11 ELR 50043 | Environmental Law Reporter | copyright © 1981 | All rights reserved

Judicial Review Under the Fish and Wildlife Coordination Act: A Plaintiff's Guide to Litigation

Oliver A. Houck

Oliver A. Houck, Vice President for Conservation and Education, the National Wildlife Federation, Washington, D.C., is presently on leave as a visiting professor of law, Tulane Law School.

The assistance and collaboration of Patrick A. Parenteau, Resources Defense Director, the National Wildlife Federation, on this article and on FWCA issues over many years is gratefully acknowledged.

[11 ELR 50043]

Over the past 40 years, the United States Congress has constructed a body of law aimed at salvaging fish and wildlife resources from the impacts of federal water resource projects — dams, canals, channelization, and their attendant improvements. These provisions and their amendments, known collectively as the Fish and Wildlife Coordination Act (FWCA),[1] call for "equal consideration" of fish and wildlife in project planning, close coordination between federal construction and fish and wildlife agencies,[2] reports on measures to compensate for fish and wildlife losses, and specific recommendations to Congress — the so-called fish and wildlife "mitigation plan." The implementation of these provisions over the past 40 years has been a rather unblemished history of failure in every branch of government.

The construction agencies have failed to consult. The wildlife agencies have failed to prepare mitigation reports. The construction agencies have failed to make mitigation recommendations to Congress which, in turn, has simply looked the other way.[3] And courts of law, faced with bald violations of the Act, have commonly found compliance with its provisions judicially unenforceable.

The result has been the reduction of entire ecosystems without a step towards restoration of the fish and wildlife base. Man-made Oahe Reservoir in South Dakota, so large it appears on most airline maps of the United States, inundating over 100,000 acres of riverine habitat, has been in placefor 20 years and is still awaiting a mitigation plan. The lower Mississippi valley has seen the elimination of the bottomland hardwood wetlands, from over 20 million acres at the turn of the century to less than two million acres today, primarily as a result of drainage and clearing from federal channelization projects.[4] The State of Colorado can look to the upper Colorado River storage projects, where there are 14 dams slated to flood more than 120,000 acres, not one with a plan for replacing the fish and wildlife loss.[5] In the upper northwest part of the country, at least 18 separate dams on the Columbia and Snake Rivers inundate over 2,000 miles of river,

blocking passage of the once-great salmon and steelhead runs, obliterating their spawning ageas, and bringing several of the anadromous fisheries to their knees.[6] A recent survey of 452 Corps of Engineers water projects currently under construction showed more than *half* without mitigation plans recommended by fish and wildlife agencies or proposed to Congress.[7]

The Fish and Wildlife Coordination Act is not working. Whatever the variety of reasons, an important one is a failure of law. Despite a number of attempts by plaintiffs representing fish and wildlife interests, there has been little judicial review and enforcement. This article explores the strange problem of review under the Coordination Act and proposes methods of pleading and argument to overcome it.

The Fish and Wildlife Coordination Act

Orginally enacted in 1934,[8] the Coordination Act is one of the earliest federal laws dealing specifically with wildlife conservation. The initial version of the statute, passed during the heyday of federal water project authorizations, was little more than a token effort. While recognizing the need for comprehensive programs of wildlife conservation and rehabilitation, the 1934 legislation did not mandate the creation of any specific conservation program. And even though it authorized research into the wildlife effects of pollution, especially domestic sewage and industrial wastes, and encouraged the "development of a program for the maintenance of an adequate supply of wildlife on the public domain,"[9] the 1934 Act failed to create a mechanism to achieve these objectives.

Because they were precatory rather than mandatory, these 1934 congressional exhortations had little effect on the federal construction agencies — the Army Corps of Engineers and the Interior Department's Bureau of Reclamation — which continued to shortchange fish and wildlife resources in the planning and construction of water resource developments. The "spirit of Cooperation." upon which the 1934 legislation was based, "proved to be inadequate in many respects"[10] and led Congress to pass amendments in 1946 which sought to tighten the directives **[11 ELR 50044]** of the original Act.[11] The 1946 legislation required the construction agencies to "consult" with the U.S. Fish and Wildlife Service and with the appropriate state wildlife agency "whenever the waters of any stream or other body of water are authorized to be impounded, diverted or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under federal permit."[12] The purpose of such consultation was to prevent the "loss of and damage to wildlife resources"[13] occasioned by such developments. The 1946 amendments also required construction agencies to make "adequate provision consistent with the primary purposes of [water projects] for the conservation, maintenance, and management of wildlife."[14]

Like its 1934 predecessor, the 1946 version of the Coordination Act fell "far short of the results anticipated."[15] So Congress tried again, in 1958, to strengthen the Act by requiring that wildlife conservation by given "equal consideration" with other features of water resource developments.[16] The 1958 amendments also expanded the coverage of the Act to include channel deepening and all other "modifications" of any body of water.[17] Finally, these amendments added the goal of wildlife enhancement to the existing goals of loss prevention and mitigation.[18]

There have been no substantive changes in the Coordination Act since the 1958 overhaul. There have been, however, numerous post-1958 amendments introduced in both houses, only to be abandoned for lack of strong congressional support.[19]

Judicial Review

Environmental laws depend largely on public enforcement. Public enforcement depends in turn on access to the courts. These propositions are reflected throughout recent federal environmental legislation, providing explicit mechanisms for judicial review and often including the bonus of attorneys fees to encourage the public to go into the courtroom.[20] Citizen lawsuits have made compliance with the National Environmental Policy Act a first instinct in agency decisionmaking.[21] Federal administrators, particularly those with environmental responsibilities, frequently seek citizen "counter-pressure" on resource decisions which have traditionally been controlled by economic interests,[22] and are known to solicit less openly a citizen suit here and there when environmental safeguards have been coopted. Courts too have been sensitive to the need for public enforcement, rolling over the historically formidable defenses of sovereign immunity, reviewability, and standing.[23] Almost alone against this trend towards effective legal action stands the sad figure of the Fish and Wildlife Coordination Act. Here environmental plaintiffs face surprising resistance to judicial review.

Review Problems Under the Coordination Act: The Genesis

Public enforcement of Coordination Act requirements began poorly more than thirty years ago in a familiar setting. *Rank v. Krug*[24] involved an attempt by landowners to prevent a Bureau of Reclamation project from diverting, in effect, the flow of an entire river system away from their lands. Folded late into their pleadings, and equally late into the court's opinion, was the landowners' argument that "adequate provision" had not been made in the project for the conservation of fish and wildlife resources, in particular the salmon fishery of the river.In rejecting this argument, the court stated: "It is too plain to need argument that a citizen cannot compel compliance where that duty is lodged with regularly selected officials whose duties are clearly defined by statute …."[25]

The above language in *Rank* has probably been quoted more often than it has been understood, both with regard to its facts and its time. On the fact side, the plaintiffs in *Rank* were apparently asking the court to enforce the Coordination Act by imposing, from the bench, the "maintenance of a low flow for commercial or recreational fishing or spawning."[26] The court, rightly, looked at the Act and saw that a plan for these purposes was to be developed by the state and federal wildlife agencies and then recommended to Congress by the Bureau of Reclamation. That process had apparently not begun. To confuse matters, the State of California had filed an amicus curiae brief supporting the plaintiff's position and then withdrawn it. Under these circumstances, the Court's reaction was predictable: courts do not submit mitigation plans, nor do private citizens; the agencies do. Had the plaintiffs in *Rank* sued state and federal officials for their failure to prepare a fish and wildlife plan, and for injunctive relief pending its preparation, the result may well have been different. Indeed, in an infrequently-quoted continuation of its opinion the court in fact stated: "[w]hether or not the plaintiffs by mandamus against the California [fisheries] officials could compel **[11 ELR 50045]** them to act is not before the court."[27]

Narrowly construed, all *Rank* held was that mitigation planning has to be initiated by the appropriate wildlife agencies.

The *Rank* opinion can alsd be understood in its time frame of 1950. The statute interpreted was the current Coordination Act's predecessor, which lacked several provisions added in 1958, most noticeably the requirement that wildlife conservation be given "equal consideration" with other project purposes. Additionally, of course, to the extent that *Rank* appeared to close the door on affected individuals seeking to compel compliance with "clear legal duties," the Administrative Procedure Act (APA) has since come along to reopen it.[28]

Before turning to the effect of modern concepts of judicial review upon *Rank v. Krug,* however, a more bizarre obstacle to enforcement of the Coordination Act has arisen. According to some courts, indeed a numerical majority, the National Environmental Policy Act (NEPA)[29] — friend of the environment — has come along and swallowed it. The origin of this extraordinary thesis is found in *Environmental Defense Fund v. Corps of Engineers (Gilham Dam),*[30] in which plaintiffs sought to enjoin a Corps of Engineers project on several grounds including the FWCA. The court labored through a series of lengthy and precedent-setting rulings interpreting NEPA,[31] applying the statute for the first time to congressionally authorized water resources development, and ultimately enjoining the project for numerous inadequacies in the environmental impact statement, including its descriptions of fish and wildlife impacts. Turning at weary last, well into its third memorandum opinion, to plaintiff's claims under the Coordination Act, the court concluded: "if defendants comply with the provisions of [NEPA] in good faith, they will automatically take into consideration all of the factors required by the Fish and Wildlife Coordination Act."[32]

Whatever circumstances led the court to dismiss the Coordination Act claims in *Gilham Dam,* the environmental plaintiff is now faced with a formidable mass of judicial precedent all citing the *Gilham Dam* decision and each other and all stating broadly and without a shred of further explanation that compliance with NEPA is also a de facto compliance with the Fish and Wildlife Coordination Act.[33] *Sierra Club v. Morton,*[34] while as devoid of examination of this thesis at the other cases, did offer the following as additional bases to deny the cause of action: "It seems likely that congressional enactment of the National Environmental Policy Act acts as an implicit proscription of such a private right of action."[35] This may be the only decision of record interpreting NEPA as a limitation on other laws. Feeling, perhaps, that three such reasons would be better than two, the *Sierra Club* court also concluded that "plaintiffs simply have not established that inferenceof such a private right of action would be consistent with legislative intent of FWCA and with the effectuation of purposes intended to be served by the Act."[36] That there is no "private right of action" comes full circle to *Rank v. Krug.*

Litigation Approaches to Judicial Review

When a plaintiff is seeking to compel compliance with the Coordination Act, the conservative approach will track what courts seem disposed to accept at the time. The acceptable route goes as follows: NEPA requires all agencies of the federal government, "to the fullest extent possible," to analyze alternatives to proposed actions.[37] Thus, failure by a construction agency to consult with the Department of Interior, to prepare a mitigation report, or to submit recommendations to

Congress can with some ingenuity by characterized as procedural failures under NEPA's §§ 102(2)(C)(iii) and 102(2)(E).[38] An early case accepting this approach is *Environmental Defense Fund, Inc. v. Froehlke* (Cache River Project)[39] in which the court reasoned: "The proposed mitigation plans [under the Coordination Act] go to the very heart of the question before the Corps in preparing its environmental impact statement — whether the project should proceed at the present time in view of its environmental consequences."[40] Mitigation thus appears as a required *Alternative* under NEPA in the *timing* of project construction.

[W]e see no practical reason why the Corps could not have included in its final impact statement a thorough exploration of the possibility of mitigation in order to give decision makers an opportunity to consider the possibility of delaying construction until a mitigation plan was put into effect.[41]

Although this line of reasoning may not be the most direct way to get there, the Cache River/Bayou de View channelization project was halted in this case pending "exploration of" compliance with the Coordination Act's basic requirement: the preparation of a mitigation plan. Several years later this "exploration," in fact, produced a mitigation plan.[42]

[11 ELR 50046]

Since the *Cache River* decision, other courts have picked up the mitigation-as-NEPA-alternative theme, enjoining water projects pending the inclusion of mitigation plans in project EISs. In *Akers v. Resor (II)* the Court invalidated the Corps of Engineers' second attempt at a final environmental impact statement, in part because "the EIS fails to consider the alternative of deferring further work on at least some portions of the project pending acquisition of surrounding mitigating lands…."[43]

An obvious advantage to this approach is that litigation under NEPA has never faced the "private right of action" problems raised in *Rank v. Krug.*[44] Pled under NEPA, the cause of action is accepted. A disadvantage in relying on this approach, however, is that the typical grievance in a Coordination Act violation is not so much with federal agency failure to "consider" fish and wildlife impacts as it is with an outright failure to propose something specific to mitigate them. Exploration of "the possibility of mitigation" and "the possibility of delaying construction" — in the hands of an experienced EIS writer — may produce boilerplate meeting the minimum requirements of NEPA but not the specific results the Coordination Act intended. This drawback will be particularly true for water projects in which project construction will not automatically *foreclose* mitigation options. In the above-cited cases, land clearing along the project boundaries induced by the federal projects would all but eliminate the possibility of setting those lands aside for wildlife habitat, foreclosing the mitigation options. Where hydroelectric and flood control dam projects are involved, on the other hand, the foreclosure of mitigation alternatives may not be so obvious. In these cases, injunctive relief under the NEPA approach diminishes. The relief will have to be requested head-on.

To obtain judicial review directly under FWCA, the first objective is to remove the NEPA confusion caused by *Gilham Dam* and its progency: compliance with NEPA equals compliance with the FWCA. The first step here is to compare the Coordination Act's requirements to those of

NEPA. NEPA calls for, at the least, consideration of environmental impacts of a proposed project, consideration of alternatives, and the full disclosure of impacts and alternatives in an environmental impact statement, prior to agency action.[45] The Coordination Act requires a different process with a different end product:

(1) direct consultation between the construction agency and the Department of Interior;[46]

(2) preparation of an Interior "mitigation" report;[47]

(3) determination by the construction agency of "justifiable means and measures" to mitigate losses;[48]

(4) submission of the agency's recommendations to Congress;[49] and

(5) implementation.[50]

These requirements are consistent with NEPA, but they are no more subsumed or duplicated by NEPA than are, for example, the consultation, public review, and response requirements under such similar environmental laws as §§ 402 and 404 of the Clean Water Act,[51] § 7 of the Endangered Species Act,[52] or § 4(f) of the Department of Transportation Act.[53] At bottom, it should be plain that NEPA does not require a fish and wildlife mitigation plan. The Coordination Act does: a wildlife agency report, focused specifically on losses and remedies, a construction agency determination on the proper plan, and a submission to Congress.[54]

Equally easy work should be made of *Sierra Club v. Morton's* strange proposal that NEPA somehow "proscribes" Coordination Act review.[55] Unfortunately, this statement appears in the district court opinion without reference to any particular offending provision of NEPA. NEPA does, of course, address the question of its effect on other laws, and rather specifically, in the following provision:

Nothing in section 4332 or 4333 of this title *shall in any way affect the specific statutory obligations of any Federal agency* (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.[56]

[11 ELR 50047]

If that were not enough, the following section provides, "The policies and goals set forth in this chapter are *supplementary* to those set forth in existing authorizations of Federal agencies."[57] In short, the NEPA "proscription" theory flies in the face of NEPA's plain language. It should be laid to rest. Nothing in the Coordination Act or NEPA proscribes judicial review.

Having flushed the Coordination Act our from the shadow of NEPA, we can now address the problem raised in *Rank v. Krug* and resurrected in *Sierra Club v. Morton* — does the Act admit

of a "private right of action?"[58] There may be no better starting point than the authority cited in *Sierra Club v. Morton* (none were cited in *Rank*): *Cort v. Ash.*[59]

Cort v. Ash was a civil action by corporate shareholders against their directors under a criminal statute prohibiting corporate contributions in presidential campaigns.[60] In finding no private right of action, the Supreme Court emphasized that the law was "nothing more than a bare criminal statute," void of any congressional intent to benefit private parties or a class of the general public; private recovery would not aid in achieving the congressional purposes; and the area was traditionally regulated by state law. When applied to the Coordination Act, these same factors compel the opposite conclusion. To quote the *Cort* test *verbatim:*

1. *"Is the plaintiff one of the class for whose benefit the statute was enacted?"*[61] The legislative history of the 1958 Coordination Act amendments show the intent to "help significantly in permitting federal water development to serve the interests of a much larger share of our population."[62] Who are those people? Most obviously, those concerned with fish and wildlife. To quote the Senate Report: "The bill enjoys an exceptionally enthusiastic and widespread support … every major and national conservation organization supports it. The bill has the whole hearted endorsement of the commercial fishing industry."[63] In describing "the purpose of the bill," the report specifies that "considerable study would be required in some cases, with suggested changes in construction plans to the great advantage of our wildlife resource …."[64] The history shows, in summary, that Congress was mandating that specific steps be taken which would directly benefit an identified class of users of fish and wildlife resources.[65]

2. *"Is there any indication of legislative intent to create a private remedy or to deny?"*[66] Nothing in the statute or the legislative history speaks to judicial review either way, at worst a neutral fact. In a more affirmative light, there is not so much as a hint that these requirements should be unenforceable, or that the "much larger share of our population" to be served by the requirements of the Act should be excluded from their enforcement. The absence of a barrier here is important: the Supreme Court has elsewhere stated a strong presumption favoring review. In *Abbott Laboratories v. Gardner*,[67] the court favored review of federal regulations requiring labeling of drugs, with the following statement: "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive evidence to believe that such was the purpose of Congress."[68] *Barlow v. Collins*[69] similarly held review of crop payment regulations proper under a statute granting the Secretary of Agriculture authority to "promulgate such regulations as may deem proper,"[70] affirming specifically the *Abbott Laboratories* approach. Unless the legislature indicates otherwise, review is the rule.

3. *Is it consistent with the purposes of the legislative schemes to imply such a remedy for the plaintiff?*[71] This is perhaps the most obvious distinction between *Cort* and the Coordination Act. *Cort* involved a "bare criminal statute," and there are no administrative requirements for agencies to follow; there is simply an enforcement mechanism: a federal indictment. The Coordination Act has no criminal sanctions. It lays out instead a set of agency requirements and substantive goals. If private citizens are not allowed to enforce the goals through legal action, there will be no enforcement. There is no other way to enforce.[72] Cases under criminal statutes are simply inapposite to the Coordination Act.

4. *Is the cause of action one traditionally regulated by state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?*[73] Needless to say, under the FWCA there is no tradition of state law or state remedy. The Act was passed and strengthened in order to provide a federal remedy, for federal actions, where none has previously existed.

In summary, the analysis called for by *Cort v. Ash* favors review.[74] More recently, however, the Supreme **[11 ELR 50048]** Court has decided *California v. Sierra Club*[75] and cast a shadow on its approach for determining those laws subject to a "private right of action."

California v. Sierra Club was a civil action by a private conservation organization and two private citizens against the California Water Project, a series of dams and canals designed to transport water from northern to central and southern California. The action claimed a violation of § 10 of the Rivers and Harbors Act of 1899[76] and by the time the matter reached the U.S. Supreme Court, the justiciability of this section had become the central issue. The Court found no cause of action, but the manner in which it arrived at this conclusion may well reopen the very uncertainty which *Cort v. Ash* sought to dispel through its four-pronged test. The *California v. Sierra Club* opinion acknowledged the *Cort* test in the following fashion:

Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private right of action [citations omitted], but the four factors specified in *Cort* remain the "criteria through which this interest could be discovered."[77]

The Court did not then proceed to apply the *Cort* factors, however; instead it looked to the first two factors … and ruled. More specifically, the Court found first that the 1899 statute was not apparently created for "the especial benefit of a particular class.[78] Nor, the Court then found, did Congress speak to the creation of a private remedy.[79] This so, it was "unnecessary" to consider the remaining *Cort* factors;[80] Congress did not intend to provide review.

Does *California v. Sierra Club* narrow the field of review, or does it only muddy the boundary lines? We must remind ourselves that we are dealing here with the areas of law where Congress has *not* spoken to a private right of action. Where Congress has expressed itself, one way or the other, the result is automatic and there is no need for an inquiry. To interpret the *California* opinion, therefore, as saying that (1) the test is "congressional intent," and (2) to resolve that question one looks to what Congress said its intent was, is either entirely circular or entirely limits judicial review to those laws where Congress has specifically provided for it.[81] As at least a majority of the Court has not taken the latter position, the most that can be said with safety following *California v. Sierra Club* is that there are two "primary" factors to be applied for determining justiciability (identifiable beneficiaries, and legislative intent), and two "secondary" factors (consistency with the statutory scheme, and the role of state law) which come into play if the first two sound — to an undetermined degree — in the affirmative.

Applying this understanding of *California v. Sierra Club* to the FWCA, the central fact distinguishing the Coordination Act from § 10 is that, while there was nothing in the 1899 legislative history to indicate that Congress was responding to any particular class of individuals, the Coordination Act was enacted with a class of users in mind. Indeed, they were named, at the

door, and lobbying hard. A second distinguishing fact is that while the 1899 Act provides for its own enforcement through criminal and civil actions by the Department of Justice, the Coordination Act contains no separate enforcement mechanism.[82] These two facts should bring the Coordination Act over the threshold, for the full application of the *Cort v. Ash* factors and the conclusion reached above.

Relevant support can be found in *Citizens to Preserve Overton Park v. Volpe*.[83] The Spureme Court held that § 10 of the Administrative Procedure Act[84] subjects the action of "each authority of the government of the United States" to judicial review except (1) "where there is a statutory prohibition on review," or (2) where "agency action is committed to agency discretion by law."[85] These should be the appropriate tests for a *non*criminal statute.Applied to the Coordination Act, we see at once no "statutory prohibition" on review. How about the second exception: "law to apply"?

This is a very narrow exception. The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."[86]

The first thing to note in applying this test is that the Coordination Act is replete with "shalls." Clean, mandatory verbs. To begin with, the construction agency "shall consult."[87] As a product of the consultation, *the* report of the Department of the Interior

shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and *shall* describe the damage to wildlife **[11 ELR 50049]** attributable to the project and the measures proposed for mitigating or compensating for these damages.[88]

Reports and recommendations of the Secretary of the Interior based on studies made by the Fish and Wildlife Service "*shall be made* an integral part of any report" to Congress.[89] It "*shall give* full consideration" to that report, and propose such justifiable means and measures as it "*finds*" should be adopted.[90] Even the goal of this entire process, that fish and wildlife "*shall* receive equal consideration" in water project planning is stated in affirmative and mandatory terms.[91] In short, Congress loaded the Coordination Act with "to do's," "law to apply," a specific goal and specific steps that it wanted to see taken to accomplish that goal. Failure to company with these steps should be as reviewable as failure to company with other congressional mandates.

A comparison with similar environmental mandates is revealing. Section 4(f) of the Department of Transportation Act,[92] requires, for a highway taking, "no reasonable and prudent alternative to the use of the land" and "all possible planning to minimize harm to such park." The Supreme Court in *Overton Park* found this language to be "plain and explicit" and to constitute "law to apply."[93] Similarly, § 3(b) of the Wilderness Act of 1964[94] requires administrative classification over a ten-year period of areas "as to suitability or non-suitability for preservation as wilderness." In *Parker v. United States*[95] the court sustained an injunction against a timber harvest in an area yet unclassified under the Wilderness Act, finding in the "suitability" language "law to apply." Likewise, under the Federal Insecticide, Fungicide and RodenticideAct,[96] the Secretary of Agriculture "may" suspend or cancel registration of pesticides upon certain findings. In

Environmental Defense Funds, Inc. v. Hardin,[97] the court held the Secretary's action properly reviewable, stating that "evidence cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms … his decision is not thereby placed beyond judicial scrutiny."[98] In yet another relevant analogy, the Ninth Circuit in *Rockbridge v. Lincoln*[99] found jurisdiction to review the extent to which trading with Indians under the jurisdiction of the Commissioner of Indian Affairs conformed with congressional purpose. The statute at issue gave the Commissioner "the *full power and authority* to appoint traders … and to make such rules and regulations *as he may deem just and proper* ….[100] The court held that "[A] permissive statutory term like 'as he may deem just and proper,' is not by itself to be read as Congressional command precluding judicial review."[101] It is safe to conclude from these cases that courts have consistently found law to apply from far more discretionary and ambiguous language than that of the FWCA.

So applying the *Overton Park* criteria, there is no legislative proscription to review under the FWCA, and there is clear law to apply.Lest another red herring be trailed across our paths at a later time, a final word should be said on "standing." Although none of the reported cases to date have characterized their refusal to review compliance with the Coordination Act on standing grounds, *Rank v. Krug's* "private right of interest" test and *Sierra Club v. Morton's* recent paragraphse of it smack enough of standing to bear comment. Once "law to apply" is found, a careful pleader should find standing no obstacle. Fish and wildlife interests were dominant in the legislative history of the 1958 Coordination Act amendments, as noted above, and the protection of those resources and interests was a stated purpose of the new law. This so, it remains to allege in a given case that failure of consultation, reporting, or planning will lead to a diminution of the fish and wildlife resources, to plaintiff's injury. Anyone who uses or enjoys the uncompensated resources for commercial, recreational, scientific or aesthetic reasons should have his day in court.[102]

Review: The Remedy Applied

Lest the scenario for review under the Coordination Act look too complicated or hazardous, there is precedent for the arguments advanced in this article. In one of the first reported cases under the FWCA since *Rank v. Krug, Akers v. Resor (I)*,[103] the court had no hesitation enjoining a Corps channelization project until a mitigation plan was proposed to Congress, stating:

It is completely clear from a reading of the provisions of 16 U.S.C.A. § 661 *et seq.* that a construction agency such as the Corps must consult in good faith with the ecology agencies and give their recommendations due consideration and, if mitigation is approved and funded by Congress, carry out the plan of mitigation. It also seems clear from Senate Report No. 1981 (U.S. CODE CONG. & AD. NEWS, 85th Cong., 2d Sess., 1958, p. 3446) that it is contemplated that *a plan* of mitigation be submitted to Congress by the construction agency when Congress is asked to appropriate funds for the project itself even though, as here, the project had already been generally authorized.[104]

And more directly on the reviewability question:

We also do not understand the defendants to contend that the proposal of the Corps to continue work on this project is not reviewable by this court. In any event it is clear that this agency action

is reviewable since review is not prohibited by statute and the challenged action by the Corps is not committed by the statutes to its discretion.[105]

[11 ELR 50050]

One of the statutes alleged to have been violated here was, of course, the Fish and Wildlife Coordination Act.

A second case supporting the direct approach to review under the FWCA is *Association of Northwest Steelheaders v. Corps of Engineers.*[106] Reversing the dismissal of a complaint alleging violations of the Coordination Act, the Circuit Court relied on several of the U.S. Supreme Court decisions cited above to find review of compliance with the Act available for both state and private plaintiffs.[107] More recently, the case of *National Wildlife Federation v. Andrus*[108] resulted in a reviewable Coordination Act violation. In this case plaintiffs alleged a failure to submit a mitigation report to Congress concerning the impacts of a power plant. The court agreed and enjoined the project, albeit "alternately," on this basis.[109]

So case law is available as well. Coupled with clear pleading on FWCA violations, there is no logical remaining obstacle to judicial review.

Review: The Appropriate Standard

Once review is obtained, the appropriate standard of review will depend on exactly what is being reviewed. Certainly the *procedural* requirements of the Coordination Act — did consultation take place, was an Interior report prepared, were recommendations proposed to Congress — should receive the same "rigorous" scrubbing that reviewing courts accord compliance with § 102 of NEPA. These are the kind of "action-forcing" procedures to which courts have traditionally required close adherence.[110]

As to review of the *substance* of the mitigation recommendations themselves — do they contain "adequate" means and measures to offset fish and wildlife losses, were they "justifiable" under appropriate criteria — these are also matters which should be reviewable by courts, although under a narrower standard. The threshould difficulty will be that, in the statutory scheme, the mitigation plan is submitted to Congress for its approval and authorization. Hence a plaintiff can anticipate the argument, apparently accepted in at least one opinion, that the "adequacy" decision is entirely up to Congress and not the courts.[111] On the other hand, recent cases requiring environmental impact statements on legislative proposals,[112] and reviewing these statements for their adequacy notwithstanding their review by Congress, offer analogies to the contrary.[113] If the construction agency's mitigation recommendations clearly failed to give weight to appropriate factors (ignored fisheries impacts altogether, for example), or were based on inappropriate factors (rejected on the basis of an economic, benefit/cost ratio, for example), the courts still have a traditional role to ensure that the agency actions have a lawful basis. Should they not, a court should be able to direct a second agency finding based on appropriate factors. The court's role here is in aid of Congress, ensuring that FWCA recommendations come to Congress based on the considerations Congress intended.

Returning to *Overton Park* for the appropriate *standard* of review on the merits:

… the generally applicable standards of § 706 [of the APA] require the reviewing court to engage in a substantial inquiry. Certainly the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.[114]

The review will measure the mitigation plan and its justification against the criteria of the statute. The test will be whether the plan departs from the statute to the point that it is arbitrary, capricious, or an abuse of discretion.[115]

Such administrative abuses are rarely found. But it is undeniable that the potential for judicial review and remand has had a hand in making them rare. It is equally clear that, without this potential, failures under the FWCA have become the rule.

Conclusion

The problem of judicial review of Fish and Wildlife Coordination Act violations has been with us too long and for no persuasive reason. It may be that lawyers and courts have tended to read the *Title* of the Act and conclude that mere "coordination" was all it contained; this would be a little like reading the title of the National Environmental Policy Act and concluding that "policy" was all it contained. In fact, even a casual reading of the Coordination Act reveals that it imposes clear requirements on federal agencies. Their consistent application will go far to conserve America's rapidly diminishing fish and wildlife resource.

1. 16 U.S.C. §§ 661-666c, ELR STAT. & REG. 41801.

2. Among other reasons, the statute was enacted "to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs …." 16 U.S.C. § 661, ELR STAT. & REG. 41801.

3. *See, e.g.*, GENERAL ACCOUNTING OFFICE, IMPROVED FEDERAL EFFORTS NEEDED TO EQUALLY CONSIDER WILDLIFE CONSERVATION WITH OTHER FEATURES OF WATER RESOURCE DEVELOPMENTS, B-118370 (1974); *Hearings Before the Subcommittee on Fisheries and Wildlife, Conservation and the Environment of the House Committee on Merchant Marine and Fisheries,* 93d Cong., 2d Sess. (June 26, July 1, 2, 11, 1974). Oversight hearings held in July 1978 before this same subcommittee produced more recent evidence of Coordination Act failures.

4. U.S. FISH & WILDLIFE SERVICE, DOCUMENTATION, CHRONOLOGY AND FUTURE PROJECTIONS OF BOTTOMLAND HARDWOOD HABITAT LOSS IN THE LOWER MISSISSIPPI ALLUVIAL PLAIN (NOV. 1979).

5. WATER SPECTRUM, Spring 1978, at 34.

6. Columbia Basin Salmon and Steelhead Analysis, Summary Report, App. II (Sept. 1, 1976).

7. Letter from Director of Civil Works, U.S. Army Corps of Engineers, to Counsel, National Wildlife Federation (May. 22, 1978).

8. Act of March 10, 1934, 48 Stat. 401.

9. *Id.* §§ 4, 5.

10. H.R. REP. NO. 1944, 79th Cong., 2d Sess. 1 (1946).

11. Act of August 14, 1946, 60 Stat. 1080.

12. *Id.* § 2

13. *Id.*

14. *Id.* § 3.

15. S. REP. NO. 1981, 85th Cong., 2d Sess. 1-4 (1958).

16. Act of August 12, 1958, 72 Stat. 563.

17. 16 U.S.C. § 662(a), ELR STAT. & REG. 41801.

18. 16 U.S.C. § 662(b).

19. *See, e.g.*, H.R. 8161, 95th Cong., 1st See., introduced by Rep. Oberstar (D-Minn.) (June 30, 1977).

20. *See, e.g.*, Clean Air Act § 304, 42 U.S.C. § 7604, ELR STAT. & REG. 42256; Clean Water Act § 505, 33 U.S.C. § 1365, ELR STAT. & REG. 42147; Surface Mining Control and Reclamation Act § 520, 30 U.S.C. § 1270, ELR STAT. & REG. 42421.

21. *See, e.g.*, F. ANDERSON, NEPA IN THE COURTS (1973).

22. This counter-pressure often comes about through citizen intervenors in agency proceedings. Federal agency activities funding such intervention is discussed in Comment, *NOAA Finds Implicit Authority to Assist Intervenors Despite Second Circuit's Reversal of* Green County, 7 ELR 10210 (1977); Comment, *DOT Establishes Demonstration Assistance Program for Indigent Participants in Agency Proceedings*, 7 ELR 10043 (1977); Comment, *Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings*, 6 ELR 10052 (1976).

23. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 566 (abr. ed. 1965).

24. 90 F. Supp. 773 (S.D. Cal. 1950) (Friant Dam).

25. *Id.* at 801.

26. *Id.*

27. *Id.*

28. 5 U.S.C. §§ 551-559, 701-706, ELR STAT. & REG. 41002.

29. 42 U.S.C. §§ 4321-4361, ELR STAT. & REG. 41009.

30. 325 F. Supp. 749, 1 ELR 20138 (E.D. Ark. 1971).

31. The several district court opinions are reported seriatim at 325 F. Supp. 728, 1 ELR 20130

32. 325 F. Supp. at 739, 1 ELR at 20134.

33. *See, e.g.*, Environmental Defense Fund, Inc. v. Froehlke (Cache River Project), 473 F.2d 346, 3 ELR 20001 (8th Cir. 1972); Sierra Club v. Morton (California Water Project), 400 F. Supp. 610, 6 ELR 20047 (N.D. Cal. 1975), *aff'd in part, rev'd in part sub nom.* Sierra Club v. Andrus, 610 F.2d 581, 9 ELR 20772 (9th Cir. 1979); Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 3 ELR 20571 (W.D. Va.), *aff'd* 484 F.2d 453, 3 ELR 20786 (4th Cir. 1973).

34. 400 F. Supp. 610, 6 ELR 20047 (N.D. Cal. 1975), *aff'd in part, rev'd in part sub nom.* Sierra Club v. Andrus, 610 F.2d 581, 9 ELR 20772 (9th Cir. 1979).

35. 400 F. Supp. at 640.

36. *Id.*

37. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C), ELR STAT. & REG. 41010.

38. 42 U.S.C. §§ 4332(2)(C)(iii) and 4332(2)(E), ELR STAT. & REG. 41010.

39. 473 F.2d 346, 3 ELR 20001 (8th Cir. 1972).

40. *Id.* at 351, 3 ELR at 20003.

41. *Id.*

42. Subsequently, however, after a protracted struggle in which mitigation was only a small part, local sponsors have withdrawn support for the Cache RiverProject altogether, leaving its future uncertain at best. Arkansas Gazette, June 13, 1980, at 6A.

43. Akers v. Resor, 443 F. Supp. 1355, 1360, 8 ELR 20388, 20390 (W.D. Tenn. 1978); *accord*, Texas Committee on Natural Resources v. Alexander, __ F. Supp. __, 12 ERC 1676 (E.D. Tex. Dec. 8, 1978).

44. NEPA, like the FWCA, is directed at a federal agency process to improve consideration of environmental values in federal decisionmaking. Although NEPA, like the FWCA, contains no provisions enabling private citizens to sue for failures in the reocess, private litigation under NEPA has flourished with the "private right of action" question seldom, if ever, raised. One explanation could be the more explicit reference to private citizens in NEPA itself: "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." NEPA § 101(c), 42 U.S.C. § 4331(c), ELR STAT. & REG. 41009. A more pragmatic explanation is that early NEPA litigation, particularly Calvert Cliffs Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971), gave an inexorable momentum to NEPA causes of action without dealing with the question.The FWCA has experienced the same phenomenon, in reverse.

45. *See* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C), ELR STAT. & REG. 41010.

46. 16 U.S.C. § 662(a), ELR STAT. & REG. 41801.

47. 16 U.S.C. § 662(b), ELR STAT. & REG. 41801. The Department of Interior has taken the position informally that the FWCA does not *require* it to produce a mitigation report, hinging in effect the entire process on DOI discretion. In the one case to deal with this proposition, albeit in dicta, the thesis was rejected. Sun Enterprises Ltd. v. Train, 394 F. Supp. 211 (S.D.N.Y. 1975). A pending case raised the issue directly, South Carolina Wildlife Federation v. Hoffman, No. 76-2164 (D.S.C., filed Nov. 16, 1976), but Interior has since produced its mitigation report, mooting this issue before a judgment was reached.

48. 16 U.S.C. § 662(b), ELR STAT. & REG. 41801.

49. *Id.*

50. 16 U.S.C. §§ 662(c), 662(d), 663, ELR STAT. & REG. 41801-02.

51. 33 U.S.C. §§ 1342, 1344, ELR STAT. & REG. 42141, 42142.

52. 16 U.S.C. § 1536, ELR STAT. & REG. 41830.

53. 49 U.S.C. § 1653(f), ELR STAT. & REG. 41605.

54. 16 U.S.C. § 662, ELR STAT. & REG. 41801.

55. 400 F. Supp. 610, 6 ELR 20047 (N.D. Cal. 1975), *aff'd in part, rev'd in part sub nom.* Sierra Club v. Andrus, 610 F.2d 581, 9 ELR 20772 (9th Cir. 1979).

56. 42 U.S.C. § 4334, ELR STAT. & REG. 41010 (emphasis added).

57. 42 U.S.C. § 4335, ELR STAT. & REG. 41010 (emphasis added).

58. *See* text at notes 33-35, *supra.*

59. 442 U.S. 66 (1975). It is curious that the *Sierra Club v. Morton* court discussed and applied the *Cort v. Ash* tests fully in concluding that §§ 9 and 10 of the Rivers and Harbors Act *do* give rise to a private cause of action, 400 F. Supp. at 622-38; for the Coordination Act, no such analysis is provided, *id.* at 640.

60. 18 U.S.C. § 610.

61. 442 U.S. at 78.

62. S. REP. NO. 1981, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3447.

63. *Id.*

64. *Id.* at 3446.

65. This legislative history, subsequent to the *Rank* decision, affords a graceful way to distinguish that earlier opinion.

66. 442 U.S. at 78.

67. 387 U.S. 136 (1967).

68. *Id.* at 140.

69. 397 U.S. 159 (1970).

70. *Id.* at 165, 166.

71. 422 U.S. at 78.

72. It could be argued that recourse to Congress is an available alternative to judicial review, but this defense would be available to virtually all federal agency noncompliance. It might just as easily be contended that Congress should review and remedy inadequacies of environmental impact statements under NEPA.

73. 422 U.S. at 78.

74. Several Supreme Court opinions subsequent to *Cort v. Ash* left its guiding principles intact. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cannot v. University of Chicago, 441 U.S. 677 (1979). For a recent thorough application of these principles, see National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 10 ELR 20155 (3d Cir. 1980), in which the court found a course of action

under the Clean Water Act independent of its citizen suit provisions. Unlike *Sierra Club v. Morton,* however, the court found no cause of action under the Rivers and Harbors Act.

75. __ U.S. __, 11 ELR 20357 (U.S. Apr. 28, 1981). *See* Comment, *Supreme Court Finds No Implied Private Right of Action Under § 10 of the Rivers and Harbors Act,* 11 ELR 10098 (May 1981).

76. 33 U.S.C. § 403, ELR STAT. & REG. 41142. Section 10 prohibits, *inter alia,* the placing of obstructions in navigable waters without authorization by Congress or, in some cases, by the Secretary of the Army.

77. 11 ELR at 20358.

78. *Id.*

79. 11 ELR at 20359. Whether Congress *assumed* that a private remedy was available was left less clear in the opinion. *Compare* the discussion at 11 ELR 20359 n.7 *with* the concurring opinion of Justice Stevens.

80. 11 ELR at 20359.

81. This is, in fact, the position of three concurring Justices, including the Chief Justice for whom limiting access to the federal courts is an oft-stated policy objective. *See* concurring opinion of Justice Rehnquist, joined by Justice Powell and Chief Justice Burger, 11 ELR at 20360. The dissenting nature of this opinion was pointed out by Justice Stevens in his separate concurrence, 11 ELR at 20359.

82. This fact was important to the *California v. Sierra Club* Court. *See* 11 ELR at 20358 n.6.

83. 401 U.S. 402, 1 ELR 20110 (1971).

84. 5 U.S.C. § 701, ELR STAT. & REG. 41005.

85. 401 U.S. at 410, 1 ELR 20112.

86. *Id.*, 1 ELR at 20112 (footnotes and citations deleted).

87. 16 U.S.C. § 662(a), ELR STAT. & REG. 41801.

88. 16 U.S.C. § 662(b), ELR STAT. & REG. 41801 (emphasis added).

89. *Id.*, ELR STAT. & REG. 41801 (emphasis added).

90. *Id.*, ELR STAT. & REG. 41801 (emphasis added).

91. 16 U.S.C. § 661, ELR STAT. & REG. 41801 (emphasis added).

92. 49 U.S.C. § 1653(f), ELR STAT. & REG. 41605.

93. 401 U.S. at 411, 413, 1 ELR at 20112.

94. 16 U.S.C. § 1132(b), ELR STAT. & REG. 41412.

95. 448 F.2d 793, 1 ELR 20489 (10th Cir. 1971).

96. 7 U.S.C. § 135b(c), ELR STAT. & REG. 42305.

97. 428 F.2d 1093, 1 ELR 20050 (D.C. Cir. 1970).

98. *Id.* at 1098, 1 ELR at 20052 (footnote deleted).

99. 449 F.2d 567 (9th Cir. 1971).

100. 25 U.S.C. § 261 (emphasis added).

101. 449 F.2d at 570.

102. A simple "standing" affidavit along these lines, attached to the complaint, can save a good deal of paperwork on the issue later in the case.

103. 339 F. Supp. 1375, 2 ELR 20221 (W.D. Tenn. 1972).

104. *Id.* at 1390, 2 ELR at 20223 (footnote deleted) (emphasis in original).

105. *Id.* at 1379, 2 ELR at 20223.

106. 485 F.2d 67, 3 ELR 20807 (9th Cir. 1973).

107. *Id.* at 70, 3 ELR at 20808.

108. 440 F. Supp. 1245, 7 ELR 20526 (D.D.C. 1977).

109. *Id.* at 1255, 7 ELR at 20531. To the contrary, however, see Environmental Defense Fund, Inc. v. Morton, 420 F. Supp. 1037, 7 ELR 20078 (D. Mont. 1976) (Libby Dam). Interestingly, in affirming the district court on NEPA grounds, the Ninth Circuit Court of Appeals issued a memorandum opinion which, in its first report, found "no private cause of action for violations of the Coordination Act." Slip Op. No. 76-3133, April 18, 1979. In its published version, however, the panel apparently had second thoughts for the FWCA discussion was entirely omitted, 596 F.2d 848, 853, 9 ELR 20268 (9th Cir. 1979).

110. Calvert Cliffs Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971).

111. Association of Northwest Steelheaders v. Corps of Engineers, No. 3362 (E.D. Wash, Sept. 9, 1977).

112. Sierra Club v. Andrus, 581 F.2d 895, 8 ELR 20490 (D.C. Cir. 1978), *rev'd* 442 U.S. 347, 9 ELR 20390 (1979); Realty Income Trust v. Eckerd, 564 F.2d 447, 7 ELR 20541 (D.C. Cir. 1977).

113. Admittedly, the environmental impact statement (EIS) analogy is incomplete in that NEPA envisions nongovernmental recipients of its information. For legislative proposals, however, Congress is the *primary* intended beneficiary for EISs, as it is for mitigation proposals. In *both* cases, Congress will be in a more informed position to act if the information presented — EIS or mitigation plan — is in full compliance with its own statutory requirements. This conclusion is reinforced when we assess the way in which two bodies function. Congress is in no better position to evaluate the adequacy of the bases for a mitigation plan than it is the bases for an EIS. The legislature is not structured to make the case-by-case inquiries necessary to unmask agency noncompliance on specific projects. The "unmasking" function is a traditional responsibility of the judiciary. Congress passes laws and reviews performance in order to amend andpass new laws; courts enforce compliance.

114. 401 U.S. at 416, 1 ELR at 20113 (citations omitted).

115. *Id.* at 414, 1 ELR at 20113.
