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The Fish and Wildlife Coordination Act in Environmental Litigation

Michael Veiluva*

INTRODUCTION

Enacted by Congress in 1934, the Fish and Wildlife Coordination Act (FWCA)1 is one of the earliest federal environmental statutes and represents the first attempt "to integrate fish and wildlife conservation measures into [the Federal Government's] water resource planning activities."2 This statute reflects the congressional response to an emergency discovered during that period—the deterioration of rivers and lakes caused by rapid urban growth.3 FWCA was intended to preserve and propagate remaining fish and game stocks through a program of voluntary cooperation between federal agencies involved in construction of projects affecting navigable waters and local fish and game services.4 Amendments enacted in 19465 transformed the voluntary program into one requiring federal agencies administering projects that modified watercourses to take fish and wildlife resources into consideration before proceeding6 but did not affect such agencies' discretion in making final decisions.7 Further amendments passed in 1958,8 which

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3. One major congressional concern was the unsightly pollution of and disappearance of fish from the Potomac River. See 78 CONG. REC. 3726 (1934). See also H.R. REP. No. 850, 73d Cong., 2d Sess. 1 (1934) (referring to the "enormous national investment" and "great value" of the nation's wildlife resources).
4. H.R. REP. No. 850, 73d Cong., 2d Sess. 1 (1934). Senator Walcott commented that, "[t]here is nothing but a spirit of cooperation which is insisted on by this bill. There is nothing mandatory about this bill." 78 CONG. REC. 2011 (1934).
6. Id. § 2 (current version at 16 U.S.C. § 662 (1976)). These amendments also authorized federal agencies to reserve lands and waters accompanying a project for use as refuge areas. Id. § 3 (current version at 16 U.S.C. § 663 (1976)).
form the heart of the present Act, expanded the authority of action agencies to take affirmative steps so that projects would enhance fish and wildlife resources but still left intact FWCA’s interagency-cooperation approach.

FWCA, in its current form, requires federal agencies proposing to construct or to issue permits for construction of projects affecting streams, lakes, or other watercourses to consult with the Fish and Wildlife Service (FWS) and state wildlife agencies prior to final approval of the project. The federal action agency is required to consider recommendations made by wildlife agencies concerning the project’s wildlife aspects. Furthermore, an action agency may adopt changes in project plans to mitigate damage to wildlife resources and, where possible, to enhance such resources. The action agency, however, retains complete authority to decide which mitigation measures, if any, to incorporate into the project plan.

By the late 1960’s, FWCA’s ineffectiveness had become apparent. Federal agencies involved in projects affecting aquatic habitats had not

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13. The term “action agency” will be used in this Comment to identify federal agencies that are subject to the requirements of FWCA because of their participation in projects that impound, divert, or modify a body of water and includes federal agencies with permit authority over state, local, or private water projects. See 45 Fed. Reg. 83,412, 83,414 (1980) (to be codified in 50 C.F.R. § 410.3).

14. The term “wildlife agency” will be used in this Comment to refer to all federal and state agencies that, pursuant to FWCA consultation requirements, advise action agencies about the impacts on wildlife likely to result from projects proposed by the latter. Cf. 45 Fed. Reg. 83,412, 83,414 (1980) (to be codified at 50 C.F.R. § 410.3) (agencies exercising “immediate and direct administration over fish and wildlife resources”).


16. Id.

17. See S. REP. No. 1981, 85th Cong., 2d Sess. 6 (1958). The Act requires action agencies to include FWS and state agency recommendations in any reports they present to Congress or to agencies with approval authority. 16 U.S.C. § 662(b) (1976). The project plan must include only those measures for preventing loss of or damage to wildlife resources “as the [action] agency finds should be adopted to obtain maximum overall project benefits.” Id. (emphasis added). See also id. § 663(a) (directing action agencies constructing water projects to make “adequate provision, consistent with the primary purposes [of such projects],” for use of the water body being modified and surrounding waters or lands administered by the agency to conserve and improve wildlife and wildlife habitat).
responded to the congressional concern over declining fisheries and wildlife stocks that was the motivation for the Act. The Army Corps of Engineers had continued to issue permits allowing dredging and filling of thousands of acres of productive wetlands and watersheds. Dam construction and channel projects had proceeded without regard to the spoiling of existing wildlife habitats. A reassessment of FWCA by Congress and members of the Executive Branch in the early 1970's revealed failures at every step of the FWCA process: federal action agencies had failed to consult adequately with FWS and often glossed over or ignored impacts on wildlife; the Service itself lacked the funds necessary to make the reports; and no general criteria had been established for evaluating wildlife factors. The result was that water-resource projects continued to cause substantial losses of fish and wildlife. Furthermore, judicial enforcement of agencies' compliance with the Act was virtually nonexistent.

One response to this crisis was enactment of the National Environmental Policy Act (NEPA) in 1970. Almost immediately, NEPA

21. Id. at 15-16, 21, 23-24, reprinted in Amendment Hearings, supra note 20, at 75-76, 81, 83-84.
22. Id. at 21-23, reprinted in Amendment Hearings, supra note 20, at 81-83.
23. See id. at 29-33, reprinted in Amendment Hearings, supra note 20, at 89-93.
24. Id. at 8-10, reprinted in Amendment Hearings, supra note 20, at 68-70.

As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted.

For a detailed legislative history of NEPA, see F. Anderson, NEPA in the Courts 4-10 (1973). See also H.R. Rep. No. 378, 91st Cong., 1st Sess. (1969); National Environmental
proved effective in forcing federal agencies to consider environmental consequences of their activities.\textsuperscript{27} Courts enforced NEPA's requirement that agencies prepare comprehensive Environmental Impact Statements.\textsuperscript{28} Furthermore, private parties could bring suits to compel agencies to comply with NEPA without showing concrete harm to an economic or property interest.\textsuperscript{29}

\begin{quote}


29. NEPA contains no citizen-suit provision nor any references to judicial review. \textit{See} 42 U.S.C. §§ 4321-4361 (1976). Nevertheless, courts in the early 1970's allowed private individuals and organizations to bring suit to enjoin federal activities alleged not to be in compliance with NEPA's Environmental Impact Statement requirements. \textit{See} R. LIROFF, \textit{A National Policy for the Environment} 154-65 (1976). These courts relied on the general judicial review provision of the Administrative Procedure Act (APA), which provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." APA, § 10(a), 5 U.S.C. § 702 (1976).

In Data Processing Serv. v. Camp, 397 U.S. 150 (1970), the Supreme Court acknowledged the availability of judicial review under this provision to private parties alleging injuries resulting from agency decisionmaking and addressed the related issue of plaintiffs' standing to sue. The Court held that invasions of economic, aesthetic, or recreational interests provide a basis for standing to obtain judicial review of agency action under APA, so long as the plaintiff demonstrates that the challenged action will cause "injury in fact," \textit{id.} at 152, and that its interest lies within the "zone of interests protected by the statute or constitutional guarantee in question." \textit{Id.} at 153.

Two years later, in Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court specifically addressed standing under NEPA. The plaintiffs in \textit{Sierra Club} attempted to extend the injury-in-fact doctrine of \textit{Data Processing} to obtain a standing rule that in effect would give environmental organizations automatic standing in NEPA suits or other environmental claims brought under § 10 of APA. Omitting from their pleadings any references to tangible injuries, the Sierra Club alleged only that it had longstanding expertise in the matter and was a responsible representative of the public. \textit{Id.} at 735, 736. The Court reaffirmed the expansive standing doctrine outlined in \textit{Data Processing} but found that the plaintiffs had failed to meet the injury-in-fact requirement: "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." \textit{Id.} at 734, 735.

In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412
The courts' responsiveness to NEPA had the secondary effect of facilitating enforcement of other environmental statutes like FWCA. For example, in Zabel v. Tabb\(^3\) the Court of Appeals for the Fifth Circuit found that the combined mandates of NEPA and FWCA required the Secretary of the Army to consider potential environmental effects in deciding whether or not to grant a dredge-and-fill permit for a proposed project.\(^3\) Subsequent cases held that Environmental Impact Statements (EIS) prepared pursuant to NEPA\(^3\) should include the consideration of effects on fish and wildlife required by FWCA.\(^3\)

Although NEPA has revitalized FWCA, a secondary result is that NEPA and FWCA have become linked to avoid expensive duplicate environmental analysis and documentation, and federal action agencies are now urged to consolidate FWCA consideration into the NEPA process.\(^3\) Moreover, some courts have found FWCA claims to be unenforceable by private parties because of the similarity between that Act and NEPA.\(^3\)

U.S. 669 (1973), the Court reduced the requirement of factual injury to a mere pleading formality. In SCRAP, a student environmental group challenged an Environmental Impact Statement (EIS) filed by the Interstate Commerce Commission. \textit{Id.} at 675. The plaintiffs alleged that a proposed railroad freight surcharge on recyclable goods pending before the Commission would increase the use of, and therefore littering of, nonrecyclable goods. \textit{Id.} at 676. The resultant injury alleged by SCRAP was damage to the environment in local parks, which members of the group used for recreational purposes. \textit{Id.} at 676. The Court granted the students standing, despite the prospective and tenuous nature of the alleged injury. \textit{Id.} at 683-90. (The plaintiffs in SCRAP also alleged injury in having to pay higher prices for recyclable goods. \textit{Id.} at 676. The Court specifically held, however, that plaintiffs need not allege economic harm to obtain standing. \textit{Id.} at 686.)

Later Supreme Court cases reviewing standing under \$ 10 of APA appear to have imposed a stricter injury-in-fact requirement than that developed in \textit{Sierra Club} and SCRAP. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). \textit{See generally} Broderick, \textit{The Warth Optional Standing Doctrine: Return to Judicial Supremacy?}, 25 \textit{CATH. U.L. REV.} 467 (1976). These cases may be distinguishable from \textit{Sierra Club} and SCRAP, which could be read as adopting a liberal standing approach for environmental cases. \textit{See also} Atchison, T. & S.F. Ry. v. Calloway, 431 F. Supp. 722 (D.D.C. 1977) (injury to public's interest in information created by impact statement requirement of NEPA is injury sufficient to confer standing on environmental group), discussed in Note, \textit{Standing to Sue—Alleged Violation of Private Party's Informational Interest in Environmental Impact is Sufficient to Establish Standing to Enforce National Environmental Policy Act}, 30 \textit{VAND. L. REV.} 1271 (1977). It is unclear whether the generally liberal rules of standing applied to NEPA suits would also apply in actions brought under FWCA; unwilling to imply a private right of action under FWCA, see cases cited in note 155 \textit{infra}, courts have not reached the standing question.

34. \textit{See} 40 C.F.R. \$\$ 1500.4(k), 1502.25 (1980) (Council on Environmental Quality Guidelines on NEPA requirements) (recommending that federal agencies integrate preparation of draft EIS with studies required by FWCA).
35. County of Trinity v. Andrus, 438 F. Supp. 1368, 1383 (E.D. Cal. 1977); Sierra Club
This linking of NEPA and FWCA should not provide a basis for courts to neglect aspects of FWCA that impose stricter requirements on action agencies than NEPA does. This Comment will consider both procedural36 and substantive37 requirements imposed on action agencies by FWCA that do not duplicate NEPA requirements. These independent provisions of FWCA are likely to become increasingly important in light of several recent Supreme Court decisions narrowly interpreting the requirements imposed by NEPA.38

Although there are important differences between NEPA and FWCA, the procedural similarities will make combined procedures for compliance with the two environmental statutes more efficient than separate compliance in most cases.39 This Comment concludes that where FWCA is applicable, separate compliance procedures for that Act and NEPA should not be imposed on action agencies, but the final EIS required by NEPA should contain an explicit record of compliance with FWCA.40 Courts should then allow challenges to agency compliance with FWCA either as a separate cause of action or as one element of an attack on EIS sufficiency under NEPA.41 Such an approach will further administrative efficiency while not neglecting the important independent features of FWCA.

I

ADMINISTRATIVE PROCEDURES UNDER FWCA

Although the Fish and Wildlife Coordination Act does not expressly limit action agencies' discretion in deciding whether or not to proceed with particular projects,42 it does impose specific consultation procedures on these agencies.43 Whenever an action agency proposes a project that will affect a watercourse or considers issuing a permit for a private project that will affect a watercourse, it must first consult with FWS and the fish and wildlife agency of the state in which the project is to be constructed.44 After consultation, FWS must submit a report to the action agency detailing the damages to wildlife that the project will

v. Morton, 400 F. Supp. 610, 640 (N.D. Cal. 1975). In County of Trinity, the court nevertheless examined the administrative record and found that the federal agency had complied with FWCA. See also Oversight Hearings, supra note 2, at 478-79 (statement of Oliver Houck).

36. See Part II.B infra.
37. See Part III infra.
38. See text accompanying notes 170-77 infra.
39. See text accompanying notes 45-52 infra.
40. See Part II.C infra.
41. Id.
42. See note 17 supra and accompanying text.
43. See 16 U.S.C. § 662(a), (b) (1976).
44. Id. § 662(a).
cause and listing possible mitigation measures. Where the action agency itself proposes to build the project, it must include the FWS report, together with any similar reports submitted by state agencies, in the proposal it submits to Congress or the agency that will authorize the project.

The U.S. Army Corps of Engineers is the action agency most substantially affected by FWCA's consultation requirements. In addition to building hundreds of water projects itself, the Corps also administers dredge-and-fill permits under section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. Although many projects will require permits under both of these provisions, the coverage of the section 404 and section 10 permit programs is not entirely overlapping. The Corps follows the same review process in ruling on permits under both of these laws, however.

In 1967, the Secretary of the Army entered into a Memorandum of

45. Id. § 662(b).
46. Id.
47. Since 1820, the Army Corps of Engineers has completed 3400 civil works projects, 350 reservoirs and local flood protection projects, and many other construction projects in addition to fulfilling its regulatory and permit responsibilities. Corps of Engineers Oversight, Hearings Before the Subcomm. on Water Resources of the Comm. on Public Works, 93d Cong., 2d Sess. 1-2 (1974) (Serial No. 93-H45).
49. Id. § 1344 (Supp. III 1979).
51. 33 C.F.R. § 325.1(a) (1980). The procedures followed by the Corps in processing permits are set out in id. pt. 325.
Understanding with the Secretary of the Interior.\textsuperscript{52} This Memorandum contains the administrative procedures that the Corps of Engineers will follow in order to comply with FWCA when acting on dredge-and-fill permits. In cases where officials in the Departments of Army and Interior are unable to resolve their differences on how a permit should be handled, the Memorandum provides that the Secretary of the Army shall make the final decision, carefully evaluating all the potential benefits and adverse effects of the project.\textsuperscript{53} Regulations promulgated by the Corps of Engineers in 1977 direct Corps officials to "give great weight" to views expressed by FWS and state wildlife agencies.\textsuperscript{54} Corps officials must urge permit applicants to modify their proposals to eliminate or mitigate potential damage to fish and wildlife resources, and, in appropriate cases, the Corps will impose conditions on permits to insure that such damage is limited.\textsuperscript{55}

The Environmental Protection Agency (EPA) is another federal agency whose activities often require consultation under FWCA. EPA shares responsibility with the Corps of Engineers for administering dredge-and-fill permits under section 404 of the Clean Water Act.\textsuperscript{56} EPA also administers the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act.\textsuperscript{57} The legislative history of section 402 indicates that Congress intended that the NPDES program would be subject to FWCA requirements.\textsuperscript{58} EPA's regulations also recognize its duty to consult with state wildlife agencies in conducting its regulatory activities.\textsuperscript{59} Because most EPA actions under the Clean Water Act are not subject to NEPA,\textsuperscript{60} compliance with FWCA is necessary to ensure that EPA considers the potential impacts of its decisions on wildlife.

Although the two major action agencies, the Corps of Engineers and EPA, have recognized their duty to comply with the consultation

\textsuperscript{52} The Memorandum of Understanding is reprinted at 44 Fed. Reg. 29,323 (1979) and at 33 C.F.R. pt. 325, app. B (1980).
\textsuperscript{54} 33 C.F.R. § 320.4(c) (1980).
\textsuperscript{55} Id. In practice, the Corps of Engineers has required permit applicants to "make peace" with FWS before it will issue a permit. See Oversight Hearings, supra note 2, at 317-18.
\textsuperscript{56} 33 U.S.C. § 1344(c) (Supp. III 1979). See generally Blumm, supra note 50, at 418-19, 433-34.
\textsuperscript{57} 33 U.S.C. § 1342 (1976 & Supp. III 1979). The Clean Water Act authorizes EPA to approve state permit programs, which then will operate in place of the EPA-administered program. Id. § 1342(b)-(d).
\textsuperscript{59} 40 C.F.R. § 122.12(e) (1980).
\textsuperscript{60} 33 U.S.C. § 1371(c)(1) (1976). The agency remains subject to NEPA requirements in granting permits for new point-source discharges, however. Id.
requirements of FWCA, the Act has failed to prevent destruction of substantial fish and wildlife resources.\textsuperscript{61} The Corps of Engineers, like other action agencies, has not consulted with FWS on all projects affecting wildlife.\textsuperscript{62} Although a 1974 General Accounting Office report recommended that the Secretaries of the Army and Interior establish general procedures for consultation and criteria for determining when to require mitigation measures,\textsuperscript{63} the Secretaries still have not adopted such guidelines.\textsuperscript{64} Furthermore, various proposed amendments to FWCA that would have imposed stricter consultation requirements on action agencies seeking to build water projects\textsuperscript{65} have never been enacted.

Another reason that fish and wildlife resources have not been adequately protected is that FWS has not carefully studied the potential impacts on wildlife for many proposed projects.\textsuperscript{66} Because of the Service's limited personnel and funding, it engages in detailed analyses of selected projects only.\textsuperscript{67} Federal action agencies engaging in direct construction activities are required to transfer funds to FWS for wildlife studies required in connection with such activities;\textsuperscript{68} no such requirement has been imposed on agencies whose permitting authority subjects them to FWCA requirements, however.\textsuperscript{69} The Act requires that certain costs associated with planning and implementing mitigation measures must be treated by action agencies as "an integral part of

\begin{footnotes}
\item[61] See text accompanying notes 18-25 \textit{supra}.
\item[62] GAO \textit{Report, supra} note 20, at 16, reprinted in \textit{Amendment Hearings, supra} note 20, at 76. The Corps failed to notify FWS of a modification of one project, for example, that increased by 800 acres the area of wetlands in which dredge spoils would be placed because, in the Corps' view, the change "would not have a significant effect on wildlife." \textit{Id.} at 23-24, reprinted in \textit{Amendment Hearings, supra} note 20, at 83-84. FWS, upon learning of the modification, disagreed that it was not significant and expressed its view that determining the significance of impacts on wildlife from project modifications was the responsibility of FWS rather than action agencies. \textit{Id.} Another action agency whose projects often have substantial impacts on wildlife, the Water and Power Resources Service (formerly the U.S. Bureau of Reclamation), cited the absence of established procedures for reporting postauthorization changes in water projects as one reason for failure to consult. \textit{Id.} at 24, reprinted in \textit{Amendment Hearings, supra} note 20, at 84.
\item[63] \textit{Id.} at 45, reprinted in \textit{Amendment Hearings, supra} note 20, at 105.
\item[64] Regulations recently proposed by FWS would establish uniform consultation procedures and criteria. See text accompanying notes 76-88 \textit{infra}.
\item[66] GAO \textit{Report, supra} note 20, at 16-23, reprinted in \textit{Amendment Hearings, supra} note 20, at 76-83.
\item[67] \textit{Id.} at 21-23, reprinted in \textit{Amendment Hearings, supra} note 20, at 81-83; \textit{Amendment Hearings, supra} note 20, at 542, 548-49.
\item[68] 16 U.S.C. \S 662(e) (1976). See also GAO \textit{Report, supra} note 20, at 21-22, reprinted in \textit{Amendment Hearings, supra} note 20, at 81-82.
\item[69] \textit{Oversight Hearings, supra} note 2, at 42 (statement of American Fisheries Society).
\end{footnotes}
the cost of such projects.” 70 In *Sun Enterprises, Ltd. v. Train*, 71 the Court of Appeals for the Second Circuit questioned the Interior Department’s 72 failure to evaluate thoroughly all projects subject to FWCA requirements. 73 The court recognized the Department’s funding problems but found that these difficulties had resulted from the Department’s own nonfeasance in failing “to request the funds and personnel necessary for it to fulfill its responsibilities.” 74 The court concluded: “[W]e cannot condone what amounts to administrative or executive repeal of an act of Congress.” 75

FWS has proposed regulations that would establish generally applicable consultation procedures designed to make consultation between action agencies and wildlife agencies more timely, uniform, and efficient. 76 The proposed regulations emphasize the need for early consultation 77 and “strongly encourage” private permit applicants and action agencies to initiate consultation with wildlife agencies early during the project planning process. 78 Wildlife agencies would then be subject to detailed requirements for reporting to action agencies results of studies concerning project impacts on wildlife and alternative mitigation measures, 79 and action agencies would be required to issue findings

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70. 16 U.S.C. § 662(d) (1976). Costs covered by this provision include all those attributable to mitigating losses of wildlife but, in the case of costs attributable to “development and improvement of wildlife,” include only those necessary for acquiring land, constructing facilities specifically recommended in wildlife agency reports, and modifying a project or its operation and do not include costs of operating wildlife facilities. *Id.*

71. 532 F.2d 280 (2d Cir. 1976).

72. FWS is a division of the Department of the Interior, 16 U.S.C. § 742b(b) (1976), and its functions are supervised by the Secretary of the Interior. *Id.* § 742b(d). See also id. § 742f(a) (1976 & Supp. III 1979).

73. *Sun Enterprises, Ltd. v. Train*, 532 F.2d at 289-90.

74. *Id.* at 290. *Cf.* *Oversight Hearings, supra* note 2, at 29 (statement of Oliver Houck) (describing agencies’ failure to request funds).

75. *Sun Enterprises, Ltd. v. Train*, 532 F.2d at 290. A statement by the Environmental Defense Fund in *Oversight Hearings, supra* note 2, at 110-11, describes the difficulties in funding FWCA by transferring funds from action agencies to FWS for mitigation measures: Although transfer funds are better than no funds at all, this budgetary process puts the Fish and Wildlife Service unfortunately in a rather defensive posture vis-à-vis development agencies. The Fish and Wildlife Service on an annual basis must negotiate transfer of funds from the various agencies whose projects they may be severely criticizing and where comprehensive compensatory mitigation schemes may make those projects far less attractive. The Environmental Defense Fund concludes that direct appropriations by Congress to FWS for carrying out its FWCA responsibilities would be preferable to the existing scheme. *Id.* at 111.


78. 45 Fed. Reg. 83,416-17 (1980) (to be codified in 50 C.F.R. § 410.22(a)).

79. *Id.* at 83,417-18 (to be codified in 50 C.F.R. § 410.23(b),(c),(d)). An apparent loophole would be created by § 410.23(e) of the proposed regulations, *id.* at 83,418, which pro-
demonstrating that they had considered the wildlife agencies' recommendations and could justify their decisions regarding wildlife resources.80 Whenever officials from wildlife and action agencies are unable to resolve their differences, the proposed regulations provide that the dispute will promptly be referred to the next higher level of authority within each of the agencies involved.81

In addition to prescribing detailed, uniform procedures, a major innovation in the proposed regulations is their direction to wildlife and action agencies to evaluate projects' impacts on "wildlife resources, their productivity, and related values."82 The Army Corps of Engineers traditionally has evaluated wildlife habitats solely for their potential recreational use and has neglected to consider other wildlife values.83 The proposed regulations require agencies to evaluate and attempt to mitigate all losses of wildlife and wildlife habitat that may

vides that where a wildlife agency is "unable to report, or is unable to do so within a statutorily required or an agree-upon [sic] period of time," lack of response by that agency within 30 days to a request from an action agency for consultation will be considered notice that no report will be prepared by the wildlife agency. Id. In the event of such failure by a wildlife agency, the action agency would be relieved of all duties to respond to recommendations by that wildlife agency. Id.

80. Id. at 83,418-20 (to be codified in 50 C.F.R. § 410.24).
81. Id. at 83,419 (to be codified in 50 C.F.R. § 410.24(a)(5),(6)).
82. Id. at 83,418 (to be codified in 50 C.F.R. §§ 410.23(c)(2)(iv), 410.24(a)(1)(ii)). This proposal retreats from the position taken in an earlier version of the proposed regulations that would have required wildlife agencies to analyze the impacts of proposed federally constructed projects on "wildlife resource productivity... without reference to values attributed to human use... or other monetary computations." Compare id. with 44 Fed. Reg. 29,304, 29,309-10 (1979) (proposed 50 C.F.R. §§ 410.23(c)(3), 410.24(a)(i),(b)(1)). Nevertheless, by requiring wildlife agencies to "focus on the needs of, and effects of such projects on, wildlife resources and their productivity and related values measured using habitat-based evaluations systems," 45 Fed. Reg. 83,412, 83,418 (1980) (to be codified at 50 C.F.R. § 410.23(a)(2)(iv)), the revised version of the proposed regulations would ensure that the Corps of Engineers and other action agencies take into account a broader range of environmental values associated with wildlife protection. Cf. 44 Fed. Reg. 29,300, 29,302 (1979) (describing objectives sought to be attained through prescribed techniques for evaluating impacts on wildlife).
83. Oversight Hearings, supra note 2, at 28, 55-56. The Corps has followed a policy in developing mitigation plans of acquiring lands only when a project would result in destruction of wildlife areas used by hunters or fishermen. Id. The method used by the Corps to evaluate habitat, termed "man-day use," involves assessing habitat according to how many sportsmen are likely to use an area and assigning a cash value to the use per sportsman. Id. The man-day use method enabled the Corps to compute a precise dollar value for lost habitat, which could then be mitigated by an equivalent expenditure on land purchase or contribution to local wildlife agencies. Id. at 398-99. This method of evaluation presumes that destruction of wildlife and habitat in one area can be mitigated simply by purchasing another area that provides opportunities for hunting and fishing. See id. at 28. Not only does the method focus solely on human recreational uses of wildlife, thus neglecting intangible habitat values, it also fails to account for many recreational uses other than hunting and fishing, such as photography and bird watching. Id. Moreover, by failing to recognize the "interrelationship of habitats," agencies relying on the man-day use procedure fail to protect even hunting and fishing uses of habitat areas distant from project sites. Id.
result from proposed projects, not only those affecting hunting and fishing. Another important feature of the proposed regulations is their requirement that wildlife agencies prepare plans for management of wildlife resource properties transferred to them by action agencies in mitigation of projects causing destruction of wildlife. In addition, the proposed regulations would require action agencies to include in their annual requests for appropriations requests for funds to cover the cost of implementing mitigation measures adopted pursuant to FWCA requirements.

Despite the potential improvements in agency procedures and decisionmaking and the resultant enhancement of wildlife resources that could be achieved under these proposed regulations, they still have not been adopted. Because they would impose substantially more detailed requirements on action and wildlife agencies and could subject FWS's mitigation-plan procedures to more scrutinizing judicial review, the Department of Interior may be reluctant to adopt the proposed regulations. If the new regulations are not adopted, private parties seeking to protect wildlife resources will have to resort to other legal bases to obtain judicial enforcement of FWCA.

II JUDICIAL ENFORCEMENT OF FWCA

A. Background

Courts did not begin to acknowledge the environmental policies embodied in FWCA as a basis for judicial review of federal agency actions until the first series of cases brought under NEPA in the early 1970's. In one of the earliest NEPA opinions, Zabel v. Tabb, the

84. FWS responded to the inequities of the Corps' habitat assessment methods by developing an alternative methodology, referred to as the "Habitat Evaluation System" (HEP), which assigns nonmonetary values to wildlife habitat based on its potential to support fish and animal species and does not depend on the exploitative value. Id. at 28-29. The proposed regulations embody in spirit FWS's push toward adopting nonmonetary habitat evaluation methods. See note 82 supra.

86. Id. at 83,421 (to be codified in 50 C.F.R. § 410.34).
87. When this Comment went to print, the last statement in the Federal Register regarding these proposed regulations was the Notice of Proposed Rulemaking and Availability of Draft Environmental Impact Statement, 45 Fed. Reg. 83,412 (1980).
88. The Army Corps of Engineers, for example, is currently bound only by its Memorandum of Understanding with the Department of Interior. See note 52 supra and accompanying text. The proposed regulations have much more detailed procedural requirements. See text accompanying notes 76-88 supra.
89. In Udall v. Federal Power Comm'n, 387 U.S. 428 (1967), the Supreme Court cited FWCA as a policy supporting its holding, which required the Federal Power Commission to evaluate potential effects on wildlife in deciding whether to approve a hydroelectric project. Id. at 443-44.
90. 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).
Court of Appeals for the Fifth Circuit used FWCA’s requirement that action agencies consult with FWS to support its holding that, under section 10 of the Rivers and Harbors Act, the Secretary of the Army must consider environmental factors in deciding whether the Corps of Engineers should issue a dredge-and-fill permit. The court, relying on the legislative history of FWCA and the Memorandum of Understanding between the Corps of Engineers and FWS, concluded that FWCA authorized and directed the Secretary of the Army to consult with FWS in deciding whether to issue a dredge-and-fill permit.

Because the holding of Zabel was based on both NEPA and FWCA, however, a major question left unanswered by that decision is whether the same conclusion could be reached on the basis of FWCA alone. The failure of the Zabel opinion to distinguish between the procedural requirements of the two statutes may have contributed to later erosion of FWCA as an effective tool for judicial review of agency decisions.

In the ten years since Zabel, considerable confusion has remained regarding FWCA’s status as an independent ground for judicial review in environmental litigation. The basis of this confusion is the substantial overlap of NEPA’s EIS requirement with FWCA’s mitigation-plan requirement. Because in recent years FWCA has remained relatively obscure as compared with the more recently enacted NEPA, it is not surprising that, in cases raising claims under both NEPA and FWCA, most courts have devoted their opinions primarily to the NEPA issues. Once having resolved the NEPA claims, however, courts have differed widely on what further requirements, if any, FWCA imposes

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92. Zabel v. Tabb, 430 F.2d at 209.
93. Id. at 210-11. See note 52 supra.
94. In Zabel, the plaintiffs, two landowners who had sought a permit from the Corps to fill a wetland area in Florida for use as a mobile home park, sued the Corps challenging its denial of the permit. Id. at 201. The Corps had refused to grant the permit because of the project’s harmful effect on fish and wildlife. Id. at 202. The plaintiffs argued that the Corps was without authority under § 10 of the Rivers and Harbors Act to deny a permit on grounds other than obstruction of navigation. Id. at 203. The court held not only that the commerce power could be used to protect the marine environment, id. at 204, and that the Corps was authorized under NEPA and FWCA to deny permits on nonnavigational grounds, id. at 207, but also that those statutes require the Corps to consider environmental effects of projects before issuing dredge-and-fill permits. Id. at 209-14.
95. Id. at 209.
96. Id. at 214. At the time the permit was denied in Zabel, NEPA was not yet in effect. Nevertheless, the court judged the agency’s decision to deny the permit according to the standards developed for NEPA in the interim between the agency action and the court’s decision. Id. at 213.
98. See, e.g., Bankers Life & Cas. Co. v. Village of N. Palm Beach, 469 F.2d 994 (5th Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Akers v.
on agencies. The varying degrees of emphasis courts have placed on FWCA issues in environmental litigation have not coalesced into an understandable doctrine, though they have undoubtedly influenced agencies' behavior. Although the FWCA cases do not always state clearly what the Act requires federal agencies to do, two trends have emerged. The Fifth Circuit, beginning with Zabel v. Tabb, has often interpreted FWCA and NEPA as jointly imposing a duty on action agencies to consider potential harm to fish and wildlife. In contrast, Eighth Circuit cases generally have not considered FWCA independently, instead finding compliance with NEPA procedures sufficient to fulfill the requirements of FWCA.

Fifth Circuit cases after Zabel have generally been unenlightening as to the independent significance of FWCA in cases raising claims under both that statute and NEPA. Subsequent cases have cited the holding of Zabel that NEPA and FWCA are complementary, but in many cases the courts have referred to these environmental statutes only as providing policies generally supporting agencies' decisions. In one district court case, Sierra Club v. Morton, the court considered plaintiffs' FWCA claim independently of the issues raised concerning the agency's compliance with NEPA. Relying on the agency's EIS as well as other prior records, the court concluded that the agency had fulfilled the mitigation-measure requirement of FWCA in designing a federal dam project.

In early cases brought under NEPA, the Eighth Circuit attempted to promote the environmental policies of NEPA's opening section by reviewing agency actions to determine not only whether the procedural

Resor, 443 F. Supp. 1355 (1978) (W.D. Tenn. 1978) (parties stipulated that NEPA issues, but not FWCA issues, would be addressed). 99. See generally Oversight Hearings, supra note 2, at 9-14 (statement of National Audubon Society), 95-111 (statement of Environmental Defense Fund), 472-503 (statement of Oliver Houck). See also the discussion of the relation of FWCA to NEPA in the initial draft of the proposed regulations produced by the Departments of Interior and Commerce, 44 Fed. Reg. 29,300-01 & n.2, which supports the view that NEPA and FWCA impose similar but "distinct requirements" that should each provide a basis for judicial review. 100. See text accompanying notes 102-05 infra. 101. See text accompanying notes 106-08 infra. See also Oversight Hearings, supra note 2, at 95, 105-06 (statement of Environmental Defense Fund), 472, 478-79 (statement of Oliver Houck). 102. E.g., Di Vosta Rentals, Inc. v. Lee, 488 F.2d 674, 681 (5th Cir. 1973); Banker's Life & Cas. Co. v. Village of N. Palm Beach, 469 F.2d 994, 999 (5th Cir. 1972). 103. See Joseph G. Moretti, Inc. v. Hoffman, 526 F.2d 1311, 1313 (5th Cir. 1976); Di Vosta Rentals, Inc. v. Lee, 488 F.2d 674, 681 (5th Cir. 1973); United States v. Underwood, 344 F. Supp. 486, 489 (M.D. Fla. 1972). Because these cases were brought by parties challenging federal agencies' decisions to deny projects proposed by plaintiffs, no NEPA or FWCA claims were raised by plaintiffs or addressed by the courts, and those statutes were relied on only as embodying policies that supported the agencies' decisions. 104. 431 F. Supp. 11 (S.D. Tex. 1975). 105. Id. at 20.
EIS requirements had been satisfied but also whether the decisions made by such agencies met substantive environmental standards believed to be imposed by NEPA. This approach had the secondary effect of reducing the relative importance of other environmental statutes like FWCA because courts assumed that NEPA standards sufficiently protected all the policies and interests embodied in these other statutes. For example, in *Environmental Defense Fund v. Froehlke*, the Eighth Circuit found that NEPA procedures necessarily protected all the interests sought to be achieved through FWCA. While the court acknowledged that FWCA required government agencies to coordinate their activities to minimize adverse effects on fish and wildlife, it declared that good-faith compliance with NEPA "will automatically take into consideration all the factors required by FWCA, and it is not reasonable to require them to do both separately."

Because FWCA differs in important respects from NEPA, both the Fifth and Eighth Circuits' approaches have unreasonably subordinated FWCA where parallel claims have been raised under both that statute and NEPA. The next Section considers several requirements imposed by FWCA that are stricter than those mandated by NEPA. These stricter, independent requirements of FWCA mandate that courts give separate, careful consideration to FWCA compliance rather than merely finding FWCA claims subsumed within NEPA actions.

**B. The Independent Procedural Significance of FWCA**

Because Congress enacted NEPA as a general statement of na-

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106. *See Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972) (Cache River Project); Environmental Defense Fund v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), cert. denied, 409 U.S. 1072 (Gillham Dam). For a discussion of the differences between substantive and procedural review of agency decisionmaking under NEPA and FWCA and the current state of the law in this area, see Part III.A infra.

107. 473 F.2d 346 (8th Cir. 1972).

108. *Id.* at 356 (quoting *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728, 749 (E.D. Ark. 1971)). In *Environmental Defense Fund v. Corps of Eng'rs*, the court held that the defendants had failed adequately to fulfill the EIS requirements of NEPA. *Id.* at 755-63. Although the plaintiffs, who had challenged the Corps' Gillham Dam Project, made a substantial showing that the Corps had not complied with the mitigation-plan requirements of FWCA, the court dismissed the FWCA claims, holding that because compliance with NEPA would require agencies to consider all of the factors required by FWCA, alleging noncompliance with FWCA alone would not form the basis for injunctive relief. *Id.* at 753-54. The plaintiff was thus required to assert the claim that the Corps had failed to comply with FWCA as part of a challenge of the EIS. *Id.* The court noted, however, that the Corps would be required to address in its EIS any departures from FWCA. *Id.* at 754. Although the court's refusal in *Environmental Defense Fund v. Corps of Eng'rs* to conduct separate review of plaintiffs' FWCA claim may have been used in part on its finding that the FWCA challenge was not raised until thirteen years after the alleged failure to comply, *id.* at 754, the Court of Appeals in *Environmental Defense Fund v. Froehlke* did not limit the rule to tardy claims.

tional environmental policy and in response to growing awareness of environmental problems that culminated in the early 1970's, it is not surprising that courts have tended to emphasize NEPA and ignore FWCA in environmental litigation. Because section 104 of NEPA expressly provides that NEPA does not diminish action agencies' duties under other statutes to coordinate and consult with other federal and state agencies, courts should be careful not to overlook FWCA requirements as an independent basis for review of agency decisionmaking. Moreover, because the procedural requirements of NEPA and FWCA differ in several significant respects, neither law's procedural requirements should be ignored. This Section highlights the differences between the two statutes and demonstrates that action agency compliance with FWCA cannot be satisfied only by complying with NEPA.

I. Scope

FWCA governs many federal agency activities that are not covered by NEPA. NEPA requires agencies to prepare an EIS only for "major Federal actions." While divergent views have emerged from the courts concerning what actions are encompassed by that phrase, it is clear that there is some range of agency activity that will not be considered "major" and thus will not require an EIS under NEPA, regardless of its potential environmental effects. NEPA is also limited to actions "significantly affecting the quality of the human environment," a limitation on statutory scope generally considered to be separate from, and in addition to, the requirement that the action be "major." In contrast to NEPA's EIS requirement, the consultation provisions of FWCA are not limited to major agency actions or to actions that will significantly affect wildlife. The proposed FWCA regulations would authorize wildlife agencies, upon finding that the effects


111. See note 98 and text accompanying notes 106-08 supra.

112. 42 U.S.C. § 4334(2) (1976). See also id. § 4335 (providing that NEPA's goals are supplementary to those set forth in existing authorizations of federal agencies).


114. See W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 751-53 (1977); F. ANDERSON, supra note 26, at 73-105.


of a project on wildlife are insignificant, to decline to issue a report on potential effects on wildlife and recommendations for mitigation measures. Moreover, where a wildlife agency issues no report, the proposed regulations relieve action agencies of the duties they otherwise must fulfill in responding to that wildlife agency's report. Unlike NEPA, however, under which action agencies, in making the threshold determination of whether an EIS is required, assess whether projects are likely to significantly affect the environment, the proposed FWCA regulations authorize only wildlife agencies to determine the significance of projects' potential impacts on wildlife and to forego FWCA procedures where such impacts are expected to be insubstantial. Moreover, such waiver of the consultation requirements of FWCA by one wildlife agency would not relieve an action agency of its duties vis-à-vis the other wildlife agency if the latter agency decided to carry out consultation.

In addition to the major-federal-action and significant-effect limitations on the scope of NEPA, a number of specific federal agency activities are expressly made exempt from NEPA. For example, no EIS is required for federal agency actions authorized under the Clean Air Act. The Clean Water Act similarly exempts many EPA activities. On the other hand, almost all federal agency actions that will affect watercourses are subject to the FWCA's procedural requirements.

2. Responsibilities of the Reporting Agency

Under NEPA, the basic responsibility for obtaining comments on

119. 45 Fed. Reg. 84,418 (1980) (to be codified in 50 C.F.R. § 410.23(c)(1)).
120. Id. (to be codified in 50 C.F.R. § 410.23(e)). See note 79 supra.
122. See 45 Fed. Reg. 83,418 (1980) (to be codified at 50 C.F.R. § 410.23(c)(1)). This provision would resolve a dispute between the Corps of Engineers and FWS concerning whether the action agency or wildlife agency has responsibility for determining when consultation is required. See note 62 supra.
123. FWCA requires agencies to consult with both FWS and state wildlife agencies. 16 U.S.C. § 662(a) (1976).
124. Id. (to be codified in 50 C.F.R. § 410.23(e)).
126. 33 U.S.C. § 1371(c)(1) (1976). For EPA actions under the Clean Water Act, NEPA applies only to federal financial assistance for the construction of publicly owned treatment works and to granting of NPDES permits for discharges from new point sources. Id.
127. See Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 288 n.9, 290 (2d Cir. 1976). The only significant exception to FWCA's scope is that it does not apply to the Tennessee Valley Authority. 16 U.S.C. § 666C (1976). Other minor exemptions include water-impoundment projects with a maximum impoundment area of less than 10 acres and projects carried out by federal agencies on federal lands under federal land management programs. Id. § 662(b).
a draft EIS rests with the federal action agency.128 FWCA, by contrast, imposes a greater duty on FWS to respond to an action agency’s inquiries,129 reflecting congressional intent that action and wildlife agencies engage in an “equal partnership” to further conservation of wildlife resources.130 FWS’s duty to respond to action agencies’ inquiries under FWCA is thus not discretionary but required.131

3. Mitigation Plans

Although NEPA does not explicitly require that impact statements contain plans for mitigating proposed projects’ environmental damage, it does require them to include discussion of alternatives to the actions proposed.132 Some courts have held, however, that NEPA implicitly requires agencies to discuss methods for mitigating projects’ environmental impacts.133 In any event, a mitigation plan will at most constitute only a small part of the EIS, which seeks mainly to identify possible environmental effects,134 and courts are unlikely to require detailed mitigation plans if an EIS is otherwise sufficient.135 FWCA, on the other hand, explicitly requires action agencies to prepare mitigation plans136 and to give consideration to a particular class of environmental resources—fish and wildlife—equal to that accorded to projects’ projected benefits.137 If an agency fails to consider measures for mitigating a project’s impact on wildlife, FWCA therefore provides greater support than NEPA for a court to compel such consideration.

128. Sierra Club v. Froehlke, 359 F. Supp. 1289, 1346 (S.D. Tex. 1973), rev’d on other grounds, 499 F.2d 982 (5th Cir. 1974) (basic burden of complying with NEPA is on action agency, but other agencies also have duties under NEPA). See also Flint Ridge Dev. Co. v. Scenic Rivers Ass’n, 426 U.S. 776, 787 (1976) (federal action agencies are not relieved of their obligations under NEPA even if other agencies fail to submit comments). But cf. 40 C.F.R. § 1503.2 (1980) (imposing duty on federal agencies with jurisdiction or expertise with respect to environmental impact to comment on action agencies’ impact statements).
130. FWCA Hearings, supra note 10, at 36-37 (statement of John Briggs). See also id. at 7 (statement of Rep. Metcalf).
131. See Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 289-90 (2d Cir. 1976). The Sun Enterprises opinion emphasized that the particular permit at issue in that case was exempt from NEPA review and that the legislative history of the Clean Water Act demonstrated that Congress intended FWS to comment on all action-agency inquiries. Id. at 290.
137. Id. § 661.
Moreover, FWCA, unlike NEPA, expressly authorizes action agencies to implement mitigation plans. In addition to the requirement that action agencies prepare plans for the use of water and lands affected by a project for wildlife conservation purposes, the Act empowers action agencies to modify construction or operation of water projects in order to conserve wildlife resources.\(^{138}\) Such agencies may also acquire lands to be used for wildlife conservation purposes.\(^{139}\) Finally, FWCA vests state wildlife agencies and the Secretary of the Interior with authority to administer lands and waters acquired or set aside for wildlife conservation under agency mitigation plans.\(^{140}\) When Congress amended FWCA in 1958,\(^{141}\) it envisioned these options as the key to mitigating water projects’ damages to fish and wildlife resources.\(^{142}\)

### C. Judicial Review of Agency Procedures Under FWCA

When an action agency is obligated to comply with NEPA and FWCA, the recommended procedure is for the agency to incorporate into the EIS required by NEPA a record of the consultation with wildlife agencies required by FWCA.\(^{143}\) This procedure enables a court seeking to determine whether an agency has complied with FWCA to do so by reviewing the agency’s EIS for an explicit record of the consultation and mitigation plans required by FWCA. In the early 1970’s this procedure facilitated the first judicial enforcement of FWCA.\(^{144}\)

A recent case, *Texas Committee v. Alexander*\(^{145}\) illustrates how a trial court, reviewing agency compliance with NEPA, may order an agency to comply with FWCA procedures. In this case the plaintiffs challenged the sufficiency of an EIS prepared by the Corps of Engineers, alleging that the Corps had neither consulted adequately with other agencies on possible project mitigation nor developed a mitigation plan.\(^{146}\) The Federal District Court for the Eastern District of Texas noted the holding of the Court of Appeals in *Environmental Defense Fund v. Froehlke*\(^{147}\) that fulfillment of NEPA’s EIS requirement

\(^{138}\) *Id.* § 662(c).

\(^{139}\) *Id.* §§ 662(c), 663(c).

\(^{140}\) *Id.* § 663(b) provides that action agencies must make such waters and lands available to the state wildlife agency in whose jurisdiction they are located or, in the case of lands or waters that are valuable for carrying out the national migratory bird program, to the Secretary of the Interior.

\(^{141}\) See notes 8-11 *supra* and accompanying text.


\(^{143}\) See 40 C.F.R. § 1502.25(a) (1980). See also *id.* §§ 1500.9(a)(8), 1500.8(b) (1979). Agencies are encouraged to follow this procedure in order to reduce duplication and to further administrative efficiency. *Id.* § 1506.4 (1980).

\(^{144}\) See notes 25, 30-33 *supra* and accompanying text.


\(^{146}\) *Id.* at 1677.

\(^{147}\) 473 F.2d 346, 355-56 (8th Cir. 1972). See text accompanying notes 107-08 *supra*.
would suffice to demonstrate compliance with FWCA, but interpreted that case as establishing only that compliance with FWCA was prerequisite to an adequate EIS and rejected the view that compliance with the EIS requirement would in all cases satisfy agencies' duties under FWCA.\[148\] Then, in reviewing the agency's EIS for FWCA compliance, the court found that the agency had not fulfilled FWCA's mitigation plan requirements.\[149\] Statements in the EIS of the agency's intent to comply with FWCA in the future, without more, were insufficient; instead, the court held that FWCA required a detailed record of the mitigation planning engaged in by the agency.\[150\] Texas Committee synthesizes previous Fifth Circuit and Eighth Circuit FWCA cases,\[151\] allowing FWCA procedures to be incorporated into the NEPA EIS process but still requiring agency compliance with specific FWCA procedures not duplicated by NEPA.\[152\]

Texas Committee and similar cases\[153\] are an encouraging sign that courts in future NEPA cases will recognize independent, unduplicated, FWCA requirements. In order for FWCA to be fully effective, however, courts should allow private parties to bring suits to enforce agency compliance with FWCA without showing concrete harm to economic or property interests.\[154\] At least three district courts have stated that there is no private right of action under FWCA.\[155\] Although private parties often may raise claims of agency noncompliance with FWCA in suits challenging EIS sufficiency under NEPA,\[156\] NEPA's different scope will prevent claims from being raised under that statute in some cases where FWCA requirements are applicable.\[157\] If no private right of action is available in such cases, enforcement of FWCA will depend entirely on the good faith of the agencies.

\[149\] Id.
\[150\] See id. at 1679-80.
\[151\] See text accompanying notes 100-08 supra.
\[152\] For a discussion of such provisions, see Part II.B supra.
\[154\] For a discussion of the evolution of such suits under NEPA, see note 29 supra.
\[156\] See, e.g., notes 145-55 supra and accompanying text.
\[157\] See text accompanying notes 113-27 supra.
III

SUBSTANTIVE REQUIREMENTS OF FWCA

A. Substantive Review of Agency Decisionmaking

"Substantive review" refers to judicial power to modify or nullify agency decisions that violate standards established by statute or regulation.158 Where a court is authorized to exercise this power, it may enjoin further work on a project, despite compliance with applicable procedural requirements, if the project would violate a substantive statutory standard.159 For example, the Clean Air Act160 empowers federal courts to enjoin projects that will emit pollutants in excess of air-quality emission limitations established by EPA pursuant to its authority under that statute,161 and the Endangered Species Act of 1973162 authorizes courts to halt construction of projects that will destroy species protected by that Act.163

Neither FWCA nor NEPA contains explicit substantive standards that courts might apply to limit the planning, construction, or operation of federally assisted or approved projects. NEPA includes only a broad statement of congressional intent to improve the quality of the environment164 and procedural requirements for preparation of an EIS designed to effectuate that purpose.165 Similarly, FWCA sets forth its goal of protecting fish and wildlife resources166 and establishes the procedural requirements for consultation and preparation of mitigation


159. W. RODGERS, supra note 114, at 738.


165. Id. § 4332(2)(c) (1976).

plans.167

Until recently, there was considerable debate over courts' power under NEPA to reverse agency decisions on the merits.168 If NEPA empowered courts to engage in substantive review, and thus to limit the amount of environmental damage relative to the benefits of projects constructed by, or subject to the approval authority of, federal agencies, it would provide a strong weapon for parties seeking to enjoin environmentally harmful projects. If, on the other hand, NEPA imposes only procedural standards, it would be satisfied if an agency considered potential environmental harm identified in the EIS process, regardless of the decision ultimately reached by the agency or its impact on environmental resources.169

A series of Supreme Court decisions culminating in Strycker's Bay Neighborhood Council, Inc. v. Karlen170 have interpreted NEPA as primarily a procedural statute.171 In Strycker's Bay, the Court reversed an

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167. Id. §§ 662-663. See text accompanying notes 12-17 & 44-46 supra.
168. The first decision to address whether NEPA provides a basis for substantive review of agency decisions was Calvert Cliffs' Coord. Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), in which the court noted in dicta: "The reviewing courts probably cannot reverse a substantive decision on the merits under section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Id. at 1115. See also F. Anderson, supra note 26, at 258-65; Tarlock, Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee v. AEC, 47 IND. U.L. J. 645 (1972); Yarrington, supra note 158, at 279; Comment, The National Environmental Policy Act of 1969 Saved from "Crabbed Interpretation," 52 BOSTON U.L. REV. 425 (1972).


171. In the past five years, the Supreme Court has intervened two other times to restrain lower courts from exercising substantive review of agency decisionmaking under NEPA. In Kleppe v. Sierra Club, 427 U.S. 390 (1976), the Court refused to enjoin the Department of the Interior from issuing coal leases over a large section of the Midwest until a regional EIS
injunction issued by the Second Circuit Court of Appeals prohibiting
construction of a federally sponsored low-income housing project. The
Court of Appeals had reasoned that, although the EIS filed by the
Department of Housing and Urban Development (HUD) complied with
all of NEPA's procedural requirements, the Department's pro forma
consideration of the project's environmental impact did not satisfy
NEPA. The Court held that both the "arbitrary and capricious"
standard of the Administrative Procedure Act and the substantive
standards contained in NEPA required HUD to reconsider relocation
of the project. The Supreme Court reversed, stating that the reviewing
court's sole function is "to insure that the agency has considered the
environmental consequences" of its action. The Supreme Court's
conclusion that "NEPA requires no more" apparently forecloses any
substantive review under NEPA.

Although Strycker's Bay has diminished the efficacy of NEPA as a
tool for compelling environmentally sound agency decisionmaking,
one result of that decision may be to shift the focus of environmental
litigation to complementary environmental statutes, like FWCA, which
could be interpreted to provide an independent basis for substantive
review. Even though FWCA has been slighted by cursory judicial
treatment in the past, it still contains features, distinct from any
found in NEPA, that support substantive enforcement of its policy
objectives. FWCA's narrower focus on wildlife preservation, the

had been prepared, on the grounds that NEPA requires an EIS only when there is a propos-
al for a regional plan, not when an agency is only contemplating such a plan. Id. at 398-
(1978), the Court reversed the lower court's order compelling the Atomic Energy Com-
mission to reopen permit proceedings on two nuclear power plants to consider energy conserva-
tion alternatives, on the grounds, inter alia, that the role of a court in reviewing the
sufficiency of an agency's consideration of environmental factors is limited, and that NEPA
does not contemplate that a court should substitute its judgment for that of the agency. Id.
at 555. The Court stated that, while a reviewing court could require expansion by an agency
of its rulemaking record to facilitate judicial review, it could not impose procedural require-
ments beyond those imposed by the Administrative Procedure Act nor engage in substantive
review of agency decisions beyond the "arbitrary or capricious" standard of review. Id. at
553-56.

172. Karlen v. Harris, 590 F.2d 39, 44 (2d Cir. 1978), rev'd sub. nom. Strycker's Bay
173. For a brief description of the "arbitrary" and "capricious" standard of the Admin-
istrative Procedure Act, § 10, 5 U.S.C. § 706(2)(a) (1976), see note 158 supra. See also
Karlen v. Harris, 590 F.2d at 43-45.
174. Karlen v. Harris, 590 F.2d at 43.
176. Id. at 228.
177. But cf. N. ORLOFF & G. BROOKS, supra note 27, at 307 (Strycker's Bay could be
read narrowly to hold only that NEPA does not elevate environmental considerations over
nonenvironmental factors).
178. See Part II.A supra.
specificity of its consultation and reporting procedures, and, most significantly, its requirement that agencies mitigate damage to fish and wildlife caused by federal or federally approved projects, reflect clear congressional intent that agencies will take affirmative steps to protect wildlife resources.

B. The Public Trust Doctrine and FWCA

FWCA's relationship to the common law public trust doctrine is another even more significant potential basis for substantive judicial review under the Act. The public trust doctrine, grounded in early English property law, is the bedrock of modern wildlife regulation. Briefly stated, the doctrine establishes a public right to natural resources, such as wetlands, navigable waters, coastal shores, and wildlife, and imposes responsibility on the government as trustee, to hold such resources in trust for public use. Professor Joseph Sax describes the doctrine in its modern formulation as imposing on state and federal government a substantive obligation to protect broad, but diffuse, public interests in natural resources against narrower, but more highly organized, private interests. While such protection is predominantly a legislative task, courts may play an important role under the doctrine, by ensuring that responsible government agencies properly consider and weigh the public interest in allocating the use of natural resources. When presented with claims challenging agency decisions on natural resource use, courts may invoke the public trust doctrine to remand decisions to agencies for further consideration. Final authority over resource allocation decisions, however, remains in the legislature. Thus, the role of courts in protecting the public trust is not limited to review for compliance with procedural rules; rather, courts

180. See text accompanying notes 12-17, 43-46 & 128-42 supra.
185. Sax, supra note 184, at 560.
186. See id. at 558-60.
187. Id. at 560.
188. Id. at 558.
189. Id. at 560. Sax describes the judicial function as one of "democratization." Id. at 561. He identifies four guidelines for judicial determination that a decisionmaker has not adequately considered diffuse public interests: public property has been disposed of at less than market value with no obvious justification for the subsidy; government has granted authority to make resource-use decisions to a private interest; there has been an attempt to reallocate diffuse public uses to private use; and a resource is not being used for its natural purpose. Id. at 562-65.
must engage in substantive review to the extent necessary to ensure that agency decisions reflect adequate accommodation of diffuse public interests.  

A theory of wildlife ownership similar to the public trust doctrine that evolved historically in the United States established the state as the sovereign unit empowered to regulate wildlife use. Although early Supreme Court decisions were interpreted as acknowledging states' power to regulate wildlife exclusive of federal control in this area, later cases make clear that there are broad constitutional bases for federal regulation of wildlife. Recent Supreme Court decisions have held that the doctrine of state ownership cannot bar federal wildlife regulation.

In Kleppe v. New Mexico, the Court upheld a congressional grant of exclusive jurisdiction to the Federal Bureau of Land Management to regulate wild burros and horses on federal lands against a challenge that the action unconstitutionally infringed on state sovereignty. The Court reasoned that burros are an integral part of federal lands and that the property clause of the Constitution vests complete power in Congress to regulate wildlife living on federal property. The Court concluded that the powers incident to state ownership "exist only insofar as their exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution."

190. Id. at 561-62.
191. See M. Bean, supra note 7, at 12-20; Coggins, supra note 183, at 304-08.
197. Id. at 541-46.
198. U.S. Const. art. IV, § 3, cl. 2 provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."
In *Hughes v. Oklahoma*,201 the Court overruled the earlier cases and held unconstitutional under the commerce clause202 a state law that prohibited export of minnows caught within the state.203 The Court declared that state regulation of wildlife is no more favored than state regulation of any natural resource and that state regulatory interests must yield to federal interests when they impermissibly burden interstate commerce.204 Although *Hughes* dealt with limits to state regulation, it acknowledges by implication a federal commerce clause power to enact a national scheme of wildlife regulation.205

Federal and state wildlife laws, which developed to protect divergent interests, now form distinct, but complementary, bodies of law. State wildlife law has traditionally been exploitative, reflecting a preoccupation with the propagation and harvesting of "useful" game species.206 Federal wildlife regulation, on the other hand, has traditionally focused largely on preservation, emphasizing aesthetic and ecological values, rather than recreational and commercial use of game.207 Federal regulation protects resources otherwise ignored by the law, such as endangered species,208 and those beyond the effective control of a single state, such as migratory fish and birds.209 Thus, both federal and state wildlife law seem to reflect the substantive policy considerations of the public trust doctrine, and each level of government may be viewed as a "public trustee" for a distinct set of public interests in wildlife resources.210

The enactment of FWCA in 1934 and of the first amendments to the Act in 1946 represented a remarkable extension of federal authority over wildlife in the United States.211 At the same time, they reflected an uneasy congressional balance between states' rights, as defined by the ownership doctrine, and the need for federal control over water-related construction projects that could significantly damage fish and

202. U.S. CONST. art. I, § 8, cl. 3 provides in part: "Congress shall have power . . . to regulate Commerce . . . among the several States."
204. *Id.* at 331-38. *See Coggins, supra* note 183, at 318-19.
205. For a general discussion of the commerce, treaty, and property clauses as applied to federal wildlife law, *see Coggins, supra* note 183, at 323-28.
207. *Id.* at 48, 81-82. *See generally id.* at 82-99.
210. *Cf.* Sax, *supra* note 184, at 560 (noting possible competing interests that may be asserted under public trust doctrine).
211. *Cf.* M. BEAN, *supra* note 7, at 193 (describing FWCA as the "first major federal wildlife statute . . . compelling consideration of wildlife impacts" and as a "remarkably forward looking piece of legislation").
wildlife resources. The Act emphasized voluntary cooperation between state game agencies and federal agencies, in part to avoid enlarging the federal bureaucracy, but also to minimize the impact of federal intrusion into an area formerly under exclusive state control. Later amendments to FWCA, however, have extended the Act, shifting greater responsibility for wildlife management to the Federal Government.

By enacting the 1958 amendments to FWCA, Congress in effect wrote the public trust doctrine into this area of federal wildlife law. The protection of fish and wildlife resources sought to be achieved through these amendments is an interest that the public trust doctrine was developed, in part, to vindicate. The Act's mandate that "wildlife conservation shall be given equal consideration . . . with other fea-

212. The House Committee on Merchant Marine and Fisheries saw the 1934 Act as a means of providing additional federal assistance at no cost to the states in carrying out their traditional game-management roles. See H.R. REP. No. 850, 73d Cong., 2d Sess. 1 (1934).

213. The record of congressional debate reveals a concern over the possible expense of administering the Act. Sponsors assured other legislators that "it would not cost a cent" and would not lead to the creation of another bureau within the then rapidly swelling Federal Government. See 78 CONG. REC. 2011, 3725 (1934).

214. Section 3(a) of FWCA, as originally enacted, provided: Whenever the Federal Government, through the Bureau of Reclamation or otherwise, impounds water for any use, opportunity shall be given the Bureau of Fisheries and/or the Bureau of Biological Survey to make such uses of the impounded waters for fish-culture stations and migratory bird resting and nesting areas as are not inconsistent with the primary use of the waters and/or the constitutional rights of the States. In the case of any waters heretofore impounded by the United States, through the Bureau of Reclamation or otherwise, the Bureau of Fisheries and/or the Bureau of Biological Survey may consult with the Bureau of Reclamation or other governmental agency controlling the impounded waters, with a view to securing a greater biological use of the waters not inconsistent with their primary use and/or the constitutional rights of the States and make such proper uses thereof as are not inconsistent with the primary use of the waters and/or the constitutional rights of the States. Pub. L. No. 73-121, § 3(a), 48 Stat. 401 (1934) (emphasis added).

215. For example, while the focus of the 1934 Act was on preventing losses of wildlife, the 1958 amendments embodied the broader objective of enhancing wildlife resources. See S. REP. No. 1981, 85th Cong., 2d Sess. 4-6 (1958). More significantly, federal control over wildlife has been expanded by indirect increases in FWCA's coverage through expansion of federal agency authority over water projects under other statutes. One example is Congress's enactment of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1970) (current version, entitled Clean Water Act, at 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979)), which greatly expanded federal regulatory authority over water pollution control, see S. REP. No. 414, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3675-77, and, because federal agencies acting pursuant to its provisions must in some instances comply with FWCA requirements, see, e.g., text accompanying notes 47-60 supra, indirectly increases federal control over wildlife management.

216. T. LUND, supra note 206, at 11-12. For an argument that natural objects should be represented in environmental litigation on their own behalf, see Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting); C. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1972).
tures of water resource development programs”\textsuperscript{217} reflects the fundamental principle of the doctrine that the sovereign has a duty to manage wildlife resources for the common good. The Senate report on the 1958 amendments states that “equal consideration” requires action agencies to put wildlife interests “on the basis of equality with flood control, irrigation, navigation, and hydroelectric power.”\textsuperscript{218} The Act should thus be understood to require more than just compliance with consultation procedures; its thrust is that projects may not always proceed at the expense of valuable wildlife resources. FWCA provides a sound basis for substantive judicial review of agency decisions that have major impacts on fish and wildlife resources and authorizes judicial relief where agency decisionmaking has given inadequate weight to fish and wildlife values.

CONCLUSION

FWCA represents one of the earliest attempts by the Federal Government to promote sound management of public natural resources through legislation. While the initial version of the Act and its earliest amendments emphasized state-federal cooperation and voluntary efforts to protect wildlife, the 1958 amendments reflect a shift toward increased federal responsibility and affirmative obligations on agencies to protect and enhance wildlife resources. Despite these changes, as a result of action agencies’ failure to carry out the Act’s procedural requirements and because of the absence of guidelines for evaluating impacts on wildlife, FWCA remained ineffective, and water projects continued to cause substantial losses of fish and wildlife.

In the 1970’s, public concern with environmental problems resulted in the passage of NEPA, and the ascendancy of that statute as the primary tool for environmental litigation, as evidenced by its aggressive enforcement in many federal courts, overshadowed less prominent statutes, such as FWCA. In a few of the many NEPA cases decided in the past decade, courts have also considered claims under FWCA. Although these decisions have emphasized NEPA, some have noted that FWCA has independent significance. This Comment has considered the independent aspects of FWCA and has found that it imposes some important independent procedural requirements on federal action agencies and may provide a basis for federal courts to exercise substantive review over actions of federal agencies that affect wildlife resources.

In order for FWCA to become an effective environmental statute as Congress intended, several important changes must occur. Most im-

\textsuperscript{217} 16 U.S.C. § 661(a) (1976).
portant, the Department of the Interior must adopt its proposed regulations and thus establish generally applicable procedures for federal agency compliance with FWCA's consultation and mitigation-plan requirements and criteria for evaluating projects' impacts on wildlife. Second, federal courts must carefully scrutinize agency actions for compliance with FWCA requirements. To ensure adequate enforcement of FWCA, courts should allow private parties to assert a cause of action under FWCA in environmental litigation independent of claims that may be raised under NEPA. Finally, courts should recognize FWCA's incorporation of the substantive standards embodied in the public trust doctrine and evaluate agency decisionmaking with greater scrutiny.