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“Oversight: Modernization of the Endangered Species Act.”

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Good morning Chairman Barrasso and Senator Carper, and members of the Committee. My name is Gordon Myers, and I am the Executive Director of the North Carolina Wildlife Resources Commission (Commission). I am also President of the Southeastern Association of Fish and Wildlife Agencies (SEAFWA), and I sit on the Executive Committee of the Association of Fish and Wildlife Agencies (AFWA), of which all 50 states are members. In those capacities, I also represent the views and positions of SEAFWA and AFWA today, and I very much appreciate the opportunity to testify today on modernizing the Endangered Species Act (ESA).

The state fish and wildlife agencies (states) 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. Since then, Congressional authorization has been realized through the annual appropriations bills for the respective agencies. Enacted in 1973, over the almost 44 years of implementation, we have learned much about the conservation of listed species, their recovery needs, and how to facilitate, not proscribe, private landowner involvement. It is time to apply that knowledge to improving the ESA to better achieve the conservation and recovery of listed species and to better enable, not direct, the participation of private landowners. I will share today our recommended improvements to the ESA, and some state success stories.

Let me quickly describe the jurisdictional authorities for fish and wildlife in the state-federal relationship. States have broad police powers and authority for the conservation and management of fish and wildlife within their borders, including on most federal land. Congress has repeatedly confirmed that authority. 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”. 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 agency exists concurrent with the pre-existing authority of the state agency (defined in the ESA as the state fish and wildlife agency).

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, directing research and management of listed species, not just apply the Secretary's program for each species. The legislative history of the ESA demonstrates that Congress intended that states with qualified endangered species programs lead in the conservation and recovery of threatened species (see Sen. John Tunney's 1973 floor remarks in consideration of S.1983).

Congress also authorized the Secretary to grant funds to the qualified states for implementing the ESA, but no funds were ever granted to the States under Section 6 to fulfill Congress' intent that States lead in the conservation of threatened species. Unfortunately, this has created missed conservation opportunities to restore species by state experts who are closest to the species, understand the recovery needs, and have the community relationships necessary to achieve recovery.

Unfortunately, the Section 6 authorities available to the states have never been fully realized by the states, and Section 6 became only a funding mechanism to direct limited appropriated funds to 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 U.S. Fish and Wildlife Service (FWS) exercised through rule and policy, a very significant portion of the ESA authority. There are a few exceptions where a state and the FWS have a Section 6 Cooperative Agreement that creates a more sophisticated state-federal partnership for implementing the ESA. Since the mid-1980s, in general the 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 envisioned and if it was modernized to meet today's species restoration needs. Some state budgets are challenged to provide the dedicated and permanent fiscal resources consistent with their desires and abilities to launch into implementation of an enhanced ESA.

We support the ESA but believe that it should be modernized to meet today's restoration challenges. As state agencies and managers of fish and wildlife resources held in trust for the public and for the benefit of future generations, we would like to see more constructive and collaborative efforts from interested stakeholders that more directly advance the conservation and recovery of species of interest. We all have an interest in recovering species listed under the ESA and together could do more if concerns and stakeholder interests were directly focused on habitat conservation and recovering listed species rather than redirecting limited federal and state fiscal resources away from on the ground conservation activities.

As an observation, the states 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, economic and biologically sound approach to managing species tending toward listing. Through State Wildlife Action Plans, the states have comprehensively identified species of greatest conservation need and outlined the key actions needed to conserve them. Further, we have funding source recommendations from a Blue Ribbon Panel on Sustaining America's

Diverse Fish and Wildlife Resources co-chaired by Governor Freudenthal and Bass Pro Shops founder and CEO John L. Morris, and are working with Congress to identify a permanent and dedicated funding source. We would be happy to discuss this further.

I include as an attachment, the AFWA General Principles for Improving Implementation of the Endangered Species Act, approved on March 18, 2016 by all State fish and wildlife agency Directors assembled in their Business Meeting in Pittsburgh, PA. AFWA continues to actively participate in Western Governors' Species Conservation and Endangered Species Act Initiative led by Governor Matt Mead (WY) and continues to coordinate with those staffs. The two sets of modernization ideas are congruent, and AFWA in cooperation with the Governors is utilizing both sets of ideas as we contemplate future ways to improve implementation of the Act and more quickly recover species listed under the ESA.

Let me now describe the ESA priority improvements of the AFWA. First, increase opportunities for state fish and wildlife agencies to take a more formal and active role and fully participate in all aspects of ESA implementation as intended by Congress, through the authority of Section 6 Cooperative Agreements. States have broad expertise, experience and often comprehensive data sets and analyses on listed species because before they were listed, the species were under state management jurisdiction. These data and the states' interpretations should be more readily utilized by our federal partners throughout ESA processes. States 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 providing guidance to private landowners in the use of federal incentive programs that provide them more certainty, to decisions regarding down-listing and delisting of recovered species.

Second, restore the distinction between threatened and endangered species to reflect Congressional direction, providing greater flexibility to manage these categories differently. 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. Unfortunately, the FWS (but not NOAA) promulgated a default rule (50 CFR 17.31) in the mid-1980s that applies all Section 9 restrictions for endangered species also to threatened species unless the Secretary determines otherwise. This essentially eliminated the distinction between the two listing categories because by statute, endangered species Section 9 provisions could only be applied to threatened species if the Secretary explicitly declared it.

Third, improve the listing process. This involves a consideration of adjusting the listing process decisions to a more realistic time frame in order to appropriately utilize the best available science and improving the quality of petitions submitted that should also reflect the best available science. We support a provision authorizing a prioritization process for species considered for listing in order 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 the state agencies in decision-making. In some cases, this may preclude the need to list a species under the ESA because of the quantity and quality of state data. However, states' data must be shared between state and federal partners in a way that upholds State privacy laws and respects private property rights.

Fourth, require recovery teams to develop science based recovery plans for listed species, providing opportunities for the states to lead recovery planning and implementation. Recovery can be expedited by supporting and continuing state level initiatives and partnerships to recover listed species. Further, require that once an approved recovery plan's population and/or habitat objectives are reached, the Secretary must initiate the delisting process.

Fifth, relocate critical habitat designation to recovery plan development, and give the Secretary more discretion to designate or not designate critical habitat based comprehensively on continued implementation of state conservation plans or initiatives, state lessons-learned, economic 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.

Finally, create more specificity and flexibility in the delisting process to alleviate lengthy and unnecessary burdens on local communities by allowing both the listing and delisting of a species by a Distinct Population Segment (DPS) of a species, 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. Unfortunately, that has not been the case 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, with a report to the Secretary after 5 years.

North America's conservation model and its delivery system is the foremost model around the globe. The fundamental tenets of this model along with the collective efforts of partners have resoundingly contributed to its effectiveness, and contributions of state fish and wildlife agencies are foundational. Collectively, state fish and wildlife agencies provide more than 50,000 full and part-time employees, including more than 11,000 biologists and 8,400 certified law enforcement officers to manage, conserve, and protect the public's wildlife resources and their habitats.

Across the Southeast and throughout nation, the states are leading and supporting many innovative and collaborative efforts to keep common species common, prevent declines of imperiled species, and recover threatened and endangered species. There are many groundbreaking state-led conservation partnerships across the region that have yielded significant conservation outcomes, including the historic delisting of the Louisiana black bear, range-wide collaborative conservation of the Gopher Tortoise, and innovative Red-cockaded woodpecker recovery efforts within the eastern North Carolina Sentinel Landscape. I will briefly share a few other examples that demonstrate state capacity to focus, coordinate, and integrate resources to deliver effective conservation.

The first example focuses on a state-led recovery partnership for the Spotfin Chub (*Erimonax monachus*), a federally threatened minnow found in western North Carolina, east Tennessee, western Virginia, and north Alabama. The Spotfin Chub recovery plan calls for reestablishment of the species into suitable habitat within its historic range. A section of the Cheoah River in

western North Carolina was determined a suitable reintroduction location following river restoration pursuant to Santeeelah Reservoir FERC relicensing. In 2008, the Commission partnered with the FWS, Conservation Fisheries, Inc., the U.S. Forest Service, Alcoa Power Generation, Inc. and others to collect broodstock, propagate the species, and ultimately reintroduce it into the Cheoah River. Staff from the Commission collected broodstock that were taken to Conservation Fisheries for propagation. The resulting fry were then taken to a state-owned hatchery operated by the Commission for grow out. The propagated fish were released into the Cheoah River when they reached one year of age. Between 2008 and 2016, over 5000 Spotfin Chub were propagated and released or translocated to the Cheoah River. Follow up surveys indicate that the Spotfin Chub restoration in the Cheoah River has been a success. The Cheoah River Spotfin Chub reintroduction location was differentiated from other potential sites because it was highly unlikely to result in additional regulatory burden. The reintroduction area is relatively remote and already designated as critical habitat for Appalachian Elktoe, a federally endangered mussel. The Commission has identified several other suitable reintroduction areas and should the species be similarly reestablished, the species would likely be considered recovered and could be de-listed. Unfortunately, regulatory impacts that accompany the presence of a federally listed species have proven to be a significant barrier to implementing additional recovery efforts. It is ironic that the regulatory provisions meant to protect the Spotfin Chub and other federally listed species is inhibiting the recovery of these species. The Commission is currently propagating four other federally-listed species and others petitioned for listing. If a means of reintroducing these species into historic habitat without the threat of increased regulatory burden could be formulated, effective conservation actions could be implemented which could lead to the protection and potential recovery of these species.

The second example focuses on the Tar River Spiny mussel (*Elliptio steinstansana*), a federally-endangered mussel species restricted to the Tar and Neuse river basins in central and eastern North Carolina. In 2007, the Commission worked in partnership with the FWS and North Carolina State University to collect broodstock, propagate, and ultimately augment remaining populations of these federally endangered mussels. Between December 2014 and September 2016, the Commission and partners released over 9,500 propagated Tar River Spiny mussels at four locations in Fishing and Little Fishing creeks in the Tar River basin. To measure program success, 1,310 mussels were individually tagged, measured, and released into an experimental reach of Little Fishing Creek in 2014 and 2015. Follow up surveys indicated high survival and good growth of the stocked mussels. Preliminary results suggest that propagation and stocking of Tar River Spiny mussels into the best available habitat has the potential to bolster dwindling populations and assist in the recovery of this species. An important follow up step in this state-led effort is to determine mechanisms to stock propagated mussels into currently unoccupied suitable habitat without introducing regulatory constraints associated with the presence of a federally listed species.

The last example focuses on a pioneering approach to unify human, financial, data, and other resources across the Southeast. Following the 2010 filing of the so called “mega-petition” by the Center for Biological Diversity and others that covered 404 aquatic species in the southeast, state fish and wildlife agencies comprising the SEAFWA developed the Southeast At-Risk Species (SEARS) program in partnership with the FWS 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. A first task was to develop a work plan to guide the activities of the states. The plan includes the following five elements:

1. Develop and implement an information sharing network.
2. Establish a criteria framework for species prioritization.
3. Develop a regional research and survey process
4. Conduct regional conservation activities
5. Speak with one unified voice

Implementation of this plan has resulted in numerous beneficial actions to date. The states 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 FWS for their national work plan.

The outcomes of this approach have been remarkable. This focused, coordinated, and integrated allocation of human, financial, and other resources across the Southeast has already accomplished the following:

- Four species have been listed as threatened rather than endangered,
- Eight species have been down-listed to threatened from endangered,
- 84 species were determined to not need protection under the ESA, could be listed as threatened rather than endangered, or could be down-listed or removed altogether, due to proactive conservation efforts, and
- The voluntary conservation efforts developed for these species also provide benefits for many more species (both imperiled and common) on the landscape.

The SEAFWA states are also similarly committed to integrate agency resources across territorial jurisdictions to develop species status assessments. For species where information is lacking, states are coordinating survey and monitoring activities. These actions will provide much needed information to determine each species' conservation status. Most importantly, activities of the SEARS program have led to needed conservation actions. A prime example is the Candidate Conservation Agreement for the Sicklefin Redhorse, a large fish found in western North Carolina and northern Georgia. This agreement involved two states, the FWS, two power companies, and the Eastern Band of Cherokees. This agreement, which contains numerous conservation actions for the species, led directly to a decision by the FWS not to list the species. Such examples demonstrate the benefits and capabilities of the states and FWS to work shoulder-to-shoulder for the range-wide conservation of species and their habitats.

In the more than four decades since the landmark ESA was enacted, the state-of-the-art for conserving fish, wildlife, and their habitats has evolved considerably. Great strides have been made to fill critical knowledge gaps, build professional capacity, and conserve and protect key habitats. As outlined in the preceding examples, range-wide conservation partnerships among state, federal, non-governmental organization, and private citizens are capable of remarkable conservation outcomes. It is time to apply state-of-the-art conservation to improving the ESA to better achieve the conservation and recovery of listed species and to better enable the full participation conservation partners. Thank you once again for this opportunity to testify. I would be happy to answer any questions.