

A DISCUSSION OF LEGISLATIVE REQUIREMENTS FOR
U. S. FISH AND WILDLIFE SERVICE PARTICIPATION
IN WATER RESOURCE DEVELOPMENT PLANNING

by

Joe W. Hardy and Robert M. Dawson
U. S. Fish and Wildlife Service
Vicksburg, Mississippi
April 19, 1977

INTRODUCTION

In recent years, Mississippi, like most other states, has witnessed a rapid increase in competition for development, management, and utilization of water resources to serve a wide variety of public wants. New demands for navigation, flood control, impoundments, and diversions for water supplies, electric power, agricultural expansion, sewerage disposal, and recreation have resulted in an increased awareness of environmental quality. Such has given rise to a proliferation of new legislation and policy requiring public agencies to reorder priorities on natural resource values in their planning and construction of water development projects.

MAJOR LEGISLATION

Congressional intent for consideration of the Nation's fish and wildlife resources is detailed in legislative acts listed in Table 1. These complimentary acts guide policy for land and water resource development on a national basis. The primary basis for Fish and Wildlife Service involvement in water related activities in Mississippi includes the Fish and Wildlife Coordination Act, River and Harbor Act, Federal Water Pollution Control Act, Coastal Zone Management Act, Estuary Act, Endangered Species Act, and National Environmental Policy Act.

Fish and Wildlife Coordination Act (16 U.S.C. 661-667e)

The enabling legislation for fish and wildlife investigations of water resource development actions is the Fish and Wildlife

Coordination Act. This act authorizes the Secretary of Interior to report and advise on consequences of proposed water-related construction actions of Federal agencies but does not require that the recommendations be incorporated into project plans. Results of such reports and recommendations are required to be included in the construction agency's request for congressional authorization. The law also authorizes the transfer of congressionally authorized funds from the Federal construction agencies to the Service to conduct such investigations and make recommendations.

The Fish and Wildlife Coordination Act is also applicable to water-related activities proposed by other organizations or individuals that require a permit or license from a wide variety of Federal regulatory agencies (Table 2). The Fish and Wildlife Coordination Act is complimentary to most other acts which address related impacts to water resource development planning, i.e., River and Harbor Act, Federal Water Pollution Control Act, and congressionally authorized Corps of Engineers' projects. With three revisions from 1934 to 1958, the Fish and Wildlife Coordination Act is the oldest environmental legislation which recognizes, "the vital contribution of wildlife resources to the nation, the increasing public interest and significance thereof" In direct reference to water development interests, the law states "Wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation"

River and Harbor Act of 1899

This act declares it unlawful to build or commence the building of any structure in any navigable water of the United States or to excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of any navigable water of the United States unless approved by the Corps of Engineers. Functions, powers, and duties relative to location and clearances of bridges and causeways were transferred to and vested in the Secretary of Transportation (Coast Guard) in 1966.

Coastal Zone Management (16 U.S.C. 1451-1464) and Estuarine Areas (16 U.S.C. 1221-1226) Acts.

These acts express congressional policy on values of estuaries and the need to conserve these natural resources. The Secretary of Interior is authorized to cooperate in area-wide planning and assist states in comprehensive planning programs. Service

input is at the Washington and regional levels and currently includes participation in development, review, and implementation of Coastal Zone Management programs by 34 coastal states and territories.

Endangered Species Act (16 U.S.C. 1531-1543)

The law seeks ". . . to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" Of primary importance to planning and development of water resource projects is Section 7 which states ". . . Federal departments and agencies shall, in consultation with and with the assistance of the Secretary (of Interior), utilize their authorities in furtherance of the purpose of this act" In April 1976, the Fish and Wildlife Service and the National Marine Fisheries Service circulated "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973".

Federal Water Pollution Control Act Amendments of 1972

Primary Service responsibility centering around this act is related to issuance of permits for disposal of dredged and fill material into navigable waters, commonly referred to as Section 404 permits. The Service reviews applications for all 404 permits and makes recommendations to the Corps of Engineers, the agency responsible for administering the permit program. Impacts on water quality and unacceptable adverse effects on fishery and wildlife resources are the focal points of the 404 permit program. Although permit review includes recommendations of this Service, the Corps of Engineers with the concurrence of EPA, who must approve the selection of disposal sites, may grant a permit without Service approval.

National Environmental Policy Act (42 U.S.C. 4321-4347)

Most agencies are intimately familiar with this act and its impact on water resource planning activities. The National Environmental Policy Act (NEPA) directs all Federal agencies to adopt and implement procedures designed to assure that their actions are in harmony with national environmental goals. The Service has been delegated the primary responsibility for the act relative to fish and wildlife resource impacts. Our input focuses on review of Section 102(2)(C), environmental impact statement (EIS) and preparation of Service project EIS's.

Fish and Wildlife Areas of Expertise

The National Environmental Policy Act of 1969 and Environmental Quality Improvement Act of 1970 directs the Council of Environmental Quality (CEQ) to assist Federal agencies in defining and establishing certain responsible areas of expertise relevant to environmental quality. CEQ published areas of expertise of the Fish and Wildlife Service in Federal Register, August 1, 1973, Guidelines for Preparation of EIS's, Appendix 2. Table 3 lists those areas most directly involved with water resources.

Regulatory Authority

Once basic legislation (Table 1) is established, then more detailed guidance for implementation is effected by publication of rules and regulations in the Federal Register. An agency or department is designated by the Congress as responsible for detailed implementation of congressional intent. Such regulations provide the authority for the Service in water resource planning activities. For example, the National Environmental Policy Act of 1969 established a Council on Environmental Quality and designated this executive office to carry out the intent of NEPA. CEQ then published guidelines for act implementation, and various Federal agencies have followed with published rules and regulations in accordance with these guidelines.

Memoranda of Agreement or Understanding

In order to facilitate cooperation between Federal agencies involved in natural resource and environmental policy matters, coordination agreements or memoranda of understanding (MOU) have been developed. Table 4 lists agencies and a brief description of intent of MOU's between the Service and other concerned agencies.

PROJECT SPECIFIC LEGISLATION AND REGULATION AUTHORITY

Authorized (Corps of Engineers) Projects

Each one to three years, Congress authorizes the Secretary of the Army, acting through the Chief of Engineers, to study and/or

construct certain individual water resource projects. Prior to 1974, such acts were known as the Flood Control Act of (given year) and the River and Harbor Act of (given year) or commonly as the "Omnibus Bill". Beginning in 1974, all such projects were authorized under a single act, the Water Resources Development Act.

As directed by FWCA, the Fish and Wildlife Service receives transfer funds from the Corps which have been authorized by Congress to study specific projects. Service reports and recommendations of fish and wildlife investigations accompany Corps plans to Congress for final authorization for construction or modification. Service reports may recommend project modifications, appropriate mitigation, or against project authorization.

TABLE 1. MAJOR FEDERAL LEGISLATION AFFECTING FISH AND WILDLIFE RESOURCES

ACT	PURPOSE
Fish and Wildlife Act	Established Fish and Wildlife Service within U. S. Department of the Interior
Fish and Wildlife Coordination Act	Provides advice on impacts of water and related land resource projects on fish and wildlife
National Environmental Policy Act (NEPA)	Public disclosure of anticipated environmental impacts of Federal projects
River and Harbor Act of 1899	Regulates works in navigable waters primarily to prevent obstruction of navigation -- permits issued by Corps of Engineers and Coast Guard
Federal Water Pollution Control Act Amendments of 1972	Regulates activities in navigable waters, primarily to prevent pollution -- permits issued by EPA and Corps of Engineers or by States with review by EPA
Marine Protection, Research and Sanctuaries Act of 1972	Provides for the Corps of Engineers to issue permits under criteria established by the EPA, for transport of dredged material for dumping in ocean waters
Federal Power Act	Regulates construction of hydroelectric power plants and rates charged for electricity -- licenses and preliminary permits issued by Federal Power Commission
Endangered Species Act of 1973	Designates species and related habitats which are likely to become threatened with extinction.

Estuary Act of 1968

Requires discussion of project impact on estuaries to be affected by Secretary of Interior

Coastal Zone Management Act

Provides technical assistance to States in developing plans under this legislation

Federal Water Project Recreation Act

Requires full consideration of fish and wildlife enhancement and establishes cost sharing for facilities constructed

Food and Agriculture Act of 1962

Establish Resource Conservation and Development Program -- regionally sponsored projects receiving financial and technical assistance from the Soil Conservation Service

Note: Most of the above acts relate environmental impacts to fish and wildlife resources, thus are viewed by the Fish and Wildlife Service as complimentary to the Fish and Wildlife Coordination Act as source legislation.

TABLE 2. REGULATORY AGENCIES ISSUING PERMITS AND/OR LICENSES FOR
WORKS IN NAVIGABLE WATERS OF THE UNITED STATES FOR
WHICH FISH AND WILDLIFE SERVICE REVIEWS APPLICATIONS

Regulatory Agency	Permit Issued
<u>U.S. Army Corps of Engineers</u>	
Structures in Navigable Waters	Sec. 10, Act of 1899 (to prevent obstruction of navigation)
Dredge and Fill Activities in Navigable Waters	Sec. 10, Act of 1899 (to prevent obstruction of navigation)
Dikes, Dams, and Similar Obstructions	Sec. 9, Act of 1899 (to prevent obstruction of navigation) also requires approval of Congress
<u>U.S. Coast Guard</u>	
Bridges and Causeways in Navigable Waters	Sec. 9, Act of 1899, and Department of Transportation Act
<u>Environmental Protection Agency</u>	
Discharge of Dredged Material into Navigable Waters	Sec. 404, Federal Water Pollution Control Act Amendments
Discharge of Sewage Sludge into Navigable Waters	Sec. 405, Federal Water Pollution Control Act Amendments
Discharge of Pollutants into Navigable Waters (including heated water from steam electric plants)	Sec. 402, Federal Water Pollution Control Act Amendments

Federal Power Commission

Construction and Operation of Hydro-
electric Power Plants

Part I, Federal Power Act

Nuclear Regulatory Commission

Construction and Operation of Nuclear-
Fueled Power Plants

Atomic Energy Act of 1954 and Energy Reorganization Act
of 1974

TABLE 3. FISH AND WILDLIFE SERVICE AREAS OF SPECIAL EXPERTISE OR
JURISDICTION BY LAW (CEQ GUIDELINES)

Air Quality (relative to fish and wildlife resources)

Coal and Minerals Development, Mining, Conversion, Processing, Transport, and Use

Electric Energy Development, Generation, and Transmission and Use

Fish and Wildlife

Land Use Changes

Land Use in Coastal Areas

Marine Pollution, Commercial Fishery Conservation and Shellfish Sanitation

Natural Gas Development, Production, Transmission and Use

Pesticides (relative to the natural environment)

Petroleum Development, Extraction, Refining, Transport and Use

Planning and Regulation of Land Development

Protection of Environmentally Critical Areas -- Floodplains, Wetlands, Beaches and Dunes, Unstable Soils, Steep Slopes, Aquifer Recharge Areas, etc.

Public Land Management

Renewable Resource Development, Production, Management, Harvest, Transport, and Use

Soil and Plant Conservation and Hydrology

Water Regulation and Stream Modification

Water Quality (relative to fish and wildlife resources)

TABLE 4. INTERAGENCY MEMORANDA OF AGREEMENT OR UNDERSTANDING BETWEEN THE
FISH AND WILDLIFE SERVICE AND OTHER FEDERAL AGENCIES WHICH
RELATE TO WATER RESOURCE PLANNING

Department of Agriculture - U. S. Forest Service (1960):

Delineates the respective roles of the FS and FWS, especially with regard to matters in which each agency serves in an advisory capacity to the other.

Department of Agriculture - Agriculture Research Service and Department of Interior - Fish and Wildlife Service and Bureau of Reclamation (1962):

Provides for cooperative investigations in all phases of aquatic and ditchbank weed control, including use of herbicides.

Department of the Army - U. S. Corps of Engineers (1962):

Establishes policies regarding acquisition in fee or easement of lands at Federal reservoir projects.

Nuclear Regulatory Commission (1964):

Provides for the Service to coordinate its reports and those of the National Marine Fisheries Service on the effects of nuclear power plants on fish and wildlife resources.

Department of the Army - U. S. Corps of Engineers (1967):

Establishes procedures for coordinating permit application review under Section 10 of the Act of March 3, 1899, and provides a mechanism for referral to higher authority when differences cannot be resolved at the field level.

Tennessee Valley Authority (1968):

Provides for an exchange of information and discussion of fish and wildlife aspects of TVA water-control projects.

U. S. Geological Survey and Bureau of Land Management (1972):

Outlines the respective roles of USGS, BLM, and FWS, regarding the development of mineral resources and the protection of fish and wildlife resources involved in the Outer Continental Shelf program.

Bureau of Outdoor Recreation (1973):

Outlines respective roles of BOR and FWS regarding comprehensive State plans for programs administered by the respective agencies.

Environmental Protection Agency (1974):

Delineates the respective roles of EPA and FWS regarding matters of mutual concern. Capabilities and responsibilities are identified to avoid duplication of effort and facilitate exchange of information.

REFERENCES

Committee on Merchant Marine and Fisheries. 1975. A Compilation of Federal Laws Relating to Conservation and Development of Our Nation's Fish and Wildlife Resources, Environmental Quality, and Oceanography. U. S. Government Printing Office: 844 pp.

Federal Register. 1973. Guidelines for Preparation of Environmental Impact Statements. August 1.

Fish and Wildlife Service. 1974. Position Paper of the Fish and Wildlife Service Relative to Losses of Fish and Wildlife Habitat Caused by Federally Planned or Constructed Water Resource Development. Unpublished memorandum.

Fish and Wildlife Service. 1975. Selected List of Federal Laws and Treaties Relating to Sport Fish and Wildlife. U. S. Government Printing Office: 8 pp.