AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 114–200

FEDERAL INTERACTIONS WITH STATE MANAGEMENT OF FISH AND WILDLIFE

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

FEBRUARY 9, 2016

Printed for the use of the Committee on Environment and Public Works

Available via the World Wide Web: http://www.gpo.gov/fdsys

U.S. GOVERNMENT PUBLISHING OFFICE

99–406 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED FOURTEENTH CONGRESS
SECOND SESSION

JAMES M. INHOFE, Oklahoma, *Chairman*

DAVID VITTER, Louisiana
JOHN BARRASSO, Wyoming
SHELLEY MOORE CAPITO, West Virginia
MIKE CRAPO, Idaho
JOHN BOOZMAN, Arkansas
JEFF SESSIONS, Alabama
ROGER WICKER, Mississippi
DEB FISCHER, Nebraska
MIKE ROUNDS, South Dakota
DAN SULLIVAN, Alaska

BARBARA BOXER, California
THOMAS R. CARPER, Delaware
BENJAMIN L. CARDIN, Maryland
BERNARD SANDERS, Vermont
SHELDON WHITEHOUSE, Rhode Island
JEFF MERKLEY, Oregon
KIRSTEN GILLIBRAND, New York
CORY A. BOOKER, New Jersey
EDWARD J. MARKEY, Massachusetts

RYAN JACKSON, *Majority Staff Director*
BETTINA POIRIER, *Democratic Staff Director*

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

DAN SULLIVAN, Alaska, *Chairman*

JOHN BARRASSO, Wyoming
SHELLEY MOORE CAPITO, West Virginia
JOHN BOOZMAN, Arkansas
JEFF SESSIONS, Alabama
ROGER WICKER, Mississippi
DEB FISCHER, Nebraska
MIKE ROUNDS, South Dakota
JAMES M. INHOFE, Oklahoma *(ex officio)*

SHELDON WHITEHOUSE, Rhode Island
THOMAS R. CARPER, Delaware
BENJAMIN L. CARDIN, Maryland
BERNARD SANDERS, Vermont
KIRSTEN GILLIBRAND, New York
CORY A. BOOKER, New Jersey
EDWARD J. MARKEY, Massachusetts
BARBARA BOXER, California *(ex officio)*

C O N T E N T S

Page

FEBRUARY 9, 2016

OPENING STATEMENTS

Sullivan, Hon. Dan, U.S. Senator from the State of Alaska 1
Whitehouse, Hon. Sheldon, U.S. Senator from the State of Rhode Island 4
Inhofe, Hon. James M., U.S. Senator from the State of Oklahoma, prepared statement 66

WITNESSES

Regan, Ronald J., Executive Director, Association of Fish and Wildlife Agencies 5
Prepared statement 8
Responses to additional questions from Senator Sullivan 18
Barry, Donald, Senior Vice President, Conservation Program, Defenders of Wildlife 20
Prepared statement 22
Responses to additional questions from Senator Whitehouse 35
Lang, Doug Vincent, former Director, Alaska Division of Wildlife Conservation 39
Prepared statement 41
Responses to additional questions from Senator Sullivan 46

ADDITIONAL MATERIAL

Letter to Senators Murkowski and Cantwell from Jennifer Mock Schaeffer, Government Affairs Director, the Association of Fish & Wildlife Agencies, December 15, 2015 74
Letter to Dan Ashe, Director of the U.S. Fish and Wildlife Service, from Ronald J. Regan, Executive Director, the Association of Fish & Wildlife Agencies, January 15, 2016 78
Written testimony of Todd Parfitt, Director, Wyoming Department of Environmental Quality, February 3, 2016 79
Letter to Joseph G. Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, from Todd Parfitt, Director, Wyoming Department of Environmental Quality, May 22, 2015 88
Letter to Joseph G. Pizarchik, Director, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, from Todd Parfitt, Director, Wyoming Department of Environmental Quality, October 23, 2015 90
Letter to Janice M. Schneider, Assistant Secretary for Land and Minerals Management, Department of the Interior, from Todd Parfitt, Director, Wyoming Department of Environmental Quality, December 3, 2015 96
Letter to Janice M. Schneider, Assistant Secretary for Land and Minerals Management, Department of the Interior, from Todd Parfitt, Director, Wyoming Department of Environmental Quality, January 19, 2016 98
Written testimony of John Corra, Director, Wyoming Department of Environmental Quality, before the House Energy and Mineral Resources Subcommittee, September 26, 2011 101
Written testimony of Safari Club International 109
Letter to C. L. "Butch" Otter, Governor of the State of Idaho, from Ken Salazar, Secretary of the Interior, April 15, 2011 114

FEDERAL INTERACTIONS WITH STATE MANAGEMENT OF FISH AND WILDLIFE

TUESDAY, FEBRUARY 9, 2016

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:34 p.m. in room 406, Dirksen Senate Building, Hon. Dan Sullivan (chairman of the subcommittee) presiding.

Present: Senators Sullivan, Barrasso, Capito, Boozman, Fischer, Rounds, Inhofe, Whitehouse, and Gillibrand.

OPENING STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM THE STATE OF ALASKA

Senator SULLIVAN. The Subcommittee on Fisheries, Water and Wildlife will now come to order. Good afternoon to our witnesses.

The purpose of this hearing is to examine the interactions States have with the Federal Government as they seek to manage the fish and wildlife resources within their borders. I think a lot of people have a misunderstanding of this very important principle. Since the founding of our Republic, the States, not the Federal Government, have had primacy over the management of wildlife within their borders.

In the case of Alaska, our Statehood Act, passed by Congress, even included language to affirmatively transfer management authority of fish and wildlife management to the State. By reserving certain powers to various States, the unique needs of each of those States to manage and control their resources are preserved. That is why traditionally there is State management for all States.

Alaska, for example, has an excellent history of sustainably managing our own fish and wildlife resources for the benefit of our citizens, and when the Federal Government and the States have been able to work together cooperatively, which we usually do, whether through the Pittman-Robertson or Dingell-Johnson Acts or other direction from Congress, species have benefited, and the overall management has significantly benefited.

Having entered the Union on equal footing, all States enjoy management authority unless modified or diminished by an Act of Congress. There are many examples of this where Congress does act to preempt State management authority whether it be the Migratory Bird Treaty Act, Endangered Species Act, the Bald and Golden Eagle Protection Act, title 8 of the ANILCA. These are all examples where the Federal Government has taken that management au-

thority and preempted it. I am not always in favor of such preemption, but the authorities of these Acts are not nearly as damaging to our States and to our federalism system of government as ones carried out by agency fiat.

In many ways, that is what we are going to focus on today where the Congress makes clear that the Federal Government has authority, agencies clearly have that prerogative and States abide by that. The broader concern is where it is not clear, and Federal agencies take actions that do not seem to focus on the rule of law or Federal statutes.

In my State, conservation is not only a matter critical to our quality of life and customs and traditions; it is also a matter of social justice for our most remote communities who depend on nature's bounty for food. Any time the Federal Government intrudes into our sovereign responsibility to sustain and manage fish and wildlife populations, it is of great concern to all Alaskans.

I want to emphasize a theme that develops sometimes unfortunately in this committee is that it is always partisan; one side only wants to protect the environment. I think we all want to protect the environment. Most of these concerns, in my experience, are very bipartisan in terms of protecting the environment but also in terms of how States manage their resources.

That is why one major newspaper in Alaska referred to a recently proposed rule from the U.S. Fish and Wildlife Service that would preempt Alaska's management of fish and game in the following way: "Alaskans should be clearly concerned, even alarmed, that these proposed rules by the Federal Government, are just more in a long list of attempts by the Federal Government to amend the Alaska Statehood Act and have preemption in terms of fish and wildlife management."

Last fall, the National Park Service finalized similar rules that prohibit several forms of hunting in preserves in Alaska and would allow superintendents to simply post a notice online preempting State wildlife laws and regulations. Calling the rule overarching, vague and indiscriminate, the Alaska Federation of Natives passed a resolution in opposition, again, a group that is very bipartisan in my State.

That same resolution stated, "Other Federal agencies, such as the U.S. Fish and Wildlife Service, also apply various rules that interfere with traditional resource management practice that reduces subsistence access to our citizens." In both cases, the rules being preempted are based on practices that subsistence hunters requested to the Alaska Board of Game, again in an open, public process to provide food security for passing on their traditional practices.

We are fortunate to have three very distinguished witnesses here today to look forward to a more detailed discussion on this important issue of the interchange between Federal and State management of our important wildlife resources.

I am glad to have the witnesses here and my Ranking Member, Senator Whitehouse, join me for this important hearing. I will turn to him for his opening statement.

[The prepared statement of Senator Sullivan follows:]

STATEMENT OF HON. DAN SULLIVAN,
U.S. SENATOR FROM THE STATE OF ALASKA

Good afternoon. The purpose of this hearing is to examine the interactions States have with the Federal Government as they seek to manage the fish and wildlife resources within their borders. Since the founding of our Republic, the States—not the Federal Government—have had primacy over the management of wildlife. In the case of Alaska, our Statehood Act even included language to affirmatively transfer management authority to the State. These rights were further guaranteed under the Alaska National Interest Lands Conservation Act (ANILCA) of 1980.

By reserving certain powers to the various States, the unique needs of each of those States to manage and control their resources are preserved. Alaska, for example, has an excellent history of sustainably managing our own fish and wildlife resources for the benefit of all Alaskans. And when the Federal Government and the States have been able to work together cooperatively—whether through the Pittman-Robertson or Dingell-Johnson Acts or other direction from Congress—species have benefited.

Having entered the union on equal footing, the States enjoy management authority unless modified or diminished by an Act of Congress. And on a handful of occasions, Congress has modified the authority of the States. The Migratory Bird Treaty Act, Endangered Species Act, Bald and Golden Eagle Protection Act, Marine Mammal Protection Act, and title VIII of the ANILCA are all examples of where this is the case.

Preemption can severely affect the management authority of the States, most markedly with the Endangered Species Act, which leads to a Federal takeover of species management and land use under very specific circumstances.

I am not always in favor of such preemption, but the authorities of these Acts aren't nearly as damaging—to my State and to our system of government—as ones carried out by agency fiat. When agencies, as they increasingly do, seek to bypass the will of Congress through regulations, it's Federal overreach at its worst.

In Alaska, conservation is not only a matter critical to our quality of life and customs and traditions. It is also a matter of social justice for our most remote communities who depend on nature's bounty for food. Anytime the Federal Government intrudes into our sovereign responsibility to sustain and manage fish and wildlife populations, it's of great concern to Alaskans.

That's why one major newspaper in Alaska referred to a proposed rule from the U.S. Fish and Wildlife Service that would preempt Alaska's management in this way: "Alaskans should be clearly concerned—even alarmed—that these proposed rules are just more in a long list of attempts by the Federal Government to amend the Alaska Statehood Act."

The National Wildlife Refuge System was created by President Theodore Roosevelt in 1903, when he created the first refuge by Executive Order. Today, the Refuge System is comprised of 560 refuges and 150 million acres that have been reserved for the conservation of fish and wildlife. In Alaska, the Fish and Wildlife Service manages nearly 77 million acres of land in 16 national wildlife refuges.

These refuge lands are not parks or national monuments, but rather are intended for priority public wildlife-dependent uses for hunting, fishing, wildlife observation, photography, environmental education and interpretation. Refuges are conservation units, not preservation units.

The proposed regulations as currently written seek to alter that balance and will fundamentally alter not only how national wildlife refuges and the fish, wildlife and habitats on them will be managed but will also change the relationship of the Service and the individual States from one of cooperation to subservience. The proposed Alaska regulations are not based on any of the laws I referenced earlier but rather on an ideology that was implemented into a policy that the FWS now seeks to fold into regulation.

With these regulations, the Fish and Wildlife Service will administratively impose its will via regulatory action. In doing so, they will preempt science-based management approved by the Alaska Board of Game in an open, public process. For those outside of Alaska, know that once this rule is adopted in Alaska, there is no limiting its spread to other States.

Last fall, the National Park Service finalized similar rules that would prohibit several forms of hunting in preserves in Alaska and would allow superintendents to simply post a notice online preempting State wildlife laws and regulations. Calling the rule, "overreaching, vague, and indiscriminate," the Alaska Federation of Natives passed a resolution in opposition. That same resolution stated, "Other Federal agencies such as the U.S. Fish and Wildlife Service also apply various rules

that interfere with traditional resource management practice that reduce subsistence access."

In both cases, the rules that are being preempted are based on practices that subsistence hunters requested to the Alaska Board of Game, again in an open, public process, to provide food security or for passing on their traditional practices.

We're fortunate to have all three of our witnesses here today, and I look forward to discussing this important topic with them.

OPENING STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chairman. It is good to be with you.

Looking at the witness testimony and the scope of this hearing, I guess I should first note that although the word environment is in the name of this committee, it does not mean we get to stake claim to all things water and all things soil. In the written testimonies of both Mr. Vincent Lang and Mr. Regan, their reference is to the National Park Service. The relationships of State Fish and Wildlife agencies with other Federal agencies like the National Park Service and Forest Service may be worth reviewing. They are not jurisdictional to this committee.

It is also worth pointing out that a critical witness is not present at today's hearing. Though the bulk of testimony and discussion from this hearing will be focused on the U.S. Fish and Wildlife Service, its director, Dan Ashe, was not invited to participate. In a discussion about the Fish and Wildlife Service's rules and regulations and how they are affecting State agencies, the Service should be here to explain and if necessary, defend its actions.

The problems here may be regional, but whatever the issue, I should note that many States manage to get along very well with these Federal agencies. Successful cooperation and collaboration between State and Federal agencies, I would argue, is actually the norm. Serious conflicts are an anomaly.

In my State of Rhode Island, Cathy Sparks, Assistant Director of Natural Resources at the Rhode Island Department of Environmental Management, notes, "A spirit of collaboration exists in the Northeast between State fish and wildlife agencies and their U.S. Fish and Wildlife Service counterparts."

Rhode Island has a "good working relationship with the Service, especially with issues concerning national wildlife refuges and Endangered Species Act implementation." Assistant Director Sparks shared particular appreciation for the Fish and Wildlife Service's willingness to maintain what she called "open dialogue with the State and a track record of being both reasonable and forthcoming."

I do not think the Rhode Island experience is unique. As Mr. Barry indicated in his testimony, Nick Wiley, Executive Director of the Florida Fish and Wildlife Conservation Commission, mirrored the Rhode Island Department of Environmental Management's comments in noting "the longstanding collaborative and positive relationships" that his State has with the Service.

Effective management of our country's land, air, water and wildlife is reliant upon cooperation between States and Federal Government. We are not one sovereign or another, and they are dual sovereigns. Throughout the many statutes that govern natural resource management and the relationship between Federal and

State authorities, the words "collaboration," "cooperation," and "in consultation with" litter the text.

Though States are given significant deference in Federal fish and wildlife decisionmaking, the laws make clear that State interests cannot come at the cost of conservation, especially not on the public lands held in trust for the enjoyment of all Americans.

I look forward to working with you on this. I understand that Alaska has particular concerns, and perhaps those can be dealt with on a State or regional basis. But I would contest any premise that this is a national categorical problem, certainly based on Rhode Island's experience. We have a terrific relationship with our Federal counterparts. I think many States enjoy and manage to accomplish the same.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Whitehouse.

I want to welcome our witnesses. Mr. Ronald J. Regan is the Executive Director of the Association of Fish and Wildlife Agencies. Mr. Doug Vincent Lang is the former Director of the Alaska Division of Wildlife Conservation. Mr. Donald Barry is the Senior Vice President, Conservation Program, Defenders of Wildlife.

Witnesses have 5 minutes to deliver their oral statements. Longer written statements will be included in the record. I am very excited to have such a distinguished group of witnesses here today.

Mr. Regan, let us begin with you. You have 5 minutes to deliver your statement.

STATEMENT OF RONALD J. REGAN, EXECUTIVE DIRECTOR, ASSOCIATION OF FISH AND WILDLIFE AGENCIES

Mr. REGAN. Thank you, Chairman Sullivan and Ranking Democrat Whitehouse, for the opportunity to share with you our perspectives on Federal interaction with State management of fish and wildlife.

As the introduction suggested, I am Ron Regan, Executive Director of the Association of Fish and Wildlife Agencies, of which all 50 State fish and wildlife agencies are members. The Association's mission, which has not changed significantly from our founding in 1902, is to protect State agency authority to conserve and manage the fish and wildlife within their borders.

State governments hold title to fish and wildlife as trustees of these resources for their citizens. Regulating take for hunting and fishing resides under that authority. Case law at all levels up to the Supreme Court upholds that trustee ownership in the State agencies.

Where Congress has given Federal agencies certain conservation responsibilities and thus authority for fish and wildlife, Congress has also affirmed that State jurisdiction is concurrent with the Federal authority starting with the Migratory Bird Treaty Act in 1918 and continuing for federally listed threatened and endangered species under the ESA and certain migratory and anadromous fish under the Anadromous Fish Conservation Act.

Congress affirmed State agency authority for fish and wildlife management on Federal lands in organic Acts for the U.S. Fish and Wildlife Service, the Bureau of Land Management, the U.S. Forest Service and the Department of Defense military installations. Each

statute directs that to the maximum extent practicable, hunting and fishing seasons and bag limits shall conform to State agency regulations. In general, State agencies enjoy a good working relationship with the Federal agencies, but they strive constantly to improve that for the benefit of fish and wildlife resources and constituents.

Contemporary examples include State-Federal task force collaboration on administration of the Wildlife and Sport Fish Restoration Program and Federal implementation of the ESA. Recent conservation success stories for greater sage-grouse, lesser prairie-chicken, monarch butterflies and the New England cottontail attest to the strength of the State-Federal partnership.

That being said, my written testimony suggests there are foundational, jurisdictional concerns with managing elk in Wind Cave National Park in South Dakota, recreational fisheries management and access in the Biscayne National Park of Florida and wilderness designations for two national forests in Arizona.

However, today I will focus my brief time on proposed rulemaking for Alaskan national wildlife refuges and preserves that would change how the Alaska Department of Fish and Game manages fish and wildlife resources on those refuges.

The Association appreciates the Chair's accepted amendment to the Bipartisan Sportsmen's Act which would prohibit the Fish and Wildlife Service from further action on its proposed regulation and preclude implementation of the like National Park Service regulation. The Association has requested a comment period extension, and we will continue to work with the Fish and Wildlife Service to address our concerns.

If enacted, the proposed rule would usurp Alaska's authority to manage fish and wildlife for sustained yield including predators and large ungulates on national wildlife refuges in favor of a hands-off or passive management paradigm which would adversely impact Alaska fish and game objectives for resident fish and wildlife. The proposed rule takes what is now national policy on biological integrity, diversity and environmental health and elevates it to a regulation, thereby giving it preeminence in Alaska over other national wildlife refuge policy and also over ANILCA.

This action may result in litigation that seeks to apply that policy to the entire national wildlife refuge system under the argument that what is good for Alaska should be good for all refuges given that it is a national system. A recent public relations appeal by the Humane Society of the United States to support this proposed rule already refers to it as applying to all national wildlife refuges.

I will conclude my remarks with two legislative and policy remedies among several that were offered in my written testimony. First, the use of savings clauses in Federal law with respect to State authority for fish and wildlife management needs some revision and certainly more prominent placement in statutes or legislation than it now occupies.

Second, the Association recommends revising the several Federal agency organic Acts to define with more certainty and clarity the phrase "in cooperation with the States" at the appropriate places with direct fish and wildlife management on Federal lands and/or

in statutes that recognize the concurrent jurisdiction of State agencies with Federal agencies for fish and wildlife.

The Association would be pleased to work with committee staff on both provisions, and thank you very much, Mr. Chairman, for this opportunity to share these remarks.

[The prepared statement of Mr. Regan follows:]

ASSOCIATION of FISH & WILDLIFE AGENCIES

Testimony on Federal Interaction with State Management of Fish and Wildlife
Before the Senate Subcommittee on Fisheries, Water and Wildlife of the
Committee on Environment and Public Works
Ron Regan, Executive Director, Association of Fish and Wildlife Agencies

February 9, 2016

Thank you, Chairman Sullivan and Ranking Democrat Whitehouse, for the opportunity to share with you our perspectives on federal interaction with state management of fish and wildlife. I am Ron Regan, Executive Director of the Association of Fish and Wildlife Agencies (the Association), of which all 50 state fish and wildlife agencies (state agency) are members. Prior to that, I concluded my state agency career as Commissioner of the Vermont Department of Fish and Wildlife. The Association's mission, which has not changed significantly from our founding in 1902, is to protect state agency authority to conserve and manage the fish and wildlife within their borders. In meeting that goal, we strive to facilitate cooperation between state and federal agencies, conservation NGOs, and private landowners.

In general, the state agencies enjoy a good working relationship with the federal agencies, but we strive constantly to improve that for the benefit of our fish and wildlife resources and our hunters, anglers, bird watchers, other outdoor enthusiasts, plus the general public. I will today share with you some of those successes of working together, and a few specific examples with the potential to be precedent setting, which need to be resolved.

The United States is truly unique in the world with respect to how fish and wildlife conservation is achieved principally by the state agencies in cooperation with the federal fish and wildlife and land management agencies. State agencies are the primary, front-line managers of fish and wildlife within their borders, including on most federal lands. They strive to proactively maintain healthy fish and wildlife populations, initiating conservation strategies to preclude the need to list species under the federal Endangered Species Act (ESA) and to preserve state agency management authority for fish and wildlife species. They have broad trustee powers grounded in state statutes, constitutions, or both. Despite state agencies having primary legal authority to manage most fish and wildlife in the U.S., in some instances the states have concurrent jurisdictional authority with federal agencies and share fish and wildlife management responsibilities with them. And, since the federal land management agencies own the land, they manage the habitat, so a cooperative state-federal agency relationship is imperative.

The state constitutional and statutory laws that codify state agencies' authority were not written in a vacuum. They codify a concept that dates back to the Roman Empire and that came to North America via English common law. The concept is the public trust in fish and wildlife which assigns trustee ownership of fish and wildlife to the states.

State governments hold title to fish and wildlife, as trustees of these resources, for their citizens. Regulating take for hunting and fishing resides under that authority. Like a trustee of real property or financial assets, states are to manage the fish and wildlife so that the populations, which can be compared to trust principal, are sustained for the current and future use and enjoyment of the citizens of their states, who are the beneficiaries of the trust. Case law at all levels up to the Supreme Court upholds that trustee ownership in the state agencies.

As fish and wildlife conservation in the U.S. matured at the beginning of the last century, Congress affirmed the state agencies authority for fish and wildlife management on federal lands in organic acts for the U.S. Fish and Wildlife Service (USFWS), the Bureau of Land Management (BLM), the U. S. Forest Service (USFS) and Department of Defense military installations (DoD). Each statute directs that to the maximum extent practicable, hunting and fishing seasons and bag limits shall conform to the state agency regulations. The exception is the organic act for the National Park Service (NPS) which reserves authority to the Secretary to manage fish and wildlife on units of the NPS. For example, hunting is prohibited on designated National Parks unless specifically authorized by Congress in the enabling legislation. However, hunting is allowed on many National Preserves and National Seashores.

Where Congress has given federal agencies certain conservation responsibilities, and thus authority for fish and wildlife, Congress has affirmed that state jurisdiction is concurrent with the federal authority starting with the Migratory Bird Treaty Act (MBTA) in 1918. Congress also granted federal agencies authority for listed threatened and endangered species under the ESA, and certain migratory anadromous fish under the Anadromous Fish Conservation Act. All of these statutes reflect the concurrent management jurisdiction of the state agencies with the federal agencies, with the exception of the Marine Mammal Protection Act (MMPA) in which Congress reserved the management authority exclusively to the federal government.

Allow me to share a few success stories regarding the state and federal agencies interaction on managing fish and wildlife.

We are fortunate in the U.S. to have had a Congress that recognized many decades ago the importance of the management of our fish and wildlife resources and further sought to provide sustainable funding to ensure this management. The first of these statutes was the Wildlife Restoration Act passed in 1937. This statute is commonly referred to as "Pittman-Robertson" (P-R) after its Congressional sponsors. In 1951, the Sportfish Restoration and Recreational Boating Safety Act passed and similarly named "Dingell-Johnson" (D-J) after its sponsors. In 1984, significant amendments were made to this act which brought in the federal gasoline tax that is attributable to boaters and small engines and expanded its common name to include "Wallop-Breaux" (W-B). These acts are seminal federal statutes which provide permanent (not subject to Congressional appropriations) and dedicated funds to state agencies for fish and wildlife conservation providing for fulfilment of their public trust responsibilities.

Enacted when state fish and wildlife agencies' duties were growing from basic enforcement of game laws to include conservation and habitat programs, P-R and D-J/W-B directed revenues from their respective excise taxes on hunting and angling equipment to state fish and wildlife agencies for conservation-related uses. By enacting these laws, Congress recognized and affirmed that state agencies are the primary managers of fish and wildlife within their borders. At the time of passage, these acts provided the majority of funds in the states for fish and wildlife conservation, hunter safety and education, shooting range construction for hunter safety education, sportfish conservation, boating safety education, boating access, aquatic resources education and other programs. To this day, these statutes continue to be the foundational acts for fish and wildlife conservation as delivered by the state agencies. Since their enactment, over $13 billion dollars have been made available to the state agencies to be matched by state revenues from the sale of hunting and fishing licenses. These excise taxes are collected by the U.S. Treasury and placed into special accounts to be apportioned to the states by the USFWS.

Relative to the administration of P-R and D-J/W-B, the Association and the USFWS several years ago established a State-Federal Joint Task Force on Federal Assistance (FAJTF) comprised of state agency and federal agency staffs, to collaboratively resolve challenging issues regarding implementation of these programs. Since its establishment, the FAJTF has successfully addressed and modernized implementing regulations and policies.

The MBTA dates from 1918, and enacts sequentially four treaties between the United States and Britain (signing for Canada), Mexico, Japan and Russia, agreeing to protect migratory birds that cross international boundaries during their life cycles. The USFWS administers the MBTA and maintains a list of migratory birds. The MBTA prohibits "take" and it also prohibits trafficking. It has "take" exceptions for research and for hunting, and state agencies mostly regulate migratory bird hunting within season and bag limit frameworks established by the USFWS in cooperation with the states. The USFWS shares with state agencies the regulation and enforcement of migratory bird hunting.

The administration of the National Wildlife Refuge System (NWRS) is governed by the National Wildlife Refuge System Administration Act as amended by the National Wildlife Refuge System Improvement Act of 1997 (NWRSIA). The NWRSIA is a comprehensive organic act that establishes: the mission and statutory purposes of the System; direction to the Secretary regarding administration of the System, including acquisitions, and development of Comprehensive Conservation Plans (CCP) for each refuge; direction to cooperate with state agencies during acquisition and management of the System; and several other provisions. The Association worked closely with both sides of the Congressional aisle, the Administration, and NGOs in drafting language of the NWRSIA through its various iterations.

Subsequent to enactment of the NWRSIA, the USFWS integrated a small, regionally representative team of state agency senior staff into their process of developing policies to implement NWRSIA. Under an Interagency Personnel Agreement, these 5 state individuals worked in confidence with USFWS staff at every step from the concept stage to final policy over a period of 4-5 years in the development of many refuge policies. In large part, the state fish and wildlife agencies were pleased with this unprecedented process and now seek to use this model of partnership and cooperation with other aspects of fish and wildlife conservation with the USFWS and other federal agencies.

Enacted in 1997, the Sikes Act Improvement Act (SAIA) directed that DoD military installations prepare an Integrated Natural Resource Management Plan (INRMP) for installations with significant natural resources. It also directed that with respect to fish and wildlife conservation, the INRMP must be "mutually agreed to" by the state agencies, the USFWS, and the installation in order to establish an approved INRMP for implementation on the military installation. While some armed forces branches have different implementation policy, in general this (mutually agreed to) is the strongest language with respect to the state agency-federal agency interface on managing fish and wildlife. The SAIA also directs that unless it is inconsistent with the military mission of the installation, the property shall be open to the general public for hunting and fishing. No other federal lands act has this concurrence requirement between the state agencies and other non-DoD federal land management agencies.

Approximately 8 years ago, an Endangered Species Act Joint Task Force (ESAJTF) was established between the state agencies, the USFWS and National Oceanic and Atmospheric Administration (NOAA) to address regulations, rules and policies implementing the ESA. To our knowledge, this was the first time that all three jurisdictional agencies worked together to constructively address known issues with implementation of the ESA. These discussions are replete with challenges due to the complex processes associated with the implementation of the ESA and the shared passions in achieving the protection and recovery of imperiled species. We are pleased with our progress and are grateful that the ESAJTF provides a forum in which the jurisdictional authorities can compare and contrast regulations and policies governing the ESA and formulate problem solving approaches to address disparities.

Just recently, there have been several examples of successful state agency-federal agencies (USDA Natural Resources Conservation Service, USFWS, BLM, USFS,) cooperation in delivering on-the ground, landscape-level conservation for both species and habitats in particular need of conservation. These plans and actions have been successful in precluding the need to list species under the ESA because the jurisdictional agencies have addressed the species' life-cycle needs and habitat requirements through collaborative on-the-ground conservation actions. These include landscape-level conservation initiatives for the Greater Sage Grouse, New England Cottontail and others.

These few examples highlight that on many fronts we have a strong history of state-federal collaboration and that we continue to make positive progress with regard to state-federal relationships for the conservation issues of our day. With that being said, there are potentially precedent-setting issues that, if not resolved, could significantly compromise state agency authority and state-federal agency relationships in this arena. A few examples follow.

State Agency Management of Fish and Wildlife on Alaska National Wildlife Refuges and National Preserves

Of particular interest to the Chairman, the USFWS recently published in the Federal Register a proposed regulation that would change how the Alaska Department of Fish and Game (ADFG) manages fish and wildlife on National Wildlife Refuges (NWR). The USFWS set a 60 day comment period which ends March 8. Because of the implications to state agency authority, the Association has requested the comment period be extended to 121 days.

If enacted the proposed rule would usurp Alaska's authority to manage fish and wildlife for sustained yield, including predators (wolves, bears and coyotes) and large ungulates (moose, deer, and caribou), on NWRs in favor of "hands-off" or passive management which would adversely impact many fish and wildlife species ADFG currently seeks to manage while providing benefits for the public. The USFWS indicates that this proposed rulemaking is about predator management. Upon critical review of the language it appears to the Association to be fundamentally about the derogation of state agency authority to manage fish and wildlife on NWRs. This proposed regulation is also contrary to the subsistence provisions of the Alaska National Interest Lands Conservation Act (ANILCA). Further, the legislative history of ANILCA affirms the merit of predator control as one of the many management tools that are appropriate on NWRs to help manage populations of wildlife of critical importance to Alaska's subsistence users. ADFG manages wildlife populations, including ungulate to provide for sustainable uses consistent with state law. Eliminating state agency management on refuges in favor of allowing an extreme interpretation of natural diversity (no involvement by man) with resultant unchecked fluctuations in wildlife populations will reduce the availability of wildlife for subsistence and non- subsistence use. A few of our specific concerns about the proposed rule are as follows:

- The proposed rule is contrary to ANILCA which governs management of Alaskan Conservation System Units. When a conflict with ANILCA and the NWRSIA is present, ANILCA prevails according to the NWRSIA, which Congress explicitly intended.
- In the absence of a conflict with ANILCA, the NWRSIA applies equally to Alaska NWRs. However, the proposed regulation is inconsistent with several provisions of the NWRSIA which direct that the Secretary of the Interior (through the USFWS) work in cooperation with state agencies in the acquisition and management of refuges and the System. It further directs that state agencies comprehensive fish and wildlife management plans be utilized in developing the Comprehensive Conservation Plan for each Refuge. The USFWS is also directed to use to "the maximum extent practicable" the state agencies' fish and game seasons and bag limits on refuges.
- The term "natural diversity", as articulated in the legislative history of ANILCA, decidedly recognizes the presence of man as an accepted part of the environment. This is certainly not consistent with the ultimate goal of the proposed rule, which is to implement the "hands-off" direction of the "Biological Integrity, Diversity and Environmental Health Policy" (BIDEH) as currently defined by the USFWS throughout the refuge system and not just Alaska.
- The proposed rule is contrary to the NWRSIA which gives the Secretary 14 responsibilities in managing refuges and the System. The BIDEH is but one of those 14, which were not prioritized in either statute or legislative history. The USFWS has given this one responsibility preeminence over the other 13 responsibilities by proposing to promulgate only it as a regulation.
- The proposed rule takes what is now USFWS national policy on BIDEH and elevates it to a regulation giving it preeminence in Alaska over other NWRS policy and ANILCA.
- Finally, this action may result in litigation that seeks to apply the BIDEH to the entire NWR System under the argument that what is good for Alaska should be good for all refuges given that it is a National System. NWRSIA directs that all NWRs be managed to meet both purposes of the refuge and of the System. This potential causes great concern to all state agencies if this proposed rule were enacted as a regulation across all of

USFWS Region 7 (Alaska) and subsequently applied to create parity across the entire NWR System. A recent public relations appeal by the Humane Society of the United States to support this proposed rule already refers to it as applying to all NWRs.

We will continue to work with the USFWS to address our concerns but absent acceptable (to the state agencies) revisions, the Association will strongly oppose the promulgation of this regulation.

The NPS has recently promulgated similar regulations for Hunting and Trapping in National Preserves in Alaska. These regulations are flawed for many of the same reasons we object to in the proposed FWS regulations and additionally raise concerns about the adequacy of the NEPA analysis by the Department of the Interior. Although the Association did not comment on the NPS proposed regulation, the ADFG finds it so unsound that they recommend those regulations be rescinded and that the NPS engage in meaningful cooperation and consultation to identify and resolve differences.

The Association sincerely appreciates the Chairman's accepted amendment to the Bipartisan Sportsmen's Act (BSA) which would preclude implementation of the NPS regulations and prohibit the USFWS from further action on its proposed regulation. We will support the retention of this language as the BSA proceeds through the legislative process.

Challenges of Managing Elk in Wind Cave National Park

The South Dakota Department of Game, Fish and Parks (SDGFP) has collaborated with Wind Cave National Park (Park) for years on elk and other natural resource issues. Most recently, that collaboration has been solid and steady through the scoping process of the Wind Cave Elk Management Plan which began in 2004, to finalizing the plan in 2009, to implementing management actions through 2015. Operating under the good neighbor policy, through the common border shared with Custer State Park, has facilitated this working relationship.

The Park's Elk Management Plan adopted the preferred alternative which was to utilize hunting outside the Park on private and public lands by licensed hunters administered by SDGFP to decrease the elk population in order to reach sustainable herd levels inside the Park. The approach was to lower fences and construct specially designed gates that would allow elk to leave the Park in the spring and raised or closed in the fall to prevent their return, thus making elk available to hunters outside the Park on state land, USFS land, and to a lesser extent private land where elk populations were low. Locations of gates were based on historical and natural elk movements, but ultimately this proved to be an ineffective method of reducing elk numbers in the Park.

In the winter of 2013, elk were herded via helicopter from the Park to Custer State Park. In 2014, elk were herded by helicopter into Custer State Park as well as the elk management unit bordering the Park to the west. The Park was notified in writing that the herding activity of 2014 was likely the last year this management activity would occur because herding was no longer a viable option for four primary reasons: 1) the overall elk population in the Black Hills has seen steady growth and is reaching its overall population objective quickly; 2) because of the difficulty in moving desired numbers there is concern of herding too many elk onto private land

that could increase agricultural depredation; 3) elk herded into Custer State Park have not distributed and are primarily congregating on the southern end of the park; and 4) there is a high concern adding additional animals to an already congregated herd would elevate the prevalence of Chronic Wasting Disease (CWD).

Based on the state's decision not to move elk via helicopter, the Park informed SDGFP they would use the adaptive management strategy outlined in their management plan, which was culling elk. However, culled elk would remain on the Park and would not be salvaged. SDGFP responded that not salvaging culled elk was an unacceptable practice and offered services and assistance to salvage and distribute the meat to people who needed the protein source.

Between August and September of 2015, SDGFP and the NPS engaged in several discussions to finalize the logistics of handling a cull operation. The state agency spent extensive time and effort determining the best approach and most efficient means of transporting, storing, and distributing the processed meat to final destinations as SDFGP agreed to assist with the handling of carcasses upon removal from the Park. In October, a decision was rendered by the NPS to not proceed with the culling operation. Discussions continued with SDFGP on how to move forward in the future, and a commitment from the NPS was offered to further investigate the option of using shooters within the Park to remove elk. As of February 2016, the state agency still awaits further dialogue to continue discussions.

The SDGFP not only prefers but believes in the necessity of using hunters to manage the Park elk population. This is the most fundamental and effective tool to reach and maintain desired population levels and reduce the spread of CWD. SDGFP has offered and is willing to establish the necessary structure and administer the drawing process to issue the appropriate licenses to meet Park elk management objectives. However, hunting as a management alternative in the Park was dismissed during the planning process because the enabling legislation of the Park does not permit hunting. Because hunting would be the most effective means of managing this resource, a change in policy is desired but would require modifying the Park's authorizing legislation to allow hunting.

Lowering the elk population in the Park is highly desirable, but it is frustrating that a more efficient and affordable management tool such as hunting currently cannot be used as the long-term practical solution to elk management. In the short-term, SDGFP will assist with salvaging culled elk to assure the protein source is not wasted and is distributed to needy people and families in South Dakota, but this effort is not indefinitely sustainable.

State Managed Fisheries for the Benefit of All

Biscayne National Park (Biscayne) is a destination for outdoor enthusiasts who wish to boat, kayak, snorkel, camp, observe wildlife, and especially fish. While Biscayne is part of the NPS, fishing and other harvesting activities have largely been governed by Florida state agency law until recently.

The Florida Fish and Wildlife Conservation Commission (FWC) endeavors to provide a well-balanced approach to ensuring opportunities for resource use and conservation and, is admired for its ability to balance both interests fairly using the best empirical and objective data available. According to the NPS Ocean and Coastal Resources Program, "Ocean and coastal park

management requires specialized experience with shoreline, island, marine, and Great Lakes environments." The Association and FWC agree and believe that state agencies have the most knowledgeable and specialized experience dealing with management of these local environments and should be relied upon by federal partners to manage these natural resources. NPS acknowledges, "Regulations concerning fishing and the take of fish from National Parks are most often established in coordination and cooperation with the State fisheries departments in which state(s) the park occurs." In fact, the Federal Code of Regulations (C.F.R. Section 2.3), which governs the use and management of National Park System areas, requires that fishing occur in accordance with "the laws and regulations of the State within whose exterior boundaries a park area or portion thereof is located,' except for parks (such as Biscayne) for which special exceptions have been made.

The Association finds it quite troubling that the NPS eliminated fishing completely in more than 10,000 acres of the best habitat for reef fishing in what would otherwise be state-managed waters before any of the intended actions detailed in the recently finalized Fishery Management Plan (FMP) have been implemented and without the close coordination and concurrence of the FWC. We believe that fishery closures such as those exercised in Biscayne are a tool of last resort that should only be used when all other management measures have been tried and failed.

FWC worked closely with NPS staff in the development of the Fishery Management Plan (FMP), and FWC Commissioners expressed formal support for finalizing that plan and implementing various measures described therein in order to accomplish NPS's goals. Unfortunately, the General Management Plan (GMP) for Biscayne did not follow the FMP and rejected all of the state expertise, data, common-sense reasoning, and alternative fishery management plans that could have continued to allow American citizens access to their public waters and resources.

Local economies will suffer as a result of the many local commercial fishermen, professional fishing guides, fishing enthusiasts, boaters, wildlife observers, other outdoor enthusiasts and others who are adversely affected by the NPS's decision to eliminate all fishing in Biscayne rather than allow the state fisheries experts, who know these waters and resources best, to guide NPS decisions.

Administrative Actions Can Restrict State Management of Wildlife

Through federal land management planning and associated guidelines, some federal agencies are recommending certain public lands as wilderness areas. These administratively 'recommended' wilderness areas lack the full and appropriate NEPA analyses, lack transparency in designation, and circumvent Congressional oversight. Unfortunately, state agencies are witnessing unsettling restrictions resulting from these de facto wilderness areas including significant restrictions on public access and recreation, paralyzing restrictions on the state agency's ability to manage fish and wildlife, and potentially catastrophic restrictions on vegetation and habitat improvement projects such as fire management activities. Complicating this is the challenges Congress faces to provide a legislative fix to the "fire-borrowing" problem for the USFS and Department of the Interior (DoI) where funds from other programs such as fire prevention and fish and wildlife conservation are used to fight catastrophic fires when the USFS and DoI exhaust their appropriated budget for fire suppression. The Association urges Congress to expeditiously enact bipartisan, bicameral legislation to remedy the fire-borrowing problem.

According to Federal Land Management Agency guidelines, administratively recommended wilderness areas must be managed to 'protect and maintain the social and ecological characteristics that provide the basis for wilderness recommendation' in perpetuity or until Congress takes action to formally designate it as a Wilderness Area. Allowable activities within these areas seem to be left to the discretion of federal staff and deciding officers who can require even greater restrictions and limitations than those formally vetted and designated by Congress. Congressionally designated wilderness provides clearer guidance for management and coordination with the state agency, specific process for fish and wildlife management exemptions, and direction for collaboration via existing state agency agreements and guidelines; all of which are lacking for administratively recommended wilderness areas. We find this very troubling. The Association looks forward to working with Congress to find appropriate oversight mechanisms or sunset provisions that would remedy the state agencies' concerns.

Administratively recommended wilderness areas circumvent the spirit of NEPA and Congressional intent, and lacks transparency and an opportunity for local comment and involvement. This can have unsettling consequences for state agencies and local communities who depend on these natural resources. Unfortunately, areas being recommended as wilderness are not included within original wilderness designations with purposeful intent by Congress and lack an analysis of the cumulative impacts of further loss of public lands that provide for multiple-use and fish and wildlife related recreational and economic opportunities. Furthermore, additional restrictions imposed via administratively recommended wilderness areas impinge on a state agency's ability to proactively manage fish and wildlife and fulfill its public trust responsibility, including specific management activities.

Such is the case with the recently released Prescott and Apache Sitgreaves National Forest recommended wildernesses in Arizona. While the Forest Service indicates that these areas are simply preliminary administrative recommendations and that further NEPA analyses are necessary, it is disconcerting to read transmittal letters from the Forest Service that state: '...the Final Environmental Impact Statement for the... Forest's Revised Resource Management Plan contains the NEPA analysis necessary to support a legislative proposal'. It suggests the NEPA EIS requirements have already been fulfilled albeit without adequate public engagement, which is disingenuous to the state agencies charged with managing important natural resource assets in the area and the local communities and economies impacted by such designations, and completely lacks transparency. The Association finds this type of administrative circumvention of process and transparency unsettling and worrisome.

We now turn to legislative and policy remedies that would apply universally to federal lands and the concurrent jurisdictional authorities of state agencies with federal agencies, and offer the following recommendations.

First, and this is in the purview of the DoI, 43 CFR Part 24.3 which is the DoI policy regarding federal-state authority relationships with respect to fish and wildlife management should be modernized and promulgated with revisions. This is a not often cited regulation in this arena of authority for fish and wildlife, but it is accurate as of its date of finalization, and it should carry more weight than it currently does with the DoI agencies. We recommend that the Secretary, after promulgating a revised regulation, issue a directive to the federal agency heads that they are expected to adhere to this regulation in practice and in their policies.

Second, the use of savings clauses in federal law with respect to state authority for fish and wildlife management needs some revision, and certainly more prominent placement in statutes or legislation than it now occupies. Most courts are dismissive of savings clauses in legislation that gives Congressional direction to federal agencies regarding fish, wildlife, and habitat management if the savings clause is placed at the end of complicated legislation. More prominent, and possibly frequent, placement of savings clauses will ensure that state agency authority is upheld, respected and utilized as Congress intended going back to 1918.

Third, the Association recommends revising the several federal agency organic acts to utilize the phrase "in cooperation with the states" at the appropriate places which directs fish and wildlife management on federal lands, and similarly where appropriate in statutes that recognize the concurrent jurisdiction of state agencies with federal agencies for fish and wildlife. The phrase "in cooperation with the states" needs to be defined with certainty and clarity, and the Association would be pleased to work with Committee staff on this definition.

Fourth, both state agencies and federal agencies need to look for more opportunities to educate their respective staffs on the relationship of state-federal jurisdiction, plus encourage, facilitate and reward state-federal staff cooperation. Some federal agency staffs very clearly understand and share our view of what "in coordination with the states" means, and they try to implement that vision in their federal agency actions and decisions.

Recognizing diminishing budgets for fish and wildlife conservation at both the state and federal levels, we must work together to succeed in fish and wildlife conservation for our hunters, anglers, bird watchers, nature photographers, other outdoor recreation enthusiasts and the general public. Conservation of fish, wildlife and their habitats delivers ecosystem services (clean water, clean air), enhances the quality of life for all of our citizens through quality outdoor experiences, and are a major driver of the nation's economy.

Thank you very much for the opportunity to share the Association's perspectives, and I would be pleased to answer any questions.

Senate Environment and Public Works Committee
Subcommittee on Fisheries, Water, and Wildlife
Oversight Hearing entitled, "Federal Interactions with
State Management of Fish and Wildlife"
February 9, 2016
Questions for the Record for Executive Director Ronald J. Regan

Subcommittee Chairman Sullivan:

Question 1. In your view, would the proposed U.S. Fish and Wildlife Service regulation, entitled *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*, affect the full opportunity of some visitors to enjoy one or more of the six priority "wildlife dependent recreational uses," hunting, fishing, wildlife observation and photography, environmental education and interpretation?

Answer 1. Under the scenario that the proposed regulation is finalized, we believe that it would adversely impact visitors from enjoying hunting for certain, and perhaps fishing, on National Wildlife Refuges in Alaska. The remainder of the "big six" purposes are non-consumptive uses and may not be significantly affected, if at all.

Question 2. In your testimony, you mentioned an issue in Biscayne National Park in Florida where the state and the National Park Service disagreed about implementing a no fishing marine reserve in the park. It appears there is a philosophical difference in how the two agencies approach the management of fisheries specific to closures. What is the State of Florida's position on implementation of these types of management approaches that close public lands and waters?

Answer 2. The Florida Fish and Wildlife Conservation Commission (FWC) has clearly documented their philosophy regarding fishing closures consistently throughout their efforts to work with NPS on Biscayne Bay issues. FWC supports science-based, sustainable fishing in Florida waters. FWC's position and philosophy is that any fishing closure should be supported

by credible and compelling scientific evidence that such a closure is necessary to recover or sustain a fishery or protect important spawning aggregations and that closures should be considered only after less restrictive measures have been implemented, evaluated and determined to be ineffective relative to the desired benefits to the fishery. FWC has a nationally recognized fisheries research institute and holds the best data on the health of the various fisheries, fishing pressure, and how fishing take should be regulated to sustain those resources in Biscayne Bay. FWC has repeatedly advised the NPS that the fishing closure in Biscayne Bay is entirely at odds with their position and philosophy regarding such closures; it is not sufficiently supported by science; and no other less restrictive measures have been tried.

The National Park Service (NPS) acknowledges that "Regulations concerning fishing and the take of fish from National Parks are most often established in coordination and cooperation with the State fisheries departments in which state(s) the park occurs". Biscayne Bay offers first-class recreational fishing opportunities, and the FWC worked closely on a Fishery Management Plan (FMP) with the NPS to ensure that there would be a science-based sustained use of the fishery. Unfortunately, through a new general management plan (GMP), the NPS decided to go forward, with closing more than 10,000 acres of the best habitat for reef fishing before the FMP was completed. In fact, in approving the new GMP the NPS rejected reasonable alternatives to the fishing closure offered by FWC. The FWC endorses and manages to a science-based, sustainable use of the fishery resources for the benefit of Florida citizens. The NPS denied access for resource use based on little or no science-based substantiation for their decision and refused to try less restrictive measures.

Senator SULLIVAN. Thank you, Mr. Regan.
Mr. Barry.

STATEMENT OF DONALD BARRY, SENIOR VICE PRESIDENT, CONSERVATION PROGRAM, DEFENDERS OF WILDLIFE

Mr. BARRY. Thank you, Mr. Chairman.

I would like to summarize five points from my testimony that is being submitted formally to the record.

Unfortunately, hearings like this can create the false impression that the rare exception of problems and conflict is actually the norm. It is what I refer to in my testimony as it gets you to start focusing on the hole instead of the doughnut.

My testimony, including the quotes from the State Fish and Game director of Florida, indicates the norm throughout most of the United States. He described the working relationship he had with the Fish and Wildlife Service and the other State directors in his region in the Fish and Wildlife Service as the "no daylight" policy.

From his perspective, there is no daylight between the State fish and wildlife agencies and the Fish and Wildlife Service. He acknowledged that there would be some disagreements and even some strong disputes, but they worked together to work through them, and then they move on. He felt it was an extremely constructive relationship. He believed that most of the most of the State directors throughout the Nation feel the same way.

One court referred to this relationship as cooperative federalism. I think that is a term that describes the way it has worked fairly well. I also believe that given the overwhelming success in the Fish and Wildlife Service and the States working together, no compelling case has been made yet that there needs to be a significant change or amendments to the underlying Federal laws, and Congress should not do so now.

I would also like to shift my focus to ANILCA since that seems to be the primary focus of this hearing. It is my view that ANILCA does not require the Fish and Wildlife Service to accept lock, stock and barrel the State of Alaska's anti-predator program for national wildlife refuges.

In fact, I think my testimony clearly demonstrates that ANILCA requires the exact opposite. It requires the Fish and Wildlife Service to reject such an outdated approach to hammering predators on wildlife refuges as required by the State of Alaska's intensive management legislation.

I would note that even the Fish and Wildlife Service and the Alaska Department of Fish and Game's 1982 MOU acknowledges the authority and the responsibility of the Fish and Wildlife Service to reject the State's animal damage control program where and when it believes it is incompatible with the purposes for a given refuge.

Even in 1982, the State of Alaska acknowledged that the Fish and Wildlife Service was only required to substantially try to accommodate the State Fish and Game Predator Control Program but was not obligated to do so.

It is my view that national wildlife refuges in Alaska were intended to be a lot more than just game factories for sport hunters.

ANILCA's natural diversity management goal for each wildlife refuge, which was included in sections 302 and 303 of ANILCA, and I should also note that in 302 and 303 which expanded the wildlife refuges in Alaska, a number of those new units specifically mentioned bears and wolves as some of the key species those wildlife refuges were being created to focus on.

From my perspective, when Congress added the requirement that national wildlife refuges in Alaska be managed to conserve in the natural diversity the species of key focus in those refuges and included various different wolves and bears in some of the different refuges, it seems to me to be impossible to conclude that Alaska, under ANILCA, was being given the authority and the power to adopt the very heavy anti-predator program designed to suppress the population levels of predators within those national wildlife refuges.

It is also very clear under ANILCA that all sport hunting in the national wildlife refuges in Alaska needs to be compatible and consistent with that natural diversity management goal. It is also unfortunate, I believe, that an amendment has been adopted to the bipartisan Sportsmen's Bill to block the ability of the Fish and Wildlife Service to finalize their rule. I think it is going to increase the likelihood that bill may not ever be accepted and adopted by the Administration and might generate a veto.

I should also say that the wildlife management and refuge provisions in ANILCA are not in conflict with the 1997 Refuge Improvement Act. Both statutes can apply and are in sync.

The Alaska refuges are to be managed under ANILCA and be managed under the natural diversity management goal, and all national wildlife refuges under the 1997 Refuge Improvement Act are to be managed under a new broader management mission and vision for the national wildlife refuge system to ensure that biological integrity, diversity and environmental health of each refuge in the system is maintained. Therefore, it is my view that there is no conflict between the requirement under ANILCA to management for natural diversity and the requirement of the 1997 Act to management for the biological integrity, diversity and environmental health of each refuge.

My time is up so I will quit at that point and look forward to taking questions.

[The prepared statement of Mr. Barry follows:]

Testimony of Donald James Barry
Senior Vice President for Conservation Programs
Defenders of Wildlife

Before the
Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife
U.S. Senate

Federal Interactions with State Management of Fish and Wildlife

February 9, 2016

Mr. Chairman and members of the Subcommittee:

My name is Donald Barry and I am the Senior Vice President for Conservation Programs for Defenders of Wildlife. I have worked on federal fish and wildlife and public lands conservation programs for more than 41 years, having gone immediately to work for the Department of the Interior and the U.S. Fish and Wildlife Service after graduation from law school in 1974. I have logged in almost 25 years of service at the Interior Department and in Congress, having worked as both a staff attorney and as Chief Counsel for the Fish and Wildlife Service, as the General Counsel for Fisheries and Wildlife for the Chairman of the House Merchant Marine and Fisheries Committee, and as the Assistant Secretary for Fish and Wildlife and Parks, overseeing the programs of the National Park Service and the Fish and Wildlife Service.

I helped draft all of the core implementation regulations for the Endangered Species Act in 1975 and reviewed, approved and in many cases personally negotiated dozens of the state Cooperative Agreements authorized under Section 6 of the ESA. I have also worked closely with state fish and wildlife agencies on the passage of a wide range of federal wildlife conservation laws ranging from the North American Wetlands Conservation Act to the Wallop-Breaux Act and the National Wildlife Refuge System Improvement Act of 1997. All of these experiences have given me deep

respect and appreciation for the dedicated men and women of both the Fish and Wildlife Service and of the state fish and wildlife agencies.

I also have a deep professional connection to wildlife and public land conservation issues in Alaska that goes back almost four decades. In 1977, I was assigned the task of being the lead staff attorney at the Department of the Interior for work on the passage of the Alaska National Interest Lands Conservation Act (ANILCA) and was the chief negotiator for the Department for two of the Titles that became part of ANILCA. I was also a member of the Fish and Wildlife Service's ANILCA planning team, becoming deeply involved in the development of all of the language that ended up in ANILCA dealing with fish and wildlife conservation, national wildlife refuges, and subsistence hunting and fishing. I have also visited every national wildlife refuge in Alaska and am familiar with the current disagreement between the Service and Alaska Fish and Game over the state's desire to dramatically accelerate the killing of predators within national wildlife refuges.

With regards to this dispute which appears to be the primary reason for this hearing, there is absolutely no doubt in my mind that the Fish and Wildlife Service is correctly reading the requirements of ANILCA and other federal laws governing the management of national wildlife refuges in rejecting the state's predator killing proposal. Moreover, the Service is acting in a manner that is consistent not only with ANILCA and National Wildlife Refuge System laws, but also with a post-ANILCA 1983 Department of the Interior Policy Statement on State/Federal fish and wildlife jurisdictional relationships, with the 1982 MOU signed between the Fish and Wildlife Service and the Alaska Department of Fish and Game on the management of wildlife on national wildlife refuges in that state, and with various federal court opinions dealing with past federal/state jurisdictional disagreements over the management of wildlife. Please see the Service's *Federal Register* proposed rulemaking barring the state's predator program from national wildlife refuges in Alaska (81 Fed. Reg. 887 (Jan. 8, 2016)(to be codified at 50 C.F.R. Parts 32 and 36)).

Moreover, Defenders of Wildlife and a coalition of other national organizations strongly oppose an amendment blocking the finalization of this FWS rule, offered by Senator Sullivan and recently added to S. 659, the Bipartisan Sportsmen's Act. A copy of a letter from nine organizations highlighting this opposition is attached to this testimony. This provision is a direct attack on an important agency rulemaking. This poison pill runs directly counter to the "bipartisanship" the sponsors of the legislation state they are seeking. If the provision does not prevent Senate passage of the bill, it will undoubtedly produce strong opposition from the Administration and seems certain to make the bill a candidate for a veto by the President, should it get to his desk in its current form. I will return to the Alaskan predator control dispute later in my testimony but will first discuss the status and quality of federal and state collaboration and cooperation on wildlife management issues writ large, using a nation-wide focus to more accurately frame this important and sensitive issue.

The purported focus of this hearing is on the ambiguously worded topic of "Federal and State interactions" with regards to the management of fish and wildlife. What is mystifying and bizarre to me, however, is why, for a hearing designed to focus on the interactions between the Fish and Wildlife Service and state fish and wildlife agencies, Dan Ashe, the Director of FWS, would be denied a chance to testify in person? A request by the Subcommittee's Minority staff to have Director Ashe testify at this hearing was rejected by Majority staff and it should be pretty clear to most observers that if this was intended to be a truly constructive hearing, that the Director of the

Fish and Wildlife Service should be sitting in this chair next to Mr. Regan and not me. Since that was prevented from happening, I will do my best to be a surrogate in providing a federal perspective on state and federal wildlife interactions.

There is a real danger in setting up a hearing like this because it can easily create the impression that strong disagreements between FWS and State fish and wildlife agencies are the norm and that there is constant wildlife warfare between the feds and the states over jurisdiction and turf. Nothing could be further from the truth. Playing on this false impression is like focusing on the hole and not the rest of the donut, since for dozens and dozens of fish and wildlife conservation programs, the state and federal biologists are linked arm in arm and are working closely and collaboratively and successfully with each other. That is the true norm, not the fight in Alaska over predators.

And you don't have to take my word for it – just listen to the observations and direct quotes from a state fish and wildlife director himself. Last Thursday, I called Nick Wiley, the head of the Florida fish and wildlife agency that I have worked with in the past and admire. I told Nick that I was going to be a witness for this hearing, and asked him to share his candid and honest assessment of the quality of the working relationship he had with the Fish and Wildlife Service. Here are his exact words:

> He said that in his region, the Service and the affected state fish and wildlife agencies have a "no daylight approach" where they all strive to ensure that there is no daylight on wildlife conservation programs between the Service and the states. He said that the Service and the states all "stay close and work together," that they have "long standing collaborative and positive relationships," that there will be the "occasional tug of war and disagreement but that you work together to process through those disagreements in a constructive way and then move on." He also was confident that the other state fish and wildlife agency directors in his region would feel the same way and that it was his opinion that with a few exceptions, nationwide, the relationship between the Fish and Wildlife Service and state wildlife agencies was "excellent."

It is easy to see how he could feel that way when you look at the long list of ongoing, collaborative wildlife conservation programs undertaken together by federal and state authorities for many decades. Here is just a sampling of some of those programs:

The National Wildlife Refuge System

As a general matter, the Service enjoys strong collaborative relationships with state partners in managing the National Wildlife Refuge System (Refuge System). These relationships were emphasized in statute with the passage of the 1997 Refuge System Improvement Act, a law that I was heavily involved in the passage of. The Improvement Act requires that comprehensive conservation plans, required for each refuge to guide its management, be developed "in consultation with" affected state conservation agencies and "be consistent to the maximum extent practicable" with conservation plans of the state in which the refuge is located. The law also requires that hunting and fishing of resident wildlife be "consistent with" State laws, regulations and plans to the "maximum extent practicable." And it requires the timely and effective "cooperation" and "collaboration" with Federal agencies and state fish and wildlife agencies during the course of "acquiring and managing refuges." It must be noted, however, that while this language signals a

strong and persistent emphasis on close coordination and collaboration with affected states, "to the maximum extent practicable" does not give the states veto authority or mandate acceptance of all state recommendations, reserving instead final refuge decision-making for the Service.

Refuge Hunting / Fishing Coordination – The Service does rely heavily on the expertise and data of state fish and wildlife agencies when reviewing and administering hunting or fishing programs on refuges. For each proposed opening of a refuge, the Service sends a letter to the appropriate state fish and wildlife agency requesting their comments and recommendations. In addition, the Service consistently adopts state hunting and fishing regulations on Refuge System lands, publishing additional, *more restrictive* regulations only when they are needed to meet the purposes and mission of the specific refuge or Refuge System. Thus, the Service always reserves the right to be more protective of refuge resources when necessary to comply with federal wildlife refuge law. This federal reservation of final decision-making authority on refuge hunting and fishing programs has certainly not been an impediment to these wildlife dependent forms of recreation. Since the passage of the 1997 Improvement Act, the Service has worked with its state partners to open over 100 new refuges to hunting or fishing opportunities, and expanded hunting or fishing programs on nearly 100 additional refuges.

Refuge System Strategic Vision – Just as the Improvement Act is peppered with references to consultation and collaboration with states, the importance of the federal/state relationship is highlighted in the Refuge System's vision document, *Conserving the Future: Wildlife Refuges and the Next Generation*, which maps out a strategic vision for the Refuge System over the next decade. Throughout the vision document there is acknowledgement of the important federal/state relationship and a strong encouragement to continue to develop and expand these relationships:

> "Today this partnership between state and federal agencies is nowhere stronger than in the field and on Refuges. No matter the logo on their shoulders, state and federal wildlife managers roll up their sleeves together. They assist each other with prescribed burning and fighting wildfires. They patrol and enforce conservation laws together. They maintain roads, water control structures, and enhance habitat. They below to the same scientific and professional organizations and collaborate on studies and research." (Page 22)
>
> "We have worked especially closely with state fish and wildlife agencies in planning and administering the Refuge System, relying both on the authority and the expertise these agencies have in managing fish and wildlife." (Page 10)
>
> "Vision: The Service will enhance its close relationship with the state fish and wildlife agencies. We will coordinate with them on management of fish and wildlife within the Refuge System and on establishing population objectives." (Page 12)

Wildlife and Sport Fish Restoration Program (WSFR)

WSFR administers federal aid grants to states, insular areas and the District of Columbia (hereinafter States) to conserve fish, wildlife and habitats, and to provide opportunities for hunting, sport fishing and recreational boating. Most of the grant programs require States to provide non-federal matching funds.

- Wildlife Restoration (Pittman-Robertson) – $810 million in 2015. Apportioned to States by formula for projects to conserve wild birds and mammals and their habitats, and to provide access to public lands, hunter education, and shooting ranges. Supported by excise taxes on firearms, ammunition, and archery equipment.

- Sport Fish Restoration (Dingell-Johnson) – $348 million in 2015. Apportioned to States by formula for projects to conserve fisheries and to provide boating access and aquatic education. Supported by excise taxes on fishing gear, boat import duties, and gasoline taxes.

- State Wildlife Grants – $54 million in 2016. Ninety percent of funds are apportioned to States by formula, 10 percent is awarded competitively for projects to conserve "species of greatest conservation need" identified in State Wildlife Action Plans (SWAPs). Many projects focus on preventing species from listing as endangered or threatened. SWAPs constitute a national blueprint for conserving America's wildlife diversity. Funds are appropriated annually by Congress.

- Clean Vessel Act (CVA) – $12 million in 2015. Competitively awarded to the States to promote clean water by preventing improper disposal of sewage. Projects construct and operate pump-out stations for recreational boaters and inform boaters of the importance of proper disposal of their sewage. Supported by excise taxes on fishing gear, boat import duties, and gasoline taxes.

- Boating Infrastructure Grants (BIG) – $12 million in 2015. Awarded competitively and non-competitively to the States to construct, renovate, and maintain tie-up facilities for transient boaters in vessels 26 feet or more in length, and to produce educational materials about the program. Supported by excise taxes on fishing gear, boat import duties, and gasoline taxes.

- National Coastal Wetlands Grant Program – $17 million in 2015. Awarded competitively to the States to protect, restore and enhance coastal wetlands. Supported by excise taxes on fishing gear, boat import duties, and gasoline taxes.

- Multistate Conservation Grant Program – $6 million/year. Awarded competitively for national or regional projects identified by the States through the Association of Fish and Wildlife Agencies. Supported by excise taxes on firearms, ammunition, and archery equipment, and by excise taxes on fishing gear, boat import duties, and gasoline taxes.

Migratory Bird Hunting Program

There may be no area of cooperative wildlife management between the Service and the states that is as well managed and organized as the annual migratory bird hunting program. First authorized a century ago with the passage of the Migratory Bird Conservation Act, the Service's heavy reliance on annual state bird and habitat survey data, as well as the utilization of north-south regional flyways for developing fall hunting regulations provides extremely close regulatory interactions between the federal and state governments. While working as a staff attorney for the Service, the migratory bird hunting program was one of my areas of responsibility so I have witnessed this extremely effective regulatory coordination process first hand.

Endangered Species Program

Sections 6 and 4 of the Endangered Species Act (ESA) – Section 4 mandates consideration of the conservation efforts being made by affected states as one of the listing criteria for species under the ESA. It also requires close coordination and communication with the states in other provisions in Section 4 as the listing process for a resident species moves forward. Section 6 directs the Secretaries of the Interior and Commerce to cooperate to the "*maximum extent practicable*" with the states in carrying out ESA programs. In 1994, the Fish and Wildlife Service and National Marine Fisheries Service (Services) published a new policy regarding the role of State fish and wildlife agencies in implementing the ESA (59 FR 34275; July 1, 1994). The policy recognized that, in the exercise of their general governmental powers, the States possessed broad trustee and police powers over fish, wildlife, and plants and their habitats within their borders. It also acknowledged that *unless preempted by Federal law*, the states possessed primary authority and responsibility for protection and management of fish, wildlife, and plants and their habitats. The policy noted that state agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants, information that is critical for the section 4 listing process. It also acknowledged that state agencies, because of their authorities and their close working relationships with local governments and landowners, were in a unique position to assist the Services in implementing all aspects of the Act. As with section 4, section 6 of the Act directed that the Services "*cooperate to the maximum extent practicable*" with the States in carrying out programs authorized by the Act. Once again, you see the dichotomy of a strong Congressional emphasis on close coordination and reliance on the states, while still reserving ultimate and final ESA decision-making to the Services.

Cooperative Endangered Species Conservation Fund (CESCF) - $48.7 million in Federal funding in FY 2015 under four grant programs that are available through the CESCF. Funds for each grant program are described below:

Authorized under section 6 of the ESA, the CESCF provides grants to States and Territories (hereinafter States) to participate in a wide array of voluntary conservation projects for candidate, proposed, and listed species. The program provides funding to States for species and habitat conservation actions on non-Federal lands. States must contribute a minimum non-Federal match of 25 percent of the estimated program costs of approved projects, or 10 percent when two or more States implement a joint project. A State must currently have a cooperative agreement with the Service to receive grants. Most States have entered into these agreements for both plant and animal species.

- *Traditional Conservation Grants*: Over 220 grants totaling $11.5 million were awarded to States and Territories in FY 2015 to implement conservation projects for listed species and at-risk species. Funded activities include habitat restoration, species status surveys, public education and outreach, captive propagation and reintroduction, nesting surveys, genetic studies, and development of management plans.

- *Habitat Conservation Planning Assistance Grants*: Eleven grants totaling $4.7 million were awarded to nine States to support the development of Habitat Conservation Plans (HCPs) through support of baseline surveys and inventories, document preparation, outreach, and similar planning activities.

- *HCP Land Acquisition Grants.* Twelve grants totaling $20.3 million were awarded to States to acquire land associated with approved HCPs. Grants do not fund the mitigation required of an HCP permittee; instead, they support land acquisition by the State or local governments that complement mitigation.

- *Recovery Land Acquisition Grants*: Twenty-two grants totaling $12.2 million were awarded to States in FY 2015 for the acquisition of habitat for endangered and threatened species in support of approved recovery goals or objectives.

International species conservation – the Convention on Endangered Species (CITES)

Section 8 of the ESA implements CITES and FWS has the lead responsibility for implementing that treaty on behalf of the United States. Since the first Conference of the Parties for CITES in 1976, the states have had a representative on the US delegation and work extremely closely with FWS in deciding which domestic species, if any, should be proposed for inclusion on one of the Appendices under the Convention.

Wildlife Law Enforcement

The working relationship between federal and state wildlife law enforcement officers is extremely close and mutually supportive and has been for many, many decades. Since the passage of the Lacey Act at the beginning of the last century, the violation of state wildlife laws is also a violation of federal wildlife law. State and federal law enforcement officials back each other up in major enforcement actions and cross-deputize each other when necessary and appropriate. The Service and other federal agencies routinely provide invaluable enforcement training programs for state wildlife officers, developing even stronger bonds of friendship and trust in the process.

Rejecting aggressive predator control programs for national wildlife refuges in Alaska

Having described above, numerous examples of the more accurate collaborative norm – the "donut" if you will of federal/state interactions on wildlife, I will now turn to the current Alaskan "hole" that obviously is the true focus and reason for this hearing. For the reasons that follow, it is my strong belief the Service's proposed rejection of the state of Alaska's aggressive predator killing program is absolutely consistent with, and required by, not only ANILCA, but also by the 1997 Refuge Improvement Act. Moreover, the exercise of the Service's authority to say "no" is also consistent with the 1982 MOU between the Service and Alaska Fish and Game, as well as the reservation of primary federal authority for wildlife refuge decision-making in a Secretary James Watt-era Interior Department policy statement on federal/state wildlife jurisdictional authority. If the state were to challenge a final federal refuge rulemaking of this sort in court, I have no doubt that they would lose, which is probably why there is now an effort to block the Service from taking final action by legislation.

Establishing the Purposes of National Wildlife Refuges in Alaska under ANILCA

Sections 302 and 303 of ANILCA set out the purposes for each of the new and expanded national wildlife refuges in Alaska. In every instance for every wildlife refuge, the first stated purpose out of

four purposes listed was the conservation and preservation of the "*natural diversity*" of the particular refuge. This was not casually or accidentally chosen statutory language but rather it was intentionally and specifically chosen by the Service's ANILCA wildlife refuge planning team to prevent exactly the sort of anti-predator initiative now being promoted by the state. As noted correctly in the Service's proposed rulemaking, managing refuge wildlife populations for "natural diversity" was intended to ensure that a natural ecological balance be maintained, particularly between predator and prey, and that one species not be aggressively suppressed in order to benefit another.

It is also worth noting that under Section 302 and 303, each statement of purpose for a given refuge included a non-inclusive list of key species that were of particular importance for the refuge. By my count, eight of the new or expanded refuges specifically mentioned bears and three mentioned wolves, in addition to other furbearers as being species of special interest and priority for a refuge. It escapes me how the Service could possibly adopt regulations designed to aggressively drive down the numbers of predators that are specifically noted in the statement of purposes of a given refuge, let alone satisfy the mandate to manage wildlife for the "natural diversity" of the refuge? The whole guiding purpose of ANILCA was for this country to finally get large landscape scale conservation planning right, not only in setting aside entire watersheds for protection from future development, but also to shed outdated views on "good wildlife" (that you would promote and make money off of) and "bad wildlife" (predators and other species that you would suppress and aggressively manage.

Title VIII of ANILCA Dealing With Subsistence Opportunities For Rural Alaskans Does Not Preclude the Fish and Wildlife Service From Barring State Predator Controls

Providing for the continued opportunity for subsistence hunting and fishing by rural Alaskans was an important goal under ANILCA as expressed in detail in Title VIII of the law. The priority status of subsistence hunting and fishing under ANILCA was also signaled by including providing for its continued opportunity as a purpose for each new or expanded wildlife refuge under Section 302 and Section 303, with the sole exception of the Kenai Wildlife Refuge. However, in all instances under Section 302 and Section 303, the inclusion of subsistence as a purpose of each refuge was made subordinate to being consistent with the first enumerated primary purpose of conserving fish and wildlife, including maintaining the natural diversity of fish and wildlife species in each refuge. This subordination of subsistence uses to a dominant priority goal of wildlife conservation is further recognized in Section 802 (1) which reaffirms that the exercise of that opportunity must be consistent with the purposes for which a given wildlife refuge was established (in each case, the "maintenance of natural diversity") and the maintenance of "healthy populations of fish and wildlife." Moreover, Section 815 expressly states that nothing in Title VIII modifies or repeals the National Wildlife Refuge System Administration Act of 1966, nor authorizes the use of fish or wildlife in a manner which is inconsistent with the purposes for which conservation areas like wildlife refuges were established.

To be clear, the Fish and Wildlife Service's proposed rulemaking that the state is upset about expressly states that it is not intended to apply to subsistence uses within refuges but rather is focused on addressing the killing of predators for sport hunting. I only have brought up Title VIII and subsistence in my testimony because if subsistence activities are clearly subordinate to the overarching refuge management goal of maintaining refuge wildlife populations in their natural

biological diversity, then sport hunting is surely subject to those standards as well, especially given that Section 804 of ANILCA establishes nonwasteful subsistence uses as a preferential higher priority use than sport hunting.

The Protective Refuge Management Standards under the 1997 Refuge Improvement Act Are Not Preempted or in Conflict with ANILCA

The 1997 Refuge Improvement Act significantly elevated the protective stewardship standards for the management of wildlife refuges and the Refuge System as a whole by requiring the Secretary and the Director to manage the Refuge System so as to "...ensure that the biological integrity, diversity, and environmental health..." of the System are maintained. The Service in the preamble for its proposed rulemaking rejecting the state of Alaska's predator control program makes the clear and convincing connection between the mandatory directive in ANILCA to maintain the biological natural diversity of species within wildlife refuges in Alaska and the equally emphatic stewardship standard under the 1997 Refuge Act to ensure the biological integrity, diversity and environmental health of refuges and the System as a whole. The Service thus, makes the convincing case that the 1997 stewardship standards are not in conflict with nor preempted by ANILCA, and are therefore yet one more justification for the Service's decision to reject the predator proposal from Alaska.

It should also be noted that while the 1997 Refuge Improvement Act in several places recognized the unique and special role that states were to play with regards to the management of individual refuges, in every instance, Congress qualified the directives with the use of the words "to the maximum extent practicable," obviously reserving the right of the Service to conclude that in a given case it might not be practical to adopt state recommendations while still complying with federal wildlife refuge law.

The 1982 MOU Between FWS and the Alaska Department of Fish and Game (AF&G) Reaffirms the Primary Authority of the Service to Reject the State's Predator Control Program on Refuges

It has been said by some that the MOU signed by the Service and AF&G prevents the Service from rejecting the state predator program on wildlife refuges. Actually, the language of the MOU says the exact opposite in numerous places. In particular, under the MOU, AF&G expressly agreed to

> *"...recognize the Service as the agency with the responsibility...on Service lands in Alaska to conserve fish and wildlife and their habitats and regulate human use."*

The MOU went on to say that AF&G also conceded that it would need to:

> *"...manage fish and resident wildlife populations in their natural species diversity on Service lands."*

Similarly, the Service acknowledged its obligation to:

> *"...manage the fish and wildlife habitat on Service lands so as to insure conservation of fish and wildlife populations and their habitats in their natural diversity."*

The MOU most importantly goes on to state that the Service agreed to:

> *"...adopt refuge management plans whose provisions -- including provision for animal damage control -- are in substantial agreement with the Department's fish and wildlife management plans, unless such plans are determined formally to be incompatible with the purposes for which the respective refuges were established." (underlining added)*

This language is dispositive of which agency has the last word on predator control programs on wildlife refuges in Alaska and that agency is the Fish and Wildlife Service. Under this language that I just cited, the Service only committed to (and the state accepted that limited commitment by signing the agreement) have its approved predator control program be in "substantial agreement" with what the state wanted, and was reserving the right to differ from and reject state proposals where warranted. Moreover, the Service expressly reserved the right to reject a state predator control program that it found to be incompatible with the purposes of a given refuge (i.e. managing wildlife populations for natural diversity).

Finally, the state further acknowledged under the MOU that it recognized:

> *"...that the taking of fish and wildlife by hunting, trapping, or fishing on Service lands in Alaska is authorized in accordance with applicable State and Federal law unless State regulations are found to be incompatible with documented Refuge goals, objectives, or management plans."*

Again, this demonstrates that AF&G acknowledged that the Service had final administrative decision-making and control over compatibility findings for proposed hunting and trapping activities on refuges.

Summary of My Testimony

I believe that my testimony has demonstrated that the true "norm" or "donut" in the interaction of state and federal wildlife agencies is the presence of very close, supportive and cooperative working relationships. While that may not be true in every state in the country, it is clearly true in the clear majority of states, and while disagreements or disputes might arise time to time, the vast majority of them are settled constructively and in good faith. The dispute over the Service's rejection of the State of Alaska's proposed and highly aggressive predator control program is not the norm for state/federal wildlife relations but rather an infrequent "hole" in those relations. The Service's rejection of Alaska's predator proposal is solidly based upon the agency's statutory obligations under ANILCA, the 1997 Refuge Improvement Act, and the 1966 Refuge Administration Act. It is also consistent with the 1982 MOU with the Alaska Department of Fish and Game as well as with a 1983 Department of the Interior policy statement on federal and state jurisdictional issues involving public lands and wildlife. The Service has taken a courageous and correct step and it would be a major mistake for Congress to block the agency from finalizing its predator rule for national wildlife refuges in Alaska.

I am happy to take any questions at this time from the members of the Senate Subcommittee.

****ATTACHMENT****

Center for Science and Democracy at the Union of Concerned Scientists * Clean Water Action * Defenders of Wildlife * Earthjustice * Environment America * Environmental Defense Fund * League of Conservation Voters * Natural Resources Defense Council * Sierra Club

RE: Please Oppose S. 659 ("The Bipartisan Sportsmen's Act of 2015")

January 29, 2016

Dear Senator,

On behalf of our millions of members and supporters nationwide, we write to convey our strong opposition to S. 659 ("The Bipartisan Sportsmen's Act of 2015"). This bill contains anti-environmental provisions that threaten our lands, waters, wildlife and the health of our communities.

We understand that prior to the committee markup of this legislation, some members of the Senate – as well as some of our groups – opposed particular provisions of underlying bill. Those sections include language that would further weaken the Environmental Protection Agency's authority to regulate lead and any other chemical used in firearms, ammunition, and sport fishing equipment, and to allow individuals to possess firearms at any area open to the public at water resources development projects. We urge that these provisions be removed or amended prior to any Senate floor consideration of this legislation.

Further, during the January 20 Environment and Public Works Committee markup of S. 659, a number of incredibly damaging amendments were added to the bill. These non-negotiable, poison pill amendments, listed below, must be removed from this legislation for the sake of our environment and our public health.

Barrasso Amendment #1, which strips gray wolves of existing federal protections and undermines the Endangered Species Act.

This provision would undermine science-based decision making under the Endangered Species Act (ESA) by removing federal protections for gray wolves in Michigan, Minnesota, Wisconsin, and Wyoming. The amendment overrides two federal court decisions that found the state management plans at issue were illegal under the ESA because they did not sufficiently protect wolves. Further, this amendment includes "no judicial review" clauses covering both court decision overrides – thus stripping the ability of citizens to further challenge these wolf delistings. The appeals processes on the two federal court decisions impacting wolves in Wyoming, Michigan, Minnesota, and Wisconsin are still underway. It would be damaging for Congress to meddle in the ESA listing status of a particular species at any stage, but now is an especially bad time as these cases are still playing out in the courts.

Last year, 25 senators, 92 members of the House, and more than 150 organizations opposed this same wolf delisting legislation and all the other anti-Endangered Species Act riders that were added to Fiscal Year 2016 appropriations bills. And this same wolf delisting legislation was highlighted in the White House's Statement of Administration Policy on the House Department of Interior

Appropriations Bill, H.R. 2822, which opposed sections that would "limit the ability of the [U.S. Fish and Wildlife Service] to properly protect, based on the best available science, a number of species including . . . certain gray wolf populations." Further, last month 70 scientists wrote a letter urging that wolves in Great Lakes region and beyond remain protected under the ESA until the legal requirements for delisting are met.

Crapo-Carper-Fischer Amendment #1, which guts Clean Water Act safeguards that protect our streams, rivers, and lakes from excessive pesticide pollution.

This provision axes all Clean Water Act protections for waterways into which pesticides are directly applied. If enacted, this legislation would result in the direct application of pesticides into streams and rivers without any meaningful oversight, as the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) – the law under which pesticides are registered – does not require tracking of such pesticide applications. A Clean Water Act pesticide general permit (PGP) that took effect in late 2011 lays out commonsense practices for applying pesticides directly to waters that already fall under the jurisdiction of the Clean Water Act. There is no need to change these protections because the system has worked well ever since these safeguards were put into place four years ago. Alarmist predictions by pesticide manufacturers and others have failed to bear any fruit. Americans rely on the Clean Water Act to protect our rivers, lakes, and streams from pesticides because FIFRA's mere registration requirements have not and will not protect our waters from these toxic chemicals. Already, nearly two thousand U.S. waterways are contaminated by pesticides.

Nearly 150 human health, fishing, and environmental organizations oppose legislation such as this provision that would gut Clean Water Act safeguards that protect communities from toxic pesticides. Further, last year the Environmental Protection Agency reported that they have been getting very good data since the PGP took effect, and they had not been made aware of any issues associated with the PGP.1

1 Testimony of Ken Kopocis, Deputy Assist. Administrator, Office of Water, U.S. Envtl. Prot. Agency, before the House Transportation and Infrastructure Committee (March 18, 2015): "We have not been made aware of any issues associated with the Pesticide General Permit. Nobody has brought an instance to our attention where somebody has not been able to apply a pesticide in a timely manner . . . [t]here have been no instances. We've been getting very good data. . . ." *available at* http://transportation.house.gov/calendar/eventsingle.aspx?EventID=398705

Sullivan Amendment #1, which prohibits the Fish and Wildlife Service from implementing new conservation measures for wolves and brown bears on national wildlife refuges in Alaska.

This amendment would prohibit the U.S. Fish and Wildlife Service from finalizing a rule to regulate non-subsistence hunting of wolves, bears, and other large carnivores on national wildlife refuges across Alaska. The proposed rule rejects various anti-predator recommendations from the state of Alaska that were designed to dramatically suppress carnivores in order to boost game populations. The state's recommendations flouted the Alaska National Interests Lands Conservation Act mandate that national wildlife refuges in Alaska be managed to conserve fish and wildlife populations, including carnivores, in their natural diversity. The Service's proposed rule promotes wildlife conservation by prohibiting certain unethical practices on refuge lands, such as the use of

traps or bait in bear hunting, hunting wolves and coyotes during denning season, and hunting bear cubs or bear sows with cubs.

We strongly urge you to stand up for our lands, waters and wildlife by opposing S. 659. Thank you for your consideration.

Sincerely,

League of Conservation Voters
Earthjustice
Sierra Club
Natural Resources Defense Council
Environmental Defense Fund
Defenders of Wildlife
Clean Water Action
Center for Science and Democracy at the Union of Concerned Scientists
Environment America

Senate Environment and Public Works Committee
Subcommittee on Fisheries, Water, and Wildlife oversight hearing entitled, "Federal Interactions with State Management of Fish and Wildlife".
February 9, 2016
Mr. Donald Barry's Responses to Questions for the Record

Senator Whitehouse:

1. **As someone with firsthand experience of Congress' intent in the drafting the Alaska National Interest Lands Conservation Act and 1997 Refuge System Improvement Act, many years in leadership positions at the U.S. Department of Interior overseeing the Fish and Wildlife Service, and 14 additional years with wildlife-minded environmental organizations, is it your opinion that the U.S. Fish and Wildlife Service overstepped its authority and impinged state wildlife management rights in restricting predator control in Alaskan National Wildlife Refuges? What do you understand to be the impetus for the Service's statewide rule?**

ANSWER: There is not the slightest doubt in my mind that the Fish and Wildlife Service had not only the authority but also the obligation to reject the state of Alaska's proposed anti-predator program for national wildlife refuges in Alaska. As noted in my testimony at the Committee hearing, Sections 302 and 303 of the Alaska National Interest Lands Conservation Act (ANILCA) set out the purposes of each of the new and expanded national wildlife refuges being created under that law. The first out of four stated purpose for each refuge was the conservation and preservation of the "natural diversity" of the refuge. Having worked closely with the U.S. Fish and Wildlife Service ANILCA planning team as the legislative language setting out the draft purposes for each refuge were being developed, I can assure you that the management standard of "natural diversity" was specifically and intentionally chosen for each new and expanded refuges in order to avoid the narrow historic focus on game species for many wildlife refuges in the Lower 48 States.

In particular, the head of the Service's ANILCA planning team had a strong dislike for predator control programs in general and wanted to employ a more modern, ecological-based management system that treated all wildlife on the refuges alike and avoided hammering predators in order to artificially benefit game species. Moreover, many of the stated purposes for the new or expanded refuges under ANILCA expressly included bears and wolves as key species for various refuges, making it obviously incompatible with the purpose of those refuges to aggressively drive down the populations of the very predators the refuges were established to protect. It is therefore, my strong belief that Alaska's proposed anti-predator program is

exactly the sort of outdated and discriminatory approach to predator management that the "natural diversity" management standard was designed to prevent.

I also noted in my testimony that not long after the passage of ANILCA, even the state of Alaska itself, expressly recognized the authority of the Fish and Wildlife Service to say "no" to proposed state predator control programs within national wildlife refuges in Alaska. In 1982, the Alaskan Department of Fish and Game signed a cooperative management MOU with the Fish and Wildlife Service laying out their respective authorities and commitments. In various places in that MOU, Alaska expressly agreed to:

> *"...recognize the Service as the agency with the responsibility...on Service lands in Alaska to conserve fish and wildlife and their habitats and regulate human use."*
>
> *"...manage fish and resident wildlife populations in their natural species diversity on Service lands."*

Conversely, the Fish and Wildlife Service expressly agreed to:

> *"...adopt refuge management plans whose provisions – including provisions for animal damage control – are in substantial agreement with the Department's fish and wildlife management plans, unless such plans are determined formally to be incompatible with the purposes for which the respective refuges were established." (emphasis added).*

This language clearly shows that the state's predator management program had to conform to the Service's management plans and not vice versa. Moreover, the MOU reserved the right of the Service to say "no" to the state's predator program if it found the program to be incompatible with the purposes for which a refuge was established. Thus, the MOU language cited above is dispositive of whether the state or the Fish and Wildlife Service was to have the last word on predator control within national wildlife refuges in Alaska. It was in 1982 - and still is today - the Fish and Wildlife Service that has the power to have the last word and the state of Alaska acknowledged that fact when it signed the MOU in 1982.

2. **In Mr. Vincent-Lang's testimony, he makes a recommendation for legislation that would prohibit federal agencies from promulgating any rules or regulations that would deal with hunting restrictions and sustainable management of wildlife populations without explicit and specific legislative authority or concurrence from state agencies. As someone with over 40 years in wildlife management, what is your opinion on this language?**

ANSWER: I strongly disagree with this recommendation for a variety of reasons. Most state fish and wildlife agencies are heavily if not entirely dependent upon the sale of hunting and fishing licenses for their annual budgets, putting immense pressure on them to maximize hunting opportunities within their respective state. This in turn often leads to outdated anti-predator programs designed to drive game predation down in order to drive game populations up, resulting in the sale of more hunting licenses. Mr. Vincent-Lang acknowledged this predator control/hunting license linkage when in response to a question, he stated that the traditional funding model for big game management was in financial jeopardy and that the state of Alaska

needed to kill more predators in order to sell more game licenses and secure the funding it needed.

National wildlife refuges and national preserves by contrast, are called "national" for a reason: they are units of nation-wide conservation systems that are managed for the benefit of all Americans under broad national conservation system missions and standards. Sport hunting may be allowed within these areas but only where it has been found to be both compatible with the purposes for which a given affected unit was created, and consistent with the applicable federal land management and other conservation laws. This is the correct focus and priority as it should be for wildlife management decisions within national wildlife refuges and preserves, and federal law should not be amended so as to convert these areas into revenue generating game farms for depleted state budgets.

3. **Though states – some more so than others – may experience conflicts and disagreements with the U.S. Fish and Wildlife Service and other federal agencies on management decisions on occasion, would you classify any relationships as dysfunctional? Or elevating to the point of discontent that a state has ever declined to accept federal funding in support of fish and wildlife management programs?**

ANSWER: I do not have detailed personal knowledge of the quality of current state/federal relations on wildlife management beyond the extremely positive assessment of federal/state wildlife relationships provided Nick Wiley, the head of the Florida Fish and Wildlife Commission which I included in my testimony before the Committee. I would note, however, that based upon my 40+ years of working on wildlife conservation issues involving federal/state jurisdictional issues, I do not believe that it would be accurate to characterize that relationship as dysfunctional. As within any large family, there may be from time to time disagreements between FWS and one or more states, but those disputes are not by any means the norm.

By way of example, the last year that I served as the Assistant Secretary for Fish and Wildlife and Parks at the Interior Department, I attended the North American Wildlife Conference which is the largest annual gathering of federal and state wildlife officials. After participating in a luncheon with state fish and wildlife directors and senior federal agency officials, I had two different state directors come up to me independently of each other and tell me that while they liked to occasionally complain publicly about the feds, they were actually glad that the federal wildlife agencies and conservation laws were there because it gave them (the state directors) stronger traction within their own internal state political battles where wildlife considerations would otherwise have been ranked a low priority. Thus, the federal and state wildlife agencies need each other and the present jurisdictional balance of power between them has worked remarkably well. And no, I have no personal knowledge of whether a state has ever refused to accept federal financial assistance for wildlife conservation.

4. **Do you agree with Mr. Vincent-Lang's assessment that subsistence hunters are the most likely to "suffer" from the Fish and Wildlife Service's proposed statewide rule?**

Answer: I respectfully but strongly disagree with the statement that subsistence users in Alaska will be the most likely "to suffer" as a result of the Fish and Wildlife Service's rejection of the

state anti-predator program within national wildlife refuges. First off, the proposed Fish and Wildlife Service regulation expressly states that it will only apply to sport hunting and not to subsistence hunting and to argue otherwise is a cynical attempt to generate subsistence user fear and opposition to the Service's proposal. Moreover, as I noted in my testimony before the Committee, Section 804 of ANILCA establishes non-wasteful subsistence uses as a preferential higher priority use within wildlife refuges over sport hunting. Thus, sport hunting opportunities would have to first be dramatically curtailed or shut down entirely before any restrictions could be imposed upon subsistence users within refuges.

The real issue however, is not whether subsistence uses might be curtailed, but rather whether game populations should be artificially enhanced for subsistence users and sport hunters through the eradication of predators within refuges? ANILCA answers that question with a resounding "no". As my testimony before the Committee pointed out, Sections 302 and 303 of ANILCA specified what the purposes were for each new or expanded wildlife refuge under ANILCA. In every case, the first stated purpose for each refuge out of the four purposes listed in those sections was the conservation and preservation of the "natural diversity" of the particular refuge. In addition to this general wildlife conservation stated purpose, the same section also included a list of key species that were to receive particular special attention in defining the purpose of the refuge. Eight of the new or expanded refuges specifically included the conservation of bears as a stated purpose of the refuge and three expressly included wolves. While Sections 302 and 303 also included the continued opportunity for subsistence uses in all statements of purpose for wildlife refuges in Alaska (with the exception of the Kenai), such subsistence uses were expressly made subordinate and secondary to the earlier primary stated purpose of wildlife conservation. Thus, it would be contrary to Titles III and VIII of ANILCA for the Service to allow the aggressive suppression of wolves and bears in order to artificially boost game opportunities for both subsistence users and sport hunters.

5. **In his written testimony, Mr. Regan calls on Congress to revise "several federal agency organic acts to utilize the phrase 'in cooperation with the states'" and that the term "needs to be defined with certainty and clarity". Do you feel these modifications of existing law are necessary?**

ANSWER: No, I believe that existing federal laws currently describing state and federal jurisdictional relationships over wildlife are appropriate and adequate and should not be amended. As I noted in my previous testimony before the Committee, the overall quality of state/federal interaction over wildlife has been generally collaborative, cooperative and respectful. The rare instances when this has not been the case often involved disagreements over the management of sport hunting on federal lands like national wildlife refuges or the listing of species under the Endangered Species Act, both situations where federal law should control. It is a bad idea to upend long-standing and well performing laws in order to deal with isolated cases of federal/state disagreement over wildlife management alternatives, especially if in the vast majority of interactions, federal and state wildlife agencies support each other and work well together. To push for legislative changes based upon infrequent disagreements is like focusing on the hole and not the donut.

Senator SULLIVAN. Thank you, Mr. Barry. I appreciate your interest in ANILCA as you can imagine.

Mr. Vincent Lang, may we have your testimony, please, sir?

STATEMENT OF DOUG VINCENT LANG, FORMER DIRECTOR, ALASKA DIVISION OF WILDLIFE CONSERVATION

Mr. LANG. Senator Sullivan and members of the committee, thank you for inviting me to discuss Federal overreach and wildlife management in my State of Alaska.

My name is Doug Vincent Lang. Today, I will speak as a representative of Safari Club International and from my perspective as a former State chief wildlife manager. SCI is a world leader in preserving the freedom to hunt and promoting wildlife conservation. Our chapters in Alaska are some of the most effective hunter conservation groups in my State.

When you consider the uniqueness of Alaska's relationship with its wildlife resources, it is not surprising that the framers of my State's constitution required active management of my State's fish and game for the sustained yield and the many benefits it provides.

It is also not surprising that the historic intent and incredible wisdom of the framers of the U.S. Constitution reserved certain powers to the individual States become crystal clear. This includes recognition that it is the responsibility of the States to manage and control their natural resources for their unique needs.

For Alaska, Congress specifically recognized and guaranteed Alaska's right to manage and control its resources under our State constitution as part of our statehood compact. For the past decade, my State has begun to experience increased administrative intrusions by Federal agencies into the management of our fish and game that some unresolvable given increasingly divergent administrative management philosophies.

The intrusions are wide ranging. They include misuse of the Endangered Species Act. As an example, let us look at the ringed seal. These seals were listed as a threatened species based solely on speculative models forecasting possible reductions over a 100-year timeframe. Yet, these seals currently number in the millions and are expected to remain at these numbers through the mid-century. Such listings are unnecessary and allow Federal agencies to exert management control over the listed species as well as their landscapes.

The National Park Service recently finalized new regulations governing wildlife in Alaska's national preserves over my State's objection. In these regulations, the Park Service closed preserves to hunting opportunities despite there being no conservation concerns. The Park Service chose to substitute their agency ethics and values as to what constitutes appropriate hunting methods, ignoring publicly adopted State regulations that allowed those practices.

Now we see the U.S. Fish and Wildlife Service proposed new rules that administratively exert Federal management control over wildlife in Alaska's national wildlife refuges. These rules fundamentally will alter the Federal Government's longstanding wildlife management relationship with Alaska.

The Service is using their administratively adopted biological integrity policy to thwart protections of State management authority

that Congress includes in the National Wildlife System Improvement Act and in the Alaska National Interest Lands Claim Conservation Act, both of which confirm deference to State management authority.

By incorporating national diversion policies into their permanent regulations, the Service is replacing time proven, traditional active State management with a hands-off management approach. Let me give you an example of how this plays out in the real world.

On Unimak Island in Alaska, the Service has elevated natural diversity and its hands-off management policy over sound principles of wildlife management. On this island, without active management of both predator and prey populations, an indigenous caribou population has a high likelihood of disappearing.

The Service determined that under their natural diversity guidelines, it would be acceptable for the caribou on this island, in the Service's own words, to blink out; this despite one of the refuge's congressionally established purposes being the conservation of these very caribou and their subsistence uses. The application of this hands-off approach throughout Alaska's refuges could put many other populations of moose, caribou, deer and elk at risk and as a result, seriously reduce opportunities for hunters including subsistence hunters.

Under a hands-off approach, it is questionable whether Alaska will be allowed to continue to actively manage its sheep and bear populations for trophy hunting opportunities. Will Alaska be allowed to continue to actively manage its salmon runs for optimal sustained yields since that is an active management program? Will subsistence hunters be required to adopt fair chase standards?

Taken together, these agency actions and others represent an unprecedented administrative intrusion by Federal agencies into the State's traditional role as principal manager of fish and wildlife. It is occurring despite congressional assurances from a variety of legislative savings clauses which statutorily preserve the State authority to manage.

In Alaska, it is preventing my State from fulfilling our sustained yield mandates that our constitution tells us we must and is impacting my State's ability to manage and provide sustained hunting and fishing opportunities.

Those will suffer the most are those who hunt and fish in Alaska including subsistence hunters. We ask Congress to work with us to preserve the rights and opportunities of Alaskan hunters and fishers to prevent these Federal intrusions.

The State fish and game model is a proven success that should be built upon, not replaced with a new, one size fits all Federal conservation model. We need congressional action to stop these administrative intrusions.

The Safari Club applauds the efforts of Senator Sullivan toward this end. Safari Club International asks Congress for assistance toward this end in protecting Alaska's hunters.

Thank you for the opportunity to speak with you today.

[The prepared statement of Mr. Lang follows:]

Oral Testimony of
Doug Vincent-Lang
to the
Senate Energy and Public Works Committee

February 9, 2016

Senator Sullivan and members of the Committee, thank you for inviting me to discuss federal overreach into wildlife management in Alaska, including the regulatory changes proposed by the U.S. Fish and Wildlife Service and those recently adopted by the National Park Service pertaining to wildlife management on Alaska's national wildlife refuges and national preserves.

My name is Doug Vincent-Lang. Today I will speak as a representative of Safari Club International (SCI) and from my perspective as a former chief state wildlife manager. SCI is the world leader in preserving the freedom to hunt and promoting wildlife conservation, and our chapters in Alaska are the most effective hunter conservationist groups in my state.

When you consider the uniqueness of Alaska's relationship with it's wildlife resources, it is not surprising that the framers of the Alaska Constitution required active management of my state's fish and game for their sustained yields and their many benefits. It is also not surprising that the historic intent and incredible wisdom of the framers of the U.S. Constitution that reserved certain powers to the individual states become crystal clear. This includes the recognition that it is the responsibility of the states to manage and control their natural resources for their unique needs. And, for Alaska,

Congress specifically recognized and guaranteed Alaska's right to manage and control its resources under our state constitution as part of our statehood compact.

Over the past decade, Alaska has begun to experience increased administrative intrusions by federal agencies into management of our fish and wildlife that seem unresolvable given increasingly divergent management philosophies.

The intrusions are wide ranging. They include misuse of the Endangered Species Act. As an example, let's look at the ringed seal. These seals were listed as a threatened species based on speculative modeling forecasting possible reductions over a 100-year timeframe. Yet, these seals currently numbers in the millions and are expected to remain at these numbers through mid-century. Such listings are unnecessary and allow federal agencies to exert management control over listed species and their landscapes.

The National Park Service recently finalized new regulations governing wildlife in Alaska's national preserves over Alaska's objection. In these regulations, the Park Service closed preserves to many hunting opportunities despite there being no conservation concerns. The Park Service chose to substitute their agency ethics and values as to what constitutes appropriate hunting methods, ignoring publically adopted state regulations that allowed those practices.

Now we see the U.S. Fish and Wildlife Service propose new rules that administratively exert federal management control over wildlife in Alaska's national wildlife refuges. These rules will fundamentally alter the federal government's long-standing wildlife management relationship with Alaska. And, once applied in Alaska, we could see similar rules from the Service for similar management across all the states.

The Service is using their administratively adopted Biological Integrity Policy to thwart the protections of state management authority that Congress included in the National Wildlife Refuge System Improvement Act and the Alaska National Interest Lands Conservation Act, both of which confirmed deference to state management.

By incorporating natural diversity principles into their permanent regulations, the Service is replacing time-proven, traditional "active" state management with a "hands-off" management approach. Let me give you a real example. On Unimak Island in Alaska, the Service has elevated natural diversity and its hands-off management philosophy over sound principles of wildlife management. On this island, without active management of both predator and prey populations, an indigenous caribou population has a high likelihood of disappearing. The Service determined that under their natural diversity guidelines it would be acceptable for these caribou to, in the Service's words, "blink out". This, despite one of the Refuge's established purposes being the conservation of these very caribou and their

subsistence uses. The application of this "hands off" approach throughout Alaska's refuges could put many other populations of moose, caribou, deer and elk at risk, and as a result, seriously reduce opportunities for hunters, including subsistence hunters.

Under a hands-off approach it is questionable whether Alaska will be allowed to continue to actively manage its sheep and bear populations for trophy hunting opportunities. Will Alaska be allowed to continue to actively manage its salmon runs for optimal sustained yield? Will subsistence hunters be required to adopt fair chase standards?

Taken together these agency actions and others represent an unprecedented administrative intrusion by federal agencies into the state's traditional role as the principle manager of fish and wildlife. It is occurring despite Congressional assurances through a variety of legislative "savings clauses", which statutorily preserve the state authority to manage. In Alaska this is preventing my state from fulfilling the sustained yield mandates of our constitution and is impacting my state's ability to manage and provide sustained hunting and fishing opportunities. Those who will suffer the most are those who hunt and fish in Alaska, including subsistence hunters.

We ask Congress to work with us to help preserve the rights and opportunities of Alaska's hunters and fishers and prevent these federal intrusions. The state fish and game management model is a proven success

that should be built on, not replaced with a new, centralized, one-fit-all, federal conservation model.

We need Congressional action to stop these administrative intrusions. Safari Club International applauds Senator's Sullivan's effort towards this end.

Specifically, we ask Congress to adopt legislation that ensures that the successful state fish and game management model is not preempted or compromised by federal administrative actions. This legislative language should clarify that the federal agencies' responsibility for conservation of wildlife is a monitoring role. The language should also ensure that, unless specifically authorized in statute adopted by Congress, federal agencies be prohibited from adopting regulations that involve seasons, bag limits, methods and means, and from determining the range of sustainable wildlife numbers. Also, federal agency actions involving wildlife management must be preceded by consultation with state fish and wildlife agencies that results in state concurrence. Without concurrence, federal agencies should not be authorized to regulate harvests, except as specifically stated in federal statute.

Safari Club International asks Congress for assistance towards this end and in protecting Alaska's hunters. Thank you for the opportunity to speak with you today.

Sent by email to Elizabeth_Olsen@epw.senate.gov

March 6, 2016

Dear Ms. Olsen:

Following are my (Mr. Doug Vincent-Lang) responses to Senator Sullivan's follow-up questions from the Senate Committee on Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife for their February 9, 2016 hearing.

Q1. Recently, the U.S. Fish and Wildlife Service published contingency operations in the event that funding for the federal government lapses. In this plan, the U.S. Fish and Wildlife Service propose to close the refuges. What are your thoughts on this plan, particularly as it relates to Alaska where closures are required by statute to undergo a public process?

Plain and simple, the plan contradicts clear language of ANILCA that directs refuge lands remain open to public use except under specified criteria. The plan violates procedural and substantive requirements of ANILCA to implement refuge closures. These unjustified closures will result in substantial harm to Alaskans and state management of fish and wildlife.

Application of the plan to Alaska refuges is illegal: *The September 2015 Contingency Plan for Operations in the Event of a Lapse in Appropriations (Plan) proposes wholesale closure of refuge lands in Alaska based on funding reasons. Congress adopted key provisions under ANILCA to protect the Alaska way of life, i.e., those activities occurring on federal land prior to ANILCA will continue and only be restricted under criteria and a process specified in the Act and its implementing regulations. Those criteria for closing refuge lands do not include a shortage of funds.*

Under ANILCA Section 1110(a), "Notwithstanding any other provision of this Act or other law," all conservation system units (national wildlife refuges, national park units, wild and scenic rivers, monuments, Wilderness, National Trails) are 'open until closed' for access by the public "and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds such use would be detrimental to the resource values of the unit or area." The term "Notwithstanding" means: 'it doesn't matter what any other law says, this section of ANILCA prevails.' As such, public access on refuge land is allowed and not closed until after a notice, hearing, and finding of detrimental impact. There was no notice provided to the State of Alaska or public of the proposed closure in the Plan, no hearing, and no consultation with the State prior to adoption of the Plan.

Other provisions of ANILCA are similarly flouted by the proposed closure of 76 million acres of national wildlife refuges in Alaska without a basis or procedure required by ANILCA.

Sent by email to Elizabeth_Olsen@epw.senate.gov

- *For example, Section 1314(a) confirms that "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act" and Section 1314(b) confirms "Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." Despite Congress direction, wholesale closure of the refuges would significantly diminish the State's ability to sustainably manage fish and wildlife through conduct of its own management activities and prohibition of the public's ability to participate in hunting, fishing, and trapping. Enactment of such a closure is a de facto grant of enlarged authority by the Service to itself to close the public lands without cause and to trump the State's authorities granted by Congress in the Alaska Statehood Act and confirmed in ANILCA.*
- *As another example, Section 1314(a) [quoted above] grants a single diminishment of State authority to manage fish and wildlife in Title VIII, in which Congress authorizes the Secretaries of the Interior and Agriculture (Section 814) to adopt regulations to implement the priority consumptive use of fish and wildlife for subsistence purposes by certain qualified rural residents on federal lands. While the Plan proposes to allow federal subsistence users to continue their activities on the refuge lands during the closure, it disallows such harvests authorized by the state for subsistence and non-subsistence uses. Title VIII expressly does not allow this selective closure of federal lands to only the federal authorized harvests. Section 815(3) prohibits the Secretary from "authorizing a restriction on the taking of fish and wildlife for non-subsistence use of fish and wildlife (other than national parks and park monuments) unless necessary for the conservation of healthy populations of fish and wildlife, for the reasons set forth in section 816, to continue subsistence uses of such populations, or pursuant to other applicable law;" none of these criteria that would justify any closure, let alone to necessitate total closure of the Alaska refuges, are met.*

Wholesale closures of Alaska refuges will cause significant social and economic harm to the public and diminish the State's management of fish and wildlife <u>without cause</u>:

- *The Plan proposes closure of 16 national wildlife refuges for which <u>there is no emergency</u>. The September Plan foresaw a possible funding shortfall in December of 2015 (3 months after adoption of the Plan) and will implement the Plan in subsequent years should such a shortfall occur. This was ample time to evaluate alternatives to total closure in consultation with the State as required by Secretarial policy in 43 CFR Part 24 and ANILCA Section 816.*
- *FWS states that there will be no reduction in public safety or enforcement personnel, so <u>there is no public safety or administrative basis</u> to justify the closure of refuge lands.*

Sent by email to Elizabeth_Olsen@epw.senate.gov

- *Closure would shut down hunting, fishing, and trapping, which are the main management tools that the State uses to sustainably manage fish and wildlife populations. There is no scientific basis, shortage of resources, or concern for wildlife that justifies such closure. In fact, the closures will create unnecessary hurdles for the state to monitor populations and to manage, such as to assure wildlife are harvested to keep numbers within the desired range of population numbers, sex and age ratios, and balance with other wildlife populations.*
- *Wildlife populations do not know political boundaries and there are millions of acres of inholdings within the refuges. A checkerboard of open versus closed lands will upset the State's ability to manage populations as well as complicate harvests for all users.*
- *Closure will result in substantial harm to the residents who depend on harvests for their sustenance, livelihood, and cultural well-being as well as impact the fish and wildlife populations themselves. Alaskan residents that harvest for subsistence purposes but may not qualify as rural residents under the federal regulations will not be allowed to continue subsistence uses under the Plan. Such closures to subsistence uses are only allowed under specific criteria in ANILCA Section 816, and such closure requires "consultation with the State" except in emergencies as well as public notice and hearing "only if necessary for reasons of public safety, administration, or to assure the continued viability of such population." Furthermore, such closure contradicts Congress expressed findings and intent in ANILCA Title I that "provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people . . .."*
- *Closure unreasonably prohibits priority public uses established under the Refuge Improvement Act of 1997, such as hunting, fishing, and other wildlife dependent recreational uses that have already been found compatible with the refuge(s) purposes.*
- *Such closure effectively shuts down the entire commercial guiding industry—hunting guides, fishing guides, transporters, air taxi operators, and their employees including many local residents in rural Alaska will all experience significant economic harm. The hunting and fishing seasons are very short and the logistics and expenses by both the commercial providers and the participants are difficult under the best of circumstances. The impacts even for a short closure will be significant and far reaching.*
- *Such closure will impact rural residents who depend upon harvests by hunters as well as by relatives to sustain them.*
- *Such closure will impact trappers who depend upon harvests for trade, barter, clothing, crafts, and a cash economy.*
- *Such closure will impact the ability of commercial fishermen, including local residents using set nets, who are permitted by ANILCA Section 304(d) to exercise valid commercial fishing rights and to use the Refuge lands "for campsites, cabins, motorized vehicles, and aircraft landings directly incident to the exercise of such rights." Such impacts have ripple effects by depriving local communities*

Sent by email to Elizabeth_Olsen@epw.senate.gov

of taxes derived from commercial fishing that support schools and community infrastructure as well as the State economy.

Closure for financial reasons contrasts more reasoned action by other agencies: *In October 2013 the federal government shutdown resulted in a much more reasoned approach to closing federal land in Alaska by the National Park Service and Bureau of Land Management. For example, the NPS closed its facilities but recognized "millions of acres of parks and preserves in Alaska were made broadly open and accessible to the public and no fees for entrance or admittance were allowed by the legislation. Subsistence, hunting and access to in-holdings were authorized by the law and the public undertaking these activities may be engaged in these activities in the remotest areas of parks and preserves at the time of shutdown. Noticing them of any requirement to depart park areas would not be reasonably possible. Similarly, BLM stated "Commercial, competitive and group authorization for events and activities, including commercial outfitter and special recreation permits, can continue operations provided they do not need BLM field monitoring, oversight or BLM assistance of any kind, and are not operating in sites that have been closed." BLM advised persons may "hunt or fish on public lands . . . consistent with State law."*

Given the rights of access under ANILCA and other federal laws, the Service's approach to close all refuge lands in Alaska is inappropriate, illegal, and will lead to unnecessary harm to Alaska, Alaskans, and the resources.

Q2. The U.S. Fish and Wildlife Service is exterminating caribou from Kagalaska Island that are used for food by local residents. The rationale used by the U.S. Fish and Wildlife Service is that the caribou are an invasive species. Could the same rationale be used by the U.S. Fish and Wildlife Service to eradicate transplanted deer, elk or mountain goats on Kodak Island?

Given its decision to remove caribou from Kagalaska Island after classifying them as invasive species, this opens the door to the Service to remove/eradicate any other species they determine to be "invasive" species on the refuge system in Alaska. I am particularly concerned that the Service will initiate efforts to eradicate deer, elk, and mountain goats from the Kodiak National Wildlife Refuge as their staff have gone on record as classifying these species as introduced, invasive species that have the potential to impact natural diversity. These species were introduced and provide significant hunting opportunity, including for subsistence, and their eradication would significantly impact these uses. Also, the Service could stop fish stocking efforts for aquatic water bodies on Alaska refuges if they determine these stockings are invasive and impacting natural diversity.

Sent by email to Elizabeth_Olsen@epw.senate.gov

Q3. The U.S. Fish and Wildlife Service has implemented a program called Landscape Conservation Cooperatives. Please explain your experience with this program.

The Department of Interior has initiated an expansive program called Landscape Conservation Cooperatives, or LCCs. LCCs were initially established to coordinate science at a landscape scale to study the effects of a changing climate. On the surface this sounds good as climate is having an impact on our landscapes. Unfortunately, this program has morphed into something much broader and controlling. The USFWS has now directed these entities to establish conservation goals and objectives for all lands and waters and species occupying them within the boundaries of these cooperatives, which includes millions of acres of state and private lands and waters, including lands owned by Native Corporations. As such, federal conservation goals and objectives would apply to those lands and waters, state and private. When I was the Director of Division of Wildlife Conservation we quit participation in two LCCs because they chose to vote by majority, allowing numerically dominant federal partners and their NGO partners to establish conservation goals and objectives that applied on state lands and waters, or to state trust species, all over our objection.

***Q4.* Beyond the examples you highlighted in your testimony, what are some of the broader issues that could result from the proposed U.S. Fish and Wildlife Service regulation entitled *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*?**

There is uncertainty of how undefined natural diversity goals could impact state management of many other species managed for their sustained yield versus their natural diveristy; for example, sheep and bear populations that are managed for trophy hunting opportunities. It is also raising questions as to how these goals could affect Alaska's salmon management that is often based on maximized sustained yield, not widely variable returns based on unmanaged natural conditions. Other aspects of this proposed rule are opening the door to opinion and interpretation and paving the way for federal land managers to put their ethics into regulation.

Q5. **You state in your testimony that the agencies are misusing the Endangered Species Act. Can you explain how and define the problems this creates?**

Federal agencies are increasingly using the Endangered Species Act (ESA) as a species and landscape control mechanism. Alaska has been assaulted with precautionary listings of species irrespective of their current or near term heath or abundance based solely on untested models speculating possible extinction sometime in the far distant future. This began with the listing of the polar bear, which despite our scientist's concerns with the untested models that speculated extinction by 2050, remain today at all time high numbers, and for the Chukchi Sea population, which has experienced some of the greatest sea ice loss over the past decade, vital rates remain the same as they were 30 years ago.

Sent by email to Elizabeth_Olsen@epw.senate.gov

We are seeing this strategy of speculative listing being employed by federal agencies and their NGO partners to list or attempt to list additional species. For example, the NMFS listed the ringed seal based on speculative climate impacts 100 years in the future, despite their being over 3 million of these seals in the world today and, this is important, their own information that suggests that there will be no measurable impacts for the next 50 years. Similar listings are pending for other species which are also based solely on speculated impacts in the far distant future, rather than observed or documented declines now, or through scientifically supported projections.

This concerns me for many reasons; however, my greatest concern is that once a species is listed all forms of take, including hunting and fishing, or incidentally through development of our resources, comes under federal oversight. I view this as an unprecedented and unjustified federalization of state trust species and their habitats, and more significantly, of their management. It will not be long before a raft of state managed species are petitioned for listing and federalization, many of which are currently managed sustainably by the state. For example, what would happen if sockeye salmon were listed due to speculated impacts from ocean acidification, or caribou from global warming? Both species are currently well managed by the state but if listed would become federally managed with untold potential for restrictions on use or of development in their range.

We are also seeing this Act used as a landscape control mechanism through overly expansive designations of critical habitat that encompass any area potentially occupied by a species, rather than those areas truly critical to a species survival. As an example, for the polar bear, an area of Alaska larger than California was designated as critical habitat despite acknowledgment in the rule that the designation would not significantly benefit the species or that much of the area did not contain the primary constituent elements defining the habitat as critical. I believe this needlessly federalizes broad areas of land/seascapes, and that such designations allow federal agencies to unnecessarily exert their management goals, authorities and philosophies onto these designated critical habitat areas, which include state and private lands.

Q6. The proposed U.S. Fish and Wildlife Service regulations entitled *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska* cites a congressional record insert submitted by House Interior Committee Chairman Mo Udall nine days after enactment of ANICLA to demonstrate congressional intent over the meaning of the term "natural diversity" in ANICLA. Prior to ANILCA's enactment, Senator Ted Stevens spoke in the Senate specifically to this term. Why do you think the U.S. Fish and Wildlife Service doesn't cite the congressional intent as described by Senator Stevens?

I believe they have selectively chosen the part of the record that best substantiates their proposed regulations. If they had chosen the Congressional record as spoken by

Sent by email to Elizabeth_Olsen@epw.senate.gov

Senator Stevens as the foundation of their proposed regulations I believe a much different regulation that respected state right to manage and that allowed active management for human benefit would have resulted.

On December 1, 1980, Senator Stevens read into the record House Concurrent Resolution 453 which was agreed to by the Senate prior to passage of the Alaska National Interest Lands Conservation Act on December 2. This resolution addresses the meaning of the phrase "natural diversity" that is used in Title III of ANILCA to describe the purposes of the refuges. As such, this language is the "valid" legislative history that explains Congressional intent regarding language in the statute. The phrase is also used in the Refuge Improvement Act of 1997, which makes no change to the phrase and expressly states that if there is any conflict between that Act and ANILCA, then ANILCA prevails. Thus, for Alaska refuges, the explanation of the phrase contained in the Congressional record entered by Senator Stevens remains unchanged.

Language entered into the Congressional record by Congressman Mo Udall weeks after Congress passed ANILCA, and after the President signed it, is not "valid" legislative history. Congressional record that is not "valid" has no legal basis—it cannot be used in court to justify an administrative decision that is contrary to the statute and that contradicts "valid" legislative history upon which Congress took positive action in passing the resolution. Congressman Udall's 'Johnny come lately' interpretations have no basis in law, so there is only one reason I can think of for the Service to cite those interpretations in the proposed rulemaking—to intentionally and deceptively influence the public in their review in order to support the Service's incorrect interpretation.

Q7. Please attempt to quantitatively define natural diversity.

The phrase "natural diversity' is a term of art for biologists engaged in the management of fish and wildlife that evolves just as the knowledge of fish and wildlife populations and their relationship to their environment, including humans, evolves. We know what it isn't—populations are not "in their natural diversity" when they are not occurring in sufficient numbers in relation to each other to be sustainable and healthy.

The question of how to apply the phrase "natural diversity" in Title III of ANILCA was addressed in the early stages of implementation of ANILCA. For example, each of the refuges was required by ANILCA to adopt refuge comprehensive conservation plans. Most of the plans adopted in the 1980s addressed the term. Some cited the Congressional record cited above and several noted "the term is not intended to preclude predator control on refuge lands" (Nowitna 1986) and that it means managed in its "present condition" or so numbers do not fall below "present levels (Becharof 1985 ;Koyukuk, Kanuti, Tetlin 1987). All of the CCPs recognize the state as the manager of fish and wildlife on refuge lands as well as regulating hunting, fishing, and trapping.

Sent by email to Elizabeth_Olsen@epw.senate.gov

The Alaska Department of Fish and Game has the authority and responsibility to manage fish and wildlife on all lands, as Congress adopted in the Alaska Statehood Act and confirmed by ANILCA and the Refuge Improvement Act. As such, it is up to the Department to manage all species for sustainability; i.e., healthy and sufficient numbers to assure maintenance of healthy populations. Populations of fish and wildlife that are managed to assure their sustainability in relation to their habitat allows for a range in numbers while maintaining a spectrum or mix of animals that normally or naturally inhabit a particular area. This does not preclude hunting or manipulation of populations within a range of higher and lower numbers that assure sustainability. It also does not require maintenance of a particular population age structure or genetic composition for each species or unregulated population fluctuation. This said, it does not allow the Department to completely extirpate populations of indigenous species and/or to allow a population to decline below sustainable numbers or increase to numbers that impact sustainability through damage to its habitat or that damage other populations. Thus, it is inconsistent with ANILCA for the Service to prohibit lawful hunting or supersede other management actions that are part of the State's management programs to assure sustainable populations of fish and wildlife on refuges. In short, the state's sustained yield management provides for natural diversity.

It can be quantitatively measured by assessing outputs that quantify benefits to humans (e.g., escapement goals, harvest management goals, achievement of subsistence needs, wildlife viewing, etc...).

Q8. During the course of the hearing, we discussed several problems related to the diminishment by the federal government of the ability of the individual states to manage fish and wildlife. What steps do you recommend Congress take to restore any imbalance?

Specifically, I ask Congress to adopt legislation that ensures that the successful state fish and game management model is not preempted or compromised by federal administrative actions. This legislative language should clarify that the federal agencies' responsibility for conservation of wildlife is a monitoring role. The language should also ensure that, unless specifically authorized in statute adopted by Congress, federal agencies be prohibited from adopting regulations that involve seasons, bag limits, methods and means, and from determining the range of sustainable wildlife numbers. Also, federal agency actions involving wildlife management must be preceded by consultation with state fish and wildlife agencies that results in state concurrence. Without concurrence, federal agencies should not be authorized to regulate harvests, except as specifically stated in federal statute. Lastly, Congress needs to affirmatively 'give teeth' to the various savings clauses in prior legislation by adopting legislation that confirms recognition that the states have full authority and responsibility for the management of fish and wildlife except as specifically diminished

Sent by email to Elizabeth_Olsen@epw.senate.gov

by Acts of Congress (not by agency policy and regulations). State management authority and responsibility overlays all lands within its borders and, therefore, states are not required to acquire permits from federal agencies for the conduct of state management and research activities on federal lands. Federal agencies are required to meet the conditions of state management agencies when handling fish and wildlife unless specifically exempted by Acts of Congress. However, in such cases, Congress expects the agencies with such exemptions or overlapping jurisdiction will coordinate and consult with the states on such activities. Congress needs to confirm that the states have deference in any determination of what constitutes conservation of healthy fish and wildlife populations.

Q9. The U.S. Fish and Wildlife Service contends that the proposed rule entitled *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska* would prevent the State of Alaska from implementing predator control. Do you agree?

Yes. For example, the USFWS has told my state that it cannot actively manage for moose on the Kenai National Wildlife Refuge, a species that is critically important to hunters, including subsistence hunters. This specifically includes not allowing the state to actively manage both wolf and beer populations, both of which have been shown to keep moose numbers depressed. They have stated that under their biological integrity and natural diversity guidelines that the numbers of moose can fluctuate within their natural ranges, including low ranges that are insufficient to provide hunting opportunity. I should note that this in a refuge that was originally established as a national moose range and that there is a presidential executive order requiring the perpetuation a nationally significant population of moose.

Wildlife managers often actively manage to keep predators and prey in balance with habitat, while providing stable opportunities for their use by the public. If one segment of the process gets out of step with another we use tools to get them back in sync. Its all a balancing act intended to provide for stable populations and to avoid the wild swings and deep declines that may be seen in "unmanaged" populations. I suspect that these approaches, given they are not natural, will be banned under the new rules. If they are banned, they will have significant impacts on hunting. For example, if you are a subsistence hunter in Alaska, you depend on stable populations of wildlife to provide food for your family and expect your wildlife managers, state and federal, to do so.

***Q10.* Through the proposed rule entitled *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska* the U.S. Fish and Wildlife Service is proposing to implement their biological integrity policy into regulation. What do you believe the implication of this action will be in regards to the way the refuge system is managed?**

Sent by email to Elizabeth_Olsen@epw.senate.gov

By moving the Biological Integrity Policy into regulation the USFWS is requiring that as an agency it must follow their extreme interpretations regarding wildlife management. And essentially, that management will be a "hands off" or passive management approach versus the active management traditionally employed.

So why is it a problem? Let me give you a real example. On Unimak Island, a part of the Alaska Maritime National Wildlife Refuge, USFWS biologists have told the State of Alaska and area residents that the primary purpose for the management of this island is to provide for biological integrity and natural diversity. On this island, indigenous caribou has a real potential to become extirpated unless scientifically based, active management action is taken. The state used all its regulatory tools to manage the harvest of caribou, but also determined that additional action, including the management of their key predators, wolves, was necessary to prevent the extirpation of caribou. However, the USFWS determined that under their biological integrity and natural diversity guidelines it would be acceptable for caribou to "blink out" of existence. Let me repeat this, the USFWS determined that it would be okay for caribou to "blink out" of existence as this is "natural". Alaska cannot, under its constitution, simply allow a population to "blink out" of existence. To ensure Alaska did not take any action, the USFWS took legal steps to stop the State from protecting these caribou from extirpation including threats of arrest. At this time, the caribou herd remains on the verge of extirpation, and does not provide for any subsistence uses, a specific purpose of Alaska national wildlife refuges. In this instance, the USFWS has very clearly shown that they are willing to allow the elimination of a wildlife populations and deny people food for subsistence in order to comply with their concept of biological integrity and natural diversity.

This makes one wonder what is in store for Arctic National Wildlife Refuge that was recently proposed for significantly increased wilderness designations by the USFWS, and presumably a more passive management approach. Will the Porcupine Caribou herd be allowed under the USFWS's wilderness and biological diversity policies to someday become extirpated from this refuge? How will this impact local communities dependent on caribou for subsidence?

So what then is management for biological integrity and natural diversity? Areas untouched by humans where no active management is allowed, as the USFWS contrives in the example of Unimak Island? Perhaps, but perhaps not. In my state the USFWS actively manages predators in Prince William Sound to ensure Pigeon Guillemots, a small, cliff dwelling water bird, do not become extirpated from Naked Island. The state cooperated to issue a permit to the USFWS for active management by allowing trapping of native mink to aid in the recovery of Pigeon Guillemots. The USFWS has so far expended over one million dollars on this effort and early indications are promising with efforts likely to continue with the support of the state. Similarly, the USFWS actively manages lions in Arizona to ensure against extirpation of native sheep.

Sent by email to Elizabeth_Olsen@epw.senate.gov

What is the difference here? Why is the active management of invasive species, lions and mink in this manner allowed, but the management of wolves by my state is not? I cannot answer that question, perhaps the USFWS may be able to do so, but the inconsistency of the application of the biological integrity policy at the whim of the USFWS is deeply troubling, especially as these regulations become codified and put into use. The inconsistencies will lead to a range of other questions.

For example, Alaska and most other states actively manage ungulates such as deer, moose, caribou and elk, to intentionally manipulate their sex composition to allow for increased harvests of males that are surplus to the population and that allow for sustained use. So, instead of having a natural mix of about 50/50 males and females, you actively manage to have a mix of 30 males to 70 females. This is a long practiced and accepted wildlife management practice that provides for hunting, wildlife viewing and other uses, as well as for continued propagation of the herd. Because it is not a natural process, but an intentional manipulation of nature, will such management approaches be prohibited under the new rules, and the resultant impacts to hunting opportunity be allowed?

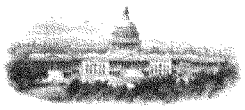
Another example of how the movement of the Biological Integrity Policy to regulation will alter current wildlife management occurs outside Alaska. Waterfowl Production Areas (WPAs) were developed to basically grow waterfowl to make up for the loss of vast acreages of lost habitat due to development. These areas grow waterfowl by planting crops they eat, ensuring water in dry times, and eliminating predation. They have been very successful in helping meet the flyway goals of the states and contribute to the harvest of waterfowl by hunters across the US. But are they consistent with Biological Integrity given their active management strategies? Since they intentionally manipulate wildlife and habitat for desired outcomes that benefit humans, probably not.

Senator SULLIVAN. Thank you, Mr. Lang.

I would like to begin by submitting for the record a letter from Congressman Don Young on the House side who is interested in commenting on the subject matter of this hearing, without objection.

[The referenced information follows:]

DON YOUNG
CONGRESSMAN FOR ALL ALASKA
WASHINGTON OFFICE:
2314 RAYBURN BUILDING
WASHINGTON, DC 20515
202-225-5765



COMMITTEE ON
NATURAL RESOURCES

CHAIRMAN, SUBCOMMITTEE ON
INDIAN, INSULAR, AND
ALASKA NATIVE AFFAIRS

COMMITTEE ON
TRANSPORTATION & INFRASTRUCTURE

REPUBLICAN
POLICY COMMITTEE

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 9, 2016

The Honorable Dan Sullivan, Chairman
Subcommittee on Fisheries, Water, and Wildlife
410 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Chairman Sullivan:

I am writing today in regard to your hearing this afternoon entitled, "Federal Interactions with State Management of Fish and Wildlife," and ask you allow this letter to be entered into the official record.

On January 8, 2016 the United States Fish and Wildlife Service (FWS) announced a proposed rule restricting state-approved management practices in an effort to expand closures of refuges in Alaska. I take strong exception to this act of government overreach, as the proposal conflicts with the intent of the Alaska National Interest Lands Conservation Act (ANILCA), and the protections contained in the National Wildlife Refuge System Administration Act (NWRSAA), as amended by the National Wildlife Refuge System Improvement Act (NWRSIA). Further, I am dismayed by the explanation given by the FWS using these laws as justification for their actions.

As you are aware, ANILCA further protects the ability of the State of Alaska to manage wildlife across the state, on state, private and federal lands. As Section 1314 states, "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution." As it relates to the term "natural diversity," Senator Ted Stevens explained in the legislative history of the Act, "The phrase 'in their natural diversity' was included in each subsection of those two sections to emphasize the importance of maintaining the flora and fauna within each refuge in a healthy condition. The term is not intended to, in any way, restrict the authority of the Fish and Wildlife Service to manipulate habitat for the benefit of fish or wildlife populations within a refuge or for the benefit of the use of such populations by man as part of the balanced management program mandated by the Alaska National Interest Lands Conservation Act and other applicable law. The term is also not intended to preclude predator control on refuge lands in appropriate instances." As Alaska's lone representative in the House, and someone who was intimately involved in the process that produced ANILCA, it's my conclusion that the proposed rule set forth by the FWS is in clear violation of Federal law.

The FWS asserts their actions are validated by NWRSIA; however, as the original sponsor of that legislation, I can knowingly and affirmatively state that the FWS proposal goes against the original intent of my legislation. Section 7 of NWRSIA specifically provided for refuge lands in Alaska to be governed by the refuge planning provisions of ANILCA, and Section 9 of NWRSIA gives primacy to ANILCA for any conflicts. Further, Section 5 of NWRSIA, articulated 14 responsibilities that the Secretary has for managing the refuge system. This proposed regulation inappropriately elevates one of those broad responsibilities above the others, and places it into regulation. I find it concerning the FWS would cite a

law which forbids them from taking such actions as the justification for breaking the very law they are trying to circumvent. I hope during your hearing you are able to bring some semblance of order to the ill conceived proposal of the FWS.

Sincerely,

DON YOUNG
Congressman for All Alaska

Senator SULLIVAN. I also want to mention Senator Whitehouse and some of the testimony at the beginning of the hearing today talked about the importance of a cooperative attitude or a cooperative relationship. We could not agree more.

I remember this committee, on both sides of the aisle, certainly thinks that is important and that is the goal. In many ways, that is what the hearing is about, how do we get there. I think that is a goal we all share.

The Ranking Member mentioned Dan Ashe. I could not agree more. We would certainly be glad to have the Fish and Wildlife Service. As a matter of fact, he has testified before the full committee. In September, he testified here before a subcommittee. Unfortunately, I do not think any of the members of the other side of the aisle attended that hearing. We will have Mr. Ashe here again to answer some of these questions.

What we wanted to do today was to not have Government witnesses but to have some of the practitioners who I think can help bring an objective view and then also a view from the States where this issue is having the most impact.

Mr. Regan, I wanted to start with a question. In 2014, the AFWA published a report entitled, Wildlife Management Authority, the State Agency's Perspective. Can you explain what led to the drafting of that report, what recommendations it includes, and how that relates to the topic we are discussing today?

Mr. REGAN. Yes, I would be glad to, Mr. Chairman. In fact, I have a copy here to submit for the record.

Senator SULLIVAN. Without objection.

[The referenced report was not received at time of print.]

Mr. REGAN. I will say just a couple of things about this. First of all, I have been the executive director at the Association for 7 years. Throughout that 7 years of my tenure here in D.C., there have been ebbs and flows to the concerns about the extent to which Federal and State agencies effectively collaborate.

I would say, as I said in my opening remarks, by and large, there is a great record of collaboration and partnership across the State and Federal spectrum. However, as with any family situation, if you will, there are issues that manifest themselves that create challenges and stresses in working through issues.

This particular document to which you refer, Mr. Chairman, is really the product of those kinds of ebbs and flows over the past 7 years since I have been at AFWA. Our president at the time wanted to put some of these issues to rest. He appointed a task force which was chaired by the State director from Arizona and comprised the State directors to take a look at the broad spectrum of Federal laws, regulations, policies and other kinds of guidance with respect to how State fish and wildlife agencies do their work.

This document is the product of that committee's work. It was approved by the State membership. An annual meeting took place 2 years ago. It summarizes our best take on that relationship.

Senator SULLIVAN. What was the impetus behind it? Do you think there was a relationship between the State and Federal Government in this area that needed to be addressed?

Mr. REGAN. Yes. I would say that these ebbs and flows, these tensions that emerge over either public lands management policy,

wilderness policy, differing perspectives in different parts of the country by different regional line staff or administrators, coupled with some of the challenges that go with working through hard issues like Endangered Species Act listings and that sort of thing.

It was really driven not by any one particular issue but the overall perception that there was always this undercurrent ebbing and flowing of concern about the State and Federal relationship.

I will conclude, if I might, by not only referring to this document, but this document has helped set the stage for a couple of different executive leadership retreats, both with State agency leaders and leaders within the Forest Service and the Fish and Wildlife Service to create a better dialogue prior to issues becoming as big as they might.

Senator SULLIVAN. Thank you.

Mr. Lang, Mr. Barry actually mentioned the 1980 MOU between the Department of Fish and Game in Alaska and the Fish and Wildlife Service. Are you familiar with that MOU? Do you think that is being abided by in the light in which it was drafted?

Mr. LANG. I am familiar with that MOU. When I was director of the Wildlife Division of Conservation of Alaska Fish and Game, we tried to work with our Federal partners in the Fish and Wildlife Service to implement that MOU.

Unfortunately, the Federal Government was not abiding by much of the terms. For instance, we were not given opportunity to go out and access fish and wildlife and be able to monitor those fish and wildlife populations.

Senator SULLIVAN. The right to do that exists under the Statehood Act, ANILCA and many other Federal laws, correct?

Mr. LANG. Correct and as also acknowledged under the MOU. In essence, the MOU is there, but it does not really work as well as was intended.

The other thing I would like to point out is that the MOU says we are going to manage for natural diversity. The State of Alaska does manage for natural diversity, but the State of Alaska considers ecosystems as a functional part and humans as being a functional part of that ecosystem. We manage those ecosystems for human benefit.

When we signed that MOU back in 1982, the Fish and Wildlife Service and the Federal Government agreed that humans were a functional part of that ecosystem. Now instead, we are seeing the Fish and Wildlife Service believes humans are a threat to ecosystems and they are increasingly managing for natural diversity to minimize human impact on species.

I think that is a fundamental difference in Alaska. We have continually managed ecosystems for human benefit. The Federal Government is managing ecosystems to minimize human impact on those ecosystems.

Senator SULLIVAN. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you very much.

First, I want to say to the Chairman that one of the traditions of the Senate is that when there is a home State issue with a Senator, we tend to try to rally around one another. If something were going badly wrong in Rhode Island, I would hope you would be

willing to help me and in the same spirit to the extent there were issues in Alaska where I can be helpful, I would like to try to be helpful also.

Senator SULLIVAN. I would.

Senator WHITEHOUSE. I also think it is important, I do think where there are problems, they may not be nationwide problems, but local problems are real problems as you know very well.

I would like to shift my questioning a little bit and let me start with Mr. Lang. You are here representing Safari Club International?

Mr. LANG. Yes, I am representing Safari Club International.

Senator WHITEHOUSE. What is Safari Club International's position on global climate change?

Mr. LANG. I think Safari Club International believes that global climate change is occurring but that you can mitigate those actions through a variety of different means. Climate is affecting wildlife in a variety of different manners.

Just like any other stressor, climate change is one of those stressors that we as managers will manage for. It is no greater or no lesser than any other stressor. For instance, we will manage climate in the short and long term as we would any hunting pressure or anything else that would affect the long term sustainability use of wildlife on our State lands that we manage.

Again, I think we are managing it as any other stressor that occurs out there.

Senator WHITEHOUSE. Your described—your organization has it as a major concern? I am reading from your Web site. Would that be accurate?

Mr. LANG. What I am saying is that I believe that it is a concern but is no more or greater a concern than any other stressor we are doing in terms of managing wildlife.

Senator WHITEHOUSE. Do you disagree with Safari Club International's Web site statement that it is a major concern?

Mr. LANG. I did not say that. I said it is not the most significant concern. It is a concern, but in the short term, there may be more significant concerns affecting wildlife.

Senator WHITEHOUSE. In the long term, can you think of any more likely to affect wildlife?

Mr. LANG. I think as you are moving forward in time, human use of wildlife is something we all need to consider. For instance, I think one of the longer term impacts of managing wildlife is going to be managing wildlife in the urban interface.

We have been very successful in restoring wildlife over the last 150 years. Now I think one of the stressors is going to be, how are we going to turn that success into managing wildlife at the urban interface.

Senator WHITEHOUSE. The coyotes in my trash?

Mr. LANG. Yes.

Senator WHITEHOUSE. Mr. Barry, global climate change, a major concern?

Mr. BARRY. Absolutely.

Senator WHITEHOUSE. In what way does it bear on protection of wildlife?

Mr. BARRY. From a wildlife conservation point of view, I would say it is one of the biggest concerns, if not the biggest concern. It is going to cause a huge disruption in migration patterns. I think along the northeastern coastline, you have migratory birds that come back and have been coming back probably since time immemorial. They have arrived at a certain time because that is when some of the crabs pop up.

Senator WHITEHOUSE. You are talking about Delaware now?

Mr. BARRY. Yes, and all of a sudden it is out of sync. The birds are coming back and the food supply is not there.

We are seeing this with other migratory patterns that are being disrupted. Food sources are being disrupted. In Alaska, the polar bears are in big trouble because of climate change. We think from a wildlife conservation point of view it is probably the largest long term, big time threat.

Senator WHITEHOUSE. Mr. Regan, a major concern for wildlife?

Mr. REGAN. Yes, I would say it is a major concern. The Association of Fish and Wildlife Agencies has one dedicated staff person.

Senator WHITEHOUSE. You have a whole climate change committee, don't you?

Mr. REGAN. We have a climate change committee.

Senator WHITEHOUSE. You take it seriously?

Mr. REGAN. Yes, we take it seriously. We are working with Federal agencies and States to think about climate change adaptation and providing tools and best management practices to help the States think through the adaptive challenges for the future.

Senator WHITEHOUSE. You are all wonderful people. But as the Senator from the Ocean State, let me urge that we not forget the oceans. We are a terrestrial species, but we get a lot from the oceans in terms of cooling of the planet, oxygenation of the atmosphere, fish that we eat, and the place I think we might be hitting our ecosystem the hardest is actually in the oceans.

Mr. Chairman, back to you.

Senator SULLIVAN. I agree with my Ranking Member on the importance of the oceans. We have a lot of bipartisan agreement on these issues.

Senator Rounds.

Senator WHITEHOUSE. We may be the Ocean State, but Senator Sullivan actually has more ocean.

Senator ROUNDS. Thank you, Mr. Chairman.

Mr. Regan, in your testimony, you discuss the conflict between the South Dakota Department of Game, Fish and Parks and the Park Service management at Wind Cave National Park. I am curious about this because of the fact that it has to do with a South Dakota Fish and Wildlife agency.

The GF&P would prefer to use hunters to manage the elk population in this particular national park. However, the Park Service has found that this proposal to hunt them was unacceptable due to statutory prohibitions against hunting in the park.

Further, when the Park Service informed Game, Fish and Parks that they would cull the elk, which in South Dakota terms means they would shoot them and let them lay. Only after significant disagreement from the Game, Fish and Parks did the Park Service

agree to consider allowing the culled elk to be distributed to needy South Dakota families.

That decision has not been made yet. In fact, they have not been able to come to an agreement yet with the Park Service.

I suspect this is part of the reason why the State Game, Fish and Parks Department get frustrated with their Federal partners who sometimes do not seem to be partnering with them in anything that is considered close to being a local concern.

While modifying the Park Service's authorizing legislation to allow hunting as a management tool would solve the problem in Wind Cave National Park, it is not a comprehensive solution to statewide wildlife management, nor is it a solution to the tension between State and National Park Service or Fish and Wildlife Service officials.

State officials know how to best manage wildlife in our State, and they should be the chief decisionmakers when deciding how best to conserve our wildlife.

The debate over how to manage an elk population has now spanned several years in this particular case with no solution to the over population of elk. South Dakota GF&P reached out to the Park Service in 2015 to set up a meeting, but the Park Service has yet to confirm a date to continue this conversation.

How do these types of longstanding disagreements between State and Federal officials over wildlife management impact the overall health of the wildlife population that we all propose to want to protect?

Mr. REGAN. That is a big question, Senator. I think I will start by saying when I first began my career with the Vermont Fish and Wildlife Department, about 30 years ago, the State of Vermont Fish and Wildlife Agency was having a terrible time working with the U.S. Forest Service on the Green Mountain National Forest.

The agency heads in that situation almost came to blows over whether or not certain kinds of trees should be cut on the forest for timber or potentially to the detriment of the whitetail deer resource in the State of Vermont.

These kinds of issues emerge. I think at the end of the day, what is required is a major commitment to think about science, think about partnerships, and think about working through issues.

Unfortunately, with turnover in agencies, the bureaucracies of managing issues, and then not to mention the overlay of the judicial system sometimes professional management is taken away from the professional managers.

Senator ROUNDS. I am just curious, do you see anything that a change in law or change in statute or a directive in terms of the regulatory processes that could be done to basically reach or help reach a long term solution to reinforce the State officials' ability to control and manage wildlife populations in their own States?

Mr. REGAN. Yes, Senator. I pointed out a couple of those in my oral testimony. There is more detail in the written narrative. The whole notion of revisiting and making sure that the savings clauses are contemporary and adequate for the future when thinking about State management authority is important.

In my written testimony, you will note that sometimes these savings clauses find their way at the end of legislation as opposed to

being on the front end. Our opinion is when that occurs, the courts may not give them the kind of deference they should in thinking through decisions.

We also suggest another remedy concerning close collaboration or coordination with the States.

Senator ROUNDS. With the Chair's indulgence, I have one more quick question.

Are you aware of any other cases where U.S. Fish and Wildlife or Park Service officials have recommended the culling or killing of a game animal and then simply suggested they be allowed to rot where they are shot?

Mr. REGAN. Off the top of my head, no.

Senator ROUNDS. Thank you.

Senator SULLIVAN. Chairman Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

I was really coming here for two purposes. One was to learn a little bit more about Alaska and the other was to let this committee and the witnesses know that the problems you have up there are not unique to Alaska. We have had similar problems.

There is a thing called the Sikes Act that the Secretary of Defense in collaboration with Fish and Wildlife would take care of the wildlife on military establishments. Are you familiar with that, Mr. Lang?

Mr. LANG. Yes, I am.

Senator INHOFE. Is that working pretty well?

Mr. LANG. At times, it works well, and at times it does not work very well. I think it works better than the Refuge System Improvement Act because it clearly recognizes State authority.

Senator INHOFE. Are any of you familiar with the lesser prairie-chicken issue? It is unique to five States, Oklahoma, Colorado, Kansas, New Mexico and Texas.

We had a five-State plan that goes out for the purpose of taking care of and evaluating what is happening with the lesser prairie-chicken. Five States all agreed and signed off on this. Somehow there is this perception that if you are a landowner or a rancher, somehow you do not want to conserve. That is so wrong. One of the few really good things that has worked is the partnership program.

In this case, you had five States that had experts in those States, the landowner stakeholders in those States all agreeing that we done a very good job with the lesser prairie-chicken, and between the years of 2014 and 2015 our population of prairie-chickens actually increased by 25 percent. It does not get any better than that, does it? Yet, they went ahead and gave an endangerment listing.

We have an example in Oklahoma of what does work and what does not work. How about you, Mr. Regan; can you tell me the logic behind that decision in spite of the effort that went into it and the successes we had?

Mr. REGAN. You are talking about the prairie-chicken. We were clearly disappointed as State agencies that a threatened listing was provided by the Federal Government. On the other hand, that was certainly better than managing to an endangered listing.

Senator INHOFE. No, that is not the point. The point is any listing at all when the populations increased and you had the very best not in just one State, but five States agreeing. I might add so

did the members of the U.S. Senate from all five of the States, of which some were Democrats and some were Republicans.

Mr. REGAN. I think one of the key story lines there, aside from the listing decision, was the ability of those five States, including your home State, Senator, to come together with a proactive landscape level, voluntary conservation program to secure and manage prairie-chicken habitat for the future.

I think that is the big plus or bottom line story which shows the ability of the States to come together and demonstrate a willingness and effectiveness to grapple with a large, landscape scale conservation issue.

Senator INHOFE. Yet, they still came to the conclusion.

Mr. REGAN. That is correct.

Senator INHOFE. That is my whole point. I agree with everything you said up to that point.

That is all I have, Mr. Chairman.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

We meet today to discuss the Federal Government's encroachment on State rights to manage fish and wildlife populations. The North American Model of Wildlife Conservation dictates that fish and wildlife are for the non-commercial use of citizens and should be managed in a way that ensures they are available at the optimum population levels indefinitely. There is certainly a role for both the States and the Federal Government in this process.

In recent years, however, the Federal Government has expanded its role in both managing populations and dictating how States should manage populations. Not only do States fund much of their conservation and management programs through local excise taxes, but they also have more on-the-ground expertise about local populations. Therefore, States should have a significant role in working with the Federal Government and the private sector to ensure the most sensible fish and wildlife management programs are adopted and implemented.

In Oklahoma, we have worked together with local landowners, businesses, and State agencies to develop a plan for the conservation of the lesser prairie-chicken. The Five State Plan has worked. In fact, estimates show that population numbers for the lesser prairie-chicken climbed by almost 25 percent between 2014 and 2015. This is just one of many examples of the strength and success of State management plans, when given the opportunity to thrive.

This hearing today explores the need to re-balance the relationship between Federal and State governments. More directly, States must have more control over their fish and wildlife populations. I thank Senator Sullivan for holding this hearing today, and I look forward to the testimony of our witnesses.

Senator SULLIVAN. Thank you, Chairman Inhofe.

Senator Barrasso.

Senator BARRASSO. Thank you very much, Mr. Chairman.

Mr. Regan, I have a couple of questions. In 2014, the Senate and Congressional Western Caucus released a report entitled Washington Gets It Wrong and the States Get It Right, a report on State environmental stewardship. It runs through what happens nationally as well as what is happening locally and how we think the States continue to do a much better job than Washington.

It highlights the significant boots on the ground in terms of biologists, scientists and States in the West like Wyoming. We have nearly 300 people in Wyoming, biologists, scientists and support staff at the Wyoming Game and Fish Department. They live and work in Wyoming, not in Washington. They live where the species live.

There are people in my State who have pledged to protect our species, including the gray wolf population. I think these dedicated men and women should be the ones we should be entrusting to protect Wyoming's wildlife. Can you give me your thoughts on that?

Mr. REGAN. Certainly, Senator. We certainly agree that State fish and wildlife agency managers are on the front lines of enforcement and delivering fish and wildlife conservation in this country. That is what the Association is all about, trying to make sure no harm is done to that principle, that delivery and that conservation effectiveness for the future.

Senator BARRASSO. Mr. Barry, your organization says in your wolf plan entitled Places for Wolves, A Blueprint for Continued Wolf Restoration and Recovery in the Lower 48—you say, "No matter how ideal the habitat, however, it is ultimately up to the people to determine if wolves will be allowed to survive in any given area."

The U.S. Fish and Wildlife Service has said that the gray wolf is recovered and that the agency has approved the plan the State of Wyoming has put together to ensure the protection of Wyoming's wolves. If it is up to the people to protect the wolves, I wonder why won't outside activist groups, like your organization, not allow the people of Wyoming to protect our wolves if the U.S. Fish and Wildlife Service approves the management plan and the science says the gray wolf is recovered.

Mr. BARRY. Senator, a district court judge disagreed that the Fish and Wildlife Service had appropriately made the right decision.

Senator BARRASSO. The district court judge was not in Wyoming and does not really know Wyoming, does not have an ability to understand the situation, and did not study it.

Mr. BARRY. I am just saying that a Federal judge, when given a chance to review the record, concluded the Fish and Wildlife Service inappropriately delisted the wolf.

Senator BARRASSO. What was the scientific basis for that, do you know?

Mr. BARRY. I could not tell you off the top of my head. I have not seen the record.

Senator BARRASSO. You are not familiar with the specifics of the case?

Mr. BARRY. Not the specifics.

Senator BARRASSO. And probably would be happy with that.

Mr. Lang, you shared many of the same concerns that Mr. Regan raised in his testimony. In Alaska and across the West, the Federal Government is increasingly requiring the public and the States to take a hands-off approach to public lands. This means the public and the States have less interaction and access to public lands.

Would you agree that ultimately this hands-off approach to wildlife and public land management could be detrimental to conservation of the very species we all work to preserve if Washington bureaucrats on the other side of the country are calling all the shots?

Mr. LANG. The State conservation model is built on the use or pay system. The further you separate those users from the benefits they will gain from those systems, the less they will be willing to pay and over the long term pay for the management and conserva-

tion of those resources. That model is the Pittman-Robertson Fund and the Dingell-Johnson Fund.

You have to provide benefits off refuges and parklands across our Nation. If you do not, they will become areas that are not of concern to people, and the people will not be willing to pay for the long term protection and conservation of those areas.

Hunters are some of the largest payers for conservation in our Nation. You cannot exclude people from the management of resources. I guess that is the bottom line. Increasingly, as I am seeing the Fish and Wildlife Service's management model, it views people as a threat, not as an integral part and not something you need to provide benefits for.

In my State, if you are living a rural lifestyle far away and you are dependent upon local resources for your food, you cannot just let nature's cycles going up and down provide for that. You cannot have a decade where there is no moose near your village. You have to manage for sustained moose populations.

In the example I gave, caribou blinking out on Unimak Island is not good for hunters there, not good for subsistence users to allow them to someday, some century from now, swim back out to that island and reestablish the caribou population.

Senator BARRASSO. Thank you very much.

Thank you, Mr. Chairman.

Senator SULLIVAN. Thank you, Senator Barrasso.

I have a couple follow up questions. My colleague, Senator Whitehouse, mentioned the tradition in the Senate that when we have an issue here, actually the proposed Fish and Wildlife Service rule that came out on January 8 was solely focused on Alaska.

In the hearing where we had an amendment to cancel out that rule, I specifically asked members of this committee, by using the example of if there was a Federal rule dealing with the California movie industry only or the Maryland crab industry only, or the Delaware chemical industry only, I certainly would help my colleagues on the committee.

The Fish and Wildlife Service dealt with an Alaska fish and game management issue only. I would agree with Senator Whitehouse's comment about the Senate colleagues rallying around each other when there is a Federal action specific only to your State. Unfortunately, in our last hearing, that did not happen, which is one of the reasons we wanted to hold this hearing but to talk about the broader issue.

Focusing on that regulation, Mr. Lang, in your testimony you talked about the proposed January 8 Fish and Wildlife Service rule that would allow the Federal Government to preempt State hunting regulations based on their personal ethics or personal preference. Can you explain that a bit more? Can you give an example of what you were talking about?

Mr. LANG. Let's look at the Kenai National Wildlife Refuge. That refuge was originally established as a moose range before it was established as a national wildlife refuge. It was a Presidential executive order that said you have to maintain a significant population of moose on that former moose range, now a refuge.

Under the natural diversity guidelines, the State of Alaska is now being told that we have to let moose cycle in their natural cy-

cles on that range. We can no longer manage them to provide for the long term benefits that have been provided, including subsistence.

We could see moose numbers go incredibly low, low enough that there is no harvestable surplus for hunters or very high where they could actually damage the refuge and the food base they need to stay sustainable.

As the State of Alaska, we want to actively manage the moose population to provide for human benefits, including subsistence use and a harvestable surplus. We do not want that population to widely fluctuate.

In working with the Service, we are growing increasingly frustrated with the inability to manage fire, which is a habitat component; manage the predator numbers which are incredibly important in terms of how they affect moose numbers; and it is all driven around these natural diversity guidelines where human interference on the national wildlife refuge system is increasingly disallowed versus the State's approach to actively manage to provide for long term sustained yields and benefits.

Senator SULLIVAN. What do you mean by personal preference or personal ethics when you talked about that as part of the rule?

Mr. LANG. Let us again go the Kenai National Wildlife Refuge. The Fish and Wildlife Service has determined that baiting brown bears is not an ethical practice for the taking of brown bears.

Even though it is not affecting the long term conservation of brown bears on the refuge, they determined that no longer can hunters practice the tradition which we have done for years on the refuge of taking brown bears over bait near the refuge.

Senator SULLIVAN. Is there a law that outlaws that?

Mr. LANG. They have administratively banned it. They are banning it through these kinds of administrative regulations you are seeing here.

The State of Alaska largely adopted that bear baiting practice to soften some of the interactions we were having with local communities that were having increased problems with human-bear interactions. We were seeing increased numbers of maulings and a variety of other things.

Interestingly enough, when the Service banned the taking of brown bears over bait, they allowed the continued practice of taking black bears over bait. It is very confusing as to why the taking of brown bears over bait would be disallowed but the taking of black bears would continue to be allowed.

Senator SULLIVAN. Does the Fish and Wildlife Service employ predator control activities, even though they have prohibited the State of Alaska to use predator management activities?

Mr. LANG. That is an interesting observation because when I was director one of the things we worked on closely with the Service was to ensure that pigeon guillemots, a sea bird that occurs in Prince William Sound, did not become extirpated from an island in Prince William Sound.

Very similar to Unimak Island where we have a caribou population at risk of extinction from that island because of wolf predation, here we are not going to lose caribou overall in the Aleutians, it is a very small area where we will lose them and we want to

take active steps and Prince William Sound is very similar with pigeon guillemots. They are going to potentially be extirpated from an island because of mink predation.

The Fish and Wildlife Service came to us and asked for a permit to exterminate these mink from this island to allow for the restoration and prevent the extirpation of these pigeon guillemots from the island. We worked very closely with them and gave them the permit to do that.

We are very confused why we cannot take any steps to actively manage on Unimak Island to prevent the extirpation of the caribou herd, but yet the Service can go in and actively manage State mink which are indigenous to that island from potentially harming and causing the extirpation of pigeon guillemots from an island.

Senator SULLIVAN. Let me step back a bit more with regard to the proposed Fish and Wildlife rule that has been the source of a lot of concern in Alaska and I think even nationally.

The Fish and Wildlife Service claimed that the proposed rules will not affect title 8 of ANILCA, the federally defined subsistence users category. Do you agree with that?

Mr. LANG. No, I do not because again it is the passive management approach that we are increasingly moving to. As I said earlier, if you are living a rural lifestyle in Alaska, you need a steady source of food. You do not need a food source that is going to fluctuate widely with cycles of nature.

Senator SULLIVAN. Can you explain that? Honestly, I do not think most people in Washington, DC, at a hearing like this understand what subsistence actually means. If someone does not have the right to subsist with regard to fishing or hunting, what possibly happens to them in the winter? Do they have a store down the street to go to and fill up their freezer?

Mr. LANG. The thing I like to say is when you are in Alaska, there is not a road running to your place. Every place in the lower 48, almost every community has a road going to it. You can drive to a store to get something.

Now picture yourself in Alaska. Oftentimes you are 3 hours by plane to get to the nearest grocery store or anything else. In the wintertime, there is no guarantee you will get there. You rely on food sources for your very subsistence, for you and your family's subsistence.

How would you like to be told that we are not going to guarantee that subsistence is going to be there for you because we are not going to actively manage for it? We are not going to allow you to control the number of wolves or bears near your area. Instead, we are going to allow moose numbers way down to insufficient numbers to provide food for you and your family. You are going to starve.

It is not a matter of going to a grocery store as an alternative food source. It is a matter of social justice. You have to be able to eat. That is the food that you have, living off the land.

Senator SULLIVAN. I appreciate that. I think that is why these hearings are important because I do not think those kinds of issues come up in other States all the time. Maybe they do in some States, but I do not think they do in a lot of States.

I think that kind of testimony is powerful. It also helps us understand some of the issue at play here.

Mr. Barry, this goes to the issue of working with the States and other organizations. The National Park Service and the Fish and Wildlife Service have proposed a number of regs over the course of the last several years. Has your organization been provided an opportunity to input or review the draft documents of these regs or EAs that have come from some of these Federal agencies?

Mr. BARRY. I certainly have not personally. I have no idea if anyone on my staff has. I am not aware of our being given any advance copies to take a look at or to critique.

Senator SULLIVAN. One of the things that has been an enormous source of frustration which I think goes to the federalism issues, the broader topic of today's hearing, is there have been a number of occasions where the Department of Interior and different Federal agencies announced proposed rules that clearly impact States.

The States are literally the last to know. Some outside environmental groups that clearly get heads up from our Federal agencies get a chance to discuss them with Federal officials, have press releases that go out as soon as the Federal Government makes these announcements.

The States which are often, in statute, required to be consulted and have input, the No. 1 priority organization, we get told last. I think it is an enormous frustration and something I have raised with different officials including Secretary Jewell. It is an issue I think we need to continue to work on.

The purpose of today's hearing is how important the States are in terms of their relationship with the Federal Government in terms of management but also in terms of what the Federal statutes require the Federal agencies to do in terms of State input.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

I have two observations in closing. One is in sympathy with Senator Rounds and the elk having to rot where they are shot.

On the fisheries side, we have, as you know, situations in which our fishermen are allowed to go out and troll for fish. When the net comes in, there are fish that have been caught, and if you have ever been out, being at the back after a long troll is not a good situation for a fish.

When they come out of the troll, they are not doing well, yet the fishermen are not allowed to keep certain of them because they are not permitted for it so they have to go over the side. Some of them are really beautiful and are not going to survive. It is a shame. It is a waste.

We have tried to work through programs so they can be taken, frozen and given to people in need of food and so forth, but it is a constant challenge. I think it is a place where we can and should do better.

The second point I wanted to make is I want to push back a little on a theme that has begun to emerge in this hearing that it is always the local community that is the best determinant of the conservation interest. I think that is probably usually true, but if you think back to the era of Teddy Roosevelt, he faced situations in which enormous natural bounty in our country was being despoiled

and ruined because the mining interests, the timber interests, the wholesale hunting interests had gotten control of State legislatures. They were essentially ransacking and plundering the West. It took TR to step in and protect those resources which we still enjoy today.

That will not be the case every time, but neither is it the case every time that the Federal Government has no proper role. In fact, one of the better biographies of Teddy Roosevelt described him as the wilderness warrior because he fought to preserve these areas of wilderness.

I think we need to look toward balance between the Federal interests and the State interests. We need to pay particular attention to the State interests where there is an appearance that there is political control being abused, and I think we need to pay very close attention to people whose lives depend on these resources in remote areas with which many of us are not familiar.

I think if we can stay within those principles, we can find a lot of common ground.

Senator SULLIVAN. I thank the Ranking Member for those comments. I would agree wholeheartedly with those.

Let me finish by relating to that. Mr. Lang, Mr. Barry described some of the refuges as game factories for sport hunters early in his testimony. For example, when you were the head of fish and game in Alaska, is that how you managed Federal lands as game factories for sport hunters?

Mr. LANG. No, I do not think we managed them as game refuges at all. I think we managed them for multiple use benefits. We certainly did manage them for human benefit. We did not manage them just for nature's benefit. They were not managed solely as game factories.

Senator SULLIVAN. Mr. Regan, I mentioned the rule, and it has been a focus of mine for obvious reasons given the State and the people I represent. The Fish and Wildlife Service proposed rule was the subject of an amendment in this committee a couple of weeks ago.

As I mentioned, it is specific to Alaska. Given the breadth of your organization and who you represent, should other States be concerned by this kind of specific rule focused on one State from the Federal Government in terms of game management? If so, why?

Mr. REGAN. Yes, Mr. Chairman. Clearly that is why the Association is involved. We are concerned that if this policy guidance on biodiversity is elevated to being a regulation for refuges in Alaska, that is going to create a new standard, if you will, for judicial engagement and we could potentially see the export of that rule from Alaska to other national wildlife refuges in the lower 48.

To the extent that would perpetuate or continue to comprise State authority, that is the real nexus for our engagement with the issue right now.

Senator SULLIVAN. Let me ask more specifically, the National Wildlife Refuge System Administration Act assigns the Secretary 14 responsibilities when administering the refuge system. The rule we are talking about with regard to Alaska, the Secretary clearly seems to be prioritizing one of these responsibilities in defining it in a regulation.

Do you think that is appropriate? Does that have an impact beyond Alaska alone from your organization's perspective?

Mr. REGAN. Mr. Chairman, we do not think it is needful. We do not think it is appropriate. We think it could impact other States beyond Alaska.

Senator SULLIVAN. For the same reason you mentioned in your earlier answer?

Mr. REGAN. That is correct.

Senator SULLIVAN. Thank you.

I want to thank the witnesses. You have been very patient. I want to thank you all for your service over the years. I know many of you have engaged and participated in public service in different capacities.

I think this was a very useful hearing. There was a lot of substance and a lot of potential common ground on some of these issues. Thank you for coming, taking the time to testify and enlightening the committee on a number of the important issues.

This hearing is adjourned.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

ASSOCIATION of FISH & WILDLIFE AGENCIES

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

December 15, 2015

Hon. Lisa Murkowski, Chair
Senate Committee on Energy and Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Hon. Maria Cantwell, Ranking Democrat
Senate Committee on Energy and Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairwoman Murkowski and Ranking Democrat Cantwell:

I write on behalf of the Association of Fish and Wildlife Agencies (Association) to submit comments for the public record on the December 3, 2015 Committee "Hearing to Receive Testimony on Implementation of the Alaska National Interest Lands Conservation Act of 1980, Including Perspectives on the Act's Impacts in Alaska and Suggestions for Improvements to the Act". Founded in 1902, all 50 state fish and wildlife agencies are members of the Association.

The Association is very concerned about the diminishment, by a soon to be published US Fish and Wildlife Service (USFWS) regulation regarding management of National Wildlife Refuges (NWR) in Alaska, of the Alaska Department of Fish and Game's management authority for fish and wildlife by federal actions that are contrary to the intent of ANILCA and the National Wildlife Refuge System Administration Act (NWRSAA), as amended by the National Wildlife Refuge System Improvement Act (NWRSIA). State fish and wildlife agencies are the principle front-line managers with authority to manage fish and wildlife within their borders, including on most federal lands. The Association acknowledges that ANILCA affirms that authority, which is also affirmed in the respective organic acts for the National Wildlife Refuge System, National Forests, and Bureau of Land Management lands. Finally, the Association is concerned that the USFWS by administrative fiat, or as a result of litigation, will apply this draft regulation to all NWRs in the country, with the resulting usurpation of all state fish and wildlife agency authority on all NWRs.

When Congress passed ANILCA, it directed the Secretary of Agriculture and the Secretary of the Interior to manage natural resources to meet the needs of local communities that depend on these natural resources as well as "to provide for the maintenance of sound populations of and habitat for, wildlife species of inestimable value to the citizens of Alaska and the nation". In order to fulfill this statutory mandate, Congress further obligated the federal agencies to "cooperate with adjacent landowners and land managers including Native Corporations, appropriate state and federal agencies, and other nations". The soon to be published USFWS regulation clearly contravenes Congress' intent in enacting ANILCA.

The USFWS has developed a draft proposed regulations package which would have the effect of limiting hunting authorized under certain State of Alaska regulations on NWR lands. The package is currently under review by the Department of the Interior. Following that internal review the USFWS intends to release it for a public review and comment period.

The USFWS Proposal

The Association recognizes the preeminence of ANILCA in directing federal land management in Alaska, but observes that except for conflicts with ANILCA, the NWRSAA as amended by the NWRSIA in 1997, provides comprehensive Congressional direction to the Secretary of the Interior for managing NWRs. We believe that there is little conflict between ANILCA and the NWRSAA, but Congress explicitly addressed that in the NWRSIA.

Section 9 of NWRSIA as enacted explicitly states "If any conflict arises between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the provision in the Alaska National Interest Lands Conservation Act shall prevail", providing primacy of ANILCA over NWRSIA. Sect 668(dd) (f) of the Act with respect to Refuge conservation planning, states "except with respect to refuge lands in Alaska (which shall be governed by the refuge planning provisions of the Alaska National Interest Lands Conservation Act [ANILCA]), the Secretary shall ...". This language was specifically drafted in NWRSIA to ensure that with respect to conservation planning, ANILCA prevailed over NWRSIA on Alaska refuges. The Association believes that much of the NWRSAA applies to Alaska because it is not in conflict with ANILCA.

The NWRSAA as amended by the NWRSIA at Sect 668(dd)(a)(4), assigns the Secretary 14 responsibilities in administering the System. At Sect.668(dd)(4)(B) the Act directs the USFWS to "ensure that the biological integrity, diversity and environmental health of the System are maintained for the benefit of present and future generations of Americans." The USFWS draft proposal would codify in regulation for Alaska NWRs, USFWS policy 601 FW 3 regarding Biological Integrity, Diversity, and Environmental Health (BIDEH) and make it the principle objective for Alaska refuges. The Association concerns are:

a. There are 13 other statutory responsibilities given to the Secretary, and the Act does not prioritize those responsibilities but simply lists them. Likewise, House Committee Report 105-106 (NWRSIA) does not assign a priority to these 14 responsibilities. The USFWS is assigning priority to this aspect of administering refuges over all other mandated responsibilities.
b. The adoption of this one aspect of the Act as regulation clearly usurps and undermines the authority, responsibility, and objectives of the Alaska Department of Fish and Game regarding the conservation (including take) of fish and resident wildlife in Alaska under the sustained yield principle. This authority is grounded in Article VIII of the Alaska Constitution.
c. Sect 668(dd)(m) states in part "Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations and management plans." The current proposal by the USFWS clearly is not consistent with this Congressional direction.

d. While the proposal is currently intended to apply only to Alaska refuges, there is nothing preventing the USFWS from subsequently applying these regulations to all refuges in the System, resulting in usurpation and undermining of state fish and wildlife authority to manage fish and resident wildlife on all refuges in the System.
e. The USFWS is directed at 43 CFR 24.4(e) to manage refuge units "to the extent practicable and compatible with the purposes for which they were established, in accordance with State laws and regulations, comprehensive plans for fish and wildlife developed by the states, and Regional Resource Plans developed by the Fish and Wildlife Service in cooperation with the States". Instituting a region-wide rule outside of the Comprehensive Conservation Planning (CCP) process for the individual refuge and in conflict with state wildlife management plans is contrary to this intent.

The Association identifies five significant changes that would result from the proposed rule, as articulated below.

- The proposed rule would introduce undefined and subjective reasons for closing NWRs to hunting under state regulations, including "particularly efficient" methods and means of take and "conserving the natural diversity, biological integrity, and environmental health of the refuge," absent decision criteria to guide refuge managers or the public in its implementation.
- It would prohibit methods and means for the take of species under state management authority, seeking to "Prohibit the following particularly efficient methods and means for non-subsistence take of predators", including prohibiting the use of bait for the harvest of brown bears. If the use of bait is "particularly efficient" for brown bears, what would prevent application of this criteria to other species (black bear) in Alaska or in the Lower 48 States where it is currently allowed under state authorization in some states. In many large states, baiting is necessary as a wildlife management tool to ensure the achievement of desired bear population numbers that remain within social tolerance for bears.
- The USFWS intends to "manage populations for natural densities and levels of variation throughout the Refuge System", and that "These proposed regulatory changes are aimed at ensuring that natural ecological processes and functions are maintained and wildlife populations and habitats are conserved and managed to function in their natural diversity on Alaska refuges." This intent lacks criteria for implementation or consistency with state fish and wildlife agency planning and could easily be applied to all NWRs in the system.
- Proposed changes to the USFWS closure process includes an allowance that would essentially permit "temporary regulations" to extend indefinitely, avoiding both the full regulatory process and the CCP process allowing for public comment.

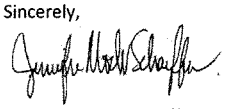
The Association is concerned that movement of the BIDEH policy into regulation will diminish the ability of the states to manage fish and wildlife on NWRs. While the current proposed rule only targets Alaska and the management of predators, there is the distinct potential that it would be applied to the NWRS nationally by administrative fiat or as a result of litigation, and that other refuges would be required to passively manage for the extreme end of BIDEH for all species (predators and prey). For example, a state may manage ungulate populations for bull:cow ratios of 30:100, which allows for sustainable harvest opportunities and subsistence use. This is not a "natural population," but a reasonable objective for state management goals under sustained yield management.

The USFWS has not differentiated the need to manage Alaska refuges at the extreme end of the BIDEH spectrum, other than to mention the ANILCA purpose of "natural diversity," which is not equivalent to BIDEH. Therefore, application of this policy could conceivably extend to other refuges as well, superseding refuge purposes and influencing management of areas such as Waterfowl Production Areas by requiring that the USFWS to apply "natural ecological processes," significantly limiting opportunities for compatible wildlife-dependent public uses. The regulations proposed by the USFWS do not address any conservation concerns for any species and appear to be derived by concerns regarding ethical behavior as determined by USFWS staff.

Links to the USFWS generated documents to this proposal are below:
http://www.fws.gov/alaska/nwr/ak_nwr_pr.htm
http://www.fws.gov/alaska/nwr/pdf/NWRS-Statewide-Regs-Proposal-FAQ-06-23-15.pdf

The Association sincerely appreciates the opportunity to submit testimony for the record.

Sincerely,



Jennifer Mock Schaeffer
Government Affairs Director

ASSOCIATION of FISH & WILDLIFE AGENCIES

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

January 15, 2016

Mr. Dan Ashe, Director
US Fish and Wildlife Service
Department of the Interior
1849 C Street, NW, Room 3359
Washington, DC 20240

Dear Director Ashe:

I write representing the Association of Fish and Wildlife Agencies (AFWA), of which all 50 state fish and wildlife agencies are members, to request an extension to the comment period for the proposed rule "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska" (FR vol. 81, No. 5, pages 887-897, January 8, 2016). The Association respectfully requests a comment period of 121 days after publication, in lieu of the 60 days proposed in the Federal Register notice.

This proposal is very significant with respect to state fish and wildlife agency authority in Alaska, with resulting national implications. The Association's spring meeting at the North American Wildlife and Natural Resources Conference on March 13-18 will provide all State Directors the opportunity to appropriately deliberate on this proposal which will inform AFWA's comment. In addition to the effects on the authority of the Alaska Department of Fish and Game, AFWA remains concerned that the precedence of this proposal could lead to further rule promulgation to apply it to all National Wildlife Refuges in the System, including Waterfowl Production Areas, with markedly deleterious effects to state fish and wildlife authority. The states' authority is affirmed throughout the National Wildlife Refuge System Administration Act as amended by the National Wildlife Refuge System Improvement Act in 1997.

We also respectfully note that on a similar proposal, the National Park Service provided a 121 day comment period. The requested length of the comment period of 121 days for this proposal is certainly warranted.

Thank you very much for your consideration of AFWA's request.

Sincerely

Ronald J. Regan

Ronald J. Regan
Executive Director

cc: Michael Bean, Principal Deputy Assistant Secretary, Fish, Wildlife and Parks

WRITTEN TESTIMONY OF TODD PARFITT, DIRECTOR
WYOMING DEPARTMENT OF ENVIRNOMENTAL QUALITY

BEFORE
THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE
OVERSIGHT HEARING ON:

THE STREAM PROTECTION RULE: IMPACTS ON THE ENVIRONMENT AND IMPLICATIONS FOR ENDANGERED SPECIES ACT AND CLEAN WATER ACT IMPLEMENTATION

FEBRUARY 3, 2016

Good morning Chairman Inhofe, Ranking Member Boxer, and members of the Senate Environment and Public Works Committee. My name is Todd Parfitt. I am the Director of the Wyoming Department of Environmental Quality (WDEQ). I thank the committee for inviting the State of Wyoming to share our perspective on the development of the Proposed Stream Protection Rule by the Office of Surface Mining Reclamation and Enforcement (OSM). In short, we are deeply disappointed with the development of the Proposed Rule and the lack of engagement with the states in that process.

Before I provide further detail on those concerns, I want to provide some perspective on why this subject matter is important to Wyoming. Wyoming is home to Yellowstone National Park, Devil's Tower and many more special places. Our natural resources help make Wyoming a truly special destination. Our citizens and visitors expect these places to have world class environmental stewardship. Wyoming's abundant mineral resources provide its citizens and the State with the jobs and tax revenue necessary to thrive. In Wyoming, we manage our natural resources exceptionally well, providing for both environmental stewardship and energy production. As our governor, Matt Mead, has stated, "It is a false question to ask: Do we want energy production or environmental stewardship?" In Wyoming, we must and do have both.

Wyoming is the number one exporting state of British thermal units (BTU's) in the country, contributing 12% of all BTU's produced in the U.S. in 2013. Wyoming is also the number one

producer of coal in the country, mining 40% of the nation's production and delivering coal to over 30 states. Wyoming's energy leadership is matched by its leadership in establishing and enforcing strong environmental regulation and enforcement programs to protect the environment that is so important to each of us who call Wyoming home. Wyoming also coordinates on mine permitting with all appropriate federal agencies, including the US Fish and Wildlife Service for endangered species review and consultation.

Wyoming's dual interests in environmental stewardship and coal production is why the State has closely followed the development of the Stream Protection Rule from its inception. Wyoming supports reasonable, practicable and sensible efforts to improve stream protection. To that end, Wyoming was pleased when OSM reached out to states in 2010 extending an offer for us to become cooperating agencies in the National Environmental Policy Act (NEPA) process associated with the development of the Proposed Rule. In August 2010, the WDEQ entered into a Memorandum of Understanding (MOU) with OSM to provide meaningful and timely comments on the draft environmental impact statement (EIS) that OSM intended to prepare in support of the Stream Protection Rule. Nine other states participated as cooperating agencies.

The cooperating agency process provided OSM with an opportunity to take advantage of the wealth of knowledge that states have compiled over the past decades implementing robust surface mining control and reclamation programs. That wealth of knowledge had the potential to shape the development of a meaningful, appropriate and well-written EIS and Proposed Rule. Unfortunately, because of the unwillingness of OSM to effectively engage with the states, despite the cooperating agency MOU's, these opportunities were not realized.

Wyoming is not opposed to changes being made to the Stream Protection Rule. Wyoming supports regulations that protect our environment but only those that are reasonable, practicable, and sensible. What Wyoming is critical of is a Proposed Rule and process that is seriously flawed. OSM excluded states from the process, failed to recognize the regional differences that affect mining and reclamation, and is attempting to impose one-size-fits-all regulations on Wyoming based upon science related to Appalachia.

Wyoming is very familiar with the cooperating agency process. We have served as a cooperating agency on numerous activities with the Bureau of Land Management. This includes assisting in the

development of resource management plans and the development of environmental impact statements on large-scale projects. Wyoming has also served as a cooperating agency with the U.S. Forest Service and the U.S. Fish and Wildlife Service on several planning initiatives (most recently in partnership on sage grouse management), and also for the development of environmental impacts statements for large scale projects. We know and understand the process and are fully aware of the staff and resource commitment that must be made to be an effective contributing cooperating agency. Our past experiences have proven that federal agencies which actively participate in cooperating agency efforts end up with well-informed decision documents for federal, state and local government partners.

This is the type of relationship Wyoming expected when we entered into the cooperating agency MOU with OSM on August 24, 2010. Unfortunately, the OSM's cooperating agency process failed to meet the principles established in the MOU, in stark contrast to the processes Wyoming enjoyed with other federal agencies over the past few decades.

Initially, the process seemed to follow the spirit and intent of the MOU. OSM provided Wyoming the opportunity to review three draft chapters of the EIS, two in late 2010 and one in early 2011. OSM, however, provided minimal time to review those documents. Even though the review period was exceedingly short, Wyoming DEQ committed the necessary resources to review the documents and provided comments back to OSM, while still adhering to our other mandatory regulatory duties. Unfortunately, the initial review of those early chapters was the last involvement OSM allowed or provided to Wyoming.

Now, nearly five years later, OSM has issued a Proposed Rule, draft EIS and Regulatory Impact Statement (RIA) spanning over 2,200 pages that in their own words is substantially different than the pre-drafts the states reviewed nearly five years ago. Included are five new alternatives not seen or reviewed by the cooperating states. OSM did not engage states or share how or if it considered the states' comments and expertise. Wyoming has sent several letters to OSM, in addition to letters signed by all of the cooperating states, requesting that OSM re-engage in the cooperating agency process and reiterating our willingness to participate. OSM disregarded these repeated requests.

On April 26, 2015, OSM met with the cooperating agency states to update them on the status of the rule development. That meeting was simply a broad overview of the draft EIS and did not provide

any opportunity for cooperating agencies to provide input. Those in attendance were informed that the final draft EIS and Proposed Rule would look nothing like what states reviewed in 2010 and 2011. For example, OSM explained that it had a new contractor working on the documents and that the agency had added additional alternatives for consideration. Essentially, the states were told they would not recognize the draft EIS or Proposed Rule as published, but were assured that the documents represent "much better work."

Given OSM's failure to effectively engage with the states throughout the development process, eight of the ten cooperating states withdrew from the cooperating agency process in 2015. While tempted, Wyoming did not withdraw from its cooperating agency status at that time. However, Wyoming did send one last letter to OSM on May 22, 2015, expressing our serious disappointment with the process and our concerns that the states' views were being ignored. OSM finally replied to that letter on October 8, 2015. In the letter, OSM thanked Wyoming for our prior, valuable contributions to the draft EIS. The letter also stated that OSM values our continued participation in the process of developing a final EIS. Finally the letter extended an invitation to review draft responses to public comments received on the draft EIS and the Proposed Rule specific to our state and region. I find this to be a hollow gesture given the loss of trust experienced by Wyoming during the pre-draft process, including OSM's unwillingness to honor the MOU and engage with the states during the past five years.

Wyoming decided not to withdraw from the cooperating agency because we remain optimistic that OSM will realize the tremendous opportunity of honoring their commitment to cooperating states and withdraw the draft EIS and Proposed Rule. OSM should reengage with the states to develop a superior product than has been put forth. In addition, we were concerned that if all states pulled out of the cooperating agency process, states would potentially lose standing in any legal challenges that may arise out of the faulty NEPA process.

OSM's failure to engage Wyoming and the other cooperating states in the drafting process clearly violated the commitment by Secretary Salazar to the Western Governors' Association on April 15, 2011 that "all cooperating agencies will have an additional opportunity to review and comment on a Preliminary Draft EIS before it is published for public review and comment". For the record, the Draft EIS and the Proposed Rule were published by OSM without ever providing Wyoming or other state cooperating agencies the opportunity to review and comment on a Preliminary Draft EIS.

The process failed to comply with one of the basic principles of the Surface Mining Control and Reclamation Act of 1977. Public Law 95-87 (SMCRA) makes the following statement under TITLE I – STATEMENT OF FINDINGS AND POLICY, SEC. 101(F);

> "(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States;" (emphasis added)

Turning to the comments Wyoming submitted on the proposed documents, we commend Assistant Secretary Janice Schneider for recently reaching out to Wyoming. She has expressed interest in making sure that she understands our comments on the Proposed Rule, and we have taken her up on the offer to discuss them. Open dialogue and exchange of information is what should have been occurring since the start of the process under the MOU. While we acknowledge the Assistant Secretary's efforts in this regard, it does not eliminate the need to withdraw the draft EIS and Proposed Rule and fully engage the states in a meaningful way. The development of the draft EIS and Proposed Rule occurred with no input from the states that have special expertise and jurisdiction in these matters. The two recent meetings with OSM and the Department of Interior have only been focused on specific areas and questions by OSM and the Department of Interior with no detailed discussions about the Proposed Rule, draft EIS, RIA or the other questions and concerns raised by Wyoming. Yes, Wyoming's comments are critical of the Proposed Rule, but they are critical for good reason.

The Proposed Rule makes no distinction between mining in Appalachia and mining in Wyoming even though the Proposed Rule would apply uniformly to all states. The Proposed Rule would establish regulations that do not reflect the specific environment and ecology of the west, are unnecessary, would greatly increase the cost to the Wyoming coal regulatory program, and in some cases would be impossible to implement or comply with. Review of the documents cited in the Proposed Rule, EIS and RIA also seems to demonstrate that the main sources of scientific information used to develop the Proposed Rule were directly referencing Appalachia. The vast majority of the cited documents directly related to Appalachia and only a very small number of cited documents reference the West, much less Wyoming. Since the majority of coal production is

in the West and mining in the West is vastly different from mining in Appalachia, it is concerning that OSM used minimal science related to the West to develop the Proposed Rule. The result is a rule that applies Appalachian standards to Wyoming without a scientific basis for doing so. This again is inconsistent with the language of SMCRA that recognized "the diversity of terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations".

OSM fails to recognize Wyoming's primacy in implementing its federally-delegated programs, and in fact seems committed to eroding Wyoming's rights under those programs. The fact that OSM failed to engage Wyoming as stipulated in the MOU or the development process can only be interpreted as disregard for the fact that Wyoming is the delegated regulatory authority under SMCRA. OSM's failure to engage Wyoming or the other coal programs dismisses the expertise and best practices developed by states. This failure to recognize Wyoming's primacy is exemplified by the language establishing water quality standards under the Proposed Rule for areas already delegated to states. This represents a clear attempt to duplicate existing regulatory jurisdiction and state authority under the Clean Water Act. The incorporation of the new Clean Water Rule – the implementation of which has been stayed by two federal courts – into the Proposed Rule also appears to be an effort to impose new restrictions on state programs under SMCRA, such as protection of ephemeral streams. Authority for stream protection, including all classes of streams, already rests with Wyoming for Wyoming waters under state law, and is augmented by Wyoming's additional Clean Water Act program authorities.

In our most recent conversation with the Assistant Secretary and her team we noted that the Proposed Rule, EIS and RIA were so large that, even in the 90-day comment period, Wyoming was not provided with sufficient time to go through much of the public documents. One area that we were unable to review was the reference documents cited in the Proposed Rule, EIS and RIA. At our last meeting with the Assistant Secretary we requested hyperlinks to, or digital copies of, all of the documents so that we can review them. We were told that those documents were cited in the proposed documents and could be accessed there. We then attempted to access the documents using the citations in the documents. The results of this investigation were concerning. Many of the scientific articles cited can only be accessed by subscribing to the journals that they were published in. That clearly represents a cost and time implication for states and anyone else attempting to review the documents during the short comment period. Numerous documents were cited with URL links to access the material where those URL links are no longer valid. There were supportive

citations for newspaper articles which are clearly not peer reviewed. In addition, other questionable reports were also cited. OSM did not seek information from Wyoming even though we are the delegated regulatory authority under SMCRA. As a result OSM ignored the experience, scientific knowledge and best practices that directly relate to Wyoming and western coal mining.

One of the Proposed Rule sections establishes new standards for blasting. Blasting had never been previously noted as an area to be addressed in the Stream Protection Rule so the inclusion was a surprise. As a threshold matter, we understand that OSM is currently rewriting its stand-alone blasting regulations under SMCRA, without input – at least at this stage – from the delegated state regulatory programs. We sincerely hope that OSM is not repeating its prior failure to engage with the states while reworking the blasting or any other regulations. Regarding the inclusion of the blasting provisions in the Stream Protection Rule, we were recently informed by OSM that the blasting rule language was a "printer error" in the Proposed Rule and should not have been included. This item represents a significant procedural problem that does little to instill confidence in the Proposed Rule. OSM was asked if they were aware of any additional "printer errors". I was surprised by the response which was that Wyoming should let OSM know of any additional printer errors. The obvious question is how would Wyoming know since OSM is in charge of the document preparation? Since OSM had not engaged Wyoming throughout the process we would have no knowledge of OSM's intent. The proposed blasting provisions, to our knowledge, have not been removed from the Proposed Rule, as no public notification of the error has been provided by OSM.

To emphasize the long running frustration with the OSM process, I refer you to the testimony of the prior WDEQ Director John Corra before the House Energy and Mineral Resources Subcommittee on September 26, 2011. A copy of his testimony is attached for reference. Among the points he raised were:

- "The OSM has used a court order and an agreement with other federal agencies that were aimed at tackling a problem in Appalachia as an excuse to impose unnecessary and costly over regulation across all coal mining states."

- "We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA."

These concerns, now more than four years old, are unchanged. Wyoming prepared extensive comments on the Proposed Rule, EIS, and RIA, and simply cannot support the Proposed Rule as written. Our cover letter transmitting those comments to OSM is attached for your reference. I'll highlight a few of our main concerns here:

- OSM has undertaken a comprehensive rewrite of the core regulations implementing SMCRA, and has not limited itself to focusing on stream protection.

- The Proposed Rule is a one-size-fits-all regulation that imposes nationwide standards without consideration for the fundamental regulatory, environmental, ecological or economic differences amongst the states.

- The Proposed Rule fails to consider Wyoming's regulatory program and the best practices, including award-winning reclamation techniques, which our regulatory experts have developed over several decades of running the largest surface coal mining program in the country.

- The Proposed Rule exceeds OSM's statutory authority and infringes on the authority and ability of states to implement SMCRA.

- The RIA grossly underestimates the financial impact of implementing the new standards. The RIA estimates that the total impact on regulatory agencies in the Rocky Mountain Region (CO, WY, MT, ND), for example, to be $29,000 per year. For Wyoming alone, we estimate the increased cost to be closer to $550,000 per year.

- The RIA grossly underestimates the impact of the Proposed Rule on Wyoming and federal tax revenue, understating that impact by over $1.3 million.

- The Proposed Rule imposes extensive monitoring and reclamation requirements without sound scientific justification.

Wyoming has recently written to Assistant Secretary Schneider following our last discussions to once again express our frustrations and concerns regarding the Proposed Rule and the process that

brought us to this point. In summary, the failure to engage cooperating agencies throughout this process is reflected in the poor quality of the Proposed Rule and inaccuracies in the draft EIS and RIA. Wyoming does not believe that the Proposed Rule, draft EIS or RIA can be modified, amended, or changed to overcome their many problems through the public comment process. The only reasonable and logical decision is to withdraw the rule and work with the states, regulated industry and other members of the public to put forth a more appropriate proposal.

Wyoming remains willing to commit staff time and resources to fully engage in a meaningful cooperative agency process. If the new direction articulated by the Assistant Secretary to establish open, meaningful exchanges of information with the states, allowing OSM to benefit from the strong experience and best practices of states like Wyoming, is serious, OSM should pull back the Proposed Rule and work directly with the states to develop a reasonable, practicable and sensible rule. This would move the process in the direction envisioned by SMCRA, collaborative partnership led by the special expertise of the states. I ask this committee for any help that it may provide in securing this outcome.

Thank you for the opportunity to provide Wyoming's perspective on these important matters. I would be happy to answer any questions that you may have.

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Matthew H. Mead, Governor

Todd Parfitt, Director

May 22, 2015

Mr. Joseph G. Pizarchik
Director, Office of Surface Mining Reclamation and Enforcement
U.S. Department of Interior
1951 Constitution Avenue, NW
South Interior Building
Washington, DC 20240

RE: Stream Protection Rule Cooperating Agency Status

Dear Director Pizarchik:

The Wyoming Department of Environmental Quality (DEQ) continues to be disappointed and concerned about the lack of engagement by the Office of Surface Mining (OSM) with cooperating agencies regarding the Stream Protection Rule EIS process. DEQ has joined with the other cooperating agency states on three letters to you expressing our concern and expressing our desire and willingness to engage and provide input on the Stream Protection Rule as cooperating agencies. Unfortunately, OSM has chosen to ignore the request's by states to participate as cooperating agencies.

As I noted at our April 27, 2015 meeting in Baltimore, DEQ has extensive experience partnering with federal agencies as a cooperating agency. DEQ is routinely engaged on the development of rules, EIS documents and BLM management plans for example. This experience reinforces my point that early engagement of states as well as engagement throughout the entire process results in a positive interagency relationship and a quality end product. OSM's approach was to only provide states a single review opportunity under unreasonably short deadlines in September 2010 for Chapter 2, October of 2010 for Chapter 3 and January 2011 for Chapter 4.

As stated by OSM on April 27, 2015, the early draft EIS chapters that were shared with the cooperating states in 2010 and 2011 were of poor quality and incomplete. As further explained by your staff on April 27, 2015, the most recent draft EIS (which OSM has refused to share with cooperating states) is a major change from the first draft with five (5) new alternatives in addition to the original four (4) alternatives and other significant changes.

Our experience with other federal agencies in drafting an EIS is that subsequent drafts are shared with states for additional review and input. OSM has not engaged the cooperating agencies in the EIS development since January 2011. Under no measure of "cooperation" does that lack of

engagement honor the intent or terms of the Memorandum of Understanding (MOU) between DEQ and OSM dated August 25, 2010.

DEQ is disturbed by OSM's reluctance to allow cooperating states the opportunity to review the latest version of the Stream Protection Rule and the reluctance to honor the terms of the August 25, 2010 MOU. The state seals for cooperating agencies are normally affixed to documents when they are released for public comment. This is for the purpose of indicating that the cooperating agencies had meaningful participation in the process. Because OSM has elected not to allow meaningful participation by Wyoming on the Stream Protection Rule EIS Wyoming's state seal should not be used on or in the EIS document. Finally, I am requesting the final draft acknowledge the fact that Wyoming was not given an opportunity to review or provide comment on the Stream Protection Rule EIS since January 2011.

Sincerely,

Todd Parfitt, Director
Department of Environmental Quality

cc: Governor
Senator John Barrasso
Senator Mike Enzi
Representative Cynthia Lummis
Alan Edwards, DEQ
Greg Conrad, IMCC

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Matthew H. Mead, Governor

Todd Parfitt, Director

October 23, 2015

Mr. Joseph G. Pizarchik
Director, Office of Surface Mining Reclamation and Enforcement
U.S. Department of Interior
1951 Constitution Avenue, NW
South Interior Building
Washington, DC 20240

Re: Wyoming Department of Environmental Quality Comments for Docket Nos. OSM-2010-0018, OSM-2010-0021 and OSM-2015-0002.

Dear Director Pizarchik:

The Wyoming Department of Environmental Quality (WDEQ) appreciates the opportunity to provide the following comments on the proposed Stream Protection Rule, 80 Fed. Reg. 44,436 (July 27, 2015) (Proposed Rule), the Draft Environmental Impact Statement (DEIS), and the Draft Regulatory Impact Analysis (DRIA). WDEQ recognizes the significant work that the Office of Surface Mining Reclamation and Enforcement (OSMRE) has invested in the Proposed Rule, but we ask OSMRE to withdraw the proposal immediately.

The Proposed Rule exceeds OSMRE's statutory authority, infringes on state sovereignty, fails to recognize existing best practices developed and implemented by states like Wyoming, lacks clarity, is scientifically unsound, and imposes significant economic and regulatory burdens without appreciable environmental benefit. WDEQ also objects to the process by which the Proposed Rule was developed. Members of the public, including WDEQ, were not given sufficient time and opportunity to review and comment on the massive rulemaking. Nor were the states appropriately consulted during the development of the Proposed Rule, including those states who signed agreements with OSMRE to serve as cooperating agencies for the development of the DEIS. We therefore ask OSMRE to withdraw the Proposed Rule and work with the states to develop a more appropriate regulatory proposal.

This letter summarizes WDEQ's core concerns with the Proposed Rule and the process by which it was developed. Detailed comments on the Proposed Rule, the DEIS, and the DRIA are provided in Attachment 1. Additional comments from the Air Quality Division of WDEQ are provided in Attachment 2. WDEQ also supports and endorses the technical, economic and legal comments submitted by the Interstate Mining Compact Commission (IMCC) on behalf of its members, which include the State of Wyoming.

Failure to Consult

The Land Quality Division (LQD) of WDEQ is the delegated regulatory authority for regulating coal mining in Wyoming and has received numerous awards from OSMRE for its regulatory program. Given its vast experience regulating coal mining in Wyoming, WDEQ/LQD accepted OSMRE's invitation in 2010 to become a cooperating agency in the development of the DEIS pursuant to the National Environmental Policy Act (NEPA). Wyoming

expected a meaningful role in the development of the DEIS and the Proposed Rule, and was willing to commit significant resources to the effort. But it immediately became clear that OSMRE was not interested in cooperative federalism and meaningful participation by the states. In fact, OSMRE provided little opportunity for WDEQ/LQD to participate and began to develop the Proposed Rule and supporting documentation in a vacuum.

WDEQ/LQD objected to OSMRE's closed-door approach numerous times. *See* Attachment 3 (providing a timeline of Wyoming's cooperating agency status and related correspondence). Despite letters from WDEQ/LQD, the Governor of Wyoming, and Wyoming's congressional delegation, OSMRE ignored its obligations under NEPA and shut Wyoming out of the process. In fact, WDEQ/LQD has not had any meaningful input since at least 2011, as acknowledged by OSMRE in the DEIS. The result of OSMRE's failure is a complete lack of understanding on its part – as evidenced throughout the proposal – of the regulatory program, environmental conditions, successes, and challenges in the country's most productive coal producing state. The failure also violates NEPA, the Council on Environmental Quality's NEPA regulations, and Executive Order 13,132 (Aug. 4, 1999).

Insufficient Opportunity to Comment

The federal Administrative Procedure Act requires the federal government to provide the public with ample time and opportunity to comment on proposed rules, and to consider and respond to those comments prior to finalizing any such rules. *See* 5 U.S.C. § 553. On July 27, 2015, OSMRE released more than 2,200 pages of highly technical and complex regulatory information in support of the Proposed Rule. The released documentation also contained citations to thousands of pages of additional scientific and technical information in support of the Proposed Rule and associated studies. Despite the sheer enormity of the proposal, OSMRE expects the public to review and meaningfully comment on that information within 91 days. The review period is wholly inadequate, and appears designed to purposefully evade meaningful public participation.

WDEQ has made its best efforts to review as much of the information as possible in the time allowed, but we have not had sufficient time to review the entire proposal and supporting documentation. WDEQ has reviewed enough of the Proposed Rule and associated documents, however, to know that the proposal is unsound and should be withdrawn.

Failure to Consider Wyoming's Regulatory Program

WDEQ's LQD has developed and implemented a strong and effective coal permitting and regulatory program in Wyoming. Our regulations require extensive baseline monitoring, detailed ground and surface water data collection for development of cumulative hydrologic impact assessments, and effective post-mining reclamation, among others factors. Wyoming mines have won numerous national awards for reclamation practices, including stream restoration. *See* Attachment 4 and Attachment 5. There are currently 82,000 acres in Wyoming in various bond-release phases of reclamation, and 50% (38,000) of those acres are now back in agricultural production. *See* Attachment 6. Productive post-mining land use is increasing annually under Wyoming's program.

Given the strength of Wyoming's program, it is no wonder that OSMRE has never questioned the efficacy of our regulatory efforts, much less issued any notice of program failure. And yet, despite this programmatic success, OSMRE now wants to impose a prescriptive national one-size-fits-all regulation, with nationwide standards, on coal mining operations in Wyoming. The Proposed Rule does not fit Wyoming's program or its landscape and ecology.

The Proposed Rule was clearly developed to target mountaintop mining in Appalachia. It does not account for regional or natural variability in stream types, water quality condition, natural vegetation types, climate, groundwater and surface water hydrology, or mining methods. It requires extensive monitoring before mining, during mining, and after mining until full bond release, regardless of whether such monitoring is scientifically

justified. The Proposed Rule also requires establishing 200-foot wide riparian zones on all streams, including ephemeral, regardless of whether a stream has the natural hydrology to support riparian vegetation or has a natural channel shape with a floodplain.

These and other regulatory elements in the Proposed Rule are not needed in Wyoming, particularly because Wyoming's existing regulatory program is robust and appropriately designed to address all environmental and reclamation concerns. The proposal may even undermine the success of our existing program. OSMRE has not articulated, nor can it demonstrate, the need for such a far-reaching rule. Wyoming has developed extensive best practices for surface coal mining and reclamation, none of which appear to have been considered in the development of the Proposed Rule. The proposal should therefore be withdrawn and reworked in consultation with the states to more appropriately tailor any new regulatory requirements to the actual facts and circumstances in each state.

Exceeds Statutory Authority and Infringes on State Sovereignty

The Proposed Rule exceeds OSMRE's statutory authority and infringes on state sovereignty. The Surface Mining Control and Reclamation Act (SMCRA) established "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). According to Congress, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States . . . ." 30 U.S.C. § 1201(f) (emphasis added). The Proposed Rule disrupts this directive from Congress.

Wyoming received SMCRA program authority in 1980. Since that time, Wyoming has implemented an effective surface coal mining control and reclamation program, tailored to meet the needs of Wyoming's arid landscape and our regulatory climate. Once states have gained program approval, exclusive jurisdiction over surface coal-mining operations transfers to the states. *See id.* § 1253(a). No state law or regulation of an approved program shall be superseded by any provision of SMCRA or any regulation issued thereunder unless the state law or regulation is found to be inconsistent with SMCRA. *Id.* § 1255(a). Wyoming's program is consistent with the statutory mandates in SMCRA, and OSMRE has never indicated a problem with WDEQ's program. Indeed, Wyoming's reclamation efforts have been award-winning. OSMRE has not demonstrated the need for a modification in the federal minimum standards, and to attempt to apply new minimum standards to Wyoming's program without that demonstration would undermine the statutory scheme crafted by Congress.

In addition, the Proposed Rule creates new standards for water quality that conflict with the federal Clean Water Act (CWA) and Wyoming's right to implement a delegated program under that Act. For example, OSMRE is attempting to make CWA permit requirements subject to enforcement under SMCRA permits. OSMRE is also proposing to take enforcement action if a mine operator fails to obtain all CWA authorizations prior to obtaining the necessary SMCRA permits. OSMRE lacks the authority to enforce the CWA, as it expressly recognized in 2008: "nothing in SMCRA provides the SMCRA regulatory authority with jurisdiction over the [CWA] or the authority to determine when a permit or authorization is required under the [CWA]. . . . In addition, nothing in the [CWA] vests SMCRA regulatory authorities with the authority to enforce compliance with the permitting and certification requirements of that law." 73 Fed. Reg. 75,814, 75,842 (Dec. 12, 2008). The Water Quality Division of WDEQ is the permitting and enforcement authority for the CWA in Wyoming, with oversight by the U.S. Environmental Protection Agency (EPA). The Proposed Rule should not conflate separate regulatory programs.

OSMRE should also drop any reference in the Proposed Rule and associated documentation to the recently promulgated definition of "waters of the United States" by EPA and the U.S. Army Corps of Engineers. *See* 80 Fed. Reg. 37,054 (June 29, 2015) (generally referred to as the "Clean Water Rule"). That definition is subject to legal challenge by 31 States, including Wyoming, and two courts have already held in response to preliminary injunction motions that the new definition likely violates the jurisdictional reach of the CWA. The Clean Water Rule is enjoined nationwide, and likely will not survive legal challenge. OSMRE should avoid future confusion by deleting any reference to the Clean Water Rule in the Proposed Rule and associated documents.

Grossly Understates Regulatory Impact

OSMRE has grossly understated the projected impacts of the Proposed Rule in the DEIS and the DRIA. The DRIA in particular indicates a complete lack of understanding and recognition by OSMRE of WDEQ's regulatory program and, by extension, the impacts that the Proposed Rule would have on Wyoming's economy.

The DRIA estimates that the total annual cost impact to regulatory programs in the Rocky Mountain Region would be $29,000. On its face, that figure is laughable. WDEQ has spent more than that simply reading and analyzing the Proposed Rule and associated documents, an effort that is not even remotely close to being finished. The DRIA attempts to explain how the $29,000 estimate – again, for the entire Rocky Mountain Region – was derived, but the explanation and approach indicates a clear failure to recognize how state programs are required to operate to meet our delegated responsibilities under SMCRA. WDEQ conservatively estimates that the Proposed Rule will impose up to $550,000 per year in additional costs on the LQD, through additional staffing and technical resources needed to implement and monitor the new regulatory program.

The additional cost to Wyoming will be accentuated by the reduction in state revenue as a result of the Proposed Rule. For example, the DRIA attempts to project lost tax revenues in Wyoming through implementation of the Proposed Rule. The estimate is grossly understated, and fails to recognize the relevant tax revenue streams tied to coal production in Wyoming. The DRIA only discusses coal severance tax revenue. The DRIA projects that the severance taxes lost in Wyoming would be $360,000 annually. As a threshold matter, that number is understated because it relies on 2012 coal production forecasts. The current conditions in the coal sector are far worse than what existed in 2012, the base year used in the DRIA. Coal companies are struggling to maintain market share in light of changing regulatory and market conditions. Economic and market forecasters are predicting that the coal industry will need to shed up to one-third of existing coal production capacity in order for the industry to begin to stabilize. Any market impacts, and by extension revenue impacts, based on 2012 data have no validity in the current market.

Setting aside the flaws in OSMRE's base year calculations, the annual $360,000 tax loss projection is grossly understated. The estimate fails to consider the additional loss of ad valorem taxes in Wyoming, which would be $350,200 per year based on the $360,000 coal severance tax estimate. In addition, the DRIA assessment does not acknowledge federal mineral royalty taxes. Based on the projected severance tax loss in the DRIA, there would be an additional $269,000 per year in federal mineral royalties lost to Wyoming. An additional $291,000 will be lost annually to the federal government. The DRIA also fails to acknowledge and evaluate the impact on the budget of OSMRE to implement and oversee the significant regulatory changes imposed by the Proposed Rule. Finally, the Abandoned Mine Land fee collection would be reduced by $142,500 per year, and Black Lung fee collections would be reduced by $260,000 annually in Wyoming alone.

The financial and regulatory impacts on industry also must be evaluated in light of the current and present market conditions. For example, one additional alternative that needs to be incorporated and evaluated in the DRIA and DEIS is whether the impact of the costs to implement the Proposed Rule would result in a decision to close a mine instead of a mine operator attempting to comply with the new regulatory program. The Proposed Rule increases costs and regulatory uncertainty, particularly in the area of bonding. These factors, coupled with the current market conditions, may result in a decision to close a mine that is or may become marginally competitive. This would represent a completely different set of financial impacts and regulatory burdens for both the regulated

industry and WDEQ. But this scenario was not evaluated in the proposal in sufficient detail, and must be analyzed before any regulatory decision can be finalized.
In short, the impact of the Proposed Rule on state expenses, state and federal tax revenues, and on local and regional economies is grossly underestimated in both the DRIA and DEIS. This flaw demonstrates that OSMRE simply does not recognize the true impacts of the Proposed Rule. It also highlights the fact that OSMRE does not understand and failed to consider key state and regional differences when developing the Proposed Rule. This reality calls into question the basic support and foundation for the entire proposal.

Not Supported by Sound Science

The Proposed Rule has several requirements that have no scientifically defensible justification, such as requiring biological monitoring and the development of biological index values of intermittent and ephemeral streams.

The Water Quality Division of WDEQ has been conducting bioassessments using multimetric bioassessment protocols on perennial streams and rivers for over 20 years and has one of the nation's most robust bioassessment programs, with numerous peer reviewed publications. It is widely recognized in peer-reviewed scientific literature that the highly variable and naturally harsh conditions of intermittent and ephemeral systems in the West support native biological communities that are spatiotemporally variable and naturally tolerant to a broad range of environmental conditions. Thus, the use of biological communities from intermittent or ephemeral waters as diagnostic aquatic indicators of anthropogenic stress is limited at best; the cost and resources required to develop indices, in addition to actual monitoring of these highly variable systems, would be substantial. Biological monitoring of any stream with less than perennial flows imposes a regulatory burden that will provide little to no scientifically defensible data as it pertains to the implementation of the Proposed Rule.

The Proposed Rule also does not account for regional or natural variability in stream types, water quality conditions, natural vegetation types, climate, groundwater and surface water hydrology, or mining methods. Most ephemeral streams in the West naturally have no riparian vegetation because by their ephemeral nature, they lack the natural hydrology for maintaining riparian vegetation. In addition, many perennial and intermittent streams naturally do not have 100 feet of riparian vegetation on each side of the stream channel due to hydrology and valley type. Requiring establishment of 100 feet of riparian vegetation on each side of a stream as a reclamation standard, regardless of natural hydrologic or riparian conditions, not only has no scientific basis, is likely impossible to accomplish in Wyoming.

Baseline monitoring of an entire suite of water quality parameters, as mandated by the Proposed Rule, may be valuable in understanding what parameters of concern may be present. However, requiring continued monitoring of that full suite of parameters, regardless of whether a parameter is ever detected or is detected consistently at low levels, has no scientific basis and will not result in water quality improvement or protections. The result is increased regulatory and financial burdens without corresponding environmental benefit.

Conclusion

In summary, WDEQ remains committed to effective regulation and control of surface mining operations in Wyoming. We believe in our core mission of environmental protection through effective and efficient governance. OSMRE's Proposed Rule is not effective or efficient governance. It is a one-size-fits-all national regulation that is divorced from the realities of differing regulatory and environmental climates amongst the states. We ask you to withdraw the Proposed Rule and work with your state partners to craft a regulatory proposal that works for state regulators and our regulated industries, while simultaneously protecting the environment within the statutory mandates established by Congress.

Sincerely,

Todd Parfitt
Director

Attachments (6)

cc: Office of Wyoming Governor Matt Mead

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Matthew H. Mead, Governor

Todd Parfitt, Director

December 3, 2015

The Honorable Janice M. Schneider
Assistant Secretary for Land and Minerals Management
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

RE: Proposed Stream Protection Rule, Draft Environmental Impact Statement, and Regulatory Impact Analysis

Dear Assistant Secretary Schneider:

Thank you for taking the time to discuss the Wyoming Department of Environmental Quality (DEQ) comments on the proposed Stream Protection Rule, Draft Environmental Impact Statement, and the Regulatory Impact Analysis. Your invitation to, and participation in, the video conference call on Friday November 20, 2015 hopefully provided insight and clarification to the concerns Wyoming has expressed regarding the aforementioned documents. We look forward to continuing that dialogue, as agreed upon, within the next few weeks.

As much as I appreciate the opportunity for the current dialogue, I want to be clear, as I stated in our conference call, it does not resolve or absolve the Office of Surface Mining and Reclamation Enforcement's (OSMRE) failure to honor the Stream Protection Rule cooperating agency Memorandum of Agreement or Secretary of Interior Ken Salazar April 15, 2011 commitment to the Western Governor's that "All cooperating agencies will have an additional opportunity to review and comment on a Preliminary Draft EIS before it is published for public review and comment". The failure of OSMRE to engage Wyoming DEQ since January 2011 has resulted in Wyoming having the significant concerns raised about the proposed rule. DEQ continues to believe that the information and assumptions upon which the proposed rule is based are seriously flawed and OSMRE should consider withdrawing the current proposal, re-engaging the states to re-write the rule, and go out for new public review.

As I stated in the meeting, Wyoming DEQ remains committed to engage in a meaningful cooperating agency process. In this manner we could work together to develop a rule that is practicable, reasonable and could work in Wyoming. I look forward to our next video conference to complete our discussion regarding the comments and concerns that Wyoming has with the proposed and draft Stream Protection documents. My assistant, Connie Osborne will be in touch with your staff to schedule the next video conference.

Sincerely,

Alan Edwards

for Todd Parfitt
Director

Cc: Alan Edwards
Kyle Wendtland
Dave Ross
Andrew Kuhlmann

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Matthew H. Mead, Governor

Todd Parfitt, Director

January 19, 2016

The Honorable Janice M. Schneider
Assistant Secretary for Land and Minerals Management
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

RE: Proposed Stream Protection Rule, Draft Environmental Impact Statement, and Regulatory Impact Analysis

Dear Assistant Secretary Schneider:

Thank you again taking the time to discuss the Wyoming Department of Environmental Quality's (DEQ) comments on the proposed Stream Protection Rule, Draft Environmental Impact Statement, and the Regulatory Impact Analysis. DEQ hopes that our discussions provided further insight and clarification of the concerns Wyoming has expressed regarding the proposed documents.

The opportunity to discuss the proposed rule and related documents is greatly appreciated, but I find it necessary to once again reiterate that these conversations do not resolve or absolve the Office of Surface Mining and Reclamation Enforcement's (OSMRE) failure to honor our cooperating agency Memorandum of Agreement. Furthermore, it does not resolve the failure by OSMRE to honor the commitment to the Western Governors Association by then-Secretary of the Interior Ken Salazar, by letter dated April 15, 2011, that "All cooperating agencies will have an additional opportunity to review and comment on a Preliminary Draft EIS before it is published for public review and comment." Had OSMRE fulfilled these commitments, it would have benefitted from the considerable regulatory expertise that Wyoming and other Western states have developed over the past 43 years. DEQ maintains its position that the information and assumptions supporting the proposed rule are seriously flawed and that OSMRE should withdraw the current proposal, reengage the states to rewrite the rule, and ensure additional, robust public participation and review of all of the information that OSMRE has compiled in support of this multi-year effort. Be assured that Wyoming DEQ is willing to commit – as it has been throughout this process – the resources and staff necessary to engage in a meaningful cooperating agency process.

Setting aside the procedural deficiencies in OSMRE's process to date, Wyoming's underlying substantive concern about the proposed rule is that OSMRE fails to recognize the critical distinction between Western and Eastern issues and conditions. There are significant differences in terrain, moisture and mining activities in the West compared to Appalachia; differences which often require distinct regulatory approaches. Taking these differences into account would result in regulation that is more practical to administer and comply with while also ensuring that the regulation will result in protection of the environment. DEQ's comments identify some of the instances where the proposed documents need to reflect regional distinctions to avoid arbitrary and capricious regulatory action by OSMRE.

200 West 17th Street · Cheyenne, WY 82002 · http://deq.wyoming.gov · Fax (307)635-1784

ADMIN/OUTREACH	ABANDONED MINES	AIR QUALITY	INDUSTRIAL SITING	LAND QUALITY	SOLID & HAZ. WASTE	WATER QUALITY
(307) 777-7937	(307) 777-6145	(307) 777-7391	(307) 777-7369	(307) 777-7756	(307) 777-7752	(307) 777-7781

You have stated that you are reaching out to all coal programs that provided comments on the proposed rule and related documents. DEQ requests that you include the Interstate Mining Compact Commission (IMCC) in this outreach effort. Currently IMCC represents 23 member states and 2 associate member states, with the governor of each member state serving as that state's delegate to the IMCC. IMCC's comments on the proposed documents were the product of extensive collaboration by those members, and Wyoming and other states adopted and incorporated by reference all of IMCC's comments in the states' own individual comment submissions. IMCC is therefore uniquely positioned to bring its member states together to coordinate the states' assistance to OSMRE in developing meaningful and practicable amendments to the proposed Stream Protection Rule. IMCC's involvement would facilitate a more efficient and effective dialogue with the states.

As we mentioned, it was surprising to see bonding provisions included in the proposed Stream Protection Rule with no prior consultation with the states, or even an indication that bonding was to be addressed in the proposed rule. Changes to regulatory bonding provisions should not be made without direct involvement and engagement with the delegated regulatory authorities, including DEQ. During our meeting, DEQ was informed that Interior may be looking at the bonding rules, but to date has not initiated any process to change the rules beyond the changes already in the proposed Stream Protection Rule.

We fully expect the delegated states to be actively engaged in any process to change the bonding program. IMCC continues take a leadership role with the states in this area. A working group of member states has been established to examine all bonding, including the challenges both to the minerals industry and the financial sector. Wyoming will take a very active role in what we hope and expect to be a truly meaningful cooperating agency process. On this same topic, I would ask that OSMRE engage in a cooperating agency process for all proposed rulemaking activity, such as the blasting rules and the coal combustion residue rules currently being developed by OSMRE.

Another important concern that we raised in our comments is related to the technical and related materials cited in the proposed rule, draft EIS, and draft RIA. The sheer number and size of the referenced documents did not allow time to access and review those critical documents during the public comment period. Since our conference call, DEQ staff has reviewed the accessibility of the cited materials, and remain concerned that members of the public and the delegated states cannot adequately access the information. Some of the scientific papers are not available without subscribing to the scientific journals that they were published in, or without securing an inter-library loan. Several documents are cited with URL links that no longer exist. And most citations were not hyperlinked, as was implied during our conference call. Also, some of the citations in the regulatory documents were to newspaper articles or information provided by NGO's that have not been peer reviewed.
These deficiencies call into question the adequacy of the public participation process and compliance with OSMRE's obligations under the Administrative Procedure Act, and certainly underscore our continuing concerns with the lack of meaningful engagement as cooperating agencies.
We also noted during our review that there are very few references to Wyoming, much less the West, and the majority of the citations were to either mid-continent or Appalachian concerns. We would fully expect a rule of this magnitude to have been developed with appropriate, region-specific scientific and technical information, which appears to be lacking. This raises significant compliance concerns with the Administrative Procedure Act and OSMRE's substantive regulatory program authorities. I would request that OSMRE identify any other reports or scientific information used for the development of these proposed documents that were not cited as references.

Given these multiple concerns with OSMRE's supporting materials, I also respectfully request that an electronic file containing all of the references in the proposed rule, the draft EIS, and the draft RIA be provided to Wyoming. This information should have been provided to Wyoming as a cooperating agency under NEPA, as a delegated program under SMCRA, as a state sovereign, and as an interested participant in the rulemaking process. As we are sure this information has been assembled to support OSMRE's rulemaking

effort, we would assume providing it to Wyoming and the other states would not be a burden on the agency. Wyoming will commit to reviewing the material expeditiously and will provide OSMRE with additional comments regarding those materials as soon as practicable. Upon receipt of the referenced material and the opportunity for a cursory review by DEQ, we will let you know how much time will be needed to conduct an adequate full review of all materials. We would expect to complete that initial cursory review within 30 days of receipt. We would expect OSMRE to delay publication of the final rule until this important material has been provided, reviewed and additional comments fully considered and addressed by OSMRE. I also encourage OSMRE to allow the public another opportunity to review this information prior to finalizing the rule. The additional time is especially important because we may have questions on the scientific data or may find additional areas for which additional scientific research needs to be performed.

Again, I would like to thank you for taking the time to speak with us about Wyoming's concerns. I hope we can move from here and engage in a meaningful process that will result in a better and more informed regulation.

The DEQ has been, and continues to be, willing to work with OSMRE to address the regulatory challenges that we mutually face.

Sincerely,

Todd Parfitt
Director

cc: Governor Matt Mead
Senator Mike Enzi
Senator John Barrasso
Congressman Cynthia Lummis
Joe Pizarchik
Greg Conrad

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Matthew H. Mead, Governor

John Cora, Director

Written Testimony of John Corra, Director, Wyoming Department of Environmental Quality before the House Energy and Mineral Resources Subcommittee re Oversight Hearing on "Jobs at Risk: Community Impacts of the Obama Administration's Effort to Rewrite the Stream Buffer Zone Rule" – September 26, 2011

My name is John Corra. I am the Director of the Wyoming Department of Environmental Quality. I wish to thank the Subcommittee for inviting the State of Wyoming to testify at this hearing today. Wyoming coal mines produced 442 million tons of coal in 2010, over 40% of the nation's total production. This was accomplished by 6,800 miners operating some the most advanced equipment at 18 mines across the state. Production generates over $1.8 billion in taxes, royalties and fees for use by federal, state and local governments. The economic impact to the state is much greater. The industry has been recognized many times for both its superior safety programs and its innovative reclamation efforts. We have primacy for the administration of the Surface Mining Control and Reclamation Act (SMCRA) in Wyoming, and year over year receive high marks from the Office of Surface Mining (OSM) for our regulatory programs.

I would like to talk with you today about how Wyoming protects its waters and why this rule has little value for us. I will also speak to the disappointing process that has been followed to date relative to the Environmental Impact Statement (EIS) for this rule.

The OSM has used a court order and an agreement with other federal agencies that were aimed at tackling a problem in Appalachia as an excuse to impose un-necessary and costly over regulation across all coal mining states. The action OSM is undertaking is a comprehensive rewrite of regulations under SMCRA, not just a stream protection rule. The packaging of this major revision to a law that has served the country well for over 40 years as a "stream protection rule" is misleading. Some of the changes being contemplated have broad implications and deserve thoughtful re-evaluation.

We are unaware of any objective data, scientific or otherwise, that supports this level of change to SMCRA. The agency has not provided any objective data to support such comprehensive regulatory changes. In fact, OSM's most recent evaluation reports for 2010 strongly suggest otherwise. For example, the report for our state says that:"...the Wyoming

program is being carried out in an effective manner." The report also shows that we have gained much ground in increasing the ratio of acres reclaimed to disturbed acres over the past 12 years. The report also mentions no issues with regard to restoring mined land to approximate original contour or reclamation bonding. The report goes on to say that: "this lack of additional enforcement actions, despite increased inspection frequency, helps illustrate the effectiveness of Wyoming's regulatory program." And, inspections increased during the reporting period by a very significant 78%! While we are not perfect, and OSM does at times ask us to correct deficiencies, there is significant evidence from the OSM's own evaluation reports for Wyoming and other western states that current regulatory programs are working. Wyoming sees no justification for these significant rule changes or for the necessity of applying them nationwide.

OSM's rush for completing the rulemaking is at the expense of thoughtful discourse as required by National Environmental Policy Act (NEPA). This undue haste is limiting the thoughtful and reasonable "hard look" as required under NEPA. Although OSM had earlier identified an option to apply the regulations only to mountaintop removal and steep slope operations in Appalachia, that alternative seems to have been dropped. One of the primary justifications put forward by the agency in its Federal Register notice is a June 11, 2009 memorandum of understanding (MOU) between the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers and the Department of Interior. The MOU was specifically targeted at "Appalachian Surface Coal Mining", and Section 404 of the Clean Water Act (CWA) in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia. Despite this clear limitation in the MOU, the OSM rules are written to apply everywhere, including Wyoming.

NEPA requires an EIS to examine all reasonable alternatives to the proposal. If OSM proceeds with this rulemaking, it should be reminded not only of the MOU, but also its own recognition of differences between east and west and thereby apply the proposed regulations only east of the 100th Meridian. This approach would parallel SMCRA's (30 CFR Chapter VII 785.19) current legal framework and guidance documents reflecting recognition of hydrologic and reclamation changes at the 100th Meridian. For example, alluvial valley floor protection is only applied west of the 100th meridian. Likewise, the bond release clock is 5 years east of this line and 10 years for the west, which is a recognition of the arid and semi-arid environment in the western U.S.

The Clean Water Act also recognizes the unique differences between the arid west and the eastern part of the U.S. as noted in the National Pollutant Discharge Elimination System (NPDES) surface discharge regulatory program. This rulemaking may also conflict with state authorities under both the state SMCRA programs and under the Clean Water Act (CWA). OSM does not have the authority to attempt to broaden a state's water quality standards by adding new stream definitions, criteria, and restrictions such as "material damage to the hydrologic balance." There are no federal water quality standards in Wyoming and OSM lacks the authority to establish any. OSM must work through the State rulemaking process since the authority to establish water quality standards rests solely with the state. OSM cannot do an end run around the prohibition against setting water quality standards by requiring state regulatory authorities to establish more stringent "corrective action thresholds" at the direction of OSM. In addition,

"enhancement" concepts are likely to conflict with mitigation requirements under the Corps' § 404 program. OSM's proposals have serious potential to directly conflict with and/or duplicate CWA requirements of the state and/or the Corps.

There are good reasons to make a distinction between the management and regulation of water in the western U.S. as compared to the east. Recognizing differences in water uses, quality and availability, Clean Water Act regulations have historically treated the area of the country west of the 98th meridian (arid west) differently than the eastern portions. We can't help but think that both the Corps and EPA had this historical perspective about the nation's waters outside of Appalachia in mind when they signed the MOU. If OSM insists upon a national approach, we hope that the parties re-open the MOU and make it available for public comment.

The resource requirements and associated costs of implementing the proposed rules are of particular concern to the states. Proposed concepts regarding stream definitions, expanded biologic criteria, definition of material damage to the hydrologic balance and the replacement of Post Mining Land Uses with "climax communities" as a reclamation requirement all trample on effective and time-proven mining and reclamation efforts by the states. To elaborate on just one of these changes, the use of climax communities as a standard, it is widely recognized that the periodic drought conditions, grazing impacts, and other pre-mining land uses and climatic variables make it nearly impossible to determine what the state of vegetation was, or might be, let alone how to accurately measure it given the scale of variability that exists in the west.

Wyoming has the necessary regulations in place to assure stream protection and when necessary, stream diversion and reclamation, as evidenced by successful efforts that have been recognized by OSM over the years. I would like to review just a few examples.

North Tisdale Creek Stream Restoration, Caballo Coal Mine, Caballo Mining Company. This area was mined in the 1990's. The mine was required to record the pre-mining conditions, preserve topsoil, and reclaim the mining area to an approved post mining land use. As can be seen by the photo, restoration of a wetlands area has been successful. In fact the mine received awards in 2003 and again in 2009 for the successful reclamation of the North Tisdale Creek Wetlands, and the creation of wildlife habitat. Please see Exhibit 1.

Tongue River Stream Restoration, Big Horn Coal Mine, Big Horn Coal Company (subsidiary of Kiewit Mining). This project won the OSM 2011 Excellence in Surface Coal Mining Award. The Tongue River in northern Wyoming is a trout fishery at this location. As can be seen in the following photos, the mining operation progressed through the intersection of Goose Creek and the Tongue River. Note that the stream had to be relocated to accommodate mining. Stream function was modestly impaired for a period of time until restoration. It is unclear if this would be allowed under OSM's proposed rules concerning material damage and biologic thresholds for action. Note the reclaimed grasslands on both sides of the stream, and how it is beginning to blend in with the pre-mining vegetation shown in the background. Please see Exhibits 2a and 2b.

Caballo Creek Restoration, Belle Ayr Mine, Alpha Resources. This project won the 2007 OSM Reclamation and Enforcement Director's Award. Note the preservation of the stream gradient to ensure against excess erosion. Additionally, rock weirs were incorporated in the reclaimed channel to mimic the pre-mine riffle/pool structure of this intermittent prairie stream. Please see Exhibits 3a and 3b.

Other projects worth noting, but with no exhibits are:

Wyodak Mine: ~ 1.7 miles of Donkey Creek reclaimed with water flows returned to reclaimed channel in 2005.

Cordero-Rojo Mine: ~ 3.9 miles of Belle Fourche River reclaimed with water flows scheduled to be returned to reclaimed channel in December, 2012. Cordero-Rojo Mine received 2006 Excellence in Surface Mining and Reclamation Award from the WDEQ for design of this river channel reconstruction.

Eagle Butte Mine: ~ 2.0 miles of Little Rawhide Creek reclaimed.

Buckskin Mine: ~0.90 mile of Rawhide Creek; received the 1997 OSM Reclamation and Enforcement Director's Award for successful reclamation.

North Antelope Rochelle Mine: ~ 2.1 miles of Porcupine Creek reclaimed with water flows returned to two of the three reaches.

There are also cases where we refuse mining through important areas that, in our belief have key hydrologic issues or would not be capable of restoration. For example, Wyoming affords a high level of protection to alluvial valley floors, or stream valleys underlain by unconsolidated stream-laid deposits which have sufficient water availability to be important to agriculture.

Each mine application is reviewed carefully and the applicants are required to accurately describe the pre-mining conditions and land uses. An approvable mine permit application must contain a reclamation plan that assures achievement of post mining land uses, and a return of the land to a use equal to or better than before. We are proud of our regulatory efforts, and have had a long history of mine regulation and restoration, even prior to the enactment of SMCRA. We don't believe we would be the nation's largest coal supplier, as well as one of its most beautiful places, without the commitment of both our regulators and our industry. We are perplexed that the EIS process to date has been so distant from Wyoming.

OSM actions consistently appear to avoid or limit public and state comment throughout this rulemaking. Initially the agency tried to avoid rulemaking altogether by asking a federal court to allow it to revise the stream buffer zone rule through a guidance document. This request was denied. Next, OSM denied multiple requests for additional time to comment on their advanced notice of proposed rulemaking on this issue in December, 2009, providing the bare bones minimum period of time required by law for one of the most complicated rulemaking efforts in OSM's history. The agency's initial scoping notice was so deficient that OSM had to issue a second notice providing more information in June 2010. Scoping meetings were a sham, because the public was not even allowed to speak publicly at the agency's public meetings. The public open house meeting in Gillette, Wyoming, which is the center of 40 percent of the coal

production in the US, was held the evening of July 29, 2010. The comment period ended July 30, 2010. This hardly represents time for thoughtful discourse.

The EIS documents provided by OSM have-been poorly written, unclear and sometimes internally inconsistent. The unreasonably complex process of 5 alternatives with 11 items for each alternative results in 55 options to evaluate. It has been difficult to follow.

Wyoming is a "cooperating agency" in preparation of the EIS. Yet, we do not believe we have been given meaningful opportunity to comment and participate. Sections of the EIS with 25, 50, and even 100's of pages were distributed to the States with only a few days to read, review, and provide comment back to the agency. States were forced to withdraw staff from permitting and other critical areas in order to have any opportunity to provide feedback to OSM within the required timeframe. Even when states take such measures, meaningful comments could not be provided in an appropriate manner.

OSM appears to be ignoring the resource implications for these proposed rules. We find this particularly disturbing in light of the fact that OSM has a goal of significantly reducing their share of funding for our regulatory program.

The proposed rules will result in massive increases of information and data collection that may not even be useful or practical in improving environmental performance. This is a significant resource burden and suggests that OSM pay close attention to the cost/benefits of forcing a solution to an eastern problem upon western states, such as Wyoming. We are hopeful, now that OSM has retained a new contractor and pressed the pause button on the EIS process, that it will comply with its obligations under NEPA and conduct a genuine EIS process where States are engaged in real discussions of the regulatory options and EIS alternatives. They have committed to do so, and I hope we get the chance to share Wyoming's expertise.

I also suggest that OSM extend its deadline so that it can re-examine the "purpose and need" for these rules, provide appropriate scientific and factual information to support a rule change of this magnitude on a national scale, and engage Wyoming and other states in a more meaningful way. An extension would also allow enough time to thoroughly evaluate the economic impacts of the rule. The analysis that we have seen so far is inadequate especially given the complex decision making process that a customer using a given type of coal uses in fuel-switching decisions. The myriad air and water rules that are either published or pending regarding just the utility industry alone is enough to throw into question any simple assumptions that coal production will simply shift around the country as a result of OSM's proposal.

EXHIBITS

NORTH TISDALE CREEK STREAM RESTORATION

2008 and 2009 OSM Reclamation and Enforcement Director's Awards

Caballo Coal Mine,
Caballo Mining Company

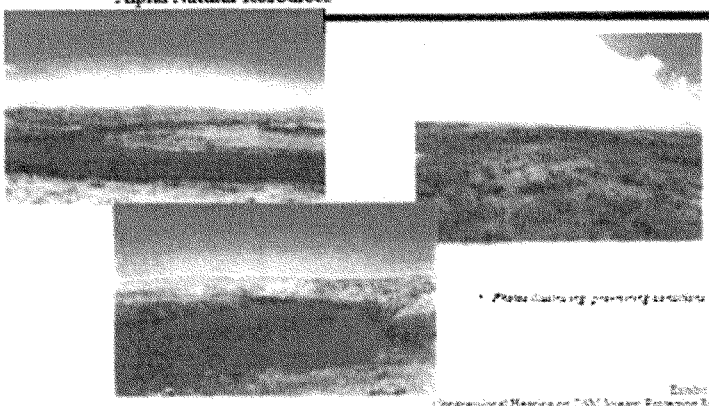
WYOMING

- *2008 award for successful reclamation and creation of wildlife habitat along the Tisdale Creek Drainage.*
- *2009 award for successful restoration of the North Tisdale Creek Wetlands*

Exhibit 1
Congressional Hearing on OSM Stream Protection Rule
September 26, 2011, Charleston, WV

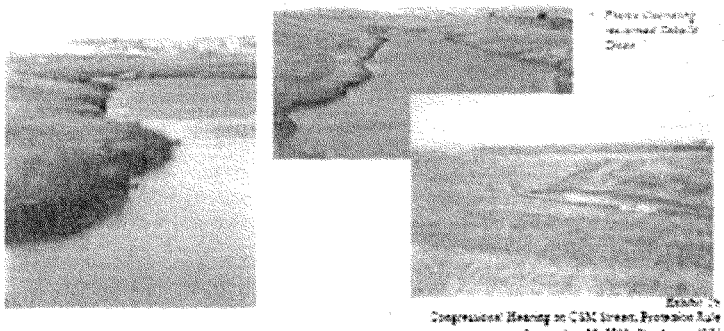
CABALLO CREEK RESTORATION
2007 OSM Reclamation and Enforcement Director's Award
Belle Ayr Coal Mine,
Alpha Natural Resources

WYOMING



CABALLO CREEK RESTORATION
2007 OSM Reclamation and Enforcement Director's Award
Belle Ayr Coal Mine,
Alpha Natural Resources

WYOMING



Safari Club International Supplementary Testimony
Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water and Wildlife
Hearing February 9, 2016

Safari Club International (SCI) submits this testimony to supplement the oral testimony presented by Douglas Vincent-Lang on February 9, 2016 at the hearing of the Senate Environment and Public Works Subcommittee on Fisheries, Water, and Wildlife entitled, "Federal Interactions with State Management of Fish and Wildlife." We appreciate the opportunity to present additional testimony on a topic that significantly impacts SCI members who hunt in Alaska.

Safari Club International

SCI has approximately 48,000 members and 177 chapters throughout the world. We have two Alaska-based chapters, the Alaska Chapter and the Alaska Kenai Peninsula Chapter. Both are extremely active in promoting and protecting hunting and wildlife conservation in Alaska. SCI has many members who live in Alaska and others who travel to Alaska for the purpose of enjoying the state's world-class hunting opportunities. These members hunt for many purposes, including for subsistence and non-subsistence, and all of these members are affected by the recent decisions and proposed decisions by the federal government to interfere with the State of Alaska's management of wildlife within state boundaries. SCI members are passionate hunters and conservationists. Together they, and we who advocate for them, want to make sure that hunting and the wildlife resources that provide those hunting opportunities in Alaska remain available now and long into the future.

Sixteen and a half years ago, SCI filed a lawsuit in federal court to challenge the Federal Subsistence Board's administration of ANILCA. Our lawsuit did not challenge the law itself. It challenged the way that the federal agencies were administering ANILCA because that administration unfairly and illegally deprived those who did not qualify for rural subsistence priorities of access to Alaska's wildlife. In addition, our lawsuit challenged the lack of representation from non-subsistence interests on the Regional Advisory Councils that advised the Federal Subsistence Board in regard to determinations pertaining to priority access to wildlife resources on federal lands in Alaska. As a result of our lawsuit, the federal government acknowledged its obligation to fairly balance the Regional Advisory Councils with representation from both subsistence and non-subsistence interests. Unfortunately, that was far from the end of the problems that SCI and all Alaskan hunters would face from the federal government's interpretation of its laws and approach to its authority to manage wildlife on federal lands.

Safari Club International - Washington DC Office
501 2nd Street, NE, Washington, DC 20002 • Phone 202 543 8733 • Fax 202 543 1205 • www.safariclub.org

Alaska National Interest Lands Conservation Act (ANILCA)

The federal government relies on an illogical interpretation of ANILCA to justify its disregard of state management authority over Alaska's wildlife. Just as we did back in 1999, SCI today understands that ANILCA's purpose is to provide a balance between the needs of the user groups who must share Alaska's resources. Congress designed ANILCA to provide access to wildlife resources for Alaska's subsistence communities but also to make sure that non-subsistence users maintained their access in all situations where sufficient wildlife resources are available. Congress tasked the administrators of ANILCA to conserve those resources to make sure that Alaska's hunters have wildlife to hunt. ANILCA directs the Secretaries of the Department of the Interior and the Department of Agriculture to manage resources to fulfill the needs of the communities that depend upon these resources as well as "to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation," 16 U.S.C. § 3101. Congress directed these federal managers to fulfill subsistence and non-subsistence needs on federal lands in accordance with sound management and recognized scientific principles of fish and wildlife conservation. 16 U.S.C. § 3112.

The drafters of ANILCA did not give federal managers exclusive authority in administering ANILCA. Instead, Congress explained that to protect "the continued viability of all wild renewable resources in Alaska," those administrators were obligated to "cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations." 16 U.S.C. § 3112. In other words, Congress did not intend for the federal agencies to operate as though they alone had the responsibility or authority to make decisions about how to conserve and manage Alaska's wildlife resources. Congress tasked the Secretaries with the duty to collaborate with the state of Alaska, among others. Sadly, the federal government has ignored these important ANILCA mandates.

Recent Actions by Federal Agencies Contravene ANILCA.

Recently, two of the federal government agencies that are tasked with administering ANILCA have taken actions that abandon the intent of Congress concerning ANILCA's protection of hunting opportunities. Specifically, the National Park Service and the U.S. Fish and Wildlife Service have each invoked ANILCA as the basis for decisions that deprive Alaska's residents, both subsistence and non-subsistence hunters, of hunting opportunities. Both of these agencies have taken or intend to take positions that interfere with Alaska state management of wildlife that supports hunting opportunities. The National Park Service and the U.S. Fish and Wildlife Service are reinterpreting ANILCA to require a "hands-off" approach to wildlife management even if that approach would lead to the complete disappearance of huntable populations of wildlife.

The management of fish and wildlife on federal lands found within state boundaries requires a working partnership between federal and state management agencies. Partnerships cannot work unless the partners respect each other's expertise and authorities and the partners abide by the commitments they make to each other. In this administration, the federal

government has often lost sight of these realities and Alaska appears to be the latest casualty of this situation.

National Park Service

The National Park Service (NPS) finalized regulations on October 23, 2015 that prohibit several forms of hunting on National Preserves in Alaska. These regulations unabashedly target "sport" or non-subsistence hunters, yet the rules actually prohibit methods that are often practiced by subsistence hunters in the hunting of wolves, bears and coyotes. These regulations send the message that the NPS is uncomfortable with certain methods of take and that the NPS intends to be the final judge of what are and what are not "ethically appropriate" methods of hunting. Despite the State of Alaska's determination that those types of hunting are legal and appropriate within the state, the NPS wants to impose its contrary, and emotionally–based, value system on legally mandated hunting on National Preserve lands in Alaska.

In this action, the NPS is taking rather lightly ANILCA's requirement that federal agencies "cooperate" with Alaska state wildlife managers. The NPS seems to interpret compliance to require only that the NPS demand that the Alaska Board of Game adopt the NPS's prohibitions. If the Board of Game refuses, the NPS then promulgates regulations that contradict Alaska state hunting rules and that undermine Alaska statutory obligations to provide hunting opportunities to its citizens. Instead of cooperating with the State of Alaska in addressing this difference of opinion on hunting methods, the NPS handed out edicts and then moved ahead with regulatory prohibitions based on the NPS's opinions of what constitutes appropriate hunting in Alaska.

For all hunters, the way that the NPS is imposing its personnel's value judgments about what constitutes appropriate hunting methods is a concern that doesn't restrict itself to Alaska. This subjective and emotionally based approach to what constitutes appropriate methods of hunting could extend to hunting authorized on NPS lands throughout the U.S.

The October 23rd regulations are not the only example of the NPS's attempt to take action that overrides state authority to regulate hunting activities in Alaska. SCI member John Sturgeon has recently argued a case before the U.S. Supreme Court that challenges the National Park Service's effort to exercise its authority to restrict the use of non-federal waters and lands located within NPS boundaries. The NPS prohibited Mr. Sturgeon from operating his personal hovercraft on a river that runs through a National Preserve, despite the fact that the navigable water at issue is state owned and that the state permits hovercraft use on such state owned waterways. SCI filed an amicus brief in support of Sturgeon's arguments and currently await the Supreme Court's ruling on this case.

The U.S. Fish and Wildlife Service

Similarly, the U.S. Fish and Wildlife Service (FWS) has proposed revisions to its regulations for wildlife management and hunting on National Wildlife Refuges in Alaska. The FWS wants to codify the concept of so-called "natural diversity" to manage wildlife resources on

National Wildlife Refuge lands in Alaska. Like the NPS, the FWS intends to ignore the intent of ANILCA's drafters. Instead of recognizing the goal of providing wildlife resources for the needs of Alaska's hunting public, the FWS intends to apply a "hands-off" approach to wildlife management. The FWS refuses to recognize the State of Alaska's need to balance Alaska's predator and prey populations. Instead, the FWS prefers to allow growing predator populations to decimate the very prey populations upon which hunters depend for both subsistence and non-subsistence hunting opportunities. In adopting this approach, FWS leadership ignores the specific definition for "natural diversity" provided by Senator Stevens, one of the key drafters of ANILCA's complicated and balanced approach to wildlife management on federal lands in Alaska:

> The term is not intended to, in any way, restrict the authority of the Fish and Wildlife Service to manipulate habitat for the benefit of fish or wildlife populations within a refuge ***or for the benefit of the use of such populations by man as part of the balanced management program mandated by the Alaska National Interest Lands Conservation Act and other applicable law***. The term also is not intended to preclude predator control on refuge lands in appropriate instances.

(emphasis added) Congressional Record, Dec. 1, 1980, S-15132.

Like their National Park Service colleagues, the FWS considers its duty to "cooperate" with Alaska state wildlife management officials to be satisfied by the delivery of edicts and the adoption of regulations that contradict and undermine Alaska state regulations and statutory wildlife management mandates. If adopted, these rules will undermine state authority and will make it impossible for the Alaska Department of Fish and Game to meet its state statutory obligations to manage and conserve its wildlife so a broad diversity of wildlife remains available for those who wish to use it both consumptively and non-consumptively.

SCI recently testified against these proposed rules at a hearing held on February 18, 2016 in Anchorage, Alaska and will be filing written comments to address the legal and practical failings of the FWS's approach.

Post Senate Committee Hearing Actions

SCI appreciates the interest the Subcommittee has taken in these important issues. We ask the Subcommittee to continue to work with the hunting community to prevent the federal government from taking an approach that will severely undermine hunting opportunities and the sustainable use of wildlife in Alaska – and potentially throughout the nation.

The conduct demonstrated by the NPS and FWS in Alaska demonstrates that Congress must provide states and the hunting communities with legislative protection against federal overreach in the management of wildlife on federal lands that exist within state boundaries. Congress should adopt language for Alaska and for the country generally that ensures that the successful state fish and game management model is not preempted or compromised by federal

administrative actions. This legislative language should clarify that the federal agencies' responsibility for conservation of wildlife is a monitoring role. Unless specifically authorized in a federal statute, the federal agencies are not authorized to adopt regulations that involve seasons, bag limits, methods and means, or determining the range of sustainable wildlife population numbers.

In adopting this legislative protection for state wildlife management authority, Congress needs to resolve any confusion introduced by the terms "consult" or "consultation" that appear in the savings clauses of numerous federal statutes. Congress must clarify that federal agencies' duty to "consult" with state wildlife management agencies cannot be fulfilled until federal decision-making results in state concurrence. SCI asks Congress to adopt language that makes clear that without concurrence, federal agencies will lack the authority to regulate any aspect of the harvest of wildlife that occurs within state boundaries.

SCI appreciates the opportunity to provide this supplementary testimony and looks forward to working with the Subcommittee on this and all other issues affecting hunting and hunters in the United States. Should you have any questions concerning this testimony, please contact Anna M. Seidman, Director of Litigation, Safari Club International, 202-543-8733, aseidman@safariclub.org.

THE SECRETARY OF THE INTERIOR
WASHINGTON

APR 15 2011

The Honorable C. L. "Butch" Otter
Governor of Idaho
Boise, Idaho 83702

Dear Governor Otter:

Thank you for your letter of February 27, 2011, concerning the development of stream protection regulations and the supporting Draft Environmental Impact Statement (EIS) by the Office of Surface Mining Reclamation and Enforcement (OSM).

I appreciate your interest in the potential application of this rule to the coal-producing states that the Western Governors' Association (WGA) represents, several of which are cooperating states in OSM's Draft EIS development process.

I want to assure you that OSM has not proposed a new Stream Protection Rule, nor has it completed a Draft EIS that is necessary to inform a proposed rule. The OSM is still gathering information, reviewing a preliminary draft of EIS chapters, and considering comments received from states serving as EIS cooperating agencies. The OSM shared the early, contractor-generated chapters of the Draft EIS with the cooperating states as part of its effort to be more open and transparent in its rulemaking process. These early drafts are not official OSM documents and do not reflect the official views of OSM or the Department of the Interior.

Along with OSM Director Joseph Pizarchik, I greatly appreciate the contributions that your member states have made in reviewing these early draft chapters. The comments they have provided to OSM have been helpful and will strengthen the Draft EIS and the proposed rule as they are further refined. All cooperating agencies will have an additional opportunity to review and comment on a Preliminary Draft EIS before it is published for public review and comment.

The Draft EIS will be based on reliable and accurate information. It will contain a set of alternatives that are fully analyzed, and will be made available through the normal EIS process for public review and comment. Together with the Draft EIS, the proposed rule will provide the scientific and policy basis for any proposed regulatory changes. Comments received on the proposed documents will be considered, consistent with the requirements of the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA), before OSM or the Department makes any final rulemaking decisions.

The OSM has afforded extensive opportunities for stakeholder participation throughout the rulemaking and EIS development processes, far beyond what the APA and NEPA require. In doing so, OSM has demonstrated a commitment to developing reasonable, fair, and effective stream protection rules through an open and inclusive process.

The OSM is proposing new stream protections because of its responsibility to protect all of the Nation's streams from the adverse effects of surface coal mining. This responsibility is not limited to any particular region, and protective measures and standards must be applied wherever there is the potential for coalmine-related stream damage.

Thank you for sharing your views on OSM's stream protection rulemaking effort and the EIS development process. The public, the states, and stakeholders have been crucial -- and will continue to be crucial - to these efforts every step of the way. I look forward to the continued involvement of the WGA member states serving as cooperating agencies in helping OSM to make the tough choices necessary to protect our Nation's streams.

A similar response is being sent to the Honorable Christine O. Gregoire, Governor of Washington.

Sincerely,

Ken Salazar

Ken Salazar