

Union Calendar No. 471

107TH CONGRESS
2^D SESSION

H. R. 4840

[Report No. 107-751]

To amend the Endangered Species Act of 1973 to ensure the use of sound science in the implementation of that Act.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 2002

Mr. HANSEN (for himself, Mr. POMBO, and Mr. WALDEN) introduced the following bill; which was referred to the Committee on Resources

OCTOBER 15, 2002

Additional sponsors: Mr. THOMAS, Mr. OTTER, Mr. HERGER, Mr. GALLEGLY, Mr. SIMPSON, Mr. THUNE, Mr. PETERSON of Minnesota, Mr. HAYWORTH, Mr. RADANOVICH, Mr. SESSIONS, Mr. CUNNINGHAM, and Mr. LEWIS of Kentucky

OCTOBER 15, 2002

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on May 23, 2002]

A BILL

To amend the Endangered Species Act of 1973 to ensure the use of sound science in the implementation of that Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 *This Act may be cited as the “Sound Science for En-*
3 *dangered Species Act Planning Act of 2002”.*

4 **SEC. 2. SOUND SCIENCE.**

5 (a) **BEST SCIENTIFIC AND COMMERCIAL DATA AVAIL-**
6 **ABLE AS BASIS OF DETERMINATIONS.**—Section 4(b)(1)(A)
7 *of the Endangered Species Act of 1973 (16 U.S.C.*
8 *1533(b)(1)(A)) is amended in the first sentence, by inserting*
9 *“, including any finding under paragraph (3)(B) on a peti-*
10 *tion referred to in paragraph (3)(A),” after “determina-*
11 *tions required by subsection (a)(1)”.*

12 (b) **PREFERENCE FOR EMPIRICAL, FIELD-TESTED,**
13 **AND PEER-REVIEWED DATA.**—Section 4(b) of the *Endan-*
14 *gered Species Act of 1973 (16 U.S.C. 1533(b)) is amended*
15 *by adding at the end the following:*

16 *“(9) In making any determination under this section,*
17 *the Secretary shall give greater weight to any scientific or*
18 *commercial study or other information that is empirical*
19 *or has been field-tested or peer-reviewed.”.*

20 (c) **CONTENTS OF LISTING PETITIONS.**—

21 (1) **IN GENERAL.**—Section 4(b)(3) of the *Endan-*
22 *gered Species Act of 1973 (16 U.S.C. 1533(b)(3)) is*
23 *amended by adding at the end the following:*

24 *“(E) A petition referred to in subparagraph (A) re-*
25 *garding a species—*

1 “(i) shall, to the maximum extent practicable,
2 contain clear and convincing evidence—

3 “(I) of the current known and historic
4 ranges of the species concerned;

5 “(II) of the most recent population esti-
6 mates and trends for the species, if available;

7 “(III) that any change in the population
8 that is alleged in the petition is beyond the nat-
9 ural range of fluctuations for the species; and

10 “(IV) of the reason that the petitioned ac-
11 tion is warranted, including known or perceived
12 threats to the species;

13 “(ii) shall include a bibliography of scientific lit-
14 erature on the species in support of the petition; and

15 “(iii) may contain any other information the pe-
16 titioner considers appropriate.

17 “(F) For purposes of subparagraph (E), evidence is
18 clear and convincing evidence if—

19 “(i) a preponderance of the evidence is based on
20 reliable scientific and commercial information; and

21 “(ii) the evidence is sufficient to support a firm
22 belief by the Secretary that the petitioned action may
23 be warranted.”.

1 (2) *REQUIREMENT FOR CONSIDERATION OF PETI-*
2 *TION.—Section 4(b)(3) of the Endangered Species Act*
3 *of 1973 (16 U.S.C. 1533(b)(3)) is further amended—*

4 (A) *in subparagraph (A) in the first sen-*
5 *tence, by inserting “and contains the informa-*
6 *tion required under clauses (i) and (ii) of sub-*
7 *paragraph (E)” after “may be warranted”; and*

8 (B) *in subparagraph (B) in the matter pre-*
9 *ceding clause (i), by inserting “and contains the*
10 *information required under clauses (i) and (ii)*
11 *of subparagraph (E)” after “may be warranted”.*

12 (d) *USE OF SOUND SCIENCE IN LISTING.—Section*
13 *4(b) of the Endangered Species Act of 1973 (16 U.S.C.*
14 *1533(b)) is further amended by adding at the end the fol-*
15 *lowing:*

16 “(10) *Not later than 1 year after the date of enactment*
17 *of this paragraph, the Secretary shall promulgate regula-*
18 *tions that establish criteria that must be met for scientific*
19 *and commercial data, studies, and other information to be*
20 *used as the basis of a determination under this section.*

21 “(11)(A) *The Secretary may not determine that a spe-*
22 *cies is an endangered species or a threatened species unless*
23 *data collected in the field on the species concerned supports*
24 *the determination.*

25 “(B) *The Secretary shall—*

1 “(i) accept and acknowledge receipt of data re-
2 garding the status of a species that is collected by an
3 owner of land, including data obtained by observation
4 of the species on the land; and

5 “(ii) include the data in the rulemaking record
6 compiled for any determination that the species is an
7 endangered species or a threatened species.”.

8 (e) *USE OF SOUND SCIENCE IN RECOVERY PLAN-*
9 *NING.—Section 4(f) of the Endangered Species Act of 1973*
10 *(16 U.S.C. 1533(f)) is amended by adding at the end the*
11 *following:*

12 “(6)(A) *The Secretary shall identify and publish in*
13 *the Federal Register with the notice of a proposed regula-*
14 *tion pursuant to paragraph (5)(A)(i) a description of addi-*
15 *tional scientific and commercial data that, if collected,*
16 *would assist in the preparation of a recovery plan and—*

17 “(i) *invite any person to submit the data to the*
18 *Secretary; and*

19 “(ii) *describe the steps that the Secretary plans*
20 *to take for acquiring additional data.*

21 “(B) *Data identified and obtained under subpara-*
22 *graph (A)(i) shall be considered by the recovery team and*
23 *the Secretary in the preparation of the recovery plan.”.*

1 **SEC. 3. INDEPENDENT SCIENTIFIC REVIEW.**

2 (a) *IN GENERAL.*—Section 4 of the Endangered Spe-
3 *cies Act of 1973 (16 U.S.C. 1533)* is amended by adding
4 *at the end the following:*

5 “(j) *INDEPENDENT SCIENTIFIC REVIEW REQUIRE-*
6 *MENTS.*—(1) *In this subsection:*

7 “(A) *The term ‘covered action’ means—*

8 “(i) *the determination that a species is an*
9 *endangered species or a threatened species under*
10 *subsection (a);*

11 “(ii) *the determination under subsection (a)*
12 *that an endangered species or a threatened spe-*
13 *cies be removed from any list published under*
14 *subsection (c)(1);*

15 “(iii) *the development of a recovery plan for*
16 *a threatened species or endangered species under*
17 *subsection (f);*

18 “(iv) *the determination that a proposed ac-*
19 *tion is likely to jeopardize the continued exist-*
20 *ence of a listed species or result in the destruc-*
21 *tion or adverse modification of critical habitat*
22 *and the proposal of any reasonable and prudent*
23 *alternatives by the Secretary under section*
24 *7(b)(3), if the Secretary finds that—*

1 “(I) there is significant disagreement
2 regarding that determination or proposal;
3 or

4 “(II) that determination or proposal
5 may have significant economic impact; and

6 “(v) the determination that a proposed ac-
7 tion is not likely to jeopardize the continued ex-
8 istence of a listed species or result in the destruc-
9 tion or adverse modification of critical habitat,
10 if the Secretary finds that there is significant
11 disagreement regarding that determination or
12 proposal.

13 “(B) The term ‘qualified individual’ means an
14 individual who meets the standards of the National
15 Academy of Sciences for independent scientific review
16 conducted by the Academy, except that such term does
17 not include any individual with a conflict of interest
18 as determined by the Secretary or by a Governor who
19 nominates the individual under paragraph (3)(B).

20 “(2) The Secretary shall—

21 “(A) maintain a list of qualified individuals
22 who are available to participate on independent re-
23 view boards under this subsection;

24 “(B) seek nominations of individuals to partici-
25 pate on such boards (upon appointment by the Sec-

1 retary), through the Federal Register, scientific and
2 commercial journals, and the National Academy of
3 Sciences and other such institutions; and

4 “(C) update such list every two years.

5 “(3)(A) Before any covered action becomes final, the
6 Secretary shall appoint an independent review board in ac-
7 cordance with this section that shall review and report to
8 the Secretary in writing on the scientific information and
9 analyses on which the covered action is based.

10 “(B) Each independent review board under this para-
11 graph shall be composed of 5 members, of which—

12 “(i) 3 shall be appointed by the Secretary from
13 the list under paragraph (2); and

14 “(ii) 2 shall be appointed by the Secretary from
15 among qualified individuals nominated by the Gov-
16 ernor of a State in which the species concerned is lo-
17 cated.

18 “(C) If any individual declines appointment to an
19 independent review board under this paragraph, the Sec-
20 retary shall appoint another individual in the same man-
21 ner.

22 “(D) The selection of the members, and the activities,
23 of independent review boards under this paragraph are not
24 subject to the Federal Advisory Committee Act (5 U.S.C.
25 App.).

1 “(E) If funds are available, the Secretary shall provide
2 compensation to an individual for service as a member of
3 an independent review board under this paragraph, at a
4 rate not to exceed the daily equivalent of the maximum an-
5 nual rate of basic pay for grade GS-14 of the General
6 Schedule for each day (including travel time) during which
7 the individual is engaged in the actual performance of du-
8 ties as a member of such board.

9 “(F) The Secretary may not delegate the authority to
10 make appointments under this paragraph to any official
11 who is below the level of the Director of the United States
12 Fish and Wildlife Service or the Assistant Administrator
13 for Fisheries of the National Oceanic and Atmospheric Ad-
14 ministration.

15 “(4)(A) Each independent review board under this
16 subsection shall provide to the Secretary, within 90 days
17 after the completion of appointment of the board, the opin-
18 ion of the board regarding all relevant scientific informa-
19 tion and assumptions relating to the taxonomy, population
20 models, and supportive biological and ecological informa-
21 tion for the species in question.

22 “(B) The Secretary shall—

23 “(i) develop a protocol for the conduct of sci-
24 entific independent review under this subsection,
25 that—

1 “(I) includes review of the adequacy of any
2 scientific methodology used to support an action
3 and the validity of any conclusions drawn from
4 data used to support an action; and

5 “(II) is modeled after applicable National
6 Academy of Sciences policies and guidelines for
7 report reviews; and

8 “(ii) provide to each independent review board
9 established under this subsection clear guidelines as to
10 the conduct of its review consistent with that protocol.

11 “(5) If an independent review board under this sub-
12 section makes a recommendation regarding a covered ac-
13 tion, the Secretary shall, within 90 days after receiving the
14 recommendation, evaluate and consider the information
15 that results from the review by the board, and shall include
16 in the rulemaking record for the covered action—

17 “(A) a summary of the results of the review by
18 the board; and

19 “(B) in a case in which the recommendation of
20 a majority of the members of the board is not fol-
21 lowed, an explanation of why the recommendation
22 was not followed.

23 “(6) The report of each independent review board
24 under this subsection shall be included in the rulemaking
25 record of any regulation with respect to which the board

1 *is convened, and shall be available for public review for at*
2 *least 30 days before the close of the period for comment on*
3 *the regulation.”.*

4 (b) *BIOLOGICAL ASSESSMENTS.*—Section 7(c) of the
5 *Endangered Species Act of 1973 (16 U.S.C. 1536(c)) is*
6 *amended by adding at the end the following:*

7 “(3) *In preparing a biological assessment under this*
8 *subsection, the head of an agency shall solicit and review*
9 *any scientific and commercial data that a prospective per-*
10 *mit or license applicant believes is relevant to the assess-*
11 *ment, and shall make that data available to the Secretary.”.*

12 (c) *EXTENSION OF PERIODS.*—Section 4(b)(6) of the
13 *Endangered Species Act of 1973 (16 U.S.C. 1533(b)(6)) is*
14 *amended—*

15 (1) *in subparagraph (A)—*

16 (A) *in the matter preceding clause (i) by*
17 *striking “one-year” and inserting “18-month”;*
18 *and*

19 (B) *in clause (i)(III) by striking “one-year”*
20 *and inserting “18-month”; and*

21 (C) *in clause (ii)(II) by striking “one-year”*
22 *and inserting “18-month”;*

23 (2) *in subparagraph (B)—*

24 (A) *in clause (i) by striking “one-year” and*
25 *inserting “18-month”;*

1 (B) in clause (ii) by striking “one-year”
2 and inserting “18-month”; and
3 (C) in clause (iii) by striking “one-year”
4 and inserting “18-month”; and
5 (3) in subparagraph (C)(ii) by striking “one-
6 year” and inserting “18-month”.

7 **SEC. 4. IMPROVED INTERAGENCY COOPERATION.**

8 (a) *USE OF INFORMATION PROVIDED BY STATES.*—
9 Section 7(b)(1) of the Endangered Species Act of 1973 (16
10 U.S.C. 1536(b)(1)) is amended by adding at the end the
11 following:

12 “(C) In conducting a consultation under subsection
13 (a)(2), the Secretary shall actively solicit and consider in-
14 formation from the State agency in each affected State.”.

15 (b) *OPPORTUNITY TO PARTICIPATE IN CONSULTA-*
16 *TIONS.*—Section 7(b)(1) of the Endangered Species Act of
17 1973 (16 U.S.C. 1536(b)(1)) (as amended by subsection (a))
18 is further amended by adding at the end the following:

19 “(D)(i) In conducting a consultation with a Federal
20 agency under subsection (a)(2), the Secretary and the head
21 of the agency shall provide any person who has sought au-
22 thorization or funding from a Federal agency for an action
23 that is the subject of the consultation, the opportunity to—

24 “(I) before the development of a draft biological
25 opinion, submit and discuss with the Secretary and

1 *the Federal agency information relevant to the effect*
2 *of the proposed action on the species and reasonable*
3 *and prudent alternatives that the Federal agency and*
4 *the person can take to avoid violation of subsection*
5 *(a)(2), including any such alternatives proposed by*
6 *the person;*

7 *“(II) receive information, on request, subject to*
8 *the exemptions specified in section 552(b) of title 5,*
9 *United States Code, on the status of the species,*
10 *threats to the species, and conservation measures, used*
11 *by the Secretary to develop the draft biological opin-*
12 *ion and the final biological opinion, including any*
13 *associated incidental taking statements; and*

14 *“(III) receive a copy of the draft biological opin-*
15 *ion from the Federal agency and, before issuance of*
16 *the final biological opinion, submit comments on the*
17 *draft biological opinion and discuss with the Sec-*
18 *retary and the Federal agency the basis for any find-*
19 *ing in the draft biological opinion.*

20 *“(ii) If alternatives are proposed by a person under*
21 *clause (i) and the Secretary does not include the alter-*
22 *natives in the final biological opinion, the Secretary shall*
23 *provide to the person reasonable justification, based on the*
24 *best scientific and commercial data available, why those al-*
25 *ternatives were not included in the opinion.*

1 “(iii) Comments and other information submitted to,
2 or received from, any person (pursuant to clause (i)) who
3 seeks authorization or funding for an action shall be main-
4 tained in a file for that action by the Secretary and shall
5 be made available to the public (subject to the exemptions
6 specified in section 552(b) of title 5, United States Code).”.

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