

History of Fish Passage Public Policy

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Objectives

- Further awareness that:
 - interest in fish passage is not new
 - fish passage has been an important public purpose for centuries
 - the responsibility to ensure that fish passage is provided has long been entrusted with the sovereign
- Foster understanding of:
 - the history of fish passage that has influenced public policy and modern statutes
 - the purposes for providing fish passage

What will be covered...

- Brief historical perspective
- Purposes of a fishway



Historical Perspective

- The history of fishways is rooted in the common law of ancient times.
- English common law: the right of fishery – held in the public trust.
- The fishery (industry of catching fish) provided a critical food source and an important source for commerce.

Looking Back

530-533 AD, the
Digest of Justinian

1620- 1776 -
Colonial period -
Dam owners in the
New World
required to provide
fishways

1215, Magna
Carta ended
Monarchy's
ownership of
fisheries and
supported the
"right of fishery."

1776 -
Independence -
Enforcement of
fishway
requirement
passed from
sovereign to the
States.

Early Court Decisions & Law

1700s, City of Falmouth (MA) v. dam owner, fishway required

1850s, MA required fish passage in charter to Essex Company

1879, IL passed legislation requiring fishways at dams

1790, MA passed legislation requiring fish passage

1872, Holyoke Company v. Lyman, U.S. Supreme Court, fishway required

1884, Parker v. Illinois, State Supreme Court, fishway required

History of Federal Law

- Federal laws enacted in the late 1800s & early 1900s -
 - 1899 Rivers and Harbors Act
 - 1906 Dam Act
 - 1920 Federal Power Act
- 1992 – Congress identified a fishway in the National Energy Policy Act, Section 1701(b):

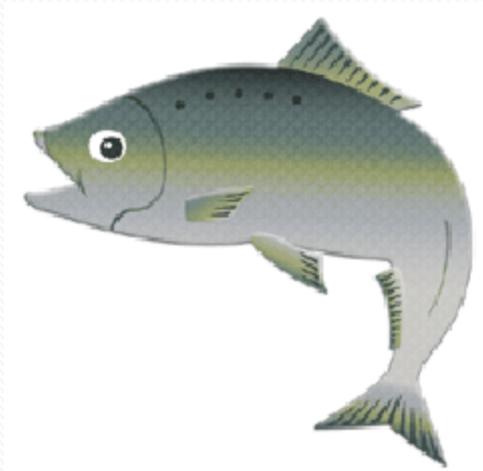
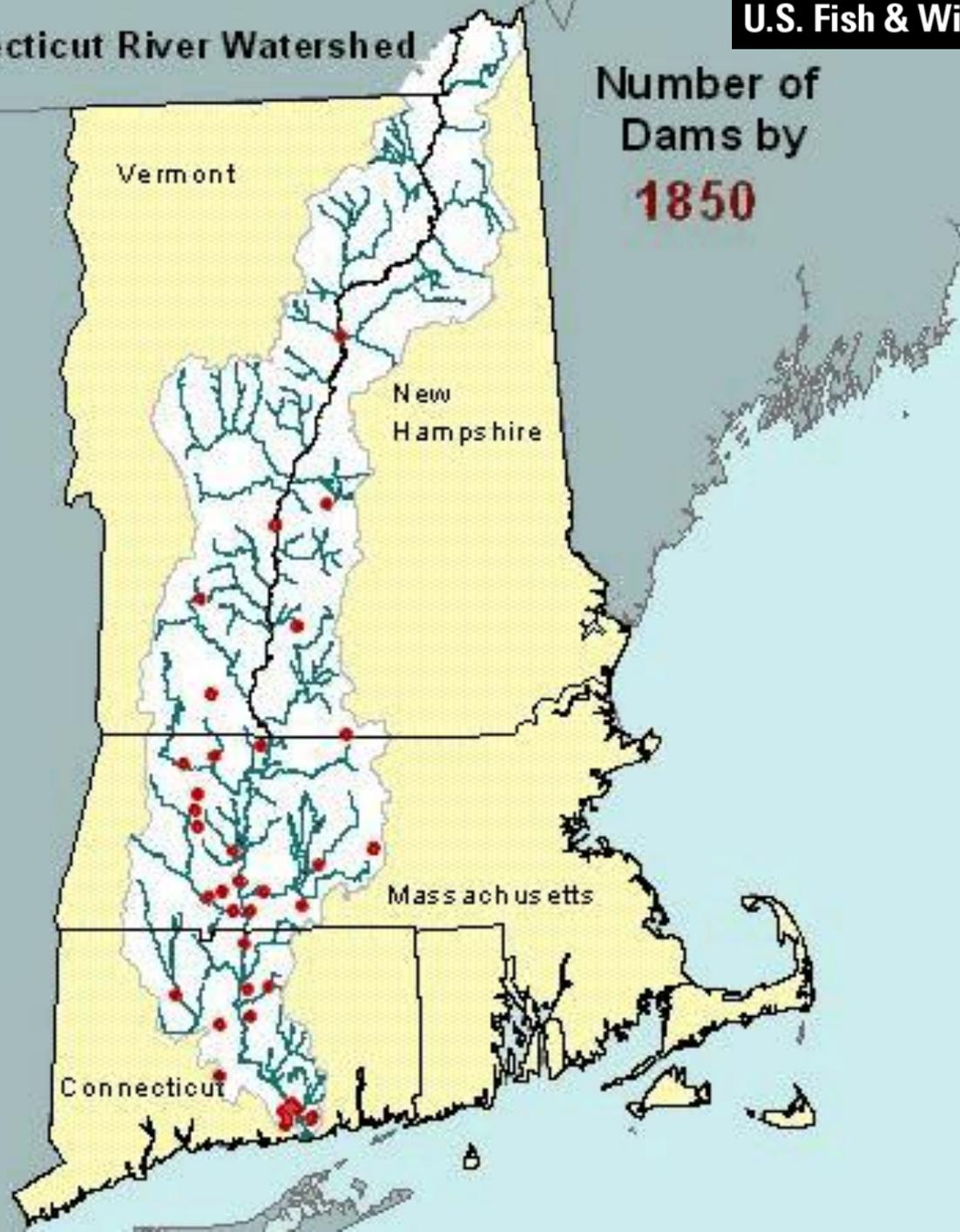
“... the items which may constitute a "fishway" under section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, and devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.”

Effect of Federal Legislation

- State fishway laws were pre-empted by the Federal Power Act at FERC-regulated hydro projects.
- States are dependent on FWS and NMFS to require fishways, at FERC-regulated hydro projects, except as the states may prescribe under section 401 of the Clean Water Act.

Connecticut River Watershed

Number of
Dams by
1850



Fundamental purpose of a fishway

- ...**is** to provide **access** for fish to and from the habitats upon which they depend.
- ...**is** to provide for the **safe, timely and effective movement** of fish past a project-related barrier or impediment (e.g., dam; dewatered ledge, gravel bar, bypass channel; turbines, impoundment, thermal cline; road crossing, etc.) for life history purposes or to help achieve resource goals and objectives.
- ...**is not to** protect or improve fish **habitat!**

Life History Purposes

- The life history purposes for fish movement include, but may not be limited to:
 - spawning
 - rearing
 - feeding
 - growth to maturity
 - dispersion
 - migration
 - seasonal use of habitat
 - providing host services; e.g., for mussels.

The Service's definition includes the following key points:

1. Fishways provide passage both upstream and downstream;
2. Passage must be safe, timely, and effective;
3. Passage applies to all life stages of fish;
4. Fishways include physical structures, facilities, or devices; and,
5. Fishways include project operations and measures (related to those structures, facilities, or devices) that are necessary to ensure fishway effectiveness – a.k.a. effectiveness measures.

Questions

5:15:00

