108TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
108–785

ENDANGERED SPECIES DATA QUALITY ACT OF 2004

NOVEMBER 19, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. POMBO, from the Committee on Resources, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1662]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 1662) to amend the Endangered Species Act of 1973 to require the Secretary of the Interior to give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Endangered Species Data Quality Act of 2004".

SEC. 2. SOUND SCIENCE.

(a) BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE.—

(1) IN GENERAL.—Section 3 of the Endangered Species Act of 1973 (16 U.S.C. 1532) is amended—

(A) by amending the section heading to read as follows:

"SEC. 3. DEFINITIONS AND GENERAL PROVISIONS. ".

(B) by striking "For the purposes of this Act—" and inserting the following:

"(a) DEFINITIONS.—In this Act:"; and

(C) by adding at the end the following:

"(b) USE OF CERTAIN DATA.—In any case in which the Secretary is required by this Act to use the best scientific and commercial data available or the best scientific data available, the Secretary shall—

"(1) ensure that such data comply with guidelines issued under section 515 of the Treasury and General Government Appropriations Act, 2001 (Public Law 106-554; 114 Stat. 2763A-171) by the Director of the Office of Management and Budget, and any guidance issued by the Secretary pursuant to such guidelines, except as provided in this Act;

"(2) ensure that such data include timely field survey data to the extent such data are available; and

"(3) give greater weight to interpretations of data derived from or verified by timely field work (commonly referred to as 'empirical data') that have been subjected to peer-review.".

(2) CONFORMING AMENDMENT.—The table of contents in the first section of the Endangered Species Act of 1973 is amended by striking the item relating to section 3 and inserting the following:

"Sec. 3. Definitions and general provisions."

(b) USE OF SOUND SCIENCE IN LISTING.—Section 4(b) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)) is amended by adding at the end the following:

"(9) ESTABLISHMENT OF CRITERIA FOR SCIENTIFIC DATA TO SUPPORT LISTING.—Not later than 1 year after the date of the enactment of this paragraph, the Secretary shall promulgate regulations that establish criteria that must be met in order to determine under this section that data is the best scientific and commercial data available and for best scientific data available to be used as the basis of a determination under this section that a species is an endangered species or a threatened species.

"(10) FIELD DATA.—

"(A) REQUIREMENT.—The Secretary may not determine that a species is an endangered species or a threatened species unless the determination or designation, respectively, is supported by data obtained by timely fields.

"(B) DATA FROM REAL PROPERTY OWNERS AND OPERATORS.—The Secretary shall—

"(i) accept data during the appropriate public comment period regarding the status of a species that is collected by an individual who is an owner of real property or who holds or is an applicant for a contract, lease, or other permit for real property through observation of the species on the real property; and

"(ii) acknowledge receipt of data submitted under clause (i) and include such data in the rulemaking record compiled under this section for any determination that the species is an endangered species or a threatened species.".

(c) USE OF SOUND SCIENCE IN RECOVERY PLANNING.—Section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)) is amended by adding at the end the following:

"(6) ADDITIONAL DATA.—

"(A) IDENTIFICATION.—The Secretary shall—

"(i) identify and publish in the Federal Register with the notice of a proposed regulation published pursuant to subsection (b)(5)(A)(i), and with notice of any final regulation published pursuant to subsection (b)(6), a description of additional scientific and commercial data that would assist in the preparation of a recovery plan;

"(ii) invite any person to submit such data to the Secretary; and

"(iii) describe the steps that the Secretary plans to take to acquire additional data.

"(B) CONSIDERATION.—Data identified and obtained under subparagraph (A) shall be considered by the recovery team and the Secretary in the preparation of the recovery plan in accordance with section 5.".

SEC. 3. PEER REVIEW.

Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) is amended by adding at the end the following:

"(j) INDEPENDENT SCIENTIFIC REVIEW REQUIREMENTS.—

"(1) DEFINITIONS.—In this subsection:

"(A) COVERED ACTION.—The term 'covered action' means—

"(i) a proposed determination under subsection (a)(1) that a species is an endangered species or a threatened species under subsection (a)(1);

"(ii) a proposed determination under subsection (a)(1) that would change the status of a species as an endangered species or a threatened species or would remove such a species from any list published under subsection (c)(1);

"(iii) the development of a recovery plan for a threatened species or endangered species under subsection (f); and

"(iv) the determination that a proposed action is likely to jeopardize the continued existence of a listed species, including the proposal of any reasonable and prudent alternatives by the Secretary under section 7(b)(3).

"(B) QUALIFIED INDIVIDUAL.—The term 'qualified individual' means an individual—

"(i) who through publication of peer-reviewed scientific literature or other means, has demonstrated scientific expertise on the species or a similar species or other scientific expertise relevant to the covered action;

"(ii) who does not have, or represent any person with, a conflict of interest with respect to the covered action that is the subject of the review; and

"(iii) who has not advocated a position, and is not employed by a person who has advocated a position, with respect to the outcome of the covered action that is the subject of the review, or of any previous covered action with respect to the affected species.

"(C) CONFLICT OF INTEREST.—The term 'conflict of interest'—

"(i) shall have such meaning as is established by regulations as shall be issued by the Secretary; and

"(ii) shall include, in accordance with such regulations, direct financial interests in the outcome of the action that will be the subject of the review, including consulting arrangements, grants, honoraria, or employment.

"(2) RECOMMENDATION OF INDEPENDENT REVIEWERS.—The Secretary shall solicit recommendations from the National Academy of Sciences and the governors of affected States of qualified individuals to serve as independent reviewers for a covered action.

"(3) APPOINTMENT OF INDEPENDENT SCIENTIFIC REVIEWERS.—(A) Before making the final decision on any covered action, the Secretary shall appoint, from among the individuals recommended under paragraph (2), 3 qualified individuals who shall review and report to the Secretary on the scientific information and analyses on which the covered action is based.

"(B) The selection and activities of the independent reviewers appointed pursuant to this paragraph shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

"(C) If funds are available, the Secretary shall provide compensation to an individual for service as an independent reviewer under this paragraph, at a rate not to exceed the daily equivalent of the maximum annual rate of basic pay for GS–14 of the General Schedule for each day (including travel time) during which the individual is engaged in the actual performance of duties as an independent reviewer.

"(4) INFORMATION FOR REVIEW.—The Secretary shall transmit to the independent reviewers all available scientific and commercial data identified in the administrative record for the action at the time of the transmission.

"(5) RESPONSE OF INDEPENDENT REVIEWERS.—The independent reviewers shall provide the Secretary, within 3 months after the transmission of the data under paragraph (4), their reviews regarding all relevant scientific information and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for the species in question.

"(6) NOTICE OF DATA AVAILABILITY.—

"(A) Following receipt of the reviews provided under paragraph (5) and not less than 30 days before making the final decision on a covered action described in paragraph (1)(A)(i) or (ii), the Secretary shall publish a notice of the availability of the draft determination of which data available qualify as the best scientific and commercial data available on which the final decision will be based and which do not, including any ongoing assessments that are expected to produce such data.

"(B) The Secretary shall provide the public with not less than 15 days to identify any additional information that should be considered as best scientific and commercial data available data with respect to a covered action described in paragraph (1)(A)(i) or (ii), including the reasons why such information should be so considered.

"(C) The Secretary shall explain, in the notice of final covered action with respect to a covered action described in paragraph (1)(A)(i) or (ii), why information identified under subparagraph (B) did or did not qualify as the best scientific and commercial data available.

"(D) The Secretary shall identify the data that qualified as the best scientific and commercial data available on which the final decision with respect to a covered action described in paragraph (1)(A)(iii) or (iv) is based in a final biological opinion or final recovery plan for the covered action.

"(7) FINAL DETERMINATION.—The Secretary shall evaluate the reviews received pursuant to paragraph (5) and include in the final determination—

"(A) a summary of each independent review; and

"(B) in any case in which the Secretary does not accept a recommendation of an independent reviewer with respect to data reviewed pursuant to this subsection, an explanation of why the recommendation was not followed.

"(8) PUBLIC NOTICE.—The reviews received by the Secretary pursuant to paragraph (5) shall be included in the official record of the final decision on the action and shall be available for public review as soon as the final decision is issued.".

SEC. 4. IMPROVED CONSULTATION.

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

"(C) USE OF STATE INFORMATION.—In conducting a consultation under subsection (a)(2), the Secretary—

"(i) shall actively solicit and consider information from the governor of the State where the agency action is located; and

"(ii) shall provide an opportunity for the governor of any State otherwise affected by the agency action, as determined by the Secretary, to submit information.".

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

"(D) OPPORTUNITY TO PARTICIPATE IN CONSULTATIONS.—

"(i) IN GENERAL.—In conducting a consultation under subsection (a)(2), the Secretary shall provide to any person who has sought authorization or funding from a Federal agency for an action that is the subject of the consultation or who holds or is an applicant for a Federal contract, lease, or other permit that may be materially affected by an agency action that is the subject of the consultation—

"(I) the opportunity, before the development of a draft biological opinion, to submit and discuss with the Secretary and the Federal agency information relevant to the effect of the proposed action on the species and any actions that could serve as reasonable and prudent measures or reasonable and prudent alternatives in the event such measures or alternatives are necessary to complete the consultation;

"(II) information, on request, subject to the exemptions specified in section 552(b) of title 5, United States Code, on the status of the species, threats to the species, and conservation measures, used by the Secretary to develop the draft biological opinion and the final biological opinion, including any associated statement under subsection (b)(4); and

"(III) a copy, on request, of the draft biological opinion, including any draft statement under subsection (b)(4), that was provided to the Federal agency and, before issuance of the final biological opinion and statement, the opportunity to submit comments on the draft biological opinion and statement and to discuss with the Secretary and the Federal agency the basis for any finding in the draft biological opinion and statement.

"(ii) EXPLANATION.—If reasonable and prudent alternatives are proposed by a person under clause (i) and the Secretary does not include the alternatives in the final biological opinion, the Secretary shall explain to the person why those alternatives were not included in the opinion.

"(iii) PUBLIC ACCESS TO INFORMATION.—Comments and other information submitted to, or received from, any person (pursuant to clause (i)) who seeks authorization or funding for an action shall be maintained in a file for that action by the Secretary and shall be made available to the public (subject to the exemptions specified in section 552(b) of title 5, United States Code).".

Amend the title so as to read:

A bill to amend the Endangered Species Act of 1973 to provide guidance and direction on the development and use of data under that Act, and for other purposes.

PURPOSE OF THE BILL

As ordered reported, the purpose of H.R. 1662 is to amend the Endangered Species Act of 1973 to provide guidance and direction on the development and use of data under that Act, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Prior to 1966, authority for wildlife protection rested primarily with the States, except where the wildlife was highly migratory or where wildlife was taken in violation of State or federal law and transported across State boundaries. In response to a concern that various species had become or were in danger of becoming extinct, the federal government began to consider legislation protecting endangered and threatened fish, wildlife and plants. Congress' efforts culminated in 1973 with the passage of the Endangered Species Act of 1973 (ESA, Public Law 93–205, 16 U.S.C. 1531 et seq.), which has become our Nation's strictest and most stringent environmental law.

The ESA is implemented by the Secretary of the Department of the Interior, through the Fish and Wildlife Service (FWS), which has responsibility for plants, wildlife and inland fishes. The Secretary of Commerce, through the National Marine Fisheries Service (NMFS), is responsible for implementing the ESA with respect to ocean going fish and marine animals. However, given the much greater number of species under its jurisdiction, FWS is the major agency involved in ESA-related decisions.

Under the ESA, certain species of animals and plants are listed as threatened or endangered based on the risk of their extinction. In addition, the ESA requires prior consultation with FWS and NMFS whenever a federal agency action might affect an endangered to threatened species. FWS and NMFS are also responsible for the development of recovery plans to improve the survival of species. Finally, FWS and NMFS can designate critical habitat to protect a species.

H.R. 1662 amends the ESA by directing the Secretaries to provide guidance and direction on the development and use of scientific and commercial data that is empirical or that has been field-tested or peer-reviewed in determining that a species is an endangered or threatened species. The bill also directs the Secretaries to promulgate regulations that establish criteria for data to be used as the basis of such a determination.

The fundamental goal of this legislation is to ensure that sound and defensible science is used and peer-reviewed in all listing decisions. For many Members of Congress, this is a simple and long overdue revision to the ESA. The ESA was passed by Congress in 1973 with the intent to protect and preserve species that have been identified as threatened or endangered. Over the past 30 years more than 1,800 species have been listed for protection. While the ESA has many unique provisions designed to recover threatened and endangered species, H.R. 1662 focuses primarily on the use of sound science and peer review in actions including: a proposed list-

ing or delisting of an endangered or threatened species; a proposal to reclassify a species from threatened to endangered or vice versa; the development of a recovery plan for an endangered or threatened species; and a jeopardy determination.

Each Secretary follows a regulatory process to list species as threatened or endangered and to recover a species. Currently, the ESA requires "the best scientific and commercial data available" for listings and other actions. However, this term is not defined, and there are no objective standards to ensure a uniformly high quality of scientific data. Further, many question the cost, magnitude and validity of the ESA's requirements and implementation since the Act has produced very limited recovery results. This has led to concerns about the adequacy of science supporting implementation of actions under the ESA. To address these issues, H.R. 1662 amends the ESA by requiring the Secretaries to set standards for the scientific and commercial data that is used to take actions under the ESA.

The ESA grants the Secretaries broad discretion in determining what listings, if any, will take place, with little to no constraints as to what data may or may not be used. H.R. 1662 prohibits the Secretaries from determining that a species is endangered or threatened unless the determination is supported by data obtained by observation of the species in the field. It requires the Secretaries to accept, acknowledge receipt of, and include in the rulemaking record of such a determination data collected by landowners through observation of the species on the land. This provides a constructive role for private landowners in the listing recovery and consultation processes who will be affected by the actions of the Secretaries.

Furthermore, the Secretaries are also currently given broad discretion in developing recovery plans and critical habitat designations. H.R. 1662 requires the Secretaries to publish with the notice of a proposed regulation a description of additional scientific and commercial data that would assist in preparing a recovery plan, invite any person to submit such data, and describe the steps for acquiring additional data. This will give the public an opportunity to comment on a draft recovery plan, something that currently does not occur.

The bill also establishes a peer review board and process by directing the Secretaries to solicit recommendations from the National Academy of Sciences, develop a list of qualified reviewers to participate in independent scientific review actions, appoint from such list three individuals who shall report on the scientific information and analyses on which such action is based before any proposed action becomes final, and include such report in the official record of the proposed action. This peer review process improves the ESA, which currently requires the Secretaries to cooperate with the States "to the maximum extent possible," but largely leaves the implementation of such cooperation to the discretion of the relevant Secretary.

H.R. 1662 requires the Secretaries, in consultation with each federal agency and the affected States, to consider information provided by those States. The bill also provides any person who has sought authorization or funding from a federal agency for an action the opportunity to submit, discuss, and receive information rel-

evant to the draft biological opinion relating to that action. This gives the applicant a formal role in the ESA process.

These changes will greatly improve the process by which endangered species are protected and recovered. This bill improves the underlying scientific and commercial basis for ESA decision making by establishing objective standards; favoring common sense use of science; including States, landowners and other stakeholders in the listing, delisting, recovery planning processes; and providing reliable data analysis in the decision making process for endangered species.

COMMITTEE ACTION

H.R. 1662 was introduced on April 8, 2003, by Congressman Greg Walden (R–OR). The bill was referred to the Committee on Resources. On July 21, 2004, the Full Resources Committee met to consider the bill. Congressman Greg Walden offered an amendment in the nature of a substitute to make technical changes. The amendment was adopted by a voice vote. The bill as amended was then ordered favorably reported to the House of Representatives by a rollcall vote of 26–15, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
108th Congress

Date: July 21, 2004

Convened: 10:01
Adjourned: _____

Meeting on: **HR 1662 - Favorably reporting the bill, as amended, to House of Representatives by Roll Call Vote of 26 Yeas and 15 Nays**

☐ Attendance ☒ Recorded Vote Vote Number 26 Total: Yeas 26 Nays 15

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman	✓			Mr. Peterson, PA	✓		
Mr. Rahall, WV		✓		*Mr. Tom Udall, NM*		✓	
Mr. Young, AK				Mr. Gibbons, NV	✓		
Mr. Miller, CA		✓		*Mr. Mark Udall, CO*		✓	
Mr. Tauzin, LA				Mr. Souder, IN	✓		
Mr. Markey, MA		✓		*Mr. Acevedo-Vilá, PR*			
Mr. Saxton, NJ				Mr. Walden, OR	✓		
Mr. Kildee, MI		✓		*Mr. Carson, OK*	✓		
Mr. Gallegly, CA	✓			Mr. Tancredo, CO	✓		
Mr. Faleomavaega, AS		✓		*Mr. Grijalva, AZ*		✓	
Mr. Duncan, TN	✓			Mr. Hayworth, AZ	✓		
Mr. Abercrombie, HI		✓		*Mr. Cardoza, CA*	✓		
Mr. Gilchrest, MD		✓		Mr. Osborne, NE	✓		
Mr. Ortiz, TX				*Ms. Bordallo, GU*		✓	
Mr. Calvert, CA	✓			Mr. Flake, AZ	✓		
Mr. Pallone, NJ		✓		*Ms. Herseth, SD*		✓	
Mr. McInnis, CO				Mr. Rehberg, MT	✓		
Mr. Dooley, CA	✓			*Mr. Hinojosa, TX*			
Mrs. Cubin, WY	✓			Mr. Renzi, AZ	✓		
Mrs. Christensen, VI				*Mr. Rodriguez, TX*			
Mr. Radanovich, CA	✓			Mr. Cole, OK	✓		
Mr. Kind, WI				*Mr. Baca, CA*	✓		
Mr. Jones, NC				Mr. Pearce, NM	✓		
Mr. Inslee, WA		✓		Mr. Bishop, UT	✓		
Mr. Cannon, UT	✓			Mr. Nunes, CA	✓		
Mrs. Napolitano, CA		✓		Mr. Neugebauer, TX	✓		
				Total	26	15	

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

H.R. 1662 may be cited as the "Endangered Species Data Quality Act of 2004."

Section 2. Sound science

This section amends ESA section 3 (definitions) to requires the Secretaries to "use the best scientific and commercial data available or the best scientific data available" and incorporates the so-called Data Quality Act (Public Law 106–554; 114 Stat. 2763A–171), which ensures that such data comply with Office of Management and Budget and agency issued guidelines, making the agency actions subject to judicial review. This is supplemented by a field survey requirement and gives greater weight for peer review.

This section also amendments section 4 of the ESA (determination of endangered species and threatened species) to requires the use of sound science for the listing and for the designation of critical habitat of threatened or endangered species. More specifically, this section requires FWS and NMFS to "accept and acknowledge receipt" of data from landowners or lessees or contractors. These individuals may present the agencies with their own field-survey data when the agencies are considering listing a species as threatened or endangered which is present on their land or the land they are performing work on. The section also stipulates that this data must be submitted during the appropriate public comment period.

In addition, section 2 requires the identification of the scientific and commercial data needed for a recovery plan in a proposed rulemaking to list a species, as well as in the final rulemaking process, and ensures that this data will be considered in the preparation of the recovery plan.

Section 3. Peer review

Section 3 adds a new subsection (j) to section 4 of the ESA to require peer review for the following: a proposed listing or delisting of an endangered or threatened species; a proposal to reclassify a species from threatened to endangered or vice versa; the development of a recovery plan for an endangered or threatened species; or a jeopardy determination. In addition, the section requires a peer-reviewer to have relevant scientific expertise.

The section further requires FWS and NMFS to consult with the National Academy of Sciences and the governors of affected States to develop a list of qualified independent peer reviewers. The section requires the appointment of three qualified individuals from the recommended list to review and report to the Secretaries. These individuals, if funds are available, will be provided compensation for their service.

Section 3 requires that federal agencies transmit all data that was used in the final decision-making. The section requires each independent reviewer to provide the Secretaries with their views within three months of receipt of the data provided by the Secretaries. The section requires the Secretaries to publish a notice of the availability of the draft determination of which data available qualifies as the "best scientific and commercial data available" on which the final decision will be based. The Secretaries must pro-

vide the public with at least 15 days to identify any additional information that should be considered. In the publication of the final biological opinion or final recovery plan, the Secretaries must identify the data that qualified as the best scientific and commercial data available. In addition, the Secretaries must include in the final determination the reviews received from the peer reviewers, and the independent reviews received must be included in the official record and available for public review.

Section 4. Improved consultation

Section 4 amends ESA section 7 (interagency cooperation) to requires FWS and NMFS to actively solicit and consider information from the governor of the State where the proposed agency action is located. This will prevent the ESA agencies from "agency shopping" within a State to get the most favorable data. All States affected by the federal action are given the opportunity to submit comments.

The section further requires the Secretaries to consider information from any person who has sought authorization or funding from a federal agency for a particular action potentially affecting threatened or endangered species the opportunity to submit, discuss, and receive information relevant to the draft biological opinion for that action. These comments and information will be made available to the public.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. This bill does not authorize funding and therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 17, 2004.

Hon. RICHARD W. POMBO,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1662, the Endangered Species Data Quality Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

H.R. 1662—Endangered Species Data Quality Act of 2004

Summary: Under the Endangered Species Act (ESA), certain species of plants and animals are listed as threatened or endangered based on assessments of the risk of their extinction. H.R. 1662 would amend the ESA to clarify the role of science as the basis for making certain decisions under that act.

CBO estimates that implementing H.R. 1662 would cost $27 million over the 2005–2009 period, assuming appropriation of the necessary amounts. The bill would not affect direct spending or revenues. H.R. 1662 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1662 is shown in the following table. The costs of this legislation fall within the budget function 300 (natural resources and environment).

	By fiscal year in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	5	5	5	6	6
Estimated Outlays	5	5	5	6	6

Basis of estimate: Under the ESA, the Secretary of the Interior and the Secretary of Commerce maintain a list of species that are threatened or endangered. The ESA outlines a multistage process of review and public participation that the two Secretaries must follow in making decisions to list or unlist a species and develop plans for its recovery.

H.R. 1662 would specify new requirements and procedures regarding the collection, use, and review of information throughout that process. Specifically, the bill would:

- Require the Secretaries of the Interior and Commerce to promulgate regulations establishing criteria that studies must meet to serve as the basis for decisions under the ESA;
- Direct the Secretaries to give greater weight to studies that use empirical or field-tested data;
- Authorize the Secretaries to appoint individuals to review the information used in making certain decisions under the ESA; and
- Direct the Secretaries to solicit and consider information from State agencies, landowners, and others who might be affected by decisions under the ESA.

Based on information from the Department of the Interior and the National Marine Fisheries Service, CBO estimates that implementing H.R. 1662 would cost $5 million in 2005 and $27 million over the 2005–2009 period, assuming appropriation of the necessary amounts. That amount includes $3 million in 2005 and $17 million over the next 5 years for increased administrative costs to the agencies. The estimate also includes $2 million a year over the 5 years for the cost of compensating individuals who review information used in certain ESA decisions. That estimate assumes that such individuals would review roughly 200 decisions a year at an average cost of $10,000.

Intergovernmental and private-sector impact: H.R. 1662 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no cost on State, local, or tribal governments.

Estimate prepared by: Federal Costs: Megan Carroll; Impact on State, Local, and Tribal Governments: Marjorie Miller; and Impact on the Private Sector: Amina Masood.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

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[DEFINITIONS

[SEC. 3. For the purposes of this Act—]

SEC. 3. DEFINITIONS AND GENERAL PROVISIONS.

(a) DEFINITIONS.—In this Act:

(1) * * *

* * * * * * *

(b) USE OF CERTAIN DATA.—In any case in which the Secretary is required by this Act to use the best scientific and commercial data available or the best scientific data available, the Secretary shall—

(1) ensure that such data comply with guidelines issued under section 515 of the Treasury and General Government Appropriations Act, 2001 (Public Law 106-554; 114 Stat. 2763A-171) by the Director of the Office of Management and Budget, and any guidance issued by the Secretary pursuant to such guidelines, except as provided in this Act;

(2) ensure that such data include timely field survey data to the extent such data are available; and

(3) give greater weight to interpretations of data derived from or verified by timely field work (commonly referred to as "empirical data") that have been subjected to peer-review.

* * * * * * *

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) * * *

(b) BASIS FOR DETERMINATIONS.—(1) * * *

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(9) ESTABLISHMENT OF CRITERIA FOR SCIENTIFIC DATA TO SUPPORT LISTING.—Not later than 1 year after the date of the enactment of this paragraph, the Secretary shall promulgate regulations that establish criteria that must be met in order to determine under this section that data is the best scientific and commercial data available and for best scientific data available to be used as the basis of a determination under this section that a species is an endangered species or a threatened species.

(10) FIELD DATA.—

(A) REQUIREMENT.—The Secretary may not determine that a species is an endangered species or a threatened species unless the determination or designation, respectively, is supported by data obtained by timely fields.

(B) DATA FROM REAL PROPERTY OWNERS AND OPERATORS.—The Secretary shall—

(i) accept data during the appropriate public comment period regarding the status of a species that is collected by an individual who is an owner of real property or who holds or is an applicant for a contract, lease, or other permit for real property through observation of the species on the real property; and

(ii) acknowledge receipt of data submitted under clause (i) and include such data in the rulemaking record compiled under this section for any determination that the species is an endangered species or a threatened species.

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(f)(1) * * *

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(6) ADDITIONAL DATA.—

(A) IDENTIFICATION.—The Secretary shall—

(i) identify and publish in the Federal Register with the notice of a proposed regulation published pursuant to subsection (b)(5)(A)(i), and with notice of any final regulation published pursuant to subsection (b)(6), a description of additional scientific and commercial data that would assist in the preparation of a recovery plan;

(ii) invite any person to submit such data to the Secretary; and

(iii) describe the steps that the Secretary plans to take to acquire additional data.

(B) CONSIDERATION.—Data identified and obtained under subparagraph (A) shall be considered by the recovery team and the Secretary in the preparation of the recovery plan in accordance with section 5.

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(j) INDEPENDENT SCIENTIFIC REVIEW REQUIREMENTS.—

(1) DEFINITIONS.—In this subsection:

(A) COVERED ACTION.—The term "covered action" means—

(i) a proposed determination under subsection (a)(1) that a species is an endangered species or a threatened species under subsection (a)(1);

(ii) a proposed determination under subsection (a)(1) that would change the status of a species as an endangered species or a threatened species or would remove such a species from any list published under subsection (c)(1);

(iii) the development of a recovery plan for a threatened species or endangered species under subsection (f); and

(iv) the determination that a proposed action is likely to jeopardize the continued existence of a listed species, including the proposal of any reasonable and prudent alternatives by the Secretary under section 7(b)(3).

(B) QUALIFIED INDIVIDUAL.—The term "qualified individual" means an individual—

(i) who through publication of peer-reviewed scientific literature or other means, has demonstrated scientific expertise on the species or a similar species or other scientific expertise relevant to the covered action;

(ii) who does not have, or represent any person with, a conflict of interest with respect to the covered action that is the subject of the review; and

(iii) who has not advocated a position, and is not employed by a person who has advocated a position, with respect to the outcome of the covered action that is the subject of the review, or of any previous covered action with respect to the affected species.

(C) CONFLICT OF INTEREST.—The term "conflict of interest"—

(i) shall have such meaning as is established by regulations as shall be issued by the Secretary; and

(ii) shall include, in accordance with such regulations, direct financial interests in the outcome of the action that will be the subject of the review, including consulting arrangements, grants, honoraria, or employment.

(2) RECOMMENDATION OF INDEPENDENT REVIEWERS.—The Secretary shall solicit recommendations from the National Academy of Sciences and the governors of affected States of qualified individuals to serve as independent reviewers for a covered action.

(3) APPOINTMENT OF INDEPENDENT SCIENTIFIC REVIEWERS.—(A) Before making the final decision on any covered action, the Secretary shall appoint, from among the individuals recommended under paragraph (2), 3 qualified individuals who shall review and report to the Secretary on the scientific information and analyses on which the covered action is based.

(B) The selection and activities of the independent reviewers appointed pursuant to this paragraph shall not be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

(C) If funds are available, the Secretary shall provide compensation to an individual for service as an independent reviewer under this paragraph, at a rate not to exceed the daily equivalent of the maximum annual rate of basic pay for GS–14 of the General Schedule for each day (including travel time) during which the individual is engaged in the actual performance of duties as an independent reviewer.

(4) INFORMATION FOR REVIEW.—The Secretary shall transmit to the independent reviewers all available scientific and commercial data identified in the administrative record for the action at the time of the transmission.

(5) RESPONSE OF INDEPENDENT REVIEWERS.—The independent reviewers shall provide the Secretary, within 3 months after the transmission of the data under paragraph (4), their reviews regarding all relevant scientific information and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for the species in question.

(6) NOTICE OF DATA AVAILABILITY.—

(A) Following receipt of the reviews provided under paragraph (5) and not less than 30 days before making the final decision on a covered action described in paragraph (1)(A)(i) or (ii), the Secretary shall publish a notice of the availability of the draft determination of which data available qualify as the best scientific and commercial data available on which the final decision will be based and which do not, including any ongoing assessments that are expected to produce such data.

(B) The Secretary shall provide the public with not less than 15 days to identify any additional information that should be considered as best scientific and commercial data available data with respect to a covered action described in paragraph (1)(A)(i) or (ii), including the reasons why such information should be so considered.

(C) The Secretary shall explain, in the notice of final covered action with respect to a covered action described in paragraph (1)(A)(i) or (ii), why information identified under subparagraph (B) did or did not qualify as the best scientific and commercial data available.

(D) The Secretary shall identify the data that qualified as the best scientific and commercial data available on which the final decision with respect to a covered action described in paragraph (1)(A)(iii) or (iv) is based in a final biological opinion or final recovery plan for the covered action.

(7) FINAL DETERMINATION.—The Secretary shall evaluate the reviews received pursuant to paragraph (5) and include in the final determination—

(A) a summary of each independent review; and

(B) in any case in which the Secretary does not accept a recommendation of an independent reviewer with respect to data reviewed pursuant to this subsection, an explanation of why the recommendation was not followed.

(8) PUBLIC NOTICE.—The reviews received by the Secretary pursuant to paragraph (5) shall be included in the official record of the final decision on the action and shall be available for public review as soon as the final decision is issued.

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INTERAGENCY COOPERATION

SEC. 7. (a) * * *

(b) OPINION OF SECRETARY.—(1)(A) * * *

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(C) USE OF STATE INFORMATION.—In conducting a consultation under subsection (a)(2), the Secretary—

(i) shall actively solicit and consider information from the governor of the State where the agency action is located; and

(ii) shall provide an opportunity for the governor of any State otherwise affected by the agency action, as determined by the Secretary, to submit information.

(D) OPPORTUNITY TO PARTICIPATE IN CONSULTATIONS.—

(i) IN GENERAL.—In conducting a consultation under subsection (a)(2), the Secretary shall provide to any person who has sought authorization or funding from a Federal agency for an action that is the subject of the consultation or who holds or is an applicant for a Federal contract, lease, or other permit that may be materially affected by an agency action that is the subject of the consultation—

(I) the opportunity, before the development of a draft biological opinion, to submit and discuss with the Secretary and the Federal agency information relevant to the effect of the proposed action on the species and any actions that could serve as reasonable and prudent measures or reasonable and prudent alternatives in the event such measures or alternatives are necessary to complete the consultation;

(II) information, on request, subject to the exemptions specified in section 552(b) of title 5, United States Code, on the status of the species, threats to the species, and con-

servation measures, used by the Secretary to develop the draft biological opinion and the final biological opinion, including any associated statement under subsection (b)(4); and

(III) a copy, on request, of the draft biological opinion, including any draft statement under subsection (b)(4), that was provided to the Federal agency and, before issuance of the final biological opinion and statement, the opportunity to submit comments on the draft biological opinion and statement and to discuss with the Secretary and the Federal agency the basis for any finding in the draft biological opinion and statement.

(ii) EXPLANATION.—If reasonable and prudent alternatives are proposed by a person under clause (i) and the Secretary does not include the alternatives in the final biological opinion, the Secretary shall explain to the person why those alternatives were not included in the opinion.

(iii) PUBLIC ACCESS TO INFORMATION.—Comments and other information submitted to, or received from, any person (pursuant to clause (i)) who seeks authorization or funding for an action shall be maintained in a file for that action by the Secretary and shall be made available to the public (subject to the exemptions specified in section 552(b) of title 5, United States Code).

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DISSENTING VIEWS

We view H.R. 1662 as quasi political science wrapped in the thread bare blanket of sound science. If enacted, H.R. 1662 would make the Secretaries of the Interior and Commerce jump through so many bureaucratic hoops to implement the Endangered Species Act (ESA) that decisions would be delayed, making compliance with the statutory deadlines nearly impossible. Ultimately additional lawsuits will be filed, fewer species recovered, and there will be more extinctions.

The ESA requires the Secretaries of the Interior and Commerce to rely on the best scientific and commercial data available when making listing decisions, developing recovery plans, and evaluating whether endangered or threatened species will be affected by a Federal action. For critical habitat designations, the Secretaries are to use the best scientific data available.

Apparently the best scientific data is not good enough for supporters of H.R. 1662. They would prefer to limit the scientific information available to the Secretaries, and rig the decisions that follow.

The National Research Council in its briefing to the Committee in July 2004 warned that a statutory definition of best scientific information available in fisheries management is inadvisable because it could impede the incorporation of new types of scientific information and would be difficult to amend if circumstances warranted change. In our view, the Secretaries should have the freedom to use the best science available, including field studies, modeling, and a combination of the two, in their ESA decisions as well.

Standards for Data. Under H.R. 1662, the Secretaries could not designate critical habitat or list a species as endangered or threatened, unless the decisions were supported by timely field survey data. Decisions to delist species, however, would not have to be based on field survey data. Neither definitions of timely nor standards for field survey data are provided in H.R. 1662. In making these determinations the Secretaries would have to consider data from property owners and lessees, which the ESA already requires. The difference is that H.R. 1662 would allow the observations by individuals who own land or applicants for contracts, leases or permits to masquerade as legitimate scientific data. Biased, untrained, self-serving observations could become the scientific basis for secretarial decisions. The individual's observation would not even have to meet the criteria for data the Secretary is to establish under H.R. 1662.

Under H.R. 1662, the Secretary would be required to give greater weight to empirical data that has been peer reviewed when (1) deciding whether species should be listed as endangered or threatened, (2) approving recovery plans, (3) determining whether endangered or threatened species are present in the area of a proposed

agency action, and (4) developing biological opinions addressing whether a proposed agency action is likely to jeopardize the continued existence of a listed species or adversely modify critical habitat. This could cause the agency to be dependent on older, peer-reviewed data even when more recent, even better data, may be available. Under H.R. 1662, if both empirical data and non empirical data relevant to a decision are available, the Secretary could not give equal weight to each set, even if both had been peer reviewed.

Ironically, some proponents of this bill also supported the Record of Decision issued earlier this year that eliminated the Forest Service's and Bureau of Land Management's requirements to conduct detailed field surveys prior to logging in old growth and other forests covered by the Pacific Northwest Plan. We see inconsistency, if not hypocrisy, in those who advocate that Federal agencies skip field surveys prior to timber sales but insist on field data to support endangered and threatened species listing decisions, and critical habitat determinations.

In the complex sciences of conservation biology and ecology, there is no scientific justification for giving greater weight to empirical data over modeling results. As a matter of course, the field data is often inadequate and important interactions can only be understood by sophisticated models. Moreover, "the [Fish and Wildlife] Service's policies and practices generally ensure that listing and critical habitat decisions are based on the best available science," according to the General Accountability Office (GAO) in a 2003 report commissioned by Chairman Richard Pombo. [Fish and Wildlife Service Uses Best Available Science to Make Listing Decisions, but Additional Guidance Needed for Critical Habitat Designations, August 2003.]

Today, mathematical models are fundamental to forecasting everything from the weekend weather to the national budget deficit. We value models when predicting the arrival of hurricanes and eruption of volcanoes. We support the Federal Reserve's use of models to predict the response of the economy to monetary policies. We understand why the Environmental Protection Agency develops models to assess risks to human health. Models are no less important to understanding environmental interactions and maintaining environmental health.

Nevertheless, H.R. 1662 would strip the Secretaries of their ability to base decisions on models used to predict the risk of extinction. In 1995, the National Research Council issued its report Science and the Endangered Species Act which on page 82 states, "Population viability analysis is the cornerstone, the obligatory tool by which objectives and criteria are identified." Most population viability analyses (PVA0 combine data from field studies with simulation modeling of the possible impacts of various extinction factors. Yet, the Secretaries of the Interior and Commerce could not use PVA in listing decisions and critical habitat determinations if H.R. 1662 is enacted.

During hearings last Congress on similar legislation (H.R. 4840), the Administration expressed concern over the requirement to limit the use of modeling in ESA decisions. In testimony, William Hogart, Director of National Oceanic and Atmospheric Administra-

tion (NOAA)—Fisheries said, "We support the goal of basing our decisions on sound and peer-reviewed science, and we agree that empirical field tested data are important. However, we would not want to diminish the use of models of populations, habitat use and/or life histories, which frequently do represent the best available science and are based on field-collected data." [Testimony before the House Resources Committee on June 19, 2002; the Committee failed to hold hearings on H.R. 1662.]

Peer Review. H.R. 1662 also would require that all proposals to list and de-list species, designate critical habitat, issue a recovery plan, and determine that a proposed action is likely to jeopardize the continued existence of a listed species or adversely modify habitat, be subject to peer review prior to the Secretary's final decision. Since 1994, the Fish and Wildlife Service and NOAA Fisheries have used external peer review of listing and critical habitat decisions. The GAO found in 2003, "The Service's peer-review policy generally appears to be appropriate for the circumstances in which it is used."

Under H.R. 1662, the Secretary would be required to select three individuals to review relevant scientific information and assumptions for the species in question. They would be paid at the annual rate of basic pay for GS–14 of the General Schedule, if funds are available.

"An independent peer review process could potentially add six months to each action that is reviewed, and this type of delay could have tremendous economic impact to business including the fishing industry when we were trying to open and close seasons and also public projects," testified Director Hogarth at a hearing in 2002. Similarly, the Wildlife Society said that peer review during the Section 7 consultation process "would substantially lengthen the timeframes for that consultation to the detriment of species conservation or federal agency actions."

H.R. 1662 fails to say what is to happen if funds or individuals are not available to participate in peer review. The plan is not practical because there are not enough scientists to carry out the tasks indicated. "One limitation that the Service faces in getting an independent review is the scarcity of experts on a particular species," the GAO found in its 2003 report.

The cumbersome peer review process established under H.R. 1662 would likely result in the Secretary missing statutory deadlines in the ESA, providing fodder for additional lawsuits, and forfeiting opportunities to recover species.

Consultation—Access for Some But Not for Others. Finally, H.R. 1662 would legislate exclusive access to the development of a biological opinion for any person who has sought authorization for an activity that is the subject of the consultation. Other interested parties who may also be affected economically or in other ways by the outcome of the opinion would have no such opportunity for input. In the case of the Klamath River biological opinion, H.R. 1662 would ensure that the irrigators were guaranteed access to the consultation process under Section 7 of the ESA, but not the Indian Tribes and fishermen who are also economically affected by the outcome of the opinion would be provided no such access. This

is wholly inconsistent with American standards of fairness and procedural equity.

Conclusion. Rather than give the Secretaries the tools they need to make sound decisions, H.R. 1662 would limit the type of data available. The bill would predetermine what constitutes the best science, instead of letting the scientists make this determination. It also would delay decisions, making it likely that additional lawsuits alleging failure to comply with statutory deadlines will be filed against the Fish and Wildlife Service. More importantly, the delays in listings, critical habitat designations and development of recovery plan will make it more difficult more species to recover. For these reasons we strongly oppose H.R. 1662.

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