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TESRA To The Rescue?

The Threatened and Endangered Species Recovery Act of 2005, Its Affects On The
Endangered Species Act of 1973 And On South Carolina

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I. Introduction

In late 1973 President Richard M. Nixon signed the Endangered Species Act (“ESA”) into law after it had a nearly unopposed march through both Houses of Congress.¹ The express intent behind the ESA was to create a movement in the nation by requiring wise land-management practices with the goal of recovering species that had become threatened, endangered, or extinct. Congress specifically noted that all species

¹ <http://www.environmentaldefense.org/pressrelease.cfm?ContentID=1462> (Last viewed March 22, 2006) This press release, dated December 28, 1998, discussed the Environmental Defense Fund’s celebration of the 25th anniversary of the Endangered Species Act. The EDF celebrated the occasion by releasing state-by-state summaries of the progress made since the ESA’s inception. This summary was specific to South Carolina.

“are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people” and thus should be offered greater protection.² Nearly thirty-three years later the success or failure of the ESA is a hotly debated topic which has led some to call for reform.

Those who tout the ESA’s success in South Carolina do so while pointing to notable recoveries of species such as the bald eagle. In South Carolina alone the bald eagle saw a rise from 59 pairs in 1990 to 114 in 1997.³ South Carolina also was home to the first recorded east coast nesting of the endangered Kemp’s Ridley sea turtle in May of 1992 at Litchfield Beach.⁴ Further, supporters point to the decline in drowned sea turtles in South Carolina’s waters. The number dropped significantly from an average of 224 a year in the 1980’s to 127 in the 1990’s.⁵ Environmental Defense, an environmental advocacy group, asserts that this turnaround is a direct result of improved fishing techniques, notably the use of turtle excluder devices on shrimp fishing nets, due to the existence of the ESA.⁶

² <http://www.state.sc.us/forest/mesa.htm> (Last viewed March 27, 2005) This article was published by the South Carolina Forestry Commission which was established by law in 1927. Its mission statement states, in part: “The mission of the South Carolina Forestry Commission is to protect, promote, enhance, and nurture the forest lands of South Carolina in a manner consistent with achieving the greatest good for its citizens...The Forestry Commission shall have general and specific responsibilities for the promulgation and enforcement of laws and regulations related to protection of the forest and its associated values”.

³ <http://www.environmentaldefense.org/pressrelease.cfm?ContentID=1462> (Last viewed March 22, 2006)

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Those who call for reform of the ESA do so while citing three weaknesses of the Act. First, they argue that the ESA has not performed satisfactorily in its ability to move species from being on the endangered list, to the threatened list, to off the list altogether. This argument centers on the ESA's lack of parameters for removing species from the list. Reform supporters note an inexplicable absence of a plan within the ESA to name, monitor, and remove species from the list in a timely manner.⁷ Those supporters essentially argue this point as stated by John C. Nagel in his book, The Law of Biodiversity and Ecosystem Management, "Listing is not supposed to be forever. The goal of the ESA is to help a species recover so that it is no longer in danger of extinction and no longer in need of the law's protections."⁸ Second, reform supporters argue that the ESA does not adequately address the adverse effects that land use restrictions impose on land owners. Under the ESA, once a species is identified as inhabiting a certain parcel of land the landowner then has a duty to abstain from any activity that may be deemed to take a protected species. "Taking" a species is defined in the South Carolina Code Annotated §50-10-20 as "harass, hunt, capture, kill". Landowners, on the other hand, argue that abiding by the mandates of the ESA results in an uncompensated governmental "taking" of their property. Finally, reform supporters argue that the scientific data used to maintain the list is not the best available data but instead is a standard that is too open to interpretation.

⁷ John C. Nagle and J.B. Ruhl. (2002) The Law of Biodiversity and Ecosystem Management 153 (N.Y. Foundation Press). This excerpt illustrates the frustration that many have with the Endangered Species Act's low number of fully recovered species and species which seem to stall on the threatened level.

⁸ *Id.*

These differences of opinion led to the first significant attempt to reform the ESA with the introduction of HR 3824 in 2005 by Representative Richard Pombo of California. The bill, named the Threatened and Endangered Species Recovery Act of 2005 (“TESRA”), passed in the House of Representatives on September 29, 2005, just ten days after being introduced⁹. The bill now sits in the US Senate committee and could come up for vote this year.

Part II of this paper will examine the current state of environmental law in South Carolina by examining the ESA and pertinent case law which illustrate the ESA’s effects on South Carolina ecosystems, land use practices and landowners. Part III of this paper will examine HR 3824, the major changes it will bring to the ESA and the current arguments being made for and against the bill. Part IV will then analyze the changes that TESRA is expected to make in South Carolina.

II. The Endangered Species Act and South Carolina

South Carolina’s response to the Endangered Species Act was to enact the South Carolina Nongame and Endangered Species Conservation Act of 1974 (“SCNESA”) which is found in section 50 of the South Carolina Code. This act, unlike the Endangered Species Act, only protects animals and not plants.¹⁰ Like the Endangered

⁹ <http://www.scwf.org/articles/index.php?view=514> (last viewed April 26, 2006) The South Carolina Wildlife Association was originally founded by sportsmen in 1931. Today, however, it serves as an organization which seeks to give a voice to all who enjoy, and wish to conserve, nature. This particular article chronicled the rising of TESRA and its potential effects on the ESA.

¹⁰ <http://ipl.unm.edu/cwl/statbio/southcarolina.htm> (last viewed March 27, 2006) Website managed by the University of New Mexico School of Law “Center for Wildlife Law”

Species Act, SCNESA does not outline specific processes or even expectations of recovery but only institutes fines ranging from \$500 to \$1000 and prison terms of up to one year for violations.

The SCNESA also appointed the State's Department of Natural Resources ("SCDNR") to formulate and maintain the State's endangered species list.¹¹ The Act defined the term "taking" as it pertained to listed species in §50-10-20 as "harass, hunt, capture, kill". While the SCNESA does not further the regulation of lands as mandated by the ESA the State's legislature has asserted in multiple statutes that it is "state policy to preserve wildlife and natural resources, the coastal zone and the state's river areas," S.C. Code Ann. §§48-9-20, 48-39-20, 48-39-250, 49-29-30.¹²

South Carolina is currently home to 42 total listings of protected species. Of these there are 23 animal species listed; the most notable of these the Bald Eagle (threatened), Puma (endangered), five species of sea turtle, Snubnosed sturgeon (endangered), Bachman's Warbler (endangered), and the Red-cockaded Woodpecker (endangered).¹³ Also 19 species of plant life appear on the list, including Michaux's Sumac (endangered),

which compiled biodiversity reports for all fifty states. These reports detailed each state's biodiversity plan, endangered species, land conservation efforts and contact information.

¹¹ <http://www.defenders.org/pubs/sesa09d.html> (Last viewed March 27, 2006) This cite detailed the listing process, pertinent code of laws and recovery plans in existence in each State. This cite is managed by the Defenders of Wildlife which is "dedicated to the protection of all native wild animals and plants in their natural communities. We focus our programs on what scientists consider two of the most serious environmental threats to the planet: the accelerating rate of extinction of species and the associated loss of biological diversity, and habitat alteration and destruction."

¹² <http://ipl.unm.edu/cwl/statbio/southcarolina.htm> (Last viewed March 27, 2006)

¹³ http://ecos.fws.gov/tess_public/StateListingAndOccurrence.do?state=SC (Last viewed March 26, 2006) This cite, operated by the Fish & Wildlife Service, maintains a current listing of each State's endangered and threatened plant and animal species.

Schweinitz's Sunflower (endangered), and the Pondberry (endangered).¹⁴ South Carolina Code Ann. § 50-15-55 (2005) authorizes the Department of Natural Resources to examine species population every five years.¹⁵ The purpose of these examinations is two-fold. First the Department of Natural Resources examines the population levels of the currently listed species to determine if they remain eligible for protection and if their classification of threatened, endangered, or extinct remains accurate. The second purpose is to examine the lands that each species routinely uses as habitat. The Department of Natural Resources is authorized to declare certain areas as habitat for particular species and thus restricts the landowner's use of that land. As one can imagine, this government action is often met by the opposition of land owners who have the use of their land restricted by the government.

There are several cases in South Carolina which illustrate the friction that can arise between the government and land owners and between landowners and others when the Department of Natural Resources' regulation affects the use of the land by the landowner.

In *State v. Thompson*, 349 S.C. 346, 563 S.E.2d 325(2002), Jeffery Thompson was discovered trapping beavers out of season on his mother's property on March 11,

¹⁴ *Id.*

¹⁵ South Carolina Code Ann. §50-15-55 (2005). "Criteria of designating land as certified management area for endangered species; review and revision. (A) The department shall promulgate regulations addressing criteria for designating land as certified management area for endangered species or of species in need of management in order to qualify a taxpayer for the income tax credit provided for in Section 12-6-3520. (B) Every five years the department may review the population status of species subject to certified management agreements and shall revise the regulations accordingly. The department may revise criteria at that time as necessary for lands to retain their designation as certified management areas."

2001.¹⁶ While the species of beaver was not a protected species, the season for trapping furbearing animals is regulated by the Department of Natural Resources to ensure the strength of the furbearing animal's population.¹⁷ At the time that Thompson was discovered trapping beavers he was outside of the 60-day trapping season mandated by the Department of Natural Resources and South Carolina Code Ann. §50-11-2540. In 2001 that season extended from January 1- March 1.¹⁸ The Department is allowed to issue depredation permits to land owners who displayed information indicating that a particular species is overpopulating their land and, in turn, causing undue damage to the property. Depredation permits are often issued to farmers who have a problem with their crops being consumed by the State's large White-tailed Deer population. In this instance Mr. Thompson did, in fact, have a depredation permit issued by the Department of Natural Resources but it had expired in January of 2001.¹⁹ Mr. Thompson received the permit on the basis that the beavers were damming a stream on his mother's property which was turning much of her property into swampland.²⁰ As with most cases of this kind the issues became entrenched in the constitutionality of the state statutes which limited a landowner's right to protect her land from damage. The court articulated Mr. Thompson's argument by saying "Appellant's argument is twofold. First, appellant

¹⁶ *State of South Carolina v. Jeffery M. Thompson*, 349 S.C. 346, 563 S.E.2d 325(S.C. 2002).

¹⁷ *Id.* at 349.

¹⁸ SC Code Ann. §50-11-2540 (2005): "It is lawful to trap furbearing animals for commercial purposes from January first to March first of each year. The trapping season may not exceed sixty days each year under any circumstances. It is unlawful to trap any other times unless authorized by the department. It is lawful to take furbearing animals by other lawful means during the general open hunting seasons established therefore."

¹⁹ *State of South Carolina v. Jeffery M. Thompson*, 349 S.C. 346, 563 S.E.2d 325(S.C. 2002).

²⁰ *Id.* at 348.

contends that property owners enjoy a fundamental right to protect their property. Therefore, a property owner may protect his property from an animal causing damage even if the animal is protected by law. Second, appellant maintains that sections 50-11-2540 and 50-11-2570 operate unequally against different property owners who seek to exercise their fundamental right to protect their property. Consequently, appellant contends that the statutes violate equal protection. While we agree with appellant that property owners have a right to protect their property, we find the statutes are constitutional".²¹ Essentially, Mr. Thompson's argument was based upon the South Carolina Constitution which states, in part, "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."²² The court held that Mr. Thompson's right to property had not been violated in that it is established that fish and game are property of the State and there is a strong public interest in their maintenance by the State.²³ Further, the Department of Natural Resources issued him a depredation permit without hesitation and the arresting officer actually wrote him a new permit on the spot while also issuing him the ticket.²⁴ The Court iterated that this cooperation by the Department of Natural Resources certainly did not seem to violate Mr. Thompson's

²¹ *Id.* at 350.

²² S.C. Const. art. I, §3. "Privileges and immunities; due process; equal protection of laws. The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

²³ *State of South Carolina v. Jeffery M. Thompson*, 349 S.C. 346, 351, 563 S.E.2d 325(S.C. 2002).

²⁴ *Id.* at 352.

rights.²⁵ As to Mr. Thompson’s equal protection argument the Court had to first decide what level of scrutiny to apply when examining the issue. Mr. Thompson argued that any infringement of his rights to use of his property should be examined using strict scrutiny.²⁶ The Court disagreed, saying, “We are persuaded by these federal authorities that the proper equal protection analysis is not strict scrutiny, but rather rational basis. The fundamental rights which usually are protected by heightened scrutiny are personal rights such as the rights to vote, marry, procreate, etc., and these rights are very different from the right to protect one's property, which essentially is an economic right. See *Clajon Production Corp. v. Petera*, 854 F. Supp. at 855. This conclusion "is not meant to degrade property rights or to say that they are not, in some sense, 'fundamental.'" *Id.* at 855 n.18. As discussed above, there is ample authority stating that property rights are fundamental; however, these statements were never made in the context of an equal protection challenge.”²⁷ The Court then clearly stated the elements of rational basis scrutiny as stated in *Lee v. South Carolina Dep't of Natural Resources*, 339 S.C. 463, 530 S.E.2d 112 (2000) which held that the challenged statute must be examined to determine if “(1) the classification must bear a reasonable relation to the legislative purpose sought to be achieved; (2) members of the class must be treated alike under similar circumstances; and (3) the classification must rest on some rational basis”.²⁸ The Court then found that the statutes in question (§§50-11-2540 and 50-11-2570) took reasonable steps to protect a legitimate State interest and that the depredation permit requirement

²⁵ *Id.*

²⁶ *Id.*

²⁷ *State of South Carolina v. Jeffery M. Thompson*, 349 S.C. 346, 352, 563 S.E.2d 325(S.C. 2002).

²⁸ *Id.*

was not such a limitation that caused extreme inconvenience to the landowner especially in light of the ease with which the permits are obtained.²⁹ The Court felt that this process established by the statute fairly balanced the State's interest with the landowner's interest in protecting his or her property.³⁰

Another case, *Swanson v. Stratos*, 350 SC 116, 564 S.E.2d 117 (2002), illustrates a conflict which arises not between the State and a landowner but between two individuals which centers on the SCESA and its effects on landowners.³¹ The facts of the case are these: John Stratos and Milton Stratos, as representatives for their father's estate, hired Stephen Swanson in 1996 to inventory timber on a 561 acre tract of land owned by the estate.³² Swanson, who was a licensed forester, was also to appraise the value of the timber on the tract located in Cordesville, South Carolina.³³ While performing the inventory and appraisal Swanson noticed that the red-cockaded woodpecker inhabited the land³⁴. The red-cockaded woodpecker is an endangered species as listed by the Endangered Species Act. Upon learning of this, Swanson realized that the presence of the bird would affect the value of the land and the timber it held.³⁵ He also knew that the discovery would lead to many meetings with government agencies to come to an agreeable solution to protecting the woodpecker while also selling as much of the timber as possible.³⁶ Swanson notified the family of this fact and moved forward to find a

²⁹ *Id.*

³⁰ *Id.*

³¹ *Swanson v. Stratos*, 350 SC 116, 564 S.E.2d 117 (2002).

³² *Id.* at 119.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

suitable buyer and price for the timber³⁷. Swanson was to receive a 10% commission off of the sale less a \$2,500.00 fee he charged to appraise the timber.³⁸ However, following the discovery of the red-cockaded woodpecker, Swanson spent a large amount of time meeting with the Department of Natural Resources and the U.S. Fish & Wildlife Commission to resolve the issue.³⁹ Swanson's response to this was to also charge the family \$100.00 an hour for the time spent resolving the woodpecker issue because the issue was not anticipated at the time of contract.⁴⁰

The Swanson case became a heated contract case which moved past the woodpecker issue but clearly shows the conflicts that may arise when a protected species is found on a property. The results of the discovery of the woodpecker were highly damaging to the monetary value of the land. After the extensive meetings with the Department of Natural Resources and the U.S. Fish & Wildlife, the result was that 66 acres of the 561 total acreage, or nearly 12%, was set aside as habitat for the woodpecker and was thereby unmarketable for timber.⁴¹ Mr. Swanson's demanded fee for negotiating the agreement was not insignificant when billed at a rate of \$100.00 an hour.⁴² In the end the Stratos family sold the timber for \$318,000.00 or \$642.42 an acre.⁴³ Therefore the total loss for the timber on the 66 acre woodpecker habitat totaled \$42,400.00. Thus one can see the issues that arise when a species protected by the ESA is found on one's property. This appraisal and sale of timber, which should have been fairly easy and

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 120.

⁴⁰ *Id.*

⁴¹ *Id.* at 119.

⁴² *Id.* at 120.

⁴³ *Id.*

timely turned into a lengthy process which included many meetings with government officials, the setting aside of a portion of the land and extra payments to Mr. Swanson.

Through these two cases one can see that, while not perfect, the local effects of the Endangered Species Act, the SCNESA and the Department of Natural Resources, are seemingly being applied successfully in South Carolina. In *Thompson* we see that while the Courts justifiably give deference to the Act and its mandates, thus the use of rational basis scrutiny, they also seem to have some sympathy for the adverse effects on the landowner and seek to ensure that the Act is applied while still respecting the landowner's rights to his property. From *Swanson* we see that the Department of Natural Resources is ready and willing to work with landowners to protect wildlife while trying to do so with as little negative effect to the landowner's interests. From the examination of South Carolina case law and the interactions of the Department of Natural Resources it appears that the Endangered Species Act needs little, or no, adjustment. Part III will examine the changes to the Endangered Species act as proposed by HR 3824.

III. HR 3824 ("TESRA") and the Endangered Species Act

Discerning the true purpose and effects of HR 3824 ("TESRA") on the Endangered Species Act is a complicated process. The reason for this is that TESRA has become a lightning rod of sorts in the political arena and thus there are countless opinions fueled by countless motivations currently swirling around the bill. This paper will focus on three sources to outline the opposing side's arguments for and against the bill. Those sources are a publication from the official website of the US House of Representatives

Committee on Resources which is chaired by Representative Richard Pombo, a Republican from California and TESRA's sponsor, another publication from the House Resources Committee authored by Representative Nick Rahall, a ranking Democrat from West Virginia, and member of the House Resources Committee, who staunchly opposes TESRA, and a letter, dated September 28, 2005, in opposition to the bill, signed by 110 concerned law professors from around the country. These sources give an accurate cross-section of the proponents of the bill, the opposition to the bill, and an informed, well educated group of citizens. By examining these three sources one can see where the fluffing stops and the real changes begin. One can also see where the real problems lie and gain some insight into what those problems will mean to the average citizen.

As previously stated, the need for reform of the Endangered Species Act is the first question to be analyzed. Representative Richard Pombo, the sponsor of TESRA addressed this issue in a publication appearing on the House Resources Committee website under the heading "Modernizing the ESA".⁴⁴ The publication, labeled "TESRA Background & Need" first discusses the need for reform of the ESA and then outlines the proposed changes.⁴⁵ The report explains the need for reform by stating, "After more than three decades of implementation, the Endangered Species Act (ESA) has failed to achieve its purpose of recovering endangered species to healthy and sustainable populations. In addition, the unintended consequences of this law have caused a tremendous amount of conflict with landowners and local communities alike. As such,

⁴⁴ <http://resourcescommittee.house.gov/> (Last viewed April 12, 2006) Website maintained by the House Resources Committee. The site lists the jurisdiction of the Committee and listed first is: "Fisheries and wildlife, including research, restoration, refuges, and conservation."

⁴⁵ *Id.*

Congress must update and modernize the ESA to strengthen its results for species recovery by turning conflict into cooperation. TESRA will do just that.”⁴⁶ While citing studies from US Fish & Wildlife the report provides the following statistics to validate the claim that reform is needed: “less than 1% (10 of roughly 1300 species) have recovered in the Act’s history, 39% of all listed species are classified in “unknown” status, 21% of all listed species are classified as “declining”, 3% (or roughly 2 dozen species) are believed to be extinct, only 6% of all listed species are classified as “improving.”, **77%** of all listed species have only achieved 0-25% of their recovery goals”.⁴⁷ The report continues by laying out by listing four areas which it claims must be, and will be, improved under the TESRA: development of recovery teams and tools, the designation of critical habitat, the improvement of the scientific standards used to judge the strength of the listed species, and establishing incentives for property owners to abide by the tenets of the ESA.⁴⁸

According to those who support TESRA one of the most obvious failures of the ESA is that there are no global mandates asserted that specify the plan for a species to be removed from the list. Thus a species, once named, is protected by the land restrictions and the hunting restriction but there is no plan in place to specifically address the welfare of that species, chart its progress, and take steps to have its numbers strengthened to the point that it can be removed from the list. TESRA will require “recovery teams” which

⁴⁶ <http://resourcescommittee.house.gov/issues/more/esa/tesra/background&need.htm> (Last viewed April 12, 2006) Publication located on the House Resources Committee’s website which details the need for ESA reform and the main areas in which TESRA will provide reform.

⁴⁷ *Id.*

⁴⁸ *Id.*

will “draw not only on those who have knowledge and skills essential to guide effective conservation efforts, but also those who have property or livelihoods affected by species where any successful program must be made to work”.⁴⁹ The chief goal of this requirement is to foster collaboration rather than confrontation when it comes to the government/landowner relationship.⁵⁰ According to the report the teams will develop recovery plans which will “be required by law, within two years of listing, and will be reviewed regularly to make sure they are as effective as possible. The plans will require the identification of lands important to the conservation and recovery of species.”⁵¹ Finally, the report addresses the line drawn between “endangered” and “threatened” species which has become much less clear since the inception of the ESA. “TESRA also reestablishes the distinction between endangered and threatened species as intended by requiring that rules regulating threatened species be promulgated on a case by case basis and with justification rather than by a blanket rule for all threatened species. By requiring the tailoring of rules to threatened species, TESRA ensures that the management flexibility that can be central to effectively promoting conservation is not lost.”⁵²

According to the House Resources Committee, the birthplace of HR 3824, TESRA will also address the issues surrounding the habitat critical to the survival of the species. The report argues that the ESA’s attempts at defining and selecting critical habitat have been woefully inadequate in that the current process, or lack thereof, “contributes very little, if any, additional protections for species recovery, consumes

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

massive amounts of the agency's conservation resources, is driven by litigation, not biology, which disrupts their ability to prioritize, and imposes huge social and economic costs".⁵³ TESRA proposes to remedy such issues by, "replace(ing) the critical habitat program with a more integrated recovery planning process that includes the identification of specific areas that are of special value to the conservation of the species which are then given priority in recovery efforts. This will focus the law on recovery and minimize the conflicts that lead to litigation."⁵⁴ The report pinpoints this failure of the ESA as the cause of most of the friction between landowners and government officials which in turn causes "rampant litigation".⁵⁵ Instead TESRA seeks to foster collaboration between the government and the private land owner, "enlisting private property owners as allies in the conservation of endangered and threatened species by providing incentives to manage lands, with priority given to those lands identified in recovery plans as being of special value to species, in a way that benefits these species."⁵⁶

The report next touts TESRA's improvement upon the scientific standard which the ESA set forth as the basis for decision making when it came to listing and tracking species and making decisions affecting the designation of critical habitat. The ESA coined the phrase "best scientific data" as a way of opening the door to the many considerations that come into play when considering species, the lands they inhabit and the people who own those lands. The report states that herein lies one of the main problems with the ESA. "The problem with a 'best available data' standard is that 'best'

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

is a comparative word. Thus the data need not be verified, reliable, conclusive, adequate, verifiable, accurate or even good. The best available data standard hampers the effectiveness of the program. This is certainly true in practice. Agencies that evaluate scientific data under the ESA, and courts forced to evaluate agency decisions based upon such data, have found their efforts severely hamstrung by two factors: (1) the ESA's lack of definitional terms and (2) the fact that species data is, by its very nature, often vague, ambiguous, and frequently subject to best-professional judgment rather than objectively quantifiable.”⁵⁷ TESRA seeks to correct this vague phrase in favor of a more easily defined, more practical, term by appointing the Secretary of the Interior to establish criteria by which the “best available” data is judged.⁵⁸ The report points to the Safe Water Drinking Act which uses the “best available” standard by employing a peer review process that questions the scientific processes by which the data is compiled as a way of ensuring that the science is reliable.⁵⁹

The report continues to assert that a major, though unintended, result of the ESA is a highly antagonistic, adversarial relationship that has fostered between the government and the private landowner.⁶⁰ It seems that many landowners would rather destroy habitat, or even members of the species themselves, than deal with government interference on their land.⁶¹ TESRA includes incentives for landowners to become more involved in the recovery process by creating programs to “[p]rovide certainty for private property owners by allowing landowners to request a written determination as to whether their land use

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

activities will violate the take prohibitions of Section 9, granting the landowner incidental take coverage where the written determination is that they comply with Section 9 and giving a mechanism for compensating the private property owner for foregone use of his property where the determination is that the activity would violate the take prohibitions; [and] [c]ompensate private property owners for the fair market value for foregone use of their property where the Secretary has determined that the use of that property would constitute a “take” under Section 9 and the activity is not otherwise determined a “nuisance” under principles of property and nuisance law.”⁶². Thus TESRA seeks to make the private landowner a more active, willing, participant in species recovery.

Representative Pombo begins and ends his support of the bill with a landowner-friendly argument meant to appeal to the landowners who also happen to be and voters. Other opinions on TESRA are quite numerous and not quite as laudatory. One of the more clearly defined, and well researched, opinions comes from another member of the House Resources Committee, Representative Nick Rahall, a ranking Democrat from West Virginia, who spoke out against the bill on September 29, 2005, on the House floor and later also published an opinion on the House Resources Committee’s website. Representative Rahall’s argument against TESRA centers on the proposed repeal of the prohibition of pesticides which was at the heart of the ESA, the proposed system of rewarding landowners for complying with federal law, the proposed change which delays the designation of critical habitat and section 7 of TESRA which changes the process by which the Secretary of the Interior examines proposed government agency actions to see

⁶² *Id.*

if they will jeopardize the existence of a protected species.⁶³ Representative Rahall began his argument by naming many different, environmentally focused, organizations which oppose the bill. “H.R. 3824 is strongly opposed by conservation organizations including Defenders of Wildlife, Environmental Defense, World Wildlife Fund, Trout Unlimited, Nature Conservancy and National Wildlife Federation.”⁶⁴ One must ask, if these groups, which operate at the very core of the species and habit conservation efforts and work daily with the supposedly defective ESA, oppose this bill then what purpose is the bill really seeking to serve? Representative Rahall asks the same question in his publication.

The publication first addresses the changes that TESRA seeks to make in the designation of critical habitat system. The bill as it now reads proposes to construct a recovery team for a species once listed and to require that team to construct a recovery plan within two years. Representative Rahall says that this is far too long of a delay, “H.R. 3824 eliminates the requirement that critical habitat -- geographic areas essential for the conservation of the species -- be designated at the time of listing. The bill also removes the requirement that the Secretary (of the Interior) ensure that proposed agency actions do not result in the destruction or adverse modification of habitats.”⁶⁵. Representative Rahall worries that this delay and removal of authority from the Secretary of the Interior “will likely allow actions to proceed, even if they will destroy the habitat

⁶³<http://resourcescommittee.house.gov/democrats/backgrounders/Pombo%20ESA%20bil.pdf> (Last viewed April 12, 2006) This publication, which appears of the House Resources Committee’s website is an outline of the highlights of TESRA as argued on the House floor by Representative Rahall.

⁶⁴ *Id.*

⁶⁵ *Id.*

necessary for a species' recovery" because of the gap in responsibility created by TESRA.⁶⁶

The second issue that the publication addresses is that of TESRA's proposed payment to landowners in exchange for compliance with federal law. Representative Pombo's argument in favor of TESRA characterized this payment as an incentive for landowners to become more involved in the recovery process. Representative Rahall likens it more to bribery. "Under the procedure created in Section 14 of H.R. 3824, a property owner can request a written determination as to whether a proposed use of a property, such as a condominium development, would violate the Section 9 take provisions in the ESA. If the Secretary determines, based on the applicant's information, that the proposed use would not comply with Section 9 of the ESA because it would result in the harm of a listed species, Section 13 of H.R. 3824 enables the property owner to receive compensation from the Federal government for the foregone use of the property. There is nothing in the bill to keep a landowner from submitting multiple development proposals for the same parcel of land."⁶⁷ Representative Rahall also notes that this proposal has the government paying citizens for "takings" that do not qualify as takings under the Fifth Amendment, "Section 14 enables property owners to be compensated for government actions that are not takings under the Constitution. If such "pay people to comply with the law" language as that of Section 14 were applied to local zoning, no mayor or city council could govern a community without facing fear that a decision might drive the community into financial ruin."⁶⁸ Representative Rahall points

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

out that TESRA's section 14 proposes to pay landowners not only "fair market value" but also for "speculative business losses".⁶⁹ Representative Rahall then asks the obvious follow-up question: Where does this money come from? The answer, he says, is direct spending by the federal government in the amount of at least \$20 million a year as estimated, conservatively in the Congressional Research Service, by the Congressional Budget Office.⁷⁰ On September 29, 2005, while arguing against the bill on the House floor Representative Rahall indicated that the Congressional Budget Office estimate the cost of implementing TESRA as it now reads would cost the federal government nearly \$3 billion between 2006 and 2010.⁷¹ Representative Rahall also noted that the fact that TESRA was rushed to the House floor in "the zeal to pass anything that could be labeled ESA reform" indicates that the proponents of the bills have forgotten about the taxpayers and owe them the time to consider the future tax consequences of such payments to landowners.⁷²

The third issue that Representative Rahall addressed in his publication dealt with the proposed provisions within TESRA which affect ESA's regulations on pesticides. The ESA's regulation of pesticides is the most recognized of the ESA's achievements because it has led to the rise of species such as the glamorous Bald Eagle. Therefore, potential tampering with pesticide regulation has not escaped TESRA's detractors. Representative Rahall states, "H.R. 3824 would repeal the Endangered Species Act provisions that protect threatened and endangered species from the harmful impacts of

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ http://www.house.gov/apps/list/press/ii00_democrats/esafloor.pdf (Last viewed April 12, 2006) Publication of Representative Rahall's verbatim comments on the House floor in opposition of TESRA.

⁷² *Id.*

pesticides. Have we forgotten that it was the pesticide DDT that was largely responsible for the demise of the bald eagle? Pesticides have also been blamed for poisoning the salmon in the Pacific Northwest, and are suspected of playing a key role in the recent dramatic decline of fish populations in California's San Francisco Bay/Sacramento-San Joaquin Delta. Under H.R. 3824, pesticide users would have no obligation other than to comply with the Federal Insecticide, Fungicide and Rodenticide Act, a statute that does not address impacts on endangered and threatened species. Notwithstanding the billions of dollars this country has spent to restore estuaries and waterways from the Chesapeake Bay to the Everglades to San Francisco Bay/Sacramento-San Joaquin Delta, this provision would lift prohibitions that were put into place to protect drinking water quality, fisheries, and wildlife. The economic and environmental implications of this provision are staggering.”⁷³

Currently the ESA mandates that the Secretary of the Interior examine proposed actions by government agencies to determine if that action will negatively affect a protected species.⁷⁴ This process leads to consultations which involve scientific research and opinion as to those potentially harmful effects.⁷⁵ The proposed action must pass through the Secretary before implementation.⁷⁶ The Secretary also has the ability to see the cumulative effects of multiple projects which might combine to cause a negative effect.⁷⁷ Representative Rahall opines, “H.R. 3824 undermines existing law by allowing the Secretary to delegate Section 7 responsibilities to other Federal agencies through

⁷³<http://resourcescommittee.house.gov/democrats/backgrounders/Pombo%20ESA%20bill.pdf> (Last viewed April 12, 2006)

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

undefined procedures. The bill imposes no standards for these procedures, thus potentially allowing destructive Federal activities to proceed without the normal review by the scientists with wildlife expertise. Agencies may be able to substitute alternative procedures for the current biological assessment and biological opinion requirements in the ESA, according to the Congressional Research Service.”⁷⁸. Thus Representative Rahall is concerned that by decentralizing the approval process there is no one who oversees potential disastrous cumulative effects. Further, TESRA allows for information other than dependable scientific data to potentially influence decision making. Representative Pombo argued that the ESA’s “best scientific data” was too narrow and ignored other factors whereas Representative Rahall argues that TESRA’s allowance of alternate procedures instead of traditional biological assessment and opinion will allow baseless and expensive projects to pass.

In essence, Representative Rahall argues the TESRA is a less effective, more expensive, version of the ESA. Representative Rahall argues that the potential two year delay in declaring critical habitat, lifting of the prohibition on pesticides and decentralization of authority in the Secretary of State makes recovery impossible and the proposed payments to landowners makes TESRA very expensive.

The final source which sheds light on the truth of what TESRA actually does, and does not, do is a letter signed by 110 law professors from around the country to the members of the House of Representatives. Dated September 28, 2005 and urging a “nay” vote on TESRA, the letter pleads with representatives to avoid irresponsible legislating by slowing the bill down in order to fully understand all of its parts and seek opinions on

⁷⁸ *Id.*

the many possible ramifications of the changes proposed. The letter began, “The Endangered Species Act has played a leading role in balanced federal efforts to conserve species for nearly 32 years. In 1973, the United States took a bold step toward halting the erosion of the globe’s ecosystems and the species they harbor by passing the ESA. In the three decades since then this country has set a notable example – admired around the world — showing how a modern industrial society can progress without destroying its natural capital. Hundreds of species, such as the California condor, whooping crane and black-footed ferret, have been rescued from extinction. Yet many of the legislative proposals in H.R. 3824 threaten to undermine this legacy as well as the bill’s own stated purpose of fostering recovery of threatened and endangered species.”⁷⁹ The letter states concerns about the bill which center on TESRA’s plan to designate areas of “special value” rather than critical habitats, “TESRA” proposes to eliminate critical habitat protection altogether in favor of a cursory provision for identification of areas of “special value” to listed species. The bill does not define the term “special value,” nor does it

⁷⁹ http://www.earthjustice.org/factsheets/ESAProfs_letter.pdf (Last viewed March 22, 2006) The letter signed by 110 law professors from across the nation was published on this cite managed by Earthjustice. The cite describes Earthjustice: “Earthjustice is the nonprofit law firm for the environment, representing—without charge—hundreds of public interest clients, large and small. Earthjustice works through the courts to safeguard public lands, national forests, parks, and wilderness areas; to reduce air and water pollution; to prevent toxic contamination; and to preserve endangered species and wildlife habitat. Founded in 1971 as Sierra Club Legal Defense Fund, Earthjustice has played a leading role in shaping the development of environmental law. From eight offices across the country Earthjustice attorneys take on powerful special interests and win.”

provide these areas with specific protections.”⁸⁰ The regulatory effect of TESRA’s proposed recovery plans are also of concern, “recovery plans obviously can – and should – play a leading role in efforts to recover protected species. The bill, however, includes language that indicates that these significantly important recovery plans henceforth will have no regulatory effect.”⁸¹ The letter also expresses concerns about the elimination of the consultation process that now exists for proposed federal government actions, and the fact that the bill appears to make it more difficult to name a species to the endangered or threatened list.⁸² As for the proposed incentive plan to encourage land owners to participate in the recovery effort the letter was more straight forward than Representative Rahall’s publication. “The ‘TESRA’ bill, however, threatens to stifle innovative uses of such tools by proposing a quite drastic landowner payment scheme that, if enacted, would for the first time create a federal entitlement system for property holders that not only goes far beyond the requirements of existing law, but would also mandate that FWS and NMFS either look the other way when activities kill or injure listed species or provide payments to property owners that could add many billions of dollars to the mounting federal deficit.”⁸³

From these three sources one can see that there are many different ways to view TESRA and most often that view is skewed by the loyalties that the viewer holds. Representative Pombo states that the ESA is dated and in need of serious, immediate major overhaul. Representative Rahall seems to acknowledge the need for major change but feels that many of the proposed changes are ill-conceived and short-sighted. Finally

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

the 110 law professors who wrote the House of Representatives acknowledge that the ESA needs tweaking but has major concerns as to the proposed changes which involve habitat designation and landowner “incentives” among others. The final section of this paper will serve as somewhat of a prediction as to some of the real-life consequences of HR 3824 in South Carolina if signed into law.

IV. HR 3824 (“TESRA”) and South Carolina

It seems that TESRA makes many well-intended changes to the ESA that will, in actuality cause more problems, and weaken the most effective parts of the ESA, rather than improve the ESA as a whole. There are five areas of TESRA which have been pointed out by Representative Rahall and the concerned law professors which will have discernable effects in South Carolina. There areas in which South Carolinians may feel the impact of TESRA include: changes due to the elimination of the process by which the Secretary of the Interior examines proposed government agency actions to see if they will jeopardize the existence of a protected species, abuse of the proposed system of rewarding landowners for complying with federal law, devastating effects that the proposed repeal of the prohibition of pesticides will cause, the potentially devastating effects that the proposed change which delays the designation of critical habitat for two years could bring and the relative lack of proposed funding.

First, South Carolinians may see mixed signals from the federal government when it comes to acceptable uses of potential habitat. While much of South Carolina is owned

by private land owners and corporations the elimination of a the centralized power in the Secretary of the Interior to oversee federal actions which may affect wildlife and conservation efforts could potentially lead to uses which seem to contradict one another. Under the ESA the Secretary of the Interior oversaw all actions by government entities to the extent that they were examined for potentially harmful, though unintended, side effects on the environment. While one project may not appear to interfere with protected species and protected lands the Secretary of the Interior was able to look at the broad picture and judge whether cumulative projects, with cumulative effects, could unintentionally work in concert to cause damage. Even though land or a species was protected, multiple projects within a close proximity of the species in question could cause problems. One might think of it as the environment's last line of defense. With this process now gone, and no comparable process proposed by TESRA, one must wonder who will be looking out for wildlife and habitat now?

The second area in which may directly affect South Carolina concerns an issue of morality. Representative Rahall mentioned in his comments to the House of Representatives that TESRA's section 14 provision to compensate landowners for the monetary loss they suffer due to the existence of a protected species on their land lacks sufficient checks and balances on a system that seems ripe for exploitation. As TESRA now reads all a landowner must do is provide the federal government with a business plan, the profitability of which is lessened by the existence of the species, and that landowner will be eligible for payments from the government for the fair market value of that loss. The landowner may even receive payments even though the species' presence only affects a small portion of the land. Further, there exists no provision which would

ensure that landowners do not repeatedly bring affected business plans to the government for payment after payment. Without a system of checks and balances landowners may find a way to cheat to government and thereby cheat their fellow taxpayers. Hopefully this issue will be handled before the bill is potentially signed into law but the version that passed through the House did not have an answer.

Two of the final three effects deal specifically with the chief goal of the ESA: protection, conservation and recovery. TESRA's name, the Threatened and Endangered Species Recovery Act, would lead one to believe that it is a more focused and refined version of the Endangered Species Act. However, this cannot be true with the repeal of the pesticide prohibitions which the ESA is famous for mandating. This prohibition is credited with many of the most notable recoveries of which the ESA boasts. South Carolina is home to the American Bald Eagle which owes its continued existence largely to the prohibition of pesticide. Given that the Bald Eagle is a symbol of America how can legislation propose in our Nation's capital be deemed a "species recovery act" when it allows the very chemical that nearly destroyed our symbol? Today one can see the Bald Eagle flying, fishing and feeding its young in the Santee swamps in South Carolina. Years ago pesticides had softened the eggs of this national treasure to the point that reproduction was nearly impossible. The ESA changed that, changed our view of pesticides and many thought, regulated or prohibited them forever. Now this bill that purports to be a species recovery act proposes to allow one of our environments arch enemies back into our fields, streams and lakes. The potential effects on South Carolina's wildlife can be envisioned by anyone who followed the story of the Bald Eagle before the regulation of pesticides by the ESA.

The second provision of TESRA which could immediately impact South Carolina's wildlife involves the appointing of recovery teams which are to establish special areas for the newly endangered species within two years. For those who have participated in recovery efforts this time lag is unacceptable. Many times once a species is named to the endangered or threatened list, time is of the essence. Areas of critical habitat need to be established as soon as possible to ensure that the species has somewhere to call home. A two year lag in that process could mean extinction for that species. While the ESA does not have a perfect system the proposed two year cushion is certainly not the answer to the ESA's problems. Thus South Carolinians find themselves watching a species decline while the recovery team assigned to the newly endangered or threatened species takes two years to even begin to protect the species.

Finally, TESRA provides nearly no guidance as to how it proposes to pay for the changes it imposes. As Representative Rahall states, TESRA is estimated to cost the federal government nearly 3 billion in direct spending between 2006 and 2010 to implement TESRA⁸⁴. Therefore, the final place many South Carolinians will feel the impact of TESRA will either be in their wallets or in seeing the effects of funneling funding away from key programs to cover the costs of TESRA. If dying eagles and double-dipping farmers do not get the attention of South Carolinians this likely will. The framers of TESRA somehow thought it acceptable to include provisions like section 14 to pay landowners for complying with federal law without even suggesting where that money might come from. As Representative Rahall said on the House floor, "What is next: paying citizens to wear their seatbelts, to comply with speed limits, to pay their

⁸⁴ http://www.house.gov/apps/list/press/ii00_democrats/esafloor.pdf

taxes?”.⁸⁵ At least if Representative Rahall aimed to propose those ideas he implies that would not just assume that taxpayers would not mind footing the bill to implement them. The framers of TESRA have assumed just that.

IV. Conclusion

TESRA, as it now reads, is not the answer to the shortcomings of the Endangered Species Act. Even the staunchest supporters of the Endangered Species Act will admit that the Act has not performed as well as many would have hoped in getting species removed from the endangered list. Those same people would also probably admit that many other facets of the Endangered Species Act would benefit from some occasional tweaking. However, the areas in which TESRA seems to improve the Endangered Species Act do not outweigh the glaring holes which it creates.

The holes that TESRA has thus far left unfilled, most notably the failure to allocate funds to cover the payments to landowners, the two year allowance for recovery teams to initiate a plan and the softening of the ban on pesticides can not be ignored or left to be filled in later. While it is a well-known political tactic to stall potential legislation to kill its momentum, and hopefully kill it altogether, Congress needs to do just that for the sole purpose of ensuring responsible legislating. As Representative Rahall remarked on the House floor, “I wish this bill was not being rushed to the House floor. I wish that the driving force was not the zeal to pass anything that could be labeled

⁸⁵ *Id.*

ESA reform, and instead was truly species recovery. With a little more time to consider how much this bill is going to cost, the taxpayers would at least have had a chance to see how much they are going to lose in exchange.”⁸⁶ Even after Representative Rahall’s remarks TESRA spent little more than a week on the House floor before being sent on its way.

Before any further steps are taken the bill needs to be slowed to allow time for understanding, discussion and redrafting to close these gaps and question some of TESRA’s motives and tactics.

⁸⁶ http://www.house.gov/apps/list/press/ii00_democrats/esafloor.pdf (Last viewed April 12, 2006)