

107TH CONGRESS  
1ST SESSION

# H. R. 1402

To amend the Endangered Species Act of 1973 to reform the regulatory process under that Act.

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IN THE HOUSE OF REPRESENTATIVES

APRIL 4, 2001

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

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## A BILL

To amend the Endangered Species Act of 1973 to reform the regulatory process under that Act.

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; REFERENCES.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Endangered Species Fair Regulatory Process Reform  
6 Act”.

7 (b) **REFERENCES TO ENDANGERED SPECIES ACT OF**  
8 **1973.**—Except as otherwise expressly provided, whenever  
9 in this Act an amendment or repeal is expressed in terms  
10 of an amendment to, or repeal of, a section or other provi-

1 sion, the reference shall be considered to be made to that  
2 section or provision of the Endangered Species Act (16  
3 U.S.C. 1531 et seq.).

4 **SEC. 2. LISTING PROCESS REFORMS.**

5 (a) PETITION INFORMATION.—Section 4(b)(3) (16  
6 U.S.C. 1533(b)(3)) is amended by adding at the end the  
7 following:

8 “(E) In the case of a petition to add a species to  
9 either list published under subsection (c), a finding that  
10 the petition presents the information described in subpara-  
11 graph (A) shall not be made unless the petition provides—

12 “(i) documentation from a published scientific  
13 source that the fish, wildlife, or plant that is the  
14 subject of the petition is a species;

15 “(ii) a description of the available data on the  
16 historical and current range and distribution of the  
17 species, an explanation of the methodology used to  
18 collect the data, and identification of the location  
19 where such data can be reviewed;

20 “(iii) an appraisal of the available data on the  
21 status and trends of populations of the species;

22 “(iv) an appraisal of the available data on the  
23 threats to the species;

1           “(v) an identification of the information con-  
2           tained or referred to in the petition that has been  
3           peer-reviewed or field-tested; and

4           “(vi) at least one study or credible expert opin-  
5           ion, from a person not affiliated with the petitioner,  
6           to support the action requested in the petition.”.

7           (b) AVAILABILITY OF INFORMATION RELATING TO  
8           LISTING.—Section 4(b) (16 U.S.C. 1533(b)) is amended  
9           by adding at the end the following:

10          “(9)(A) Upon publication of a proposed rule deter-  
11          mining that a species is an endangered species or threat-  
12          ened species, the Secretary shall make publicly available  
13          all information on which the determination is based, in-  
14          cluding all scientific studies and data underlying those  
15          studies, and all information related to the species the Sec-  
16          retary possesses that does not support the determination.

17          “(B) This paragraph does not require disclosure of  
18          any information that—

19                 “(i) is not subject to the requirements of sec-  
20                 tion 552 of title 5, United States Code (popularly  
21                 known as the Freedom of Information Act); or

22                 “(ii) is prohibited from being disclosed under  
23                 section 552a of title 5, United States Code (popu-  
24                 larly known as the Privacy Act).”.

1 (c) PEER REVIEW COMMITTEES.—Section 4(b) (16  
2 U.S.C. 1533) is further amended by adding at the end  
3 the following:

4 “(10)(A) In the case of a regulation proposed by the  
5 Secretary to implement a determination under subsection  
6 (a)(1) that any species is an endangered species or a  
7 threatened species or that any species currently listed as  
8 an endangered species or a threatened species should be  
9 removed from any list published pursuant to subsection  
10 (c), the Secretary shall provide for independent scientific  
11 peer review by—

12 “(i) selecting independent referees pursuant to  
13 subparagraph (B);

14 “(ii) requesting the referees to conduct the re-  
15 view, considering all relevant information, and make  
16 a recommendation to the Secretary in accordance  
17 with this paragraph not later than 150 days after  
18 the general notice is published pursuant to para-  
19 graph (5)(A)(i).

20 “(B) SELECTION OF REFEREES.—For each inde-  
21 pendent scientific review to be conducted pursuant to sub-  
22 paragraph (A), the Secretary shall select 3 independent  
23 referees from a list provided by the National Academy of  
24 Sciences, who—

1           “(i) through publication of peer-reviewed sci-  
2           entific literature or other means, have demonstrated  
3           scientific expertise on the species or a similar species  
4           or other scientific expertise relevant to the decision  
5           of the Secretary under subsection (a);

6           “(ii) do not have, nor represent any person  
7           with, a conflict of interest with respect to the deter-  
8           mination that is the subject of the review; and

9           “(iii) are not participants in a petition to list,  
10          change the status of, or remove the species from a  
11          list under subsection (c), or the proposed or final de-  
12          termination of the Secretary.

13          “(C) The Secretary shall take one of the actions  
14          under paragraph (6)(A) of this subsection not later than  
15          1 year after the date of publication of the general notice  
16          of the proposed determination. If the referees have made  
17          a recommendation in accordance with clause (ii) of sub-  
18          paragraph (A), the Secretary shall evaluate and consider  
19          the information that results from the independent sci-  
20          entific review and include in the final determination—

21                 “(i) a summary of the results of the inde-  
22                 pendent scientific review; and

23                 “(ii) in cases where the recommendation of a  
24                 majority of the referees who conducted the inde-  
25                 pendent scientific review under subparagraph (A) is

1 not followed, an explanation as to why the rec-  
2 ommendation was not followed.

3 “(D) The referees selected pursuant to this para-  
4 graph shall not be subject to the Federal Advisory Com-  
5 mittee Act (5 U.S.C. App.).”.

6 (d) ESTABLISHMENT OF CRITERIA FOR SCIENTIFIC  
7 STUDIES TO SUPPORT LISTING.—Section 4(b) (16 U.S.C.  
8 1533(b)) is further amended by adding at the end the fol-  
9 lowing:

10 “(11) Within 1 year after the date of the enactment  
11 of this paragraph, the Secretary shall issue rules that es-  
12 tablish criteria that must be met for scientific and com-  
13 mercial data to be used as the basis of any determination  
14 under this section that a species is an endangered species  
15 or threatened species or should be removed from a list  
16 published under subsection (c).”.

17 (e) FIELD DATA REQUIRED.—Section 4(b) (16  
18 U.S.C. 1533(b)) is further amended by adding at the end  
19 the following:

20 “(12)(A) The Secretary may not determine that a  
21 species is an endangered species or threatened species un-  
22 less the determination is supported by data obtained by  
23 observation of the species in the field.

24 “(B) The Secretary shall—

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

5           “(ii) include such data in the rulemaking record  
6           for any determination that the species is an endan-  
7           gered species or threatened species, unless the data  
8           is refuted by other field-collected data in the posses-  
9           sion of the Secretary.”.

10 **SEC. 3. FORMAL RULEMAKING PROCESS FOR LISTINGS.**

11           (a) FORMAL RULEMAKING REQUIRED.—Section  
12 4(b)(4) (16 U.S.C. 1533(b)(4)) is amended—

13           (1) by striking “Except as provided in” and in-  
14           serting “(A) Except as provided in subparagraph  
15           (B) of this paragraph and”; and

16           (2) by adding at the end the following:

17           “(B)(i) The Secretary shall make determinations re-  
18           ferred to in subsection (a)(1) and designations and revi-  
19           sions referred to in subsection (a)(3) by a rule made on  
20           the record after an opportunity for an agency hearing—

21           “(I) in the State in which the largest population  
22           of the species exists; and

23           “(II) in the State for which the potential eco-  
24           nomic impact of the determination, designation, or  
25           revision is greatest.

1 “(ii) A hearing under this subparagraph—

2 “(I) shall be initiated by the Secretary not later  
3 than 1 year after publication of notice of proposed  
4 rulemaking, and shall be of not more than 30 days  
5 in duration; and

6 “(II) shall be conducted in accordance with sec-  
7 tions 556 and 557 of title 5, United States Code.”.

8 (b) CONFORMING AMENDMENT.—Section 4(b)(5) (16  
9 U.S.C. 1533(b)(5)) is amended—

10 (1) in subparagraph (C) by adding “and” after  
11 the semicolon;

12 (2) in subparagraph (D) by striking “; and”  
13 and inserting a period; and

14 (3) by striking subparagraph (E).

15 **SEC. 4. ENSURING ADEQUATE BASIS FOR REGULATORY AC-**  
16 **TIONS.**

17 Section 4 (16 U.S.C. 1533) is amended by adding  
18 at the end the following:

19 “(j) STANDARD FOR CERTAIN ACTIONS.—(1) Not-  
20 withstanding section 706(2) of title 5, United States Code,  
21 the Secretary may not take an action referred to in para-  
22 graph (2) unless that action is supported by substantial  
23 evidence.

24 “(2) The actions referred to in paragraph (1) are the  
25 following:

1           “(A) A determination under subsection (a)(1)  
2           that a species is an endangered species or threatened  
3           species.

4           “(B) The removal of a species from either of  
5           the lists published under subsection (c).

6           “(C) The approval of a new or revised recovery  
7           plan under subsection (f).”.

8   **SEC. 5. ECONOMIC IMPACT ANALYSES.**

9           Section 4 (16 U.S.C. 1533) is further amended by  
10          adding at the end the following:

11          “(k) ECONOMIC IMPACT ANALYSIS.—(1) The Sec-  
12          retary shall prepare and publish with a final rule under  
13          subsection (a)(1) determining that a species is an endan-  
14          gered species or threatened species, or under subsection  
15          (b)(2) designating critical habitat for a species, an anal-  
16          ysis of the economic impacts of the rule.

17          “(2) An analysis under paragraph (1) for a deter-  
18          mination that a species is an endangered species or threat-  
19          ened species shall describe the geographic area that will  
20          be affected by the determination, including specification  
21          of privately owned property located in that area.”.

22   **SEC. 6. EXPERIMENTAL POPULATIONS.**

23          Section 10(j) (16 U.S.C. 1539(j)) is amended by add-  
24          ing at the end the following:

1       “(4)(A) The Secretary may not release any experi-  
2 mental population on or affecting privately owned property  
3 except by a rulemaking.

4       “(B) Any rule issued under this paragraph shall—

5               “(i) identify the geographic area affected by the  
6 release;

7               “(ii) describe the need for the release; and

8               “(iii) the economic impacts of the release on  
9 private landowners.”.

10 **SEC. 7. EXPEDITIOUS CONSIDERATION OF INCIDENTAL**  
11 **TAKE PERMIT APPLICATIONS.**

12       Section 10(a) (16 U.S.C. 1539(a)) is amended by  
13 adding at the end the following:

14       “(3) The Secretary shall approve or disapprove an  
15 application for an incidental take permit under paragraph  
16 (1)(B) by not later than 90 days after the date the Sec-  
17 retary receives the application.

18       “(4)(A) If the Secretary disapproves an application  
19 for an incidental take permit under paragraph (1)(B), the  
20 Secretary shall provide the applicant notice in writing the  
21 specific reasons the application was not approved and  
22 measures that, if included in the amended application,  
23 would result in approval of the application.

24       “(B) If within 30 days after the date on which such  
25 notice is provided the applicant submits an amended appli-

1 cation that adequately addresses the reasons for dis-  
2 approval that are specified in the notice, the Secretary  
3 shall promptly issue the permit.

4 “(5) The Secretary may not charge any fee for proc-  
5 essing a permit under paragraph (1)(B) in an amount that  
6 exceeds the incremental cost to the United States of proc-  
7 essing the permit.”.

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