



**Texas Water
Resources
Institute**

**June 1976
Volume 2
No. 5**

Mitigation?

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During the New Deal, a spate of bills was passed to rescue the country from economic depression and disastrous drought. The Soil Conservation Service, for instance, was created by Congress to settle the dust in the infamous Dust Bowl--that is, to establish farming practices that would guarantee against a recurrence.

But all the dust didn't settle on the parched plains. Part of it seems to have drifted East and buried stacks of new laws that were laid on the shelves in Washington after enactment. Among those was the 1934 Fish and Wildlife Coordination Act.

Now, the Coordination Act has been dusted off, and the U.S. Fish and Wildlife Service (USF&WS) is pushing hard to implement the 40- year-old act, several times amended, but rarely enforced.

The Act directs that fish and wildlife receive equal consideration-- along with such other water needs as economics, aesthetics, environment, and land use--in planning water development projects licensed or constructed by Federal agencies. It further provides means and measures for mitigating or compensating fish and wildlife damages to be included in any project plan. It states that the constructing agency "shall fund as a nonreimbursable cost the costs of providing, and maintaining means and measures, including land acquisition costs, to prevent, mitigate, and compensate fish and wildlife losses and damages." USF&WS would have authority to make recommendation to mitigate fish and wildlife losses that, according to their studies, would result.

Mitigation--meaning to lessen the effect--could go several direction: alteration of project design, stream flow regulation, incremental filling, money payment, recognition of offsetting benefits of the lake habit, and acquisition of additional land for wildlife management. Land acquisition, at this stage of the Coordination Act enforcement, is gaining greatest attention.

The "mitigation" issue surfaced in Texas in connection with Palmetto Bend, a Bureau of Reclamation (BOR) project. More recently it has cropped up, not in relation to the coordination Act (which applies to federal projects, usually the Corps of Engineers or BOR construction), but as an effect of the new program under Section 404 of the Water Pollution Control Act Amendments of 1972 (P.L. 92-500). A 1974 Federal court interpretation of Section 404 directs the Corps to extend its program of regulating discharge of dredged and filling material not only in navigable waters but in all public streams and adjacent wetlands. This, in turn, subjects state development projects to federal environmental impact review process which includes input from USF&WS.

First "404" Case

The first state project to need the Section 404 permit is the Brazos River Authority (BRA) development of Lake Limestone on the Navasota River. USF&WS has asked the Corps to deny the permit unless the BRA acquires 15,800 acres of fish and wildlife mitigation land to make up for the 15,000 acres required for the lake. Limestone fits the second phase of Section 404 and must, therefore, have a permit by July 1 of 1976. Construction has been underway since July 1975. Outcome of the Limestone case, now a center of controversy, will set a precedent.

The Corps is authorized to issue, deny, or issue with certain provisions the permit. A Corps spokesman says the 404 program is under constant study "to determine its impact on the nation's waterways--economic impact on both business and private individuals."

Since Section 404 is designed to cut down pollution, its application as a conservation measure to the Limestone project raised some doubts. It provokes more than doubt on the part of Brazos River Authority Manager Walter Wells. He protests that the current action is abusing Section 404, besides imposing impossible conditions on the BRA.

Wells says the purpose of P.L. 92-500 is to restore and maintain the quality of the nation's water, and that the establishment of wildlife management areas has no relationship to that purpose.

The BRA director enumerated several factors he thinks USF&WS should consider:

- effects on the farmers and ranchers who must be dispossessed of their land.
- added cost and who will have to pay it. Added cost for Lake Limestone would be in excess of \$8,000,000, to be paid by the consumer of water and electricity.
- effect on the three economically depressed counties around the lake of taking land out of agricultural production and off tax rolls.
- effect, in the case of Lake Limestone, of imposing on a State- approved project already under construction a requirement that simply cannot be met by the builder. The limestone project had been thoroughly coordinated with all state government agencies concerned and reviewed at a public hearing of the Texas Water Rights Commission in 1974.

"BRA does not have any source of funds nor the legal authority to buy land for use as wildlife management areas," Wells declared. He said the the BRA gets no tax money to pay for its water resource projects, but must finance them entirely from payments by water users.

Wells said Lake Limestone will supply water for industrial, municipal and agricultural use in the local area and in areas downstream. The most pressing immediate requirement is for cooling of electric generating facilities to permit use of large deposits of lignite in the local area as an urgently-needed source of energy.

Wells said the BRA would lose \$18 million if it had to stop construction. He also pointed out that potential payrolls of more than \$300 million in the next 40 years would be lost to the economically depressed counties around Lake Limestone if the planned power plants cannot be built.

Federal Projects

To gain Congressional approval of a federal project, the reservoir plan is submitted to Congress accompanied by a report from the Department of the Interior concerning fish and wildlife conservation. In this way, mitigation is part of early planning and budgeting.

An example of inter-agency participation is the planning for the Carl L. Estes Reservoir, a proposed project of the Corps and the Sabine River Authority (SRA). USF&WS recommended that 12,000 acres of high quality flood plain hardwood habitat plus 13,350 acres of flood plain land normally would have been acquired with a flowage easement estate, but because of its value for the protection and mitigation of the fish and wildlife resources the land will be purchased and offered to TPWD for conservation and enhancement of those resources.

The cost will be part of the total project cost allocated to the project purposes. This plan requires approval and funding by Congress. Also there may be future conflicts with landowners, and court action may be required to gain control of the land. However, the USF&WS has stated that the Carl L. Estes plan is "possibly the best multipurpose reservoir development plan thus far formulated for implementation in Texas."

"Any later would have been too late."

Protecting fish and wildlife resources from destruction is the concern of both the United States Fish and Wildlife Service and the Texas Parks and Wildlife Service (USF&WS).

Viewpoints of Bob Misso, acting field supervisor, and Greg Konkell, staff biologist, Division of Ecological Services, USF&WS (Ft. Worth) reflect that goal.

"Man comes into this," Misso said, "but resources are our main concern. Conservation of fish and wildlife resources is not merely for today's fishermen and hunters but for present and future generations to enjoy such pleasures as nature appreciation and camping."

Konkel stressed the need to assess the overall ecological system. He pointed out that building reservoirs doesn't displace wildlife but destroys it.

Discussing the broad ramifications of mitigation, Misso and Konkel had these observations:

- One function of the Corps of Engineers in reservoir planning is to balance the pluses and minuses in a benefit-cost ratio. Yet there is no mechanism to show environmental benefits and costs, i.e. loss of wildlife resources. Previous emphasis was on the number of hunting days foregone, but the real issue is habitat resource loss. There's a difference between man's use of the resource and the resource itself. Intangible values can't be equated to dollars. This means it is not going to be easy to attain equal consideration for wildlife conservation along with water supply and flood control purposes.
- We're not opponents of progress or water development. We are opponents of continued behind-closed doors planning. People of Texas are not being told what provisions are in the planning process.
- We seek to prevent unnecessary adverse impact upon fish and wildlife resources and to mitigate impact which occurs. Efforts are directed toward lands for wildlife and instream flows for fisheries.
- The mitigation concept does not exclude agricultural activity from lands acquired. Grazing and sharecropping will generally be included in management plans. Optimizing wildlife diversity, productivity, and public use are our goals. Control of lands will be offered to the Texas Parks and Wildlife Department. A river authority, city, or conservation organization could oversee the lands.
- Conflict with landowners may arise. Condemnation may be required. Should we view taking land to put under water with one yardstick and taking land to preserve our wildlife heritage with another?
- Cost of acquiring habitat approximates 5 percent in a federal multi-purpose project. At Limestone costs will be 16 percent. When the billion dollar utility development, including Limestone, is considered, costs drop to less than 1 percent.
- There is excessive reservoir development in Texas in anticipation of future water needs.
- The Section 404 permit bill has tremendous potential for the people in terms of conservation because projects are brought under the scrutiny of federal legislation.
- Any later would have been too late.

Texas Parks and Wildlife Department

Like its federal counterpart, Texas Parks and Wildlife Department (TPWD) is concerned with the disappearance of natural wildlife lands and feels that the public is entitled to compensation from losses caused by water development.

"Agricultural and industrial development, urban sprawl, pollution, reservoir and highway construction --all these have come about as a result of human population expansion," remarked William Sheffield, Environmental Assessment Program leader. "I feel that in the not too distant future natural land is going to be considerably diminished in Texas, especially bottomland hardwood forests. So mitigation in the form of lands set aside for fish and wildlife is an effort to make sure some land will be perpetuated in its natural condition to support wildlife for future generations."

The TPWD has made the following public statement: "Water development projects are generally destructive of terrestrial wildlife habitat. The consequences of habitat loss are the disappearance of associated wildlife and loss of wildlife recreation to the public. Approximately 3,000,000 acres in Texas will likely be affected by federal water development projects by the year 2000."

Under the Fish and Wildlife Coordination Act, the TPWD must be consulted concerning federally funded or licensed water development projects. Its role in helping implement the Coordination Act is principally fact finding--visiting the site to inventory species, to evaluate the status of fish and wildlife habitat, and to assess the probable effects of project construction. The Department has no power to require or condemn land for mitigation. Also, the Department can accept or refuse the offer to administer mitigation lands that become public under the Act.

Administration of mitigation lands may include: 1) proper management to avoid overusing resources, 2) enhancement such as increasing wildlife production, and 3) providing for public use. The TPWD currently administers 8,317 acres of wildlife habitat near Pat Mayse Reservoir in northeast Texas, the only mitigation land thus far provided in the State.

"Mitigation may take several forms," **Ted Clark**, director of the Wildlife Division, pointed out. "It could be just releasing a certain amount of water from a reservoir to maintain the fisheries in the downstream ecosystem. In many instances, mitigation features may not add to project costs and would only entail construction of a project in a different manner."

"What's it gonna cost?"

"What's it gonna cost?" and "Who's gonna pay?"

The answer is "The consumer pays." But who is the consumer? Society, considered to be the beneficiary of the law? The water user? Or the specific user of mitigation benefits, such as the hunter or the birdwatcher?

Agencies are in conflict over which one of them will channel the cost to the consuming public. Although the Coordination Act states that costs of mitigation will be defrayed by the constructing agency, the Texas Water Development Board takes the position that "where a need for mitigation is clearly demonstrable and in the public interest, the board

favors allocation to other agencies whose major responsibilities are the development and management of the Texas wildlife and outdoor recreational resources. Such costs should be borne through funds appropriated to federal and state fish and wildlife agencies."

Texas Parks and Wildlife Department makes it clear that its position is somewhat subordinate in the mitigation issue--that is the laws governing mitigation are federal statutes and the only requirement for TPWD involvement is for consultation by the construction agency or permitting agency. The Department neither has the authority to condemn land for mitigation nor the funds to support a large program of intensive management of mitigation lands. At present the TPWD administers the Pat Mayse tract from user fees.

River Authority managers are upset over the possibility of having to increase the cost of water resource projects to cover the mitigation, and having to charge the consumer more for water in order to pay off increased bonded indebtedness.

It is ironical that an issue so controversial as this one goes by the label "mitigation." Feelings of members of agencies involved in "mitigation" are neither softened or mollified at this stage. Economics is only a part of the overall philosophical differences.