

, 1975

APPENDIX III

H.R.

IN THE HOUSE OF REPRESENTATIVES

A BILL

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

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

4 Sec. 2. Section 1 of the Fish and Wildlife Coordination Act
5 (16 U.S.C. 661) is amended to add the following:

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

11 SEC. 3. Section 2(a) of the Fish and Wildlife Coordination Act
12 (16 U.S.C. 662(a)) is amended to read as follows:

13 "(a) Whenever the waters of any stream or other body of water,
14 including those of the Continental Shelf, are proposed or authorized

1 to be impounded, diverted, widened, the channel deepened, or other-
2 wise controlled or modified for any purpose whatever, including, but
3 not limited to, navigation, drainage, and offshore mineral development,
4 by any Federal department or agency (including wholly owned Government
5 corporations) either directly or by extending Federal technical or
6 financial assistance by way of grant, loan, or contract, or by issuing
7 to any public or private person a permit, license, contract, or lease,
8 such department or agency shall first ascertain the probable effect of
9 the project on fish and wildlife by (1) consulting with the United
10 States Fish and Wildlife Service, the National Marine Fisheries Service
11 in the National Oceanic and Atmospheric Administration, and the State
12 fish and wildlife agency or agencies having the immediate and direct
13 administrative authority within that State concerning the affected
14 fish and wildlife resources, and (2) requesting a written report
15 setting forth the views, comments, objections, and recommendations,
16 if any, of the Secretary of the Interior, the Secretary of Commerce,
17 and the State agency on such project; with a view to the conservation
18 of fish and wildlife resources by preventing loss of, and damage to,
19 such resources as well as providing for the development and improvement
20 thereof in connection with such projects. Such department or agency
21 shall promptly inform the public when it initiates consideration of
22 any project subject to this subsection and shall encourage public
23 participation in planning."

24 SEC. 4. Section 2(b) of the Fish and Wildlife Coordination Act
25 (16 U.S.C. 662(b)) is amended to read as follows:

1 "(b) (1) Any written report which the Secretary of the Interior,
2 the Secretary of Commerce, and the State agency or agencies, make
3 pursuant to subsection (a) of this section shall be based on written
4 findings of the United States Fish and Wildlife Service, the National
5 Marine Fisheries Service in the National Oceanic and Atmospheric
6 Administration, and the State fish and wildlife agency concerning
7 (1) the direct and indirect effects attributable to the project on
8 fish and wildlife resources, and (2) the means and measures that should
9 be adopted, including, but not limited to, project alternatives and
10 modifications or abandonment, to prevent or minimize loss of, or damage
11 to, fish and wildlife resources and provide for mitigation, full com-
12 ensation for unavoidable losses, and where possible, enhancement of
13 such resources. Such written reports shall be based on studies, surveys,
14 or investigations conducted, respectively, by the United States Fish and
15 Wildlife Service, the National Marine Fisheries Service in the National
16 Oceanic and Atmospheric Administration, and the State fish and wildlife
17 agency or agencies having immediate and direct administrative authority
18 concerning the affected fish and wildlife resources. Such written
19 report shall, to the maximum extent practicable, specify the measures
20 and features recommended for fish and wildlife conservation and develop-
21 ment, the lands to be utilized or acquired for such purposes, the
22 results expected, the damage to fish and wildlife attributable to the
23 project, and the measures proposed for preventing, mitigating, or
24 compensating for such damages. No Federal agency or department shall
25 use estimates of wildlife losses in monetary terms as justification for

1 adopting or rejecting any recommendation in such report.

2 "(2) The appropriate Federal department or agency shall give
3 full consideration to any written report of the Secretary of the
4 Interior, the Secretary of Commerce, and the State agencies made
5 pursuant to subsection (a) of this section on the fish and wildlife
6 aspects of any project and shall not carry out, finance, authorize
7 or seek authorization of any project unless and until such Department
8 or agency shall have (1) advised the Secretary of the Interior, the
9 Secretary of Commerce, and the concerned agencies of the appropriate
10 state of the proposed disposition of each recommendation on means and
11 measures to prevent, mitigate, or compensate fish and wildlife losses
12 or damages resulting from the project, including the approximate
13 schedule for installation of each measure in relation to the installa-
14 tion of other project features, and (2) secured their concurrence.
15 Provided, That should the two Secretaries and the State not respond
16 within a period of 90 days from receipt of notification of the pro-
17 posed disposition it will be deemed to signify concurrence for purposes
18 of this subsection, and Provided further, That notwithstanding the
19 receipt of a negative report from either Secretary or the State, the
20 affected Department or agency, after publishing its determination that
21 acceptance of specific recommendations is not in the public interest
22 and detailing the reasons therefor, may proceed.

23 "(3) The Secretary of the Interior and the Secretary of Commerce,
24 as appropriate, and such Federal department or agency shall jointly
25 establish and publish procedures for insuring timely reporting of

1 proposed projects. Such procedures shall include a time certain
2 in which the written reports on a project by the Secretary of the
3 Interior, the Secretary of Commerce, and the State agency must be
4 submitted to such Federal department or agency. Failure to submit
5 such a report within the agreed upon time shall be deemed a waiver of
6 the requirements to obtain such report.

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

17 "(5) In evaluating proposed major projects, the United States
18 Fish and Wildlife Service, the National Marine Fisheries Service and
19 the State fish and wildlife agency or agencies having the immediate and
20 direct administrative authority within the State concerning the affected
21 resources shall consider the need for post-project evaluation and modif-
22 ication to prevent or minimize loss of, or damage to, fish and wildlife
23 resources and provide for full compensation for unavoidable losses, and,
24 where possible, enhancement of such resources. If in their opinion
25 such post-project evaluation is necessary, they may propose and justify

1 in writing a plan for post-project evaluation and project modifi-
2 cation. The costs of post-project evaluations shall be non-
3 reimbursable.

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

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

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

23 "(B) In preparing project budgetary requests for each fiscal
24 year, the Federal department or agency shall include requests for
25 such estimated funds as will be necessary to complete all studies

1 investigations, and reports, including any post-project evaluations,
2 required during such fiscal year to carry out the purposes of this
3 section."

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

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

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

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

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

23 The Secretary of the Interior shall within thirty days transmit the
24 report made pursuant to this subsection to the Congress together with
25 his views, and those of the Secretary of Commerce, as to the timely

1 installation of fish and wildlife features as compared to other
2 aspects of project construction.

3 "(1)(1) Upon completion of any post-project evaluation the
4 United States Fish and Wildlife Service, the National Marine
5 Fisheries Service or the state fish and wildlife agency, whichever
6 is conducting the evaluation, should forward to the appropriate
7 Federal department or agency a report describing results of the eval-
8 uation and making and justifying such recommendations for modifying
9 the project as they deem appropriate to provide mitigation, full com-
10 ensation, or both, for project effects on fish and wildlife resources
11 and, where possible, enhancement of such resources.

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

23 SEC. 8. Section 3(b) of the Fish and Wildlife Coordination Act
24 (16 U.S.C. 663(b)) is amended by adding the following sentence at the
25 end thereof: "Any revenue obtained from the use and operation of such

1 waters, lands, or interests shall be available to such State agency or,
2 as appropriate, to the Secretary of the Interior as refuge receipts,
3 to supplement, but not supplant, any funds required to be provided from
4 project funds to such agency or the Secretary for the management of
5 fish and wildlife as mitigation or compensation of project effects, or to
6 supplement funds available to such agency or the Secretary for the en-
7 hancement of fish and wildlife production and utilization: Provided,
8 That such use and operation shall be consistent with the purposes of
9 this Act."

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

18 SEC. 10. Section 8 of the Fish and Wildlife Coordination Act
19 (16 U.S.C. 666(b)) is amended to read as follows:

20 "SEC. 8. As used in this Act -

21 "(1) The terms 'wildlife' and 'wildlife resources' as used herein
22 include birds, fishes, mammals, and all other taxa of wild animals and
23 all types of aquatic and land vegetation upon which wildlife is dependent.

24 "(2) The term 'consult' means to seek advice, to advise, to partici-
25 pate actively in the planning and formulation of Federal and Federal

1 licensed and assisted projects and alternatives, to evaluate proposed
 2 and completed projects and predict their impacts on fish and wildlife,
 3 and to present recommendations in the interest of conservation of these
 4 resources."

5 SEC. 11. Section 9 of the Fish and Wildlife Coordination Act
 6 (16 U.S.C. 666c) is amended to read as follows:

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

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

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

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

22 "(b) No action may be commenced -

23 "(1) Under subsection (a)(1) of this section prior to sixty
 24 days after the plaintiff has given notice of the alleged violation
(i) to the appropriate Secretary or Secretaries, (ii) to the

1 in which the alleged violation occurs, and (iii) to any
2 alleged violator of the Act, regulation, order or permit.

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

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

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

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

19 SEC. 12. Section 3 of the Act of August 12, 1958 (72 Stat. 563),
20 is hereby repealed.