APPENDIX III

H.R.

IN THE HOUSE OF REPRESENTATIVES

A BILL

To amend the Fish and Wildlife Coordination Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled, That this Act may be
cited as the "Fish and Wildlife Coordination Act Amendments of 1975."

Sec. 2. Section 1 of the Fish and Wildlife Coordination Act
(16 U.S.C. 661) is amended to add the following:

"It is the policy of Congress that all lands, waters, and interests
therein to be acquired for the installation of Federal water projects,
including those required for fish and wildlife purposes, shall be
acquired pursuant to legislative declarations of taking to be set out
in the legislation initially authorizing such projects."

SEC. 3. Section 2(a) of the Fish and Wildlife Coordination Act
(16 U.S.C. 662(a)) is amended to read as follows:

"(a) Whenever the waters of any stream or other body of water,
including those of the Continental Shelf, are proposed or authorized
to be impounded, diverted, widened, the channel deepened, or other-
wise controlled or modified for any purpose whatever, including, but
not limited to, navigation, drainage, and offshore mineral develop-
ment, by any Federal department or agency (including wholly owned Government
corporations) either directly or by extending Federal technical or
financial assistance by way of grant, loan, or contract, or by issuing
to any public or private person a permit, license, contract, or lease,
such department or agency shall first ascertain the probable effect of
the project on fish and wildlife by (1) consulting with the United
States Fish and Wildlife Service, the National Marine Fisheries Service
in the National Oceanic and Atmospheric Administration, and the State
fish and wildlife agency or agencies having the immediate and direct
administrative authority within that State concerning the affected
fish and wildlife resources, and (2) requesting a written report
setting forth the views, comments, objections, and recommendations,
"if any, of the Secretary of the Interior, the Secretary of Commerce,
and the State agency on such project, with a view to the conserva-
tion of fish and wildlife resources by preventing loss of, and damage to,
such resources as well as providing for the development and improvement
thereof in connection with such projects. Such department or agency
shall promptly inform the public when it initiates consideration of
any project subject to this subsection and shall encourage public
participation in planning."

SEC. 4. Section 2(b) of the Fish and Wildlife Coordination Act
(16 U.S.C. 662(b)) is amended to read as follows:
"(b)(1) Any written report which the Secretary of the Interior, the Secretary of Commerce, and the State agency or agencies, make pursuant to subsection (a) of this section shall be based on written findings of the United States Fish and Wildlife Service, the National Marine Fisheries Service in the National Oceanic and Atmospheric Administration, and the State fish and wildlife agency concerning (1) the direct and indirect effects attributable to the project on fish and wildlife resources, and (2) the means and measures that should be adopted, including, but not limited to, project alternatives and modifications or abandonment, to prevent or minimize loss of, or damage to, fish and wildlife resources and provide for mitigation, full compensation for unavoidable losses, and where possible, enhancement of such resources. Such written reports shall be based on studies, surveys, or investigations conducted, respectively, by the United States Fish and Wildlife Service, the National Marine Fisheries Service in the National Oceanic and Atmospheric Administration, and the State fish and wildlife agency or agencies having immediate and direct administrative authority concerning the affected fish and wildlife resources. Such written report shall, to the maximum extent practicable, specify the measures and features recommended for fish and wildlife conservation and development, the lands to be utilized or acquired for such purposes, the results expected, the damage to fish and wildlife attributable to the project, and the measures proposed for preventing, mitigating, or compensating for such damages. No Federal agency or department shall use estimates of wildlife losses in monetary terms as justification for
adopting or rejecting any recommendation in such report.

"(2) The appropriate Federal department or agency shall give full consideration to any written report of the Secretary of the Interior, the Secretary of Commerce, and the State agencies made pursuant to subsection (a) of this section on the fish and wildlife aspects of any project and shall not carry out, finance, authorize or seek authorization of any project unless and until such Department or agency shall have (1) advised the Secretary of the Interior, the Secretary of Commerce, and the concerned agencies of the appropriate state of the proposed disposition of each recommendation on means and measures to prevent, mitigate, or compensate fish and wildlife losses or damages resulting from the project, including the approximate schedule for installation of each measure in relation to the installation of other project features, and (2) secured their concurrence.

Provided, That should the two Secretaries and the State not respond within a period of 90 days from receipt of notification of the proposed disposition it will be deemed to signify concurrence for purposes of this subsection, and Provided further, That notwithstanding the receipt of a negative report from either Secretary or the State, the affected Department or agency, after publishing its determination that acceptance of specific recommendations is not in the public interest and detailing the reasons therefor, may proceed.

"(3) The Secretary of the Interior and the Secretary of Commerce, as appropriate, and such Federal department or agency shall jointly establish and publish procedures for insuring timely reporting on
proposed projects. Such procedures shall include a time certain
in which the written reports on a project by the Secretary of the
Interior, the Secretary of Commerce, and the State agency must be
submitted to such Federal department or agency. Failure to submit
such a report within the agreed upon time shall be deemed a waiver of
the requirements to obtain such report.

"(4) In the case of any project which is constructed or assisted
by a Federal department or agency, such department or agency shall
fund as a nonreimbursable cost the costs of providing, operating, and
maintaining means and measures, including land acquisition costs, to
prevent, mitigate, and compensate fish and wildlife losses and damages,
and shall fund as a nonreimbursable cost any such costs as may be
required for acquisition of land and all costs, including those of
operation and maintenance, as may be found justifiable for the enhance-
ment of fish and wildlife resources, notwithstanding other provisions
of law.

"(5) In evaluating proposed major projects, the United States
Fish and Wildlife Service, the National Marine Fisheries Service and
the State fish and wildlife agency or agencies having the immediate and
direct administrative authority within the State concerning the affected
resources shall consider the need for post-project evaluation and modif-
ication to prevent or minimize loss of, or damage to, fish and wildlife
resources and provide for full compensation for unavoidable losses, and,
where possible, enhancement of such resources. If in their opinion
such post-project evaluation is necessary, they may propose and justify
in writing a plan for post-project evaluation and project modification. The costs of post-project evaluations shall be non-reimbursable.

"(6) All written reports, findings, and determinations prepared under this Act shall be promptly made available to the public and shall accompany and be made an integral part of any report required to be submitted to Congress or to another authorizing agent."

SEC. 5. Section 2(e) of the Fish and Wildlife Coordination Act (16 U.S.C. 662(e)) is amended to read as follows:

"(e) (A) In the case of any project to which this Act applies, the Federal department or agency concerned shall transfer to the United States Fish and Wildlife Service and the National Marine Fisheries Service, out of appropriations or other funds made available for investigations, engineering, construction, or other project functions, such funds as may be necessary to complete the studies, investigations, and reports required to carry out the purposes of this section. Any part of such funds so transferred may be made available by the United States Fish and Wildlife Service and the National Marine Fisheries Service to any State agency to enable such agency to carry out all or part of any such studies, surveys, and investigations.

"(B) In preparing project budgetary requests for each fiscal year, the Federal department or agency shall include requests for such estimated funds as will be necessary to complete all studies.
investigations, and reports, including any post-project evaluations, required during such fiscal year to carry out the purposes of this section."

SEC. 6. Section 2(h) of the Fish and Wildlife Coordination Act (16 U.S.C. 662 (h)) is repealed.

SEC. 7. Section 2 of the Fish and Wildlife Coordination Act (16 U.S.C. 662) is amended by inserting at the end thereof the following new subsection (h):

"(h) Federal agencies authorized to assist, plan, or construct water projects shall provide to the Secretary of the Interior, the Secretary of Commerce, and the State agency, not later than 90 days following the end of each fiscal year a report which shall:

"(1) summarize for each project under construction during the preceding fiscal year, all means and measures (including land acquisition) implemented with respect to that project (A) to prevent, mitigate, or compensate for loss or damage to fish and wildlife resources, and (B) to enhance the fish and wildlife habitat or human use of such resources; and

"(2) compare in quantitative and qualitative terms the progress made during the fiscal year with respect to the fish and wildlife features of the project with the progress made on all other authorized features of the project.

The Secretary of the Interior shall within thirty days transmit the report made pursuant to this subsection to the Congress together with his views, and those of the Secretary of Commerce, as to the timely
installation of fish and wildlife features as compared to other aspects of project construction.

"(1) Upon completion of any post-project evaluation the United States Fish and Wildlife Service, the National Marine Fisheries Service or the state fish and wildlife agency, whichever is conducting the evaluation, should forward to the appropriate Federal department or agency a report describing results of the evaluation and making and justifying such recommendations for modifying the project as they deem appropriate to provide mitigation, full compensation, or both, for project effects on fish and wildlife resources and, where possible, enhancement of such resources.

"(2) The appropriate Federal department or agency shall give full consideration to such recommendations for modifying the project and is hereby authorized to implement those which are found justified and within its authority. For any recommendation not implemented the affected department or agency shall publish its determination not to implement the recommendation, detailing its reasons therefore; and outlining all measures which would be necessary to implement the recommendations. The department or agency shall forward said report to Congress. Said department or agency shall respond to all recommendations in the manner described above within six (6) months of receiving the post-project evaluation report".

SEC. 8. Section 3(b) of the Fish and Wildlife Coordination Act (16 U.S.C. 663(b)) is amended by adding the following sentence at the end thereof: "Any revenue obtained from the use and operation of such
waters, lands, or interests shall be available to such State agency or,
as appropriate, to the Secretary of the Interior as refuge receipts,
but not supplant, any funds required to be provided from
project funds to such agency or the Secretary for the management of
fish and wildlife as mitigation or compensation of project effects, or to
supplement funds available to such agency or the Secretary for the en-
hancement of fish and wildlife production and utilization: Provided,
That such use and operation shall be consistent with the purposes of
this Act."

SEC. 9. The proviso in section 3(c) of the Fish and Wildlife Coordina-
tion Act (16 U.S.C. 663(c)) is amended to read as follows: "Provided,
That the probable amount of lands or interests therein to be acquired
and the estimated cost thereof, together with other pertinent data,
shall be set forth in any report submitted to Congress concerning author-
ization of such project, or, in the case of any project previously
authorized, be reported to Congress before any sums are made available
for such acquisition."

SEC. 10. Section 8 of the Fish and Wildlife Coordination Act
(16 U.S.C. 666(b)) is amended to read as follows:

"SEC. 8. As used in this Act -
"(1) The terms 'wildlife' and 'wildlife resources' as used herein
include birds, fishes, mammals, and all other taxa of wild animals and
all types of aquatic and land vegetation upon which wildlife is dependent.
"(2) The term 'consult' means to seek advice, to advise, to partici-
pate actively in the planning and formulation of Federal and federal:
licensed and assisted projects and alternatives, to evaluate proposed
and completed projects and predict their impacts on fish and wildlife,
and to present recommendations in the interest of conservation of these
resources.

SEC. 11. Section 9 of the Fish and Wildlife Coordination Act
(16 U.S.C. 666c) is amended to read as follows:

"SEC. 9. (a) Any citizen may commence a civil action on his own
behalf —

"(1) against any person, including the United States and any
other governmental instrumentality or agency (to the extent permitted
by the eleventh amendment to the Constitution), who is alleged to be
in violation of any provision of this Act, or any regulation, order,
or permit issued pursuant to the authority provided in this Act, or

"(2) against any Federal department or agency where there is
alleged a failure by such department or agency to perform any act or —
uty under this Act which is not discretionary with such department
or agency.

The district courts shall have jurisdiction, without regard to the amount
in controversy or the citizenship of the parties, to enforce such pro-
vision, requirement, or condition or to order such department or agency
to perform such act or duty, as the case may be.

"(b) No action may be commenced —

"(1) Under subsection (a)(1) of this section prior to sixty
days after the plaintiff has given notice of the alleged violation
(l) to the appropriate Secretary or Secretaries, (li) to the
in which the alleged violation occurs, and (iii) to any
alleged violator of the Act, regulation, order or permit.

'(2) Under subsection (a)(2) of this section prior to
sixty days after the plaintiff has given notice of the alleged
violation to the head of the department or agency which is
alleged to be in violation of the Act, regulation, order or
permit.

Notice under this subsection shall be given in such manner as the appro-
priate Secretary shall prescribe by regulation.

'(c) The court, in issuing any final order in any action brought
pursuant to this section, may award costs of litigation, including
reasonable attorney and expert witness fees, to any party other than a
Federal department or agency, whenever the court determines such award
is appropriate.

'(d) Nothing in this section shall restrict any right which any
person (or class of persons) may have under any statute or common law to
seek enforcement of any such provision, requirement, or condition, or
any other relief.'

is hereby repealed.