107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–751

SOUND SCIENCE FOR ENDANGERED SPECIES ACT PLANNING ACT OF 2002

OCTOBER 15, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4840]

The Committee on Resources, to whom was referred the bill (H.R. 4840) to amend the Endangered Species Act of 1973 to ensure the use of sound science in the implementation of that Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sound Science for Endangered Species Act Planning Act of 2002".

SEC. 2. SOUND SCIENCE.

(a) BEST SCIENTIFIC AND COMMERCIAL DATA AVAILABLE AS BASIS OF DETERMINATIONS.—Section 4(b)(1)(A) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(1)(A)) is amended in the first sentence, by inserting ", including any finding under paragraph (3)(B) on a petition referred to in paragraph (3)(A)," after "determinations required by subsection (a)(1)".

(b) PREFERENCE FOR EMPIRICAL, FIELD-TESTED, AND PEER-REVIEWED DATA.—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) In making any determination under this section, the Secretary shall give greater weight to any scientific or commercial study or other information that is empirical or has been field-tested or peer-reviewed.".

(c) CONTENTS OF LISTING PETITIONS.—

(1) IN GENERAL.—Section 4(b)(3) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)(3)) is amended by adding at the end the following:

"(E) A petition referred to in subparagraph (A) regarding a species—

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

"(I) of the current known and historic ranges of the species concerned;

"(II) of the most recent population estimates and trends for the species, if available;

"(III) that any change in the population that is alleged in the petition is beyond the natural range of fluctuations for the species; and

"(IV) of the reason that the petitioned action is warranted, including known or perceived threats to the species;

"(ii) shall include a bibliography of scientific literature on the species in support of the petition; and

"(iii) may contain any other information the petitioner considers appropriate.

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

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

"(ii) the evidence is sufficient to support a firm belief by the Secretary that the petitioned action may be warranted.".

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

(A) in subparagraph (A) in the first sentence, by inserting "and contains the information required under clauses (i) and (ii) of subparagraph (E)" after "may be warranted"; and

(B) in subparagraph (B) in the matter preceding clause (i), by inserting "and contains the information required under clauses (i) and (ii) of subparagraph (E)" after "may be warranted".

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

"(10) Not later than 1 year after the date of enactment of this paragraph, the Secretary shall promulgate regulations that establish criteria that must be met for scientific and commercial data, studies, and other information to be used as the basis of a determination under this section.

"(11)(A) The Secretary may not determine that a species is an endangered species or a threatened species unless data collected in the field on the species concerned supports the determination.

"(B) The Secretary shall—

"(i) accept and acknowledge receipt of data regarding the status of a species that is collected by an owner of land, including data obtained by observation of the species on the land; and

"(ii) include the data in the rulemaking record compiled for any determination that the species is an endangered species or a threatened species.".

(e) 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)(A) The Secretary shall identify and publish in the Federal Register with the notice of a proposed regulation pursuant to paragraph (5)(A)(i) a description of additional scientific and commercial data that, if collected, would assist in the preparation of a recovery plan and—

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

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

"(B) Data identified and obtained under subparagraph (A)(i) shall be considered by the recovery team and the Secretary in the preparation of the recovery plan.".

SEC. 3. INDEPENDENT SCIENTIFIC REVIEW.

(a) IN GENERAL.—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) In this subsection:

"(A) The term 'covered action' means—

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

"(ii) the determination under subsection (a) that an endangered species or a threatened species be removed 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);

"(iv) the determination that a proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or ad-

verse modification of critical habitat and the proposal of any reasonable and prudent alternatives by the Secretary under section 7(b)(3), if the Secretary finds that—

"(I) there is significant disagreement regarding that determination or proposal; or

"(II) that determination or proposal may have significant economic impact; and

"(v) the determination that a proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, if the Secretary finds that there is significant disagreement regarding that determination or proposal.

"(B) The term 'qualified individual' means an individual who meets the standards of the National Academy of Sciences for independent scientific review conducted by the Academy, except that such term does not include any individual with a conflict of interest as determined by the Secretary or by a Governor who nominates the individual under paragraph (3)(B).

"(2) The Secretary shall—

"(A) maintain a list of qualified individuals who are available to participate on independent review boards under this subsection;

"(B) seek nominations of individuals to participate on such boards (upon appointment by the Secretary), through the Federal Register, scientific and commercial journals, and the National Academy of Sciences and other such institutions; and

"(C) update such list every two years.

"(3)(A) Before any covered action becomes final, the Secretary shall appoint an independent review board in accordance with this section that shall review and report to the Secretary in writing on the scientific information and analyses on which the covered action is based.

"(B) Each independent review board under this paragraph shall be composed of 5 members, of which—

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

"(ii) 2 shall be appointed by the Secretary from among qualified individuals nominated by the Governor of a State in which the species concerned is located.

"(C) If any individual declines appointment to an independent review board under this paragraph, the Secretary shall appoint another individual in the same manner.

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

"(E) If funds are available, the Secretary shall provide compensation to an individual for service as a member of an independent review board under this paragraph, at a rate not to exceed the daily equivalent of the maximum annual rate of basic pay for grade 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 a member of such board.

"(F) The Secretary may not delegate the authority to make appointments under this paragraph to any official who is below the level of the Director of the United States Fish and Wildlife Service or the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

"(4)(A) Each independent review board under this subsection shall provide to the Secretary, within 90 days after the completion of appointment of the board, the opinion of the board regarding all relevant scientific information and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for the species in question.

"(B) The Secretary shall—

"(i) develop a protocol for the conduct of scientific independent review under this subsection, that—

"(I) includes review of the adequacy of any scientific methodology used to support an action and the validity of any conclusions drawn from data used to support an action; and

"(II) is modeled after applicable National Academy of Sciences policies and guidelines for report reviews; and

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

"(5) If an independent review board under this subsection makes a recommendation regarding a covered action, the Secretary shall, within 90 days after receiving the recommendation, evaluate and consider the information that results from the

review by the board, and shall include in the rulemaking record for the covered action—

"(A) a summary of the results of the review by the board; and

"(B) in a case in which the recommendation of a majority of the members of the board is not followed, an explanation of why the recommendation was not followed.

"(6) The report of each independent review board under this subsection shall be included in the rulemaking record of any regulation with respect to which the board is convened, and shall be available for public review for at least 30 days before the close of the period for comment on the regulation.".

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

"(3) In preparing a biological assessment under this subsection, the head of an agency shall solicit and review any scientific and commercial data that a prospective permit or license applicant believes is relevant to the assessment, and shall make that data available to the Secretary.".

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

(1) in subparagraph (A)—

(A) in the matter preceding clause (i) by striking "one-year" and inserting "18-month"; and

(B) in clause (i)(III) by striking "one-year" and inserting "18-month"; and

(C) in clause (ii)(II) by striking "one-year" and inserting "18-month";

(2) in subparagraph (B)—

(A) in clause (i) by striking "one-year" and inserting "18-month";

(B) in clause (ii) by striking "one-year" and inserting "18-month"; and

(C) in clause (iii) by striking "one-year" and inserting "18-month"; and

(3) in subparagraph (C)(ii) by striking "one-year" and inserting "18-month".

SEC. 4. IMPROVED INTERAGENCY COOPERATION.

(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) In conducting a consultation under subsection (a)(2), the Secretary shall actively solicit and consider information from the State agency in each affected State.".

(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)(i) In conducting a consultation with a Federal agency under subsection (a)(2), the Secretary and the head of the agency shall provide any person who has sought authorization or funding from a Federal agency for an action that is the subject of the consultation, the opportunity to—

"(I) before the development of a draft biological opinion, submit and discuss with the Secretary and the Federal agency information relevant to the effect of the proposed action on the species and reasonable and prudent alternatives that the Federal agency and the person can take to avoid violation of subsection (a)(2), including any such alternatives proposed by the person;

"(II) receive 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 incidental taking statements; and

"(III) receive a copy of the draft biological opinion from the Federal agency and, before issuance of the final biological opinion, submit comments on the draft biological opinion and discuss with the Secretary and the Federal agency the basis for any finding in the draft biological opinion.

"(ii) If 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 provide to the person reasonable justification, based on the best scientific and commercial data available, why those alternatives were not included in the opinion.

"(iii) 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).".

PURPOSE OF THE BILL

The purpose of H.R. 4840 is to amend the Endangered Species Act of 1973 to ensure the use of sound science in the implementation of that Act.

BACKGROUND AND NEED FOR LEGISLATION

In 1973 the Endangered Species Act (ESA) was enacted. The ESA established a program to list (as either threatened or endangered) animal and plant species and to conserve the ecosystems upon which they depend. The ESA also declared it to be the policy of the Congress that all federal agencies and departments shall seek to conserve endangered and threatened species and shall utilize their authorities to further the purposes of the ESA. When first enacted, many believed the ESA was a law to provide protective measures primarily for large recognizable species in the United States in obvious peril at the time, such as the American bald eagle, California condor, grizzly bear, and gray wolf.

This view dramatically changed, however, in 1978 as a result of a U.S. Supreme Court decision dealing with the construction of the Tellico dam in Tennessee and a species of fish, the snail darter. That decision, *Tennessee Valley Authority* v. *Hill*, catapulted the ESA into the forefront as an extremely strong environmental law. This strength is derived from the Court's opinion that the ESA "indicates beyond doubt that Congress intended endangered species to be afforded the highest priorities" and that "Congress [gave] endangered species priority over the 'primary missions' of federal agencies."

As originally conceived, the ESA was thought by many as a law ensuring the survival of species threatened with extinction by specific actions such as road building, dams, and other large construction projects. Instead, however, the ESA has been applied across millions of acres and to hundreds of miles of watercourses costing billions of dollars, causing economic hardship, and, at times, devastation, to thousands of people. The situation worsens every year because of the ease to petition, then list, a species as threatened or endangered and the difficulty in removing species from the list. As of December 31, 2001, there are 1254 plants and animals listed (740 plants; 514 animals). This figure represents hundreds of species more added to the list than Members of Congress probably ever envisioned. Moreover, many of these are species that the Congress never contemplated adding to the list such as the Delhi sands flower-loving fly, Lee County cave pill bug, and the orangefoot pimpleback mollusk. Hundreds species more (249) remain on the candidate list and 32 species are proposed for listing. Obviously, as more species are listed more problems can be anticipated.

The use of "good" science by the agencies responsible for ESA listing and critical habitat determinations along with decision making on petitions, consultations, and recovery plans has been a major and contentious issue. Although the language and intent of the ESA dealing with the use of science seems clear, the interpretation by responsible federal agencies (U.S. Fish and Wildlife Service and the National Marine Fisheries Service) has been met with substantial suspicion. The ESA mandates that listing determinations be based "solely on the basis of the best scientific and commercial

data available * * *" and that critical habitat determinations be made "on the best scientific data available * * *". Implementing this mandate has been problematic, however, primarily because there are no definitions in either the ESA or the accompanying regulations as to what constitutes the "best" or "available" information. The responsible agencies have complete discretion over these terms and have defined and used them to their advantage. The only defined term in the regulations deals with the petition process whereas the petitioner must provide "substantial scientific or commercial information" in the petition. "Substantial information" is that amount which would lead a reasonable person to believe the proposed measure may be warranted. Clearly, this is a very low standard and unacceptable threshold to be met.

Although the credibility of these agencies and their use of "good" science has been frequently and deservedly criticized, it has recently come under added and very close scrutiny. Two high-profile situations—one in Klamath Falls, Oregon, the other dealing with planted Canada lynx hair—have raised the ire and concern of Congress and the public alike. Both of these incidents conclusively showed that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service based decisions on the use of unsubstantiated scientific information or had doctored scientific information. Although these two incidents clearly call the integrity of these agencies into question, they are not isolated and incidents like this have occurred for many years.

Within the context of the ESA, there is an inseparable link between "best" science and that science which has been field tested, validated, or peer-reviewed. The scientific community would generally agree that, in terms of the ESA, the "best" science would be comprised of data that had been collected by established standards or protocols, properly analyzed, and then peer-reviewed before published or released to the public. Such information is assumed to be reliable and the conclusions drawn usually can be duplicated to test the accuracy of the information. Unfortunately, the ESA currently has no such standards in either the provisions of law or in the accompanying regulations.

H.R. 4840 seeks to remedy this problem by integrating a better and more defined method of using reliable and valid science in the decision-making process and by initiating a system of peer review of many of the federal agency decisions. Specifically, H.R. 4840 gives greater weight to scientific or commercial information that is empirical or has been field-tested when making decisions and requires that the relevant Secretary determine a threatened or endangered species only if data is collected in the field and that data supports the determination. The bill also revises the contents of a listing petition and establishes a higher threshold for the petitioner to meet before the petition can be considered. Under this bill, the petition must contain clear and convincing evidence that the species is, in fact, in peril. Clear and convincing is defined as a preponderance of evidence that is based on reliable science and is sufficient enough for the relevant Secretary to have a firm belief that the petitioned action is warranted.

H.R. 4840 establishes a peer review process for numerous determinations such as listing a species, delisting a species, recovery plans, and jeopardy opinions, if the relevant Secretary finds that

there is significant disagreement or significant economic impact. The peer reviewers must be qualified individuals and meet National Academy of Sciences standards. The relevant Secretary would appoint a peer review board (three members from the Secretary and two members nominated by the appropriate State governors) who must submit a report within 90 days describing its opinion as to the scientific validity of the determination and any recommendations it has. If the Secretary does not follow the recommendation, the Secretary must justify why the recommendation is not being followed.

Lastly, the bill improves agency cooperation with States during the consultation process and actively solicit and consider any information provided by the affected State. Also, it provides any person who needs authorization or funding from a federal agency to be involved in the consultation process and allows them to submit data and information in regard to the consultation, including the development of reasonable and prudent alternatives.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 contains the short title of the bill, the "Sound Science for Endangered Species Act Planning Act of 2002."

Section 2. Sound science

Section 2 establishes the requirement of using sound science as the basis in listing petitions and recovery planning of endangered species. This section mandates that the relevant Secretary give greater weight to empirical, field-tested, or peer reviewed information or studies. It is the Committee's view that better decisions and analyses will be made by the responsible agencies by giving greater weight to this information or studies. The Committee intends "greater weight" to mean that an elevated and increased emphasis shall be given and placed on information that is empirical, field-tested, or peer reviewed in comparison to other information not fitting these criteria when reviewed by the responsible agencies. The Committee notes that information or studies that are not empirical, field-tested, or peer reviewed does not mean that these are prohibited from being considered and, as such, continue to be reviewable under the current statute. However, less importance shall be placed on this information or studies.

Section 2 revises the contents of listing petitions by establishing a higher threshold in meeting the listing requirement and requires that clear and convincing evidence must be present to support a listing. Under current regulations (50 Code of Federal Regulation § 424.14(b)) the threshold for the Secretary's finding for a petition is whether that petition contains "substantial information" indicating that the petitioned action may be warranted. The regulations further define "substantial information" as that amount of information "which would lead a reasonable person to believe that the measure proposed in the petition may be warranted." The Committee recognizes that this "reasonable person" threshold is ridiculously easy to meet and has led to a spate of petitions being considered by the responsible agencies. Therefore, the Committee has raised the threshold to a "clear and convincing evidence" standard.

The Committee believes that it is the responsibility of the petitioner to provide sufficient scientific evidence that the petitioned action is warranted and that a preponderance, that is, most of this evidence, is based on reliable scientific and commercial information. The Committee further believes that the "reasonable person" standard under current regulations is too low in determining whether a petitioned action may be warranted. Instead, the Committee raises this threshold by mandating that the petitioners submit enough information so that the Secretary has a firm belief that the petitioned action may be warranted. For this section, the Committee intends that the petitioner provide sufficient evidence so that the Secretary has a well-founded certainty in regard to making the determination.

Section 2 also contains a requirement that the Secretary cannot make a determination that a species is threatened or endangered unless data on that species is collected in the field and that data supports the listing. The Committee views actual collection of field data essential for any listing determination. The Committee believes that it makes common sense to have actual field data collected on that species for listing determinations and that this data supports the determination. The Committee finds it would be impossible to reliably and accurately list species without such information.

Section 3. Independent scientific review

Section 3 defines the covered actions which would be reviewable by the independent scientific review board. These covered actions include: the listing of a species as endangered or threatened; the delisting of an endangered or threatened species; the development of recovery plans; jeopardy opinions, in the event of significant disagreement or significant economic impact; and findings of non-jeopardy, in the event of significant disagreement.

Section 3 establishes an independent review board and requires each reviewer to meet the standards for peer review set by the National Academy of Sciences, except that an individual cannot serve on the board if that individual is determined to have a conflict of interest by the Secretary or a Governor, as appropriate. The Committee intends individuals with "conflict of interest" to include, but not be limited, to those individuals: who are a party to any petition or proposed or final determination before the Secretary; who are not nor have been under contract or employed by the Secretary or the State for work related to the species under consideration; who have a direct financial interest or employed by any person who has a direct financial in the action under consideration in the review.

Section 3 also requires that the Secretary seek nominations for and maintain a list of qualified individuals for the review board and also establishes the manner in which the independent review boards are appointed. Each review board shall be comprised of five reviewers appointed by the Secretary. The Secretary will select three of the reviewers from the list and the other two from qualified individuals nominated by the Governor of the State in which the species is located. The Secretary must compensate the reviewers if funds are available. The Committee urges, in the strongest of terms, that the Administration request in its annual budget suf-

ficient funds for the reviewers and that these funds are appropriated accordingly.

Section 3 mandates that the reviewers, within 90 days from the board's appointment, provide the Secretary with their opinion as to the scientific adequacy of the information supporting the Secretary's decision. Once the Secretary has received the review, the Secretary shall consider the board's recommendations and include a summary of the review in the rulemaking record. If the board disagrees with the Secretary's decision, the Secretary shall provide an explanation as to why the recommendation was not followed. The review shall be made available to the public. This section also directs the Secretary to establish protocols that comply with applicable National Academy of Sciences policies and guidelines for the review.

Section 3 extends the time periods required in Section 4(b)(6) of the ESA from one year to 18 months. The Committee believes that the 6 month time period extension is necessary for the board to complete its review and then for the Secretary to review the board's recommendations.

Section 4. Improved interagency cooperation

Section 4 establishes improved cooperation between federal and State agencies by directing the Secretary to solicit and use information from a State agency for the State affected. This section also allows any person who has sought authorization or funding from a federal agency for an action that is the subject of an ESA Section 7 consultation to be involved by: submitting and discussing with the relevant Secretary and the federal agency information relevant to the proposed action; propose any reasonable and prudent alternatives; receive information that the Secretary is using to make decisions related to that consultation; and receive a copy of the draft biological opinion from the federal agency and submit comments on the same before the issuance of the final biological opinion. The Committee believes it is very important for those individuals directly affected by the outcome of the consultation to be involved and have the opportunity to submit information relevant to that consultation.

COMMITTEE ACTION

H.R. 4840 was introduced on May 23, 2002, by Congressman James V. Hansen (R–UT). The bill was referred to the Committee on Resources. On June 18 and 19, 2002, the Committee on Resources held hearings on the bill. On July 10, 2002, the Full Resources Committee met to consider the bill. An amendment in the nature of a substitute was offered by Mr. Hansen. The amendment addressed a number of the Administration's concerns highlighted during the hearings on the measure: (1) the amendment added the National Marine Fisheries Service as an agency where appropriate; (2) clarified that a qualified individual with a conflict of interest cannot participate in a scientific review; and (3) added the determination of destruction or adverse modification of critical habitat to the covered actions along with other small modifications. The amendment also extended many of the time periods by six months to allow for the scientific review and Secretary's analysis and added non-jeopardy opinions to covered actions that are reviewable

by the review board. Congressman Nick Rahall (D–WV) offered a substitute amendment to the Hansen amendment in the nature of a substitute. The Rahall amendment was not agreed to by a rollcall vote of 18–22, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
107th Congress

Date: July 10, 2002

Convened: 10:00am
Adjourned: 6:50pm

Meeting on: **On Agreeing to the Rahall Substitute to the Amendment in the Nature of a Substitute offered by Mr. Hansen to H.R. 4840, To amend the Endangered Species Act of 1973 to ensure the use of sound science in the implementation of that Act.**

☐ Attendance ☐ Voice Vote ☒ Roll Call Vote Total Yeas 18 Nays 22

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Hansen, UT, Chairman		✓		Mr. Jones, NC			
Mr. Rahall, WV	✓			*Mr. Kind, WI*	✓		
Mr. Young, AK		✓		Mr. Thornberry, TX		✓	
Mr. Miller, CA	✓			*Mr. Inslee, WA*	✓		
Mr. Tauzin, LA				Mr. Cannon, UT		✓	
Mr. Markey, MA	✓			*Mrs. Napolitano, CA*	✓		
Mr. Saxton, NJ				Mr. Peterson, PA		✓	
Mr. Kildee, MI	✓			*Mr. Tom Udall, NM*	✓		
Mr. Gallegly, CA		✓		Mr. Schaffer, CO			
Mr. DeFazio, OR	✓			*Mr. Mark Udall, CO*	✓		
Mr. Duncan, TN		✓		Mr. Gibbons, NV			
Mr. Faleomavaega, AS				*Mr. Holt, NJ*	✓		
Mr. Hefley, CO				Mr. Souder, IN		✓	
Mr. Abercrombie, HI	✓			*Mr. Acevedo-Vilá, PR*			
Mr. Gilchrest, MD		✓		Mr. Walden, OR		✓	
Mr. Ortiz, TX				*Ms. Solis, CA*	✓		
Mr. Calvert, CA		✓		Mr. Simpson, ID		✓	
Mr. Pallone, NJ	✓			*Mr. Carson, OK*	✓		
Mr. McInnis, CO		✓		Mr. Tancredo, CO		✓	
Mr. Dooley, CA		✓		*Ms. McCollum, MN*	✓		
Mr. Pombo, CA		✓		Mr. Hayworth, AZ		✓	
Mr. Underwood, GU				*Mr. Holden, PA*	✓		
Mrs. Cubin, WY		✓		Mr. Otter, ID		✓	
Mr. Smith, WA	✓			Mr. Osborne, NE		✓	
Mr. Radanovich, CA		✓		Mr. Flake, AZ			
Ms. Christensen, VI				Mr. Rehberg, MT		✓	
				Total	**18**	**22**	

The Hansen amendment in the nature of a substitute was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by a rollcall vote of 22 to 18, as follows:

COMMITTEE ON RESOURCES

U.S. House of Representatives
107th Congress

Date: July 10, 2002

Convened: 10:00am
Adjourned: 6:50pm

Meeting on: **On Final Passage to the Amendment in the Nature of a Substitute offered by Mr. Hansen to H.R. 4840, To amend the Endangered Species Act of 1973 to ensure the use of sound science in the implementation of that Act.**

☐ Attendance ☐ Voice Vote ☒ Roll Call Vote Total Yeas 22 Nays 18

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Hansen, UT, Chairman	✓			Mr. Jones, NC			
Mr. Rahall, WV		✓		*Mr. Kind, WI*		✓	
Mr. Young, AK	✓			Mr. Thornberry, TX	✓		
Mr. Miller, CA		✓		*Mr. Inslee, WA*		✓	
Mr. Tauzin, LA				Mr. Cannon, UT	✓		
Mr. Markey, MA		✓		*Mrs. Napolitano, CA*		✓	
Mr. Saxton, NJ				Mr. Peterson, PA	✓		
Mr. Kildee, MI		✓		*Mr. Tom Udall, NM*		✓	
Mr. Gallegly, CA	✓			Mr. Schaffer, CO			
Mr. DeFazio, OR		✓		*Mr. Mark Udall, CO*		✓	
Mr. Duncan, TN	✓			Mr. Gibbons, NV			
Mr. Faleomavaega, AS				*Mr. Holt, NJ*		✓	
Mr. Hefley, CO				Mr. Souder, IN	✓		
Mr. Abercrombie, HI		✓		*Mr. Acevedo-Vilá, PR*			
Mr. Gilchrest, MD	✓			Mr. Walden, OR	✓		
Mr. Ortiz, TX				*Ms. Solis, CA*		✓	
Mr. Calvert, CA	✓			Mr. Simpson, ID	✓		
Mr. Pallone, NJ		✓		*Mr. Carson, OK*		✓	
Mr. McInnis, CO	✓			Mr. Tancredo, CO	✓		
Mr. Dooley, CA	✓			*Ms. McCollum, MN*		✓	
Mr. Pombo, CA	✓			Mr. Hayworth, AZ	✓		
Mr. Underwood, GU				*Mr. Holden, PA*		✓	
Mrs. Cubin, WY	✓			Mr. Otter, ID	✓		
Mr. Smith, WA		✓		Mr. Osborne, NE	✓		
Mr. Radanovich, CA	✓			Mr. Flake, AZ			
Ms. Christensen, VI				Mr. Rehberg, MT	✓		
				Total	**22**	**18**	

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.

FEDERAL ADVISORY COMMITTEE STATEMENT

The functions of the proposed advisory committee authorized in the bill are not currently being nor could they be performed by one or more agencies, an advisory committee already in existence or by enlarging the mandate of an existing advisory committee.

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. The Committee believes that enactment of this bill will have little impact on the federal budget.

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 requested but not received a cost estimate for this bill from the Director of the Congressional Budget Office.

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

* * * * * * *

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) * * *

(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1)*, including any finding under paragraph (3)(B) on a petition referred to in paragraph (3)(A),* solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

* * * * * * *

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted *and contains the information required under clauses (i) and (ii) of subparagraph (E)*. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted *and contains the information required under clauses (i) and (ii) of subparagraph (E)*, the Secretary shall make one of the following findings:

(i) * * *

* * * * * * *

(E) A petition referred to in subparagraph (A) regarding a species—

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

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

(II) of the most recent population estimates and trends for the species, if available;

(III) that any change in the population that is alleged in the petition is beyond the natural range of fluctuations for the species; and

(IV) of the reason that the petitioned action is warranted, including known or perceived threats to the species;

(ii) shall include a bibliography of scientific literature on the species in support of the petition; and

(iii) may contain any other information the petitioner considers appropriate.

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

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

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

* * * * * * *

(6)(A) Within the [one-year] *18-month* period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) * * *

* * * * * * *

(III) notice that such [one-year] *18-month* period is being extended under subparagraph (B)(i), or

* * * * * * *

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either—

(I) * * *

(II) notice that such [one-year] *18-month* period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the [one-year] *18-month* period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such [one-year] *18-month* period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the [one-year] *18-month* period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that—

(i) * * *

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the **[**one-year**]** *18-month* period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

* * * * * * *

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

(10) Not later than 1 year after the date of enactment of this paragraph, the Secretary shall promulgate regulations that establish criteria that must be met for scientific and commercial data, studies, and other information to be used as the basis of a determination under this section.

(11)(A) The Secretary may not determine that a species is an endangered species or a threatened species unless data collected in the field on the species concerned supports the determination.

(B) The Secretary shall—

(i) accept and acknowledge receipt of data regarding the status of a species that is collected by an owner of land, including data obtained by observation of the species on the land; and

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

* * * * * * *

(f)(1) * * *

* * * * * * *

(6)(A) The Secretary shall identify and publish in the Federal Register with the notice of a proposed regulation pursuant to paragraph (5)(A)(i) a description of additional scientific and commercial data that, if collected, would assist in the preparation of a recovery plan and—

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

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

(B) Data identified and obtained under subparagraph (A)(i) shall be considered by the recovery team and the Secretary in the preparation of the recovery plan.

* * * * * * *

(j) INDEPENDENT SCIENTIFIC REVIEW REQUIREMENTS.—

(1) In this subsection:

(A) The term "covered action" means—

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

(ii) the determination under subsection (a) that an endangered species or a threatened species be removed 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);

(iv) the determination that a proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat and the proposal of any reasonable and prudent alternatives by the Secretary under section 7(b)(3), if the Secretary finds that—

(I) there is significant disagreement regarding that determination or proposal; or

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

(v) the determination that a proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, if the Secretary finds that there is significant disagreement regarding that determination or proposal.

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

(2) The Secretary shall—

(A) maintain a list of qualified individuals who are available to participate on independent review boards under this subsection;

(B) seek nominations of individuals to participate on such boards (upon appointment by the Secretary), through the Federal Register, scientific and commercial journals, and the National Academy of Sciences and other such institutions; and

(C) update such list every two years.

(3)(A) Before any covered action becomes final, the Secretary shall appoint an independent review board in accordance with this section that shall review and report to the Secretary in writing on the scientific information and analyses on which the covered action is based.

(B) Each independent review board under this paragraph shall be composed of 5 members, of which—

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

(ii) 2 shall be appointed by the Secretary from among qualified individuals nominated by the Governor of a State in which the species concerned is located.

(C) If any individual declines appointment to an independent review board under this paragraph, the Secretary shall appoint another individual in the same manner.

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

(E) If funds are available, the Secretary shall provide compensation to an individual for service as a member of an independent review board under this paragraph, at a rate not to exceed the daily equivalent of the maximum annual rate of basic

pay for grade 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 a member of such board.

(F) The Secretary may not delegate the authority to make appointments under this paragraph to any official who is below the level of the Director of the United States Fish and Wildlife Service or the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

(4)(A) Each independent review board under this subsection shall provide to the Secretary, within 90 days after the completion of appointment of the board, the opinion of the board regarding all relevant scientific information and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for the species in question.

(B) The Secretary shall—

(i) develop a protocol for the conduct of scientific independent review under this subsection, that—

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

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

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

(5) If an independent review board under this subsection makes a recommendation regarding a covered action, the Secretary shall, within 90 days after receiving the recommendation, evaluate and consider the information that results from the review by the board, and shall include in the rulemaking record for the covered action—

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

(B) in a case in which the recommendation of a majority of the members of the board is not followed, an explanation of why the recommendation was not followed.

(6) The report of each independent review board under this subsection shall be included in the rulemaking record of any regulation with respect to which the board is convened, and shall be available for public review for at least 30 days before the close of the period for comment on the regulation.

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INTERAGENCY COOPERATION

SEC. 7. (a) * * *

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

* * * * * * *

(C) In conducting a consultation under subsection (a)(2), the Secretary shall actively solicit and consider information from the State agency in each affected State.

(D)(i) In conducting a consultation with a Federal agency under subsection (a)(2), the Secretary and the head of the agency shall provide any person who has sought authorization or funding from a

Federal agency for an action that is the subject of the consultation, the opportunity to—

(I) before the development of a draft biological opinion, submit and discuss with the Secretary and the Federal agency information relevant to the effect of the proposed action on the species and reasonable and prudent alternatives that the Federal agency and the person can take to avoid violation of subsection (a)(2), including any such alternatives proposed by the person;

(II) receive 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 incidental taking statements; and

(III) receive a copy of the draft biological opinion from the Federal agency and, before issuance of the final biological opinion, submit comments on the draft biological opinion and discuss with the Secretary and the Federal agency the basis for any finding in the draft biological opinion.

(ii) If 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 provide to the person reasonable justification, based on the best scientific and commercial data available, why those alternatives were not included in the opinion.

(iii) 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).

* * * * * * *

(c) BIOLOGICAL ASSESSMENT.—(1) * * *

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(3) In preparing a biological assessment under this subsection, the head of an agency shall solicit and review any scientific and commercial data that a prospective permit or license applicant believes is relevant to the assessment, and shall make that data available to the Secretary.

* * * * * * *

DISSENTING VIEWS

The ESA requires the Secretaries of the Interior and Commerce, when implementing the law, to base their decisions on the "best scientific and commercial data available". Current Department of Interior and Commerce joint policy establishes procedures and provides guidance to ensure that ESA decisions made by the Fish and Wildlife Service and the National Marine Fisheries Service rely on and represent the best scientific information available. A second joint policy requires the solicitation of independent peer review of listing proposals and recovery plans. Both have been in effect since July 1, 1994.

Unfortunately, H.R. 4840 would politicize those requirements and policies and seeks to predetermine what constitutes "best science" and what science can be considered in decision making in several ways. For these reasons, we cannot support it.

Listing Petitions—Setting the Bar Impossibly High: First, the bill sets an extremely high threshold for listing or de-listing petitions to meet before they can be considered for review by the agencies. While the requirement for petitions to contain certain basic information makes sense and has been proposed in other legislation, the requirement that any petition must demonstrate that a change in population is beyond the normal fluctuations for the species effectively shifts the burden of scientific analysis from the Fish and Wildlife Service to the petitioner, making it far more difficult for citizens to protect species.

The substitute also appears to replace the current standard of "best scientific information available" with a requirement that the petition provide "clear and convincing evidence" of the information required. Not only is this a very high legal standard, the matter is further confused by defining "clear and convincing evidence" with a different legal standard of a "preponderance of the evidence" and by requiring that the evidence must be sufficient to "support a firm belief that the petition action is warranted" and is based on "reliable scientific and commercial information". If the goal of this requirement is to create more ambiguity and potential for litigation and delay in the listing of species, it will likely have the desired effect.

Standards for Data—Letting Politicians Define Good Science: The bill gives priority to specific kinds of data and information, requires that a species cannot be listed unless the determination is supported by "data collected in the field", and requires the Secretary, not scientists, to define what constitutes the best available science to be used in determinations. By predetermining what information can be used regardless of whether it is actually the "best", the bill would seem to contradict the law and its own alleged goal of using the best scientific information available. Further, the requirement that a listing determination must be sup-

ported by data collected in the field ignores the fact that this data might not be the best and that listing decisions can be based on factors that have nothing to do with field data (such as the inadequacy of existing regulatory mechanisms).

In addition, by requiring the Secretary to dictate, through regulation, the criteria that scientific information must meet in order to be used to for decision making, the bill politicizes and allows the Secretary, not scientists, to determine what is the best information available.

Finally, the bill seems to establish contradictory standards for data, requiring the Secretary to establish rigorous criteria for data used by the agency for decision making, and giving priority to data that is empirical, field tested, or peer reviewed, but then also mandating the acceptance of data from landowners and the inclusion of that data in the rule making even though such data is not required to meet any of these standards.

Peer Review: While the concept of peer review is broadly supported, and the agencies already conduct review for listing determinations and recovery plans, the process established in the bill is problematic for several reasons. First, the bill does not require a review of decisions not to list species. Further, in conflict with current statutory deadlines for decisions, the bill requires that, before any determination to list or delist, any approval of a recovery plan, or any jeopardy or no-jeopardy decision under a Section 7 consultation can become final, the Secretary must appoint an independent review board to review and report on the scientific information and analyses on which that decision or plan is based. If the Secretary has difficulty finding five reviewers to conduct the review, it appears the action could not become final. The bill extends the statutory deadlines for listing decisions by six months to address this potential delay, it does not extend the deadlines for Section 7 consultations. The majority argues that this delay in protecting species is warranted and necessary because unwarranted listings and jeopardy decisions are resulting in greater burdens on landowners. To the contrary, the NAS found in its review of the ESA that current decision making process employed in ESA listing and jeopardy decisions makes it more likely that an endangered species is denied needed protections than it is for non-endangered species to be protected unnecessarily.

The bill also establishes a potential conflict between the responsibilities of the agencies under the law that requires them to make decisions on the best scientific information available and the findings of the scientists who will be using a protocol for review that would be developed by the Secretary under the bill. If the Secretarial protocol establishes a different standard of evaluation, as was the case with the review of the Klamath River biological opinion, and the bill then requires the Secretary to explain why his or her findings based on the best science available do not coincide with the findings of the review, the likely outcome will be more conflict, litigation, and delay in the implementation of the law.

Finally, the bill would further politicize the review process by allowing the Governor to appoint two of the five reviewers, and to determine whether the review has a potential conflict of interest.

Consultation—Access for Some but not for Others: Finally, the bill 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, the bill would ensure that the irrigators were guaranteed access to the consultation process, but the Tribes and fishermen who are also economically affected by the outcome of the opinion, would be provided no such access.

In conclusion, H.R. 4840 contradicts its own title and ensures that the science used in making decisions under the ESA will not be based on the best science, but instead on politics and result in further delay and conflict in the implementation of the law. As such, we cannot support it.

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