

PROTECTING WETLANDS FOR FISH AND WILDLIFE

*A framework for the Fish and Wildlife Service's
role in wetlands regulatory programs*



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SUMMARY

As part of a periodic evaluation of its programs, the Service recently reviewed its role in wetland regulatory programs. The review affirmed the importance of the Service's mandated role of providing specialized fish and wildlife expertise and sound recommendations to regulatory agencies in these programs as part of its Federal trust responsibility to protect fish and wildlife and their habitats. The review also identified six overarching principles that will guide and improve Service involvement in wetland regulatory programs:

- **Focus on delivery of Service expertise in fish and wildlife ecology.**
- **Base Service recommendations on sound and objective science.**
- **Emphasize service to the public.**
- **Promote flexibility of application.**
- **Promote partnerships and interagency cooperation.**
- **Use program resources efficiently and cost effectively.**

These principles, and associated action items, were developed after considering not only the issues involved in the controversy surrounding wetlands, the National Performance Review, and budget cuts, but also the firm support of the majority of the public for protection of the environment, including fish and wildlife. Many of the identified actions are already employed by Service offices. This document is intended to provide a framework for a consistent Service approach in wetland regulatory programs nationwide that will result in greater benefits to fish and wildlife resources and the American public.

INTRODUCTION

The Fish and Wildlife Service has the responsibility and longstanding tradition of providing Federal leadership in conserving the public's fish and wildlife resources. The Service acts to conserve these "public trust" resources through the broad mandates of the Fish and Wildlife Coordination Act, and other legislation such as the Fish and Wildlife Act of 1956, Food Security Act, Anadromous Fish Conservation Act, Migratory Bird Treaty Act, and the Endangered Species Act. Moreover, the Service's mission - to conserve, protect and enhance fish and wildlife and their habitats for the continuing benefit of the American people - serves vital public needs. In addition to their direct economic, recreational, and aesthetic benefits, the presence of diverse, viable fish and wildlife populations generally signals a healthy ecosystem which contains those elements necessary for human survival.

Wetlands are one of the Service's priorities for accomplishing its mission, and for good reason. Wetlands are vital for sustaining populations of fish and wildlife in the United States. They provide habitat for approximately one-third of federally-listed plants and animals, and nesting, migratory and wintering areas for more than 50 percent of the Nation's migratory bird species. However, during the last 200 years, over 50 percent of the wetlands in the lower 48 States have been lost. Therefore, the intent of much of the Service's effort in carrying out its mission is to ensure the protection, wise management, and appropriate use of this diminishing natural resource.

The Service recognizes the need for periodically assessing the direction, implementation and effectiveness of its programs, and for explaining to the public how the Service carries out its various mandates. Recently, the Service reviewed its role and approach in wetland regulatory programs. The review resulted in the production of this framework document which is intended to explain and guide the Service's involvement in wetland regulatory programs. An overview of other major wetland conservation activities the Service undertakes pursuant to a multitude of authorities is provided in a separate document - "Wetland Conservation Authorities and Activities of the Fish and Wildlife Service: An Overview."

REVIEW OF THE SERVICE'S ROLE IN WETLAND REGULATORY PROGRAMS

Authority for the Service's mandated role in the wetland regulatory program administered by the Environmental Protection Agency and Army Corps of Engineers is provided by the Fish and Wildlife Coordination Act and section 404(m) of the Clean Water Act. The Service reviews permit applications for projects that involve discharge of fill material into waters of the United States (including wetlands), and provides the Corps with recommendations for avoiding, minimizing, and compensating impacts to fish and wildlife in accordance with the Service's Mitigation Policy. The Corps must give full consideration to the Service's recommendations. The Service's comments, however, are advisory only, and it is the Corps of Engineers that must determine whether permit issuance is in compliance with the section 404(b)(1) guidelines and whether issuance would be contrary to the public interest. The Service can request review of Corps permit decisions in certain circumstances, but cannot "veto" Corps authorization of proposed development actions.

Under the Swampbuster provision of the 1996 Farm Bill, producers lose U.S. Department of Agriculture benefits if they convert wetlands to make production of agricultural commodities possible. In this sense, this program is more cross-compliance on the part of USDA program participants than it is a true regulatory program. Pursuant to Swampbuster, the Service offers technical assistance to the USDA on issues relating to wetland identification and mapping and provides technical expertise in assessing wetland functions and values for purposes of evaluating minimal effects and mitigation exemptions. Service assistance is available to Natural Resources Conservation Service local representatives. The NRCS makes the final decision on all technical determinations made at the State and local level.

The programs of the Corps, Environmental Protection Agency and the Natural Resources Conservation Service are critical to reducing the wetland loss side of the "no overall net loss of wetlands" equation. The Service's technical expertise and advice are key ingredients in the effectiveness of these programs in conserving the Nation's wetlands.

The Service also works with project proponents before formal regulatory review processes begin. By providing information on means to avoid and minimize harm to fish and wildlife resources early in the planning process, the Service seeks to avoid unnecessary conflicts and delays, and to discourage unsustainable development.

The recent review of the Service's role in wetland regulatory programs was undertaken with the intent of improving service to the public and better conserving fish and wildlife. The effects of the ongoing debate over wetlands regulation, the National Performance Review, and budget decreases were considered in this review. For some time, wetland regulatory programs have been the focus of considerable public controversy and debate in Congress. More recently, the National Performance Review has sought to streamline the Federal government while improving service to citizens. Budget uncertainties mean that Service efforts must be focused where benefits to the resources are greatest.

In light of these factors, the Service's review identified six principles for guiding the Service's involvement in wetland regulatory programs:

1. Focus on delivery of Service expertise in fish and wildlife ecology and habitat restoration.
2. Base Service recommendations on sound and objective science.
3. Emphasize service to the public.
4. Promote flexibility of application.
5. Promote partnerships and interagency cooperation.
6. Use program resources efficiently and cost effectively.

Many of the actions identified herein are being effectively employed by Service offices. The intent of this document is to make others aware of practices that have been proven to be effective and provide a framework for a consistent Service approach in wetland regulatory programs nationwide. Continued and expanded implementation of the identified action items are expected to produce greater benefits to fish and wildlife resources, improve service to the regulated public, and increase efficiency of wetland regulatory programs.

The guidance provided herein does not supersede or modify existing Service policies or guidance. In particular, this guidance does not alter the Service's approach to development of recommendations for mitigating the adverse impacts of land and water developments on fish, wildlife, and their habitats described in the Fish and Wildlife Service Mitigation Policy (46 FR 7644-7663, 1981). For example, mitigation will continue to be viewed as a sequential process wherein compensatory mitigation is sought only after all reasonable efforts have been made to avoid or minimize loss of fish and wildlife resources and their uses.

FRAMEWORK FOR THE SERVICE'S ROLE IN WETLANDS REGULATORY PROGRAMS

PRINCIPLE 1: Focus on delivery of Service expertise in fish and wildlife ecology and habitat restoration.

The Service's role in wetlands regulation is fundamental. The Service adds value to regulatory agency decisions by providing scientifically sound recommendations for avoiding, minimizing, and compensating impacts to fish and wildlife that cannot be provided by other Federal entities. Service biologists will focus on using their fish and wildlife expertise in the following actions:

A. Provide high quality technical assistance and evaluations to agencies and landowners. Service field offices will continue to provide timely, accurate and state-of-the-art technical assistance on fish and wildlife matters at the earliest possible stage of planning. Service input will focus on principles of biology, fish and wildlife ecology, habitat restoration, impact assessment, and mitigation to promote environmentally sound projects and foster greater understanding and appreciation of fish and wildlife resources.

B. Emphasize outreach to the public. Service field offices will maximize opportunities to educate the public on the value of wetlands to fish and wildlife and to the general public, and on the Service's mission with regard to conserving such values. Service employees will also promote Partners for Wildlife, Coastal, and similar programs which provide non-regulatory, partnership-based approaches to wetlands and fish and wildlife conservation.

PRINCIPLE 2: Base Service recommendations on sound and objective science.

Service actions are based on site-specific information, sound biological principles, and objective impact assessments. The following actions will be taken to ensure that Service involvement in wetland regulatory programs continues to be firmly grounded in sound science and objectivity:

A. Produce high quality reports. Service reports will embody sound, objective science to provide regulatory agencies with the technical support they need to make good decisions, and to educate the public. Service reports will:

- ▶ describe site-specific fish and wildlife resources and the impacts of proposed actions on those resources;

- ▶ contain clear, implementable recommendations;
- ▶ clearly explain the basis for impact assessments and recommendations;
- ▶ be completed in a timely manner;
- ▶ be professional in tone and approach; and
- ▶ include literature citations, as appropriate.

B. Emphasize training and education. The Service will make professional training and continuing education for its biologists a high priority. Training will ensure Service biologists are able to utilize state-of-the-science techniques to conduct impact assessments and develop recommendations on proposed actions.

C. Base recommendations on site-specific information. The Service will use site-specific information on fish, wildlife, and habitat conditions to ensure that recommendations are appropriate for the particular site and proposal and focus on areas of Service expertise. In those uncommon cases when a site visit is not practicable, other site-specific information (e.g., aerial photos, other agency sources, etc.), correlated with documented fish and wildlife usage, habitat value, and/or impacts in similar areas, will be used by Service biologists. Accepted functional and impact assessment methodologies (e.g., Habitat Evaluation Procedures and Hydrogeomorphic Approach for Assessing Wetland Functions) should be employed when appropriate to quantify project impacts, compare project alternatives, and evaluate compensatory mitigation.

D. Improve recommendations for compensatory mitigation. Service field offices will emphasize evaluation of compensatory mitigation projects, through review of monitoring reports (and site visits as appropriate), as well as wetland restoration projects implemented through the Service's Partners for Wildlife, Coastal, and Refuges and Wildlife programs. Follow-up evaluations will help the Service identify ineffective mitigation practices and refine compensatory mitigation recommendations to benefit the regulated public and fish and wildlife resources. Mitigation banks and other large-scale compensatory mitigation projects provide opportunities for both increased mitigation effectiveness and simplified compensatory mitigation planning for project proponents. The Service will continue to support and assist in design of biologically sound mitigation banks.

E. Employ an ecosystem perspective. Service biologists will view proposed actions in the context of the ecosystems and landscapes in which they occur. Using an ecosystem perspective, actions compatible with sustained ecosystem function can be identified, and Service efforts can be re-focused on projects with high potential for significantly harming

fish and wildlife on an individual or cumulative basis. The Service will proactively lend its fish and wildlife expertise to cooperative ecosystem-scale planning efforts to promote long-term conservation of fish and wildlife in concert with sustainable economic development.

PRINCIPLE 3: Emphasize service to the public.

It is a Service priority to assist project proponents in designing projects that first avoid then minimize harm to fish and wildlife resources. The Service encourages open dialogue with all interested parties, and displays professionalism, reasonableness and timeliness in its dealings with those interests. The Service recognizes the potential impact of wetland regulation on private property owners and the important role these landowners can have in wetland protection and restoration. Service to the public will be emphasized through the following actions:

A. Provide sound technical support. Many landowners are willing to protect wetlands on their property, but lack the necessary expertise and guidance. Thus, the Service will offer project proponents pre-development consultation early in the planning process, including information on habitat/wetland classification and design of compensatory mitigation for unavoidable impacts. When pre-development consultation is precluded, the Service will provide high quality, biologically sound project evaluations as early in the regulatory review process as possible.

B. Understand and address the public's concerns. To be effective, the Service must fully understand public concerns and work cooperatively to find solutions that also conserve fish and wildlife. Therefore:

- ▶ Service field staff are encouraged to get involved with local planning and zoning boards to understand local concerns, and help prevent future conflicts between necessary development and fish and wildlife conservation;
- ▶ the Service will actively promote open dialogue with all stakeholders, in conjunction with other agencies whenever possible, to understand and address issues of concern;
- ▶ whenever practicable, field office staff will offer to meet with project proponents to seek mutually acceptable solutions to Service resource concerns prior to submitting formal comments to regulatory agencies (as well as throughout the formal permitting process);
- ▶ in its reports, the Service will clearly explain the reasoning behind conclusions and recommendations, and make an effort to address project proponent concerns.

C. *Help identify more cost-effective mitigation.* The Service has a responsibility to recommend measures to conserve fish and wildlife resources. The Service also recognizes that compensatory mitigation costs can be substantial. Therefore, while Service biologists cannot perform formal cost effectiveness analyses, they will give consideration to cost in developing compensatory mitigation recommendations. Service biologists will recommend use of cost effective and biologically sound methods for restoring, creating and enhancing wetlands, such as those devised by the Partners for Wildlife program, for compensatory mitigation whenever applicable.

D. *Improve consistency of mitigation recommendations.* The regulated public values timely and predictable outcomes in the regulatory process. To this end, Service field offices will provide consistent mitigation recommendations within offices and within ecosystem units for projects with similar impacts on similar habitats unless circumstances warrant a different mitigation approach. Field offices are also encouraged to develop regionalized interagency mitigation guidance for use by project proponents. Accepted methodologies for quantifying compensation requirements should be employed whenever practicable. This guidance does not preclude consideration or development of new and innovative approaches that fully mitigate losses of fish and wildlife.

E. *Demonstrating professionalism and respect for private property.* The support and respect of the American public is critical if the Service is to successfully carry out its mission. Accordingly, Service personnel will serve the public in an honest, straightforward manner, and demonstrate professionalism at every opportunity. Service personnel will also respect the property rights of landowners, and not make site visits to private property without landowner permission.

PRINCIPLE 4: Promote flexibility of application.

The Service recognizes that there is variation in wetland functions and the severity of impacts from various activities. Accordingly, Service national program guidelines provide the flexibility to develop approaches and recommendations tailored to the particular ecosystem, quality of the habitat, likely impacts of the particular type of activity, and mitigation opportunities. The following actions emphasize Service flexibility:

A. *Develop recommendations to fit the circumstances.* The Service will not make recommendations using a "one size fits all" approach, since an activity that would significantly harm fish and wildlife in one ecosystem may be relatively benign in another. Recommendations will be commensurate with resource values and the severity of individual and cumulative impacts, and will be developed by applying sound science to the unique characteristics of the site and proposed activity and considering impacts in an ecosystem

context. This will enable increased flexibility while maintaining the overall consistency objective described in Principle 3, Action Item D.

B. Give full consideration to compensatory mitigation options. There is often considerable flexibility for achieving compensatory mitigation within the limits of existing statutes, regulations, and policies. By considering fish and wildlife conservation needs of a particular ecosystem, a variety of potential mitigation measures may be identified for compensating unavoidable fish and wildlife losses. Moreover, development of compensatory mitigation alternatives will enable project proponents to select the option that works best for them. In some areas, mitigation banking is an appropriate mechanism to compensate for unavoidable project impacts while contributing to fish and wildlife goals for the ecosystem.

C. Be proactive. Being proactive - addressing issues before they become problems - permits greater flexibility in devising mutually acceptable approaches. Service employees will seek opportunities to provide fish and wildlife expertise to advance planning efforts at various scales (e.g., local, county, watershed, ecosystem, etc.).

PRINCIPLE 5: Promote partnerships and interagency cooperation.

The Service's ecosystem approach emphasizes partnerships with other local, State and Federal agencies as well as non-governmental organizations, and the private sector. The Service will focus on adding value to the regulatory process by providing its fish and wildlife expertise and working cooperatively with all involved agencies to make the process more efficient and responsive to public needs. The following actions will be pursued:

A. Provide needed biological expertise to the regulatory process. To avoid duplication of other agencies' roles, the Service will concentrate its involvement in wetland regulatory programs in applying its special agency expertise to minimizing harm to fish and wildlife resources.

B. Develop better interagency communication/cooperation. Decisions by all involved agencies should be based on the best information available. The Service will do its part to improve information transfer among agencies and increase interagency coordination at all levels. The Service also will seek to establish local and regional interagency working groups to address, and seek solutions to, outstanding policy issues.

C. Make interagency processes more efficient. Many processes involving several agencies can be accomplished by agencies working together to make more efficient use of Federal personnel and provide better service to the public. Service field offices have long participated in interagency pre-development consultation with project proponents and should

continue to do so. Service field offices are strongly encouraged to help facilitate and participate in regularly scheduled joint permit processing activities, wherein all involved Federal and State agencies and permit applicants meet to discuss and, if possible, come to agreement on pending permits. The Service will also work with the Corps of Engineers, other Federal resource agencies, and States to develop ecologically sound State program general permits or regional program general permits that reduce workload; eliminate the need for nationwide permits; and establish clear and defensible minimal effects and agency review thresholds tailored to the States or regions where they apply.

D. Reduce duplication among agencies. For some permit applications, the combined expertise of several resource agencies is necessary to fully assess project impacts and develop recommendations for conserving fish and wildlife. There also are applications for which the input of a single resource agency is sufficient. Service field biologists coordinate closely with biologists in other resource agencies. When such coordination reveals that Service concerns will be adequately and effectively addressed by other agencies, Service biologists should redirect their efforts toward projects where there is greater need for Service participation.

E. Work with States, Tribes, and other stakeholders. In addition to better coordination and communication with other Federal agencies, the Service must more fully engage States, Tribes, and other stakeholders as partners in wetlands conservation. Specifically, the Service will increase technical assistance to States and Tribes to develop effective wetland conservation programs and narrative wetlands water quality criteria pursuant to §401 of the Clean Water Act. In addition, Service field offices will emphasize technical assistance to local planning efforts, and work cooperatively with all stakeholders to address issues of mutual concern.

PRINCIPLE 6: Use program resources efficiently and cost effectively.

Modest funding levels have always forced the Service to set priorities for Service involvement in wetlands regulatory programs based on the significance of potential adverse project impacts to fish and wildlife resources. Given the uncertainty about the adequacy of future funding levels, it is even more important that program resources be directed at the highest priority issues and resources. The following actions will be taken:

A. Allocate resources based on priority. The Service does not have the resources to work on all proposed actions. Therefore, Service efforts in wetland regulatory programs will be concentrated on identified resource priorities, such as those set forth in Service ecosystem unit plans. Focusing Service efforts on priority resources should result in higher quality and

more effective Service input on each proposed action that is addressed, without increasing overall workload.

B. Increase efficiency in use of Service personnel. Making more efficient use of Service personnel would increase service to the public and could compensate to some degree for declining budgets. The Service will explore cross-training of biologists in other Service programs to enable them to further assist in wetland regulatory programs. In addition, the Service will explore the formation and use of Service teams in each ecosystem unit or Region to conduct evaluations requiring specialized training (e.g., Habitat Evaluation Procedures, Hydrogeomorphic Approach for Assessing Wetland Functions) to increase efficiency.

C. Increase Service assistance with advance planning. Planning for fish and wildlife conservation in advance of specific development proposals typically yields greater benefits per unit effort over the long-term. The Service will emphasize involvement in advance planning efforts (e.g., watershed plans, transportation plans, mitigation banks, Special Area Management Plans) that have high potential for long-term benefits to fish and wildlife and reduction in workload over the long-term. Providing technical assistance prior to development of specific project proposals will continue to be a priority.

D. Develop products and processes that promote efficiency. The Service will develop, or assist other agencies in developing, the following products and processes for making wetland regulatory programs more efficient:

- ▶ standard recommendations for similar projects with similar impacts within ecosystem units;
- ▶ interagency processes that consolidate project reviews (e.g., consolidating National Environmental Policy Act and §404 reviews) and integrate them with Endangered Species Act consultations;
- ▶ procedures for joint permit processing (described in Principle 5, Action Item C.);
- ▶ State program general permits and regional program general permits;
- ▶ interagency working groups to engage agency management in review and resolution of policy issues arising from regulatory reviews and decisions;
- ▶ advance identification of resources of concern and/or high value, and dissemination of this information to other agencies and the public;
- ▶ procedures that better utilize and share information systems (e.g., GIS, databases) among agencies.

CONCLUSION

The Service's role in Federal wetland regulatory programs is fundamental to the programs' success. By virtue of statutory responsibility, specialized fish and wildlife expertise, and experience, the Service fills a niche that cannot be filled by other agencies. The principles and action items herein are intended to guide the Service's involvement in wetland regulatory programs as it strives to carry out its fish and wildlife conservation mission and serve the American public in a responsive, professional manner.