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Volume 27 | Issue 2

Article

1978

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Ronald H. Rosenberg

Allen H. Olson

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Recommended Citation

Ronald H. Rosenberg and Allen H. Olson, *Federal Environmental Review Requirements Other than NEPA: The Emerging Challenge*, 27 Clev. St. L. Rev. 195 (1978)
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FEDERAL ENVIRONMENTAL REVIEW REQUIREMENTS OTHER THAN NEPA: THE EMERGING CHALLENGE

RONALD H. ROSENBERG* AND ALLEN H. OLSON**

THE PASSAGE OF THE NATIONAL ENVIRONMENTAL POLICY ACT of 1969¹ has been heralded as a dramatic modification of federal agency decision-making. The Act, commonly called NEPA, had three major objectives. First, it established a government-wide obligation to include environmental factors in the activities of federal agencies.² Second, it created the Council on Environmental Quality (CEQ) to serve as an advisor to the President on environmental issues.³ And third, it mandated a comprehensive environmental review of all "major federal actions significantly affecting the quality of the human environment."⁴ The required environmental review quickly assumed the form of the Environmental Impact Statement or EIS. Prompted by judicial interpretation and guidelines issued by the Council on Environmental Quality,⁵ federal agencies in the early 1970's began to prepare EIS's on a wide variety of federal, federally-assisted and federally-licensed activities.⁶ For example, Army Corps of Engineer dams, Department of Transportation-funded highway projects, Environmental Protection Agency-assisted wastewater treatment plants fell within NEPA's broad scope.

Compliance with NEPA did not come easily. Many agencies viewed the NEPA requirements merely as burdensome paperwork without substantive importance. Most federal agencies eventually realized after a considerable body of federal court decisions were handed down, that good-faith compliance with the Act, rather than continued litigation and project delays, would better serve their agency purposes in the long term.⁷ Consequently, as

* B.A., Columbia University; M.R.P., University of North Carolina; J.D. with honors, University of North Carolina; Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. The author is grateful to the Cleveland-Marshall Fund for its support throughout the preparation of this paper.

** B.A., Cornell University; J.D., University of North Carolina; formerly Attorney/Advisor, Construction Grants Div., Environmental Protection Agency, Washington, D.C.; presently in private practice in Warrenton, Va. and a consultant to the Council on Environmental Quality.

¹ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969) (current version at 42 U.S.C. § 4331 (1976)).

² National Environmental Policy Act § 102, 42 U.S.C. § 4332 (1976).

³ National Environmental Policy Act §§ 202-204, 42 U.S.C. §§ 4342-4344 (1976).

⁴ National Environmental Policy Act § 102(c), 42 U.S.C. § 4332(2)(c) (1976).

⁵ CEQ Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. § 1500 (1977). The Council on Environmental Quality recently proposed comprehensive amendments to their Guidelines, 43 Fed. Reg. 25230-47 (1978). These proposed regulations address the issue of duplicative environmental review requirements and seek, in a general way, to streamline the federal review process. See also note 12 *infra*.

⁶ See generally, F. ANDERSON & R. DANIELS, *NEPA IN THE COURTS* (1973); Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238. (E.L. Dolgin & T.G.P. Guilbert eds. 1974).

⁷ See generally, Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238 (E.L. Dolgin & T.C.P. Guilbert eds. 1974).

the decade progressed, EIS's were prepared on an increasing number of federal activities. In addition, many agencies implemented policies which required an environmental assessment or report to be prepared on all agency projects and programs whether or not an EIS was required.⁸ Usually these assessments and reports served as the basis for decisions on whether the activity required a full EIS. For projects not constituting a "major federal action" or not "significantly affecting the quality of the human environment" the assessment was often utilized as a sub-NEPA environmental planning document.

It can be argued that the development of environmental planning capabilities and concern has been NEPA's greatest accomplishment. Enlightened federal agencies no longer see NEPA solely as a statutory paperwork requirement which must be satisfied before an activity may proceed. More importantly, NEPA represents a planning process which allows environmental considerations to be given at least some weight with technical and economic factors in the development of federal program actions and alternatives.⁹

NEPA, however, is not the only federal environmental review statute to be found in the United States Code. The concept of a comprehensive review process under NEPA is complicated by the existence of over 30 other federal statutes which impose environmental requirements upon federal activities.¹⁰

⁸ For example, the Environmental Protection Agency requires an environmental assessment of its sewage treatment plant construction projects whether or not a full NEPA-mandated environmental impact statement will ultimately be necessary. *See*, 43 Fed. Reg. 44064 (1978) (to be codified at 40 C.F.R. § 35.925-8).

⁹ One recent commentary, however, has indicated a rejection of the commonly held premise that NEPA has "brought of a new day in responsible agency decision-making" and has constituted an important "action forcing" mechanism resulting in environmentally beneficial federal actions. *See*, Fairfax, *A Disaster in the Environmental Movement*, 199 SCIENCE 743 (1978). Professor Fairfax writes:

I suggest that NEPA does not constitute a new approach to administrative reform and is actually a poor vehicle for a reformation of agency decision-making. Litigation under NEPA and preoccupation with the NEPA process truncated pre-existing and potentially significant developments in the definition of agency responsibility for environmental protection and in citizen involvement in agency deliberative processes. It turned environmentalists' efforts away from questioning and redefining agencies' powers and responsibilities and focused them instead on analyzing documents. This preoccupation has led to a misallocation of the environmental movement's resources.

Id.

¹⁰ 16 U.S.C. § 20 (1976); Airport and Airway Development Act of 1970, *as amended*, 49 U.S.C. § 1716 (1976); Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. §§ 719-719o (1976); Anadromous Fish Conservation Act, *as amended*, 16 U.S.C. §§ 757a-757f (1976); Bald and Golden Eagle Protection Act, *as amended*, 16 U.S.C. §§ 668-668d (1976); Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-1418 (1976); Clean Air Act of 1970, *as amended*, 42 U.S.C. §§ 1857-1858a (1976); Coastal Zone Management Act of 1972, *as amended*, 16 U.S.C. §§ 1451-1464 (1976); Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1976); Department of Transportation Act of 1966, 49 U.S.C. § 1651 (1976); Department of Transportation Act of 1966, *as amended*, 49 U.S.C. § 1653(f) (1976); Endangered Species Act of 1973, *as amended*, 16 U.S.C. §§ 1531-1543 (1976); Energy Conservation and Production Act, *as amended*, 42 U.S.C. §§ 6801-6892 (1976); Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. §§ 6851-6892 (1976); Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. §§ 6831-6840 (1976); Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422 (1976); Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791-798 (1976); Estuarine Areas Act, 16 U.S.C. §§ 1221-1226 (1976); Federal-Aid Highway Act of 1958, *as amended*, 23 U.S.C. § 109, § 128, § 138 (1976); Federal Aviation Act of 1958, *as amended*, 49 U.S.C. § 1431 (1976); Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. §§ 201-209 (1976); Federal Energy Administration Act of

NEPA can be distinguished from these other statutes since it requires a comprehensive examination of the impact of a federal activity upon all aspects of the environment while most of the other federal environmental review statutes are directed at a single environmental medium or concern (i.e., air, water, wildlife habitat, endangered species). Environmental review requirements in each of these statutes and the executive orders issued pursuant to them place additional responsibilities on federal agencies beyond those already imposed by NEPA. These provisions impose what can be generally described as specialized environmental review requirements. As will be shown, compliance with NEPA, even to the extent of preparation of a full EIS, will not necessarily satisfy these specialized statutes. In addition, these requirements are implemented by separate procedural regulations; each statute may have its own regulation. The CEQ environmental impact statement guidelines and individual agency NEPA regulations, at best, can only partially satisfy any of the specialized statutes. Separate documents are in many cases needed to comply with each statute.

Many of the specialized review statutes require "consultation" or "coordination" with the federal agency administering that law.¹¹ Review statutes are administered by several different federal agencies thus requiring many federal activities to go through a number of consultations. Some of the specialized statutes impose substantive as well as procedural requirements. These statutory requirements may govern the final disposition of the federal activity as well as the review procedures that must be followed in the decision making process. Other requirements are purely procedural and thus more akin to the NEPA requirements.

The aggressiveness with which these statutes and orders have been implemented in the past has varied markedly. Some have been recognized by

1974, *as amended*, 15 U.S.C. §§ 761-790h (1976); Federal Insecticide, Fungicide and Rodenticide Act, *as amended*, 7 U.S.C. §§ 121-136y (1976); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976); Federal Water Pollution Control Act, *as amended*, 33 U.S.C. §§ 1251-1376 (1976); Fish and Wildlife Coordination Act of March 10, 1934, *as amended*, 16 U.S.C. §§ 661-666c (1976); Forest and Rangeland Renewable Resources Planning Act of 1974, *as amended*, 16 U.S.C. §§ 1600-1614 (1976); Fur Seal Act of 1966, *as amended*, 16 U.S.C. §§ 1151-1186 (1976); Historic Sites, Buildings and Antiquities Act, *as amended*, 16 U.S.C. §§ 461-469i (1976); Land and Water Conservation Act of 1965, *as amended*, 16 U.S.C. § 460 (1976); Marine Mammal Protection Act of 1972, *as amended*, 16 U.S.C. §§ 1361-1407 (1976); Marine Protection, Research and Sanctuaries Act of 1972, *as amended*, 33 U.S.C. §§ 1401-1444, 16 U.S.C. §§ 1431-1434 (1976); Materials Act of 1947, *as amended*, 30 U.S.C. § 601 (1976); Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-353 (1976); Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. §§ 181, 182, 185 (1976); Mining Law of 1872, *as amended*, 30 U.S.C. § 22 (1976); Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1976); National Historic Preservation Act of 1966, *as amended*, 16 U.S.C. § 470 (1976); National Park System Mining Regulation Act, 16 U.S.C. §§ 1901-1912 (1976); Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (1976); Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1343 (1976); Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-1227 (1976); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1976); Rivers and Harbors Appropriations Act of 1899, *as amended*, 33 U.S.C. §§ 401-466n (1976); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-9 (1976); Solid Waste Disposal Act, *as amended*, 42 U.S.C. §§ 6901-6987 (1976); Taylor Grazing Act of 1934, *as amended*, 43 U.S.C. §§ 315, 315a, 315e, 315f (1976); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 (1976); Urban Mass Transportation Act of 1964, *as amended*, 49 U.S.C. § 1602, § 1610 (1976); Wild and Scenic Rivers Act, *as amended*, 16 U.S.C. §§ 1271-1287 (1976); Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1976).

¹¹ See, e.g., Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1976), and National Historic Preservation Act, 16 U.S.C. § 470f (1976).

federal agencies for a number of years. Others, although legally binding, have been actively enforced only in recent years. The reasons for this uneven treatment are numerous. Administering agencies have in some cases not had sufficient resources to implement their statutes. Also, the applicability of certain of the requirements to different types of federal activities has been disputed. Some environmental review requirements have until recently simply been ignored by the government, interest groups and the public.

To date the courts have played only a limited role in assuring compliance with the specialized review laws. The most recent statutes have had very little judicial interpretation. Other statutes have been briefly discussed in decisions which rely primarily on NEPA requirements. Unfortunately these decisions tend to confuse the specialized review requirements more than clarify them. Within the last several years, however, courts have begun to pay more attention to the specialized statutes in their own right. This has been prompted in part by increased interest in these laws by environmental organizations and other interest groups. In some cases, having failed to stop or modify a federal project on NEPA grounds, environmental litigants have turned to the specialized statutes for help. Environmental groups have also used these laws to influence federal agencies' decision-making in administrative proceedings. Thus, these requirements have had an impact in situations short of actual litigation.

The effect of specialized environmental review statutes on federal activities will continue to grow. Their increasing importance and their tendency to overlap NEPA, and occasionally each other, will certainly complicate federal environmental review and planning processes. Although there are several ongoing efforts to streamline the procedures generated by these statutes,¹² government officials, planners, lawyers and others will undoubtedly have to live with the present framework for at least the near future. With that premise in mind, this article will analyze five major specialized environmental review statutes which affect the greatest number of federal activities, including 1) the Fish and Wildlife Coordination Act of 1958;¹³ 2) the Endangered Species Act of 1973;¹⁴ 3) the National Historic Preservation Act of 1966;¹⁵ 4) the Wild and Scenic Rivers Act of 1974;¹⁶ 5) the

¹² President Carter, in his May 23, 1977 Environmental Message to Congress, stated:

Today, before any federal agency can construct a new project, or grant funds to local or state governments, or issue a permit to a private party, it must comply with more than a score of different environmental review requirements. I have directed the Council on Environmental Quality to examine the present federal environmental review requirements and to recommend specific measures, including legislation, to clarify and integrate them in a way compatible with my broader proposals for governmental reorganization. 13 WEEKLY COMP. OF PRES. DOC. 794 (May 23, 1977).

The study requested by the President is now underway at CEQ. The study will hopefully resolve some of the issues raised in this article. To assist this effort, the Council on Environmental Quality has recently issued a new NEPA regulation to replace the previous NEPA guidelines. 43 Fed. Reg. 55978 (1978). The regulation was mandated by Executive Order 11991 issued by President Carter on May 24, 1977. 13 WEEKLY COMP. OF PRES. DOC. 808 (May 24, 1977).

¹³ 16 U.S.C. § 661 (1976).

¹⁴ 16 U.S.C. § 1531 (1976).

¹⁵ 16 U.S.C. § 470 (1976).

¹⁶ 16 U.S.C. § 1274 (1976).

Coastal Zone Management Act of 1972,¹⁷ and will evaluate their existing judicial interpretations, identify emerging trends in the law, highlight the problems that have arisen owing to the proliferation of environmental statutes and finally offer suggestions for the future.

I. FISH AND WILDLIFE COORDINATION ACT

The Fish and Wildlife Coordination Act (FWCA)¹⁸ is one of the oldest federal environmental review statutes. The Act was originally passed in 1934¹⁹ and amended in 1946,²⁰ in 1958²¹ and again in 1965.²² It has had a substantial impact on the planning and development of certain types of federal projects, particularly U.S. Army Corps of Engineers dam projects and other major federal construction activities directly affecting navigable waters. The effect of the Act on other types of federal activities has varied significantly. This is due to a number of factors including: 1) lack of resources in the Fish and Wildlife Service (FWS),²³ 2) legal questions on the applicability of the Act to certain types of federal activities, 3) recalcitrance on the part of certain federal agencies to comply with the law, and 4) the passage of NEPA which has, in part, overshadowed the Act.

The environmental review requirements of the Fish and Wildlife Coordination Act are found in section 662(a).²⁴ This section provides in part that:

. . . whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage by any department or agency of the United States, or by any public or private agency under Federal permit or license, *such department or agency first shall consult with the United States Fish and Wildlife Service . . . with a view to the conservation of wildlife resources* by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water resource development. (emphasis supplied).²⁵

In addition, section 662(b) further requires that the reports and

¹⁷ 16 U.S.C. §1451 (1976).

¹⁸ 16 U.S.C. § 661 (1976).

¹⁹ Act of March 10, 1934, Pub. L. No. 73-121, 48 Stat. 401 (1934).

²⁰ Act of August 14, 1946, Pub. L. No. 79-732, 60 Stat. 1080 (1934).

²¹ Act of August 12, 1958, Pub. L. No. 85-624, 72 Stat. 563 (1958).

²² Act of July 9, 1965, Pub. L. No. 89-72, 79 Stat. 213 (1965).

²³ Possibly the most serious problem confronting the administration of the Act has been a lack of resources on the part of the Fish and Wildlife Service. This has restricted the Service's ability to provide the technical expertise needed to adequately review the increasing number of federal activities subject to the Act. In many cases, the Service has simply declined to review projects for this reason. *See, e.g., Sun Industries Ltd. v. Train*, 532 F.2d 280 (2d Cir. 1976).

²⁴ 16 U.S.C. § 662(a) (1976).

²⁵ *Id.*

recommendations of the Secretary of Interior on "the wildlife aspects of such projects" be made an integral part of all federal agency reports submitted for congressional authorization or administrative approval of water resource projects.²⁶ The reports of the Secretary under the Act must include proposed measures for mitigating or compensating damage to wildlife resources resulting from the project. Furthermore, the federal agency proposing the project is required to "give full consideration to the report and recommendations" of the Secretary and to include in project plans "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits."²⁷

Despite being on the statute books for over forty years, no comprehensive regulation has ever been promulgated setting forth procedures for complying with the consultation and reporting requirements of the Act. Procedural details have been left to interagency agreements, project agency regulations, and program guidance documents issued by the Fish and Wildlife Service. There have been many recent recommendations, including one from the President's Council on Environmental Quality, that the FWS develop such a regulation to put uniformity into the Act's implementation.²⁸

The environmental review provisions of the Fish and Wildlife Coordination Act have not received extensive judicial review. With the enactment of NEPA, FWCA issues have gradually been subsumed in the cases which examine the procedural or substantive adequacy of environmental impact statements. This is contrary to the trend seen recently in the courts giving independent status to other environmental review statutes.²⁹ However, a brief analysis of the Act's case law history reveals several important points which shed some light on the future of these provisions.

First, from the standpoint of the private litigant, there is serious question whether such a party may bring suit under section 662 to require interagency consultation. An early decision, *Rank v. Krug*,³⁰ stated that citizens could not force compliance with this duty since it "is lodged with regularly selected officials whose duties are clearly defined by statute, any more than a private citizen could step in and assume the duties of prosecuting attorney or governor."³¹ Although this sentiment seems out of place at a time when there is substantial citizen enforcement of governmental environmental obligations, it has been reiterated in a number of recent federal court decisions.³² In the

²⁶ 16 U.S.C. § 662(b) (1976).

²⁷ *Id.*

²⁸ On March 16, 1978, the Council on Environmental Quality issued a memorandum entitled "Draft recommendations of the Council on Environmental Quality on measures to simplify, coordinate and codify federal wildlife law" (on file at office of Cleveland State Law Review). One of the CEQ proposals in this document was that "a single set of procedural regulations implementing the Fish and Wildlife Coordination Act and binding all federal agencies, should be promulgated after full participation by relevant federal and state agencies and other interested parties." To date no final action has been taken by Interior or the Corps on either the NWF petition or the CEQ recommendation.

²⁹ See text accompanying note 1, *supra*, *passim*.

³⁰ 90 F. Supp. 773 (S.D. Cal. 1950).

³¹ *Id.* at 801.

³² See, *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971).

most recent of these cases, *County of Trinity v. Andrus*,³³ the district court flatly held that “no private right of action arises under” the Fish and Wildlife Coordination Act.³⁴ This attitude may reflect the judicial opinion that the consultation and reporting requirements of the FWCA can be satisfied by a procedurally and substantively adequate environmental impact statement. Such a view destroys the independent vitality of the FWCA and effectively reduces its section 662(a) and (b) requirements to “include” components of an EIS.

Another line of cases indicates support for the view that compliance with NEPA serves to satisfy the FWCA requirements. Two early cases, *Zabel v. Tabb*³⁵ and *Akers v. Resor*,³⁶ appeared to reflect an interest in reconciling the two statutes and giving them both recognition. However, cases following *Zabel* and *Akers* have been structured in a way to give NEPA claims primary emphasis.³⁷ For example, in *Environmental Defense Fund v. Corps of Engineers*,³⁸ the court found that good faith compliance with NEPA automatically constituted compliance with the Fish and Wildlife Coordination Act. This result does not clarify the relationship between the two statutes. It may be best explained by the fact that the NEPA environmental impact statement was viewed as the forum for raising all environmental concerns. However, as will be seen, the recent United States Supreme Court decision of *TVA v. Hill*³⁹ appears to cast doubt on such a result since the Court in that case applied the requirements of another specialized environmental review statute, the Endangered Species Act, in such a way to give it independent significance apart from NEPA.

Additionally courts have ignored the specific procedural consultation requirements imposed by section 662(a) of the FWCA and also the section 662(b) reporting obligation of the Department of the Interior. Instead, judicial review has focused upon the environmental impact statement to determine if there has been a departure “from the Congressional intent or policies of [the FWCA].”⁴⁰ Consequently the Fish and Wildlife Coordination Act issue has been reduced merely to a component of the court’s EIS analysis. Too often the only question raised is whether the EIS mentioned the fish and wildlife impacts of the proposed project. With that issue resolved in the affirmative, challenges based upon the FWCA have been dismissed. In *Save Our Invaluable Land (SOIL) Inc. v. Needham*,⁴¹ reviewing the adequacy of an Army Corps of Engineers EIS for a dam project, the Tenth Circuit eliminated the FWCA-based claim by summarily stating that, “[I]n preparing

³³ 438 F. Supp. 1368 (E.D. Cal. 1977).

³⁴ *Id.* at 1383.

³⁵ 430 F.2d 199 (5th Cir. 1970), *cert. denied* 401 U.S. 910 (1971).

³⁶ 339 F. Supp. 1375 (W.D. Tenn. 1972).

³⁷ *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404 (W.D. Va.), *aff'd* 484 F.2d 453 (4th Cir. 1973); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, *aff'd* 470 F.2d 289 (8th Cir. 1972); *Environmental Defense Fund v. Froehle*, 473 F.2d 346 (8th Cir. 1972); *Save our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 292 (D.R.I. 1974).

³⁸ 325 F. Supp. 749 (E.D. Ark. 1971).

³⁹ 98 S. Ct. 2279 (1978), discussed in text accompanying notes 74-89 *infra*.

⁴⁰ *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404, 418 (W.D. Va. 1973).

⁴¹ 542 F.2d 539 (10th Cir. 1976).

its EIS the Corps *did not ignore* the Fish and Wildlife Coordination Act of 1958⁴² (emphasis supplied).

Drawing from these recent cases it seems apparent that specific procedural and substantive requirements of the FWCA have not been independently considered by courts in the context of EIS review. The courts have conceived of the FWCA as a restatement of the NEPA obligations to consider wildlife impacts in an environmental impact statement. An EIS which discusses wildlife effects will often be found to "satisfy" the FWCA in a vague, non-specific way. In *Environmental Defense Fund v. Corps of Engineers*,⁴³ Judge Eisele went so far as to say it would be unreasonable to require the Corps to comply with NEPA and the FWCA separately. Such a statement reflects the judicial perception that NEPA and the FWCA are overlapping statutes covering the same concerns, and that, since the NEPA-mandated EIS is required to be a comprehensive appraisal of all environmental effects of a project, it will suffice to satisfy the FWCA obligations.

The position that satisfaction of the NEPA EIS requirement also satisfies the FWCA is incorrect for a number of reasons. (1) The FWCA imposes specific procedural and substantive requirements different from those of NEPA. There is no reason why these obligations of currently applicable federal law should not be given full force and effect. (2) Even if the NEPA environmental impact statement is to be considered the proper procedural "vehicle" for complying with the FWCA, there might be an inadequate form of judicial review then applied to the substantive elements of the Wildlife Act. It is not yet settled whether or not NEPA mandates substantive review of agency decisions.⁴⁴ If an EIS is examined to determine FWCA compliance without regard to the specific requirements of the FWCA, then these substantive concerns could be entirely outside the scope of judicial review. (3) The FWCA contains consultation and evaluation procedures which should be integrated into agency project planning at an early stage. Since Congress has specifically recognized fish and wildlife interests as deserving of special consideration, the role of the Department of Interior should not be reduced to merely commenting on another agency's draft and final environmental impact statements. If Congress wished to repeal the requirements of the FWCA, it could do so. As yet, it has not taken such action.

A recent Second Circuit decision has recognized the importance of the FWCA section 662(a) interagency consultation requirements. In *Sun Industries Ltd. v. Train*,⁴⁵ the plaintiff challenged the issuance by the Environmental Protection Agency of a National Pollution Discharge Elimination System (NPDES) permit to a sewage treatment facility on the grounds that EPA had not satisfied the FWCA. EPA had sent its draft permit to the Department of the Interior for the necessary consultation consisting of review and comment. It received in return a statement of "no action" by Interior attributable to insufficient funding and personnel in its Fish and

⁴² *Id.* at 543.

⁴³ 325 F. Supp. 728 (E.D. Ark. 1971).

⁴⁴ W. RODGERS, ENVIRONMENTAL LAW 741 at n.23 (1977).

⁴⁵ 394 F. Supp. 211 (S.D.N.Y. 1975), 532 F.2d 280 (2d Cir. 1976).

Wildlife Service. Acting upon this purported waiver of the FWCA requirements and in conformance with its own regulations EPA issued the NPDES permit. Sun Enterprises then sued to challenge EPA's action.

Although the case was resolved primarily on the issue of judicial review under section 509 of the Federal Water Pollution Control Act,⁴⁶ the court did address the waiver attempted by the Fish and Wildlife Service. The court totally rejected the Interior Department's claim that it could refuse to review submission from other federal agencies. It found no legislative intent for such an abdication of responsibility and gave no support to EPA's regulations recognizing such a waiver. In addition, the appellate court rebuffed the government's defense of inadequate funding resources by noting that the Department of Interior had not even sought appropriations.⁴⁷ This case is significant because it accords the FWCA section 662(a) requirement respect which is notably lacking in the prior decisions discussed above. Without significant discussion, the court made the threshold determination that the section 662 requirements apply to the issuance of NPDES permits; it is arguable that the statutory language and intent would not call for such a result.⁴⁸

The court's application of the FWCA consultation requirements in the *Sun Industries* case can possibly be explained by unique provisions of the Federal Water Pollution Control Act. All EPA actions under the Federal Water Pollution Control Act except for wastewater treatment grants and new source performance standards are specifically exempted from NEPA requirements.⁴⁹ Therefore, the decision to issue the NPDES permit in the *Sun Industries* case was not subject to direct EIS analysis. In this situation the court may have concluded that the FWCA consultation procedures were necessary to protect the wildlife interests in the absence of a formal EIS. It is thus unclear whether the position taken in *Sun Industries* can be considered as precedent in situations beyond the NPDES permitting process. Furthermore the discussion in *Sun Industries* of the FWCA issue was dicta and not basic to the decision. However, the Second Circuit's strong statement in *Sun Industries* concerning the importance of the FWCA consultation process does represent a recognition of the Act as a separate entity, worthy of independent compliance under a congressionally-authorized mandate.

A separate rationale for compliance with the FWCA has emerged in the recent case of *National Wildlife Federation v. Andrus*.⁵⁰ There, the plaintiff organization sued to enjoin the construction of a twenty-three megawatt

⁴⁶ 33 U.S.C. § 1369 (1976).

⁴⁷ 532 F.2d 280, 290 n.13 (2d Cir. 1976).

⁴⁸ Section 662(a) of the Fish and Wildlife Coordination Act specifically requires federal agencies to consult with the U.S. Fish and Wildlife Service and any state wildlife agency "whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever" (emphasis added). 16 U.S.C. § 662(a) (1976). The district court had found that EPA's NPDES permit constituted a potential stream modification bringing EPA under the consultation requirements of the Fish and Wildlife Coordination Act. 294 F. Supp. 211, 218 (S.D.N.Y. 1975). The granting of an NPDES permit might not necessarily be found within the breadth of this statutory section.

⁴⁹ Federal Water Pollution Control Act, 33 U.S.C. § 1371(c)(1)(1976).

⁵⁰ 440 F. Supp. 1245 (D.D.C. 1977).

hydroelectric power plant to be built on the San Juan River in New Mexico. They contended that the Department of the Interior had violated, *inter alia*, section 662(b),⁵¹ requiring the Secretary of Interior to submit to Congress a report on the effect on wildlife of those projects upon which it has been consulted. In granting the injunction, the district court found two purposes behind section 662(b): the first being the requirement of federal agency consideration of environment effects in project development and the second being "to inform the Congress of those consequences to enable it to consider conservation measures."⁵²

The court then addressed the issue of whether NEPA compliance also constituted compliance with the FWCA. Although the EIS involved was found to have been insufficient, the court noted that even if a legally adequate environmental statement had been prepared, such action would not necessarily serve the FWCA-mandated function of informing Congress of the environmental effects of the federal projects it funds. "In such circumstances, strict compliance with FWCA should be required."⁵³ This conclusion followed directly from the court's view that the Department of the Interior is to serve as an indirect advisor to Congress providing expert information on the wildlife impacts of federally-funded water resource projects.

In conclusion, the limited case law interpreting the FWCA does not provide precise answers regarding the statute's application to the ever increasing number of federal activities affecting American waterways. In the past, the FWCA has been viewed as being superfluous when a judicially acceptable environmental impact statement has been prepared. However, if the *Wildlife Federation* and *Sun Industries* cases are indicative of the emerging trend, the Fish and Wildlife Coordination Act will be viewed by the federal courts as being procedurally and also substantively distinct from NEPA. Future cases will develop the relationship between these two statutes.

II. THE ENDANGERED SPECIES ACT OF 1973

The Endangered Species Act (ESA)⁵⁴ is a recent addition to the list of specialized environmental review statutes. The key "consultation and coordination" section of the Act is section 7. Section 7 states that:

The Secretary [of Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. *All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act and by*

⁵¹ 16 U.S.C. § 662(b) (1976).

⁵² 440 F. Supp. 1245, 1255 (D.D.C. 1977).

⁵³ *Id.*

⁵⁴ 16 U.S.C. § 1531 (1976), *as amended by* Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978). The amendments are discussed in notes 90-101, *supra*, and accompanying text.

*taking such action necessary to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected states, to be critical.*⁵⁵

This section specifies four distinct obligations to be satisfied: (1) the Secretary of Interior must review and utilize existing programs to further the purposes of the Act; (2) all agencies must use their authority to further these same purposes by carrying out conservation programs; (3) all agencies must insure that their activities do not jeopardize the continued existence of endangered or threatened species; and (4) all agencies must insure that their actions do not modify or destroy critical habitats for endangered species. These obligations are set forth with relatively little detail thereby leaving major interpretive questions for the courts. Broadly interpreted, this language creates a substantive standard against which all federal agency activities would be evaluated on judicial review.

The administration of this section of the law is divided between the Department of Interior's Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) of the Department of Commerce. The FWS is responsible for the application of section 7 to the vast majority of listed endangered and threatened species while NMFS is responsible for a smaller number of marine species.⁵⁶

Section 7 imposes a procedural consultation requirement on all federal agencies whose activities may threaten listed endangered species and also their critical habitats. The recently promulgated regulation, jointly issued by the NMFS and the FWS,⁵⁷ as well as certain court decisions,⁵⁸ indicate that section 7 cannot be satisfied through compliance with NEPA. It may be possible for NEPA and Endangered Species Act procedure and documentation to be integrated to a limited extent. However, each statute has an independent legal basis, and federal agencies must assure that their activities meet the requirements of both.

The section 7 procedures may turn out to be among the most complex of the specialized review requirements confronting federal agencies. The new regulations put the burden squarely on the project agency to develop the necessary biological information for an adequate review by the FWS or

⁵⁵ 16 U.S.C. § 1536 (1976) (emphasis added).

⁵⁶ 43 Fed. Reg. 870 (1978) (to be codified in 50 C.F.R. § 402).

⁵⁷ 43 Fed. Reg. 875 (1978) (to be codified in 50 C.F.R. § 402.04(b)). Section 402.04(b)(1) states that:

Consultation under section 7 may be consolidated with interagency cooperation required by other statutes, such as the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.) or the National Environmental Policy Act (42 U.S.C. § 4321 et seq.). *The satisfaction of the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligation to comply with the consultation procedures set forth in this part.* (emphasis added).

⁵⁸ T.V.A. v. Hill, 98 S. Ct. 2279 (1978); National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976). See generally text accompanying notes 67-69 and 74-89, *infra*.

NMFS of the impact of the activity on an endangered or threatened species.⁵⁹ This data then serves as the basis for a biological opinion issued by FWS or NMFS. The biological opinion must be rendered within 60 days after a request for consultation from the sponsoring agency and the receipt of adequate biological data.⁶⁰ The response period can be extended for an additional 60 days when additional information or further review is needed.⁶¹ The procedure is further complicated in those instances when it must be determined whether critical habitat is involved.⁶² The eventual listing of up to 1700 species of endangered or threatened flora⁶³ will undoubtedly add to the procedural problems and greatly increase the number of section 7 consultations required each year.

Section 7 of the Endangered Species Act potentially may make a more substantive impact on federal projects than NEPA. A brief review of the emerging case law involving section 7 will illustrate a developing pattern of judicial thought recognizing the significant procedural and substantive requirements of the ESA.

Although the section 7 requirements were enacted into law in 1973, there have been surprisingly few cases arising under its authority. In one such case, *Sierra Club v. Froehlike*,⁶⁴ the court was asked to enjoin an Army Corps of Engineers dam project located in Meramec Park, Missouri, in part because it was alleged that construction of the dam would jeopardize the continued existence of the endangered Indiana bat. It was also claimed that the reservoir built for the dam would flood the critical habitat of this variety of bat. The Sierra Club maintained that the Corps ignored warnings from the Department of the Interior about the impact of the dam on the Indiana bat population. In rejecting the Sierra Club's position, the Eighth Circuit viewed the mandate of section 7 to be mainly procedural and concluded that once a project agency has consulted with the Department of Interior, it has satisfied

⁵⁹ 43 Fed. Reg. 875 (1978) (to be codified in 50 C.F.R. § 402.04(c)). Section 402.04(c) states that,

It is the primary responsibility of *each Federal agency requesting consultation* to conduct the appropriate studies and to provide the biological information necessary for an adequate review of the effect and identified activity or program has upon listed species or their habitat. To the extent it is available, the Service will upon request provide all relevant data and reports, personnel, and recommendations for additional studies or surveys, but the Service is not obligated to fund any such additional studies or surveys. (emphasis added).

⁶⁰ 43 Fed. Reg. 875-876 (1978) (to be codified in 50 C.F.R. § 402.04(e) (1)-(3)).

⁶¹ Fed. Reg. 876 (1978) (to be codified in 50 C.F.R. § 402.04(f)).

⁶² 43 Fed. Reg. 876 (1978) (to be codified in 50 C.F.R. § 402.05).

⁶³ Currently, 177 species of fauna in the United States have been formally listed as endangered and 37 species of fauna as threatened. Twenty species of flora have been listed as endangered and two species as threatened. Thirty-three critical habitats have been designated. 41 Fed. Reg. 24523 (1976). The Secretary of the Smithsonian Institution is directed "to review (1) species of plants which are now or may become endangered or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after December 28, 1973, the results of such review including recommendations for new legislation or the amendment of existing legislation." 16 U.S.C. § 1541 (1976). The Smithsonian Institution's report listed approximately 3100 species of endangered or threatened plants. The report is printed in H.R. REP. 94-51, 94th CONG. 1st Sess. 8, reprinted in [1975] U.S. CODE. CONG. & AD. NEWS 439. It is anticipated that many of these species will eventually be afforded the Act's protection.

⁶⁴ 534 F.2d 1289 (8th Cir. 1976).

its obligation under the ESA. In terms of the substantive effect of the Fish and Wildlife Service's expert opinion concerning the project's impact on endangered species the court stated that, "Consultation under Section 7 does not require acquiescence. . . . [T]he responsibility for [the project] decision after consultation is . . . vested . . . in the agency involved."⁶⁵ The Eighth Circuit viewed the FWS's function as being strictly advisory with no veto power over the actions of other federal agencies. At no point did the court examine the specific obligations imposed by the Act in order to insure that endangered species would not be jeopardized by agency action.

The result in the case can be explained possibly on the ground that the continued existence of a species was not threatened by federal action; the court noted that there are approximately 700,000 Indiana bats in existence and that this Corps of Engineers project would affect the habitat of only about ten thousand.⁶⁶ Also, the court had approved the environmental impact statement prepared for the project and consequently the court may have believed that the adequate EIS relieved the Corps of its obligation to consider any environmental effect.

During the same year that *Sierra Club v. Froehlke* was decided, the Fifth Circuit also ruled on a section 7 case, *National Wildlife Federation v. Coleman*.⁶⁷ The *Coleman* case concerned the construction of a federally-assisted highway through a portion of the sole habitat of the Mississippi sandhill crane an endangered bird species. At the time of the litigation only forty sandhill cranes were known to exist. The district court had dismissed the National Wildlife Federation's complaint based upon the section 7 allegations.⁶⁸ However, on appeal the Fifth Circuit gave section 7 requirements considerably more significance than had the Sixth Circuit in *Sierra Club v. Froehlke*. It determined that there was a mandatory duty imposed upon federal agencies to consult with the Department of Interior and to insure that agency activities do not jeopardize endangered species. Although the court recognized no project-stopping veto power granted the Interior Department by the ESA, it did take a significant step to expand the scope of analysis of section 7 consultation of judicial review. Judge Simpson stated that the Department of Transportation had failed to properly consider not only the direct but also the indirect effects of the highway's construction on the sandhill crane.⁶⁹ This comprehensive project review would require the sponsoring agency to evaluate secondary impacts in much the same way as does an EIS. Implied from the court's holding is the substantive principle that section 7 of the ESA mandates a broad-based endangered species impact analysis in the planning of federal projects. In terms of practical effect, the result of the Fifth Circuit's decision is that a project which lacks this wide-ranging analysis may not proceed. In the *Coleman* decision, the highway construction was enjoined until the Department of Interior determined that

⁶⁵ *Id.* at 1303.

⁶⁶ *Id.*

⁶⁷ 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

⁶⁸ 400 F. Supp. 705 (S.D. Miss. 1975).

⁶⁹ 529 F.2d 359, 373 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

project modifications brought the activity within compliance of section 7 requirements. By reaching this result, the court effectively gave the Department of Interior limited authority to regulate federal aid highways.

Not all of the cases have involved the use of provisions of the Endangered Species Act to halt federal developmental projects. In *Defenders of Wildlife v. Andrus*⁷⁰ a district court had an opportunity to review the regulations of the Fish and Wildlife Service with regard to the sport hunting of migratory birds. The plaintiffs alleged that since the regulations permitted hunting before sunrise and after dark, endangered bird species would be inadvertently killed because hunters could not distinguish between them and other birds during those periods. In striking down the regulations as being arbitrary and unlawful, the court rejected the contention of the Fish and Wildlife Service that its duty under the ESA was solely to avoid jeopardizing the continued existence of protected species. However, the court ruled that the FWS had an "affirmative duty to increase the population of protected species."⁷¹ This duty included the use of all methods necessary to increase the numbers of endangered species so that they will no longer be in that category.

Defenders of Wildlife v. Andrus may present an unusual case since the programs and regulations of the Secretary of Interior are involved and not a project-oriented, developmental agency. Under section 7 of the ESA, the Secretary is directed to review the programs under his authority and "utilize such programs in furtherance of the purposes of this Act."⁷² It could be argued that this same standard should be the mandate of every federal agency and hence the affirmative duties identified by the district court would be generally applicable. At any rate, it is worth noting the expansive substantive interpretation given the statute by this court and consider it part of an emerging trend in the law.

This trend is also represented in the recent decision of *Connor v. Andrus*.⁷³ There a plaintiff successfully challenged Fish and Wildlife Service and State of Texas migratory waterfowl regulations on substantive administrative law grounds. The agency rules prohibiting the hunting of the endangered Mexican duck in designated portions of New Mexico, Texas and Arizona were struck down as being arbitrary and capricious. The district court determined that the federal and state hunting ban would not serve to increase the population of the endangered species. The court's surprising conclusion stemmed from its determination that the hunting ban would indirectly aid in the destruction of the critical habitat of the endangered duck species. The court concluded that designated "no-hunting" lands would now be put to a more intensive land use since they could no longer be reserved for duck hunting. The ultimate result of this land use shift, the court felt, would be to eliminate necessary habitat for the Mexican duck and thus further reduce the size of species populations. Therefore in order to protect the habitat of the duck, Judge Wood enjoined the Fish and Wildlife Service's regulations thereby permitting the endangered species to be hunted in three states.

⁷⁰ 428 F.Supp. 167 (D. D.C. 1977).

⁷¹ *Id.* at 170.

⁷² 16 U.S.C. § 1536 (1976).

⁷³ Civil Action No. EP-77 CA-187 (W.D. Tex. 1978).

This decision is unsettling for a number of reasons. First, it places the burden of proof upon the federal agency acting to protect an endangered species. Here, the district court did not defer to or acknowledge any agency expertise in the endangered species field. The court, using as its sole basis information gathered at a hearing on the plaintiff's motion for a preliminary injunction, invalidated a regulation which had been formally proposed, redrafted, and finally issued as a formal agency regulation. To find these regulations as having "no rational basis" would seemingly require a more broadly based factual determination. Second, the court enjoined the agency rules without discussing the traditional tests for injunctive relief. It is difficult to imagine just how the plaintiffs could have satisfied the requisite showings of irreparable harm, likelihood of success on the merits and a furthering of the public interest in order to justify the award of the injunction. And third, this decision may encourage other individuals and organizations to challenge protective regulations in local federal districts. However, taking the *Connor v. Andrus* decision at face value, it ironically supports the evolving philosophy that in ESA cases federal agencies must exercise their responsibilities in a manner that minimizes the total adverse effects upon endangered species, both direct and indirect.

The most recent case considering the Endangered Species Act, *TVA v. Hill*,⁷⁴ is also the most well-known. A brief factual discussion of the case is necessary. Every year since 1967 Congress had authorized funds for the construction of the Tellico dam located on the Tennessee River. In 1968 construction was commenced on the \$100 million structure which would flood 16,500 acres if completed.⁷⁵ After litigation over the adequacy of the environmental impact statement had been concluded,⁷⁶ a University of Tennessee ichthyologist, Dr. David A. Etnier, discovered the existence of a small fish he named the snail darter. He determined that the segment of the Little Tennessee River that was to be impounded was the sole habitat of the species.⁷⁷ On December 28, 1973 the Endangered Species Act was enacted with the result that on November 10, 1975 the snail darter had been listed by the Department of the Interior as an endangered species⁷⁸ and in April of 1976 the river segment in which the fish is found was formally designated a critical habitat.⁷⁹

Although suit was filed to enjoin completion of the project in February of 1976,⁸⁰ the trial court agreed with the Department of the Interior in concluding that completion of the dam would probably result in the complete destruction of the snail darter species; it refused to grant the permanent injunction sought by the plaintiffs. The court believed that the continuation of funding for the project indicated a congressional interpretation that the ESA

⁷⁴ 98 S. Ct. 2279 (1978).

⁷⁵ 549 F.2d 1064, 1067 (6th Cir. 1977).

⁷⁶ See, *Environmental Defense Fund v. TVA*, 468 F.2d 1164 (6th Cir. 1972); *Environmental Defense Fund v. TVA*, 492 F.2d 466 (6th Cir. 1974).

⁷⁷ 549 F.2d 1064, 1068 (5th Cir. 1977).

⁷⁸ 40 Fed. Reg. 47505-06 (1975), codified at 50 C.F.R. § 17.11 (1977).

⁷⁹ 41 Fed. Reg. 13926-28 (1976), codified at 50 C.F.R. § 17.95 (1977).

⁸⁰ 419 F. Supp. 753 (E. D. Tenn. 1976).

did not bar completion of the dam. The cost of the dam, the degree of completion and the fact that the court believed that the project could not be modified to mitigate the effect upon the snail darter undoubtedly account for the decision. As if to confirm the district court's decision, Congress soon appropriated \$9 million for continuing work on the Tellico project.⁸¹

On appeal,⁸² the Sixth Circuit took a position diametrically opposed to the lower court. In a strongly-worded opinion written by Judge Celebrezze, the court found that the TVA dam project had violated section 7 of the Act and consequently it permanently enjoined further construction. In reversing the district court, the Sixth Circuit acknowledged that the ESA did not provide the Secretary of Interior with veto power over the activities of other federal agencies. However, the court did find a duty to satisfy "compliance standards" set by Interior which could then be considered upon judicial review.

Of greater significance was the court's resolution of the "on-going project" issue. The threshold question was whether the ESA applied to such a project initiated prior to the enactment of the statute. In unequivocal terms the court stated that the Act did apply to on-going projects, reasoning that detrimental impacts upon endangered species may not be apparent prior to construction. The degree to which the project was completed was not influential in the Sixth Circuit's opinion; it viewed the possible destruction of a species as the decisive factor. "[W]hether a dam is 50% or 90% completed is irrelevant in calculating the social and scientific costs attributable to the disappearance of a unique form of life."⁸³ Consequently, the court issued a permanent injunction.⁸⁴ Undaunted, the appropriation committees of both Houses of Congress sponsored legislation, which was ultimately enacted, which continued funding for the Tellico project.⁸⁵

Finally in 1978 the United States Supreme Court issued its decision concerning the snail darter controversy and resoundingly supported the Sixth Circuit's interpretation of the ESA.⁸⁶ The Court found the language of section 7 to be unambiguous and concluded that the operation of the Tellico dam violated both the spirit and the wording of the Act. Of great importance to the Court's decision was the fact that the issue of the impact of the dam upon the snail darter had been conclusively resolved both by the TVA's prior admissions and by the uncontroverted findings of the Secretary of Interior.⁸⁷ Consequently Chief Justice Burger addressed a large portion of the majority opinion to the question of whether the TVA, under the particular facts of the case, would be in violation of the ESA. After reviewing the development of

⁸¹ Public Works for Water and Power Development and Energy Research Appropriations Act, 1977, Pub. L. No. 94-355, 90 Stat. 889 (1976).

⁸² 549 F.2d 1064 (6th Cir. 1977).

⁸³ *Id.* at 1071.

⁸⁴ *Id.* at 1075. Judge Celebrezze added that, "[T]his injunction shall remain in effect until Congress, by appropriate legislation, exempts Tellico from compliance with the Act or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined." *Id.*

⁸⁵ Public Works for Water and Power Development and Energy Research Appropriations Act of 1978, Pub. L. No. 95-96, 91 Stat. 797 (1978).

⁸⁶ 98 S. Ct. 2279 (1978).

⁸⁷ *Id.* at 2290.

federal endangered species legislation the Court determined that the 1973 Act “represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁸⁸ The TVA’s argument founded upon legislative intent not to subject this major, on-going project to the rigors of the ESA was rejected out of hand by the Court. Under the provisions of the Act, species extinction was to be avoided “whatever the cost” and endangered species were to be accorded “priority over the ‘primary missions’ of federal agencies.”⁸⁹ Viewing this policy decision as clearly within the province of the Congress, the Court found no legislative or statutory authority vested in the judiciary to override the congressional decision. The broad interpretation given the ESA is well worth noting for application to future cases challenging federal actions.

The major idea to be taken from the *TVA v. Hill* decision is that the Endangered Species Act imposes upon all federal agencies both a consultation requirement and a substantive decision-making standard upon which courts can evaluate agency compliance. In addition, when the facts clearly indicate that a federal action will completely extinguish an endangered life form or critical habitat, the judiciary has very little choice but to enjoin the activity. The Court’s decision necessarily did not address the more difficult factual situations where species or habitat impact is unclear or debatable. In these instances the agency’s decisions should be evaluated in light of the policy embodied in the ESA. Future cases will undoubtedly develop the law concerning (1) the question of when agencies must take protective actions with respect to endangered species and (2) what level of proof is necessary to establish an agency obligation to act.

Congressional reaction to the Supreme Court’s decision in *TVA v. Hill* was quick. Congress passed the Endangered Species Act Amendments of 1978 within four months of the Supreme Court’s decision.⁹⁰ This addition to the Act contained a variety of separate provisions but it specifically addressed the Tellico dam controversy.⁹¹ Under a general exemption procedure,⁹² the

⁸⁸ *Id.* at 2292.

⁸⁹ *Id.* at 2297. The majority also disposed of the TVA’s second line of defense that the ESA should not be applied retroactively to affect an on-going federal project. The Court ruled that the section 7 requirements must be met when there remains any project activities which must yet be “authorized, funded, or carried out.” 98 S. Ct. at 2299. Furthermore the TVA argument that continuing appropriations for the Tellico project represented a limited implied repeal of the ESA was solidly rejected. The most that the Court was willing to accept was that the congressional committees did not think that the ESA was applicable to the Tellico dam project. Standing alone, the Court felt that this did not constitute a statutory repeal. This portion of the Supreme Court’s decision is especially noteworthy since it virtually eliminates one possible defense to future ESA actions — that of retroactivity.

⁹⁰ Pub. L. No. 95-632, 92 Stat. 3751 (1978) (to be codified at 16 U.S.C. § 1531).

⁹¹ Pub. L. No. 95-632, § 5(i)(1), 92 Stat. 3761 (1978) (to be codified at 16 U.S.C. § 1539). In addition, this immediate exemption provision also applies to the Grayrocks Dam and Reservoir on the Laramie River in Wyoming. See [1978 Current Developments] ENVIR. REP. (BNA) 1129 and [1978 Current Developments] ENVIR. REP. (BNA) 1379.

⁹² Pub. L. No. 95-632, § 3, 92 Stat. 3752-60 (1978) (to be codified at 16 U.S.C. § 1536(7)(e)-(p)). Two other exemption procedures are authorized by the Act. First, if the Secretary of Defense “finds that such exemption is necessary for reasons of national security” the Endangered Species Committee must grant the exemption “for any agency action.” Pub. L. No. 95-632, § 3, 92 Stat. 3758 (1978) (to be codified at 16 U.S.C. § 1536 (7)(i)). This exceedingly broad power caused President Carter to mention in his bill signing statement that, “I am asking . . . that the exercise of possible national security exemption by the Secretary of Defense be undertaken only in *grave*

amendments direct the newly-created Endangered Species Committee⁹³ to decide whether or not the Tellico project should receive an exemption. The Committee must find that (1) there are no "reasonable and prudent" alternatives to dam completion,⁹⁴ (2) that the benefits of completion "clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat,"⁹⁵ and (3) that such action is "in the public interest."⁹⁶

Although the 1978 amendments to the Endangered Species Act will dictate the future of the Tellico project they also have a broad impact beyond the scope of the problem presented by the Tennessee dam. First, they reaffirm the obligation of federal agencies to insure that their actions do not jeopardize the continued existence of any endangered species or threatened species. Also, these agencies must protect against the "destruction or adverse modification"⁹⁷ of critical habitat. The duty to consult with the Department of Interior on matters involving endangered species is unavoidable. Second, by adding a general exemption procedure⁹⁸ to be administered by the Committee, Congress has insured that many "development/wildlife" controversies will be decided before an administrative rather than judicial forum.⁹⁹ This system along with the new consciousness of endangered species matters

circumstances posing a clear and immediate threat to national security." (emphasis added) 14 WEEKLY COMP. OF PRES. DOC. 2002 (Nov. 13, 1978). Second, the President is authorized to grant exemptions "for the repair and replacement of a public facility" in any area declared to be a major disaster area under the Disaster Relief Act of 1974. Pub. L. No. 95-632, § 3, 92 Stat. 3759 (1978) (to be codified at 16 U.S.C. § 1536 (7)(p)).

⁹³ Pub. L. No. 95-632, § 3, 92 Stat. 3753 (1978) (to be codified at 16 U.S.C. § 1536 (7)(e)). This committee is composed of seven members including six governmental officials (the Secretaries of Agriculture, Army, Interior, the Administrator of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration and the Chairman of the Council of Economic Advisors) and one selected from nominees recommended by state governors.

⁹⁴ Pub. L. No. 95-632, § 3, 92 Stat. 3758 (1978) (to be codified at 16 U.S.C. § 1536 (7)(h)(1)(A)(i)). This standard also appears in section 4(f) of the Department of Transportation Act at 49 U.S.C. § 1653(f) (1970). That provision prohibits "the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance . . . or any land from an historic site. . . ."

⁹⁵ Pub. L. No. 95-632, § 3, 92 Stat. 3758 (1978) (to be codified at 16 U.S.C. § 1536 (7)(h)(1)(A)(ii)).

⁹⁶ *Id.* The term "public interest" is undefined in the Act.

⁹⁷ Pub. L. No. 95-632, § 3, 92 Stat. 3752 (1978) (to be codified at 16 U.S.C. § 1536 (7)(a)). The language employed in amending this part of the section 7 standard is new and expands the protective coverage for critical habitat. Both the "destruction" and the "adverse modification" of critical habitat are now prohibited by section 7(a). The latter objective — prohibiting adverse modifications — may be the most important change in the coverage of this section and will focus future litigation on the question of what constitutes an adverse modification of habitat.

⁹⁸ See note 3 *supra*. The procedure allows a "federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant" to apply for the exemption. Pub. L. No. 95-632, § 3, 92 Stat. 3755 (1978) (to be codified at 16 U.S.C. § 1536 (7)(g)(1)).

⁹⁹ This does not mean that judicial review of the exemption procedure is prohibited. A decision by the three member review board created pursuant to Pub. L. No. 95-632, § 3, 92 Stat. 3752 (1978) (to be codified at 16 U.S.C. § 1536 (7)(g)(3)(A)) that an irresolvable conflict does not exist or that the exemption applicant has not met the requirement necessary for exemption would be reviewable in federal district court. See Pub. L. No. 95-632, § 3, 92 Stat. 3756 (1978) (to be codified at 16 U.S.C. § 1536 (7)(g)(5)). On the other hand, any final decision of the cabinet-level Endangered Species Committee is reviewable in United States Courts of Appeal as long as the petition for review is filed within ninety days of the Committee's decision. Pub. L. No. 95-632, § 3, 92 Stat. 3756 (1978) (to be codified at 16 U.S.C. § 1536 (7)(n)). Although not specifically stated, this appears to create an exclusive grant of jurisdiction to review Committee determinations.

fostered by the *Hill* case and the 1978 amendments could serve to dissuade federal agencies from undertaking harmful projects since they would be reviewed by the Department of the Interior. Third, Congress has not found that compliance with NEPA's environmental impact statement requirement satisfies either the substantive or procedural mandate of the amended Endangered Species Act. Although one section of the new law authorizes a coordination of the ESA biological assessment with the NEPA process,¹⁰⁰ no comprehensive integration of the two statutes has been attempted. It seems apparent that Congress intended to preserve the independent function of the Endangered Species Act apart from any presidential effort to "streamline" federal environmental review activities.¹⁰¹

The developed case law discussed above must be viewed as a logical precursor to the 1978 amendments. These decisions emphasized the importance of the Endangered Species Act and the need for federal agencies to be sensitive to ESA considerations in project planning and permit granting. Now agencies must be concerned about the adverse effects of their actions upon endangered or threatened species whether or not NEPA analysis has been undertaken. The future will disclose whether the administrative system provided by the recent amendment will permit a careful review and resolution of agency conflicts while also preserving endangered species of plants and animals.

III. NATIONAL HISTORIC PRESERVATION ACT

The environmental movement of the late 1960's led to the enactment of NEPA in 1969 and greatly influenced the passage of a broad range of special environmental laws and executive orders. It also generated a new interest in older laws which previously had little or no effect on federal programs. These laws have recently regained vitality due to legislative amendments and new judicial interpretations. The National Historic Preservation Act of 1966 (NHPA)¹⁰² is a prime example of this development and in terms of federal programs, potentially one of the most important.

The National Historic Preservation Act of 1966 established the National Register of Historic Places.¹⁰³ The Act also required federal agencies to consult with the newly-created Advisory Council on Historic Preservation whenever federal projects could have adverse impacts on historic or

¹⁰⁰ Pub. L. No. 95-632, § 3, 92 Stat. 3753 (1978) (to be codified at 16 U.S.C. § 1536 (7)(c)). In addition, this coordination is merely suggested and not made mandatory by the Act.

¹⁰¹ See, Executive Order 11991, 13 WEEKLY COMP. OF PRES. DOC. 808 (May 24, 1977). This order directed the Council on Environmental Quality to issue formal regulations to control agencies' NEPA compliance activities. In announcing the executive order, President Carter stressed his intention to reduce paperwork and the accumulation of extraneous background data. If the Endangered Species Act Amendments of 1978 are indicators of the congressional propensity to enact specialized environmental review statutes with unique procedural requirements, then the total integration of all environmental review in the EIS will not be possible.

¹⁰² Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified at 16 U.S.C. § 470 (1976)). The Act has been amended several times. See, Pub. L. No. 91-383, 84 Stat. 825 (1970); Pub. L. No. 94-458, 90 Stat. 1939 (1976); Pub. L. No. 94-422, 90 Stat. 1313 (1976).

¹⁰³ 16 U.S.C. § 470(a) (1976).

archaeological sites.¹⁰⁴ Executive Order 11593,¹⁰⁵ issued in 1971, was interpreted by the Advisory Council to expand the authority of the 1966 Act to include properties *eligible* for listing on the National Register of Historic Places. This order provided protection equal to those properties actually listed on the Register. In 1976, the National Historic Preservation Act was amended to formally extend the protections of the Act to such eligible properties,¹⁰⁶ and thus the statutory authority was brought in line with the existing Executive Order. Additional legislative and administrative action in the "preservation area" can be expected.¹⁰⁷

The full impact of the Act and Executive Order began to be felt after the Advisory Council issued regulations for carrying out the Act and the Order in early 1974.¹⁰⁸ In short, the Advisory Council procedures required that a federal agency consult a State Historic Preservation Officer (SHPO) when determining how its activities will affect historic or archaeological sites.¹⁰⁹ The procedures also require that the SHPO, along with the Advisory Council and the interested federal agency, reach written agreement in certain cases on how to mitigate any adverse effects expected from a federal project.¹¹⁰ The Advisory Council procedures also contain minimum review periods which can cause delays for various federal projects. For instance, the Advisory Council may take 30 days to review a "no adverse effect" determination made by a federal agency.¹¹¹ This review follows the required survey activities, consultations with the SHPO, and possibly a determination of eligibility for

¹⁰⁴ 16 U.S.C. § 470(f) (1976). This sub-section would seem to apply to both detrimental and beneficial effects of federal actions.

¹⁰⁵ Executive Order No. 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. § 470 at 429 (1976).

¹⁰⁶ Pub. L. No. 94-422, 90 Stat. 1320 (1976).

¹⁰⁷ In his May 23, 1977 Environmental Message to Congress President Carter proposed the creation of a National Heritage Trust to "preserve places that have special natural, historical, cultural, and scientific value." 13 WEEKLY COMP. OF PRES. DOC. 782, 783 (May 30, 1977). Although various programs for implementing the Trust concept are still being debated and additional authorizing legislation from Congress will be needed, it is reasonably certain that the President's proposal will be carried forward at least in part. Already the Bureau of Outdoor Recreation and the Office of Archaeology and Historic Preservation of the National Park Service have been merged together into a new Department of the Interior sub-agency called the Heritage Conservation and Recreation Service. 43 Fed. Reg. 7482 (1978). Proposals for future Trust programs include a review and consultation procedure for both natural and cultural resources similar to that imposed currently by the Advisory Council procedures on federal activities affecting historic or archaeological properties.

Other federal authorities can be expected to impose additional cultural resource protection responsibilities onto federal projects and programs. For instance, the Archeological and Historic Preservation Act of 1974, 16 U.S.C. § 469a-1 (1976) establishes the requirement that federal activities be conducted so as to avoid irreparable harm to archaeologically significant properties. The Act also provides a series of funding mechanisms for conducting salvage work for archaeological properties adversely affected by federal projects.

¹⁰⁸ 36 C.F.R. pt. 800 (1977). On October 25, 1978 the Advisory Council proposed extensive amendments to the pt. 800 regulations. *See*, 43 Fed. Reg. 50650-660, (1978). These modifications were intended to simplify Advisory Council commenting procedures and streamline the entire process. On January 30, 1979 the Advisory Council issued its final regulations which modified the previous proposal. *See* 44 Fed. Reg. 6068-6081 (1979).

¹⁰⁹ 44 Fed. Reg. 6074-75, to be codified at 36 C.F.R. §§800.4(a)-(b)), 800.5. Strict time limits are imposed upon the SHPO and if no response to a request for his opinion is received within 30 days, concurrence is presumed. 44 Fed. Reg. 6075, to be codified at 36 C.F.R. § 800.5(a)-(b).

¹¹⁰ 44 Fed. Reg. 6076, to be codified at 36 C.F.R. § 800.6(c).

¹¹¹ Under the final regulations, this period has been reduced from the prior 45 days to 30 days. *See* 44 Fed. Reg. 6076, to be codified at 36 C.F.R. § 800.6(a).

the National Register of Historic Places made by the Heritage Conservation and Recreation Service.¹¹²

The National Historic Preservation Act and Advisory Council procedures have placed a significant additional obligation on federal agencies. By itself, NEPA requires that agencies evaluate the impacts of their activities on cultural as well as natural and ecological resources.¹¹³ The NHPA, as implemented through the Advisory Council procedures, often requires additional investigations and documentation for cultural resource impacts beyond those required by NEPA.¹¹⁴ These additional requirements may be particularly onerous from the agency's viewpoint when archaeological properties are involved. Archaeological properties eligible for the National Register are found in many areas of the country and their presence and the precise location usually cannot be detected without extensive field surveys often involving subsurface excavation. These research requirements, when combined with the Advisory Council's review procedures, could cause federal project agencies substantial expense and delay.

During the period immediately following its enactment in 1966, the NHPA was the focus of only a small amount of litigation, most of which did not progress beyond the federal district court level of review. Of these cases, most concerned NEPA violation charges, but they also involved direct judicial consideration of the Historic Preservation Act. These cases identify the requirements of section 106 of the NHPA (Section 470f of Title 16) as separate and apart from the NEPA statute. Section 470f requires federal agencies "having direct or indirect jurisdiction" over a federally-assisted or licensed activity to "take into account" the impact of the activity upon historic properties that are included or eligible for inclusion on the National Register.¹¹⁵ In addition, the federal agency must permit the Advisory Council

¹¹² Eligibility for listing is determined in conjunction with the standards established in 36 C.F.R. § 63 (1977) and 44 Fed. Reg. 6074 to be codified at 36 C.F.R. § 800.4(a) (3).

¹¹³ 42 U.S.C. § 4331(b) (4) (1976). This section states that one element of national policy will be to "preserve important historic, cultural, and natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice."

¹¹⁴ Newly-proposed amendments to the Advisory Council's regulations address the question of NEPA compliance. 44 Fed. Reg. 6078, 6079 (1979). These new regulations suggest that agencies should coordinate their NEPA and NHPA review processes, although at the same time flatly stating that the two statutes are "independent." The newly-issued Council on Environmental Quality regulations concerning federal EIS preparation direct that NEPA compliance should be combined with other statutory requirements "to the fullest extent possible." 43 Fed. Reg. 55997 (1978), to be codified at 40 C.F.R. § 1502.25. In its statement of policy the proposed NEPA regulations direct federal agencies "to the fullest extent possible" to "integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." 43 Fed. Reg. 55991 (1978) to be codified at 40 C.F.R. § 1500.2(c). Although the language employed seems more fitting in the criminal law context, the intention is clearly to streamline all federal environmental review.

¹¹⁵ Section 106, codified at 16 U.S.C. § 470f (1976) provides as follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470j of this title a reasonable opportunity to comment with regard to such undertaking.

to comment on the proposal.¹¹⁶ A brief review of the key NHPA cases will illustrate the expanding scope of federal actions subject to section 470f and the emerging substantive interpretation given to the Act.

The breadth of federal action subject to the requirements of the NHPA is illustrated by the case of *Edwards v. First Bank of Dundee*.¹¹⁷ There, plaintiffs sought to enjoin the relocation of a bank regulated by the Federal Deposit Insurance Corporation until the FDIC (1) prepared an environmental impact statement and (2) consulted with the Advisory Council. The First Dundee Bank had requested permission from the Federal Deposit Insurance Corporation (FDIC) to relocate its operations then quartered in a structure located in an historic area of Dundee, Illinois; the bank wished to demolish the building after the move.

The district court found that since the FDIC's permission was required in order for the bank to relocate, the FDIC had "authority to license" the relocation pursuant to section 106 of the NHPA, and therefore was required to follow the section 106 procedures. The court enjoined the relocation and demolition pending compliance by the FDIC with NEPA and NHPA. The effect of the decision is to give the federal courts power to enjoin "non-federal entities from performing activities in contravention" of agency responsibility to prevent those activities.¹¹⁸ Furthermore, *Edwards* exemplifies the application of environmental review requirements to federal regulatory actions as opposed to the directly developmental activities.

An important early decision interpreting the NHPA was *Ely v. Velde*.¹¹⁹ The case involved a grant from the Law Enforcement Assistance Administration (LEAA)¹²⁰ to the State of Virginia for the purpose of constructing a medical and reception center for Virginia prison inmates in the Green Springs area of Louisa County. Plaintiffs claimed that the LEAA should have filed an environmental impact statement on this grant and in addition claimed that the LEAA had violated section 470f of the NHPA by failing to take into account the effect of this proposed center on three nearby homes listed in the National Register of Historic Places. The federal government claimed that the LEAA was without authority to impose any conditions on grants it would make under the Safe Streets Act.¹²¹ The court found, however, that the LEAA was obliged to comply with the procedural requirements of both NEPA and the NHPA. It determined that it was not the congressional intent to exempt activities under the Safe Streets Act from the command of other federal statutes.

Ely is significant because there, the NHPA was applied to a situation where the federal activity would not directly involve a property on the Historic Register but rather would have a secondary effect on such a property. Such an effect analysis could be a valuable tool for environmental litigants in situations where an agency's activities do not have a direct impact

¹¹⁶ *Id.*

¹¹⁷ 393 F. Supp. 680 (N.D. Ill. 1975).

¹¹⁸ *Id.* at 682.

¹¹⁹ 451 F.2d 1130 (4th Cir. 1971).

¹²⁰ The LEAA is empowered to make grants to state planning agencies pursuant to 16 U.S.C. § 3733 (1976).

¹²¹ 42 U.S.C. § 3701 (1976).

on an historic property but rather have a secondary impact which would damage or in some other way adversely affect an historic property indirectly.¹²² The case also indicates that the courts consider the NHPA applicable to all federal agencies regardless of their enabling authority of responsibilities.

Prior to the 1976 amendment to the FHPA, a number of cases had raised the issue of determining the time when the section 470f requirements apply to federal activities.¹²³ These cases all concluded that the language of the statute applying to federal actions that affect any "district, site, building, structure, or object that is included in the National Register"¹²⁴ was not intended to encompass projects that had been approved before the property in question had been included in the National Register. The effect of these decisions, which arose largely from situations involving urban renewal demolition grants from the Department of Housing and Urban Development (HUD) was to exempt any future demolition or construction from review by the Advisory Council once federal monies had been spent for planning of an urban renewal project. This was true even if the HUD-funded project had only progressed to the preliminary stages.¹²⁵

The recent legislative amendment to the National Historic Preservation Act¹²⁶ was intended to preclude these results from occurring again. The inquiry must now focus upon the question of whether or not the proposed activity will affect a property "eligible for inclusion" on the National Register. Section 470f now states that the

head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking . . . shall, prior to the approval of the expenditure of any federal funds . . . take into account the effect of the undertaking on any district, site,

¹²² The case of *Petterson v. Froehke*, 354 F. Supp. 45 (D. Ore. 1972) also lends support to this view. There, the district court considered a suit involving the federally-funded expansion of the Portland Airport. Plaintiffs were citizens from the State of Washington who had challenged an Army Corps of Engineers' dredge and fill permit which had been granted for the filling of 640 acres of the Columbia River. Plaintiffs alleged that the expansion of the Portland Airport would affect the Fort Vancouver National Historic Site which was more than ten miles from the airport. They alleged that the Army Corps of Engineers' permit and the airport expansion would create increased auto traffic and consequently more air pollution. The court concluded that the Corp of Engineers' dredge and fill permit came within the protections of FHPA, but it felt that on the facts the alleged impacts of the permitting action were too attenuated to require compliance with the mandate of section 470f.

In contrast to *Velde* and *Froehke* is *Philadelphia Council of Neighborhood Organizations v. Coleman*, 437 F. Supp. 1341 (E.D. Pa. 1977). At issue there was the contention that the Urban Mass Transit Administration had failed to properly take "into account" the impact of the tunnel upon several railroad structures listed on the National Register of Historic Places when it funded a 1.7 mile commuter rail tunnel. The district court found no violation and unfortunately failed to address plaintiffs' specific contention that UMTA had not considered the secondary or indirect impact of the tunnel upon the listed structures.

¹²³ See, e.g., *St. Joseph Historical Soc'y. v. Land Clearance for Redevelopment Auth. of St. Joseph, Mo.*, 366 F. Supp. 605 (W.D. Mo. 1973); *South Hill Neighborhood Ass'n. v. Romney*, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970).

¹²⁴ 16 U.S.C. § 470f (1970) (amended 1976).

¹²⁵ *Save the Courthouse Comm. v. Lynn*, 408 F. Supp. 1323 (S.D.N.Y. 1975).

¹²⁶ Pub. L. No. 94-422, 90 Stat. 1320 (1976). The legislative history behind this amendment is almost void of any direct comment. This provision was part of a multi-purpose amendment to the Land and Water Conservation Fund Act of 1965. See [1976] U.S. CODE CONG. & AD. NEWS 2442, 2461.

building, structure or object that is included in *or eligible* for inclusion in the National Register. (emphasis added)¹²⁷

One recent case, however, *Hart v. Denver Urban Renewal Authority*,¹²⁸ ignores this recent legislative amendment. In *Hart*, the Department of Housing and Urban Development (HUD) had given a grant to the Denver Urban Renewal Authority (DURA) for an urban renewal project. Part of this project involved the renovation of the Daniels and Fisher Tower in Denver, Colorado. DURA had proposed to sell the Tower to a private developer. The Colorado State Historical Society and the State Historic Preservation Officer jointly sued the City of Denver and HUD to enjoin the sale of the building to this private developer. The district court granted the injunction until HUD had complied with its own regulations which had been drafted to satisfy the Advisory Council procedures.

On appeal, the Tenth Circuit held that section 470f of the NHPA was inapplicable since the approval of the expenditure of federal funds occurred *prior* to the inclusion of the Tower on the National Register. The project loan and capital grant contract was approved on March 7, 1968, while the Tower was listed on the National Register on December 2, 1969. The redevelopment authority had purchased the Daniels and Fisher Tower and offered it for sale on April 16, 1970. No buyers had been found for five years. But on April 16, 1975, the sale to the private purchasers was negotiated. The Tenth Circuit was clearly opposed to requiring HUD to solicit comments from the Advisory Council concerning DURA's agreement to sell the Tower. Not only did the court refuse to give retroactive application to the 1976 amendment, it failed even to mention it in the opinion. The court probably thought that since the HUD funds which were used to acquire these properties had already been expended, HUD had very little control over the actual disposition of the Daniels and Fisher Tower areas and consequently, requirements to comply with the Advisory Council procedures would have been a futile exercise.

The *Hart* case raises interesting questions involving federal support of long-term planning in redevelopment programs. When the federal government makes a grant for these purposes, it may not have a precise knowledge of what form the redevelopment will take in the future. Since section 470f is prospective in application, in that it applies to situations arising prior to the actual expenditure of federal funds, at the early stages of project planning, it would seem incumbent upon the federal agencies to determine to the maximum extent possible whether their present or future activities will affect historic properties that are either currently listed or eligible for inclusion on the National Register. If this is the case, then compliance with the Advisory Council procedures should be undertaken.

A more perplexing problem suggested by the *Hart* case involves a situation where federal funds are granted to state or local entities for a variety of purposes and projects. As the connection between the federal granting agency and the ultimate acting agency becomes more attenuated, it would seem as though the federal agency would find it more difficult to comply with the command of section 470f. A federal agency having a continuing

¹²⁷ 16 U.S.C. § 470f (1976).

¹²⁸ 551 F.2d 1178 (10th Cir. 1977).

relationship with a state or local grantee can, if it wishes, exert influence over the actions of that grantee.

A pair of cases involving federal support of transportation construction projects underlines the emerging importance of the NHPA in developing litigation. In *D.C. Federation of Civic Associations v. Adams*,¹²⁹ the plaintiffs sought to enjoin the completion of I-66 in the Virginia suburbs of the Washington, D.C. metropolitan area. After rejecting a number of procedural and substantive challenges to the Department of Transportation's (DOT) EIS, Chief Judge Haynsworth examined the allegation that DOT had failed to comply with the NHPA and the Advisory Council's regulations. The substance of the claim was that the highway project would affect listed historic properties in the District of Columbia and that the Secretary of Transportation had not "taken into account" these impacts when he made his decision to fund the roadway segment. The Fourth Circuit accepted the district court's and DOT's conclusion that I-66 would not adversely affect historic properties in the District of Columbia. By so doing the court approved a federal action that had bypassed the specific consultation requirements of the NHPA by a unilateral decision of the sponsoring agency. Chief Judge Haynsworth believed that merely by making the EIS available to the Advisory Council, DOT complied with the NHPA even though this participation falls far short of that required by statute and existing regulation. The decision is unfortunate since it authorizes a federal agency to make the threshold determination of the scope of impact of its projects independent of the advice of either the Advisory Council or the State Historic Preservation Officer. Such a result ignores the clear intent of the NHPA and is contrary to a policy of inter-agency consultation to encourage sound planning and developmental decisions.

A more enlightened view is to be found in *Hall County Historical Society v. Georgia Department of Transportation*.¹³⁰ This case involved a comprehensive legal attack intended to enjoin the construction on a .877 mile highway project in Gainesville, Georgia known as the "Green Street Extension." The federal Department of Transportation, through the Federal Highway Administration (FHA), had determined in 1972 that the project did not merit the preparation of an EIS alleging that it would not significantly affect the quality of the human environment. Although the project was later slightly modified, no EIS was prepared and construction commenced in September of 1977. In August of 1975 the Green Street Historical District had been formally listed on the National Register of Historic Places.

After addressing other claims of the plaintiff,¹³¹ the district court

¹²⁹ 571 F.2d 1310 (4th Cir. 1978).

¹³⁰ 447 F. Supp. 741 (N.D. Ga. 1978).

¹³¹ One issue in the case worthy of mention was plaintiff's contention that DOT had violated section 4(f) of the Transportation Act, which prohibits the "use of . . . any land from an historic site of national, State, or local significance" unless there is no "feasible and prudent" alternative. 49 U.S.C. § 1653(f)(1970). Although on the facts of the case the court found no such use of the land either directly or indirectly, future litigants may find section 4(f) a powerful tool and a companion to section 470f of the NHPA if they can prove that the constructive use or indirect impact of the proposed highway project will ultimately harm the historic structures. The use of evidence predicting the economic decline of the area should not be considered irrelevant to that determination.

considered the contention that the FHA had violated section 470 of the NHPA. In strong language, Judge O'Kelley castigated the FHA for its "improper delegation" of federal responsibilities under the NHPA and the regulations promulgated under its authority. An injunction was granted for construction of the extension project pending the FHA's compliance with the National Historic Preservation Act. The court described a fact pattern wherein the FHA had totally relied upon the Georgia DOT's and the State Historic Preservation Officers' determination that the highway project would have no effect upon the Green Street Historic District. This "blind reliance" upon a state agency's decision is reminiscent of earlier case law invalidating state authored negative declaration decisions in the NEPA-EIS context.¹³² *Hall County Historical Society* demonstrates that the NHPA requirements are federal agency obligations upon which independent federal analysis must be made. The decision is important since it precludes a federal agency making developmental grants from abdicating its substantive statutory responsibility through this form of delegation. Whether this principle will be extended to other federal grant programs remains to be seen; however, it does represent a movement towards strict compliance with both the procedural elements of the historic preservation law and a substantive standard for agency decision-making.

In conclusion, it is apparent that the NHPA section 470f requirements remain as independent obligations of federal agencies apart from the impact statement mandated by NEPA. Although there is some administrative effort being made to integrate the consultation requirement within the NEPA process,¹³³ it would seem that inclusion of historic preservation effects in an

¹³² The question of the delegation of federal environmental review responsibilities to non-federal parties has arisen previously in the context of the NEPA impact statement. *See generally*, RODGERS, ENVIRONMENTAL LAW 778-83 and cases cited therein. In the NEPA situation, the issue concerns whether or not a non-federal agency may independently prepare the project EIS when NEPA specifically requires the federal agency to undertake the review. The NEPA delegation issue has been heavily litigated and in two instances has resulted in legislative changes which permit EIS delegation in limited circumstances. *See*, Pub. L. No. 94-83, 89 Stat. 424 (1975), codified in 42 U.S.C. § 4332 (0) (1976) (federal-aid highway program) and Pub. L. No. 93-383, 88 Stat. 638 (1974), codified in 42 U.S.C.A. § 5304 (h) (1976) (HUD delegation for certain Community Development Block Grant activities). Whether Congress will permit nonfederal agencies to comply with the NHPA or other environmental review statutes remains to be seen.

¹³³ The proposed CEQ regulations governing the preparation of environmental impact statements specifically identifies the National Historic Preservation Act as an "environment review law" which can be integrated with NEPA. 43 Fed. Reg. 55997 (1978) (to be codified at 40 C.F.R. § 1502.25) of the proposal states that:

To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act . . . the National Historic Preservation Act of 1966 . . . the Endangered Species Act of 1973 . . . and other environmental review laws.

Whether this section will have any impact on existing agency procedures is problematic.

¹³⁴ It remains to be seen whether the federal courts will develop a substantive standard of agency decisionmaking based upon a presumption favoring the protection of historic structures and areas. Although section 470f only requires that agencies "take into account" project impacts upon historic properties, a combination of the policies behind the Act and the section 470f responsibilities could be fashioned into a substantive standard. The United States Supreme Court has recently ruled in favor of a local historic preservation ordinance regulating the modification of historic structures in New York City. *Penn Central Transp. Co. v. City of New York*, 98 S. Ct. 2646 (1978).

EIS will not legally satisfy the specific language of section 470f.¹³⁴ For the time being, federal agencies planning to take actions which might adversely affect historic properties should closely adhere to the Advisory Council procedures. Procedural compliance in this area is of great importance. Future cases will undoubtedly determine precisely when a federal activity or license "affects" historic properties and also what level of substantive compliance with the Advisory Council's procedures is necessary. Until then, the handful of decided cases indicate that the NHPA presents all federal agencies with responsibilities that cannot be ignored.

IV. WILD AND SCENIC RIVERS ACT

The Wild and Scenic Rivers Act (WSRA)¹³⁵ was originally enacted in 1968, and has been subsequently amended several times.¹³⁶ The statute is jointly administered by the Secretary of Interior through the Heritage Conservation and Recreation Service and, when national forest lands are involved, by the Secretary of Agriculture through the National Forest Service. Section 1(b) of the Act states the basic objective of the statute that:

certain selected rivers of the nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.¹³⁷

Section 2 of the Act effectuates this purpose by establishing "a national wild and scenic river system" and methods for inclusion of wild, scenic or recreational rivers therein.¹³⁸ It also defines criteria for eligibility for inclusion under each of the three classifications included under the law: *wild*, *scenic*, and *recreational*.¹³⁹ The Wild and Scenic Rivers system presently includes 1600 miles of river.¹⁴⁰ Fifty-one river segments are currently being considered for inclusion in the system.¹⁴¹

In section 7(a), the Act limits the activities of federal agencies with respect to rivers included in the system.¹⁴² This section provides in part that "no department or agency of the United States shall assist by name, grant, license,

¹³⁵ Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. § 1271 (1976)). The legislative history supporting the 1968 Wild and Scenic Rivers Act can be found in [1968] U.S. CODE CONG. & AD. NEWS 3801.

¹³⁶ Pub. L. No. 92-560, 86 Stat. 1174 (1972); Pub. L. No. 93-279, 88 Stat. 122 (1974); Pub. L. No. 93-621, 88 Stat. 2094 (1975); Pub. L. No. 94-199, 89 Stat. 1117 (1975); Pub. L. No. 94-273, 90 Stat. 375 (1976); Pub. L. No. 94-407, 90 Stat. 1238 (1976); Pub. L. No. 94-486, 90 Stat. 2327 (1976).

¹³⁷ 16 U.S.C. § 1271 (1976).

¹³⁸ 16 U.S.C. § 1273 (1976).

¹³⁹ 16 U.S.C. § 1273(b)(1)-(3)(1976).

¹⁴⁰ U.S. COUNCIL ON ENVIRONMENTAL EQUALITY, 8TH ANNUAL REPORT ON ENVIRONMENTAL QUALITY, 12 (U.S. Gov't Printing Off. 1977).

¹⁴¹ In his May 23, 1977 Environmental Message to Congress, President Carter proposed legislation for the addition of 8 river segments, totalling 1,303 miles, to the system. He also proposed the designation of 20 river segments for study as potential additions. 13 WEEKLY COMP. OF PRES. DOC. 783 & 791 (May 30, 1977).

¹⁴² 16 U.S.C. § 1278(a)(1976).

or otherwise in the *construction of any water resources project* that requires a *direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.*"¹⁴³ (emphasis added). Section 7(b) extends the same prohibitions to designated potential additions to the system for a ten-year period following enactment of the law or for three complete fiscal years following any Act of Congress designating a river as a potential addition, whichever is later.¹⁴⁴

Finally, section 7(c) of the Act establishes a consultation requirement.¹⁴⁵ Federal agencies are required to inform the appropriate Secretary of any activities under their control which may affect rivers designated as potential additions to the system. The language of section 7(a) indirectly establishes the same consultation requirement for river segments already a part of the Wild and Scenic system.¹⁴⁶

Several problems plague the implementation of the Wild and Scenic Rivers Act. As is the case with the Endangered Species Act, two separate agencies are responsible for the Act's administration. In addition, neither agency has ever promulgated regulations explaining its interpretation of the Act's implementation. Among those issues which could be clarified by a regulation is the definition of "water resources project" under the act. The legislative history of the Act would indicate that the term "water resources project" under the Wild and Scenic Rivers Act includes a greater variety of projects than does the same term as used in the Fish and Wildlife Coordination Act.¹⁴⁷ Also unclear is the application of the Act to the secondary or growth-induced impacts of federal activities in the vicinity of a designated segment of a study river.

In addition, the consultation process required by the Act is quite cumbersome and time-consuming. The consultation must, in many cases, be carried out at the headquarter level in Washington, D.C., between the respective agencies and consequently it cannot be conducted directly through the regional offices of the Forest Service or the Heritage Conservation and Recreation Service. This can lead to lengthy delays as project review documents are forwarded from the field to Washington for additional review and final decision.

There has been little judicial review of the section 7 requirements of the Wild and Scenic Rivers Act. The only case ruling directly on the requirements of the statute is *North Carolina v. Federal Power Commission*.¹⁴⁸ The question there was whether or not the Federal Power Commission could grant a license for a hydroelectric power plant on the New River. The Appalachian Power Company had been issued a license to construct such a project on June 14, 1974. After unsuccessfully seeking an administrative reconsideration of the decision to grant the license, the State attempted the judicial review embodied in this opinion. At that time the State of North Carolina had

¹⁴³ *Id.*

¹⁴⁴ 16 U.S.C. § 1278(b)(1976).

¹⁴⁵ 16 U.S.C. § 1278(c)(1976).

¹⁴⁶ 16 U.S.C. § 1278(a)(1976).

¹⁴⁷ See H.R. REP. No. 1623, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. CODE, CONG. & AD. NEWS 3801.

¹⁴⁸ 533 F.2d 702 (D.C. Cir.), *vacated* 429 U.S. 891 (1976).

recommended that a segment of the New River be included in the Wild and Scenic River system and in addition, the Department of the Interior was conducting a study on the administrative request. The Fourth Circuit Court of Appeals ruled that although certain designated rivers were protected, section 7(b) did not apply to state-nominated rivers until they were actually accepted into the system by the Secretary of Interior. Consequently, the hydroelectric power project could have been validly licensed by the FPC.

Subsequent to this decision, Congress amended the Wild and Scenic Rivers Act to address the specific problems presented by the facts of the case.¹⁴⁹ Section 2(a) was modified to specifically include within the National Wild and Scenic River system "that segment of the New River in North Carolina extending from the confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line."¹⁵⁰

As noted previously, the Wild and Scenic Rivers Act establishes review and consultation requirements in a number of instances. However, these evaluation duties are combined with substantive standards which can dictate the future of a proposed project. For example, section 7 of the Act is more than a procedural review requirement. Sections 7(a) and 7(b) give to the Secretary charged with the administration of a wild or scenic river the authority to determine whether federal agencies' water resource projects have "direct and adverse effects" on the protected values of designated Wild and Scenic Rivers.¹⁵¹ If he makes that determination, he may effectively veto the proposed federal activity. Obviously, this provision of the Act extends the impact of the statute far beyond the procedural review mandated by NEPA. Given the consultation process developed for the Act, it is doubtful whether NEPA documents, prepared and circulated through the NEPA process, can satisfy the procedural requirements of the Wild and Scenic Rivers Act. Additional review or environmental assessment may be necessary to satisfy the requirements of this Act. Future federal actions adversely affecting river segments included in WSRA system will be subject to the standards and consultation requirements of the Act. The potential power of this statute will undoubtedly make future river designations a politically-charged and contested decision.

V. COASTAL ZONE MANAGEMENT ACT OF 1972

The Coastal Zone Management Act¹⁵² (CZMA) provides for assistance to coastal state governments for the development and implementation of coastal zone management plans. Coastal Zone Management plans have as their

¹⁴⁹ Pub. L. No. 94-407, 90 Stat. 1238 (1976) (codified at 16 U.S.C. § 1273(a) (1976)).

¹⁵⁰ *Id.* To leave no doubt, section 7(a) was also amended to state that:

[A]ny license heretofore or hereinafter issued by the Federal Power Commission affecting the New River in North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic River System pursuant to section 1273 of this title and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.

Pub. L. No. 94-407 § 1(c), 90 Stat. 1238 (1976), codified at 16 U.S.C. § 1278(a) (1976).

¹⁵¹ 16 U.S.C. §1278(a) (1976).

¹⁵² 16 U.S.C. § 1451 (1976).

primary function land-use management for the coastal zone to assure the orderly and environmentally sound development of these ecologically sensitive areas. Pursuant to section 307 of the Act, federal and federally-assisted or licensed projects are required to be approved by the coastal state as consistent with an approved coastal zone management plan.¹⁵³ The approval procedure varies significantly with the type of federal project being reviewed. For example, federal agencies conducting direct development projects in the coastal zone are required to "insure that the project is, to the maximum extent practicable, consistent with the approved state management programs."¹⁵⁴ However, activities in the coastal zone requiring only a federal license or permit must obtain certification from the state coastal zone authority "that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program."¹⁵⁵ With respect to state and local government requests for federal grant assistance, federal agencies may not approve proposed projects that are "inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security."¹⁵⁶

At the federal level, the coastal zone management program is administered by the Office of Coastal Zone Management (OCZM) of the National Oceanographic and Atmospheric Administration of the Department of Commerce. OCZM has recently promulgated regulations implementing the consistency requirements.¹⁵⁷ Thirteen coastal zone management plans have been approved to date.¹⁵⁸ However, many have been approved only within the last year and consequently, there have been few consistency determinations made under the provisions of the Act. Court decisions interpreting the Act have also been few.

In *City & County of San Francisco v. United States*,¹⁵⁹ the plaintiff municipal corporations sought to lease an obsolete U.S. Navy shipyard. The Navy, however, granted the lease to a private corporation which had submitted a higher bid. The city and county then sued the Navy alleging eight separate causes of action, one of which was founded upon the requirements of the Coastal Zone Management Act.¹⁶⁰ The plaintiffs asserted that the lease to the private firm did not conform to the plan of the Bay Conservation and Development Commission. The district court granted the Government's motion for summary judgment on the CZMA issue because the Navy's lease had become effective more than seven and one half months prior to the formal approval of the state's coastal zone management plan. Therefore, since

¹⁵³ 16 U.S.C. §1456(c)(1)-(3) (1976).

¹⁵⁴ 16 U.S.C. §1456(c)(2) (1976).

¹⁵⁵ 16 U.S.C. § 1456(c)(3)(A) (1976).

¹⁵⁶ 16 U.S.C. § 1456(d) (1976).

¹⁵⁷ 43 Fed. Reg. 10510 (1978) (to be codified at 15 C.F.R. § 930).

¹⁵⁸ See 43 Fed. Reg. 10510 (1978) (to be codified at 15 C.F.R. §930). To date the following states have had coastal zone management plans approved in whole or in part by NOAA: Washington, Oregon, Massachusetts, Hawaii, Puerto Rico, Rhode Island, Wisconsin, Michigan, North Carolina, Maine, New Jersey, California, and Maryland. 43 Fed. Reg. 51829 (1978).

¹⁵⁹ 443 F. Supp. 1116 (N.D. Cal. 1977).

¹⁶⁰ *Id.* at 1127.

federal actions need only be consistent with “approved” state plans and there was no such plan in existence at the time of the lease, the court reasoned that the Navy’s action was proper.

Although the *San Francisco* case does not provide detailed guidance as to the direction of future judicial review, it does illustrate several points. First, it is clear that the section 307 “consistency” requirement is recognized as a potential litigation tool for parties desiring to challenge federal agency actions. In the *San Francisco* case, the plaintiffs obviously did not place primary reliance upon the CZMA-based allegation challenging the Navy but it was thought to apply to the Navy’s leasing action.¹⁶¹ Second, the court considered the plan consistency issue as being distinct from any question involving compliance with NEPA. It remains to be seen whether future courts will permit environmental impact statements to serve as the vehicle for agencies to assert that their activities are consistent with state coastal zone plans.

It is interesting to note that in the *San Francisco* case the court classified the Navy’s lease of the tract as a “development project” and not a permit, license, or other activity. If the State’s plan had been in effect, the Navy would have been obligated to “insure that the project is, to the maximum extent practicable, consistent with [the State Plan].”¹⁶² This finding would raise the issue of which federal activities occurring in or affecting the coastal zone would be subject to the procedural and substantive requirements of section 307. If the judiciary broadly construes the application of section 307, conformity with the CZMA may become a frequently litigated issue separate and apart from NEPA compliance.¹⁶³ In addition, substantial amounts of agency resources will be needed to ascertain whether an action is consistent with a state’s plan “to the maximum extent practicable.” The *San Francisco* case indicates that the consistency standard of section 307 may become a highly important planning requirement and litigation tool once the state coastal management plans become effective.

One other recent decision considers the CZMA with respect to a major federal undertaking and it reaffirms the views expressed above. In *County of Suffolk v. Secretary of Interior*,¹⁶⁴ the Second Circuit reviewed the Interior Department’s authorization of a leasing program designed to encourage the location and development of offshore oil and gas resources. The plaintiffs challenged the sufficiency of the EIS prepared by the Department, asserting that it did not contain sufficient environmental impact data to satisfy NEPA requirements. In addition, the plaintiffs claimed that the federal government had violated an extensive list of other statutes including section 307 of the Coastal Zone Management Act. While rejecting the NEPA-based claims and ruling in favor of the federal government, the court did discuss the future role and requirements of the CZMA. In an effort to assure losing appellees that any future off-shore energy development would be carefully regulated, the court

¹⁶¹ It was the City of San Francisco’s eighth claim for relief. *Id.* at 1117.

¹⁶² 16 U.S.C. § 1456(c)(2).

¹⁶³ This is especially true considering the broad definition given “coastal zone” (16 U.S.C. § 1453(1) (1976) and coastal waters” (16 U.S.C. § 1453(2) (1976) in the body of federal statute.

¹⁶⁴ 562 F.2d 1368 (2d Cir. 1977).

noted that such development activities would be controlled by state coastal zone plans "to which offshore lessees must adhere."¹⁶⁵ However, realizing that no such plans yet existed in the Mid-Atlantic area, the court stated that by the time the offshore oil and gas fields are discovered, the coastal zone plans will be effective and that the "development plans submitted to the Secretary for approval will be required under § 307(c)(3) of CZMA to certify that they are consistent with the relevant state's programs."¹⁶⁶

In the future it is not inconceivable that section 307 will become a point of conflict between the federal government and state, local and private interests. Federal activities needing EIS's may be found to be adequately complying with NEPA but independently not satisfying the mandate of the CZMA. It is clear that many aspects of the consistency provisions cannot be satisfied simply through NEPA compliance for the federal activity. The NEPA document can consider the impact of the proposed activity on the land and water resources of the coastal zone and its relationship to the approved coastal zone management plan. In most cases, however, this NEPA document will not be sufficient in itself for review under the consistency section. Additional documentation will be required to complete the consistency review. The timing of the consistency review may also vary from the timing of the NEPA process. Also, litigation over the consistency issue alone could interrupt any attempted coordination. The seriousness of this procedural problem should become apparent as more states have their coastal management plans approved and begin implementing the section 307 requirements.

VI. CONCLUSION

If recent developments are any indication, specialized environmental review statutes will play an increasingly important role in federal project planning and in litigation challenging federal activities. The decision of *TVA v. Hill* indicates that the United States Supreme Court will give effect to the substantive requirements of these statutes when the legislative mandate is clear. Moreover, the cases discussed above show that environmental and other public interest litigants are becoming increasingly aware of potential legislative and administrative approaches available to challenge federal agency decision-making. This awareness will force federal officials to come to grips with the possible spectrum of specialized environmental review requirements applicable to their activities. Initially it will be crucial that these government officials and their attorneys, and those interested private sector parties, know of the existence of these legal obligations and what they require of the agencies involved. With this step accomplished, the more difficult task of redesigning or adapting federal planning, development, and decision-making will remain.

The accommodation of these additional environmental review requirements in federal planning processes may continue to pose serious

¹⁶⁵ *Id.* at 1380.

¹⁶⁶ *Id.* at 1381. The court could also have mentioned that under a 1976 amendment to the CZMA, a state affected by Outer Continental Shelf energy development must concur with the applicant's appraisal that his development program is consistent with the state plan before the necessary federal licenses or permits may be issued. *See*, 16 U.S.C. § 1456 (c) (3)(B)(1976).

difficulties. The prospects for project delays, legal uncertainty, extended litigation and bureaucratic inaction are great. These problems will arise because several fundamental issues concerning the implementation of the specialized review statutes remain unresolved. These issues, and the opinions of the authors as to possible means to resolve them, are briefly stated below.

A. *Substance v. Procedure*

Federal agencies, the courts and, if necessary, the Congress should attempt to define which environmental review statutes impose substantive requirements and which are purely procedural in nature. Those statutes, or sections of statutes, which determine how or if a project will be built must be clearly identified. Congress should consider this in drafting new legislation and in amending existing laws. Short of amendatory legislation, federal agencies should face this issue when promulgating new regulations. Ignoring these questions will not make them vanish. Administrative agencies must examine their authorizing legislation closely and either publish new simplified regulations corresponding to their actual mandate or seek additional authority or classification from Congress. The Wild and Scenic Rivers Act and National Historic Preservation Act are two candidates for administrative action of this type. In the judicial forum, the courts should decide the issue of whether a specialized statute applies to a given fact situation, rather than allowing their decisions to avoid such a consideration or finding that NEPA embodies all environmental concerns. The recent Supreme Court decision in the *Hill* case may indicate that our highest court is prepared to face the question squarely. Lower court decisions on the Fish and Wildlife Coordination Act are not so hopeful.

B. *Relationship to NEPA*

Again, federal agencies, the courts and Congress must address the relationship of the specialized environmental review requirements to the comprehensive review mandated by NEPA. Several specific problems must be resolved. These include:

1. the extent to which NEPA procedures can be used to satisfy the procedural requirements of the specialized statutes;
2. whether NEPA compliance can be substituted in full or in part for compliance with specialized review statutes having substantive requirements;
3. the timing and sequence of compliance with NEPA procedures in relation to compliance with other review procedures; *i.e.*, which should be satisfied first in order to meet legal requirements and to promote an efficient project review;
4. whether failure to comply with one review requirement affects the status of compliance with other requirements;
5. whether conflicts exist between any of the environmental review statutes and, if so, how such conflicts are to be resolved.

These are all critical questions for which answers must be forthcoming. The questions focus upon the relationship between NEPA and the independent environmental review statutes. In one sense the issue can be

framed in terms of administrative reform — can NEPA serve to satisfy all federal environmental obligations? But a greater substantive question remains: do the independent statutes provide a degree of sensitivity and protection to specialized environmental interests that is not achieved in the NEPA environmental impact statement process? With the trend in cases indicating increasing judicial willingness to find independent standards for agency decision-making the answer to this question is to be answered in the affirmative. If this pattern continues to develop and if the basic legislative framework remains unaltered, agency conduct will be measured by multiple standards of performance. This state of affairs is the anticipated result of uncoordinated legislative activity on the part of Congress. Whether this trend will ultimately act to the benefit of environmental quality remains to be seen. It will undoubtedly place considerable stress upon the agencies' ability to comply with diverse requirements.

C. *Duplication of Requirements and Division of Responsibility*

Compliance with all of the federal environmental review requirements applicable to a given federal activity usually involves a mass of paper, sometimes lengthy administrative delays and general red tape. This is caused in part by an unnecessary duplication of procedures and also by a division of responsibility. One set of documents must be prepared to comply with one statute or requirement, and another set containing much of the same information, to comply with another statutory requirement. In addition, responsibilities for requirements affecting a single, general area of the environment, such as wildlife, are often shared by different agencies or even different offices within the same agency.

To the extent that the law allows, or can be made to allow, responsibility for administering environmental review requirements should be consolidated in a single federal agency. When this is not possible, the number of agencies involved should be kept to a minimum. A concerted effort should also be made to reduce the number of separate documents that must be prepared and the number of consultations that need to be made to satisfy the review requirements. These modifications of procedure could improve the efficiency and quality of agency decision-making.

D. *Resource Requirements*

Adequate and continued funding should be made available to all environmental review programs enacted by Congress. Those that Congress does not want to fund should be repealed. Under-funded review programs can do more harm than good to the goal of environmental protection. Review agencies without adequate manpower and technical expertise often produce paperwork burdens for federal project agencies with little beneficial impact on the environment. Often these agencies and their review procedures are perceived as mere procedural obstacles to federal projects. The procedures having been complied with, the proposed federal activity is implemented in basically the same fashion as originally planned. Because of resource limitations, the reviewing agency can often make only perfunctory comments

on the federal project and can take few steps to enforce any substantive requirements found in the review statute. This latter responsibility is often left to environmental organizations and other public interest groups through litigation, a very inefficient way to implement environmental requirements intended to shape early project planning.

Environmental review requirements are increasingly viewed in some quarters as burdensome exercises designed to appease "little old ladies in green sneakers" with little real importance to the environment. This attitude is promoted in part by the failure of the federal government to come to grips with problems of the type discussed above. The perceived emphasis of procedure over substance and paperwork over real environmental protection threatens to produce an environmental backlash of serious proportions. The backlash will undoubtedly be felt in Congress where it may well result in drastic amendments which could severely limit the environmental and planning benefits that these environmental review statutes provide. Positive administrative reforms designed to streamline the environmental review process without sacrificing the protection afforded by current statutes are by far the preferable alternative. Without a prompt administrative response, many of the accomplishments of the last decade could be lost.

