



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

OCT - 6 1978

Mr. Joseph M. Hendrie  
Chairman, Nuclear Regulatory  
Commission  
U.S. Department of Energy  
1717 H Street, N.W.  
Washington, D.C. 20555

Dear Mr. Hendrie:

As directed by the President's Water Policy Initiatives issued July 12, 1978, the Departments of the Interior and Commerce are preparing joint regulations under the Fish and Wildlife Coordination Act (FWCA). A Notice of Intent to Propose Rules was published in the Federal Register on Friday, September 29, 1978.

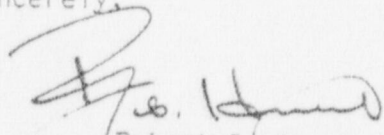
These FWCA rules could potentially affect your programs either because (1) your water-related activities are directly regulated by the FWCA, (2) you issue water-related permits or licenses, or (3) you, or applicants to your agency, are required to obtain water-related permits or licenses.

The task of meeting the President's objectives will require positive co-operation among the agencies concerned during the development and approval of rules and implementing procedures. I assure you that the views of affected Federal agencies will be sought and carefully considered at every stage of the rulemaking process. This will be an important step toward realizing the President's objective of coordinating and simplifying environmental review requirements.

Please designate a representative who can explain how the FWCA has been implemented within your agency and will supply orders, directives, agency opinions, regulations, and interpretive legal memoranda. The representative should be able to discuss any timing problems presented by the timetable set forth in the President's Water Policy Initiative for your issuance of implementing procedures. We also encourage you to respond to the questions contained in the Notice of Intent to Propose Rules prior to October 15, 1978.

Please have your representative contact Thomas J. Bond, at (202) 376-8121, to establish a meeting date within the coming month.

Sincerely,

  
Robert L. Herber  
Assistant Secretary for Fish and  
Wildlife and Parks

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parts are due by October 16, 1978, and 20 days thereafter, replies by respondents and all other participants.

**ADDRESSES:** Participation statements and pleadings should be sent to: Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423.

**FOR FURTHER INFORMATION CONTACT:**

Janice M. Rosenak, or Harvey Gobeiz, phone: 202-275-7693.

By notice of proposed rulemaking, 345 L.C.C. 2971, published in the *FEDERAL REGISTER* on August 1, 1978 (43 FR 33774), the Commission instituted this proceeding to establish performance standards governing terminal operations in the transportation of non-perishable commodities. Proposed regulations were set forth in the notice. The Commission indicated that this was not an adversary proceeding. Therefore, to expedite procedures and to avoid delay and expense, the Commission ordered only the filing of comments by respondents and interested parties 30 days from the date of publication of the notice of proposed rulemaking in the *FEDERAL REGISTER*. The Commission further ordered that one set of these comments be made available in the Secretary's Office for public inspection during regular business hours of the Commission. By decision served August 24, 1978, and by *FEDERAL REGISTER* notice published on August 30, 1978 (43 FR 38736), an extension of time for the filing of comments, requested by certain railroad respondents, was granted to all parties to October 16, 1978.

On September 6, 1978, the Commission received a letter from the North Dakota Public Service Commission (NDPSC). This letter was made part of the initial comment filed in this proceeding by NDPSC on August 28, 1978. NDPSC requested the Commission to develop and serve a participation list in this proceeding; order all parties to cross-service their pleadings; and make provision for the filing of the replies to the initial comments.

In view of the importance of this proceeding, the extension of time granted for the filing of comments, and the fact that many parties do not have the ability to visit the Secretary's Office and review the comments, the requests made by NDPSC are granted.

Persons interested in participating in this proceeding shall comply with the instructions and time schedule as set forth under "Dates".

Issued in Washington, D.C., September 13, 1978.

By the Commission, Chairman O'Neal.

WILLIAM W. GARNER, Solicitor  
500, 5th St., N.W., Washington, D.C. 20540  
FPR Doc. 78-27685 Filed 9-28-78; 10:51 AM

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## DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Office of the Secretary

[50 CFR Part 403]

FISH AND WILDLIFE COORDINATION ACT

Notice of Intent to Proposed Rules

AGENCY: National Oceanic and Atmospheric Administration, Commerce, Office of the Secretary, Interior.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: In this water policy memorandum dated July 12, 1978, President Carter directed the Departments of Commerce and the Interior to publish regulations to implement the Fish and Wildlife Coordination Act. The Act concerns the conservation of wildlife in projects involving the control or modification of any stream or other body of water. Public, Congressional, State, and Federal comment is requested to assist these agencies in preparing proposed rules to implement the Act. (FWCA, Pub. L. 95-624, 72 Stat. 563, 16 U.S.C. 661 et seq. (1976).)

DATE: Comments must be received by October 31, 1978. Responses will not be provided.

ADDRESS: Send written comments to William W. Garner, Office of the Solicitor, U.S. Department of the Interior, Room 6544, Washington, D.C. 20240, 202-348-2152.

FOR FURTHER INFORMATION CONTACT:

Karl P. Stutzman, Fish and Wildlife Service, U.S. Department of the Interior, Room 3251, Washington, D.C. 20240, 202-348-5715.

William W. Garner, Office of the Solicitor, U.S. Department of the Interior, Room 6544, Washington, D.C. 20240, 202-348-2152.

James R. Chambers, National Marine Fisheries Service, 3300 Whitehaven Street NW., Page Building II, Room 188, Washington, D.C. 20235, 202-634-7490.

Eric Erdheim, Office of General Counsel, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street NW., Page Building II, Room 400, Washington, D.C. 20235, 202-634-4224.

**SUPPLEMENTARY INFORMATION:** In a water policy memorandum dated July 12, 1978, President Carter directed that—

The Secretary of the Interior in cooperation with the Secretary of Commerce shall promulgate regulations by March 1, 1979, defining the requirements and procedures that must be met for fully complying with the Fish and Wildlife Coordination Act. . . . Then, not later than 3 months after promulgation of such final regulations, Federal agencies with consultative responsibilities under the . . . [FWCA] shall publish . . . separate procedures to be followed in implementing the regulations. . . . These procedures shall be reviewed, and if consistent with the regulations, approved within 60 days by the Secretary of the Interior.

The regulations referred to by the President (hereafter "rules") would be published jointly by the Secretaries of the Interior and Commerce using the rulemaking procedures for "significant rules" which are contemplated by Executive Order (E.O. 12044).

These rules will be joint rules because of the division of FWCA jurisdiction between the Departments of Commerce and the Interior made by Reorganization Plan No. 3 of 1970 (published in the appendix to Title 5, United States Code).

The FWCA requires Federal agencies (hereinafter "action agencies") which propose, or are authorized, to undertake the impoundment, diversion, deepening, or other control or modification of waters of any stream or other body of water, or which are asked to issue permits or licenses for such activity, to accord wildlife conservation equal consideration with other features of such projects throughout their planning and decisionmaking processes. It requires such agencies, or applicants to such agencies, to first consult with State and Federal wildlife agencies with a view to ascertaining what project facilities, operations, or measures may be considered necessary by those agencies to mitigate and compensate for project occasioned losses to wildlife resources, as well as to enhance those resources.

The FWCA further requires that the reports and recommendations on the wildlife aspects of such projects which are received by action agencies shall be presented to action agency decision-makers and (where applicable) the Congress, and that the action agencies shall give full consideration to those reports. Action Agencies are required to include in project plans such means and measures for wildlife conservation as they may find justifiable to obtain maximum overall project benefits, and the costs thereof are to be considered integral to those of the project.

Subject to certain project exceptions, the FWCA itself authorizes Fed-



eral agencies which have been authorized to construct or operate water control projects, to modify or add to project structures or operations, and to acquire lands, waters, or interest therein, in order to promote the conservation of wildlife resources associated with such projects.

#### NEED FOR FWCA REGULATIONS

Most action agencies have not adopted procedures implementing the FWCA. Where they have, there are disparities in interpretation and program emphasis, and there is often little opportunity for the public to participate in decisions by final action agency decisionmakers as to which wildlife conservation measures will be adopted. The FWCA vests that ultimate decisionmaking authority in the action agency, or, in the case of most Federal projects, the Congress.

Despite an increasing number of legal cases raising FWCA issues, this piecemeal approach is not as effective as regulations and has not provided the comprehensive level of FWCA compliance called for by the President. These rules should also advance the President's directive that Federal agencies should coordinate and simplify environmental review requirements.

#### MAJOR SUBJECT MATTER TO BE INCLUDED IN FWCA RULES

It is not the purpose of this notice to describe the proposed content of the rules in any detail. However, it is anticipated that these rules will include—

(a) Interpretive rules resolving differing constructions of the FWCA and procedures for consultation on wildlife conservation needs among State and Federal wildlife agencies, project agencies, and the Congress.

(b) Procedures for public and State participation in the FWCA planning process.

(c) Procedures for resolution of future interagency differences on interpretation of the FWCA, and of differences on what wildlife conservation measures should be included in project plans.

(d) Guidelines for determining when the discretionary decisions of project agencies to incorporate wildlife mitigation or enhancement measures at previously authorized projects should be referred to the Congress, and

(e) As directed by the President, methods for determining adequate measures to mitigate losses to fish and wildlife.

#### VIEWS REQUESTED

1. *Are the economic consequences of these rules likely to be such as to require preparation of a "regulatory analysis," within the meaning of E.O.*

12044? Because of the relationship of these rules to the programs of other agencies, a determination has been made that these joint rules will be "significant," within the meaning of E.O. 12044. However, a determination whether a "regulatory analysis" need be prepared has been withheld pending receipt of comments.

The President's criteria would require regulatory analyses for all rules which will result in (a) an annual effect on the economy of \$100 million or more, or (b) a major increase in costs or prices for individual industries, levels of Government, or geographic regions. E.O. 12044, sec. 3(a)(1). Additional criteria have been proposed by the Department of the Interior at 43 FR 22573 (May 25, 1978), and by the National Oceanic and Atmospheric Administration at 43 FR 23188 (May 30, 1978).

The FWCA places responsibilities with budgetary consequences upon State and Federal wildlife agencies, Federal action agencies, and Office of Management and Budget (OMB) (review of budget requests). If, as a result of these FWCA regulations, action agencies incorporate wildlife conservation measures at Federal projects which require the expenditure of money and manpower, nonpublic parties who purchase vendible services of such projects (through which the costs of such measures are reimbursed to the U.S. Treasury) would be economically effected.

Similarly, private applicants for water-related project permits and licenses to which the FWCA rules would apply might be required to expend additional moneys to incorporate wildlife conservation measures into their project plans.

Your views are sought as to the magnitude of the foregoing categories of expenditures at present, computed on an annual basis. Concrete documentation is requested.

2. *Is there a need for guidelines for congressional review of proposals to add wildlife conservation measures to projects?* In 1962 the Solicitor of the Department of the Interior issued an opinion that section 2(c) of the FWCA constitutes a standing authority for appropriations to add wildlife conservation measures to most authorized Federal projects, and that section 3(c) of the FWCA does not require specific congressional authorization of land acquisition (in particular) which may be a part of such a proposal. 69 I.D. 224 (1962). The Solicitor found that the Congress intended to exercise control over the land acquisition aspects of such proposals through the appropriations process. There is no dispute that, subject to appropriations where required, proposals not involving land

acquisition are authorized upon adoption by the construction agency head.

The underlying policy question presented is: Should not the Congress nevertheless be involved in review of such proposals? Should referrals be made to the Congress where no further appropriation is required to carry out some or all aspects of such proposals? Should the size of the necessary expenditure be a determinant of whether some or all categories of wildlife conservation measures are referred to the Congress? The Department of the Interior generally tends to favor specific congressional authorization of changes in its authorized water projects.<sup>1</sup> Are all these proposals really substantial enough to warrant special congressional attention?

3. *Should applicants for all, or certain categories of, Federal permits or licenses be required to first consult with wildlife agencies before submitting applications to action agencies? If so, how should these categories be defined?* One assumption advanced in favor of such a requirement is that the potential for confrontation between wildlife agencies, on the one hand, and action agencies or applicants on the other, can be avoided, if there is wildlife agency input at a flexible stage of the potential applicant's planning process. Wildlife agencies could assist action agencies and applicants in developing plans which may be less environmentally damaging, and therefore more acceptable to reviewing agencies and the public. Action agencies are now performing this public service in some cases. A countervailing consideration is the burden this places upon the manpower of wildlife agencies.

4. The President's July 12, 1978, water policy directive stated:

As part of their annual budget submissions, for each project in the planning or construction stage, Federal agencies will submit to the Office of Management and Budget reports which demonstrate compliance with the FWCA.

Although this reporting requirement may be formalized by an OMB circular, rather than in these rules, public comment is invited on the following:

<sup>1</sup>It contended (in its statement contained in the brief filed by the United States) in *Hiram Hill v. TVA*, — U.S. — (1978), that a specific form of appropriations committee action is necessary to show that congressional appropriations constitute an authorization not otherwise granted by the Congress. This contention was adopted by the Supreme Court. Provided that these formal requirements are followed, it may make no difference whether appropriations, as opposed to authorizing, committees review and accept these proposals. The determination of which committee the matter should be assigned to is, of course, the prerogative of the Congress, but the manner in which the issue is brought to the attention of the Congress by the administration often predetermines the question.

Taking into account the difference in procedures and programs of project, licensing, and permit agencies, what aspects of FWCA compliance should be broken out for individual treatment in such reports?

5. Should FWCA studies by wildlife agencies of proposed Federal or federally licensed projects be funded out of individual project funds?

6. What factors can or should be considered by action agencies in determining what wildlife conservation measures are justifiable to obtain maximum overall project benefits?

7. What procedures for FWCA consultation should be required among State and Federal wildlife agencies and action agencies?

This notice of intent to propose rules is issued under authority of E.O. 12044, the FWCA, Pub. L. 85-624, 72 Stat. 563 (16 U.S.C. § 661 et seq. (1976)), and the Administrative Procedure Act, 5 U.S.C. § 552(a) (1976).

Issued this 22d day of September 1978.

RICHARD A. FRANK,  
Administrator, National Oceanic and Atmospheric Administration, Department of Commerce.

DAVID F. HALES,  
Acting Assistant Secretary of the Interior for Fish and Wildlife and Parks.

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