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VIA email [envtestimony@cga.ct.gov](mailto:envtestimony@cga.ct.gov)

Environmental Committee  
Connecticut State Capitol  
210 Capitol Ave.  
Hartford, CT 06106

**Re: Support for HB5104, Big 5 African Trophies Act**

Dear Environmental Committee Members,

Friends of Animals' Wildlife Law Program writes in support of HB5104, An Act Prohibiting the Import, Sale, and Possession of African Elephants, Lions, Leopards, Bland and White Rhinos and Giraffes, ("the Big 5 African Trophies Act"). While Friends of Animals has submitted additional testimony regarding the need for the Big 5 African Trophies Act, this letter focuses on the legal defensibility of the bill against any potential preemption challenges. This letter sets out the relevant legal framework and precedent to demonstrate that the bill, as drafted, could work with Federal Endangered Species Act ESA ("ESA" or "Act").

As explained in more detail below, the ESA and the Big 5 African Trophies Act both seek to achieve the same goal – protection of endangered species. Moreover, language from U.S. Fish and Wildlife Service's regulations and permits indicate that it intends to and encourages states to supplement the ESA with additional regulations to protect threatened and endangered species. *See* 50 C.F.R. § 10.3. Connecticut should do just that with the Big 5 African Trophies Act.

## LEGAL BACKGROUND

### 1. Preemption

The supremacy clause of the U. S. Constitution allows Congress to displace (preempt) state law through passing certain legislation within the scope of its constitutionally granted powers. *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986). The critical issue in a preemption case is whether Congress intended a federal statute to preempt state law. *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992). Preemption can occur either through express language in a congressional enactment, or by implication. There are three ways for a court to determine whether Congress implicitly intended to preempted state law: (1) field preemption, where Congress evidences an intent to occupy an entire legislative field; (2) conflict preemption, where state law actually conflicts with federal law, and compliance with both federal and state regulations is impossible; or (3) obstacle preemption, where state law stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

## 2. Endangered Species Act

The purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which these species depend in the United States and throughout the world. 16 U.S.C. § 1531(b). The Supreme Court recognized that by enacting the ESA, Congress “intended endangered species to be afforded the highest priorities.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

In enacting the ESA, Congress expressly provided authority for listing non-native species that are deemed endangered in their home ranges in other countries. Congress’s decision to include authority for listing of non-native species was based upon a desire to make the United States a leader in protecting species and their ecosystems both domestically and worldwide. The fundamental method by which the ESA protects endangered species is its aggressive restrictions on take<sup>1</sup> of ESA-listed species, as well as the prohibition on the importation of such species into the United States. 16 U.S.C. § 1538. Congress recognized the need to restrict or prohibit importation of species because aiding a market for endangered species parts and trophies can threaten the species’ continued survival. See H.R. Rept. No. 93-412, at 2.

Congress addressed the relationship of state and federal law in Section 6(f) of the ESA, which provides:

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. This Act shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined.

16 U.S.C. § 1535(f).

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<sup>1</sup> Take is defined by the Act to mean: “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532 (19).

The Senate included Section 6(f) because it believed that a federal wildlife program should not preempt similar state regulation. The committee responsible for the Senate bill reported that "while the Federal government should protect such species where states have failed to meet minimum Federal standards, it should not preempt efficient programs. Instead it should encourage these, and aid in the extension or establishment of others, to facilitate management by granting regulatory authority and making available financial assistance to approved schemes." Senate Comm. on Commerce, Report on the Endangered Species Act of 1973, S. Rep. No. 307, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S. Code Cong. & Ad. News 2989, 2991.

Comments on the House draft further expand on the power of states to pass stricter legislation to protect endangered animals, explaining "State law is not pre-empted, but is merely subject to the Federal 'floor' of regulations under the Act. Thus, laws already passed in States such as New York, California and Hawaii, which list additional species or prohibit such activities as sales within their jurisdiction would remain unaffected." House Comm. on Merchant Marine and Fisheries, Report on the Endangered and Threatened Species Act of 1973, H.R. Rep. No. 412, 93rd Cong., 1st Sess. 14 (1973).

### 3. Precedent

#### 1. Ninth Circuit

The Ninth Circuit has found that the ESA preempted a California law's prohibition on trade in African elephant products, where elephant ivory importer and boot manufacturer had permits to trade products made from elephants. *See Man Hing Ivory and Imports v. Deukmejian*, 702 F.2d 760, 764 (9th Cir. 1983); *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758, 759 (9th Cir. 1983). The permits at issue in those cases were conditioned on compliance with state law. The court, with little analysis, found that such provision was based on a regulation and only applied to laws related to health, quarantine, customs, and agriculture. *Man Hing Ivory and Imports*, 702 F.2d at 765 (citing 50 C.F.R. § 10.3 "nothing in this subchapter B, nor any permit issued under this subchapter B, shall be construed to relieve a person from any other requirements imposed by a statute or regulation of any State or of the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or other Service enforced statutes or regulations."). On the other hand, the Eastern District Court in *H.J. Justin & Sons, Inc. v. Deukmejian*, analyzed the legislative history and purpose of the ESA and held that the boot manufacturer's permit did not preempt, and was subject to, California law. 519 F. Supp. 1383, 1391 (E.D. Cal. 1981) *overruled* 702 F.2d 758 (9th Cir. 1983). As explained by the district court, the California law did not undermine the ESA, in which Congress demonstrated its willingness to leave stricter state laws unaffected. *Id.* Moreover, the court explained that the alternative interpretation, ultimately adopted by the Ninth Circuit, would result in the "anomalous" policy that would allow states to afford more protection for species not found to be threatened or endangered under the ESA and less protection to federally recognized endangered animals. *Id.*

## 2. Court of Appeals of New York and the U.S. Supreme Court

Similar to the California District Court, the Court of Appeals of New York found that the ESA's predecessor Act, the Federal Endangered Species Conservation Act, did not pre-empt New York statutes that prohibited the importation, transportation, or possession of state and federally listed endangered species. *Nettleton Co. v. Diamond*, 264 N.E.2d 118, 121 (N.Y. 1970). The court explained that it should not ouster the State's right to regulate absent an unambiguous congressional mandate. *Id.* at 122; *see also New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 421 (1973) ("Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one"). Although New York's law was more restrictive, the Court determined that it did not conflict with the ESA. *Nettleton*, 264 N.E.2d at 118.

Moreover, the New York court found the language in 50 C.F.R. § 10.3 mandated compliance with the State's stricter statute. *Id.* Here, ESA permits to import trophy animals generally disclose that the validity of the permit "is also conditioned upon strict observance of all applicable foreign, state, local, tribal, other federal law." This demonstrates that the permits provide a baseline and are conditioned on, rather than conflicting with, stricter state laws. Applications to import these threatened and endangered species also warn that "there may be additional permitting or approval requirements by your local or state governments, as well as required by other Federal agencies or foreign government to conduct your proposed activity." It is worth noting that 50 C.F.R. § 10.3 mandates that permits "cannot relieve a person from **any** other requirements imposed by a State or regulation of any State or of the United States. . ." and thus the Ninth Circuit erred in reading it as limited to health, quarantine and agricultural regulations.

Additionally, other courts, including the Supreme Court, have found that federal statutes that permit certain activities do not preempt state statutes merely because the state statute prohibits such activities. *See Cal. Coastal Com v. Granite Rock Co.*, 480 U.S. 572, 582–583 (1987) (federal approval of mining project did not preempt California's stricter environmental requirements); *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 720–721 (1985) (stricter local regulations concerning plasma donors posed no serious obstacle to related federal regulations); *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 222–223 (1983) (federal nuclear power plant license did not preempt stricter state licensing requirements); *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963) (upholding California's right to enforce regulations prohibiting the sale of certain federally approved Florida avocados); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 447 (1960) (upholding enforcement of city's smoke abatement ordinance against federally licensed vessels).

### 3. New Jersey Law and Consent Decree

New Jersey passed a law that “no person shall possess, transport, import, export, process, sell or offer for sale, or ship, and no common or contract carrier shall knowingly transport or receive for shipment any part or product of: (1) any specified African species . . .” N.J. Stat. §23:2A-6.1. A lawsuit, led by Conservation Force, challenged the regulation claiming the ESA preempted the law.

In this case, New Jersey did not dispute that the law was pre-empted as applied to people that had received ESA permits to import one the specified African species. *Conservation Force v. Porrino*, Civil Action No. 16-04124, 2016 U.S. Dist. LEXIS 194207, at \*2 (D. N.J. Aug. 29, 2016). As such, the parties to the case agreed and proposed an order that was approved by the Court. According to the order, the New Jersey law is “preempted by and void under Section 6(f) of the ESA (16 U.S.C. § 1535(f)) to the extent it prohibits any activity that is authorized pursuant to an exemption or permit provided for in the ESA or in any regulation which implements the ESA...” *Id.* In addition, the order states that the law is “not preempted to the extent it prohibits any activity for which a person or entity does not have federal authorization pursuant to an exemption or permit granted under the ESA or the ESA’s implementing regulations.” *Id.* Finally, the order specifies that the New Jersey law shall not be enforced against anyone for an activity that is authorized by an exemption permit provided in the ESA or in any regulation which implements the ESA. *Id.* at \*2-3.

As a result of this case, the New Jersey law is still in place, but will not be enforced against people or entities for activities that are authorized by an ESA or CITES permit.

Because the parties did not dispute this issue, the Court never analyzed the preemption issue. Moreover, the unpublished order from the U.S. District Court of New Jersey is not binding on courts in Connecticut.

### 4. The Big 5 African Trophies Act is defensible against a preemption challenge.

The Big 5 African Trophies Act is defensible against a preemption challenge because the ESA does not expressly preempt the Big 5 African Trophies Act as there is no indication that Congress intended to make the importation or sale of the Big 5 African species lawful. In fact, Congress expressly prohibited the importation and sale of endangered species. 16 U.S.C. § 1538. Moreover, special rules for African elephants and leopards, as well as other permitted exceptions, all require a case-by-case determination before the U.S. Fish and Wildlife Service can authorize the importation of these animals. Thus, there is no express provision that Congress intended to preempt this legislation.

There is also no evidence that Congress implicitly intended to preempt State legislation such as the Big 5 African Trophies Act. There is no field preemption because Congress did not intend to eliminate states from the field of wildlife protection. Rather, the ESA expressly provides for states continuing role in wildlife

protection. 16 U.S.C. § 1531 (a)(5); 16 U.S.C. §1535. The U.S. Fish and Wildlife Service regulations also indicate that it did not intend its permits to trump more restrictive state laws or regulations. 50 C.F.R. § 10.3.

There is also no conflict preemption because one can easily comply with both the Big 5 African Trophies Act and the ESA by refraining from selling or importing the endangered species covered by the legislation. Finally, the Big 5 African Trophies Act does not conflict with the goals and purposes of the ESA and was intended to promote the protection of the species covered by the legislation. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (“when the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered”). Congress declared that the purposes of the ESA are to provide a means to conserve endangered and threatened species ecosystems, and to provide a program for the conservation of such endangered species and threatened species. 16 U.S.C. § 1531 (b). Similarly, the Big 5 African Trophies Act was intended to establish a program to conserve endangered species. As such, there is no support for the argument that Congress intended the ESA to preempt the Big 5 African Trophies Act. Finally, because the permits require compliance with stricter state laws, there is no indication that the permits should be read to preempt state law.

## CONCLUSION

Here, the ESA and the Big 5 African Trophies Act both seek to achieve the same goal – protection of endangered species. Moreover, language from the U.S. Fish and Wildlife Service’s regulations and permits indicate that it intended and encouraged states to supplement the ESA with additional regulations to protect threatened and endangered species. *See* 50 C.F.R. § 10.3. Connecticut can do just that with the Big 5 African Trophies Act and the ESA should not be interpreted to override and take away those protections.

Sincerely,

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