



Memorandum

AUG - 9 2018

To: USFWS Regional Directors
NOAA Fisheries Regional Administrators

From: Gary Frazer, Assistant Director for Ecological Services
Sam Rauch, Deputy Assistant Administrator for Regulatory Programs

Handwritten signatures in blue ink, including one that appears to be "M. Frazer" and another that appears to be "S. Rauch".

Subject: Agreement Regarding Shared Fish and Wildlife Coordination Act Authority

In 2016, the U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), and U.S. Army Corps of Engineers agreed that NMFS and the USFWS (the Services) have shared authority under the Fish and Wildlife Coordination Act (FWCA). To guide the collaborative implementation of our shared FWCA authority, the Services' headquarters offices, in coordination with the Regions, developed the attached Agreement, which outlines the principles and procedures that the Services will use in managing our relationship under this important, and shared, authority for mitigating the resource impacts of Federal water development projects.

The Agreement focuses on those responsibilities that fall under section 2 of the FWCA related to environmental review of projects, including consultation functions, their associated investigations and reports, and the development of transfer agreements (i.e., funding) with Federal action agencies. Please note that among the Agreement's provisions is a requirement (see section 2(C) of the Agreement) that Regional offices step-down procedures to clarify how the two Services will work together on FWCA issues in their regions. Regional procedures need not be elaborate or formal, and may vary between regions to allow for flexibility. Given that, we hope that these step-down regional procedures can be finalized within four months of this memo. We have attached a basic template to this memo to assist you in the development of the procedures. Headquarters staff in the NMFS' Office of Habitat Conservation and the USFWS' Ecological Services Division of Environmental Review are available to provide assistance.

We believe the collaborative implementation of this Agreement will enhance partnerships between our agencies, and that the principles and procedures within the Agreement will help us transition to new ways of working together. We also note that all sections of the Agreement are effective today and that engaging Federal action agencies for FWCA functions, including transfer agreements and report writing, can proceed prior to completing the regionally specific procedures.

Please familiarize yourself with the agreement and distribute to your field staff. Do not hesitate to contact Mr. Craig Aubrey (703)358-2442 or Ms. Kara Meckley (301) 427- 8642 if you have any questions.

Attachments

Shared authority under the Fish and Wildlife Coordination Act between the U.S. Fish Wildlife Service and National Marine Fisheries Service

This Agreement describes the approach that the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) (the Services) will use for implementing their shared authority under the Fish and Wildlife Coordination Act (FWCA). The principles and processes described in this document for managing this shared authority are intended to guide the Services in achieving the following goals of collaborative FWCA implementation:

- Improved conservation outcomes for water resource projects
- Strengthened partnership between the Services
- Empowered regional offices that will define how the Services coordinate efforts to prevent losses to wildlife resources and provide for their improvement in connection with water resource projects
- Increased efficiency
- Clarity regarding the transfer of funding between the Services and water-resource construction agencies in accordance with authority in sections 1(3) and 2(e) of the FWCA

This Agreement does not supplant the responsibilities of a Federal action agency as required by the FWCA.

1. Authority

The Fish and Wildlife Coordination Act (16 U.S.C. §§661-666c) requires that Federal agencies consult with the USFWS, the NMFS, and State wildlife agencies for activities that affect, control or modify waters of any stream or bodies of water, in order to minimize the adverse impacts of such actions on fish and wildlife resources and habitat. The FWCA establishes fish and wildlife conservation as a coequal objective of all Federally funded, permitted, or licensed water-related development projects. Federal action agencies developing water-related projects are to include justifiable means and measures to benefit and reduce impacts to fish and wildlife, and mitigation and enhancement recommendations are to be given full and equal consideration with other project purposes.

The FWCA is an important tool used by the Services and water-resource construction agencies to conserve the fish and wildlife resources that provide the Nation with significant economic and ecosystem benefits.

Reorganization Plan 4 of 1970 created the National Oceanic and Atmospheric Administration within the Department of Commerce and also extended the authorities of the FWCA to this new agency. This document sets forth how the Services will jointly and proactively work towards conservation of fish and wildlife resources under that authority. Below, see part 5, References, for additional background and legal analysis on the origin of shared FWCA authority.

2. Responsibilities

The Services will follow these principles as they implement their shared authority, including the application of transfer of funds in accordance with sections 1(3) and 2(e) of the FWCA:

- A. Follow the statutory requirements of the FWCA:
 - 1) In carrying out this Agreement, staff are required to adhere to the statutory requirements of the FWCA.
 - a. For the USFWS, the FWCA Handbook, titled Water Resources Development Under the Fish and Wildlife Coordination Act (2004), contains background, interpretation and guidance for USFWS implementation of the FWCA. The Handbook is available at <https://www.fws.gov/ecological-services/es-library/pdfs/fwca.pdf>
 - b. For NOAA, internal policies and guidance as found in the policy directives system and within region offices, will serve as additional background and guidance for implementation of the FWCA.
- B. Frequent communication between the Services is required:
 - 1) The Services will notify each other within 10 business days of any project request from a Federal action agency that may trigger a consultation under section 2 of the FWCA and where both Services may have resource concerns. This inter-Service requirement does not modify or replace the notification and consultation requirements of Federal action agencies in section 2 of the FWCA.
 - 2) Communication should occur between the Services before and during project execution and in the development of fiscal agreements. The Services must each identify points of contact for one another and for the Federal action agencies. The Services must ensure sufficient coordination and collaboration among the Services and with the Federal action agency to ensure efforts are coordinated and not duplicative.
 - 3) The Services will establish appropriate meeting schedules between counterpart offices, generally at the field office level. In establishing meeting schedules, the Services will consider accommodating the following minimum opportunities for long-range planning and project coordination:
 - a. When information on project budgets becomes available, through legislation or release of a President's budget for a Federal action agency.
 - b. When appropriations bills are signed.
 - c. As project studies are initiated by Federal action agencies. Under the U.S. Army Corps of Engineers' (Corps) SMART Planning process, the Services will need to prioritize early and programmatic engagement with the Corps prior to this point.
 - d. Annually, to provide updates on project-specific work and to coordinate on upcoming actions.
- C. Coordinate with one another and with the Federal action agency regarding specific projects that involve shared FWCA authority.
 - 1) The Services must develop and apply procedures that clarify how they will work together and with the Federal action agency under their equal FWCA authority. These procedures shall be developed by the appropriate USFWS Regional Office and NMFS Regional Office. The procedures should:
 - a. Define how project responsibilities will be determined for both Services.
 - b. Describe management of funding requests and budget establishment for FWCA processes (e.g., circumstances when joint or independent arrangements are appropriate, desired procedure when Services are

- funded separately vs. funding that passes through one Service to the other, other considerations)
- c. Define how the lead agency will be determined for FWCA processes, including investigations, report writing, and authorship. Circumstances to consider may include when one Service has previous history of engagement on a particular project.
- 2) Determine the collaboration approach. In determining how the Services will collaborate, the regional offices will choose a collaboration scenario such as one of the following that may or may not be delineated by freshwater, marine, or estuarine resources:
 - a. One agency will solely handle all FWCA investigations and reporting;
 - b. One agency will be the lead for FWCA investigations and reporting, with the other agency participating as a commenting agency;
 - c. Both agencies will participate as co-leads for FWCA investigations and reporting, or
 - d. A combination of scenarios.
 - 3) In engaging Federal action agencies, the Services will apply procedures developed at the regional level that fit into the above collaboration scenarios.
 - 4) Provide opportunities for scoping, review, and comment on reports. Staff who are designated leads for report writing will ensure that when overlapping resource concerns are involved, both Services can participate in the scoping and review of reports generated by the lead agency. The commenting agency will have opportunity to review and comment on any draft reports that are developed. Input from the commenting agency will be appropriately reflected in the report.
 - 5) Coordinate development of FWCA reports with appropriate State, Territorial and Tribal agencies.
- D. The Services may develop financial agreements with Federal action agencies to seek and apply transfer funds under section 2(e) of the FWCA or 1(3) as appropriate
- 1) The Services will honor all pre-existing transfer agreements made under the FWCA at all organizational levels. This document does not supersede or modify any agreement, scope-of-work, or other working arrangement made between one of the Services and a Federal action agency prior to the signature date of this document.
 - 2) Unless revised, the following national agreements remain the current guidance for transfer of funds between the USFWS and specific Federal action agencies: 2003 Transfer Funding Agreement between the USFWS and the U.S. Army Corps of Engineers; 1981 Transfer Funding Agreement between the USFWS and the Bureau of Reclamation.
 - 3) NOAA Fisheries may develop guidance for the transfer of funds between NOAA Fisheries and relevant Federal action agencies.
 - 4) Prior to entering into financial agreements, the Services will ensure they have discussed each agency's needs and responsibilities and agree how to proceed.
 - 5) Agreements are agency-owned actions with the respective Federal action agency. The Services agree that each Service can seek such agreements independently.
 - 6) In locations and circumstances where shared FWCA authority and overlapping resource concerns are relevant, the Services will refrain from developing

unilateral transfer agreements with action agencies without prior coordination between the Services and opportunity to comment.

- 7) Development of financial agreements include consideration for State, Territorial and tribal resources.
- E. If a disagreement between the Services arises, dispute resolution will be handled by the Services as follows:
- 1) Best efforts shall be made to resolve disputes in an informal manner at the field level.
 - 2) If necessary, disputes will be elevated to the regional level for resolution in a timely manner. Representatives from the Services should jointly compile a single summary that is two pages or less and contains the following sections:
 - a. statement of problem;
 - b. position statement from each Service;
 - c. supporting rationale and documentation for consideration; and
 - d. chronology of key actions taken to resolve the dispute.
 - 3) Within 30 days of receipt of the summary, the USFWS Regional Director, the NOAA Fisheries Regional Administrator or their designees will strive to complete their review of materials and, in coordination between the Services, provide their decision resolving the dispute, or their position detailing why it remains unresolved.
 - 4) Should regions fail to resolve a dispute, they will refer it to respective and appropriate HQ offices. USFWS Regions will refer the issue to the Assistant Director for Ecological Services. NOAA Fisheries will refer the issue to the Deputy Assistant Administrator for Regulatory Programs through the Director of the Office of Habitat Conservation.

3. Review

All regional coordination process documents shall be consistent with the principles in this Agreement and will be shared with the appropriate headquarters offices. Headquarters approval of regional documents and agreements between the Services at the regional level is not required.

4. Definitions

Definitions in this section apply to the implementation of this document and do not substitute for statutory or regulatory definitions that may define some of the terms in this section differently or more specifically.

Co-lead. Either of the two Services, when mutually agreed that they will equally share responsibility for FWCA functions.

Commenting Agency. One of the two Services, designated by mutual agreement as the agency with non-lead, or supporting responsibilities for FWCA functions, including review and comment on written products. Commenting agency status does not modify underlying statutory authority.

Federal Action Agency. Any department or agency of the United States proposing to authorize, fund, or carry out an action triggering the provisions of the FWCA, including consultation required by section 2(a).

FWCA consultation. Section 2(a) of the FWCA requires a Federal Action Agency that proposes to modify or authorize the modification of a water body to consult with the Services and relevant state agencies for purposes of preventing loss and damage to wildlife resources as well as providing for their improvement in connection with the water resource development activity. It encompasses the ideas of open communication among planning team members and early participation in the planning process and can vary depending on the Services' need for involvement and other factors.

FWCA investigation. At their discretion the Services will use field surveys, studies, monitoring, literature searches or other methods to gather information regarding actions covered by the FWCA and wildlife affected by those actions. The Services use information gathered through investigations to develop recommendations to prevent loss and damage to wildlife resources and to provide for their improvement in connection with the water resource development activity.

Lead Agency. One of the two Services, designated by mutual agreement as the agency with primary responsibility for conducting investigation and reporting functions under the FWCA.

The Services: United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS).

Transfer Agreement. A formal arrangement between one or both of the Services and a Federal Action Agency to receive funds from the latter for the conduct of FWCA activities, as provided for in section 2(e) or 1(3) of the FWCA. Agreements vary in geographic and programmatic scope from regional or national agreements covering multiple projects to field level agreements covering single projects.

Trust Resources: Biological, physical, or ecosystem attributes for which the Services are entrusted to manage, protect, conserve, recover, or restore on behalf of the public. Resources may include, but are not limited to, delineated geographic areas, individual species, species complexes, and specific habitats or ecosystems.

Wildlife: This document applies the definition in section 8 of the FWCA: "The terms "wildlife" and "wildlife resources" as used herein include birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent."

5. References

The following letter of October 26, 2016 from NOAA's General Counsel to the Army Corps of Engineers documents NOAA's analysis, with the Department of Interior's concurrence, of the current status and history of shared FWCA authority:



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

OCT 27 2016

David R. Cooper
Chief Counsel
Office of the Chief Counsel
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314-1000

Dear Mr. Cooper,

This responds to a request from your office that the National Oceanic and Atmospheric Administration Office of the General Counsel address certain issues that concern NOAA Fisheries' authority to apply and perform the functions of the Fish and Wildlife Coordination Act (FWCA), specifically under sections 1 and 2 of the Act. As explained below, NOAA Fisheries has full authority to carry out FWCA functions when applied to NOAA trust resources because these functions were transferred to the Secretary of Commerce (Secretary) under Reorganization Plan Number Four of 1970 (Reorganization Plan).¹

NOAA General Counsel provides this response to advance NOAA Fisheries' interest in entering into framework agreements with the U.S. Army Corps of Engineers and other agencies that frequently undertake projects requiring consultation under section 2 of the FWCA. Such agreements would ensure that NOAA Fisheries can participate fully in FWCA consultations for projects that concern NOAA's trust resources and clarify that the Corps of Engineers may transfer funds under the FWCA directly to NOAA Fisheries in furtherance of those consultations. Additionally, this response should facilitate NOAA Fisheries' participation in The Corps of Engineers SMART Planning process, which provides a coordinated framework for completion of environmental studies required under the FWCA for Corps-authorized water resource development projects. Finally, NOAA Fisheries is authorized to apply FWCA functions to resources that became the responsibility of NOAA after The Reorganization Plan became effective.

Background

The FWCA provides comprehensive authority to conserve, protect, and enhance all species of wildlife and their habitat. In section 1, Congress declared that the FWCA has two distinct purposes: 1) to recognize the vital contribution, and increasing importance, of wildlife resources to the Nation due to economic and other factors; and, 2) to ensure that such resources receive equal consideration and be coordinated with other features of water-resources development programs. To advance these purposes, section 1 authorizes the Secretary of the Interior to: 1) provide assistance to and cooperate with Federal, State, and public or private agencies on

¹ 35 Fed. Reg. 15627-30 (1970), reprinted in 84 Stat. 2090-93 (1970), and reprinted with amendments in notes to 5 U.S.C. § 903 (2012).



actions to conserve, protect, and enhance wildlife resources and habitat thereof; 2) conduct surveys and investigations of the wildlife of the public domain; and 3) accept donations of land and contributions of funds.

In section 2 of the FWCA, Congress established a specific procedure that requires consultation with the U.S. Fish and Wildlife Service (USFWS) on any proposed water-development project that is undertaken or authorized by a federal agency. The purpose of this consultation procedure is to promote conservation, protection, and enhancement of wildlife resources in connection with water-resource development. To this end, section 2 also authorizes the USFWS to conduct surveys and investigations on the wildlife aspects of such water-development projects. Based on USFWS' investigations and surveys, the Secretary of the Interior is to prepare reports that include recommendations for actions that should be adopted to prevent loss and damage to wildlife resources and also that provide concurrently for the development and improvement of such resources. Congress has not amended the FWCA since it was enacted in 1958, and, therefore, the Act does not refer to NOAA or NOAA Fisheries or expressly incorporate the transfer of functions effectuated through the Reorganization Plan. Moreover, FWCA sections 1 and 2 do not include an editor's note to indicate that the Reorganization Plan transferred functions to the Secretary of Commerce; nor is there any guidance from the Office of Management and Budget that clarifies the scope of functions transferred through the Reorganization Plan. The Reorganization Plan does indeed confer this authority on NOAA Fisheries.

Analysis

Section 1 of the Reorganization Plan provides for the following transfer of functions:

- (a) All functions vested by law in the Bureau of Commercial Fisheries of the Department of the Interior or in its head, together with all functions vested by law in the Secretary of the Interior or the Department of the Interior which are *administered through* that Bureau or are *primarily related to* the Bureau . . . (emphasis added)

Congress vested FWCA section 1 functions in the Secretary of the Interior and functions under section 2 in the Department of the Interior, USFWS or the Secretary of the Interior. The Bureau of Commercial Fisheries "administered" a portion of these functions in concert with the Bureau of Sport Fisheries and Wildlife, and a portion of these functions were also "primarily related" to the Bureau of Commercial Fisheries. Therefore, these functions are within the scope of the functions transferred under the Reorganization Plan.

The Bureau's administration of FWCA functions is demonstrated through annual reports issued by the Bureau for calendar years 1959 to 1969. These reports show extensive performance of these functions including cooperation and coordination with federal and state agencies and international organizations on conservation and protection of marine resources, completion of environmental impact studies and investigations in relation to water-resources development projects, and by making conservation recommendations for such projects.

Among other things, the Bureau compiled landings information for significant commercial stocks, promulgated conservation and management regulations, conducted scientific research on

all aspects of fisheries and marine habitat and practices of the commercial fishing industry, and performed studies and investigations and made recommendations concerning the effects of a range of projects that impact the aquatic environment. In conducting this work, the Bureau employed studies and investigations of the affected environment and made conservation recommendations. For the same reasons, these FWCA functions are also “primarily related to” the Bureau. The Bureau undertook these actions to conserve, protect, and enhance wildlife resources and their habitat using the same means and methods as authorized under the FWCA.

Corps staff has questioned whether NOAA Fisheries’ authority under the FWCA extends to resources that became NOAA’s responsibility after the date of the Reorganization Plan. It does. Nothing in the Reorganization Plan suggests that FWCA authority that transferred to the Secretary of Commerce applies only to resources that were the responsibility of the former Bureau of Commercial Fisheries. To the contrary, the purpose of the Reorganization Plan was to apply a unified approach to understanding and utilizing the resources of the sea and to consolidate certain authorities and functions in NOAA.² Application of the functions and authorities transferred under the Reorganization Plan to specific species and resources for which NOAA later assumes management responsibility furthers these broad purposes. The narrow approach Corps staff suggest would undermine these purposes by rendering the FWCA being inapplicable to resources that became NOAA’s responsibility subsequent to the effective date of the Reorganization Plan. To avoid this illogical outcome, NOAA interprets the Reorganization Plan to assign all FWCA functions to all of NOAA’s trust resources regardless of when they became the agency’s responsibility.

We have consulted with the Department of the Interior Office of the Solicitor. The Deputy Solicitor for Parks and Wildlife concurs in our assessment that NOAA’s authority under the FWCA is coextensive with and complementary to the Fish and Wildlife Service’s authority as to resources under that agency’s authority. The National Marine Fisheries Service and the Fish and Wildlife Service will be working together to assure smooth implementation, to capitalize on areas of expertise and capacity, and to avoid duplication of efforts.

I trust that this letter is sufficient to resolve concerns that the Corps has expressed about the scope of NOAA’s authority under the FWCA, and request written Corps concurrence.

Regards,



Lois J. Schiffer

cc: Eileen Sobeck, Assistant Administrator, NMFS
Pat Montanio, Director of NMFS Office of Habitat Conservation
Ann Navaro, Deputy Solicitor, DOI
Jo-Ellen Darcy, Army Corps of Engineers

² See *Message of the President*, July 9, 1970 (addressing Reorganization Plans 3 and 4), reprinted in notes following Reorganization Plan No. 3 of 1970, 5 U.S.C. App. (2012).

TEMPLATE

**Fish and Wildlife Coordination Act - Regional Coordination Process
National Oceanic and Atmospheric Administration, Fisheries (NOAA Fisheries) and U.S. Fish and Wildlife Service
(USFWS)**

Date Modified

1) Coverage:

This document provides additional detail for joint implementation of the Fish and Wildlife Coordination Act in the *(brief title/description of the geographic/administrative region covered. If desired, include listing of specific NOAA Fisheries and USFWS offices covered and specific projects.)* The information below guides local application of the Agreement entitled "Shared authority under the Fish and Wildlife Coordination Act between the U.S. Fish and Wildlife Service and the National Marine Fisheries Service" (August 9, 2018).

2) Regional Points of Contact:

- NOAA Fisheries principal *(Name, position, phone, email)*
- USFWS principal *(Name, position, phone, email)*

(Address provisions of section 2(B)(2) of the Agreement here. If tiered listing of contacts is desired, list relevant points of contact within specific NOAA Fisheries and USFWS offices)

3) Meeting Schedules:

(Address provisions of section 2(B)(3) of the Agreement here. List/describe when and which staff will meet to discuss long range planning and project coordination between the Services.)

4) Coordination

(Address provisions of section 2(C)(1) of the Agreement here. Briefly describe how the agencies will define project responsibilities, the management of funding requests, and how a lead agency will be determined.)

- a) *Project responsibilities -*
- b) *Management of funding requests -*
- c) *Lead agency -*

5) Collaboration Approach

(Address provisions of section 2(C)(2- 4) of the Agreement here. Discuss desired approach to collaboration within the region as it relates to investigation and report writing. If a combination of scenarios, highlight how that will be determined within the region. In addition, highlight when and how the Services will engage Federal action agencies, and note how the Services will collaborate on providing opportunities for scoping, review, and comments on reports.)

6) Development of Financial Agreements

(If desired, highlight key points here related to transfer agreements with action agencies in the region that may involve both USFWS and NOAA Fisheries.)

7) Dispute Resolution

(Add language here that recognizes the dispute resolution process in Section 2(E) of the Agreement)

NOAA Fisheries: *(Name of Appropriate Regional Manager / Date)* _____

USFWS: *(Name of Appropriate Regional Manager /Date)* _____