



# **The Fish and Wildlife Coordination Act**

## **A Training Workshop for NOAA HCD**

**Prepared by Craig Johnson  
Systematic Ecology**

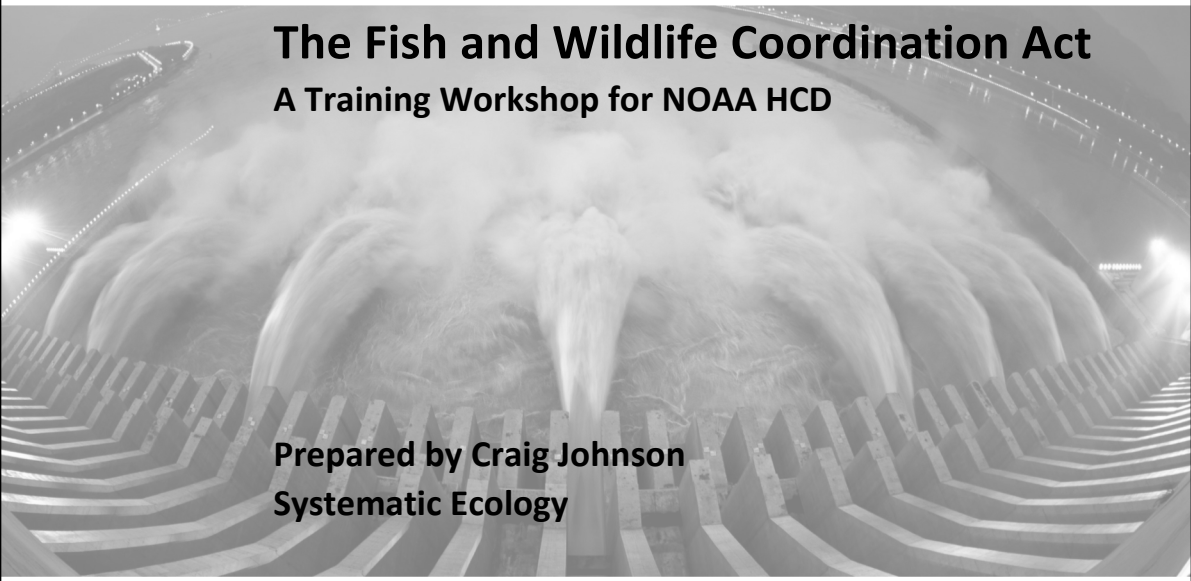
**For  
NOAA Fisheries  
Habitat Conservation Division**

**March 2020**

**SYSTEMATIC**ECOLOGY

## Workshop Agenda

- Welcome and Introductions
- The FWCA: An Introduction
- Water Resource Development
- NOAA Fisheries' Role in the Planning Process
- FWCA Reports
- FWCA and USACE Permitting
- Using the FWCA Effectively
- Course Close Out



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## **2 Agenda**

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### 3 Your Instructor: Craig Johnson

- **1978:** Hired by the USFWS to work on River Basin Studies (FWCA), 404 permitting, ESA consultations, and national wetlands inventory mapping in New York State
- **1982:** Hired by NMFS to work on 404 permitting, ESA consultations, and OCS leasing in AKR
- **1989:** Hired by the USFWS to work on FWCA, 404 permitting, ESA consultations, and wetland conservation in their Headquarters. National HEP coordinator
- **1991:** Chief, Endangered Species Division, USFWS Great Lakes Region
- **1993:** Special Assistant to Assistant Secretary of the Interior for Fish, Wildlife, and Parks, specializing in 404 permitting, FWCA, ESA, and MMPA compliance and policy development
- **1995:** Supervisor, USFWS' South Florida Ecosystem Office, primarily to support the USACE's Comprehensive Everglades Restoration Plan (FWCA & ESA)
- **1998:** National ESA Consultation Coordinator, NMFS Headquarters
- **2013:** Retired from NOAA
- **2013:** Regulatory Specialist, HDR, Inc. (NEPA, FWCA, ESA, MMPA, 404, OCSLA, etc.)
- **2014:** Formed Systematic Ecology. Numerous contracts involving NEPA, ESA, FWCA, MMPA, 404, and FERC compliance
- **2017:** Member, National Academy of Sciences Committee on Offshore Science and Assessment

### 4 A Sampling of Relevant Experience

Project (Prior to 2013)	The Project Required Expertise on...							
	FWCA	§404	ESA	NEPA	MMPA	EFH	OSCLA	FERC
Cattaraugus Creek (NY) Reconnaissance Report	•							
Fire Island Inlet to Montauk Pt. Beach Erosion Control Project (USACE Civil Works)	•							
Marcy-Utica-Deerfield Project (DOT-USACE, NY)	•	•	•	•				
Kuparuk Field Development Project (USACE; AKR)	•	•	•	•				
Endicott Development Project (USACE; AKR)	•	•	•	•				
Lisburne & Niakuk Development Projects (USACE; AKR)	•	•	•	•				
St. Matthew Island Development Project (USACE; AKR)	•	•	•	•	•			
Beaufort & Chukchi Sea Lease Sales (MMS; AKR)	•	•	•	•	•		•	
Central & South Florida Restudy (FL)	•	•	•	•				
Experimental Water Deliveries into Everglades NP (FL)	•	•	•	•				



## 5 A Sampling of Relevant Experience

Project Experience Since 2013	The Project Required Expertise on...							
	FWCA	§404	ESA	NEPA	MMPA	EFH	OSCLA	FERC
Leidy Southeast Expansion Project	•	•	•					•
Loup River Hydroelectric Project			•	•				•
New New York Bridge			•	•				
Virginia Southside Expansion Project	•	•	•	•				•
Ocean Wind Project			•	•			•	
Chesterfield Power Plant			•	•				
NOAA Coral Tool (PIR)	•	•	•	•	•	•		

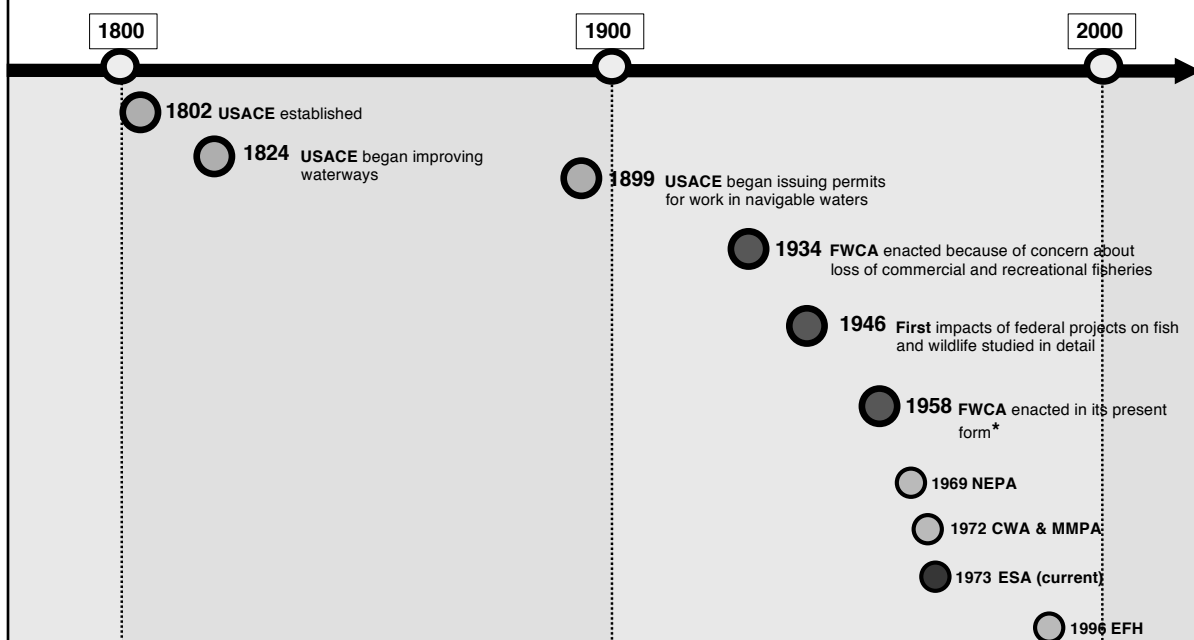
## Module 1. The Fish and Wildlife Coordination Act An Introduction

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## 7 In Module 1...

- We will cover
  - A Very Brief History
  - A Walk Through the FWCA's Provisions
  - Definition of Terms
  - Scope of FWCA Authority
  - FWCA Consultation
  - Agencies Involved
  - Relationships to Other Statutes

## 8 A Very (Very) Brief History



## 9 The Fish and Wildlife Coordination Act of 1958

16 U.S.C. 661 et seq.

- 661** Declaration of purpose, cooperation of agencies, surveys and investigations; donations
- 662** Impounding, diverting, or controlling of waters
  - a. Consultations between agencies
  - b. Reports and recommendations; consideration
  - c. Modification of projects; acquisition of lands
  - d. Project costs
  - e. Transfer of funds
  - f. Estimation of wildlife benefits or losses
  - g. Applicability to projects
  - h. Exempt projects and activities
- 663** Impoundment or diversion of waters
- 664** Administration; rules or regulations; availability of lands to State agencies
- 665** Investigations as to effect of sewage, industrial wastes; reports
- 665a** Maintenance of adequate water levels in upper Mississippi River
- 666** Authorization of appropriations
- 666a** Penalties
- 666b** Definitions
- 666c** Applicability to Tennessee Valley Authority

## 10 FWCA Mandate

Except as hereafter stated in Subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of 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 water-resource development.

Subsection 2(a)

## 11 FWCA: Mandate

- Whenever a federal agency:
  - proposes to impound, divert, channel deepen, or otherwise control or modify waters of any stream or other body of water, or
  - permit or license any public or private agency to undertake such actions
- That agency is required to:
  - consult with FWS, NMFS, and their state counterparts
  - provide FWS, NMFS, and their state counterparts with timely notice of an action
  - provide FWS, NMFS, and their state counterparts with an opportunity for continuous informal and formal involvement in all stages of planning for an action

## 12 The Purpose of FWCA Consultation

- The purpose of the consultation is to
  - prevent the loss of and damage to wildlife resources (662(a))
  - as well as provide for the development and improvement of those resources (662(a))
- The Senate Report on the 1958 amendments to the FWCA made it clear that water resource development projects should be designed to
  - develop and improve fish and wildlife resources, where feasible
  - prevent damages to them
- So FWCA consultations primarily focus on
  - impact/effects analyses
  - avoiding, minimizing, rectifying, reducing or eliminating impacts over time or compensating for residual impacts
  - enhancement

## 13 **FWCA: Wildlife Given Equal Consideration**

- The FWCA
  - Requires **wildlife conservation to receive equal consideration** and be coordinated with other water resource development programs (662(b))
  - Establishes **fish and wildlife conservation as a coequal purpose or objective of federally funded or permitted water resource development projects or proposals** (662(a)-(b)))

## 14 **The FWCA Definition of “Wildlife”**

- The FWCA only defines two words: "wildlife" and "wildlife resources"
- It defines these words to include:
  - birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent Section 666(b)

## 15 **Activities Covered by the FWCA**

- Construction and operation of dams, levees, and water diversion
- Construction and operation of navigation features
- Other actions dependent on or resulting in the diversion, control, or modification of a stream or other water body
- Discharges of pollutants
- The scope of activities include USACE permits issued pursuant to Section 404 (Clean Water Act) and Section 10 (Rivers & Harbors Act)

## 16 **Geographic Scope of the FWCA**

- The FWCA applies to
  - “any stream or other body of water” (with the exceptions noted in the next slide)
  - any water resources development program or project in the U.S., its territories, and possessions
- It follows the USACE’s regulatory jurisdiction over waters of the U.S., including wetlands and other deepwater habitats

## 17 **Activities Not Covered by the FWCA**

- Tennessee Valley Authority projects
- NRCS Small Watershed Program projects
- Federal impoundments that are less than 10 surface acres
- Activities for or in connection with programs primarily for land management and use that are carried out by federal agencies on lands under their jurisdiction
- Federal loan, grant, loan guarantees, and technical assistance that require a federal permit or license to modify water bodies

## 18 **FWCA Reporting Mandate**

In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which this Act applies.

**Subsection 2(b)**

## 19 FWCA Reporting Mandate

Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

Subsection 2(b)

## 20 FWCA: Reporting

- Section 2(b) of the FWCA requires
  - The reports and recommendations of the Secretary of the Interior and of its State counterpart to be made an integral part of any report an agency presents to Congress to
    - authorize the construction of water-resource projects
    - approve the modification or supplementation of previously-authorized projects
- The Secretary's reports should be based on surveys and investigations the Services conduct
- Those surveys are conducted for the purpose of determining possible damage and identifying measures to prevent those damages (and to develop and improve those resources)
- the Secretary's impact assessments ("damages to wildlife attributable to the project") and conservation and mitigation measures are required to be as specific as practicable (also see 16 U.S.C. 662(f))



## 21 **FWCA: Reporting**

- Section 2(b) of the FWCA **requires**
  - Reporting officers in project reports to **give full consideration to the report** and recommendations of the Secretary and those of their State counterpart
- To satisfy this requirement, it is not enough to attach FWCA Reports to agency planning documents
- The findings and recommendations presented in FWCA Reports must be integrated into agency reports, including reports to Congress that request project authorization

## 22 **FWCA: Transfer of Funds**

### **(e) TRANSFER OF FUNDS**

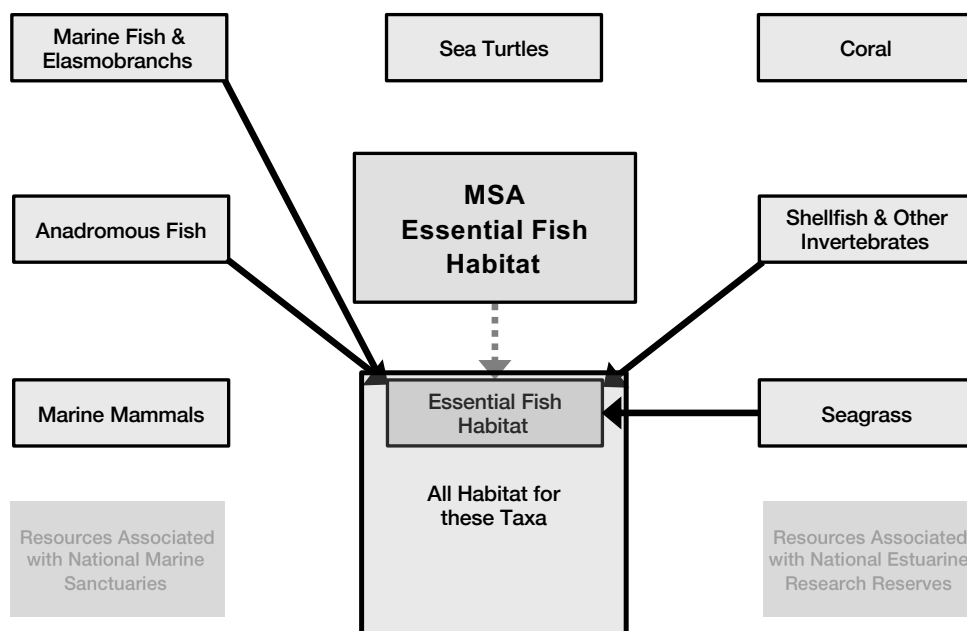
In the case of construction by a Federal agency, that agency is authorized to transfer to the United States Fish and Wildlife Service, out of appropriations or other funds made available for investigations, engineering, or construction, such funds as may be necessary to conduct all or part of the investigations required to carry out the purposes of this section.

- Water resource development agencies are authorized to transfer funds to NOAA for
  - Investigations. These are the surveys and investigations discussed in Section 2(b) of the FWCA
  - Engineering or construction
  - Preparation of FWCA reports

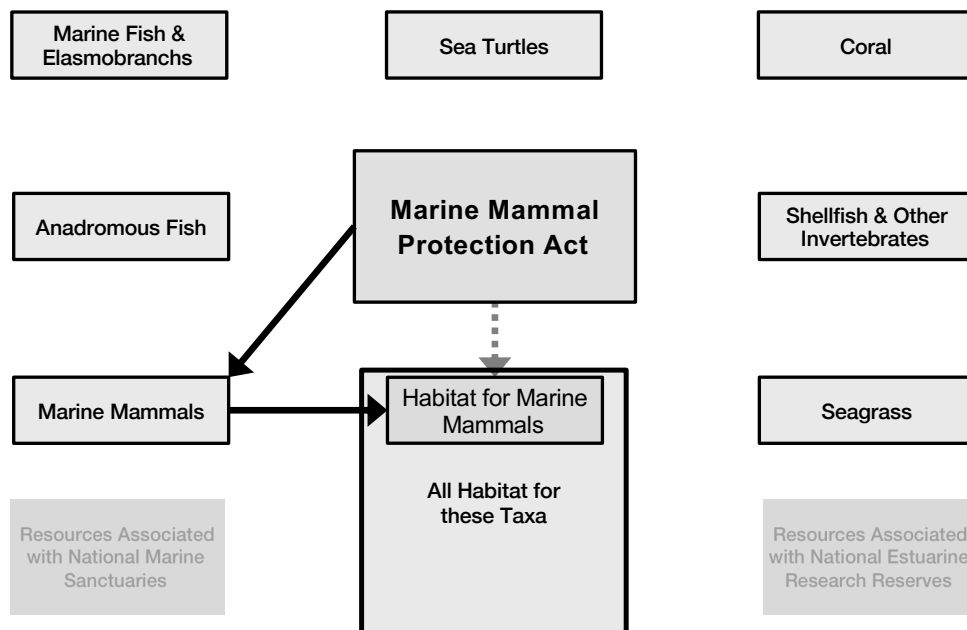
## 23 FWCA: Legal Foundations

- No regulations have been promulgated to implement the FWCA
  - The Services proposed regulations in 1979 (with draft EIS)
  - Proposed regulations were withdrawn in 1981 to comply with VP Bush's Regulatory Relief Program
- Several important court cases reviewed the FWCA's mandate
  - *Rank v Krug* (90 F. Supp. 773; S.D. California 1950)
  - *County of Trinity v Andrus* (438 F. Supp. 1368; E.D. California 1977)
  - *Zabel v Tabb* (439 F.2d 199; 5<sup>th</sup> Circuit 1970)
  - *Environmental Defense Fund v Corps of Engineers* (325 F. Supp. 749; E.D. Arkansas 1971)
  - *Sun Industries Ltd. v Train* (394 F. Supp. 211; S.D. New York 1975; 532 F. 2d 280, 2<sup>nd</sup> Cir 1976)
- Practices and procedures exist only in
  - the 1958 version of the FWCA
  - Agency policy and guidance (Action Agency & the Services)

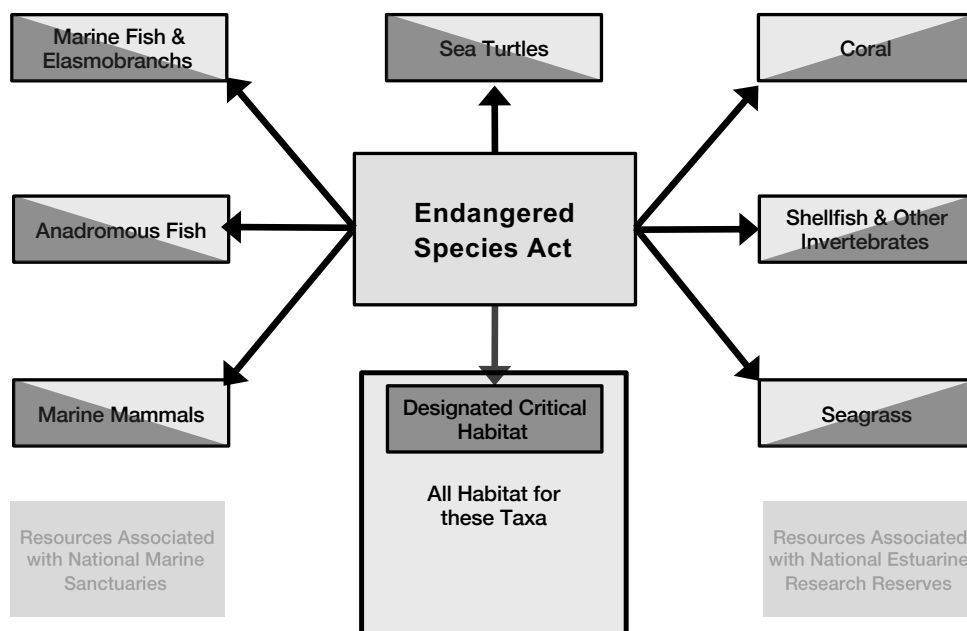
## 24 NOAA Trust Resources and Scope of EFH



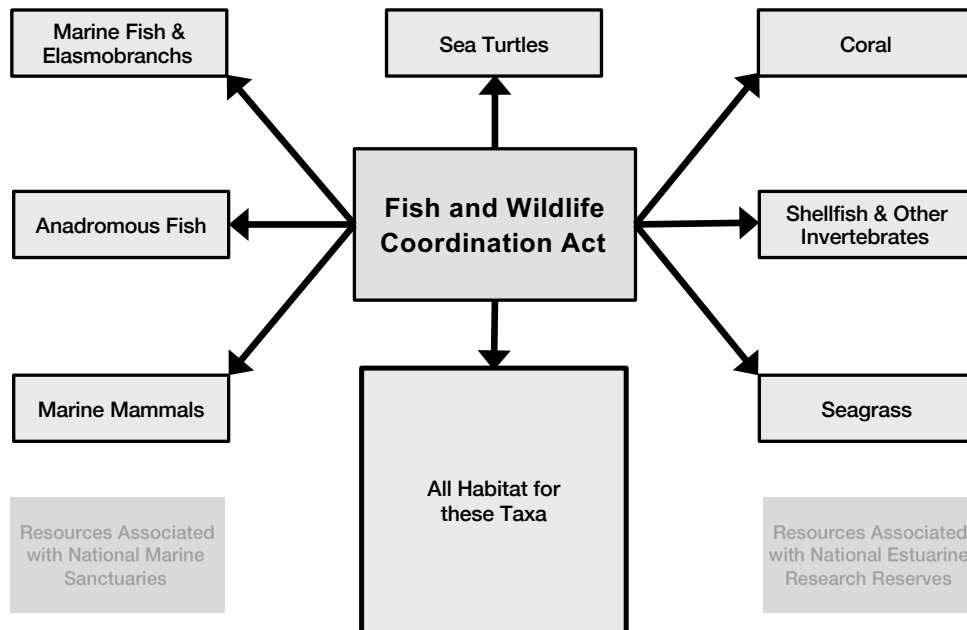
## 25 NOAA Trust Resources and Scope of MMPA



## 26 NOAA Trust Resources and Scope of ESA



## 27 NOAA Trust Resources and Scope of FWCA



## 28 Agencies Involved

- The FWCA provides NOAA opportunities to work with several other agencies
  - U.S. Army Corps of Engineers
    - Civil works
    - Regulatory
  - Bureau of Reclamation
  - Federal Energy Regulatory Commission
  - Bureau of Ocean Energy Management (Lease Sales, Permits)
  - Federal Highway Administration
  - U.S. Coast Guard (Section 9 of the Rivers and Harbors Act)
  - Nuclear Regulatory Commission (for licensing)

## 29 **Relationships to Other Statutes**

- The FWCA is closely related to several other statutes
  - Water Resources Development Act
  - NEPA
  - Endangered Species Act
  - MSA Essential Fish Habitat
  - Clean Water Act (Section 404)
  - Rivers and Harbors Act of 1899 (Section 10)
  - Federal Power Act
  - Coastal Zone Management Act
  - Coastal Barrier Resources Act
  - Estuary Protection Act

## 30 **FWCA & WRDA**

- The laws Congress passes to address environmental, structural, navigational, flood protection, hydrology, etc. aspects of water resources are called Water Resource Development Acts
- In some cases, Congress has used WRDAs to exempt projects from environmental laws or to change the federal objectives for water resource development projects
- For example, the 2007 WRDA established the following objective for federal water resources investments:
  - seek to maximize sustainable economic development
  - seek to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used, and
  - protect and restore the functions of natural systems and mitigating any unavoidable damage to natural systems
- The last WRDA was passed in 2016

## 31 **FWCA & NEPA**

- NEPA was originally proposed as an amendment to the FWCA so the two laws have similar provisions
  - NEPA requires action agencies to consult with and obtains comments from other federal agencies before preparing appropriate documents
  - it requires action agencies to append comments to NEPA documents that are circulated to the public and decision-makers
  - it requires action agencies to include appropriate mitigation
- Some courts have assumed that satisfying NEPA also satisfies FWCA
  - *Environmental Defense Fund v Corps of Engineers* (325 F. Supp. 749; E.D. Arkansas 1971)
  - *Save Our Invaluable Land Inc. v Needham* (542 F.2d 539; 10<sup>th</sup> Cir. 1976)
- Other courts have disagreed with these conclusions because NEPA does not give FWS/NOAA the ability to base its reports on investigations or submit its report directly to Congress

## 32 **Why Use the FWCA?**

- It gives NOAA the authority to address the conservation needs of all living marine resources under NOAA's jurisdiction
- FWCA gives NOAA early access to project planning with an ability to influence alternatives that are developed
- It gives NOAA the opportunity to identify species early in their decline and prevent their ultimate listing as threatened or endangered
- It gives NOAA a platform and opportunity to advocate for enhancement measures that promote species' recovery
- FWCA Reports provide NOAA an opportunity to communicate its views, concerns and recommendations directly to Congress

### 33 Limitations of the FWCA

- Other than the obligations to
  - consult,
  - give full consideration, and
  - convey Service views in reports to Congress,the FWCA has no mandatory provisions
- The FWCA does not create specific criteria or standards that action agencies must satisfy
- **The FWCA does not contains any special provisions that overcome the four central challenges of species-based or habitat-based risk assessments (SBRAs/HBRAs)**

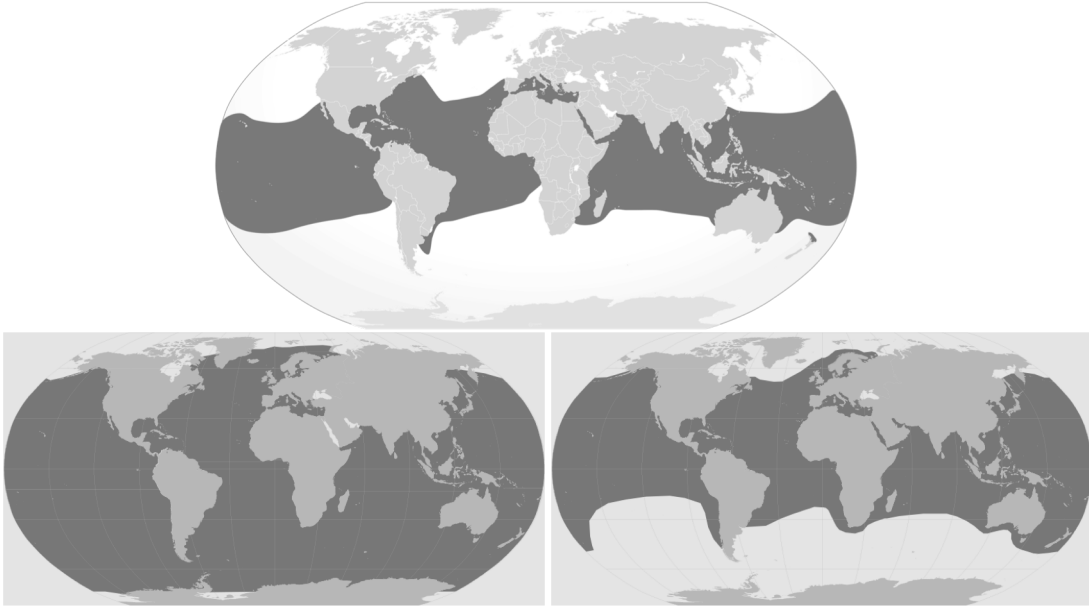
### 34 The Four Central Challenges of SBRAs

- Species-Based and Habitat-Based Risk Assessments have four central challenges:
  - **Establishing that Action A caused Effect A**
    - Sometimes Effect A is caused by Action A... but sometimes it isn't
    - Sometimes there is a hidden or "lurking" cause
  - **Dealing with disproportionality in cause and effect**
    - some small causes have large effects
    - some large causes have small effect
  - **Identifying thresholds: we almost never know where a threshold occurs until after we have passed it**
  - **The problem of "abundance" & "ubiquity" (or both)**
    - when species (or their habitat) are abundant or relatively common, it is difficult to establish that even large actions can be expected to have measureable adverse effect

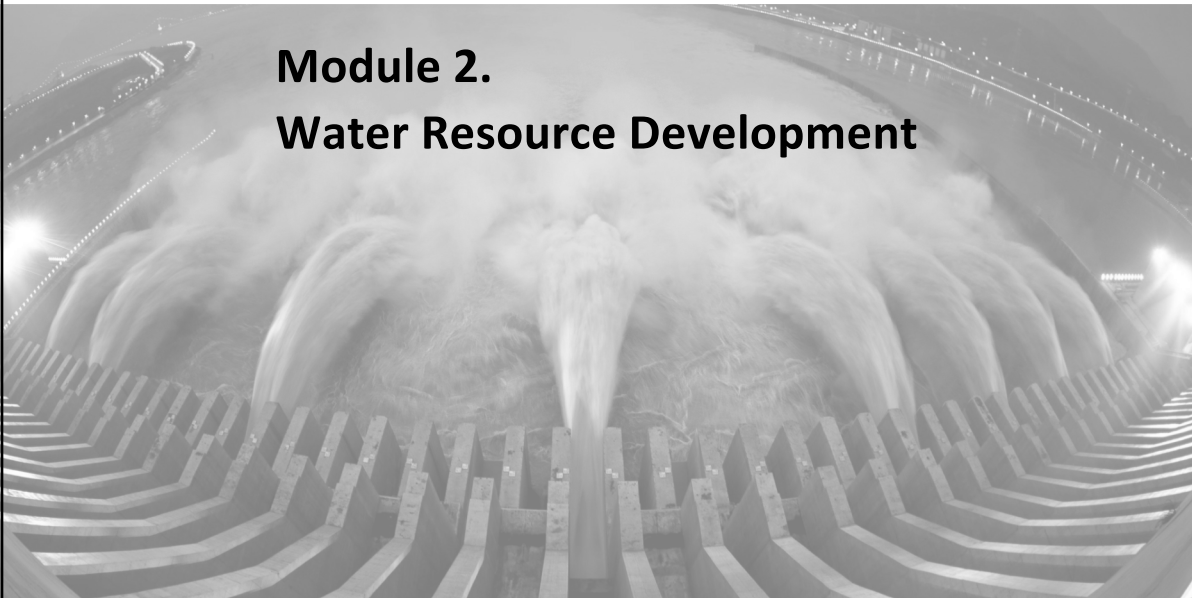
## 35 The Problem of Abundance or Ubiquity

When species (or their habitats) are “ubiquitous,” “common,” or “abundant,” it is difficult to convince anyone that any effect warrants concern

The smaller the effect, the harder this challenge becomes



## Module 2. Water Resource Development



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## 37 In Module 2...

- We will cover
  - The Life Cycle of Water Resource Projects
  - Water Resource Development Planning
  - Feasibility Studies and SMART Planning
  - Water Resource Planning & NEPA
  - FERC and Bureau of Reclamation Planning Process

## 38 Water Resource Planning

- The primary water resource management agencies — USACE, BOR, NRCS, and FERC — use different approaches for project planning
- However, they have traditionally consisted of the following steps:
  - Study initiation phase (formerly Reconnaissance Phase or Appraisal Phase for BOR)
  - Feasibility Phase
  - Preconstruction Engineering and Design
  - Construction
  - Operations and Maintenance
- These processes are currently undergoing a lot of change

## 39 USACE Water Resource Project Life Cycle



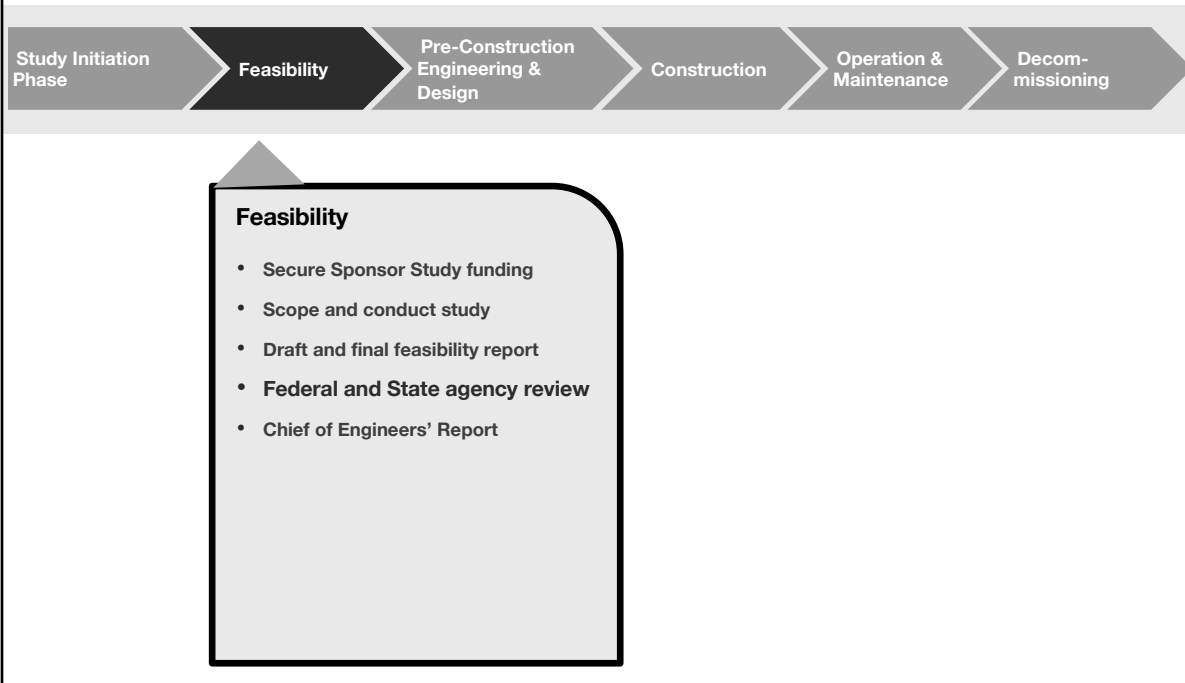
## 40 USACE Water Resource Project Life Cycle



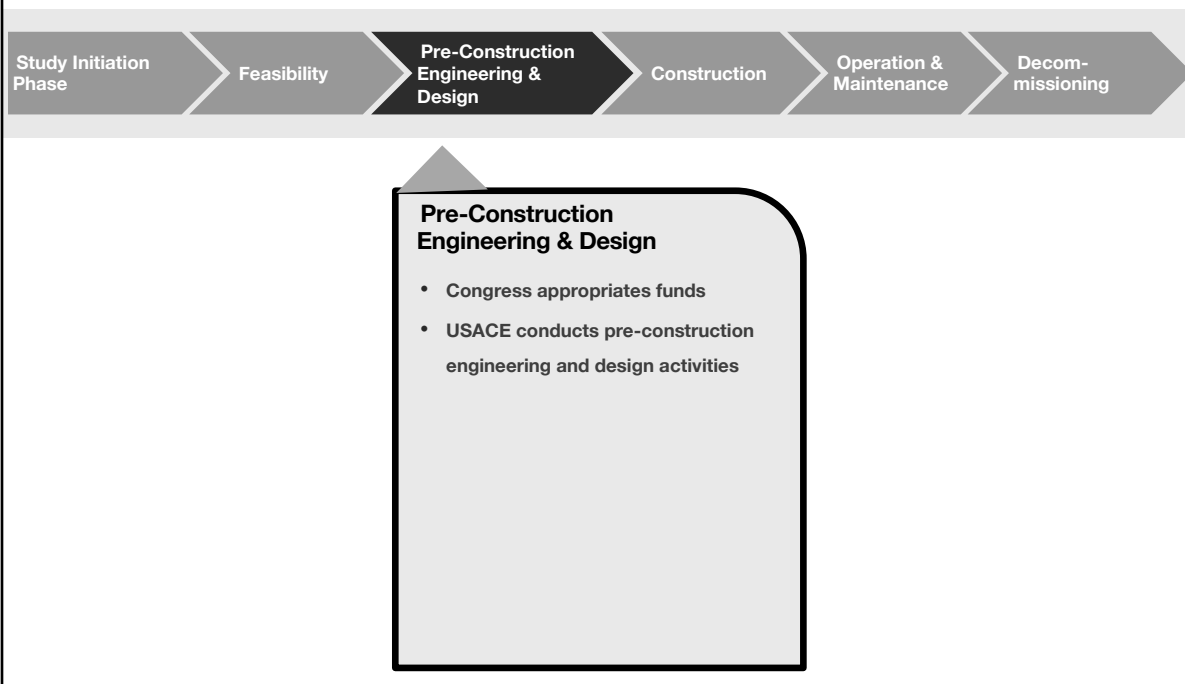
### Study Initiation Phase

- Initial problem identification
- Authority from Congress to conduct the study
- Letter of Intent from project Sponsor
- Congress appropriates study funds

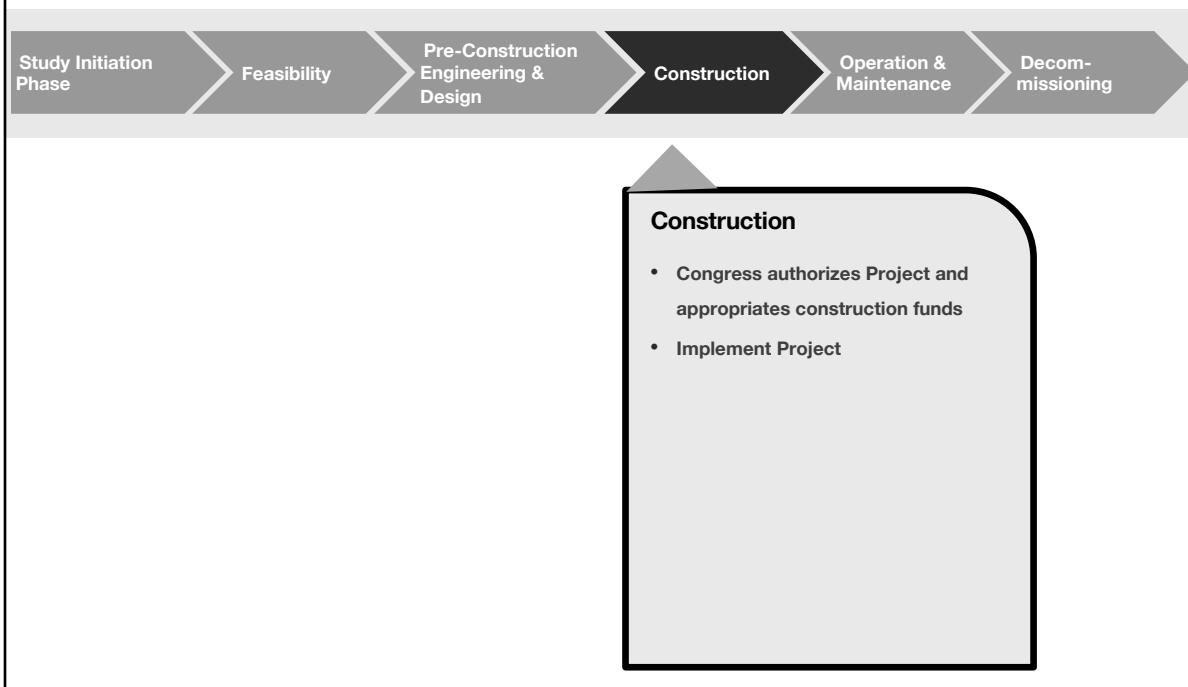
## 41 USACE Water Resource Project Life Cycle



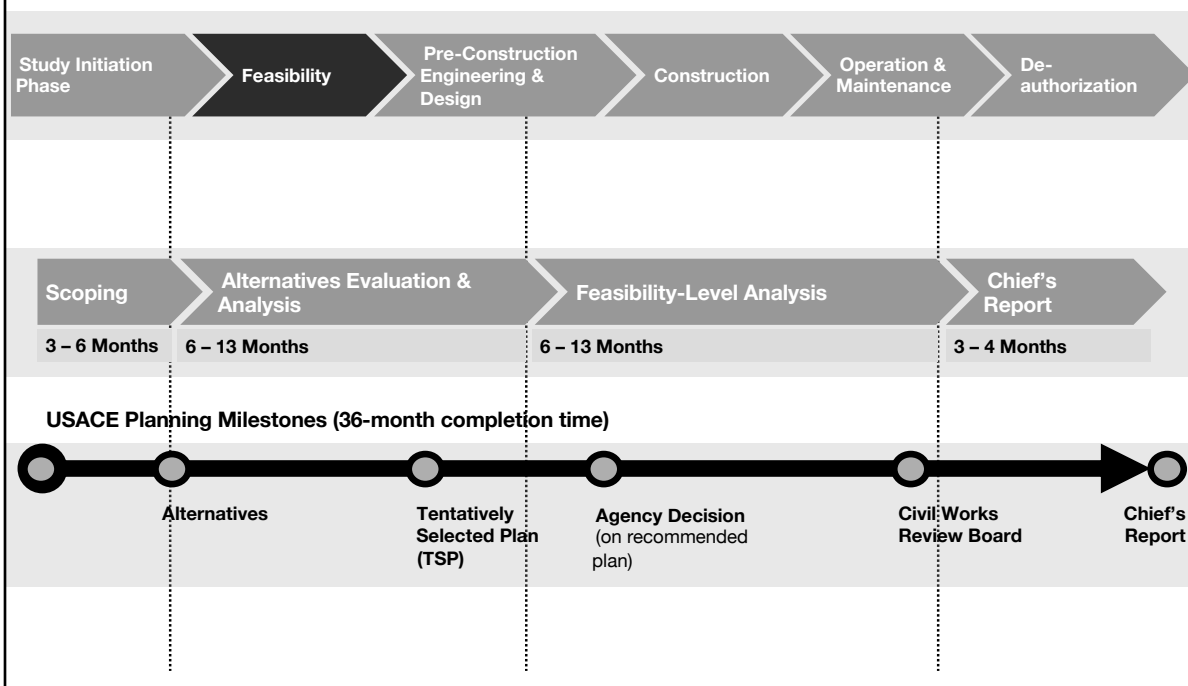
## 42 USACE Water Resource Project Life Cycle



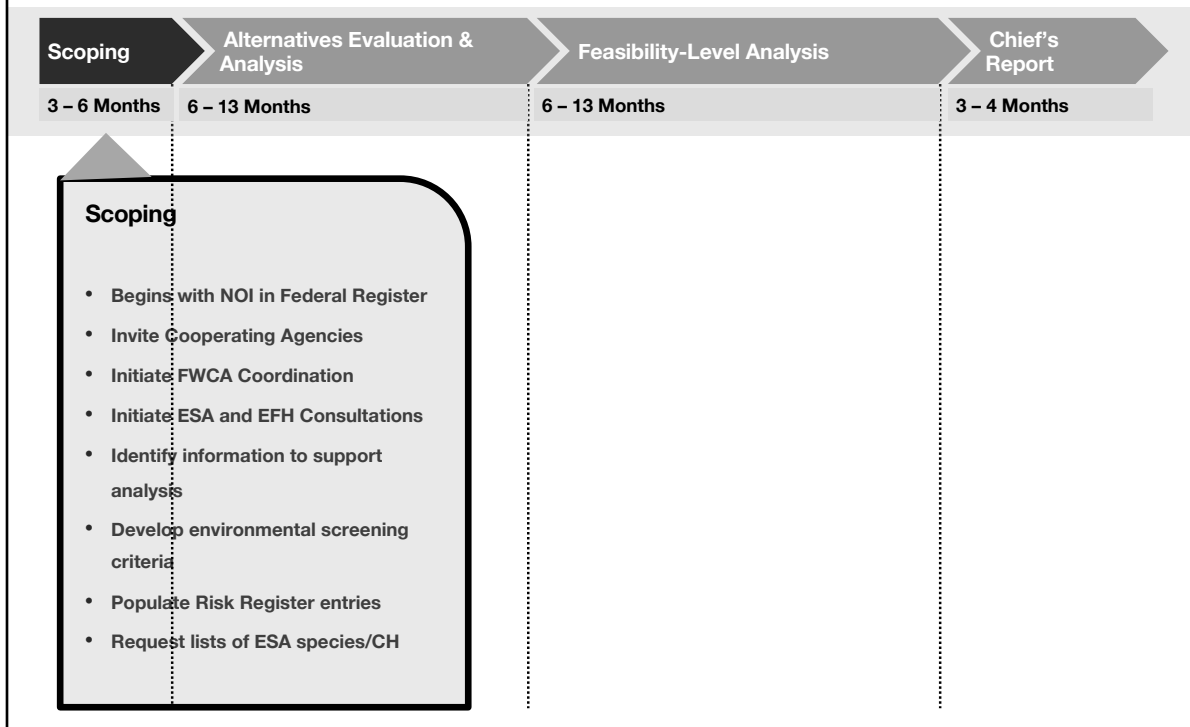
## 43 USACE Water Resource Project Life Cycle



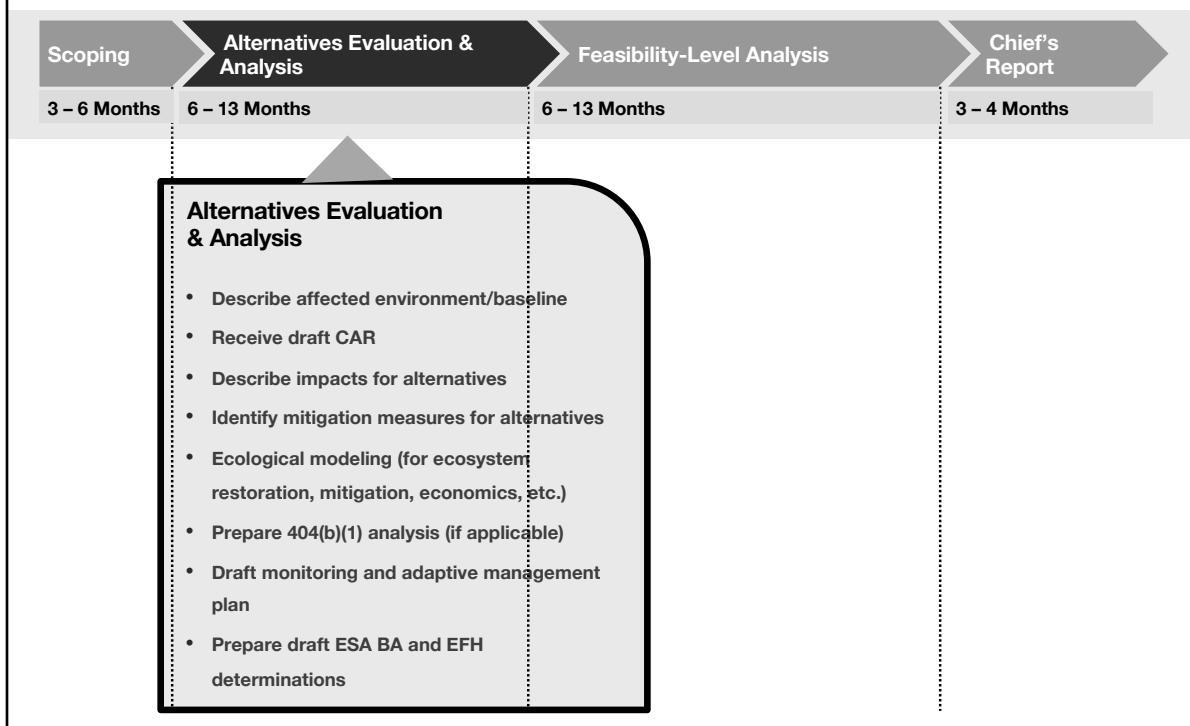
## 44 Feasibility Phase of USACE Planning



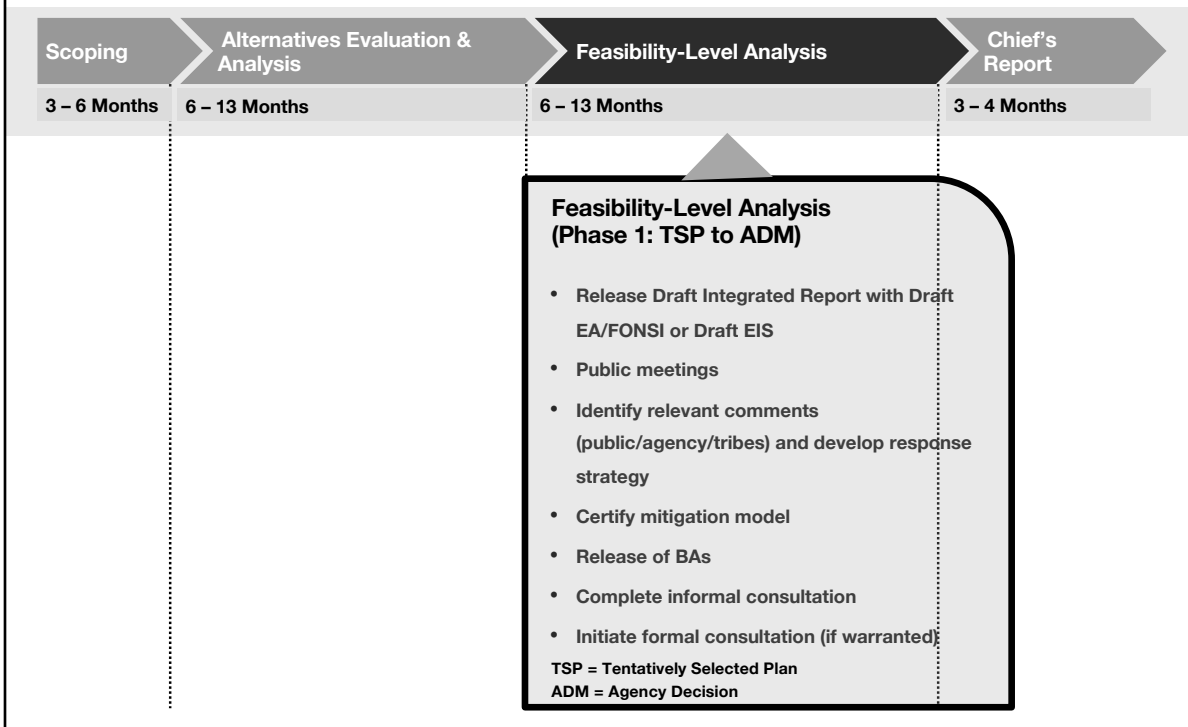
## 45 Feasibility Phase of USACE Planning



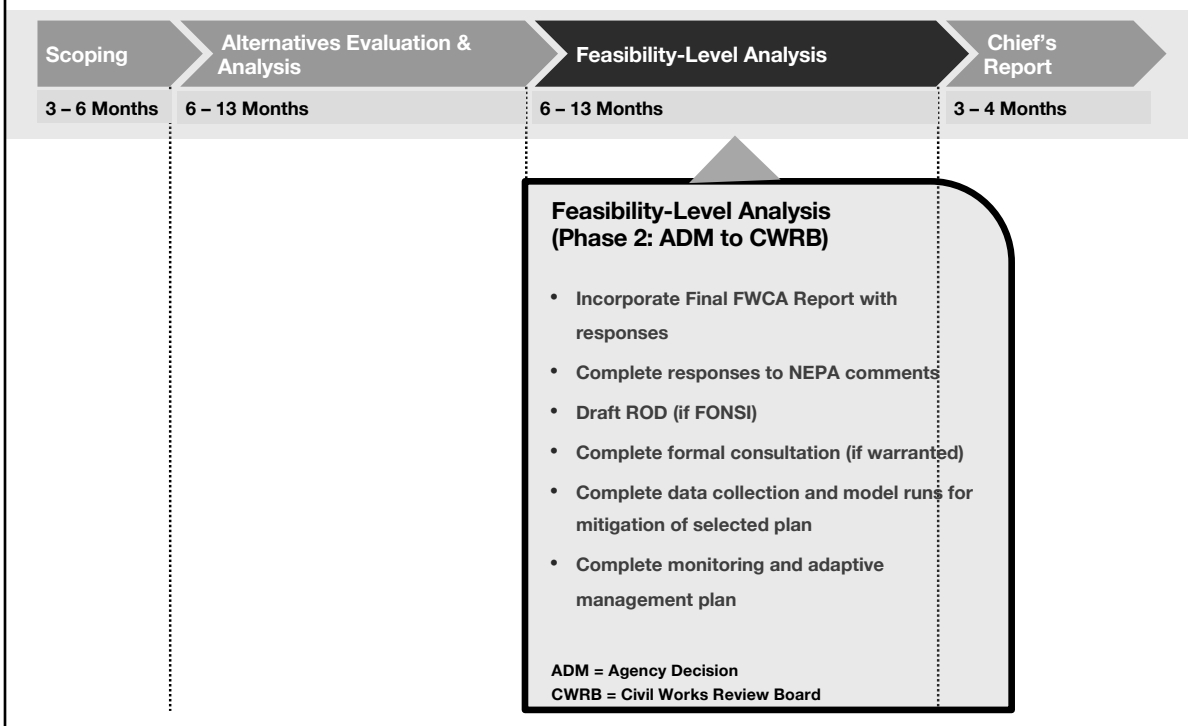
## 46 Feasibility Phase of USACE Planning



## 47 Feasibility Phase of USACE Planning



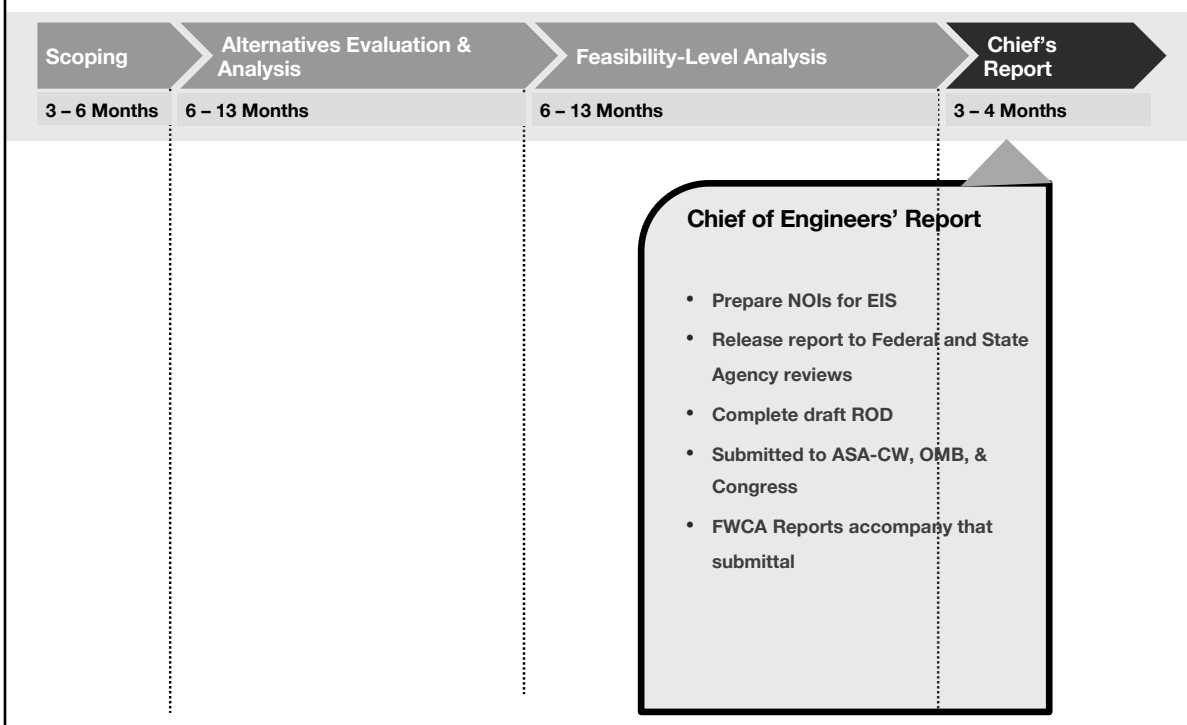
## 48 Feasibility Phase of USACE Planning



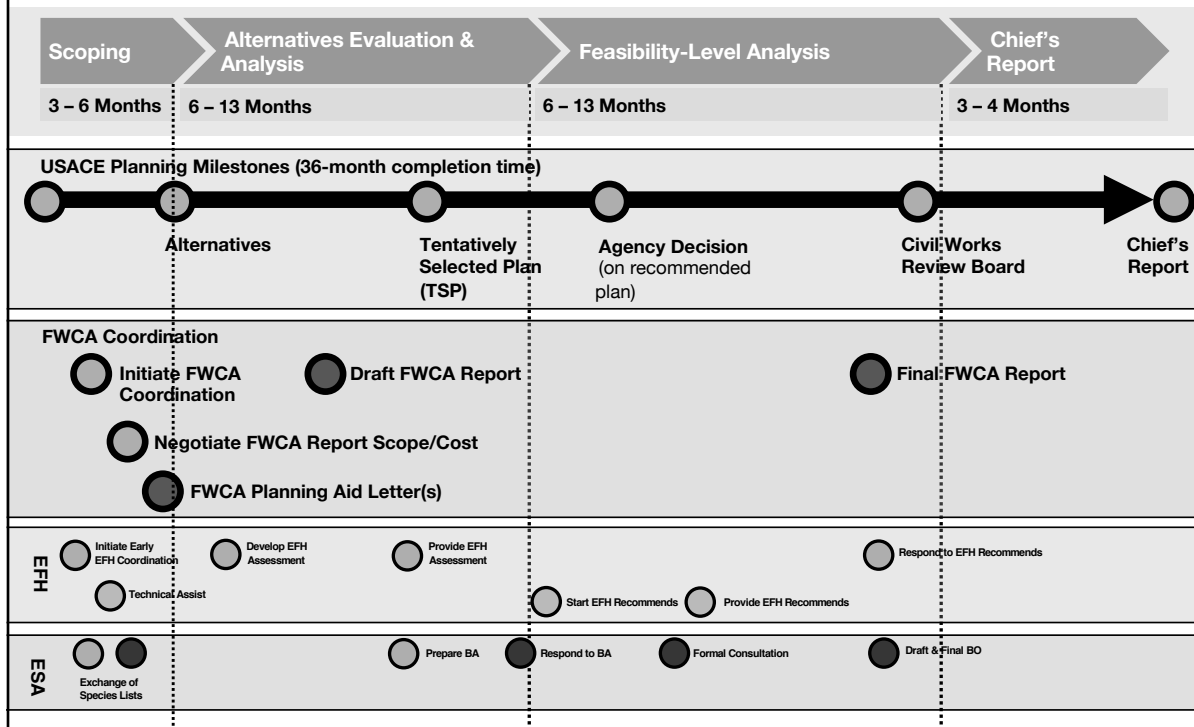
## 49 USACE SMART Planning

- Since 2012 **all feasibility studies** that had not reached the Feasibility Scoping Meeting milestone
  - will follow a “3 x 3 x 3 rule”:
  - This rule requires these studies to
    - be completed in no more than three years;
    - cost not greater than \$3M; and
    - require three levels of vertical coordination
  - The target length of the main report for feasibility studies will be 100 pages or less.

## 50 Feasibility Phase of USACE Planning



## 51 Feasibility Phase Milestones



## 52 The USACE's "3 x 3 x 3 Rule"

- In an 8 February 2012 Memorandum, the USACE stated that effective immediately all feasibility studies that have not reached the Feasibility Scoping Meeting milestone will follow a "3x3x3 rule":
  - be completed in no more than three years;
  - cost not greater than \$3M; and
  - require three levels of vertical coordination
- The \$3,000,000 threshold is the total feasibility study cost, including both the Federal and non-Federal sponsor share of the total cost
- The 3-year duration begins with the signing of the Feasibility Cost Share Agreement and ends with the signing of the Chief's Report
- Any study that exceeds the 3 years or \$3M total study cost requires justification and special USACE approval
- The 3x3x3 rule was incorporated into the Water Resources Reform & Redevelopment Act of 2014



## 53 One Federal Decision

- Executive Order (E.O.) 13807 requires Federal agencies to process environmental reviews and authorization decisions for “major infrastructure projects” as One Federal Decision and sets a government-wide goal of completing environmental reviews and authorization decisions for major infrastructure projects within an average of two years (starting from date of NOI)
- Before an NOI is published, FHWA Guidance says the lead Federal agency should:
  - develop a draft Purpose and Need
  - identify preliminary Range of Alternatives
  - determine the extent of analysis needed for each resource
  - initiate applicable resource surveys/studies
  - identify potentially significant environmental issues
  - identify potential mitigation strategies
  - initiate permit activities as soon as possible, such as pre-application processes

## 54 Leverage in FWCA Reports: Significance

- The concept of “significance” is important to both WRDA and NEPA
- The USACE’s Planning Guidance Notebook (ER 1105-2-100) acknowledges that the significance of ecological resources shall be based upon both their monetary and non-monetary values
  - Monetary value shall be based upon the contribution the resources makes to the Nation's economy
  - Non-monetary value is based on **technical**, **institutional**, and **public recognition** of the ecological, cultural and aesthetic attributes of resources within the study area.
- Criteria for determining significance include
  - the scarcity or uniqueness of the resource from a national, regional, State and local perspective.
- The significance of impacts of alternative plans shall be evaluated based upon the extent, intensity and duration of the impact on significant ecological resources, compared to the "future without plan" condition

## 55 Types of Non-Monetary WRDA Significance

Institutional Significance	Public Significance	Technical Significance
... means that the resource's importance is acknowledged by laws, adopted plans, and other policy statements of public agencies or private groups	<p>... means that some segment of the general public recognizes the importance of the resource.</p> <p>According to USACE Guidance this recognition may take the form of controversy, support, conflict, or opposition and may be expressed formally or informally</p>	...means that the importance of the resource is based on scientific or technical knowledge or judgement of critical resource characteristics

## 56 NEPA

- Water resource development projects and related civil works projects are fully integrated with the procedures and provisions on NEPA
- On 10 January 2020, the Council on Environmental Quality proposed regulations titled "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act" (85 Federal Register 1684-1730)
- This proposal represents extensive and substantive revisions to NEPA procedures (40 CFR 1502) that would affect how you use FWCA in the future

## 57 Proposed NEPA Update

- The proposed regulations would make extensive revision to NEPA procedure and practices:
  - Proposes to constrain judicial review of NEPA violations and judicial remedies for those violations
  - Expand the use of categorical exclusions and EAs
  - Establish time limits for completion of environmental impact statements (EISs) of 2 years and environmental assessments (EAs) of 1 year
  - Allow agencies to combine Affected Environment and Environmental Consequences sections of NEPA documents
  - Expanded use of FONSI, including mitigated FONSI
  - Directs agencies to integrate environmental impact analyses with FWCA and ESA reviews

## 58 Proposed NEPA Update

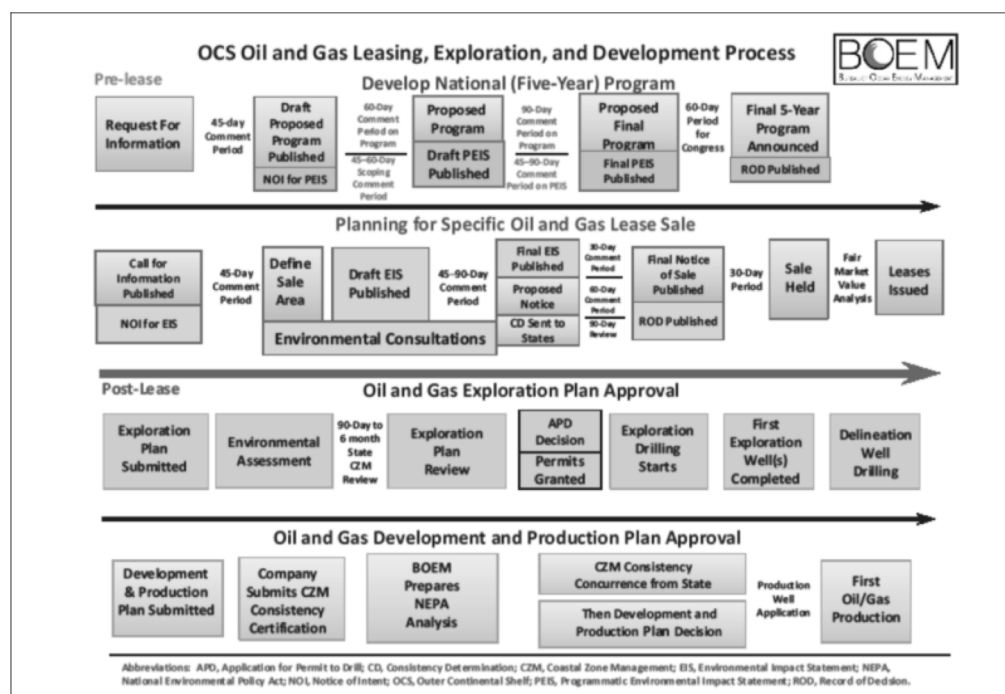
58

- New definitions
  - Define the term “reasonable alternatives” to provide that alternatives must be technically and economically feasible
  - Redefine *Effects* or *impacts* to mean
    - effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives
    - effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance
  - A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain
  - Analysis of cumulative effects is not required

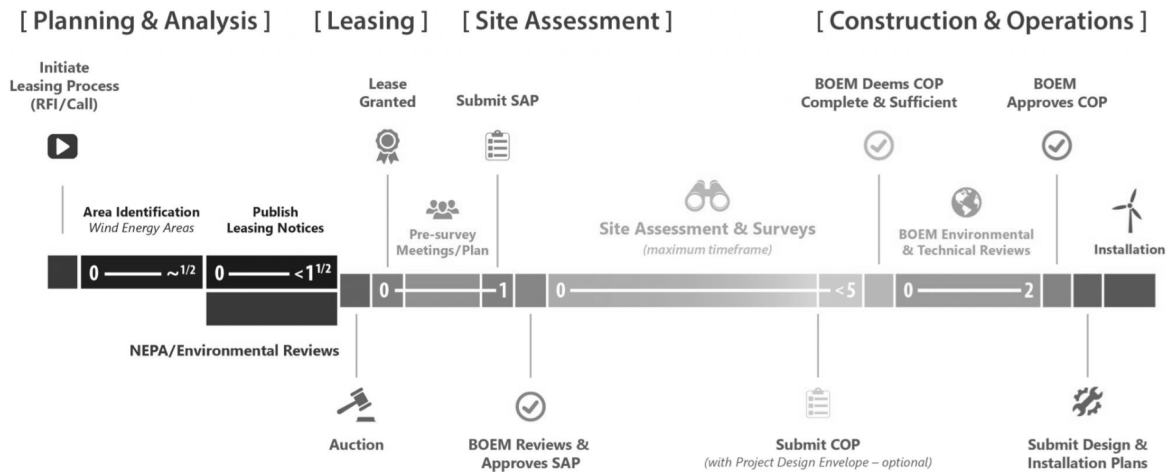
## 59 Proposed NEPA Update

- The proposed regulations eliminate the terms
  - Cumulative impact
  - Significantly and significance
  - Intensity
- The definition of mitigation, as proposed, is unchanged
- These changes would make it harder to mount substantive challenges to NEPA assessments

## 60 BOEM Process for Offshore Oil and Gas Leases



## 61 BOEM Process for Offshore Wind Leases



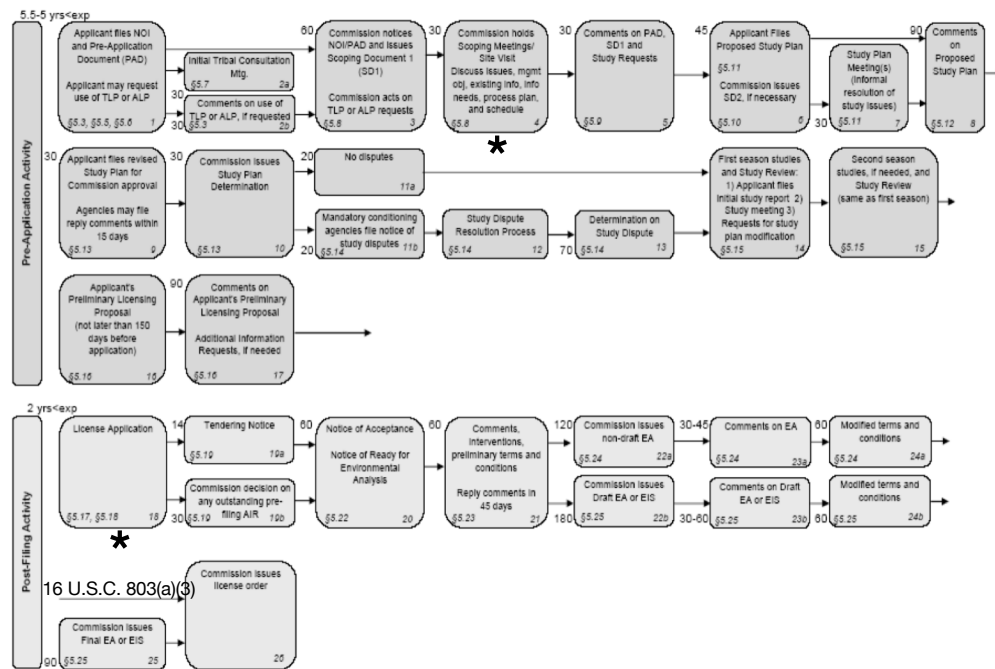
## 62 FWCA & Federal Power Act

### Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

...That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

16 U.S.C. §803(j)

## 63 FERC Licensing Process (ILP)



## Module 3. NOAA Fisheries' Role in the Planning Process

## 65 In Module 3...

- We will discuss the Roles and Responsibilities of NOAA-Fisheries' Biologists during FWCA consultations
  - Role During Water Resource Development Planning
  - Skillsets Required to Implement the FWCA Effectively

## 66 Roles During Water Resource Development

- During water resource development planning, NOAA representatives participate in
  - Study scoping
    - to identify sources of data and other relevant information
    - to raise concerns about the significance of fish and wildlife resources and anticipated impacts, and
    - to determine the resources that should be evaluated in the study
    - to identify fish and wildlife opportunities and planning objectives
    - to identify ways to avoid and minimize impacts to NOAA Trust Resources
  - Project Development Teams
    - to help identify feasible alternatives
    - identify assessment methodologies and help conduct impact assessments
    - identify, develop, and evaluate mitigation alternatives

## 67 Roles During Water Resource Development

67

- During water resource development planning, NOAA representatives serve as
  - as representatives of a cooperating agency during water resource planning
  - during transfer funding negotiations
  - as sources of information on and advocate for NOAA trust resources
  - as sources of information on assessing the impacts of water resource projects and other activities on NOAA trust resources
  - as sources of information on measures to conserve and mitigate impacts on NOAA trust resources
- They are also expected to
  - design and conduct field investigations
  - analyze, present, and communicate the results of those investigations

## 68 Skillsets Required

- When working on water resource development projects, NOAA managers and biologists will need in-depth knowledge of the following:
  - the planning processes, practices, terminology, interpretations, and environmental standards of the federal agency
  - NEPA process and practices, beyond water resource development projects
  - Best practices for assessing the impacts of water resource development project, including a solid grasp of the effects of prior projects
  - Best practices for planning and implementing effective mitigation
  - Best practices for effectively monitoring the effects of water resource development projects and reporting the results of those monitoring programs
  - The strengths of different impact study designs (BACI, B-A, After only, etc.)
  - Design, execution, and management of field investigations
  - Analysis, presentation, and communication of study results



## 69 Skillset Required for Transfer Funding

- When working on transfer funding, NOAA managers and biologists will need to
  - prepare Plans of Study
  - negotiate costs and schedules with the action agencies
  - prepare Letters of Agreement (and Regional MOAs)
  - prepare scopes of work and funding agreements
  - prepare funding estimates
  - calculate standard overhead costs
  - calculate “staff-day costs”



## Module 4. The Fish and Wildlife Coordination Act Reports

March 2020 | Portland, OR/Sacramento, CA

## 71 In Module 4...

- We will cover the various reports prepared pursuant to the FWCA
  - Planning aid letters, planning aid reports, planning aid memoranda
  - FWCA Reports
  - Other FWCA correspondence

## 72 FWCA Reports

- Reports prepared pursuant to the FWCA consist of
  - FWCA Reports
  - Planning aid report, letter, or memorandum
  - Responses to USACE Public Notices
- Although State agencies have the option of submitting their reports separately, their reports are usually included in the Federal report

## 73 FWCA Reports vs Planning Aid Letters

- FWCA Reports are the formal reports authorized by §2(b) of the FWCA
  - they are designed to represent the official views of the Secretary on a project, which can be transmitted to ASA-CW and Congress
  - the language, tone, and level of scrutiny they are given will reflect that formality
- Planning aid letters, memoranda, or notes represent all other communications between NOAA and water resource development agencies
- NOAA comments and recommendations during Scoping, Alternatives Evaluation & Analysis, and Feasibility-Level Analysis will generally consist of planning aid letters
- During the Scoping and Alternatives Evaluation & Analysis phases, NOAA can and should help incorporate specific conservation actions from T/E recovery plans in alternative development

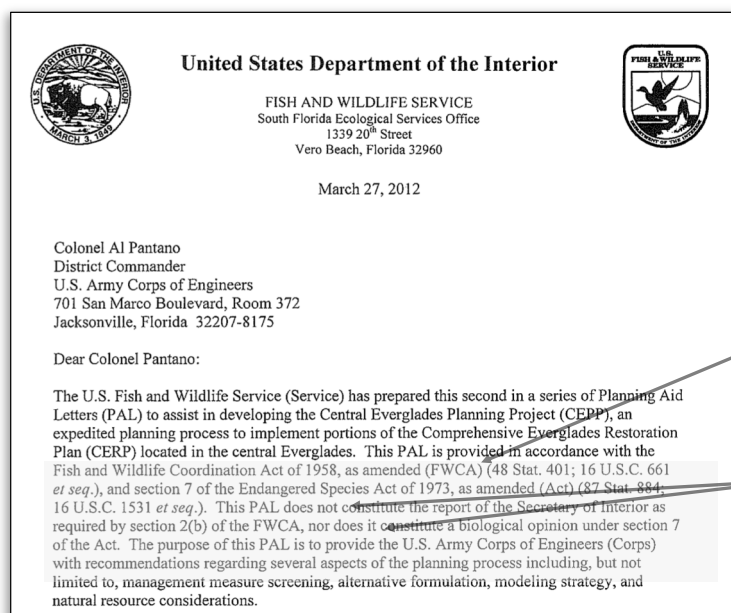
## 74 FWCA Planning Aid Letters, Reports, Memoranda

- PALs are designed to
  - identify any significant fish and wildlife resources likely to be affected by a project
  - identify fish and wildlife resource problems and opportunities that should be addressed by the study
  - identify potentially significant impacts that could result from meeting other study purposes or objectives
  - highlight the potentially significant fish and wildlife issues or concerns; and
  - define the scope and level of FWCA coordination that would be necessary during the feasibility phase (along with a cost estimate for such effort)
- The information provided during **Study Initiation** and **Scoping Phases** will be based on available information, as detailed studies will not be conducted at this time.

## 75 Contents of FWCA Reports

- All FWCA reports should
  - Identify the authorities being invoked
  - Acknowledge coordination with state agencies and other involved parties
  - Identify and describe the affected area
  - Identify the NOAA Trust Resources that occur in the affected area
  - Describe the methods NOAA used to evaluate environmental effects and any studies or investigations NOAA conducted
  - Describe the “baseline” conditions for NOAA Trust Resources and the “future without project” forecast
  - Describe the action’s expected effects on NOAA Trust Resources (the “future with project” forecast)
  - Evaluate the biotic significance of any adverse or beneficial effects
  - Discuss and justify mitigation recommendations

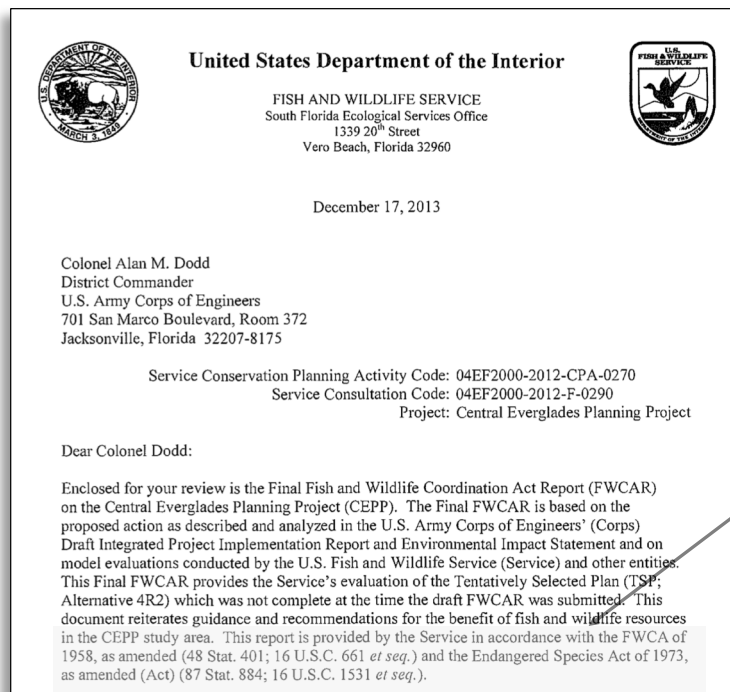
## 76 A Sample Planning Aid Letter



Clearly identifies the authorities the PAL addresses

Ensures the PAL cannot be misrepresented

## 77 A Sample Transmittal for FWCA Report



Clearly identifies the authorities the FWCA addresses

## 78 FWCA Reports

- To satisfy its FWCA responsibilities NOAA must prepare 2(b) reports that:
  - **clearly document the proposed project's impacts on fish and wildlife resources and**
  - **provide specific measures that should be taken to conserve those resources**
- 2(b) reports must answer four basic questions:
  - **What NOAA trust resources are likely to be affected?**
  - **What alternatives are being considered or evaluated?**
  - **What are the impacts of these alternatives on NOAA Trust Resources?**
  - **What will NOAA recommend to conserve fish and wildlife resources?**
- FWCA Reports should also articulate NOAA's position on a project

## 79 FWCA Reports: Mitigation Recommendations

- Mitigation measures in FWCA Reports, letters, or planning aid documents should distinguish between
  - Those measures that are known to be effective in the circumstances
  - Those measures that are known to be ineffective in any circumstances
  - Those measures that are known to be ineffective in the circumstances
  - Those measures that are not known to be effective in the circumstances
  - Those measures that are not known to be effective
- The first two of these categories are the most important
- For threatened and endangered species, recovery plans can help inform the development of mitigation measures

## 80 FWCA Reports: Mitigation Recommendations

- The most effective mitigation measures will **avoid** all or some of the exposures that cause an adverse effect
- Lesser options are to avoid:
  - exposure at a particular intensity, duration, frequency, etc.
  - a response or set of responses given an exposure
  - reducing the fitness of individuals, despite exposures and responses
  - reducing the viability of the populations those individuals represent
  - reducing the viability of the listed entity

## 81 **FWCA Reports: NOAA's Position**

- To satisfy its FWCA responsibilities NOAA must establish its position on a project.
  - Whether it would support, oppose, or not oppose a Tentatively Selected Plan under specified conditions
  - It is not enough to provide recommendations
- If NOAA recommends an alternative to the Tentative Selected Plan, the FWCA Report should provide its rationale for that alternative

## 82 **FWCA Letters**

- FWCA Letters usually consist of comments and recommendations to federal agencies. The most common are comments on USACE Public Notices
- Because the scope of the FWCA encompasses all living marine resources under NOAA's jurisdiction and their habitats, FWCA can address concerns NOAA has about the effects of a proposed permit on:
  - marine mammals and their habitat
  - endangered and threatened species and their habitat (including critical habitat)
  - commercially-important fish species and their habitat (including essential fish habitat)
  - all other animal taxa under NOAA's jurisdiction and their habitat
  - coral, seagrasses, invertebrates and their habitat

## 83 FWCA Letters

- Because of their potentially large scope, it helps to structure them to make their scope clear

Alternative A
Address
Salutation
Introductory paragraph (which should identify the authorities invoked)
Summary description of the action
Summary description of the affected area
<b>FWCA Comments</b>
...
<b>EFH Comments</b>
...
<b>ESA Section 7(a)(1) Comments</b>
<b>etc....</b>
<b>Recommendations</b>
<b>Position</b>

Alternative B
Address
Salutation
Introductory paragraph (which should identify the authorities invoked)
Summary description of the action
Summary description of the affected area
Identify the groups of living marine resources (and their habitats) the letter will address
<b>Group 1</b>
<b>Group 2</b>
...
<b>Recommendations</b>
<b>Position</b>



## Module 5. The Fish and Wildlife Coordination Act And U.S. Army Corps Permitting



## 85 In Module 5...

- We will cover...
  - Using the FWCA to Comment on USACE Permits
  - 404(q) Elevation Process

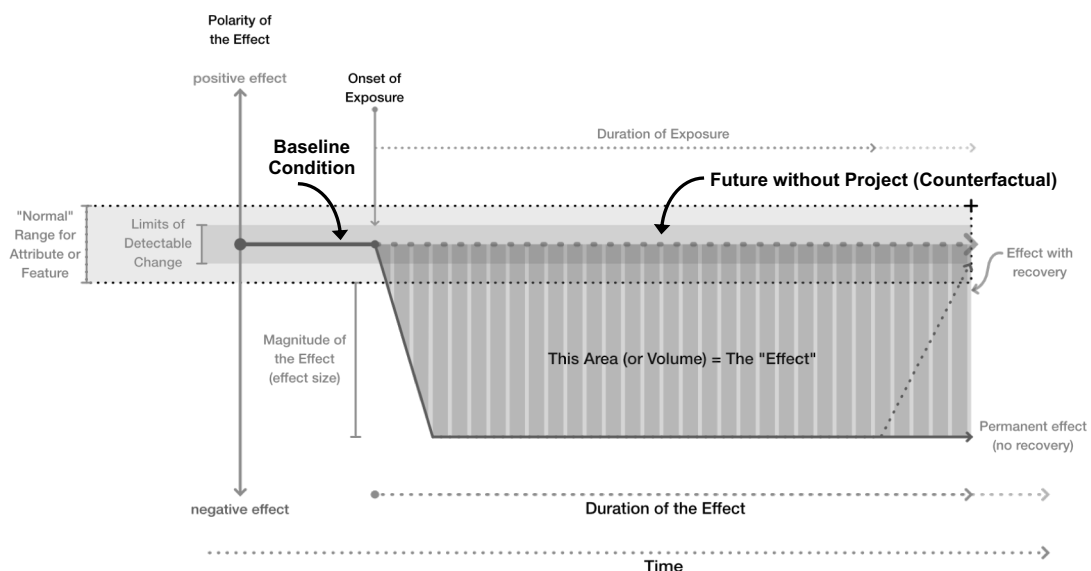
## 86 The Purpose of FWCA Consultation

- USACE permits issued pursuant to Section 404 (Clean Water Act) and Section 10 (Rivers & Harbors Act)
- As always, NOAA's review of USACE permits is intended to:
  - prevent the loss of and damage to wildlife resources (662(a))
  - as well as provide for the development and improvement of those resources (662(a))
- As always FWCA consultations primarily focus on
  - impact/effects analyses
  - avoiding, minimizing, rectifying, reducing or eliminating impacts over time or compensating for residual impacts
  - enhancement

## 87 To Fulfill That Purpose...

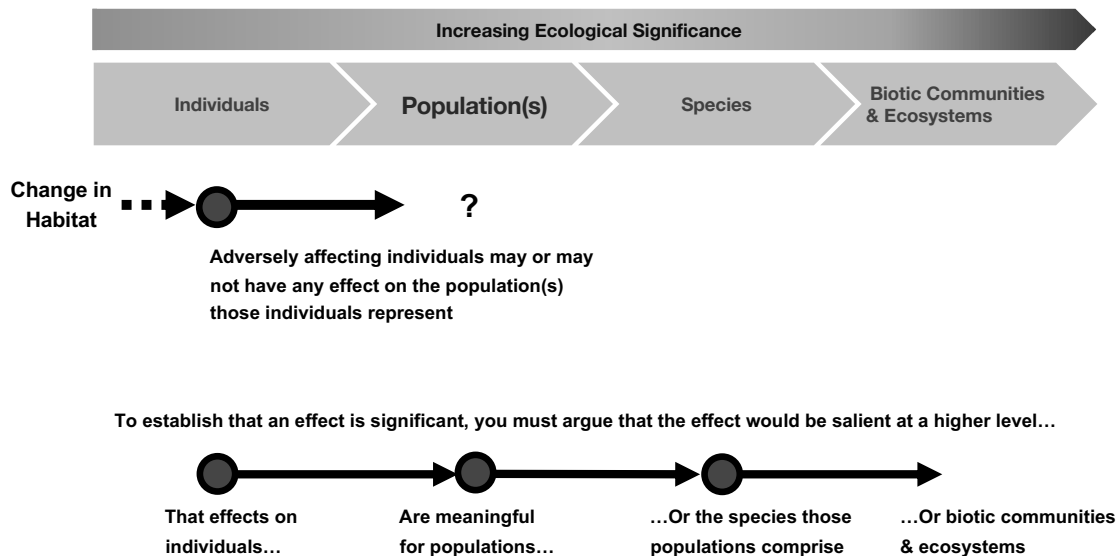
- NOAA FWCA analyses of USACE permits should:
  - Identify the authorities being employed. These will establish the legal standards NOAA will use in its effects analyses
  - Identify the affected area
  - Identify the NOAA Trust Resources that occur in the affected area
  - Identify the methods used to evaluate environmental effects and any studies or investigations conducted
  - Describe the “baseline” conditions for NOAA Trust Resources and the “future without project” forecast
  - Describe the action’s expected effects on NOAA Trust Resources (the “future with project” forecast)
  - Evaluate the biotic or ecological significance of any adverse effects
  - Respond to the four challenges of species- and habitat-based assessments

## 88 Components of a Complete Effects Analysis

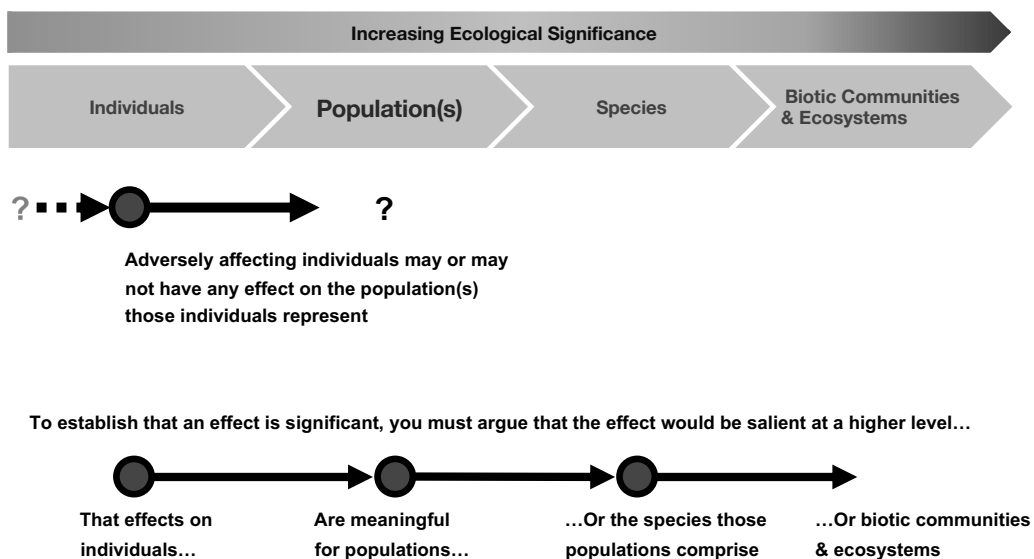


The duration will typically correspond to the time interval the action agency uses in its economic analyses, although section 3.4.7(f) of the P&G allows differences if they are necessary to fully describe impacts

## 89 Establishing the Significance of Effects



## 90 Establishing the Significance of Effects



## 91 FWCA vs ESA

- Sometimes the FWCA can be a more effective tool for conserving endangered and threatened species, designated critical habitat than ESA (Section 7) consultation
- The difference lies in the remedies the two statutes provide. The two remedies available through ESA consultation are:
  - **reasonable and prudent alternatives**, which are limited to being consistent with the intended purpose of the action, and
  - **reasonable and prudent measures**, terms, and conditions associated with incidental take statements, which are limited by the “minor change” rule
- FWCA consultations expand the toolbox available to NOAA by
  - allowing NOAA to recommend denying, modifying, or conditioning a permit to benefit NOAA Trust Resources
  - allowing NOAA to protect important habitat for T/E species that have no critical habitat designated or when a designation has omitted important habitat
- Under current policies, compensatory mitigation for T/E species is still prohibited

## 92 404(q) of the Clean Water Act

Not later than the one-hundred-eightieth day after the date of enactment of this subsection, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice of such application is published under subsection (a) of this section.

33 U.S.C. 1344(q)

- On 11 August 1992, Commerce and the USACE signed a MOA that satisfies this section of the Clean Water Act
- The FWCA and that MOA establish the rules of engagement for NOAA comments on USACE public notices

## 93 **404(q) Memorandum of Agreement**

- The scope of the MOA encompasses
  - Section 10 of the Rivers and Harbors Act of 1899
  - Section 404 of the Clean Water Act
  - Section 103 of the Marine Protection, Research and Sanctuaries Act
- It recognizes NMFS' role in the USACE regulatory programs pursuant to the FWCA, CWA, NEPA, ESA, MSA, MMPA, MPRSA (among others)
- It establishes separate processes for
  - policy disputes and
  - disputes over individual permit decisions
- Remedies associated with policy disputes are clarifications of USACE policies
- Remedies associated with disputes over individual permits include permit modifications, conditions, additional mitigation, and denials

## 94 **404(q): Elevating Policy Issues**

- 404(q) allows NOAA to elevate policy or procedural issues it has with the USACE
- Policy elevations may be related to USACE patterns of practice or classes of activities, but they are expected to be independent of specific permit decisions. As a result
  - the USACE does not delay processing individual permits during policy elevations
  - remedies to these elevations consist of changes in policy, procedure, or practice that affect future permits (not permits already being processed)
  - for example, remedies may consist of Regulatory Guidance Letters issued by a DE, changes in USACE regulations, or changes in USACE national policy
- Policy elevations are initially resolved between NOAA-Fisheries RAs and USACE DEs
- Those individuals can elevate unresolved regional or national policy issues to the NOAA Administrator and ASA-CW who have 90 days to resolve the issue

## 95 **404(q): Elevating Individual Permit Decisions**

- A key step in the process of elevating individual permit decisions is notifying the District Engineer, in writing, that NOAA believes a project (or permit) “**may** result in substantial and unacceptable impacts” to ARNIs (called a “3(a)” letter)
  - This notification **must** occur during the basic or extended comment period for a permit
- **only individual permit decisions that involve ARNIs can be elevated**
- At the Field Office level, NMFS’ Regional Director (or Acting) must notify the District Engineer by letter that NMFS believes
  - the discharge **will have substantial and unacceptable impact** on ARNIs
  - why there will be substantial and unacceptable impacts, and
  - why the permit must be modified, conditions, or denied to protect the ARNIs
- NMFS should explain how it made these determinations, ideally based on site-specific information and limit itself to matters within NMFS’ authority and jurisdiction

## 96 **404(q): Aquatic Resource of National Importance**

- The 404(q) MOA between NOAA and the USACE limits the elevation of individual permit decisions to those cases that involve “aquatic resources of national importance.”
- Specifically, the MOA limits elevations to those cases in which the net loss caused by a project will result in “unacceptable adverse effects to aquatic resources of national importance.”
- Despite its importance, ARNI is not defined other than by the phrase “As a basis for comparison, these cases will cause resource damages similar in magnitude to cases elevated under Section 404(c) of the Clean Water Act.”

404(c) of the CWA gives the EPA authority to veto a USACE permit decision for discharges that “will have unacceptable adverse effects on municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife, or recreational areas”

## 97 NMFS Guidance: ARNI

- NMFS' 2000 Guidance document on 404(q) elevations lists the following resources as ARNIs
  - species of "national economic importance" listed pursuant to the Water Resources Development Act of 1986economically important fish
  - habitats in areas where Federal dollars have been expended in planning or restoration (for example, SAMPs)
  - resources that have national, regional, or local importance other than economic (for example, a scarce, unique or irreplaceable habitat even if it supported no commercially important fish or shellfish)
  - designated critical habitat for endangered or threatened species
  - EFH may be ARNIs; HAPCs are probably ARNIs
- The USACE has traditionally rejected previously degraded areas that had been converted into special aquatic sites as an ARNI (other than mitigation sites)

## 98 “Substantial and Unacceptable” Impacts

- To support an elevation, NOAA FWCA should explicitly argue that the USACE permit **will** have **substantial and unacceptable impacts** on an ARNI
- Neither of these terms — “substantial and unacceptable impacts” — are defined in regulation, policy, or guidance
- However, NMFS has issued guidance on both terms

## 99 NMFS Guidance: “Substantial”

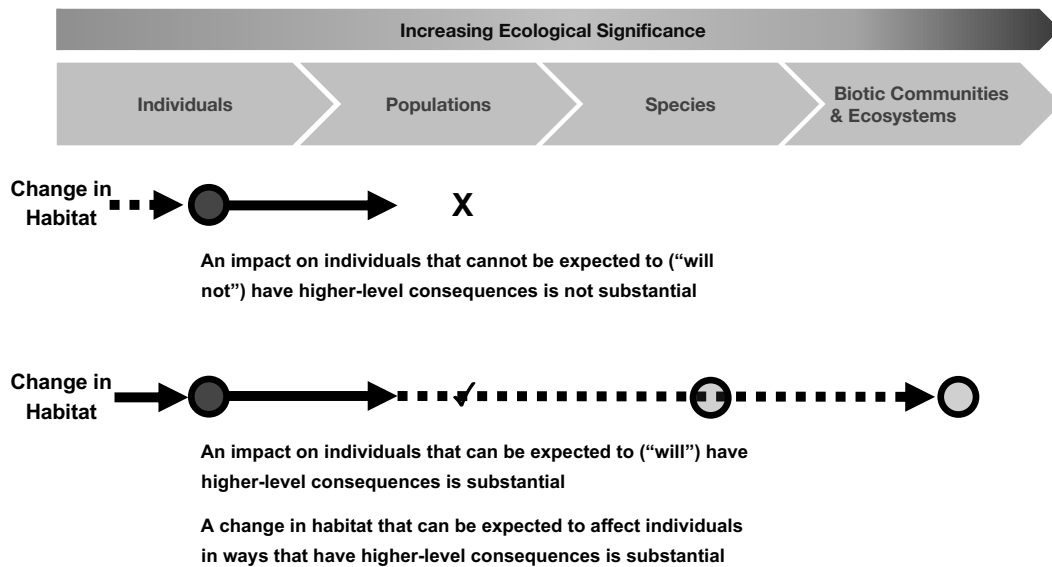
- NMFS’ 2000 Guidance document on 404(q) elevations states that determinations of whether an impact is “substantial” should consider:
  - the number of ARNIs impacted, in terms of both abundance and diversity
  - the degree to which aquatic system functions will be impaired, such as reduced spawning and feeding area, alteration to hydrology of downstream flows, etc.
  - the significance of the impact on the ARNI
  - the significance of socio-economic impacts, including those in consumptive and non-consumptive sectors.
  - the cumulative and secondary effects of this impact with other impacts of similar nature or with similar or synergistic effects
  - the duration of the impact and the implications to ARNIs

## 100 NMFS Guidance: “Unacceptable”

- NMFS’ 2000 Guidance document on 404(q) elevations states that the following factors suggest an impact may be “unacceptable”:
  - when a practicable alternative exists, as defined in the CWA Section 404(b)(1) Guidelines
  - when insufficient mitigation is being required or monitoring is inadequate monitoring to ensure mitigation success
  - when aquatic habitat loss has not been avoided and minimized
  - when impacts are contrary to specific provisions of fishery management plans, watershed management plans, restoration plans, sanctuaries, recovery plans, etc.
  - when impacts are caused by a project with a questionable likelihood of success or the design of the proposed mitigation is questionable
  - when impacts create unacceptable secondary or cumulative risks to the environment beyond the initial impact
  - when a NEPA document is required, but was not done or is inadequate



## 101 Substantial and Unacceptable Impact



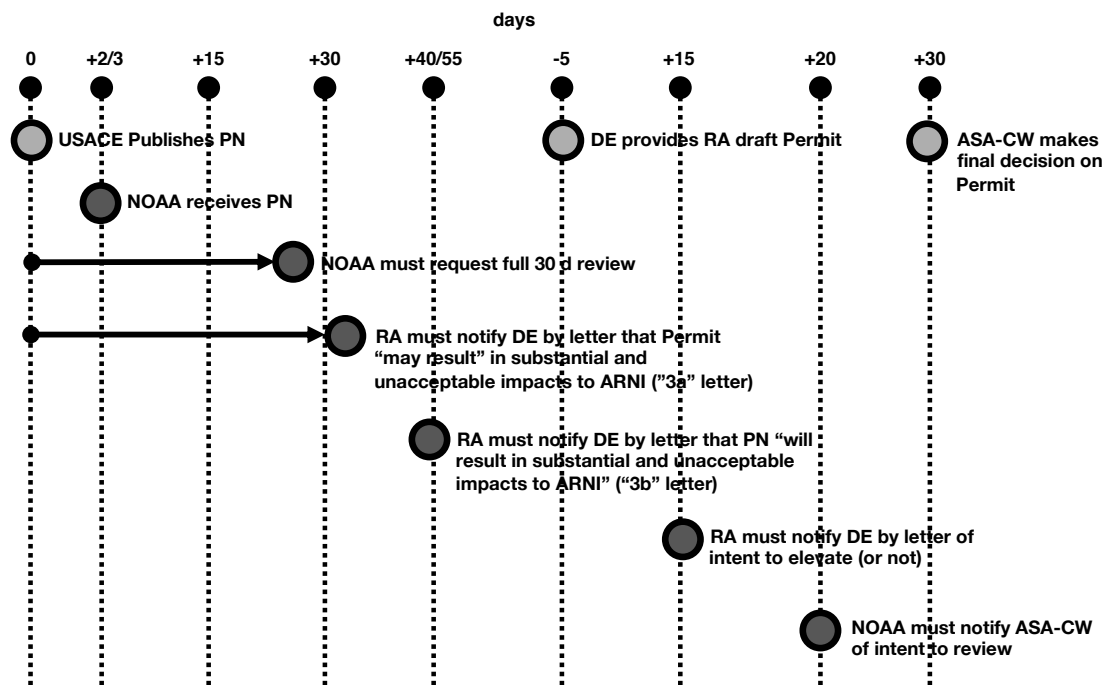
## 102 Effects Analyses

- Rigorous effects analyses
  - are supported by empirical data and other evidence
    - they consider the total evidence available (for and against a conclusion)
    - they present prior experience with similar cases
  - demonstrate familiarity with the affected area and its resources
  - explicitly address the four challenges of species- and habitat-based assessments
  - address whether individual-level effects have higher-level consequences
  - carefully construct "future with" and "future without" scenarios
  - directly address applicable agency standards and criteria
  - present the reasoned inferences of their authors based on their careful consideration of the evidence available

## 103 Support Effects Analyses with Priors

- Few water resource projects or activities that federal agencies permit or license are truly unique or novel
- It is rare to see an effects analysis in a FWCA Report, letter, planning aid letter, etc. that does not treat a project as the first of its kind
- Most categories of water resource projects and permitted activities have enough salient features in common to inform assessments of new proposals in the same category
  - How many dams, reservoirs, canals, dredging projects, channel-deepening projects, boat ramps, boat docks, bridges, and shoreline armoring projects has NOAA assessed since it was established?
  - What has NOAA learned from those earlier assessments and monitoring reports?
- Basing assessments on prior experience with actions of similar kind and effect are one of the most effective ways of supporting conclusions (good or bad)

## 104 404(q): Individual Permit Elevation Schedules



## 105 FWCA Evaluations Should Focus on CWA levers

- The primary levers available to NOAA during FWCA consultations on Clean Water Act permits are found in:
  - the purposes of the Clean Water Act
  - NEPA evaluations of CWA permits
  - 404(b)(1) guidelines
  - 404(q) MOA

## 106 CWA: Purposes and Policy

- The objective of the CWA is to **restore and maintain the chemical, physical, and biological integrity of the Nation's waters**
  - To achieve this objective it is hereby declared that, ...
    - it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985
    - it is the national goal that wherever attainable, an interim goal of water quality which **provides for the protection and propagation of fish, shellfish, and wildlife** and provides for recreation in and on the water be achieved by July 1, 1983
- CWA §101. (a)
- FWCA comment letters on USACE permits **should address the question of whether issuing the permit helps**
    - **restore and maintain the chemical, physical, and biological integrity of the Nation's waters**
    - **provide for the protection and propagation of fish, shellfish, and wildlife**

## 107 CWA: 404(b)(1) Guidelines

- The purpose of the guidelines is
  - to restore and maintain the chemical, physical, and biological integrity of waters of the United States
  - through the control of discharges of dredged or fill material

40 CFR 230.1(a)

- “Fundamental to these Guidelines is the precept that dredged or fill material **should not** be discharged into the aquatic ecosystem, **unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination** with known and/or probable impacts of other activities affecting the ecosystems of concern”

40 CFR 230.1(c)

## 108 CWA: 404(b)(1) Guidelines

- From a national perspective, **the degradation or destruction of special aquatic sites**, such as filling operations in wetlands, **is considered to be among the most severe environmental impacts covered by these Guidelines**. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.
- The terms **aquatic environment** and **aquatic ecosystem** mean **waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals**

40 CFR 230.1(d)

## 109 CWA: 404(b)(1) Guidelines

- **...no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem**, so long as the alternative does not have other significant adverse environmental consequences
- For the purpose of this requirement, practicable alternatives include, but are not limited to:
  - Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;
  - Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;
- An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes

40 CFR 230.10

## 110 CWA: 404(b)(1) Guidelines

- **...no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States**
- Effects contributing to significant degradation considered individually or collectively, include:
  - Significant adverse effects on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.
  - Significant adverse effects on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes
- Significant adverse effects on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy

40 CFR 230.10(c)

## 111 To Support Elevations FWCA letters should...

- Address the question of whether discharges of dredged or fill material **will cause or contribute to significant degradation of the waters of the United States**
  - the phrase “will cause” is key to any arguments FWCA letters present
  - establishing causal relationships between
    - the specific permit proposed and expected degradation
    - the degradation and NOAA Trust Resources (establishing that individual organisms “will” be exposed)
    - individual-level effects and higher-level ecological consequences
- FWCA assessments need to establish an expectation based on strong evidence
- specifically address the terms of art the USACE uses in its standards and criteria
- Regardless of whether or not NOAA intends to elevate cases, NOAA personnel responsible for reviewing permits should develop the expertise necessary to make these arguments

## 112 An Unused CWA Tool...

- 40 CFR 230.80 of the 404(b)(1) guidelines allows EPA and the USACE to identify sites that will be considered as:
  - possible future disposal sites, including existing disposal sites and non-sensitive areas; or
  - **areas generally unsuitable for disposal site specification**
- The latter of these areas will not be available for disposal site specification but do not prohibit applications for permits to discharge dredged or fill material in such areas
- Either type of identification constitutes information to facilitate individual or General permit application and processing
- **The (b)(1) Guidelines allow NOAA to ask EPA and the USACE to designate a specific area as unsuitable for placement of dredged or fill material**

## 113 A Case Example: Beaufort Sea Causeways



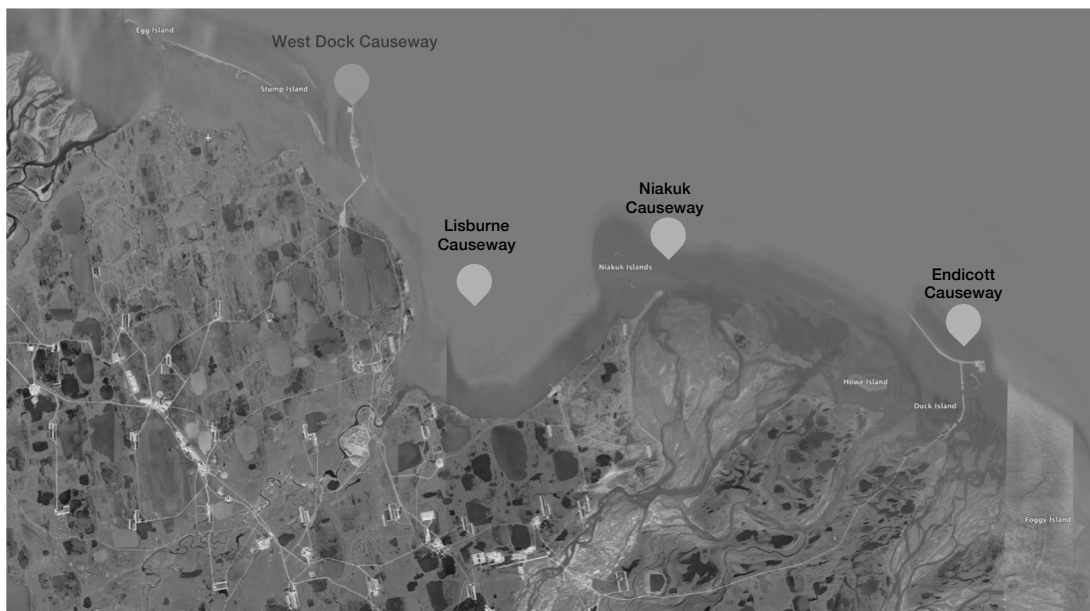
## 114 The Scenario

- **NOAA Trust Resources**
  - Arctic char, Arctic cisco, least cisco, broad whitefish
  - All of these fish are anadromous: they spawn in freshwater, overwinter in deep pools in river deltas, and migrate into nearshore waters during Arctic summers to feed
  - They are iteroparous
  - They generally remain in near the mouths of rivers and close to the coast where nearshore transport of fresh water allows them to feed in warmer water
- **The Issue**
  - Causeways disrupt the flow of fresh water in river mouths and along the coast
  - They
    - prevent these trust resources from migrating effectively between river systems
    - substantially disrupt their ability to forage

## 115 The Permits

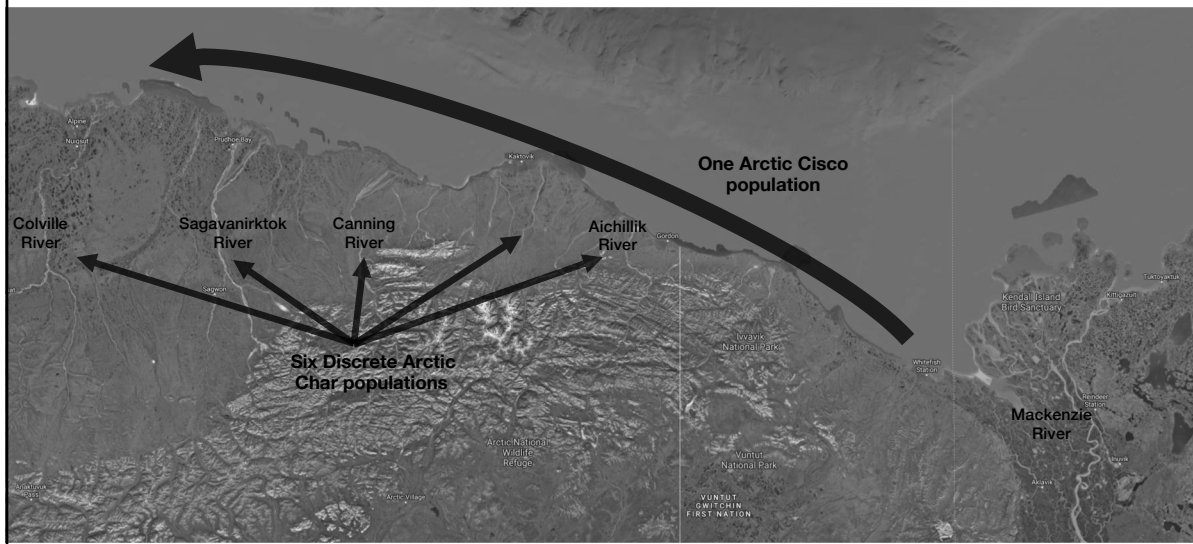
- The West Dock causeway was completed during Phase 1 of the 404 program so it was not subjected to the full public interest review
- The primary mitigation measure was an opening in the causeway that was believed to allow fish migration and eliminate any temperature or salinity gradient the causeway created
- The causeway and the breach were monitored. The monitoring data demonstrated that
  - the causeway created a substantial gradient and prevented fish from migrating east to west
  - any different the “mitigation” made was not meaningful to the fish
- Over a 5-year period, the USACE proposed to issue permits to authorize the construction of 3 more causeways: the Endicott Project, the Lisburne Project, and the Niakuk Project

## 116 A Case Example: Beaufort Sea Causeways





## 117 A Case Example: Beaufort Sea Causeways



## 118 NOAA FWCA Comments

- NOAA Fisheries recommended denial of the Endicott Project and invoked 404(q)
- To establish cause and effect, the FWCA letter invoked monitoring data from the West Dock causeway as well as similar data from a suite of other causeways throughout the USA, Canada, and a few locations in Europe
- Because the project was large, NOAA's FWCA letter did not have to demonstrate that the initial effect was "large" but NMFS had to establish that the consequences for the four fish species was large
- NOAA's FWCA letter focused on establishing the permit issuance would
  - degrade waters of the US as evidenced by its probable effect on anadromous fish
  - the anadromous fish were an ARNI (ecological and subsistence values)
  - that the permit would affect individuals and that those effects would have population level consequences (up to 50% reduction in distribution and abundance)
  - the proposed mitigation would be insufficient to avoid or minimize these effects
  - and there were viable, non-water-dependent alternatives

## 119 What is the Point of This Case Study?

- The FWCA is most effective when NOAA's assessments uses biology, ecology, and data to directly address the four challenges of species- and habitat-based risk assessments
  - Explicitly identify the causal links between an action and its effects (degradation of waters of the US, change in habitat, response of individuals, consequence for populations, species, or ecosystems)
  - Address the proportionality of cause and effect incrementally
    - that a habitat change is sufficient to affect individuals
    - that effects on individuals is sufficient to affect populations, species, etc.
  - Address the problem of abundance and ubiquity by recognizing population structure and habitat discontinuity, where it exists
  - Invoke as much data and information on priors as you can find
  - Think several moves ahead

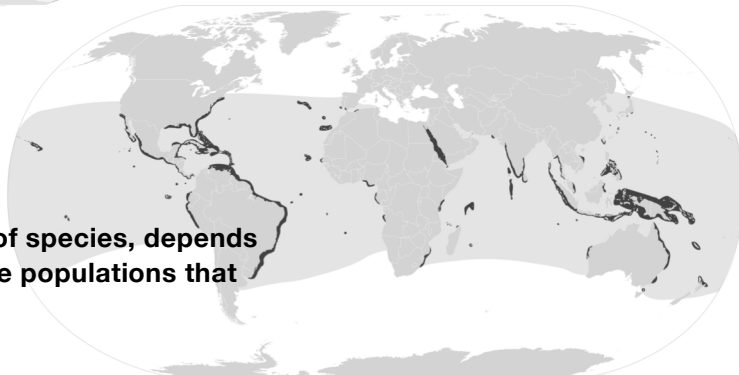
## 120 Address the Problem of Abundance and Ubiquity



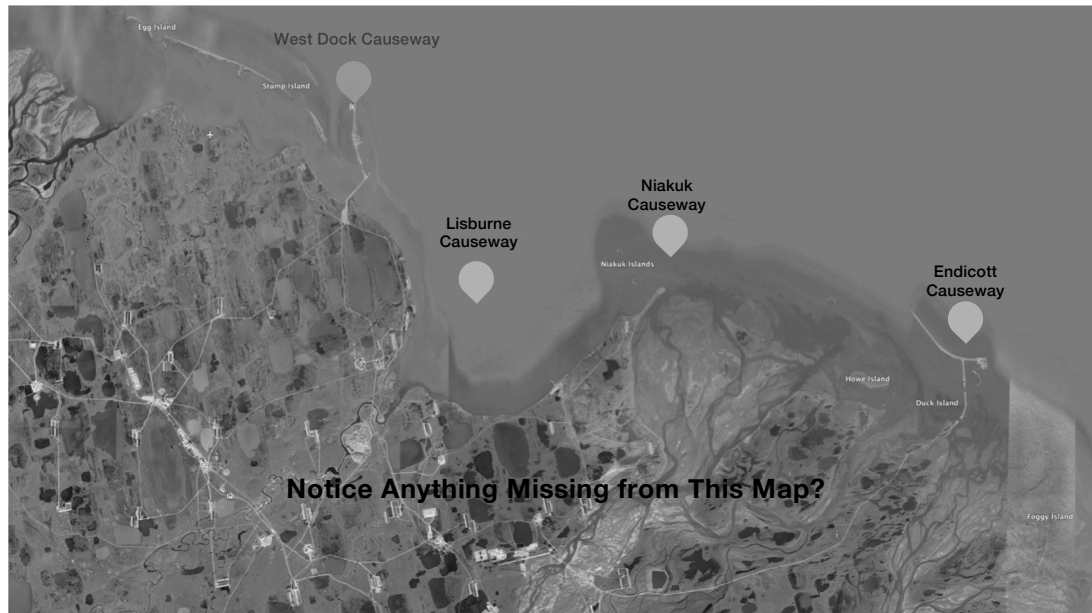
**What initially appears to be ubiquity....**

**... Really isn't...**

**... and the fate of species, depends on the fate of the populations that comprise them**



## 121 **A Case Example: Beaufort Sea Causeways**



## **Module 6.** **Using The Fish and Wildlife** **Coordination Act Effectively**

March 2020 | Portland, OR/Sacramento, CA

## 123 In Module 6...

- We will discuss...
  - How to use the FWCA to fullest effect
  - Policy Development
  - Infrastructure Development to Support Field Operations
  - Using “Test Cases” to Support Policy Development

## 124 Using the FWCA to Fullest Effect

- To use the FWCA to fullest effect:
  1. Understand other agency statutes and regulations
  2. Do not miss statutory, regulatory, or other agency milestones
  3. Conduct rigorous effects analyses that
    - are supported by empirical data and other evidence
    - demonstrate familiarity with the affected area and its resources
    - directly address the four challenges of species- and habitat-based analysis
    - directly address applicable agency standards and criteria, particularly on matters of the significance of effects
  4. Present strategic arguments
  5. Build coalitions
  6. Build public support (beyond traditional interest groups)

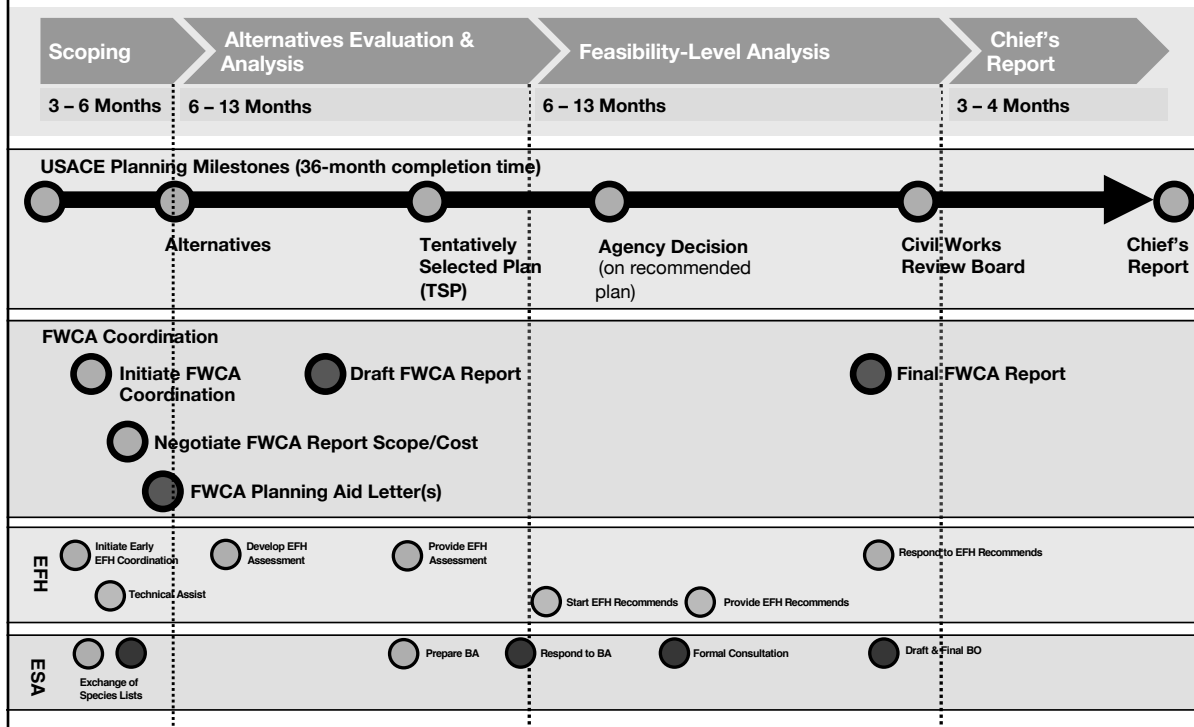
## 125 Understand Other Agency Procedures & Practices

- To use the FWCA effectively you need to become very familiar with the procedures, practices, and standards that apply to the statutes that authorize agency actions
- Specifically:
  - Water Resources Development Act, particularly how
    - USACE
    - BOR, and
    - FERC implement it
  - NEPA
  - Clean Water Act
  - Federal Power Act
  - the standards, criteria, and terms of art the different agencies use to describe and assess ecological effects
  - Section 706 of the Administrative Procedure Act (5 U.S.C 706)

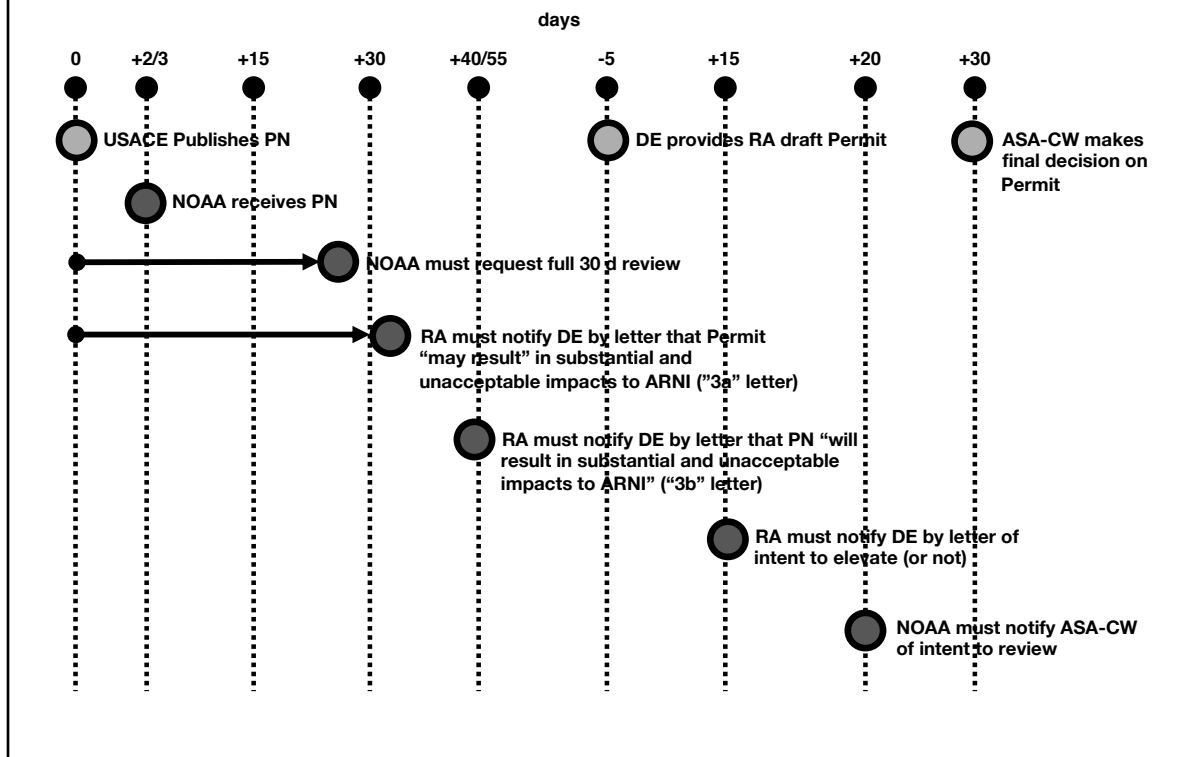
## 126 Section 706 of the APA

- Every action and every decision federal agencies make is subject to potential review under the Administrative Procedure Act
- The Administrative Procedure Act [5 USC 706] allows courts to
  1. Compel agency action that is unlawfully withheld or unreasonably delayed
  2. Hold unlawful and set aside agency actions, findings, and conclusions that are found to be —
    - a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
    - b. contrary to constitutional right, power, privilege or immunity;
    - c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
    - d. without observance of procedure required by law....

## 127 Do Not Miss Schedules or Milestones



## 128 404(q): Individual Permit Elevation Schedules



## 129 **Policy Development to Support FWCA Activities**

- Policy and guidance
  - on the FWCA and how to employ it in water resource development projects, permits, and licensing, including
    - standard formats for planning aid letters, FWCA reports, NEPA comments, etc.
    - on data analysis and presentation
    - on evaluating effects
  - on the definition of an “aquatic resource of national importance”
  - on how to determine whether an effect is “substantial and unacceptable”
  - on transfer funding
  - on the conduct of field investigations (including study design)

## 130 **USFWS Evaluation Framework for FWCA**

1. Specify the resources likely to be impacted
2. Adopt an evaluation method or methods
3. Define the baseline condition and significant resources likely to be impacted
4. Determine the most probable future resource conditions without the project
5. Define resource problems, opportunities, and planning objectives
6. Define the alternatives
7. Determine the most probable future resource conditions with project alternatives
8. Define impacts
9. Evaluate and compare alternatives
10. Formulate conservation measures and the FWS alternative
11. Develop recommendations
12. Establish the FWS position
13. Write the report

## 131 Policy Development on Water Resource Planning

- Policy and guidance on
  - how to employ the FWCA in water resource development projects, permits, and licensing, including
    - standard reporting formats for FWCA reports and planning aid letters
    - all of these documents are presented on behalf of the Secretary of Commerce so they should appear to have a common origin
  - assessing the effects of water resource development projects, including
    - dealing with the challenges of species- and habitat-based assessments
    - the effects of climate-change related phenomena on “future with” and “future without” projections
    - cumulative effects

## 132 USACE WRDA Planning

- The USACE has an extensive body of policy and guidance that applies to its civil works and regulatory programs
- These documents can change regularly based on internal and Congressional direction and lessons learned
  - USACE guidance documents include Guidance Memos, Planning Bulletins, Planning Engineer Circulars, Planning Engineer Manuals, Planning Engineer Pamphlets, Planning Engineer Regulations, Planning Guidance Letters, Policy Guidance Letters and Reports and Manuals
  - Some of these are promulgated in law (WRDA)
  - Some of these are promulgated in regulation
- Someone needs to keep track of and maintain expertise on these documents

<https://planning.eric.dren.mil/toolbox/library.cfm?Option=Start>



## 133 USACE WRDA Planning

<https://planning.erdc.dren.mil/toolbox/project.cfm?OptionsStart&Start=0>

**PLANNING LINKS**

**Request for Federal Engagement Study Initiation Phase**

- 1: Initial Problem Identification
- 2: Congressional Study Authority
- 3: Letter of Intent from Sponsor
- 4: Congress Appropriates Study Funds

**Feasibility**

- 5: Execute Feasibility Cost Share Agreement and Secure Sponsor Study Funding
- 6: Scope and Conduct Study
- 7: Release Draft Feasibility Report for Concurrent Review
- 8: Complete Final Feasibility Report for Coordination and Submission
- 9: Policy Review of Final Feasibility Report
- 10: Federal and State Agency Review
- 11: Sign Chief of Engineer's Report
- 12: Administration Review of Chief of Engineer's Report

**Pre-Construction Engineering and Design (PED)**

- 13: Congress Appropriates PED Funds
- 14: Execute Design Agreement and Secure Sponsor Design Funding

**Water Resources Project Delivery**

The Water Resources Project Delivery process is a key element of the Civil Works mission and includes planning, designing, and constructing water resources infrastructure needed by the nation.

Project delivery is a multi-step process: a Congressionally authorized feasibility study evaluates alternatives and makes a recommendation for a federal project; if that project is then authorized " and funding appropriated " it can be constructed after executing a Project Partnership Agreement. After construction, the project transitions to a local partner for operations and maintenance. The U.S. Army Corps of Engineers primary mission areas are coastal and inland flood risk management; navigation, and aquatic ecosystem restoration. Congress can also authorize the Corps to develop hydropower, recreation, and other environmental infrastructure projects.

Project delivery - the project-focused feasibility studies and new construction - is just one element of Corps water resources activities. Under our Civil Works mission, we partner with local communities and stakeholders every day to support regional watershed planning activities; deliver technical assistance and local planning support through the Flood Plain Management Services Program and Planning Assistance to States; and assess, communicate, and manage risk through our Flood Risk Management, Levee Safety, and Dam Safety Programs.

The navigation on the left provides a description as well as key policy and guidance associated with the development and delivery of Civil Works projects that provide a value to the nation.

Key Guidance for Corps Planners	Additional Resources
<ul style="list-style-type: none"> <li>Principles, Requirements and Guidelines for Water and Land Related Resources Implementation</li> </ul>	<ul style="list-style-type: none"> <li>Report to Congress on Future Water Resources Development Fact Sheet (2019)</li> </ul>

## 134 Policy & Guidance on Transfer Funding

- Policy and guidance on transfer funding should explicitly address
  - preparing Plans of Study
  - negotiating costs and schedules with the action agencies
  - preparing Letters of Agreement (and Regional MOAs)
  - preparing scopes of work and funding agreements
  - preparing funding estimates
  - calculating standard overhead costs
  - what to do in the event of default (e.g., NOAA cannot complete a study)
  - guidance on calculating "staff-day costs"

## 135 Calculating “Staff-Day Costs”

- **Step 1:** Calculate total office costs (results should be in FY dollars)

Position	Grade/Step	Base Salary	Benefits	Total
Supervisor	ZP-x	xxx,xxx	xx,xxx	
Assistant Supervisor		xxx,xxx		
⋮				
Administrative staff		xx,xxx		
⋮				
Biological staff		xxx,xxx		
⋮				
<b>Total salaries</b>		xxx,xxx		xxx,xxx
<b>Office operating costs</b>		xxx,xxx		xx,xxx
<b>Travel costs</b>		xxx,xxx		xx,xxx
<b>Total office cost</b>		xxx,xxx		xxx,xxx

## 136 Calculating “Staff-Day Costs”

- **Step 2:** Calculate total office days (results should be in days)

Position	Staff-Days	Annual Leave	Sick Leave	Holiday Leave	Supervisor & Clerical	Administrative Work
Supervisor						
Assistant Supervisor						
Support staff						
Administrative staff						
<b>Support Sub-total</b>						
Biological staff						
⋮						
⋮						
<b>Biologist sub-total</b>						
<b>Total Office Days</b>		<b>Annual Leave Total (in days)</b>	<b>Sick Leave Total (in days)</b>	<b>Holiday Leave Total (in days)</b>		
		<b>% of Biologist Time Devoted to Leave</b>			<b>% of Total Office Time Devoted to Support Services</b>	<b>% of Biologist Time Devoted to Administrative Work</b>

## 137 Calculating “Staff-Day Costs”

- Example calculation of “average staff-day cost”
  - Project requires 100 staff days of direct biologist effort (for the purposes of illustration, I’ll assume 16% of the biologists’ time is devoted to leave and 11% is devoted to administrative responsibilities, so other effort = 27%)
  - 100 staff days of dedicated effort requires 137 staff days ( $= 100 \div 1 - 0.27$ )
  - Support services represent 30% of total office time so 137 days of biologist time = 196 days of total office time ( $= 137 \div 1 - 0.30$ )
  - Staff day cost = Total Office Cost (from Step 1)  $\div$  Total Office Days (from Step 2)
  - Project cost = 196 \* Staff Day Cost + % Overhead

## 138 An Alternative Approach

- Calculate total project costs based on positions assigned to the project (results should be in FY dollars)

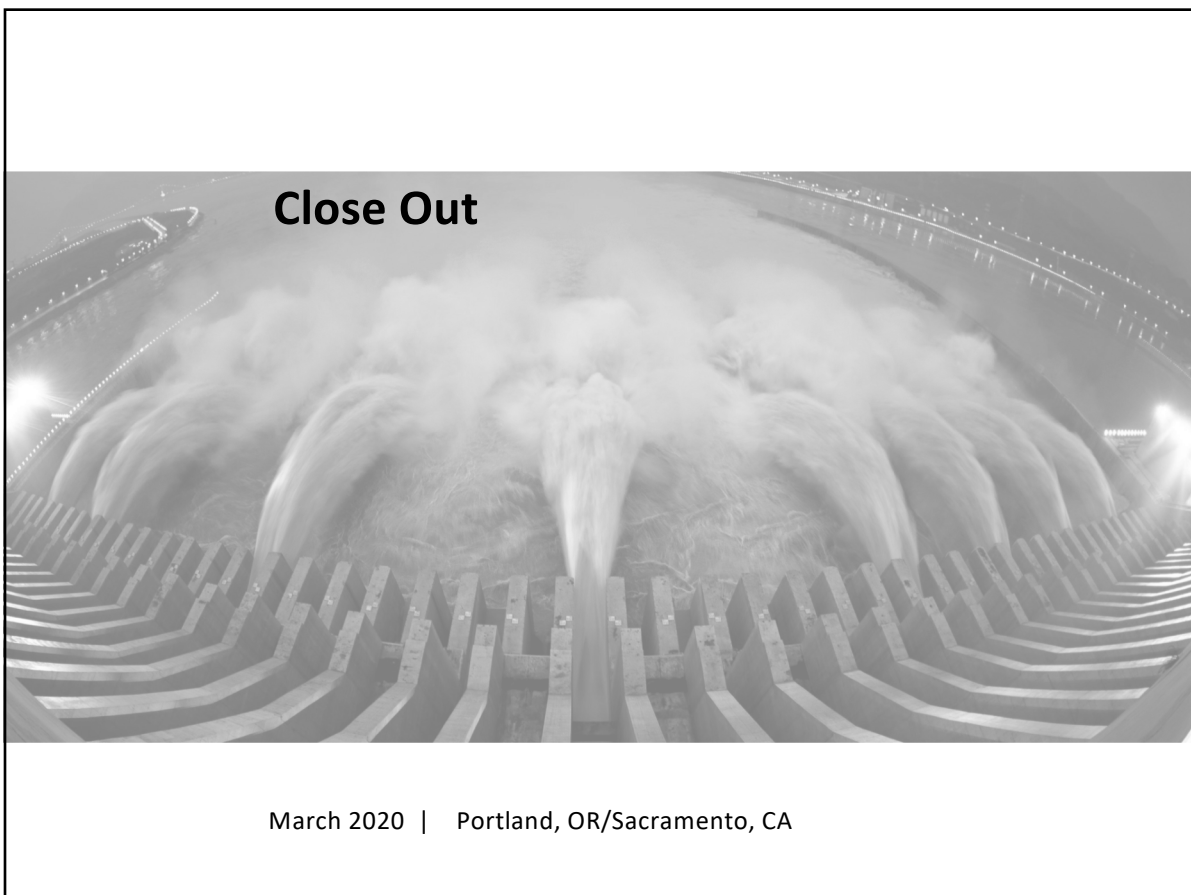
Positions Assigned to Project	Equivalent Hourly Rate	Hours Allocated to Project	Position Cost
Project manager	xxx,xxx	xxx	x,xxx
Biologist 1			
Biologist 2			
⋮			
Administrative 1			
⋮			
<b>Total Staff Cost</b>			<b>A</b>
<b>Travel &amp; Equipment Cost</b>		xxx,xxx	xx,xxx
<b>Office Overhead</b>		(= A $\times$ OH%)	xx,xxx
<b>Other Overhead (region, HQ)</b>		(= A $\times$ OH%)	xx,xxx
<b>Total project cost</b>			xxx,xxx

Equivalent hourly rate = (base salary+benefits)/(total work days+leave days)

Costs of project management, support staff, etc. are included in overhead calculation

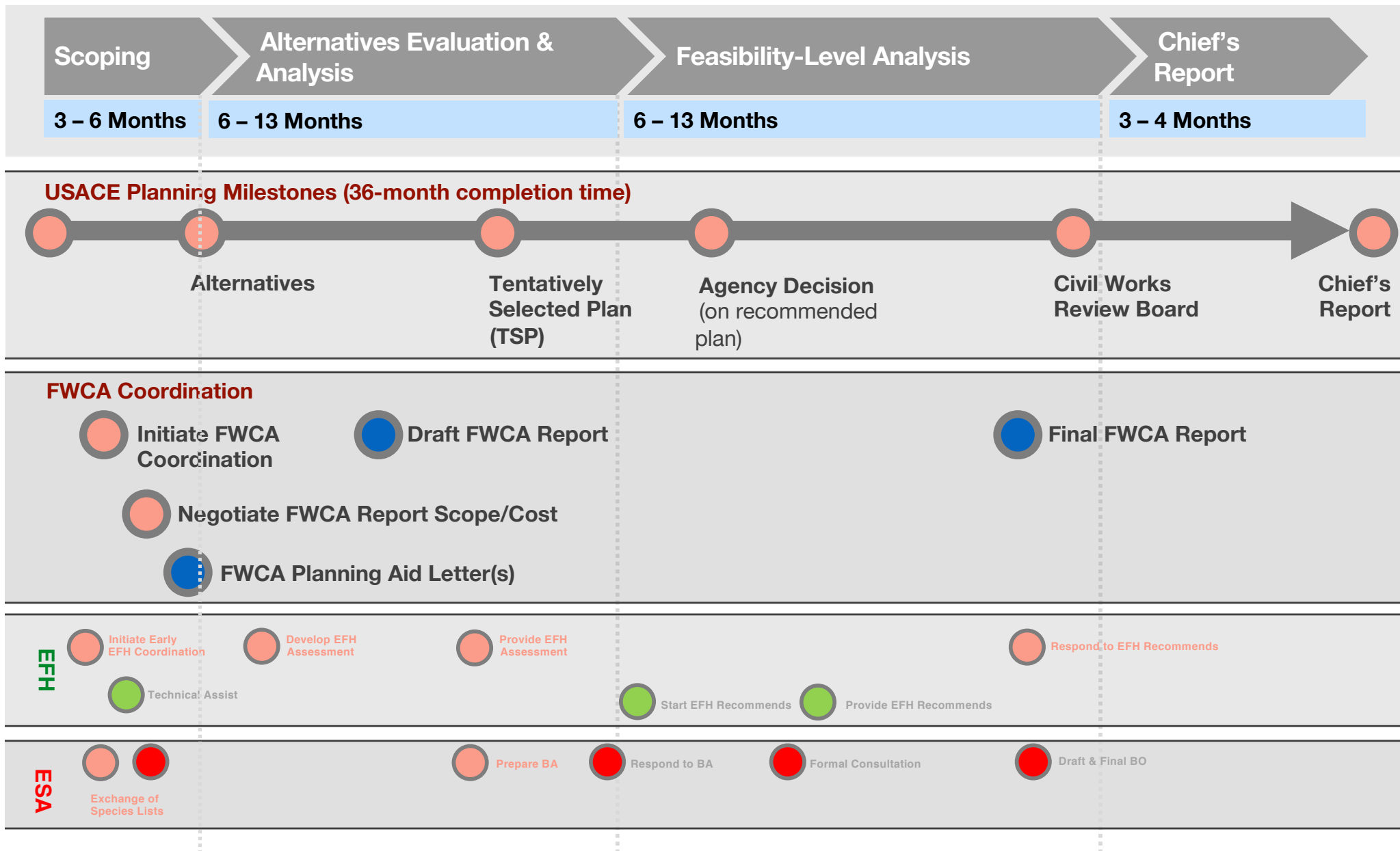
## 139 Infrastructure for Field Operations

- Transfer funds typically support the development and preparation of FWCA Reports, which are often based on field studies
- Executing those studies will typically require (not an exhaustive list):
  - Staff who hold relevant Federal/State/Tribal collection permits (including ESA 10(a)(1)(A) and MMPA permits, where applicable)
  - Staff with applicable safety certifications (e.g., FAA for airborne surveys, etc.)
  - Staff with expertise on study design, sample collection, managing field operations, sample analysis, data analysis, and data presentation
  - Development of the infrastructure necessary to support field operations and sampling (i.e., boats, dedicated vehicles, sampling gear (with places to store this equipment; lab spaces necessary to process samples; legally-compliant changing rooms, gear lockers, etc.)
  - Administrative staff who are trained to support field operations (including communications)



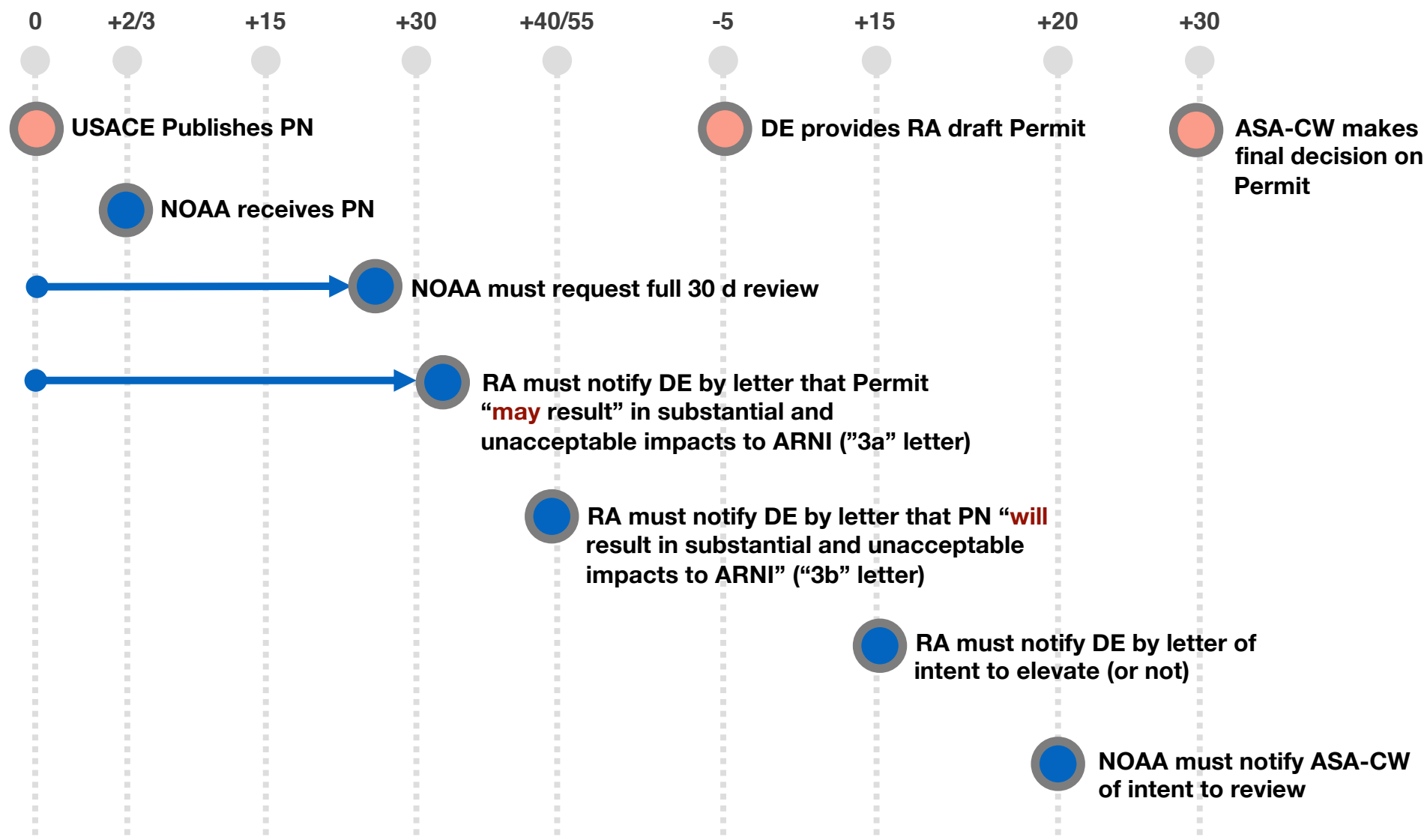
## Full Size Flow Charts

## 52 Feasibility Phase Milestones



## 128 404(q): Individual Permit Elevation Schedules

days



## **The Fish and Wildlife Coordination Act of 1958**



"(1) to civilian or Armed Forces supply or procurement officers and employees of the Federal Government ordering, procuring, or purchasing such knives in connection with the activities of the Federal Government;

"(2) to supply or procurement officers of the National Guard, the Air National Guard, or militia of a State, Territory, or the District of Columbia ordering, procuring, or purchasing such knives in connection with the activities of such organizations;

"(3) to supply or procurement officers or employees of the municipal government of the District of Columbia or of the government of any State or Territory, or any county, city, or other political subdivision of a State or Territory, ordering, procuring, or purchasing such knives in connection with the activities of such government; and

"(4) to manufacturers of such knives or bona fide dealers therein in connection with any shipment made pursuant to an order from any person designated in paragraphs (1), (2), and (3).

The Postmaster General may require, as a condition of conveying any such knife in the mails, that any person proposing to mail such knife explain in writing to the satisfaction of the Postmaster General that the mailing of such knife will not be in violation of this section."

Requirement for mailing.

SEC. 6. This Act shall take effect on the sixtieth day after the date of its enactment.

Effective date.

Approved August 12, 1958.

## Public Law 85-624

### AN ACT

August 12, 1958  
[H. R. 13138]

To amend the Act of March 10, 1934, to provide for more effective integration of a fish and wildlife conservation program with Federal water-resource developments, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of March 10, 1934, as amended, and as further amended by this Act may be cited as the "Fish and Wildlife Coordination Act".

Fish and Wildlife Coordination Act.

SEC. 2. The first four sections of the Act entitled "An Act to promote the conservation of wildlife, fish, and game, and for other purposes", approved March 10, 1934 (16 U. S. C., secs. 661-664, inclusive) are amended to read as follows:

48 Stat. 401.

"For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that 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 and rehabilitation for the purposes of this Act in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including

Wildlife conservation.

Cooperation of agencies.

Surveys and investigations.

Donations.

Interagency water control consultation.

Reports and recommendations.

Modification of projects.

easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of this Act; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of this Act.

"SEC. 2. (a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of 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 water-resource development.

"(b) In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which this Act applies. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

"(c) Federal agencies authorized to construct or operate water-control projects are hereby authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 3 of this Act, in order to accommodate the means and measures for such conservation of wildlife resources as an in-



tegral part of such projects: *Provided*, That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interests.

“(d) The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes of this section shall constitute an integral part of the cost of such projects: *Provided*, That such cost attributable to the development and improvement of wildlife shall not extend beyond those necessary for (1) land acquisition, (2) modification of the project, and (3) modification of project operations; but shall not include the operation of wildlife facilities nor the construction of such facilities beyond those herein described: *And provided further*, That, in the case of projects authorized to be constructed, operated, and maintained in accordance with the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), the Secretary of the Interior, in addition to allocations made under section 9 of the Reclamation Project Act of 1939 (53 Stat. 1187), shall make findings on the part of the estimated cost of the project which can properly be allocated to means and measures to prevent loss of and damage to wildlife resources, which costs shall not be reimbursable, and an appropriate share of the project costs may be allocated to development and improvement of wildlife resources, with a finding as to the part of such allocated costs, if any, to be reimbursed by non-Federal fish and wildlife agencies or interests.

“(e) In the case of construction by a Federal agency, that agency is authorized to transfer to the United States Fish and Wildlife Service, out of appropriations or other funds made available for investigations, engineering, or construction, such funds as may be necessary to conduct all or part of the investigations required to carry out the purposes of this section.

“(f) In addition to other requirements, there shall be included in any report submitted to Congress supporting a recommendation for authorization of any new project for the control or use of water as described herein (including any new division of such project or new supplemental works on such project) an estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conservation relating to the development and improvement of wildlife), the part of the cost of joint-use facilities allocated to wildlife, and the part of such costs, if any, to be reimbursed by non-Federal interests.

“(g) The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized before or after the date of enactment of the Fish and Wildlife Coordination Act for planning

Project costs.

43 USC 371 and note.

43 USC 485h.

Transfer of funds.

Estimation of benefits.

Applicability.

or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure.

Exceptions.

“(h) The provisions of this Act shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

Wildlife resources.

“SEC. 3. (a) Subject to the exceptions prescribed in section 2 (h) of this Act, whenever the waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision, consistent with the primary purposes of such impoundment, diversion, or other control, shall be made for the use thereof, together with any areas of land, water, or interests therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 2 of this Act.

“(b) The use of such waters, land, or interests therein for wildlife conservation purposes shall be in accordance with general plans approved jointly (1) by the head of the particular department or agency exercising primary administration in each instance, (2) by the Secretary of the Interior, and (3) by the head of the agency exercising the administration of the wildlife resources of the particular State wherein the waters and areas lie. Such waters and other interests shall be made available, without cost for administration, by such State agency, if the management of the properties relate to the conservation of wildlife other than migratory birds, or by the Secretary of the Interior, for administration in such manner as he may deem advisable, where the particular properties have value in carrying out the national migratory bird management program: *Provided*, That nothing in this section shall be construed as affecting the authority of the Secretary of Agriculture to cooperate with the States or in making lands available to the States with respect to the management of wildlife and wildlife habitat on lands administered by him.

Report to Congress.

“(c) When consistent with the purposes of this Act and the reports and findings of the Secretary of the Interior prepared in accordance with section 2, land, waters, and interests therein may be acquired by Federal construction agencies for the wildlife conservation and development purposes of this Act in connection with a project as reasonably needed to preserve and assure for the public benefit the wildlife potentials of the particular project area: *Provided*, That before properties are acquired for this purpose, the probable extent of such acquisition shall be set forth, along with other data necessary for project authorization, in a report submitted to the Congress, or in the case of a project previously authorized, no such properties shall be acquired unless specifically authorized by Congress, if specific authority for such acquisition is recommended by the construction agency.

"(d) Properties acquired for the purposes of this section shall continue to be used for such purposes, and shall not become the subject of exchange or other transactions if such exchange or other transaction would defeat the initial purpose of their acquisition.

"(e) Federal lands acquired or withdrawn for Federal water-resource purposes and made available to the States or to the Secretary of the Interior for wildlife management purposes, shall be made available for such purposes in accordance with this Act, notwithstanding other provisions of law.

"(f) Any lands acquired pursuant to this section by any Federal agency within the exterior boundaries of a national forest shall, upon acquisition, be added to and become national forest lands, and shall be administered as a part of the forest within which they are situated, subject to all laws applicable to lands acquired under the provisions of the Act of March 1, 1911 (36 Stat. 961), unless such lands are acquired to carry out the National Migratory Bird Management Program.

National forest lands.

16 USC 480-563, *passim*.

Rules and regulations.

"SEC. 4. Such areas as are made available to the Secretary of the Interior for the purposes of this Act, pursuant to sections 1 and 3 or pursuant to any other authorization, shall be administered by him directly or in accordance with cooperative agreements entered into pursuant to the provisions of the first section of this Act and in accordance with such rules and regulations for the conservation, maintenance, and management of wildlife, resources thereof, and its habitat thereon, as may be adopted by the Secretary in accordance with general plans approved jointly by the Secretary of the Interior and the head of the department or agency exercising primary administration of such areas: *Provided*, That such rules and regulations shall not be inconsistent with the laws for the protection of fish and game of the States in which such area is situated (16 U. S. C., sec. 664): *Provided further*, That lands having value to the National Migratory Bird Management Program may, pursuant to general plans, be made available without cost directly to the State agency having control over wildlife resources, if it is jointly determined by the Secretary of the Interior and such State agency that this would be in the public interest: *And provided further*, That the Secretary of the Interior shall have the right to assume the management and administration of such lands in behalf of the National Migratory Bird Management Program if the Secretary finds that the State agency has withdrawn from or otherwise relinquished such management and administration."

60 Stat. 1080.

SEC. 3. The Watershed Protection and Flood Prevention Act, as amended (16 U. S. C., secs. 1001-1007, inclusive), is amended by adding at the end thereof the following new section:

Watershed protection and flood prevention.  
68 Stat. 666.

"SEC. 12. When the Secretary approves the furnishing of assistance to a local organization in preparing a plan for works of improvement as provided for in section 3:

"(1) The Secretary shall so notify the Secretary of the Interior in order that the latter, as he desires, may make surveys and investigations and prepare a report with recommendations concerning the conservation and development of wildlife resources and participate, under arrangements satisfactory to the Secretary of Agriculture, in the preparation of a plan for works of improvement that is acceptable to the local organization and the Secretary of Agriculture.

Report with recommendations.

"(2) Full consideration shall be given to the recommendations contained in any such report of the Secretary of the Interior as he may submit to the Secretary of Agriculture prior to the time the local organization and the Secretary of Agriculture have agreed on a plan for works of improvement. The plan shall include such of

Works of improvement.

the technically and economically feasible works of improvement for wildlife purposes recommended in the report by the Secretary of the Interior as are acceptable to, and agreed to by, the local organization and the Secretary of Agriculture, and such report of the Secretary of the Interior shall, if requested by the Secretary of the Interior, accompany the plan for works of improvement when it is submitted to the Secretary of Agriculture for approval or transmitted to the Congress through the President.

Cost.

"(3) The cost of making surveys and investigations and of preparing reports concerning the conservation and development of wildlife resources shall be borne by the Secretary of the Interior out of funds appropriated to his Department."

Appropriation.

SEC. 4. There is authorized to be appropriated and expended such funds as may be necessary to carry out the purposes of this Act.

Approved August 12, 1958.

## Public Law 85-625

### AN ACT

August 12, 1958  
[S. 3778]

To amend the Interstate Commerce Act, as amended, so as to strengthen and improve the national transportation system, and for other purposes.

Transportation  
Act of 1958.

*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 "Transportation Act of 1958".

### AMENDMENT TO INTERSTATE COMMERCE ACT, RELATING TO LOAN GUARANTIES

56 Stat. 284.  
49 USC 1001.

SEC. 2. The Interstate Commerce Act, as amended, is amended by inserting immediately after part IV thereof the following new part:

#### "PART V

#### "PURPOSE

"SEC. 501. It is the purpose of this part to provide for assistance to common carriers by railroad subject to this Act to aid them in acquiring, constructing, or maintaining facilities and equipment for such purposes, and in such a manner, as to encourage the employment of labor and to foster the preservation and development of a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

#### "DEFINITIONS

"SEC. 502. For the purposes of this part—

"(a) The term 'Commission' means the Interstate Commerce Commission.

"(b) The term 'additions and betterments or other capital expenditures' means expenditures for the acquisition or construction of property used in transportation service, chargeable to the road, property, or equipment investment accounts, in the Uniform System of Accounts prescribed by the Interstate Commerce Commission.

"(c) The term 'expenditures for maintenance of property' means expenditures for labor, materials, and other costs incurred in maintaining, repairing, or renewing equipment, road, or property used in transportation service chargeable to operating expenses in accordance with the Uniform System of Accounts prescribed by the Commission.



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**SYSTEMATIC**ECOLOGY