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Lessons Learned Protecting and Restoring Wildlife  
in the Southern United States under the Endangered Species Act  
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As the nation=s premier wildlife protection law, the Endangered Species Act (ESA) has received a great deal of attention. Designed to prevent the extinction and to assist in the recovery of the rarest creatures on Earth and particularly those in the United States, the ESA was the first major federal statute to attempt to save species for their own sakes, regardless of any measurable value to humanity. Although it is arguably the strongest of America's environmental laws, in reality, the ESA has done very little to prevent the mass extinction that is currently occurring throughout the world. Neither the economic apocalypse that some opponents claim, nor the wonder law that some environmentalists claim, the ESA needs to be viewed in a proper perspective that reveals its true strengths and weaknesses and its impacts.

There are indeed a limited number of full success stories under the ESA. The recoveries of the American Alligator, the Brown Pelican, the Peregrine Falcon, the Bald Eagle and a handful of other species can be credited to the protections provided by the ESA and the work of the Departments of Interior and Commerce under the Act. For each species that has recovered due to efforts under the ESA, however, there are hundreds of other listed species that have made very little or no progress at all; at best, the majority of species listed under the ESA are just barely surviving and have been given only a short reprieve from extinction. Further, for all those hundreds of species listed under the Act and protected somewhat by it, there are thousands more that await listing and protection. Indeed, a number of species have gone extinct while waiting to be listed and protected under the mechanisms of the ESA. Chronically under-funded, a situation encouraged by Democratic and Republican administrations alike, the recovery efforts of the Fish and Wildlife Service under the Act often amount to nothing more than "too little too late" for most species listed under the Act. Nonetheless, the ESA stands as the United States' best effort to date at preserving the biological diversity of the country.

On the other hand, critics of the Act claim that it has unnecessarily adverse impacts upon the nation=s economy. However, these critics can cite no studies to substantiate this claim. From 1987 through early 1992, almost 74,000 development projects came into potential conflict with endangered species under the Act, yet only 18 of those projects had to be stopped. As Professor Oliver Houck pointed out, "The number of projects actually arrested by the ESA is nearly nonexistent.... Alternatives to avoid jeopardy included a mix of measures neither surprising nor in many cases very demanding.... Rather, they reflect the bare minimum of alternatives necessary to keep those species that are listed hanging on, unrecovered, for an indeterminate time." Oliver A. Houck, "The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce," 64 U. Colo. L. Rev. 277, 317-23 (1993). During the later years of the Clinton Administration and throughout the Bush Administration, I am aware of absolutely no projects have been stopped due to the ESA.

Although the ESA will sometimes have an adverse impact on a particular project, the vast majority of economic projects experience no difficulty under the ESA; indeed, at least 99.9% of developments never have an ESA problem at all. In highly publicized instances such as the controversy over the Northern Spotted Owl in the Pacific Northwest, the real cause of any economic problems was gross mismanagement of natural resources, such as logging at unsustainable rates. Rather than causing job losses and economic impacts, the listing of the owl under the ESA was a consequence of resource abuse, just as the economic impacts were. Often, the ESA and the creatures it attempts to protect are used as a convenient scapegoat to hide the fact of years, even decades, of irresponsible wasting of natural resources. When the facts, rather than the rhetoric, are examined, there is no evidence that the ESA or environmental statutes and regulations in general have any detectible adverse impact on the nation=s economy. Political scientist Stephen M. Meyer of the Massachusetts Institute of Technology found that environmental regulations have no perceptible adverse economic impact at the state and national levels. The states with the strongest environmental regulations had the strongest economies, and the states with the weakest regulations had the weakest economies. Meyer, *Environmentalism and Economic Prosperity: Testing the Environmental Impact Hypothesis* (M.I.T. 1992). This study also found that growth in gross state product during the 1980s was more than twice as high in states with strong environmental regulations than in states with weak ones. Construction jobs grew by 53 percent in strong states and fell 1.4 percent in weak states. The same correlation holds true for the 1970s. Further updates by Professor Meyer in more recent years find the same results. See his articles at <http://web.mit.edu/polisci/faculty/S.Meyer.html>.

This brief examination of the claims of both the supporters of the ESA and its opponents gives a better and more

accurate perspective of the Act. The ESA is not some powerful, miracle law, and it is also not some kind of economic catastrophe, or even a hindrance. Instead, it is a singular statute that attempts to accomplish something humanity has not tried before through statutory means: the saving of other species for their own good, regardless of whether those creatures have any significance to humanity or not. As such a unique statute, the ESA attempts noble things; however, although the Act sometimes succeeds, it routinely fails in its mission to bring species back from the brink of extinction. In its mission as an emergency room, as a last ditch attempt to prevent extinction, though, the ESA is arguably somewhat successful, because although it has not recovered many species, it has temporarily prevented most of the listed species from continuing to slip into the abyss of extinction. For the person who has to deal with a situation involving an endangered species, it is important to keep the ESA in correct perspective and understand how it really works in order to avoid the exaggerations and self-interested propaganda that can beset an ESA case. Working examples of protecting wildlife under the ESA, and other federal laws, exist in the Southeast.

Basically, the ESA operates blind; there is little effort to see the interaction of various species and to plan for their needs together. As a last resort, the ESA has had, and can have, only limited success. The current state of the law in protecting rare species does too little too slowly, even if the Act and the agencies under it were fully funded. Yet the ESA is still the most important of the few laws we have that emphasize the value of something on this Earth in terms other than its benefit to humans. Further, the ESA is unpredictable and erratic in giving businesses an idea of how to operate. These reasons emphasize the need to make the ESA more efficient. The Act could use strong devices for protecting ecosystems and habitats instead of just protecting species one at a time. If our law provided, for example, that a certain number of Pacific Northwest old-growth forest ecosystems be preserved in their entirety, there would be no need to go through the motions of individually listing and protecting species such as the Northern Spotted Owl and the Marbled Murrelet. Protecting the whole protects all of its parts, and such an approach would be more effective at preserving species and more efficient in handling land management problems and in alerting business as to where and how development projects could be undertaken.

The dismay that the survival of one species among all the countless millions of species in the world could stop a major project is fairly common, but it oversimplifies and minimizes the real idea behind the ESA. The point is not to save one species but to save all species, to protect the entire biodiversity of the Earth upon which all life, including humanity, depends. To developers it seems a small thing to sacrifice one species to their project and their economic interests, but the value of any species is beyond humanity's ability to measure, and what is in danger is not just one species, but the entire ecosystem of which that species is a part. Because of the emphasis placed on saving one species at a time, the operation of the ESA has fueled this erroneous viewpoint to some degree. Again, a change to an ecosystem/habitat approach would put the goals of the Act in a better perspective and allow for the protection of all components of an ecosystem at one time. Furthermore, economic survival depends upon the survival of healthy ecosystems. Since our entire economy is built upon the environment of the Earth, the loss of biodiversity cannot continue for long before a degrading environment leads to degradation of our economy and our own health as a species.

If this were about health care, it is true that the ESA emergency rooms do not work nearly as well as they should, but that is no reason to get rid of those emergency rooms or to make them even less effective. The current crisis points out the need to design, build, fund and operate effectively an ENTIRE health care system so that the need for emergency rooms is reduced and ill health is reduced.

Instead of continuing the interminable traffic jam of litigation over the ESA, people who work with the ESA need to focus on more proactive solutions to conflicts under the Act. We can remain entrenched in a warfare of wills between environmentalists who demand full implementation of the ESA, faults and shortcomings included, and business interests and an Administration committed to doing whatever it takes to maximize profits. Or we can try something else.

An excellent example of how the current ESA can work to assist development instead of hinder it comes from central Alabama. Developers want to build up the Exit 38 area on Interstate 85 in east-central Alabama, but they do not want to make it a typical exit development; they want a forward-thinking model of quality development that enhances (and is a gateway to) the unique historic heritage of the area (Tuskegee). In the very middle of the planned development is a stream that is designated critical habitat for three listed endangered species. In a normal situation, that could kill, or at least cripple, the plans for development. Instead, WildLaw showed them how this was a great and unique opportunity for a development that would HELP endangered species. The species, all mussels, are currently being hammered by illegal use of off-road vehicles (ORV) riding in the stream. Developing the area will close off access to the stream by ORV users. If the development is also well done in how it handles basic environmental issues (such as sediment, chemical runoff, etc.), as they already plan to do, enclosing the critical habitat in a greenway at the center of the development would IMPROVE the lot of these species, thus making the development a national model and a prime candidate for federal funding from politicians who want to see positive ESA solutions instead of the usual train wrecks, such as Alabama Senator Richard Shelby. Everyone involved in the development LOVED this message and now highlights the ESA issue as part of what they are doing instead of fighting it.

WildLaw could have chosen to litigate over the species and critical habitat at Exit 38. Instead, we chose to try to work with

the developers involved. Because the developers were also open to working with us, a solution was found that not only makes things better for the species but also better for the developers' bottom line.

Now, development work throughout that area does not get past the initial planning without environmentalists being brought in and listened to. The paradigm of conflict and distrust is giving way to an era of trust and cooperation. Development and sprawl WILL happen; no willful and unrealistic wishing will stop it, and no stretching of existing law can stop it. The best we can do is guide sprawl and development away from the best remnants of habitat and toward better ways of impacting the environment. Any claims to the contrary are fantasy.

Swift and favorable resolution of potential ESA conflicts begins with early recognition of their possibility. Development projects and other economic activities often give early consideration to possible problems with zoning, geology, labor, architectural requirements, materials availability and costs, transportation availability, real estate costs, water, sewer and electrical infrastructure, and many other possible factors and events that may impact a project. With increasing environmental problems and public awareness of those problems, many business activities now regularly screen for potential hazardous waste problems, toxic contamination difficulties, ground water impacts, surface water pollution concerns, public perception issues, and a host of other possible environmental impacts. With the increasing sprawl development of wildlife habitat and the rapidly increasing rate of species extinction, both in the United States and worldwide, consideration of potential ESA conflicts early in the stages of a planned project is not only prudent business policy but also good public relations material. Redesigning the ESA to encourage more such wise and early planning of development with the impacts to wildlife and biodiversity in mind would be helpful.

But it is absolutely amazing how many development interests NEVER give consideration to these matters. If business interests would be willing to see environmentalists not as natural enemies, they could learn from and profit from the expertise and knowledge of those who work to protect rare species. If environmentalists would be willing to see themselves as something more than just litigators and "warriors" for a dying cause, they might be useful.

Many ESA problems occur long after a project has begun and progressed some way towards completion. Architectural, building supplies, and construction labor contracts are worked on and considered long prior to work starting on the ground, but often, possible wildlife issues are never considered. One would never begin building a 20-story condominium if the architect had only completed a rough sketch for the first floor; one needs to know all the possible architectural issues and engineering challenges before one begins pouring concrete. With the ever increasing depletion of wildlife species and their habitats and the increasing demand for development space, wildlife and ESA conflicts will grow, and the smart business will prepare for them as they would any other reasonably foreseeable event.

Mainly, one's chances of having an ESA problem are still very slim. The overwhelmingly vast majority of projects simply never have a potential ESA problem, and the vast majority that have a potential problem are shown not to harm the species in question and are not hindered. The rarity of actual ESA conflicts with developments show that the Act does not cause any major problems to the economy; however, the prudent business person can take a few simple steps to virtually insure that a conflict will not arise and derail a specific project. As these conflicts increase in the future, such prudence will reward those who know the workings of the ESA and are prepared for such problems. Making the ESA more proactive would also help head off and solve more of these problems as they grow in the future.

One major weakness of the ESA that both proponents and critics agree on is that the Act's focus on individual species causes it to be less effective and to give business interests less warning of possible conflicts. Focusing on individual species is an emergency room approach that tries to save a species only after it is already on the brink of extinction. An emphasis on habitat and an ecosystem-wide approach to preserving biodiversity could lead to a more efficient ESA. America would be stupid to base our entire human health care system on emergency rooms alone, but we do that for our wildlife health care system. Identifying ecosystems that need preservation will enable preservation of all the species in those environments before they each reach the edge of extinction. Further, a habitat approach will give more consistent warning to business of where development projects can, and cannot occur. Knowing the habitats that are protected will give development interests more continuity, simplicity and predictability.

Still, the ESA in its current form can work much better than it often does; the problem is not in the law but in the attitudes and actions of people. Several general points on handling an ESA problem under the current law are: (1) full cooperation in the consultation process will normally speed up and facilitate a favorable result. (2) The hiring of "experts" to say what one wants them to say rather than speaking the truth and dealing with it does not help. Hire only the best and have them work with the Service rather than taking an adversarial approach. (3) Taking an adversarial stance with the Service increases negative media exposure of the project and increases the chances that environmental organizations will become involved. Environmental groups tend to look favorably upon the Fish and Wildlife Service, particularly the Service's field personnel who do the real work of wildlife conservation, and are naturally suspicious of any development that will have an

impact on a rare species. The lack of full disclosure and cooperation makes the environmentalists believe that the project is harmful, even if it is not. If a project is not harmful to a species, cooperation, not confrontation, will prove that point and allow things to proceed. If the project turns out to be harmful in some unexpected way, then cooperation again allows for a speedier and better result by showing the developer's sincerity and willingness to adapt to the needs of the listed species.

Consider the habitat conservation plan (HCP) submitted by International Paper (IP) on the Red Hills Salamander. The Red Hills Salamander lives only in a specific hillside habitat of the Red Hills of southern Alabama; it is such a unique species that it is the only member of its genus. Most of the salamander's habitat is owned by a number of large timber companies. The first company to request a '10 permit and to submit a HCP on the salamander was IP. Instead of hiring a biologist who would just say what the company wanted him to say, the company opted for hiring a member of the Alabama Natural Heritage Program who was widely respected both by Fish and Wildlife Service personnel and by environmental groups. Instead of hiring the best "biostitute" they could find, IP hired the undisputedly best field biologist in all of Alabama. Wanting to know the truth rather than wanting just to hear what seemed least expensive for the company, IP allowed this biologist full access to its property and its records on the salamander and its timber practices. The result was a report that no one questioned as to its accuracy and completeness. Basing its HCP on that report and adopting most of the biologist's suggestions, IP came up with a good plan. The Fish and Wildlife Service was pleased with the HCP, and the world's top expert on the salamander, while not as pleased, found it acceptable. Environmental groups who were watching the salamander and IP's actions found the plan acceptable, and IP got its permit without a contest. IP's open and cooperative attitude along with full opportunity for the environmental community to participate produced a swift and favorable result for the company and an improved situation for the salamander. Because no one was actively surveying and managing their timber lands for the salamander, IP's HCP would set a standard for the other companies when they requested their '10 permits. Thus, before IP's HCP, the salamander's condition and future were uncertain; after IP's HCP, the state of the species was better known, its habitat was better protected, and IP was shielded from potential '9 liability, all without any difficult media or court confrontation.

In an opinion piece in The Wall Street Journal, Mark Suwyn, the executive vice president of IP's forestry and specialty products division, stated that IP took great satisfaction in developing the Red Hills Salamander HCP. Suwyn, "We Saved the Salamander--But It Wasn't Easy," The Wall Street Journal (November 29, 1993). However, he noted that the success of IP's HCP was due to the company's great financial assets, and he surmised that small land owners might not be able financially to go through the HCP process, thus leaving themselves exposed to possible § 9 liability if they proceed or economic loss if they do not. The Service has found successful ways to "group" small landowners into one HCP process, such as the Red-cockaded Woodpecker HCPs for entire states such as Georgia, which then eliminates the vast bulk of expense and difficulty for smaller landowners. While such groupings will not work for every species, they do work for wide-ranging species that have well-known habitat needs. Information on the success of that approach for the RCW can be found at "Georgia's Red-Cockaded Woodpecker Safe Harbor and Habitat Conservation Plan," <http://www.ncedr.org/casestudies/hcp/georgia.htm>.

In all honesty, it must be stated that for every successful HCP I have seen, I have seen at least twice as many that failed utterly to do anything to protect or enhance the welfare of wildlife. The HCP process CAN be used successfully, but it has also more often been abused.

Although there are a few small fringe groups that do take contrarian positions as a rule, no matter what, the vast majority of major national and state environmental groups are not opposed to development. Any claims to the contrary are issued by those without any knowledge of how environmental organizations work or by outright liars. Most active environmentalists do not oppose development that is well-planned and that provides economic growth. Further, most environmental groups take reasonable stands on development issues, and if they can be shown that a project will not have significant adverse environmental impacts, most will not oppose it. Knowing this, the developer who confronts a potential ESA conflict should engage in active cooperation with the environmental community rather than in reactive confrontation. Indeed, environmentalists have real and unique knowledge that can not only avoid a conflict but also might make the business more money in the long run.

Where does the ESA go from here

The Endangered Species Act has been due for a reauthorization since 1992, but the numerous controversies surrounding it have preventing any changes from being made to the Act. The ESA needs a strong reauthorization which focuses on recovery, not just the survival of listed species, and that will shift the focus more toward ecosystems and entire habitats instead of just a species-by-species piecemeal approach. Currently political realities make real improvements to the ESA very difficult, at best.

Litigation under the ESA as it exists now seems destined to continue. WildLaw has filed a share of the cases under the ESA, especially in the southeast, but we have always tried to be careful and very strategic in deciding what cases to file

and when. We have sought to protect either critically imperiled species or umbrella species such that protecting them would protect many other species and much habitat. A key example was our nine-year fight (consisting of three lawsuits) to get protection for the Alabama Sturgeon. Protecting the Alabama Sturgeon protects the entire Alabama River from unnecessary water withdrawals. What water withdrawals are we talking about? Atlanta's plan to withdraw up to 90% of the water in the two main tributaries of the Alabama, the Coosa and Tallapoosa Rivers; the usage of water from the rivers by Alabama and its industries does not harm the fish. The Coosa River has already experienced the largest mass extinction documented in American history, the loss of more than 60 aquatic snails and mussel species due to the construction of the string of dams on it by Alabama Power in the early 1900s. Far from being a burden on economic development in Alabama, the Alabama Sturgeon is literally the state's last hope for legally limiting the endless sprawl of Atlanta that, if fully realized, would mean the destruction of Alabama's economy. Try running and growing a state's economy on 10% of the water that the state used to have.

Other litigation, however, does seem more of an exercise in ability than in reality. The ESA does have set timelines for making decisions, and a case over a failure to meet those guidelines is generally an easy case to win for an environmental group. Many lawsuits under the ESA do appear to be nothing more than grabs at "low hanging fruit," without much, if any, consideration of the strategic and even biological values to be won. Has too much litigation been filed under the ESA? Absolutely, BUT that litigation is NOT the problem; it is a symptom of the problem.

The problem is that we, as a society, have not decided yet whether we care enough about God's other creatures, and even about our own species' long-term environmental and economic health, to address fully what has to be done to protect biodiversity in the United States and the world.

But what can be done right now with the ESA? Due to too much litigation and the constant refusal of the Administration and Congress to give the Fish and Wildlife Service the funding it really needs to do its ESA adequately, the Fish and Wildlife Service is caught in a vice grip. This impasse can be broken one of several ways: (1) Congress can adequately fund the work under the ESA (that will most likely never happen, especially since the agency never asks for anything within two orders of magnitude of full funding), (2) environmentalists and business interests can find ways to try real solutions to species problems so as to avoid ESA showdowns (some of this does occur, as seen above, but not nearly enough), (3) Congress can fundamentally change the ESA so as to eliminate these legal problems (but that would increase the ecological problems for rare species), or (4) Congress can bring ALL the stakeholders together to find ways to truly improve the ESA to make it better at protecting biodiversity while not harming economic interests.

Option 3 seems popular on Capitol Hill right now, but "reforms" that are really just quickie political tricks to thwart legal problems will not make the real problems go away. Option 4 is the only one with a chance of actually doing something positive, both for imperiled species and for the long-term health of the human economy. Here are some of my random ideas for starting option 4:

In February 2003, the U.S. Forest Service brought together approximately 100 interested people to discuss options for protecting biological diversity on the National Forests under the new National Forest Management Act regulations. I was one of the participants in that workshop and the only environmentalist/conservationist who gave a presentation at it. While the agency ultimately ignored everything this group suggested, the people and the balance of types of people (agency, industry, scientists, enviros, etc.) at that workshop was excellent. No party of interest could claim not to be adequately represented there. Given a few more days and a real mandate to find common ground solutions to problems on the National Forests, I guarantee that that group would have found at least a handful of common sense solutions 98% of everyone would have agreed with. The agency could have then moved forward on those consensus items and left more contentious issues aside for the time being, thus accomplishing much needed work in the public forests and reducing litigation significantly. The Forest Service chose to go another route and now remains mired in litigation, most of which it loses.

Before Congress goes about changing the ESA in ways that people "think" will improve it, why not pull together the best minds and all the interested parties and task them with finding solutions, with finding changes that make sense for us to agree to try? Changing the law just to change it in response to litigation will result in one thing, more litigation to find new ways to use the law in litigation. As long as the Endangered Species Act exists, a conservative judge somewhere (and I mean a real conservative) will require the agencies to do something. Once they have to do something, people will litigate over that something endlessly, so long as the underlying conflicts exist. You cannot give agencies unbridled discretion in an attempt to make them untouchable in court. Unbridled discretion is totally anathema to the conservative ideal of limited government. Thus, a true conservative judge, not a "liberal" one, will be the one who will resurrect the litigation wars over the ESA if all you do is amend the Act in an attempt to limit litigation. I have practiced in front of more than 100 judges, and the ones who do the most to enforce the ESA the strongest are ALL Reagan and Bush I appointees.

If and when such a brain trust on the ESA is convened, my humble suggestions for ideas to consider follow: It seems to me

that the two driving forces need to be: (1) what will work better to improve the survival chances for rare species (the current system has hit a wall trying to be an emergency room and nothing else), and (2) how can (1) be accomplished in ways that give incentives to private landowners and interests to assist in species conservation and that do not penalize people for using their land in otherwise legal ways.

As a private forest landowner myself, I feel that, on the private lands side of the ESA, all punitive measures need to be removed, except for direct, willful killing of a listed species (such as shooting a bald eagle). Indirect takings of listed species need to be made noncriminal and non-illegal civilly, but tied to some tracking/study mechanism so we can learn just how much damage those things (like development, timber harvest, etc.) really do or do not adversely impact species. We could set up a system whereby if landowners, developers, etc., agree to report all the impacts from indirect take (such as the bald eagle leaves its nest due to the construction of condos next to the next tree), their activities are permitted and they have full immunity from all such takes and harm. The agencies' budgets and abilities for doing such monitoring would have to be enhanced. Underfunding these agencies is a key reason for the problems (especially the litigation) we face now.

Thus, permitting would not be the convoluted mess it is now trying to modify development plans to minimize impacts, but a swifter process that notifies the federal agencies and then sets up monitoring by those agencies for scientific purposes; once monitoring plans met requirements set in the Act or by regulations, the permit would be automatic. All this would be tied to an incentives program (such as tax credits, assistance programs, conservation easements and their tax breaks, etc.) that would reward private landowners and developers for doing more than the minimal monitoring program, such as setting aside areas for the species, changing plans to minimize impacts, etc. Direct takings, such as shooting or trafficking in listed species, would be much more aggressively funded, pursued and prosecuted.

To make up for lessening species protections on private lands, protections of species on public lands would need to be increased by beginning ecosystem monitoring and restoration/conservation programs that would look to harmonize management with doing minimal harm to species and preventing more species from needing listing. Basically, we need to move away from the emergency room only approach of the current law and build a health care system for critters (although the emergency room would still have to be there to some lesser extent). This would be tied to a larger and more targeted land acquisition/conservation easement program to gain key lands and ecosystems into public protection from willing sellers.

Efforts to restore degraded public lands would fit in well with increased ESA protections for species there. A national model of success on protecting wildlife on public lands can be found in the National Forests of Alabama. In 1992, the National Forests in Alabama were the WORST of the forests in the whole Forest Service system; they violated every federal law as often as they could in order to "get the cut out." Yes, it did take a series of lawsuits, appeals and other legal actions to finally shut down all illegal logging in the National Forests in Alabama in 1999. Since then, however, the leadership of the Forests and much of the staff changed. Instead of continuing the fights over bad management, they decided to meet with us and see if we could find agreement on solutions for good management.

Now, all the National Forests in Alabama are implementing scientifically-valid restoration programs, all of which were prepared under (and in full compliance with) the 1982 NFMA regulations and the ESA. These restoration programs are immensely successful. Being the first to do this new type of restoration work, the Conecuh National Forest prepared a full Environmental Impact Statement (EIS) on what restoration is needed for that forest's unique Longleaf Pine/Wiregrass ecosystem (the rarest forest type in North America) and on what work could be done in five years to correct past mismanagement and restore the natural and healthy forest native there. That restoration plan was not challenged legally in any way and succeeded, and it has won national awards. National Forests in Louisiana, Florida and parts of Mississippi are also doing great work at Longleaf Pine restoration, all in compliance with NFMA and the ESA. Survey data on threatened, endangered and sensitive species is being collected and analyzed. Public participation is open and good. NEPA analysis for most of these projects is exemplary and does not slow down the agency at all. Indeed, these forests have found that doing NEPA analysis right, instead of trying to shortcut NEPA, makes their final decisions better and more successful. The same could work for the ESA.

I personally do not oppose revising the scientific standards portion of the ESA, SO LONG AS the scientific standards that are adopted are indeed SCIENTIFIC, and not political in design. Why not convene a blue-ribbon panel of scientists from many perspectives and with credentials that no one from any side could attack and have them develop standards for listing, delisting, critical habitat, recovery plan designs, etc.? As for critical habitat, I would make its protections stronger on public lands and, for private lands, make it advisory, so that it guides conservation efforts (like land acquisitions, conservation easements, local planning, incentive programs) but has no actual limiting impact on private landowners. Indeed, if the incentives package is designed well enough, having land designated critical habitat would actually be an economic boost to a landowner, if and only if, they decided to make advantage of it. If they wanted to pave the critical habitat over anyway despite the incentives to do something better, they could do so freely.

And further, because every species is a unique and special creation of the God who made us all, perhaps we should not be

so cavalier about those that have passed into extinction at our hands. We should not forget so easily. We should do something to remind ourselves and recommit ourselves to doing a better job of stewardship with what the Lord has given us in trust for future generations. As we have memorials to every war, so the brave dead and the lessons of that war are not forgotten, just as we have the Civil Rights Memorial in my home town of Montgomery, so that those who gave their lives for equality are not forgotten, perhaps we should erect a fitting monument to the species that have gone extinct during our watch. As my friend Professor Dan Rohlf said:

“Society remembers things for many reasons, not all of which are pleasant. Wars, calamities, and episodes of genocide are seared in society’s collective memory in museums, memorials, books, and other cultural expressions, in part to remember victims, and in part to remind society of the tragedy and horror of these occurrences in an effort to prevent similar ones in the future. However, there are few, if any, reminders of extinct species. Therefore, as Cokinis points out, people quickly and unfortunately become accustomed to a biotic landscape that no longer has clouds of passenger pigeons (*Ectopistes migratorius*) numbered in the millions or billions, or huge ivory-billed woodpeckers, called by some the ‘Lord God Bird,’ drumming on huge trees deep in Southern swamps. Other monuments have demonstrated the power of a simple list of names of the fallen as a spare, yet potent, means of keeping memories and knowledge alive. A list of extinct species could perhaps do likewise. It may be an uncomfortable reminder of human and agency failures. Yet it would almost undoubtedly serve as a source for interest in species that no longer exist, and in the causes of their demise. And with this interest, increased resolve to protect and restore the biosphere’s biological heritage, and thus hope for the future of all species on the threatened and endangered lists, may follow.”

Daniel J. Rohlf, “Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years,” 34 *Envtl. L.* 483, 552-53 (2004).

The ultimate issue comes down to: what is it we want to accomplish here? Do we want to find solutions to improve the environment and the survival of God’s special creatures, and thus improve the long-term chances of the survival and advancement of our own society and economy? Or are we just going to keep playing expedient, short-term political games with extinction, something all sides and people involved (including me) are guilty of?

I deeply appreciate this opportunity to address the Committee and present this testimony before it. I remain committed to working with the Committee’s members and staff to find real solutions for making the ESA a better and more effective law. Representative Joe Barton has publicly invited environmental groups “to come out of the trenches” and meet y’all halfway. If that invitation is truly sincere, as I believe it is, I am here to do that.

Thank you,  
Ray Vaughan