



July 25, 2002

The Honorable James V. Hansen
Chairman, Committee on Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Commerce appreciates the opportunity to provide views on H.R. 4840, the "Sound Science for Endangered Species Act Planning Act of 2002." We commend you and the Committee for your efforts to improve implementation of the Endangered Species Act (ESA) and specifically, to ensure the best available science continues to guide agency actions and decisions regarding endangered and threatened species.

Although the Department has some concerns described below, we look forward to working with the Committee in reaching an acceptable resolution. Our principal concerns with the bill relate to the potential for added time and increased cost to the Government of implementing the ESA. In addition, some of these requirements could increase the possibility of litigation against the government, and therefore further increase costs and delays. The Department's NOAA Fisheries is under tremendous pressure to process a large number of ESA actions each year. The independent peer review process provisions of the bill alone could potentially add six months to each action that is reviewed. We are concerned that delays could result in adverse economic impacts, and we recommend that the bill allow the Secretary more flexibility to expedite independent review and minimize delays. Our suggested modifications to H.R. 4840 are provided below.

Section 2(b) - Preference for Empirical, Field-tested and Peer-reviewed Data

We support basing our decisions on sound and peer-reviewed science, consistent with the statutory requirement to ensure the decisions reflect the best scientific and commercial data available. We also acknowledge that sound data are vital to ensuring public confidence in our decisions. The Department is concerned that the requirement to give greater weight to scientific or commercial data that are empirical or field-tested could diminish the role of models of populations, habitat use, and/or life histories and other scientific methods that produce valuable scientific data. Models that are based on empirical or field-collected data expand NOAA Fisheries' ability to predict future events (e.g., whether a species is likely to become endangered in the foreseeable future).

Section 2(c) - Contents of Listing Petitions

We suggest changing Section 2(c)(1)(F)(ii) to read, "The evidence is sufficient to support a finding that the petitioned action may be warranted." We suggest this change to reaffirm that listing decisions are based on sound science. We are concerned that establishing as a legal standard that "...evidence is sufficient to support a firm belief that..." may lead to litigation.

Section 2(d) - Use of Sound Science in Listing

NOAA Fisheries continually reviews and updates its policies and guidelines regarding criteria for the use of scientific data and information used in making ESA determinations. However, publishing regulations, as proposed in Section 2(d), could reduce future flexibility the Department needs when making ESA determinations.

We reiterate our concern about the requirement to give greater weight to scientific or commercial data that are empirical or field-tested, as other scientific methods that produce valuable scientific data (e.g., models) frequently represent the best available science and are based on empirical or field-collected data.

We welcome data from sources such as landowners or fishermen, or anyone affected by a listing. We evaluate and compare these data to those that have been systematically collected.

Section 3 - Independent Scientific Review

The Administration opposes the compensation for independent scientific reviews required by this section because it would cost several million dollars not included in the President's Budget. NOAA Fisheries already incorporates independent peer review in listing and recovery activities during the public comment period. We would like to work with the Committee to ensure that these requirements would not duplicate, override, or compete with existing Federal, state, tribal, and local efforts to provide personnel and resources for peer review of ongoing species recovery projects, such as the Independent Scientific Review Panel that currently reviews salmon recovery projects in the Columbia River Basin in the Pacific Northwest. Also, we would caution that new independent scientific review requirements will create new demands on the agencies without changes to statutory deadlines. For example, the requirement to use an independent panel prior to a jeopardy opinion becoming final would inevitably cause delays to the current schedules.

We commend this section of the bill for allowing the Secretary the flexibility to determine whether a review board is necessary for biological opinions that conclude that actions may jeopardize species. However, we want to work with the Committee to ensure that the requirement for a review of certain jeopardy opinions not delay the completion of the biological opinion for those activities that require

a biological opinion. The Secretary should also be allowed the flexibility to convene a review board for non-jeopardy biological opinions as well as jeopardy opinions. We would be pleased to work with the Committee to ensure that a process is developed to maintain timely completion of biological opinions.

Section 3(a), amending Section 4(j)(3)(F) of the Endangered Species Act, states that the Secretary, when appointing scientific review boards, may not delegate that authority to anyone below the level of the Director of the Fish and Wildlife Service of the Department of the Interior or someone who has not been confirmed by the Senate. For Commerce, that would result in the Assistant Secretary of Commerce for Oceans and Atmosphere appointing review boards. If this section remains, the Department requests that the Assistant Administrator for Fisheries (NOAA) be allowed to appoint review boards.

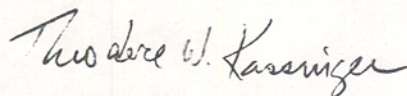
Section 3(b) requires the head of an agency developing a biological assessment to solicit and review any scientific and commercial data that a prospective permit or license applicant believes are relevant to the assessment. This may also make it more difficult to meet the current statutory deadlines.

Section 4 - Interagency Cooperation - Consultations under Section 7 of the ESA

The Department currently includes information from states in recovery activities, and this provision will strengthen the cooperation between the states and the Federal Government. We support opportunities for the action agency and the applicant to meaningfully participate in the development of biological opinions. However, the Department would like to work with the Committee to expand meaningful participation, including by the states, in a way that would also allow the Department to meet its statutory deadlines for completing biological opinions.

The Office of Management and Budget has advised that there is no objection to the transmittal of these views from the standpoint of the Administration's program.

Sincerely,



Theodore W. Kassinger

cc: The Honorable Nick J. Rahall, II