

108TH CONGRESS
1ST SESSION

H. R. 2602

To amend the Endangered Species Act of 1973 to make the authority of the Secretary to designate critical habitat discretionary instead of mandatory, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 25, 2003

Mr. OTTER introduced the following bill; which was referred to the Committee on Resources

A BILL

To amend the Endangered Species Act of 1973 to make the authority of the Secretary to designate critical habitat discretionary instead of mandatory, 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 “Scientifically Identi-
5 fying the Need for Critical Habitat Act”.

1 **SEC. 2. DISCRETIONARY AUTHORITY TO DESIGNATE CRIT-**
2 **ICAL HABITAT.**

3 Section 4(a)(3) of the Endangered Species Act of
4 1973 (16 U.S.C. 1533(a)(3)(A)) is amended to read as
5 follows:

6 “(A) may designate any habitat of a species
7 that is determined under paragraph (1) to be an en-
8 dangered species or threatened species as critical
9 habitat of such species; and ”.

10 **SEC. 3. SOUND SCIENCE.**

11 (a) **BEST SCIENTIFIC AND COMMERCIAL DATA**
12 **AVAILABLE.—**

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

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

17 **“SEC. 3. DEFINITIONS AND GENERAL PROVISIONS. ”;**

18 (B) by striking “For the purposes of this
19 Act—” and inserting the following:

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

21 (C) by adding at the end the following:

22 “(b) **USE OF CERTAIN DATA.—**In any case in which
23 the Secretary is required by this Act to use the best sci-
24 entific and commercial data available, the Secretary, in
25 evaluating comparable data, shall give greater weight to

1 scientific or commercial data that is empirical or has been
2 field-tested or peer-reviewed.”.

3 (2) CONFORMING AMENDMENT.—The table of
4 contents in the first section of the Endangered Spe-
5 cies Act of 1973 (16 U.S.C. prec. 1531) is amended
6 by striking the item relating to section 3 and insert-
7 ing the following:

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

8 (b) USE OF SOUND SCIENCE IN LISTING.—Section
9 4(b) of the Endangered Species Act of 1973 (16 U.S.C.
10 1533(b)) is amended by adding at the end the following:

11 “(9) ESTABLISHMENT OF CRITERIA FOR SCI-
12 ENTIFIC STUDIES TO SUPPORT LISTING.—Not later
13 than 1 year after the date of enactment of this para-
14 graph, the Secretary shall promulgate regulations
15 that establish criteria that must be met for scientific
16 and commercial data to be used as the basis of a de-
17 termination under this section that a species is an
18 endangered species or a threatened species.

19 “(10) FIELD DATA.—

20 “(A) REQUIREMENT.—The Secretary may
21 not determine that a species is an endangered
22 species or a threatened species unless the deter-
23 mination is supported by data obtained by ob-
24 servation of the species in the field.

1 “(B) DATA FROM LANDOWNERS.—The
2 Secretary shall—

3 “(i) accept and acknowledge receipt of
4 data regarding the status of a species that
5 is collected by an owner of land through
6 observation of the species on the land; and

7 “(ii) include the data in the rule-
8 making record compiled for any determina-
9 tion that the species is an endangered spe-
10 cies or a threatened species.”.

11 (c) USE OF SOUND SCIENCE IN RECOVERY PLAN-
12 NING.—Section 4(f) of the Endangered Species Act of
13 1973 (16 U.S.C. 1533(f)) is amended by adding at the
14 end the following:

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

20 “(i) invite any person to submit the data to the
21 Secretary; and

22 “(ii) describe the steps that the Secretary plans
23 to take for acquiring additional data.

24 “(B) Data identified and obtained under subpara-
25 graph (A)(i) shall be considered by the recovery team and

1 the Secretary in the preparation of the recovery plan in
2 accordance with section 5.”.

3 **SEC. 4. PEER REVIEW.**

4 Section 4 of the Endangered Species Act of 1973 (16
5 U.S.C. 1533) is amended by adding at the end the fol-
6 lowing:

7 “(j) INDEPENDENT SCIENTIFIC REVIEW REQUIRE-
8 MENTS.—

9 “(1) DEFINITIONS.—In this subsection:

10 “(A) ACTION.—The term ‘action’ means—

11 “(i) the determination that a species
12 is an endangered species or a threatened
13 species under subsection (a);

14 “(ii) the determination under sub-
15 section (a) that an endangered species or
16 a threatened species be removed from any
17 list published under subsection (c)(1);

18 “(iii) the development of a recovery
19 plan for a threatened species or endan-
20 gered species under subsection (f); and

21 “(iv) the determination that a pro-
22 posed action is likely to jeopardize the con-
23 tinued existence of a listed species and the
24 proposal of any reasonable and prudent al-

1 ternatives by the Secretary under section
2 7(b)(3).

3 “(B) QUALIFIED INDIVIDUAL.—The term
4 ‘qualified individual’ means an individual with
5 expertise in the biological sciences—

6 “(i) who through publication of peer-
7 reviewed scientific literature or other
8 means, has demonstrated scientific exper-
9 tise on the species or a similar species or
10 other scientific expertise relevant to the de-
11 cision of the Secretary under subsection
12 (a) or (f);

13 “(ii) who does not have, or represent
14 any person with, a conflict of interest with
15 respect to the determination that is the
16 subject of the review;

17 “(iii) who is not a participant in any
18 petition or proposed or final determination
19 before the Secretary; and

20 “(iv) who has no direct financial in-
21 terest, and is not employed by any person
22 with a direct financial interest, in opposing
23 the action under consideration.

24 “(2) LIST OF INDEPENDENT SCIENTIFIC RE-
25 VIEWERS.—The Secretary shall solicit recommenda-

1 tions from the National Academy of Sciences and
2 develop and maintain a list of qualified reviewers to
3 participate in independent scientific review actions.

4 “(3) APPOINTMENT OF INDEPENDENT SCI-
5 ENTIFIC REVIEWERS.—(A) Before any action shall
6 become final, the Secretary shall appoint randomly,
7 from among the list prepared in accordance with
8 this section, 3 qualified individuals who shall review
9 and report to the Secretary on the scientific infor-
10 mation and analyses on which the proposed action is
11 based.

12 “(B) The selection and activities of the referees
13 selected pursuant to this section shall not be subject
14 to the Federal Advisory Committee Act (5 U.S.C.
15 App.).

16 “(C) Reviewers shall be compensated for con-
17 ducting the independent review.

18 “(4) OPINION OF PEER REVIEWERS.—Inde-
19 pendent reviewers shall provide the Secretary, within
20 3 months, their opinion regarding all relevant sci-
21 entific information and assumptions relating to the
22 taxonomy, population models, and supportive biologi-
23 cal and ecological information for the species in
24 question.

1 “(5) FINAL DETERMINATION.—If the referees
2 have made a recommendation on a proposed action,
3 the Secretary shall evaluate and consider the infor-
4 mation that results from the independent scientific
5 review and include in the final determination—

6 “(A) a summary of the results of the inde-
7 pendent scientific review; and

8 “(B) in a case in which the recommenda-
9 tion of a majority of the referees who conducted
10 the independent scientific review is not followed,
11 an explanation as to why the recommendation
12 was not followed.

13 “(6) PUBLIC NOTICE.—The report of the peer
14 reviewers shall be included in the official record of
15 the proposed action and shall be available for public
16 review prior to the close of the comment period on
17 the proposed action.”.

18 **SEC. 5. IMPROVED RECOVERY PLANNING.**

19 (a) USE OF INFORMATION PROVIDED BY STATES.—
20 Section 7(b)(1) of the Endangered Species Act of 1973
21 (16 U.S.C. 1536(b)(1)) is amended by adding at the end
22 the following:

23 “(C) USE OF STATE INFORMATION.—In
24 conducting a consultation under subsection
25 (a)(2), the Secretary shall actively solicit and

1 consider information from the State agency in
2 each affected State.”.

3 (b) OPPORTUNITY TO PARTICIPATE IN CONSULTA-
4 TIONS.—Section 7(b)(1) of the Endangered Species Act
5 of 1973 (16 U.S.C. 1536(b)(1)) (as amended by sub-
6 section (a)) is further amended by adding at the end the
7 following:

8 “(D) OPPORTUNITY TO PARTICIPATE IN
9 CONSULTATIONS.—

10 “(i) IN GENERAL.—In conducting a
11 consultation under subsection (a)(2), the
12 Secretary shall provide any person who has
13 sought authorization or funding from a
14 Federal agency for an action that is the
15 subject of the consultation, the opportunity
16 to—

17 “(I) before the development of a
18 draft biological opinion, submit and
19 discuss with the Secretary and the
20 Federal agency information relevant
21 to the effect of the proposed action on
22 the species and the availability of rea-
23 sonable and prudent alternatives (if a
24 jeopardy opinion is to be issued) that
25 the Federal agency and the person

1 can take to avoid violation of sub-
2 section (a)(2);

3 “(II) receive information, on re-
4 quest, subject to the exemptions speci-
5 fied in section 552(b) of title 5,
6 United States Code, on the status of
7 the species, threats to the species, and
8 conservation measures, used by the
9 Secretary to develop the draft biologi-
10 cal opinion and the final biological
11 opinion, including the associated inci-
12 dental taking statements; and

13 “(III) receive a copy of the draft
14 biological opinion from the Federal
15 agency and, before issuance of the
16 final biological opinion, submit com-
17 ments on the draft biological opinion
18 and discuss with the Secretary and
19 the Federal agency the basis for any
20 finding in the draft biological opinion.

21 “(ii) EXPLANATION.—If reasonable
22 and prudent alternatives are proposed by a
23 person under clause (i) and the Secretary
24 does not include the alternatives in the
25 final biological opinion, the Secretary shall

1 explain to the person why those alter-
2 natives were not included in the opinion.

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

○