

**AGREEMENT BETWEEN THE
U.S. FISH AND WILDLIFE SERVICE AND THE
U.S. ARMY CORPS OF ENGINEERS FOR CONDUCTING
FISH AND WILDLIFE COORDINATION ACT ACTIVITIES**

ARTICLE I - INTRODUCTION

a. Section 1 of the Fish and Wildlife Coordination Act, as amended, (FWCA), (16 U.S.C. §§ 661 et seq.), states the general policy that fish and wildlife conservation shall receive equal consideration with other project purposes and will be coordinated with other features of water resources development projects. To accomplish this, section 2(a) of the FWCA establishes that preconstruction planning on project development shall be coordinated with the U.S. Fish and Wildlife Service (FWS). Section 2(b) of the FWCA authorizes the FWS to conduct surveys and investigations to determine the possible damage of proposed developments on wildlife resources; to make recommendations for preventing their loss or damage; and to offer measures for developing and improving them. Section 2(e) of the FWCA authorizes construction agencies to transfer funds to the FWS to conduct investigations and prepare the reports necessary to carry out the purposes of the Act.

b. The provisions of this Agreement have been developed to ensure the FWS is involved in U.S. Army Corps of Engineers (Corps) projects as an active planning team member to help find solutions to water resources development problems that avoid, minimize, or mitigate impacts to fish and wildlife. A major goal of this Agreement is to ensure the FWS is invited and funded, when applicable, to participate early in and throughout the planning process to facilitate the FWCA's equal consideration provision.

c. In compliance with section 2(a), (b) and (e) of the FWCA, the Corps and the FWS have established coordination procedures and policy for obtaining FWS input concerning the fish and wildlife resources associated with water and related land resources development activities. Accordingly, this Agreement provides guidance and establishes uniform procedures for all Corps and FWS offices to follow in implementing field-level negotiations for funding FWS efforts on Corps water resources study and development programs. Specifically:

(1) This Agreement contains provisions for the transfer of funds from the Corps to the FWS for activities pursuant to the FWCA.

(2) This Agreement applies to General Investigations, Special Studies, Continuing Authorities, Preconstruction Engineering and Design studies, Construction projects involving fish and wildlife habitat, coordination on new dredged material placement sites, and Post Authorization Modifications requiring FWCA involvement. This Agreement applies to Corps planning, engineering, design, and construction activities, including post-construction monitoring.

(3) This Agreement does not apply to the transfer of funds for FWS review of National Environmental Policy Act (NEPA) documents, Section 7 consultations under the Endangered Species Act (ESA), Operations and Maintenance, or general interagency coordination on matters unrelated to FWCA activities. Funds will not be transferred under this Agreement for fish and wildlife investigations associated with emergency actions, Corps regulatory responsibilities, or operating Corps projects. Funding for these activities may be available using existing or new cooperative agreements and other funding mechanisms, where appropriate. Further, funds will not be transferred under this Agreement for FWS activities associated with annual program coordination for FWCA activities. Funds cannot be transferred to State resource agencies for participation in FWCA activities. Generally, reconnaissance phase studies leading to a 905(b) report have limited funds and, as a result, funds will not be provided to the FWS to support its participation. However, funds for FWS involvement on large projects may be provided for participation during the reconnaissance phase.

d. This Agreement supersedes the May 1980 Agreement (amended in September 1982) between the Corps and FWS. Commitments made in compliance with the previous Agreement will be honored.

e. Procedures and obligations stated in this Agreement shall apply to all Corps districts and FWS offices and will be amended only following review and mutual agreement at the Washington level. Either agency may request review of this Agreement. Corps districts and FWS field offices may mutually agree to develop local operating procedures to facilitate effective implementation of their agreements, provided those procedures are fully consistent with this Agreement.

ARTICLE II - GENERAL

a. For purposes of this Agreement, the term "FWCA activities" means FWS involvement early and throughout the Corps process of project development and implementation, including the reconnaissance phase. The FWS participates as an active planning team member to conduct studies and investigations on fish and wildlife aspects of Corps water resources projects, as FWS staffing and workload constraints allow. In carrying out the purposes of the FWCA, FWS personnel shall attend scoping meetings and review project documents. In addition, FWS personnel may visit sites; survey, investigate, map, and evaluate wildlife resources; and determine the relative quality and quantity of terrestrial habitat and aquatic resources potentially impacted by project construction and operation. FWS personnel shall assist in Corps development of project alternatives and projections of future conditions both with and without the project. The FWS may also help the Corps develop incremental analyses of features designed to mitigate or restore wildlife resources, and monitor post project conditions to determine the effectiveness of mitigation and restoration features. This will help to assess the need for project changes and adaptive management. As appropriate, the FWS will provide information to the Corps through FWCA reports, planning aid letters, studies, and other documents, as well as through participation in workshops, meetings, and public hearings.

b. The Corps will invite FWS involvement as an active planning team member throughout the planning, construction, monitoring, and adaptive management of water resources development projects. Each Corps district and FWS field office will designate a primary point of contact by title (and an alternate) to serve as the lead person to manage all activities required under this Agreement. The point of contact for each agency will: be a senior manager or senior staff; coordinate (act as liaisons) with their counterpart and others involved; remain up-to-date on the general status of each study/project; and serve as a trouble shooter working in partnership to resolve problems that may arise.

c. The FWS will be the Federal agency through which the Corps district will first negotiate for fish and wildlife investigations in compliance with FWCA requirements. This negotiation, which includes a discussion of the feasibility study plan, schedule, and budget, will take place during development of the project management plan (PMP). The PMP will describe the data the Corps will give the FWS; when it will be delivered; the level of analyses needed for all FWCA activities; and time schedules for the completion of both agencies' actions. A Statement of Work (SOW) will be developed using the PMP or as soon as sufficient information is available. The Corps and FWS will agree on the appropriate level of cost breakdown for each SOW. Additionally, the FWCA requires the Corps to coordinate with the appropriate State fish and wildlife agencies. Corps policy, based on Government Reorganization Plan No. 4, dated August 4, 1970, also requires Corps offices to coordinate with the National Marine Fisheries Service (NMFS) in connection with activities that involve resources for which NMFS has statutory responsibility. This Agreement does not remove or alter these responsibilities.

d. The FWS has 30 calendar days from the notification date (notification could be by e-mail or telephone) of the signing of the Feasibility Cost Sharing Agreement (FCSA) to notify the Corps (which also could be by e-mail or telephone) that it will conduct the fish and/or wildlife investigations on a particular study. If the FWS determines it cannot perform all or a portion of the work itself, and so notifies the Corps within 30 days, the Corps may then use an alternate contracting source following consultation between the two agencies. Alternate contracting sources may be obtained through the Corps or FWS. All documents prepared by the alternate source contractor will be forwarded to both parties for use in preparation of their respective reports. Alternative source contractor selection shall not occur prior to coordination between both agencies, as outlined in Article VI. If the FWS contracts for the fish and wildlife investigations, the district will assist in the preparation of the contractor's SOW. If the district contracts elsewhere, as a result of notification from the FWS within the 30-day time period that it cannot perform the work, the FWS may assist in developing the contractor's SOW and review the data and analyses to ensure their adequacy. If the district contracts elsewhere, due to a lack of response from FWS regarding their ability to conduct the work within the 30-day time period, the FWS may help develop the contractor's SOW and review the data and analyses to ensure their adequacy. The FWS will be given the opportunity to help develop the contractor's SOW.

e. Non-Federal sponsors may, with FWS and Corps concurrence, be able to perform some of the tasks pertaining to fish and wildlife evaluations for projects outlined in Article I(c)(2) as part of their cost-sharing responsibilities. Corps district offices and points of contact will ensure the non-Federal sponsors understand the section 2(b) requirements for the Corps to coordinate with the responsible FWS office to prepare FWCA reports and studies.

ARTICLE III - SCOPE OF WORK FOR FWCA COORDINATION ACTIVITIES

a. Each fiscal year, the Corps district and the FWS field office(s) will jointly prepare a SOW with a schedule and estimate of funds needed to fulfill FWCA requirements for each project or study, or group of projects and/or studies. Both agencies recognize the SOW for a large project or study is much different than for a small one with very limited funds and expedited schedules. For this reason, a letter that includes FWS comments and recommendations may be acceptable in fulfilling FWCA requirements for small projects, especially for those in the Continuing Authority Program. The need for such planning aid reports is a matter of mutual agreement between the Corps and FWS and is determined on a project-by-project basis.

b. The FWS activities to be covered by transfer funding should be clearly indicated in the detailed SOW. This SOW will describe the data and information needed; specific work to be accomplished, including the FWS document required and dates for completion; detail and effort required; conditions of contracts and subcontract(s) (if appropriate); estimated cost for investigations; specific, periodic FWS and Corps progress reviews needed for billing; schedule and milestones of study activities; and time tables for information sharing between the Corps and the FWS. This includes a schedule for collecting and exchanging data and the dates of coordination meetings, public hearings, and workshops. The Corps and FWS will agree on the appropriate level of cost breakdown for each SOW.

c. Each SOW will include activities that are agreed upon by the Corps and FWS to be necessary to satisfy the study and reporting provisions of section 2(b), and that provide the Corps with fish and wildlife resources data, information, and recommendations. The amount, quality, and scale of data, as well as the data analysis included in the SOW must be consistent with the complexity of decisions for which the data will be used, limitations in funding and time, and the significance of the fish and wildlife resources involved. The data and analyses from these activities will be used by the Corps to consider fish and wildlife resources at each stage of water resources development projects requiring FWCA involvement; serve as a basis for FWS assessment and evaluation of proposed alternative measures and plans for fish and wildlife resources; and provide a substantive basis for the recommendations the FWS and Corps may deem appropriate to preserve, mitigate, or restore these resources. The SOW will include provisions, as needed, for the FWS to attend public hearings, meetings, and workshops scheduled in conjunction with the Corps planning process.

d. The SOW for each project or study negotiated by the Corps district and the FWS field office will be forwarded by the District Engineer to the Regional Director of the FWS or their designees for approval. A copy of the SOW will be sent concurrently to the appropriate Corps district and FWS field offices. Approval of the SOW may either be prior to, or concurrent with transmittal of the funding document for the study. Agreed upon revisions will be displayed as supplements to the SOW.

e. Environmental resources data and information may be available for the study area. Every effort will be made to use relevant existing information from all available sources and to reach a consensus on the appropriateness of their use.

f. The methods of analyses, techniques, and required specialized expertise for fish and wildlife studies conducted by the FWS will be set forth in the SOW. Accordingly, reports submitted to the Corps will include data collected and analytical procedures used, meeting time constraints outlined in the SOW. Districts will provide the FWS with copies of all appropriate reports and appendices, including reports recommending no Federal action or the termination of a study, as set forth in the SOW.

g. The district and field office will coordinate throughout the year, and information on each study or project will be exchanged in a timely manner. Formal study or project-specific coordination meetings will be scheduled in the SOW at least twice a year, and more frequently if mutually agreeable to both agencies. These meetings can be in the form of project-specific technical committee meetings, where all interested and involved agencies and parties are in attendance. Meetings may also be in the form of conference calls or video teleconferences, as appropriate. The Corps will provide the FWS with copies of transcripts recorded (if any) at project/study-related meetings.

ARTICLE IV - PROCEDURES

a. In budget submittals and requests, each District Engineer will include funds to support FWCA study and reporting requirements, as set forth in SOWs.

b. Corps budgetary guidance is provided around March of each year (about 18 months before the start of the fiscal year) through program development guidance. Corps and FWS coordination must be early enough to provide meaningful input into the budget process.

c. Formal programmatic meetings will be held between the two agencies at least annually to review all upcoming and ongoing Corps activities requiring FWS coordination, and to identify needed fish and wildlife information and studies. Other formal or informal programmatic meetings will be held as required. The Corps and the FWS points of contact will jointly lead these programmatic meetings.

d. Early in the fiscal year, the District Engineer or their designee will, in coordination with the Regional Director or their designee, review the status of each study

or project requiring FWS input for the current fiscal year. Adjustments to previously negotiated work may be required due to changes in the study or project, including schedules and funding levels. In addition, the agencies will review the portion of the district's anticipated Civil Works program for each of the next two fiscal years that is covered by the FWCA. These items will be discussed at the formal programmatic meetings held between the two agencies. As appropriate, scoping and funding negotiations for future work may be included in this programmatic meeting. These negotiations are beneficial to both offices and should take place as early as practicable. The FWS current fiscal year program may also be reviewed at this programmatic meeting, which should be held after the Corps submits its budget request to the Office of Management and Budget (OMB), typically in September. All parties will treat budgetary data as privileged information. No office shall reveal any budgetary data prior to release of the President's budget.

e. After the Corps submits its budget request to the OMB, districts will give FWS field offices a list of studies and projects along with the proposed amount for the FWS for each. The list of studies and proposed amounts of funding should be considered only a very rough approximation, since they are subject to change as they go through the funding process.

f. After transmittal of the President's budget to Congress and official release to the public (typically February), the district will give FWS Regional and field offices an updated list of all projects or studies included in the President's budget and the tentative amounts proposed for FWS FWCA activities. Upon budget enactment, the district will give the FWS Regional and field offices an updated list of all the projects included in the enacted budget and the amount proposed for FWS FWCA.

ARTICLE V - AGENCY RESPONSIBILITIES

a. Corps Responsibility. The following are the responsibilities of Corps District Engineers, their designees, and points of contact for the administration of this Agreement. District Engineers or their designees will:

(1) Ensure that controls are in place for proper administration of the Agreement. The district will ensure the FWS is provided the opportunity to participate in determining FWS FWCA activities and is funded to support active planning team membership in studies/projects, including early involvement in reconnaissance phase, other early planning efforts, and throughout the study/project planning process.

(2) Ensure that, at a minimum, annual meetings and other meetings, both formal and informal, on the administration of this Agreement take place.

(3) Ensure that budget requests include the amounts needed for the FWS to conduct fish and wildlife resources studies and analyses, prepare reports, and complete other related FWCA activities for each study or project requiring FWCA involvement.

(4) Ensure the Corps' fiscal year budget information that is given to OMB on studies or projects requiring FWCA coordination, and the proposed amount for transfer to the FWS for each, is sent to the FWS field office point of contact promptly.

(5) Ensure that FWS field offices are given a list of studies and projects requiring FWCA coordination and the amount proposed for the FWS after the President's budget is released, and after the budget is enacted. The Corps will also provide copies of completed Feasibility Cost Sharing Agreements, if requested. After funds are appropriated and have been allocated to the Corps districts, they will make every effort to transmit funds (using ENG FORM 4914-R, Sep 97) for all projects as soon as possible.

(6) Ensure SOWs are prepared in adequate detail for each study/project and are approved for all studies or projects that require coordination under the FWCA pursuant to this Agreement.

(7) Ensure that Corps districts transfer information needed by the FWS for FWCA activities as jointly agreed to in the study schedule and SOW. This includes information that has been jointly determined to be necessary to conduct studies and analyses, including available fish and wildlife information and maps of the study area; engineering, hydrologic, survey, and alternative futures data; and real estate and land-use information.

(8) Keep the FWS field office(s) informed of any changes during the budgetary process, deviations from milestone schedules, and modifications in project details (e.g., alternative changes or modifications) and other factors that may affect FWS FWCA activities and responsibilities. The schedule in the SOW should be adjusted accordingly.

(9) Establish a system with the FWS point of contact so that problems in the timely submission of studies and reports can be resolved quickly and amicably, or elevated to higher authority if necessary.

(10) Provide a written response to the comments and recommendations contained in the draft FWCA report. Ensure FWCA documents are included in or attached to all studies or reports prepared by the district, which will help determine requests for authorization and funding. Provide FWS with copies of all study reports and appendices.

(11) Facilitate a better understanding of the missions and responsibilities of the Corps through regular exchanges of information and inclusion of the FWS in all appropriate projects and project delivery team meetings. The Corps should facilitate opportunities for the FWS to participate in Civil Works water resources development-related training, such as planning, environmental restoration, and FWCA. FWS participation in Civil Works water resources development-related training will not be funded by the Corps under this Agreement.

b. FWS Responsibility. The following are the responsibilities of the FWS Regional Directors, their designees, and field office points of contact for the administration of this Agreement. Regional Directors or their designees will:

(1) Ensure that controls are in place for proper administration of the Agreement.

(2) Ensure FWS field offices conduct fish and wildlife investigations and provide fish and wildlife analyses, planning aid letters, and draft and final FWCA reports in accordance with the established schedules and level of analyses discussed in the SOW.

(3) Provide reports whose length is commensurate with the complexity of the project.

(4) Ensure FWS field offices transmit bills to the Corps Finance Center in Millington, Tennessee, and the Corps district point of contact in a timely manner (but no less than monthly) consistent with the agreements in the funding documents (ENG FORM 4914-R, Sep 97).

(5) Ensure that FWS field offices, within 30 days of FCSA execution, notify the district point of contact of any lack of capability to complete requested work within the milestone schedules established in the SOW or of any need to reschedule deadlines.

(6) Ensure that FWS field offices, within 30 days of FCSA execution, negotiate, select, and identify any portions of work that need to be contracted; help develop SOWs (e.g., tasks, products, time schedules, and estimated costs); and provide input on contractor selection.

(7) Ensure that FWS field offices provide the necessary consultation and conduct the necessary review whenever a fish and wildlife study or portion thereof is contracted by the district or the FWS, or is accomplished by the non-Federal sponsor.

(8) Ensure that FWS field offices establish a system with the district point of contact so problems in the management, timing, analysis, and preparation of studies and reports can be resolved quickly and amicably or elevated to a higher authority.

(9) Facilitate a better understanding of the missions and responsibilities of the FWS through regular exchanges of information and inclusion of the Corps in appropriate FWS projects. The FWS will facilitate opportunities for the Corps to participate in training on the FWCA. Corps participation in FWS-related training will not be funded by the FWS under this Agreement.

(10) Ensure that, at a minimum, the FWS field offices and Corps districts convene annual meetings and other meetings, both formal and informal, on the administration of this Agreement.

(11) Provide a response to Corps comments on the draft FWCA report, which delineates how and where the comments were addressed in the revised or final FWCA report, to complete the administrative record.

ARTICLE VI - PERFORMANCE

Both the Corps and FWS should strive to honor the commitments made by both parties in each SOW. In the event that either party cannot meet a commitment, the Corps and FWS will proactively work together to make any adjustments, including the use of an alternative source to complete the work, if necessary. Alternate contracting sources may be obtained through the Corps or FWS. All documents prepared by that source will be forwarded to both parties for use in preparation of their respective reports. Alternate source contractor selection shall not occur prior to coordination between both agencies. The use of an alternative contracting source should be the exception rather than the rule. Lack of planning is not a suitable reason for using a contractor.

ARTICLE VII - COST ESTIMATES AND INDIRECT COSTS FOR FWCA ACTIVITIES

a. The cost estimate for FWCA study activities will include 38 percent of field expenditures for indirect costs for each fish and wildlife study and/or report, and will reflect the costs in the Regional and central offices of the FWS for their activities. However, when a fish and wildlife study, or a portion thereof, is subcontracted by the FWS, the agency will receive 15 percent (not 38 percent) indirect costs for the subcontracted portion of the fish and wildlife investigations.

b. FWCA cost estimates for each project and/or subcontract will consist of labor costs by category, material, equipment, and other costs for the FWS field office or subcontractor involved.

c. Cost estimates for FWCA activities will include a lump sum person-day cost (8 hour day) per task, and the cost of any special material or equipment required for a particular project on a field office basis. Field office person-day costs will include support services such as material and supplies, leave, office equipment, telephone, travel, and training. The percent of support services charged to transfer funds will be on a prorated basis.

d. Cost estimates for FWCA activities in conjunction with the study will include provisions required for FWS attendance at planning study team meetings, public hearings, and other meetings and workshops, as appropriate.

ARTICLE VIII - METHOD OF PAYMENT AND BILLING PROCEDURES

a. Funding of FWS activities under this Agreement will be performed using an ENG FORM 4914-R, Sep 97. Funding will be provided for each individual study or project using this form. The ENG FORM 4914-R, Sep 97 will include the negotiated amount of funds required to complete each FWCA activity and the SOW (or a copy of the previously executed SOW if it has already been approved) for each study or project. When appropriate, individual SOWs can include the FWCA activities that are expected over a number of years. The signed ENG FORM 4914-R, Sep 97 obligates Corps funds and provides FWS authority to obligate funds and bill the Corps for work accomplished. The ENG FORM 4914-R, Sep 97 will show the Corps district as the ordering office and the appropriate FWS field office as the performing office.

b. At the beginning of each fiscal year, or at other times as appropriate during the fiscal year, the Corps will transmit a signed ENG FORM 4914-R, Sep 97 with a SOW for each study or project to the Regional Director for signature. Once signed, the Regional Budget and Finance Officer will give the FWS Denver Finance Center copies of each signed ENG FORM 4914-R, Sep 97 containing billing instructions.

c. Billing will be conducted under the Intra-governmental Payments and Collection System (IPAC), and will show the district as the debtor (office billed), and the applicable FWS office as the creditor (billing office). The Corps will be billed by the FWS Finance Center on at least a monthly basis. The Corps must receive the bills no later than 21 calendar days after the last day of the month. The bills will reflect direct costs incurred plus 38 percent for indirect costs (or 15 percent for indirect costs on subcontract work) and will be itemized consistent with the negotiated cost estimate for each study.

ARTICLE IX - OBLIGATION AUTHORITY

If there is not a new Appropriations Act signed by the President prior to the start of the fiscal year, and carry-over funds are not available, spending authority for ongoing studies will be given to the FWS based on the previously developed SOW if that authority is received by the Corps. In the event the Corps does not receive the authority, the Corps will notify the FWS promptly.

ARTICLE X - SUSPENSION OR TERMINATION OF STUDIES

a. Delays in project starts at the beginning of the fiscal year, other starts and stops of projects, and delays in funding make it difficult for the FWS to plan its workload and staffing needs. Therefore, every effort will be made to avoid interrupting the funding that has been negotiated. When such interruptions become necessary, the FWS will be

contacted immediately and efforts will be made to minimize the impact on FWS staff and their ability to provide needed services to the Corps.

b. In the event of rescission, revocation, lack of sufficient appropriations, or a determination that the water resources study will have unfavorable findings, and with concurrence of higher authority, the Corps district may suspend or terminate work on any fish and wildlife study, including subcontracts, and may withdraw the remaining funds. In this event, the Corps shall immediately notify the FWS field office in writing via SF30 with a copy given to the Regional Director.

c. Upon receipt of written suspension or termination of a study by the district where an ENG FORM 4914-R, Sep 97 has been signed, and where work by the FWS has been initiated but not completed, the FWS will bill the Corps, including the 38 percent for indirect costs (or 15 percent for indirect costs on subcontract work) for work accomplished as of that date. If the suspended or terminated study or project is reactivated and rescheduled, a new SOW, cost estimate, and schedule for FWS studies will be negotiated. The Corps will forward the new ENG FORM 4914-R, Sep 97 and SOW to the Regional Director for signature.

ARTICLE XI - DISPUTE RESOLUTION

In carrying out the above Agreement, every effort will be made to resolve all problems at the Corps district and FWS field office level. The FWS and the Corps points of contact have the lead on problem resolution. If this cannot be achieved, points of contact should refer the problem to the appropriate Corps Division and FWS Regional Office. Unresolved problems that impair either agency's abilities to carry out its mandated responsibilities should be referred to the Director of Civil Works, U.S. Army Corps of Engineers, and Director, U.S. Fish and Wildlife Service for resolution. Any referrals to the Washington level shall document the specific nature of the problems and efforts taken at the field level to resolve the disagreement.

ARTICLE XII - EFFECTIVE DATE

This Agreement revision shall become effective when signed by both the Service and the Corps.



Steve Williams
Director
U.S. Fish and Wildlife Service



Robert B. Flowers
Commander
U.S. Army Corps of Engineers

1/22/03

Date

22 JAN 2003

Date