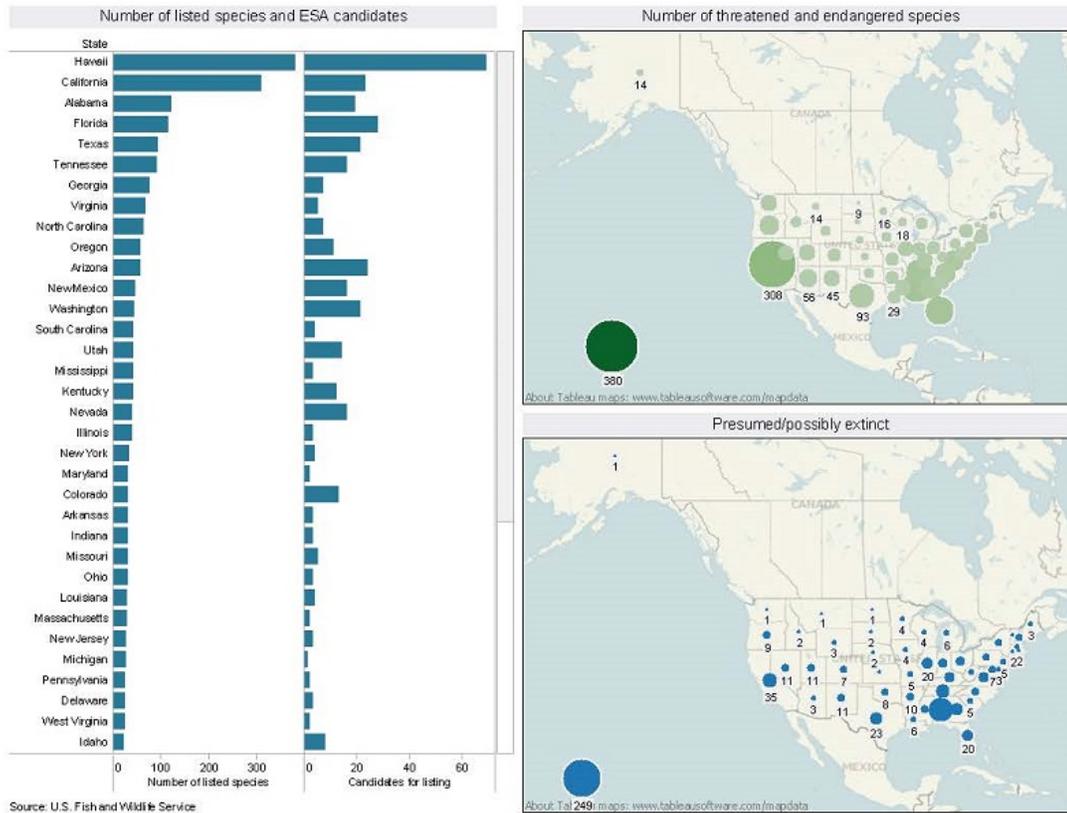
“It is imperative to realize, as the Committee did, that the greater bulk of the enforcement capabilities concerning endangered species lie in the hands of the state fish and game agencies and not the Federal government. It is on a state level that habitat areas will be located, and it is on a state level where this new Federal law will be implemented, subject to overall Federal criteria and guidelines.”

House Conference Report 93-740 (to accompany s. 1983 as reported by the House-Senate Conference Committee)

“As finally approved, the Act will have the effect of giving the states fundamental roles with respect to resident species for a given period of time... The conferees hope that this device will impel the states to develop strong programs to avoid the alternative of federal preemption.”

“It should be noted that the successful development of an endangered species program will ultimately depend on a good working arrangement between the federal agencies, which have

broad policy perspectives and authority, and the state agencies, which have the physical facilities and personnel to see that state and federal endangered species policies are properly executed.”



Source: <http://ecowest.org/biodiversity/endangered-species/>