

Union Calendar No. 479

108TH CONGRESS
2D SESSION

H. R. 1662

[Report No. 108-785]

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.

IN THE HOUSE OF REPRESENTATIVES

APRIL 8, 2003

Mr. WALDEN of Oregon (for himself, Mr. HUNTER, Mr. GIBBONS, Mr. HERGER, Mr. SIMPSON, Mr. HASTINGS of Washington, Mr. OTTER, Mr. PEARCE, Mr. PAUL, Mr. CANNON, Mr. MCINNIS, Mrs. CUBIN, Mr. STENHOLM, Mr. NETHERCUTT, Mr. REHBERG, Mr. DOOLITTLE, Mr. RENZI, and Mr. BRADY of Texas) introduced the following bill; which was referred to the Committee on Resources

NOVEMBER 19, 2004

Additional sponsors: Mr. RADANOVICH, Mr. THORNBERRY, Mr. BISHOP of Utah, Mr. EDWARDS, Mr. OSBORNE, Mr. BARTLETT of Maryland, Mr. WICKER, Mr. NORWOOD, Mr. DOOLEY of California, Mr. LINDER, Mr. GARY G. MILLER of California, Mr. AKIN, Mr. SHADEGG, Mr. CARDOZA, Mrs. EMERSON, Mr. NUNES, Ms. DUNN, Mr. JONES of North Carolina, Mr. TERRY, Mr. TANCREDO, Mr. SANDLIN, Mr. KING of Iowa, Mr. PICKERING, Mr. MILLER of Florida, Mr. TURNER of Texas, Mr. HEFLEY, Mr. ISSA, Mr. ROSS, Mr. PUTNAM, Mr. BISHOP of Georgia, Mr. PETERSON of Pennsylvania, Mr. PITTS, Mr. CALVERT, Mr. LINCOLN DIAZ-BALART of Florida, Mr. BLUNT, Mrs. MUSGRAVE, Mr. SHIMKUS, Mr. OSE, Mr. FLAKE, Mr. FEENEY, Mr. NEUGEBAUER, Ms. HART, Mr. HAYWORTH, Ms. HARRIS, Mr. WILSON of South Carolina, Mr. BONNER, Mr. CRAMER, Mr. LEWIS of Kentucky, and Mr. DUNCAN

NOVEMBER 19, 2004

Reported with amendments, 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 April 8, 2003]

A BILL

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.

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

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Endangered Species*
5 *Data Quality Act of 2004”.*

6 **SEC. 2. SOUND SCIENCE.**

7 *(a) BEST SCIENTIFIC AND COMMERCIAL DATA AVAIL-*
8 *ABLE.—*

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

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

13 **“SEC. 3. DEFINITIONS AND GENERAL PROVISIONS.”**

14 *(B) by striking “For the purposes of this*
15 *Act—” and inserting the following:*

16 *“(a) DEFINITIONS.—In this Act:”;* and

17 *(C) by adding at the end the following:*

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

5 “(1) *ensure that such data comply with guide-*
6 *lines issued under section 515 of the Treasury and*
7 *General Government Appropriations Act, 2001 (Pub-*
8 *lic Law 106–554; 114 Stat. 2763A–171) by the Direc-*
9 *tor of the Office of Management and Budget, and any*
10 *guidance issued by the Secretary pursuant to such*
11 *guidelines, except as provided in this Act;*

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

14 “(3) *give greater weight to interpretations of*
15 *data derived from or verified by timely field work*
16 *(commonly referred to as ‘empirical data’) that have*
17 *been subjected to peer-review.”.*

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

“*Sec. 3. Definitions and general provisions.*”.

22 (b) *USE OF SOUND SCIENCE IN LISTING.*—*Section*
23 *4(b) of the Endangered Species Act of 1973 (16 U.S.C.*
24 *1533(b)) is amended by adding at the end the following:*

1 “(9) *ESTABLISHMENT OF CRITERIA FOR SCI-*
2 *ENTIFIC DATA TO SUPPORT LISTING.*—Not later than
3 1 year after the date of the enactment of this para-
4 graph, the Secretary shall promulgate regulations
5 that establish criteria that must be met in order to
6 determine under this section that data is the best sci-
7 entific and commercial data available and for best
8 scientific data available to be used as the basis of a
9 determination under this section that a species is an
10 endangered species or a threatened species.

11 “(10) *FIELD DATA.*—

12 “(A) *REQUIREMENT.*—The Secretary may
13 not determine that a species is an endangered
14 species or a threatened species unless the deter-
15 mination or designation, respectively, is sup-
16 ported by data obtained by timely fields.

17 “(B) *DATA FROM REAL PROPERTY OWNERS*
18 *AND OPERATORS.*—The Secretary shall—

19 “(i) accept data during the appro-
20 priate public comment period regarding the
21 status of a species that is collected by an in-
22 dividual who is an owner of real property
23 or who holds or is an applicant for a con-
24 tract, lease, or other permit for real prop-

1 *erty through observation of the species on*
2 *the real property; and*

3 *“(ii) acknowledge receipt of data sub-*
4 *mitted under clause (i) and include such*
5 *data in the rulemaking record compiled*
6 *under this section for any determination*
7 *that the species is an endangered species or*
8 *a threatened species.”.*

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

13 *“(6) ADDITIONAL DATA.—*

14 *“(A) IDENTIFICATION.—The Secretary*
15 *shall—*

16 *“(i) identify and publish in the Fed-*
17 *eral Register with the notice of a proposed*
18 *regulation published pursuant to subsection*
19 *(b)(5)(A)(i), and with notice of any final*
20 *regulation published pursuant to subsection*
21 *(b)(6), a description of additional scientific*
22 *and commercial data that would assist in*
23 *the preparation of a recovery plan;*

24 *“(ii) invite any person to submit such*
25 *data to the Secretary; and*

1 “(iii) describe the steps that the Sec-
2 retary plans to take to acquire additional
3 data.

4 “(B) CONSIDERATION.—Data identified and
5 obtained under subparagraph (A) shall be con-
6 sidered by the recovery team and the Secretary
7 in the preparation of the recovery plan in ac-
8 cordance with section 5.”.

9 **SEC. 3. PEER REVIEW.**

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

12 “(j) *INDEPENDENT SCIENTIFIC REVIEW REQUIRE-*
13 *MENTS.*—

14 “(1) *DEFINITIONS.*—In this subsection:

15 “(A) *COVERED ACTION.*—The term ‘covered
16 action’ means—

17 “(i) a proposed determination under
18 subsection (a)(1) that a species is an endan-
19 gered species or a threatened species under
20 subsection (a)(1);

21 “(ii) a proposed determination under
22 subsection (a)(1) that would change the sta-
23 tus of a species as an endangered species or
24 a threatened species or would remove such a

1 species from any list published under sub-
2 section (c)(1);

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

6 “(iv) the determination that a pro-
7 posed action is likely to jeopardize the con-
8 tinued existence of a listed species, includ-
9 ing the proposal of any reasonable and pru-
10 dent alternatives by the Secretary under
11 section 7(b)(3).

12 “(B) QUALIFIED INDIVIDUAL.—The term
13 ‘qualified individual’ means an individual—

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

20 “(ii) who does not have, or represent
21 any person with, a conflict of interest with
22 respect to the covered action that is the sub-
23 ject of the review; and

24 “(iii) who has not advocated a posi-
25 tion, and is not employed by a person who

1 *has advocated a position, with respect to the*
2 *outcome of the covered action that is the*
3 *subject of the review, or of any previous cov-*
4 *ered action with respect to the affected spe-*
5 *cies.*

6 “(C) *CONFLICT OF INTEREST.*—*The term*
7 *‘conflict of interest’—*

8 *“(i) shall have such meaning as is es-*
9 *tablished by regulations as shall be issued*
10 *by the Secretary; and*

11 *“(ii) shall include, in accordance with*
12 *such regulations, direct financial interests*
13 *in the outcome of the action that will be the*
14 *subject of the review, including consulting*
15 *arrangements, grants, honoraria, or em-*
16 *ployment.*

17 “(2) *RECOMMENDATION OF INDEPENDENT RE-*
18 *VIEWERS.*—*The Secretary shall solicit recommenda-*
19 *tions from the National Academy of Sciences and the*
20 *governors of affected States of qualified individuals to*
21 *serve as independent reviewers for a covered action.*

22 “(3) *APPOINTMENT OF INDEPENDENT SCIENTIFIC*
23 *REVIEWERS.*—*(A) Before making the final decision on*
24 *any covered action, the Secretary shall appoint, from*
25 *among the individuals recommended under para-*

1 *graph (2), 3 qualified individuals who shall review*
2 *and report to the Secretary on the scientific informa-*
3 *tion and analyses on which the covered action is*
4 *based.*

5 *“(B) The selection and activities of the inde-*
6 *pendent reviewers appointed pursuant to this para-*
7 *graph shall not be subject to the Federal Advisory*
8 *Committee Act (5 U.S.C. App.).*

9 *“(C) If funds are available, the Secretary shall*
10 *provide compensation to an individual for service as*
11 *an independent reviewer under this paragraph, at a*
12 *rate not to exceed the daily equivalent of the max-*
13 *imum annual rate of basic pay for GS-14 of the Gen-*
14 *eral Schedule for each day (including travel time)*
15 *during which the individual is engaged in the actual*
16 *performance of duties as an independent reviewer.*

17 *“(4) INFORMATION FOR REVIEW.—The Secretary*
18 *shall transmit to the independent reviewers all avail-*
19 *able scientific and commercial data identified in the*
20 *administrative record for the action at the time of the*
21 *transmission.*

22 *“(5) RESPONSE OF INDEPENDENT REVIEWERS.—*
23 *The independent reviewers shall provide the Sec-*
24 *retary, within 3 months after the transmission of the*
25 *data under paragraph (4), their reviews regarding all*

1 *relevant scientific information and assumptions relat-*
2 *ing to the taxonomy, population models, and sup-*
3 *portive biological and ecological information for the*
4 *species in question.*

5 “(6) NOTICE OF DATA AVAILABILITY.—

6 “(A) *Following receipt of the reviews pro-*
7 *vided under paragraph (5) and not less than 30*
8 *days before making the final decision on a cov-*
9 *ered action described in paragraph (1)(A)(i) or*
10 *(ii), the Secretary shall publish a notice of the*
11 *availability of the draft determination of which*
12 *data available qualify as the best scientific and*
13 *commercial data available on which the final de-*
14 *cision will be based and which do not, including*
15 *any ongoing assessments that are expected to*
16 *produce such data.*

17 “(B) *The Secretary shall provide the public*
18 *with not less than 15 days to identify any addi-*
19 *tional information that should be considered as*
20 *best scientific and commercial data available*
21 *data with respect to a covered action described*
22 *in paragraph (1)(A)(i) or (ii), including the rea-*
23 *sons why such information should be so consid-*
24 *ered.*

1 “(C) *The Secretary shall explain, in the no-*
2 *tice of final covered action with respect to a cov-*
3 *ered action described in paragraph (1)(A)(i) or*
4 *(ii), why information identified under subpara-*
5 *graph (B) did or did not qualify as the best sci-*
6 *entific and commercial data available.*

7 “(D) *The Secretary shall identify the data*
8 *that qualified as the best scientific and commer-*
9 *cial data available on which the final decision*
10 *with respect to a covered action described in*
11 *paragraph (1)(A)(iii) or (iv) is based in a final*
12 *biological opinion or final recovery plan for the*
13 *covered action.*

14 “(7) *FINAL DETERMINATION.—The Secretary*
15 *shall evaluate the reviews received pursuant to para-*
16 *graph (5) and include in the final determination—*

17 “(A) *a summary of each independent re-*
18 *view; and*

19 “(B) *in any case in which the Secretary*
20 *does not accept a recommendation of an inde-*
21 *pendent reviewer with respect to data reviewed*
22 *pursuant to this subsection, an explanation of*
23 *why the recommendation was not followed.*

24 “(8) *PUBLIC NOTICE.—The reviews received by*
25 *the Secretary pursuant to paragraph (5) shall be in-*

1 *cluded in the official record of the final decision on*
2 *the action and shall be available for public review as*
3 *soon as the final decision is issued.”.*

4 **SEC. 4. IMPROVED CONSULTATION.**

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

9 *“(C) USE OF STATE INFORMATION.—In con-*
10 *ducting a consultation under subsection (a)(2),*
11 *the Secretary—*

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

15 *“(ii) shall provide an opportunity for*
16 *the governor of any State otherwise affected*
17 *by the agency action, as determined by the*
18 *Secretary, to submit information.”.*

19 *(b) OPPORTUNITY TO PARTICIPATE IN CONSULTA-*
20 *TIONS.—Section 7(b)(1) of the Endangered Species Act of*
21 *1973 (16 U.S.C. 1536(b)(1)) (as amended by subsection (a))*
22 *is further amended by adding at the end the following:*

23 *“(D) OPPORTUNITY TO PARTICIPATE IN*
24 *CONSULTATIONS.—*

1 “(i) *IN GENERAL.*—*In conducting a*
2 *consultation under subsection (a)(2), the*
3 *Secretary shall provide to any person who*
4 *has sought authorization or funding from a*
5 *Federal agency for an action that is the*
6 *subject of the consultation or who holds or*
7 *is an applicant for a Federal contract,*
8 *lease, or other permit that may be materi-*
9 *ally affected by an agency action that is the*
10 *subject of the consultation—*

11 “(I) *the opportunity, before the*
12 *development of a draft biological opin-*
13 *ion, to submit and discuss with the*
14 *Secretary and the Federal agency in-*
15 *formation relevant to the effect of the*
16 *proposed action on the species and any*
17 *actions that could serve as reasonable*
18 *and prudent measures or reasonable*
19 *and prudent alternatives in the event*
20 *such measures or alternatives are nec-*
21 *essary to complete the consultation;*

22 “(II) *information, on request, sub-*
23 *ject to the exemptions specified in sec-*
24 *tion 552(b) of title 5, United States*
25 *Code, on the status of the species,*

1 *threats to the species, and conservation*
2 *measures, used by the Secretary to de-*
3 *velop the draft biological opinion and*
4 *the final biological opinion, including*
5 *any associated statement under sub-*
6 *section (b)(4); and*

7 *“(III) a copy, on request, of the*
8 *draft biological opinion, including any*
9 *draft statement under subsection*
10 *(b)(4), that was provided to the Fed-*
11 *eral agency and, before issuance of the*
12 *final biological opinion and statement,*
13 *the opportunity to submit comments on*
14 *the draft biological opinion and state-*
15 *ment and to discuss with the Secretary*
16 *and the Federal agency the basis for*
17 *any finding in the draft biological*
18 *opinion and statement.*

19 *“(ii) EXPLANATION.—If reasonable*
20 *and prudent alternatives are proposed by a*
21 *person under clause (i) and the Secretary*
22 *does not include the alternatives in the final*
23 *biological opinion, the Secretary shall ex-*
24 *plain to the person why those alternatives*
25 *were not included in the opinion.*

1 “(iii) *PUBLIC ACCESS TO INFORMA-*
2 *TION.—Comments and other information*
3 *submitted to, or received from, any person*
4 *(pursuant to clause (i)) who seeks author-*
5 *ization or funding for an action shall be*
6 *maintained in a file for that action by the*
7 *Secretary and shall be made available to the*
8 *public (subject to the exemptions specified*
9 *in section 552(b) of title 5, United States*
10 *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.”.

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H. R. 1662

[Report No. 108-785]

A BILL

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.

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