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WRITTEN TESTIMONY
BEFORE THE COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

FIELD HEARING IN JACKSON, MISSISSIPPI

"LESSONS LEARNED PROTECTING AND RESTORING WILDLIFE IN THE SOUTHERN UNITED STATES UNDER THE ENDANGERED SPECIES ACT"

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Written Comments of Donald G. Waldon

I. Background

Chairman Pombo and distinguished Committee members, my name is Donald G. Waldon. I am currently the Administrator of the Tennessee-Tombigbee Waterway Development Authority (the "Authority"), which is an interstate compact ratified by the United States Congress in 1958 to promote the development of the Waterway and its economic and trade potential. Funded solely by the member states, the compact currently consists of the States of Alabama, Kentucky, Mississippi and Tennessee. The Authority's membership is limited to the four governors and certain gubernatorial appointees from each state. Governor Bob Riley currently serves as the Authority's chairman. Current members include:

- **Alabama** – Governor Bob Riley; Director of the Alabama Department of Environmental Management Trey Glenn, III; Bruce Windham; Martha Stokes; W.H. "Buck" Borders; State Representative Allen Layson; and Robert Barnett.

- **Kentucky** – Governor Ernest Lee Fletcher; Lt. Governor Steve Spencer; Judge Mike Miller; Z.C. Enix; Judge William Shadoan; and Brian S. Roy.

- **Mississippi** – Governor Haley Barbour; Nick Ardillo; Bill Cleveland; Dale Pierce; T.L. "Bud" Phillips; and Martha Segars.

- **Tennessee** – Governor Phil Bredesen; Joe Barker; David Dickey; Judge Richard Holcomb; Kathy Holland; State Representative Randy Rinks; and Eddie Shaw, Jr.

Importantly, the Authority serves as the regional sponsor of the Tenn-Tom Waterway, promoting the development of the Waterway, exploring economic and trade opportunities, and addressing potential impediments to the Waterway's beneficial use. As a result, the Authority is deeply involved in federal and state policies affecting the Waterway, including the Endangered Species Act ("ESA").

In addition to serving as the administrator of the Authority, I am also the vice chairman of the Alabama-Tombigbee Rivers Coalition ("Coalition"), which is an Alabama non-profit corporation consisting of sixteen businesses, trade associations and state agencies that rely upon Alabama waterways as integral components of their businesses. The Coalition has been actively involved in the listing of the Alabama sturgeon since 1991, submitting numerous written comments to the United States Fish and Wildlife Service ("FWS" or "Service") during the listing process and filing suit challenging the listing as contrary to law – a case which is now pending before the United States District Court for the Northern District of Alabama. *See* Alabama-Tombigbee Rivers Coalition v. Norton, No. CV-01-P-0194-S (N.D. Ala.).

Given the breadth of issues the Resources Committee is addressing, we believe it is critical for private landowners to share their real-world experiences regarding the ESA. Perhaps the most compelling saga in our experience that justifies changes in the administration of the ESA centers around FWS' decade-long effort to list the so-called Alabama sturgeon as an

endangered species.[1] Thus, the bulk of these comments are based on the Service's actions during the Alabama sturgeon listing process. Outside the listing process, the Tennessee-Tombigbee Waterway Authority actively participates in various conservation efforts with the Service and is often able to reach consensus with the Service on protecting species that merit protection under the statute. Nonetheless, as submitted below, we believe changes in both law and policy are crucial to achieving the ultimate goal of the ESA: to protect and recover the Nation's *truly* threatened and endangered species.

II. Peer Review & Best Available Science

We appreciate and share the Committee's desire to improve the quality of the science used in ESA-related decision-making. We believe that FWS has all too often relied on shoddy scientific work to justify its actions. For example, this Committee is likely aware of the concerns raised by states such as Wyoming, over the lack of objectivity in the peer review process regarding the Preble's meadow jumping mouse. Similarly, in the case of the Alabama sturgeon, the Service relied on flawed scientific data in taking the position that the fish is distinct from other shovelnose sturgeon found in abundance throughout the entire Mississippi River system. As described in more detail below, FWS has persisted in its reliance on this flawed data in the face of mounting evidence that the Alabama sturgeon is genetically identical to the Mississippi shovelnose sturgeon.

At the same time, we are unconvinced that legislation is needed to fix all the ESA's problems, nor do we believe that legislation is the most appropriate remedy in certain instances. Much can and should be accomplished through administrative management and policy changes by the Service utilizing the ESA's existing authorities. Moreover, some legislative proposals may have unintended consequences that could prove to be quite negative. Although we certainly do not agree with many of the policies of the FWS in this area, we see advantages in leaving various statutory provisions, such as the "best available science" standard, broad enough to allow some administrative flexibility to respond to the inevitable improvements in scientific technology. For example, H.R. 1662 from the 108th Congress would have required FWS to "give greater weight to interpretations of data derived from or verified by timely field work (commonly referred to as 'empirical data') that have been subjected to peer-review." Our experience, however, leads us to conclude that so-called peer review is not a panacea to the problem of incorrect science.

Nonetheless, before turning to our experiences in Alabama in greater detail, we call the Committee's attention to a matter which we hope will not be overlooked. H.R. 1662 proposed to apply new peer review provisions to "covered actions," defined as listings and delistings, changes in listing status, recovery plan development, and Section 7 consultations. Importantly, this list of "covered actions" omitted critical habitat designations. We recommend that, whatever form the Committee's legislation may take in this Congress, it is drafted in such a manner as not

[1] Notably, organizations in Alabama have challenged relatively few proposed listing decisions by FWS. For example, of the 115 species listed as threatened or endangered in Alabama, businesses have participated in challenging only seven of those proposals. Six of the seven challenges resulted in withdrawal of the proposed listing decision due to faulty science. The seventh – the challenge to the listing of the Alabama sturgeon – is still under review by the federal courts.

to imply that a lesser standard of scientific care would apply to critical habitat designations compared to other actions under the ESA.

A. Administration Policy Should be Revised to Require the Service to Flexibly Determine What Is the "Best Available Science" in Each Specific Situation

Like the standard for "best *available* technology" employed under other environmental statutes, what constitutes the "best *available* science" evolves over time. While taxonomy may have been the best scientific information the Service had available at some point in the past, today genetics is playing an increasingly more important role in the process of determining the status of various species. For example, the United States Department of Justice, in coordination with the Service, has employed genetics to convict individuals of illegal importation of caviar from foreign species of sturgeon. The Service, however, often refuses to employ genetics as a matter of listing policy, even where the taxonomic data is subject to scientific dispute. Our experience indicates that the Service often simply picks and chooses when to use genetics based on the *ends* it wishes to achieve. This is not sound science. Importantly, we do not believe that statutory revisions to the ESA are necessary to correct this particular concern. The better approach is, instead, to require the Service to issue a new policy regarding the standard for best available science in the listing process: where taxonomic data is disputed, genetics should be used to determine the status of a species.

B. The Service Has Rigged Peer Review to Support Its Preordained Conclusions

Even where the Service has purported to submit its scientific findings and determinations on listing issues to a peer review panel, at least in the unfortunate case of the Alabama sturgeon, the Service carefully screened those allowed to participate in the process to ensure a result consistent with its predetermined conclusions. The Service's efforts in this regard are well documented, because they were the subject of a Coalition lawsuit challenging the peer review process pursuant to the Federal Advisory Committee Act ("FACA"). In that case, the Eleventh Circuit confirmed that the Service had violated the procedures of FACA in its conduct of peer review for the Alabama sturgeon, and the court barred the Service from using the report produced by that illegal process. *Alabama-Tombigbee Rivers Coalition v. Dep't of the Interior*, 26 F.3d 1103 (11th Cir. 1994). That case is the source for the anecdote provided below.

After the publication of the first proposed listing in 1993, Secretary Babbitt ordered the creation of a "scientific advisory panel" to "consider the best available scientific information and assess the current status of the species." However, a bipartisan group of Alabama Congressmen and Senators objected on the grounds that the small panel was biased. In response, the Service created a new panel of nine members, but that panel included three of the four members that sparked the initial concern, and it included none of the six scientists suggested by the Alabama Congressional delegation.

Initially, the Service established a procedure that conveniently allowed it to avoid the public notice and participation required under FACA: it would have its members file individual reports. However, shortly before the reports were due, the Service changed its procedure and convened a private meeting, from which "different thinking" stakeholders and scientists were excluded. The Alabama-Tombigbee Rivers Coalition sued, alleging that this process brought the

panel's activities within FACA, and that the secretive and exclusive meeting clearly violated the openness requirements of that Act. *See* 5 U.S.C. App. 1, § 10.

The Coalition won in the district court in Alabama, which was unanimously upheld on appeal to the Eleventh Circuit. The courts held that the Service clearly violated FACA. Further, this violation was so serious that the courts were compelled to order the Service not to rely on the report produced by this illegal procedure. As both the lower and appellate courts stated:

> A simple "excuse us" cannot be sufficient. . . . FACA was designed by Congress to prevent the use of any advisory committee as part of the process of making important federal agency decisions unless that committee is properly constituted and produces its report in compliance with the procedural requirements of FACA, particularly where, as in this case, the procedural shortcomings are significant and the report potentially influential to the outcome.

26 F.3d at 1106. The Eleventh Circuit elaborated further: "Because the matters are so serious and of such great concern to so many with differing interests, it is absolutely necessary that the procedures established by Congress be followed to the letter." 26 F.3d at 1107 n.9.

That unfortunate episode illustrates the need for a renewed commitment to scientific integrity by the Service, especially including openness to ideas originating from beyond the favored circle of the Service's own staff and the Service-approved and/or favored scientists. It also highlights the fact that legislation is <u>not</u> a cure for every misdeed at the agency. Adequate laws were in place at the time of these events which should have guaranteed an open and inclusive procedure, but the Service refused to follow the law. We commend this Committee's willingness to address flaws in the peer review process with legislation, but we also urge the Committee to continue to exercise oversight of the Service and urge the leadership at Interior and the Fish and Wildlife Service to require its staff to act reasonably and responsibly through administrative, management and policy changes which are well within existing legal authorities.

III. Critical Habitat Designations Must Occur Concurrently with Listing

The ESA requires the Service to designate critical habitat "concurrently" with a listing decision. This Committee has considered legislation that would change the timing of the designation of critical habitat, such as recent legislation sponsored by Congressman Cardoza. We greatly respect the efforts of the Chairman and other Committee members, but we are opposed to this concept.

Our reasons are described in greater detail below. They can be summarized as follows: (A) allowing more time only provides greater opportunity for the Service to delay and evade its responsibility to designate critical habitat; (B) delay would cause the loss of the very real benefit of obtaining an economic analysis at the same time as a listing decision (a benefit made more important by a recent change in Service policy); and (C) we believe the NEPA process should apply to critical habitat designations, and this NEPA process should occur early in the decision process. Moreover, this issue is under active litigation by the Coalition in federal court in Alabama. In the Alabama sturgeon case, the Coalition has alleged that FWS' failure to designate critical habitat is not only illegal, but that it also impermissibly tainted the entire listing process.

To change the "concurrent" requirement would undercut the position of the Coalition in this case.

A. Removing the "Concurrent" Requirement Only Provides More Opportunity for Inexcusable Delays

For years, the Service has flouted the ESA and Congressional intent by refusing to designate critical habitat concurrently with listing, in spite of the mandate of ESA Section 4(a)(3). The Service has used – some might say abused – the excuses available to it, namely, that it is not "prudent" to designate critical habitat, or that while it is prudent to do so, the critical habitat is "not then determinable." *See* ESA § 4(b)(6)(C). The Service has argued it would not be prudent because of poorly substantiated claims that persons might vandalize or otherwise harm species, or that its budget provided insufficient funding to cover the cost of the action. For example, the Service refused to designate critical habitat when listing the green pitcher plant in Alabama due to fears that the designation would result in "over-collection." *See* 45 Fed. Reg. 18930-31 (Mar. 24, 1980) (final rule listing green pitcher plant as endangered). A wide variety of environmental groups and regulated entities have opposed these generally specious arguments, with considerable success in the federal courts.

In the case of the Alabama sturgeon, the Service in 1993 declared critical habitat to be both prudent and determinable, but it withdrew its proposed rule the following year. In 1999, the Service changed course, proposing not to designate critical habitat on the grounds that to do so could result in illegal takes. The proposed rule, however, noted that "all Federal agencies [including the Service] are currently aware of the location and extent of habitat occupied by the Alabama sturgeon." When it issued the final listing rule in 2000, the Service acknowledged that the "not prudent" finding was invalid; however, the Service then asserted that critical habitat was not determinable, despite having previously asserted that areas occupied by the fish were indeed well known. The Service also acknowledged that this finding resulted in a one-year deadline to designate critical habitat, yet it candidly admitted in litigation that it has missed this deadline and has offered no plans of imminent action to rectify its noncompliance.

For whatever reason, the Service simply does not like to designate critical habitat. Unable to wish the ESA's requirements away, the Service instead postpones compliance for years or simply ignores the law altogether. The point is, the Service already misses deadlines to designate critical habitat. The appropriate response to this situation is not to give the Service more time. The Service surely will only miss the later deadlines as well, and the species, environmental advocates, and regulated entities alike will be that much farther from a final critical habitat designation. Rather, both Congress and the courts should seek to require the Service to simply follow the law – to designate critical habitat, and to do so on time as the ESA now requires.

We note briefly that we are aware of arguments that critical habitat designation should occur later in the process, such as in conjunction with a recovery planning process. Some have suggested that FWS does not always possess adequate information to designate critical habitat at the time of listing, and to require FWS to do so places too great a burden on the agency. We would respond by suggesting that if FWS does not have enough information to know what areas

are critical to the conservation of a species, it does not know enough to declare that species to be endangered or threatened.

B. "Concurrent" Requirement Promotes Understanding of Economic and other Impacts at a Crucial Time in the Decision Process

In the past, the Service has determined that the designation of critical habitat almost never caused an adverse economic impact on the grounds that any negative economic impacts associated with critical habitat designation would have occurred regardless of the designation, due to other requirements of the ESA. However, recent litigation brought by a ranchers association resulted in a significant change in the Service's illogical approach. *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001). In this case, the court noted that FWS could have chosen to consider *all* economic impacts associated with critical habitat designation, even if a given impact was "co-extensive with other causes." Given a choice between these two methods, the court found that the "co-extensive" approach was closer to Congressional intent, since FWS' preferred method effectively read out of the Act any meaning for Congress' directive to consider economic impacts. Other courts have since followed that Tenth Circuit approach. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Service,* 268 F. Supp. 1197, 1230 (E.D. Cal. 2003); *Home Builders Ass'n of N. Cal. v. Norton,* 293 F. Supp. 2d 1, 3-4 (D.D.C. 2002); *Bldg. Indus. Legal Defense Found. v. Norton,* 231 F. Supp. 2d 100, 102 (D.D.C. 2002); *Natural Res. Defense Council v. U.S. Dept. of Interior,* 275 F. Supp. 1136, 1141-42 (C.D. Cal. 2002); *Nat'l Ass'n of Home Builders v. Evans,* 2002 WL 1205743 at *2 (D.D.C. 2002).

Although we are not aware of any formal agency guidance or policy issuance as of yet, it appears that the Service has embraced the reasoning of the Tenth Circuit on a national scale. For example, the final rule to designate critical habitat for the California tiger salamander noted that its economic analysis "complies with the direction from the U.S. 10th Circuit Court of Appeals, that, when deciding which areas to designate as critical habitat, the economic analysis informing that decision should include 'co-extensive' effects." 69 Fed. Reg. 68,568, 68,579 (Nov. 24, 2004); *see also* 69 Fed. Reg. 59,996, 60,012 (Oct. 6, 2004) (noting in the preamble to the bull trout critical habitat designation that the Service included consideration of economic impacts that are co-extensive with other causes). Several court cases also include statements that the Service represented to the court that it intended to employ the Tenth Circuit's rule in future critical habitat designations. *Home Builders Ass'n of N. Cal.,* 268 F. Supp. at 1227-28; *Home Builders Ass'n of N. Cal.,* 293 F. Supp. 2d at 2-4; *Bldg. Indus. Legal Defense Found.,* 231 F. Supp. 2d at 102; *NRDC,* 275 F. Supp. 2d at 1140-41.

We applaud the Service for embracing the "co-extensive" approach to the consideration of economic impacts, and we call to the Committee's attention a significant implication of this policy. After decades of failing to follow the ESA, the Service is now required to offer a meaningful analysis of the economic impacts *at the front end of the process* – that is, at the time of listing. We firmly believe this is what Congress had in mind all along, by (1) requiring critical habitat designations to occur <u>concurrently</u> with listings, and (2) requiring an economic impact analysis for critical habitat designations. We stand at the cusp of a significant improvement to the administration of the ESA – now is not the time to make a change in the Act that would preclude this significant improvement.

Another discussion of the Alabama sturgeon listing should illustrate this point. The listing of the Alabama sturgeon carries significant economic and social costs, ranging from impacts on the Corps of Engineers' ability to do annual maintenance dredging on Alabama's navigable waterways, to imposing greater restrictions on sand and gravel mining operations. In addition, the listing could lead to increased water flows through hydroelectric dams, which would reduce energy generation during peak load periods. NPDES permit limits could also be reduced thereby requiring major upgrades to both private and publicly owned sewage treatment plants. Notably, a detailed economic analysis jointly prepared by Troy State University and the University of South Alabama predicted a potential $11.3 billion adverse economic impact and the loss of almost 20,000 jobs over a 10-year period in Alabama and Mississippi as a result of the Alabama sturgeon listing.

During the original listing process in the early 1990s, these potential adverse economic impacts precipitated significant public relations and political problems for the Service. As discussed above, while the listing decision is to be made solely on the basis of the best available science, designation of critical habitat requires the Secretary to consider the economic and social impacts of that designation. Therefore, the economic impacts became a big issue in the Service's 1993 listing proposal, which also proposed to designate critical habitat.

However, after the Service withdrew its 1993 listing proposal, FWS relisted the Alabama sturgeon in 2000 without designating its critical habitat. This was an obvious attempt to avoid the previous economic and social impacts debate. Nevertheless, the ESA requires FWS to propose critical habitat designation concurrently with the listing proposal. Consequently, FWS was virtually guaranteed to be sued again – thereby perpetuating the sturgeon controversy and costing the private sector and the taxpayers even more money. Of course, this is now a critical issue pending in the Coalition's Alabama sturgeon litigation before the federal courts in Alabama. As a matter of policy consistent with the mandate of the ESA, the Service should be required to designate critical habitat concurrently with the listing decision, thus requiring the "up front" consideration of economic impacts during the listing process.

C. The Service Should Also Follow NEPA When Designating Critical Habitat

We have already explained why the Service violates the law by not proposing to designate critical habitat concurrently with the proposed listing. In addition, when proposing a critical habitat designation, it is imperative that the Service also comply with the National Environmental Policy Act ("NEPA"). NEPA exists to improve federal agency decisions and to provide opportunities for participation by the public. Without fully applying NEPA when assessing critical habitat designations, the Service could act without realizing that better alternatives may exist to protect, restore and enhance listed species. Landowners and users of public resources, such as waterways, are needlessly and illegally deprived of NEPA's provisions for public participation. Perhaps most importantly, the Service's failure to comply with NEPA violates a clear Congressional directive. If, as we submit, the NEPA process is good for critical habitat designations, then any change in the "concurrent" requirement would also only serve to delay the provision of NEPA's opportunities for landowners and others to participate in an ESA decision of major importance to them.

Prior to 1983, the Service performed a NEPA analysis on actions under Section 4(a) of the ESA, including critical habitats. In that year, however, the Service published a policy indicating it no longer would prepare a NEPA document for listings, delistings, reclassifications, and critical habitat designations. 48 Fed. Reg. 49,244 (Oct. 25, 1983). The Service argued that none of its environmental assessments on such actions up to that time had resulted in a determination to prepare an environmental impact statement, and that the ESA required listings to be based solely on biological grounds. Clearly, the first justification is irrelevant. NEPA admits no exception for actions arguably similar to past actions for which an EIS was not prepared. The second reason is just plain wrong when applied to critical habitat designations, for which the ESA explicitly requires consideration of economic and other impacts.

Nevertheless, in 1995, the Ninth Circuit issued an opinion supporting the Service's position. In *Douglas County v. Babbitt,* 48 F.3d 1495 (9th Cir. 1995), the court found that ESA's procedures somehow "displaced" NEPA, despite the complete absence in the ESA itself of any statement of intent to do so. Second, the Ninth Circuit found that no NEPA process was required, because a critical habitat designation either had no effect on the environment at all, or if it had an impact, the impact was ameliorative. Third, the court found that the ESA furthered the goals articulated in NEPA, and that somehow excused compliance with NEPA's procedural requirements.

However, the Ninth Circuit case has been thoroughly refuted and discredited by subsequent cases in the Tenth Circuit Court of Appeals and the District Court for the District of Columbia. *Catron County Bd. of Commissioners v. U.S. Fish & Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996); *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108 (D.D.C. 2004). These cases present persuasive arguments diametrically opposite the Ninth Circuit's decision. First, while both NEPA and the ESA operate in the area of natural resources and the environment, they establish different goals and different procedures. The ESA seeks to protect species and their habitat; NEPA seeks to improve the federal government's information-gathering and decision making for the purpose of improving the *human* environment (which includes reference to social and economic factors). Both statutes include public participation procedures, but they are different. NEPA, for example, includes a public scoping process in which interested persons, among others, may participate in decisions about what issues are appropriate for consideration. The ESA provides no such opportunity for the public.

Second, critical habitat designations do in fact have serious consequences. The Service has attempted to downplay the significance of critical habitat designations – both in their impact on the regulated community and in their benefits for species – but as discussed above, the courts are increasingly rejecting the Service's arguments in this area. Further, because NEPA requires consideration of a broad range of impacts, including social and economic impacts, the fact that an action may have certain environmental benefits does not excuse compliance with the NEPA process.

Third, the question is not whether the ESA furthers NEPA's goals, but rather whether NEPA furthers both its own goals and those of the ESA. By seeking to improve the quality of federal decision making, application of NEPA would *improve* the Service's critical habitat designations.

The Service's response to the split between the Ninth and Tenth Circuits (prior to the issuance of the recent D.C. case) was to apply the Ninth Circuit's holding nationwide, except with respect to designations within the Tenth Circuit. This is backward, for two reasons. First, the Ninth Circuit decided the case wrongly, and the recent 2004 D.C. case is further evidence of this. Second, if forced to choose between the Ninth and Tenth Circuit opinions, the Service should choose the Tenth Circuit position. By including the NEPA process, it will ensure better decision making and a better process for the people who are affected by the ESA. Unless the Service takes near term action on its own initiative to reverse its policy and begin complying with NEPA, the ESA should be amended to require it.

IV. The Coalition Supports Enhancing the Role of States in Species Conservation

We support ESA provisions and programs which seek to enhance the conservation of species by encouraging and incentivizing private entities and states to take a more active role in various ESA-related processes. We believe this approach can be beneficial both to industry and to the conservation and recovery of species, but only if the Service operates in good faith to support the program.

A. Voluntary Conservation Plans

One area where this is certainly true is the implementation of "voluntary conservation plans" by federal, state and private entities. Unfortunately, when it comes to listing species, the Service often refuses to give adequate consideration to voluntary conservation plans, which often would make listing a species wholly unnecessary. That was the case with the Alabama sturgeon listing. And, like other concerns raised by this testimony, the most effective solution to this problem is a policy change within the Service – not necessarily a revision to the ESA unless the Service fails to act.

1. The Service Should, Where Appropriate, Use Conservation Agreements as a Basis for Deciding Not to List a Species.

Our experience indicates that, at least in some circumstances, regulated entities can join with state and federal governmental interests and citizen groups to develop effective conservation plans which may, in some situations, make listing a species unnecessary. For example, we were instrumental in forming the Mobile River Basin Coalition ("MRBC"), a consensus building organization actively supported by the Service, the Corps of Engineers, and other Federal, State, and local government agencies, businesses, industries, trade associations, and environmental groups. These efforts culminated in the "Recovery Plan for the Mobile River Basin Aquatic Ecosystem," which detailed objectives, criteria and tasks for the recovery of 15 freshwater species in the Mobile River Basin listed under the ESA. *See* 63 Fed. Reg. 35277 (June 29, 1998) (public notice requesting comments on draft recovery plan).

In addition, the Alabama-Tombigbee Rivers Coalition, the MRBC, and the Service developed a voluntary "Conservation Plan for Freshwater Sturgeon in the Alabama River" ("Conservation Plan") in 1996. The voluntary Conservation Plan stated that the "primary threat to the continued survival of the freshwater sturgeon is its limited numbers, and its inability to maintain its population." Accordingly, the Conservation Plan "outline[d] research priorities and

estimated costs that are considered essential for conservation of freshwater sturgeon in the Alabama River." Specifically, the Conservation Plan "proposed to develop a sturgeon propagation facility . . . and to undertake an overall five-year research program to obtain ecological, biological and genetic data needed for the long term conservation of the sturgeon, to develop propagation techniques for the fish, to ascertain its habitat needs, and to augment existing stocks to a sufficient level to ensure the sturgeon's long-term survival." The U.S. Department of the Interior, the U.S. Army Corps of Engineers, the Alabama Department of Conservation and Natural Resources, and the Rivers Coalition fully supported this five-year, multi-million dollar Conservation Plan and committed their resources to work together toward its implementation. In fact, Congress appropriated over $1.5 million to implement the Conservation Plan.

Similarly, we were instrumental in the development of a formal Conservation Agreement and Strategy for the Alabama Sturgeon ("Conservation Agreement"), which the Service, the State of Alabama, the Rivers Coalition, and other involved parties signed in 2000. The Conservation Agreement was developed through a long and often difficult process of discussion and negotiation. All participants, including the Service, agreed the plan represented the best hope for conservation and recovery of the Alabama sturgeon. It was supported by substantial funding and in-kind assistance from business interests.

Throughout the process of negotiating the Conservation Agreement, business interests were frank in expressing their desire to implement a program which would forestall the need to list the Alabama sturgeon. Despite the clear position of the State, businesses and industries, the Service subsequently listed the sturgeon anyway. Predictably, this caused industry and the Rivers Coalition to immediately withdraw their support, financial and otherwise, for the Conservation Agreement. Not surprisingly, since the failure of that process and the loss of broad-based support, the Service has been unable to implement adequate conservation measures in terms of effectiveness and available resources for implementation. As a result, no active recovery plan for the Alabama sturgeon presently exists.

In the final rule listing the Alabama sturgeon as endangered, the Service explained that, in their view, the Conservation Agreement was the "most viable approach to conservation of the Alabama sturgeon." 65 Fed. Reg. at 26456. However, the Service decided to list the Alabama sturgeon anyway, resulting in the destruction of the Conservation Agreement because, in the Service's words, "the certainty of the effectiveness of these efforts in removing existing threats remain unproven and [are] dependent upon many factors beyond human control." We still do not understand that reasoning, and the sturgeon has been the big loser of the Service's bad decision.

The Mobile River Basin Coalition was another innocent victim of the Service's decision to ignore the Conservation Agreement and list the Alabama sturgeon. That action destroyed the four plus years of trust and credibility which had been carefully nurtured among the members of the Coalition and had produced the only multi-species Recovery Plan for listed species anywhere in the country. As a result of the Service's listing decision, the Rivers Coalition and other business and industries terminated their membership in the MRBC, and to date none of those parties have been willing to engage in any further similar discussions with the Service. The Service demonstrated it did not really value those relationships developed with the private sector,

and it will be very difficult, if not impossible, for the Service to ever recreate that dynamic in the Mobile River Basin. In the words of Forest Gump, "Stupid is as stupid does," which was applicable to the Service's actions.

As discussed above, the formal Conservation Agreement would have guaranteed the best possible approach to restoring the Alabama sturgeon. In fact, we believe the ESA currently mandates that the Service should forego listing a species where an extensive state conservation plan would provide the species with a greater chance of recovery. For example, Congress stated in the ESA that "encouraging the States and other interested parties . . . to develop and maintain conservation programs . . . is a key to . . . better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife and plants." 16 U.S.C. § 1531 (a)(5). In addition, the ESA states that a "policy of Congress [is] that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). Section (6)(a) of the ESA also states: "In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States." 16 U.S.C. § 1535(a). Finally, Section 6(c) of the ESA states: "In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement . . . with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species." 16 U.S.C. § 1535(c).

Quite possibly the strongest authority for using a Conservation Agreement as the basis for refusing to list a species is found in Section 4(a)(1) of the ESA, which states that the Service must determine whether a species is threatened or endangered because of any of the following five factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1)(A). Although this language focuses on impacts negatively affecting a species, Section 4(b)(1)(A) requires the Service to "tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction. . . ." 16 U.S.C. § 1533(b)(1)(A). Read together, Sections 4(a)(1) and 4(b)(1) of the ESA require the Service to consider any State conservation measures which either positively or negatively affect a species' status (i.e., efforts which create, exacerbate, reduce, or remove threats identified through the Section 4(a)(1) analysis). Each of these sections makes it crystal clear that Congress intended for the Service to specifically consider any conservation efforts being made by the State when making a listing decision. We believe that the Service should begin giving greater weight to state-sponsored conservation plans as a means of providing the species with the greatest chance of recovery without triggering the ESA's costly constraints.