Mitigation Models Inch Toward a Full Review: Even When Effective, the Fish and Wildlife Coordination Act Remains Overshadowed by NEPA

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I. INTRODUCTION

Upon its enactment, the Fish and Wildlife Coordination Act (Coordination Act) was one of the first federal laws devoted principally to the environment.[1] The Coordination Act was designed to ensure the maintenance and restoration of fish and wildlife habitats and

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1. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (2000); Oliver A. Houck, *Judicial Review Under the Fish and Wildlife Coordination Act: A Plaintiff's Guide to Litigation*, 11 ENVTL. L. REP. 50043, 50043 (1981).

environmental quality impacted by water resource development projects, while at the same time allowing for the promotion of economic development, with an overall concern for human well-being.[2] Although the Coordination Act mandates agency review of environmental considerations, judicial review has essentially rendered the Act toothless, and consequently its relevance has largely been eclipsed by subsequent environmental legislation.[3]

The recent decision reached in *Environmental Defense v. U.S. Army Corps of Engineers*, however, may have given new relevance to the oft-overlooked Coordination Act. Since 1954, the U.S. Army Corp of Engineers (Corps) has been working toward closing a quarter-mile gap of the Mississippi River levee system.[4] This project, located in southeast Missouri, would reduce flooding that has harmed crops and businesses, but also would cause the loss of habitat for fish and other wildlife that breed and live in the river's floodplains.[5] After working for decades to secure support for the project, the Corps resumed plans for construction again in the late 1990s.[6] In 2004, the Environmental Defense and the National Wildlife Federation filed suit in the United States District Court for the District of Columbia, claiming that the Corps had relied on outdated cost estimates, violated statutory cost-sharing requirements, and exaggerated mitigation estimates prepared by the Corps under the Coordination Act.[7] In September 2007, the court concluded that the Corps had manipulated facts and figures in their environmental impact models, granted the plaintiffs' requested injunction against further construction, and required the Corps to restore the area to its prior state.[8]

This decision represents a new development in the Coordination Act's history through an indirect application of the Act in order to review mitigation models thoroughly. The lack of a direct reference by the court to the Coordination Act, however, creates serious doubt as to whether other courts will stringently test such models. Routine review, properly executed under this vitally important legislation, would instrumentally

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2. U.S. Fish & Wildlife Serv., Water Resources Development Under the Fish and Wildlife Coordination Act, § I, at 2 (2004), *available at* http://www.fws.gov/habitatconservation/fwca.pdf.

3. Houck, *supra* note 1, at 50044, 50048.

4. Envtl. Def. v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 69, 75 (D.D.C. 2007).

5. *Id.* at 74-75.

6. *Id.* at 75.

7. *Id.* at 73-74. This Comment will focus on the third claim, relating to the Corps' mitigation models.

8. *Id.* at 69, 74.

alter the deference given to statistical mitigation models as well as the significance of such models in the review of environmental actions.

To understand the critical advancement that *Environmental Defense* makes in reviewing mitigation models prepared under its provisions, as well as the remaining problems of enforcement under those same provisions, this Comment surveys judiciary treatment of the Coordination Act from its inception. Part II examines the history of the Coordination Act and takes a quick look at legislation that may affect judicial review under the Act. Part III explains how the Act applies to Corps activities. Part IV focuses on the availability and applicable standards of judicial review under the Coordination Act. Part V details the recent decision of the D.C. district court. Finally, Part VI discusses how the D.C. district court in this case may have missed an opportunity to leave clear case law for future litigation.

II. LEGISLATIVE BACKGROUND

A. Evolution of the Coordination Act

The Coordination Act aims to protect fish and wildlife from the impact of federal water resource projects.[9] As originally enacted in 1934, the Coordination Act called only for research regarding the effects of pollution on wildlife and for the cooperation of state and federal agencies in order to conserve an "adequate supply" of wildlife resources.[10] The legislation failed entirely, however, to create a mechanism for accomplishing its statutory goals.[11] Even at the time of the Coordination Act's passage, legislators noted that the bill's provisions were not mandatory, and that the law had been passed purely to encourage a "spirit of cooperation."[12]

The first amendment to the Coordination Act came in 1946, after Congress recognized that the Act had so far "proved to be inadequate in many respects."[13] The 1946 amendments *required* an agency engaging in construction or granting a permit for another party to first consult with both the United States Fish and Wildlife Service (FWS) and the appropriate state wildlife agency.[14] Such consultation was made

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9. 16 U.S.C. § 661 (2000).

10. MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 404-05 (3d ed. 1997).

11. Houck, *supra* note 1, at 50043.

12. BEAN & ROWLAND, *supra* note 10, at 405.

13. *Id.* (quoting H.R. REP. NO. 79-1944, at 1 (1946)).

14. Houck, *supra* note 1, at 50043-44. The Coordination Act represents one of only three principle pieces of legislation allowing for the involvement of the FWS in water resources

compulsory "whenever the waters of any stream or other body of water are authorized to be impounded, diverted or otherwise controlled for any purpose whatever."[15] Congress stated that the purpose of this mandatory consultation was to prevent "loss and damage to wildlife resources."[16]

After further dissatisfaction with the results of the Coordination Act, Congress undertook another major revision of the Act in 1958.[17] Unlike earlier versions of the Coordination Act aimed at preventing wildlife *losses*, the 1958 amendments added the goal of wildlife *improvement*.[18] To achieve this, the 1958 revision required that wildlife conservation be given "equal consideration" with the other features of the water resource project in question.[19] In addition, the list of water-related activities that fell under the Coordination Act was expanded to include channel deepenings and all other modifications to any body of water.[20] The amendments also added a requirement that the project plan developed by the federal construction agency "include such justifiable means and measures for wildlife purposes as the [reviewing resource] agency finds should be adopted to obtain maximum overall project benefits."[21] Since the Coordination Act's 1958 makeover, there have been no further substantive changes to the legislation itself.[22]

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projects, along with the National Environmental Policy Act of 1969 and the Endangered Species Act. U.S. Fish & Wildlife Serv., *supra* note 2, § I, at 13.

15. Act of August 14, 1946, ch. 962, § 2, 60 Stat. 1080 (Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a) (2000)).

16. *Id.* "Wildlife" was defined in the Act as "birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent." *Id.* § 8.

17. BEAN & ROWLAND, *supra* note 10, at 407 (citing S. REP. NO. 85-1981, at 4 (1958), *as reprinted in* 1958 U.S.C.C.A.N. at 3449). A summary of the Coordination Act's provisions can be found at U.S. Fish & Wildlife Serv., *supra* note 2, § I, at 16-20.

18. BEAN & ROWLAND, *supra* note 10, at 407 (citing Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a)).

19. 16 U.S.C. § 661.

20. *Id.* § 662(a). The two principal exceptions to Coordination Act requirements are (1) water projects with a surface area of less than ten acres and (2) activities carried out in connection with land management by federal agencies on federal lands subject to that agency's jurisdiction. *Id.* § 662(h).

21. *Id.* § 662(b).

22. *E.g.*, Houck, *supra* note 1, at 50044. It is worth noting, however, that the House initially considered enacting NEPA as an amendment to the 1958 version of the Coordination Act. RICHARD A. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 20-21 (1976). Even after NEPA's passage, there have been a number of proposals to amend the Coordination Act introduced in both houses of Congress, but they have failed to gain strong support. Houck, *supra* note 1, at 50044 (citing H.R. 8161, 95th Cong. (1st Sess. 1977)); U.S. Fish & Wildlife Serv., *supra* note 2, § I, at 10.

B. Early Standing Under the Coordination Act

Rank v. Krug, one of the first tests for the Coordination Act, is also the only significant reported case under the 1946 version of the Act.[23] In *Rank*, the plaintiffs brought suit against the Bureau of Reclamation for failing to make "adequate provision" for wildlife resources in a project to dam the San Joaquin River, diverting water from the plaintiffs' lands.[24] Although the court noted a "great cogency" in the plaintiffs' argument, the court ruled for the government, finding that the state was the proper party to force compliance with the Coordination Act.[25] The ruling in *Rank*, however, is often misconstrued.[26] The plaintiffs had asked the court, from the bench, to impose the provisions of the Coordination Act in developing and maintaining a plan for the project.[27] The court did not indicate that it would refuse to compel the government to prepare or carry out a mitigation plan.[28] Instead, in rejecting the plaintiffs' claims, the court merely held that mitigation planning must be initiated by the appropriate wildlife agencies.[29]

Although *Rank* seemed to be a great setback in the enforcement of the Coordination Act, the opinion was issued before the 1958 amendment, the evolution of administrative law under the Administrative Procedure Act (APA), the passage of the National Environmental Policy Act of 1969 (NEPA), and even before agencies such as the Corps passed regulations to facilitate and ensure adherence to the Act.[30]

C. Judicial Review of Agency Actions

The APA sets out the framework for the operation of federal agencies and for the review of agency action by the judiciary.[31] Further, it provides for a right of action for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

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23. 90 F. Supp. 773, 801 (S.D. Cal. 1950); BEAN & ROWLAND, *supra* note 10, at 406.
24. *Rank*, 90 F. Supp. at 783, 801.
25. *Id.* at 801.
26. *See* Houck, *supra* note 1, at 50044.
27. *Rank*, 90 F. Supp. at 801; Houck, *supra* note 1, at 50044.
28. *Rank*, 90 F. Supp. at 801 ("Whether or not the plaintiffs by mandamus against the California officials could compel them to act is not before the court."). Indeed, as Houck notes, "[h]ad the plaintiffs in *Rank* sued state and federal officials for their failure to prepare a fish and wildlife plan, and for injunctive relief pending its preparation, the result may well have been different." Houck, *supra* note 1, at 50044.
29. Houck, *supra* note 1, at 50045-46.
30. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2000); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (2000).
31. 5 U.S.C. §§ 551-559, 701-706.

action within the meaning of a relevant statute."[32] Upon review, the court may examine final agency action to ensure that such action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[33] This standard permits the court a narrow review of agency action, under which the court may not simply "substitute its judgment for that of the agency."[34] Accordingly, the court may, however, examine the administrative record to ensure that the agency decision was a rational one, and that it was based on factors relevant to the issue at hand.[35] Agency action may therefore be invalidated where: (1) the court finds no rational connection between the facts found and the decision made by the agency, (2) the agency chose a path counter to the evidence in front of it, (3) the agency relied on factors that Congress did not intend to be considered, (4) the agency failed to consider an important aspect of the problem, or (5) the agency's decision cannot be ascribed to a difference in view or a product of the agency's expertise.[36]

D. NEPA Augments the APA

NEPA, enacted by Congress in 1970, is intended to ensure that agencies consider environmental consequences and alternative options before engaging in activities that impact the environment.[37] To foster this goal, NEPA requires federal agencies to draft an environmental impact statement (EIS) for any "major Federal action significantly affecting the quality of the human environment."[38] In reviewing agency action under

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32. *Id.* § 702.

33. *Id.* § 706(2)(A).

34. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). This ensures that the court will avoid interfering with the work of agencies, and will not become a party to policy disagreements. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 66 (2004).

35. Ethyl Corp v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (citing *Citizens*, 401 U.S. at 416; Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285, 290 (1974)).

36. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Further, upon judicial review, the Supreme Court has noted that a court may not assist agencies by supplying a basis for agency action that was not advanced in the case at bar by the agency itself. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). At the same time, a court may uphold an agency decision as long as the court can understand the nature, basis and reasoning behind that decision. *See, e.g.*, *Bowman*, 419 U.S. at 285-86 ("[The court] will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (citing Colo. Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945))).

37. 42 U.S.C. §§ 4321-4347 (2000).

38. *Id.* § 4332(C). The EIS should include considerations of:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,

NEPA, the court will look at the EIS and essentially utilize the same "arbitrary and capricious standard" that applies to other final federal agency action under the APA.[39] As such, the effect that NEPA imposes upon agencies is largely procedural.[40] Thus, under NEPA, the court may only invalidate the substantive decision of an agency when it is clear that the agency's balancing of costs and benefits was arbitrary or clearly gave insufficient weight to environmental factors.[41]

An important component of each EIS is the analysis of possible mitigation of environmental damage.[42] While the Supreme Court has held that this requirement for mitigation compels the agency preparing an EIS to perform a "reasonably complete discussion" of mitigation options, the agency is only forced to take a "hard look" at such measures.[43] Indeed, there is no actual requirement under NEPA that a full mitigation plan be in place before the agency takes action, or for that matter, that any mitigation plan is ever adopted.[44] The court's review is

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(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

39. *E.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375-76 (1989).

40. Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978).

41. Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971).

42. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). The mitigation requirement stems from both NEPA itself and from Council on Environmental Quality (CEQ) regulations. *Id.* CEQ regulations define mitigation to include:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20 (2007).

43. *Methow Valley*, 490 U.S. at 352. In the case of differing expert opinions, the agency has the discretion to rely on its own experts, even if the court may find a contrary view to be more persuasive. *Marsh*, 490 U.S. at 378.

44. *See Methow Valley*, 490 U.S. at 352-53. The Supreme Court noted "a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Id.* at 352.

limited to ensuring that the agency gave a fair evaluation of all relevant factors.[45]

In order for agencies to support their findings under NEPA, they are encouraged to consider scientific analysis, expert comments, and public scrutiny.[46] When scientific analysis is relied upon to reach a decision, the agency is required to make the pertinent studies and methodologies known so that any data and findings may be reviewed by interested parties.[47] Additionally, the record of evidence that is produced will be available for judicial review.[48] The United States Court of Appeals for the District of Columbia Circuit has noted that a close review of agency evidence is intended to educate the court.[49] For this reason, it is imperative that the more technical the evidence in a case, the more effort the court put toward reviewing and understanding that evidence.[50]

But while courts cannot properly perform a review of agency action without such evidence, courts must also avoid becoming a "superagency," overriding agency experts without any specialized scientific knowledge.[51] Consequently, courts may compel agency calculations, methodology, and models only to ensure that the agency has demonstrated a rational connection between the evidence that was utilized and the agency's final decision.[52]

III. PUBLIC INTEREST REVIEW

A. Corps Regulations

There are two types of federal actions subject to the Coordination Act.[53] The first category of actions encompasses major federal water development projects such as dams, reclamation efforts, and

45. *Id.*; *see also* 42 U.S.C. § 4332 (2000) (putting forth the requirement for the preparation of an EIS, but not creating an additional requirement that any portion of an EIS dealing with mitigation or alternatives actually be followed).

46. 40 C.F.R. § 1500.1 (2007).

47. *Id.* § 1502.24; *see also* Sierra Club v. Costle, 657 F.2d 298, 333-34 (D.C. Cir. 1981).

48. *See Marsh*, 490 U.S. at 378.

49. Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976).

50. *Id.* Such an evidentiary review allows the court to view for itself the "evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made." *Id.*

51. *Id.* ("We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.").

52. *See, e.g.*, *Costle*, 657 F.2d at 333. The court has noted that requiring an intricate review of evidentiary matters and giving deference to agency decisions, as required under APA review, are not inconsistent with one another. *Ethyl Corp.*, 541 F.2d at 36.

53. BEAN & ROWLAND, *supra* note 10, at 407.

channelization projects.[54] For these actions, the federal project agency must fully consider the reports and recommendations of both the FWS and the applicable state agencies.[55] The project agency must then make such information an "integral part" of any report that is prepared or submitted to Congress or to any other entity that has the authority to approve the project.[56]

The second category of actions falling under the Coordination Act includes any water-related activity for which a federal permit is required.[57] The most notable of these permits is that issued by the Corps pursuant to section 404 of the Clean Water Act (CWA) or section 10 of the Rivers and Harbors Appropriation Act of 1899 (RHAA).[58] The wildlife agencies may recommend that the permitting agency either: (1) deny the permit or (2) condition the permit on the reduction of adverse impact upon wildlife.[59] Although the Coordination Act forces the permitting agency to take the general goals of wildlife conservation and enhancement under advisement, it does not stipulate the degree of deference that should be given to such recommendations.[60]

With respect to permitting, the Corps has promulgated regulations that acknowledge its responsibilities under the Coordination Act and that provide criteria for the evaluation of relevant considerations.[61] Under the regulations, the Corps will consider the environmental impact of a proposed permit at the "public interest review" stage.[62] Accordingly, the district engineer must deny a permit if it would be contrary to the public interest.[63] It is at this stage that the Corps utilizes the recommendations of the FWS and other applicable agencies.[64] In making the determination

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 407-08.

58. Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (2000); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000); BEAN & ROWLAND, *supra* note 10, at 408; NAT'L RES. COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 63-64 (2001).

59. BEAN & ROWLAND, *supra* note 10, at 408. Permits of major federal water projects are rarely denied outright. *Id.*

60. *Id.*

61. NAT'L RES. COUNCIL, *supra* note 58, at 63.

62. *Id.* The Corps has recognized that the public interest review is separate from the analysis under CWA Section 404(b)(1), and that mitigation called for under the public interest review may be in addition to any compensatory mitigation under the CWA. 51 Fed. Reg. 41,206-01 (Nov. 13, 1986); NAT'L RES. COUNCIL, *supra* note 58, at 64.

63. 33 C.F.R. § 320.4(a)(1) (2008). The regulations default position places the burden on showing that the permit should be denied. *See id.* (providing that "a permit *will be granted unless* the district engineer determines that it would be contrary to the public interest" (emphasis added)).

64. *Id.* § 320.4(c).

to authorize, deny, or condition the proposal, the Corps will examine a variety of factors, along with the reports of the applicable resource agencies.[65]

B. HEP Modeling

When issuing permits under its authority, the Corps has utilized models in an effort to assess objectively the values of environmental resources and the impact that actions can have on the environment.[66] The FWS has noted that the models should be based on habitat evaluation "wherever possible."[67] One of the most common models utilized by the Corps is the habitat evaluation procedures (HEP), developed by the FWS.[68] The HEP is used as a tool both for evaluating project impacts and for facilitating mitigation recommendations.[69] The goal of the HEP

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65. *Id.* § 320.4(a)(1). Factors which may be considered under the public interest review include:

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

Id. In addition, the Corps considers the following "general criteria" in each application:

> 1. The relative extent of the public and private need for the proposed structure or work:
> 2. Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
> 3. The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

Id. § 320.4(a)(2). Importantly, the regulations emphasize that while one factor may be paramount in one proposal, that factor is not always valued the same in every other proposal. *Id.* § 320.4(a)(3) ("The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal."). Even though each individual factor may not be given equal weight, the Corps points out that it will give "full consideration" to all comments. *Id.*

66. U.S. Fish & Wildlife Serv., *supra* note 2, § III, at 20. The FWS clarifies that "evaluation methodologies should be qualitative, scientifically based, and repeatable. *Id.* The FWS has also decried the difficulty of examining environmental impacts due to the differences in legislation and a lack of consensus among scientists in the field. U.S. Fish & Wildlife Serv., 101 ESM Habitat as a Basis for Environmental Assessment § 2.3 (1980), *available at* http://www.fws.gov/policy/ESM101-2.PDF.

67. U.S. Fish & Wildlife Serv., *supra* note 2, § III, at 20.

68. *See* Envtl. Def. v. Army Corps of Eng'rs, 515 F. Supp. 2d 69, 78 (D.D.C. 2007); *see also* U.S. Fish & Wildlife Serv., *supra* note 66 (explaining the purpose, background, usage, and some methodology for the HEP model).

69. U.S. Fish & Wildlife Serv., *supra* note 2, § III, at 20-21. When the HEP is unavailable, other available techniques include the Habitat Evaluation System, the Wetland

model is to produce a "nonmonetary" value that can be assigned to fish and wildlife resources when evaluating environmental impact.[70] HEP calculations will take into account both the quantity and the quality of the habitat that is being evaluated.[71] The HEP model provides that *full* mitigation has occurred when habitat loss equals habitat mitigation.[72]

Because the HEP models merely reflect the evidence used by the agency to make a decision, they are subject to court review only to ensure the agency has taken a "hard look" at environmental consequences.[73]

IV. JUDICIAL REVIEW UNDER THE COORDINATION ACT

A. The Equivalence Approach

Perhaps one of the most surprising developments in the Coordination Act's history is how NEPA, designed to ensure that agencies considered the environmental effects of their actions, would threaten to reduce the Coordination Act to little more than a footnote in environmental law.

After the passage of NEPA, the first case filed under the Coordination Act was *Zabel v. Tabb*.[74] In order to construct a commercial mobile trailer park, the plaintiffs in *Zabel* filed for a dredge-and-fill permit under section 10 of the RHAA.[75] The Corps denied the permit after receiving input from the FWS, state resource agencies, and some 700 private individuals, all pointing to the harmful effect that the proposed action would have on the area's fish and wildlife resources.[76] The plaintiffs then brought suit against the Corps, claiming that the Corps should not consider the fish and wildlife impact and was bound only to consider the potential effects the permitted activity may have on navigation, flood control, or the production of power.[77] The court backed the Corps, finding that the agency was obliged to "take heed of . . . the

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Evaluation Technique, Hydromorphologic Methodology, and Instream Flow Incremental Methodology. *Id.* § III, at 21.

70. U.S. Fish & Wildlife Serv., *supra* note 66, § 5.1.

71. *Envtl. Def.*, 515 F. Supp. 2d at 78; *see also* U.S. Fish & Wildlife Serv., 102 ESM Habitat Evaluation Procedures § 7 (1980), *available at* http://www.fws.gov/policy/ESM102-7.PDF (explaining HEP calculation in greater detail).

72. Motion for summary judgment for the Defendant at 12, *Envtl. Def.*, 515 F. Supp. 2d 69; *see also* U.S. Fish & Wildlife Serv., *supra* note 71, § 7 (laying out three possible goals for HEP results).

73. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

74. 430 F.2d 199 (5th Cir. 1970); BEAN & ROWLAND, *supra* note 10, at 409.

75. 33 U.S.C. § 403 (2000); *Zabel*, 430 F.2d at 201-03.

76. *Zabel*, 430 F.2d at 202.

77. *Id.* at 202-03.

government-wide policy of environmental conservation [that] is spectacularly revealed in at least two statutes, [the Coordination Act and NEPA]."[78] The court held that due to this policy emphasis and its underlying statutes, the Corps "must consult with, consider and receive, and then evaluate the recommendations of all these other agencies articulately on all these environmental factors."[79] Although this ruling was supportive of environmental concerns, the court did not succeed in differentiating between the requirements of the two pieces of legislation.[80]

Akers v. Resor also contained a synergistic view of the statutes with respect to a project for the enlargement and realignment of river channels in Tennessee.[81] In particular, the court ruled that NEPA necessitated a new mitigation plan for the project in order to comply with the Coordination Act.[82] In denying summary judgment for the defendants, the *Akers* court specified that the new plan would have to meet more completely the demands of resource agencies.[83]

The belief that there was a "government-wide policy of environmental conservation" may have helped contribute to the growing perception that a review under NEPA inevitably satisfied the requirements of the Coordination Act as well. This thesis was first advanced in *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army* (*Gilham Dam*).[84] The plaintiffs brought suit to halt the construction of a dam after the project was already two-thirds complete, charging that the Corps failed to assess adequately the environmental impact of the project as required by NEPA and the Coordination Act.[85] The court engaged in an in-depth review of the "heart of the case which involve[d] the interpretation and application of NEPA," ultimately finding that the project should be enjoined for a failure to prepare an acceptable EIS.[86] The causes of action involving the Coordination Act, however, were quickly dispatched by the court, which surmised that "if defendants comply with the provisions of [NEPA] in good faith, they will *automatically* take into consideration all of the factors required by the

78. *Id.* at 209.
79. *Id.* at 213.
80. *See id.* at 211-14.
81. 339 F. Supp. 1375, 1375, 1379-80 (W.D. Tenn. 1972).
82. *Id.* at 1380. As in *Zabel*, the court in *Akers* stated that NEPA indicated a policy that "all Federal plans and programs be improved to attain environmental objectives." *Id.*
83. *Id.* at 1380-81.
84. 325 F. Supp. 749 (E.D. Ark. 1971).
85. *Id.* at 752.
86. *Id.* at 755, 763.

Fish and Wildlife Act and it is not reasonable to require them to do both separately."[87]

The idea, originating from *Gilham Dam*, that review under the Coordination Act was identical to that of NEPA, led to a view of "equivalence" between the two.[88] Unfortunately, many courts neglected to assess the decision in *Gilham Dam* critically, and without further thought, it was used as the basis for the prompt elimination of Coordination Act claims brought in conjunction with NEPA.[89] Further, without a private right of action under the Coordination Act, it was all but impossible to bring a suit without using NEPA as a vehicle.[90]

B. The Direct Approach

There are a handful of cases that do approve of a "direct" approach to review under the Coordination Act, including *Akers v. Resor*. In *Akers*, the court addressed reviewability for both NEPA and Coordination Act claims, finding agency action to be reviewable by the court except where (1) such review was prohibited by statute or (2) the challenged action was committed to agency discretion by law.[91]

In *Association of Northwest Steelheaders v. U.S. Army Corps of Engineers*, the court found support for direct review under the Coordination Act for both state and private plaintiffs.[92] The court noted that the plaintiffs, who were seeking an injunction to prevent the damming of a Washington State river, were in the protected zone of interest intended by the Coordination Act.[93]

A greater distinction between NEPA and the Coordination Act was drawn by the D.C. district court in *National Wildlife Federation v. Andrus*.[94] The plaintiffs in *Andrus* sought an injunction to prevent further

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87. *Id.* at 754 (emphasis added). Even though the decision forced the Corps to revise the EIS for inadequacies, the court felt it would be unreasonable to make the Corps engage in a Coordination Act review some thirteen years after the project had been underway. *Id.*

88. BEAN & ROWLAND, *supra* note 10, at 411.

89. *See, e.g.*, Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346, 355-56 (8th Cir. 1972) (disregarding claims under the Coordination Act in three paragraphs after a full discussion of mitigation requirements under NEPA).

90. *E.g.*, Tex. Comm. on Natural Res. v. Marsh, 736 F.2d 262, 268 (5th Cir. 1984) ("Although there is no private right of action under the [Coordination Act], an agency's compliance with its requirements may be reviewed judicially in an action brought under NEPA." (citing Envtl. Def. Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972))).

91. Akers v. Resor, 339 F. Supp. 1375, 1379 (W.D. Tenn. 1972) (citing Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

92. 485 F.2d 67, 70 (9th Cir. 1973).

93. *Id.* at 69-70.

94. 440 F. Supp. 1245 (D.D.C. 1977).

construction of a power plant at the Navajo Dam in New Mexico.[95] The plaintiffs argued that the Department of Interior failed to comply with NEPA because the EIS for the project was deficient in detailing adverse wildlife effects and in addressing alternatives.[96] The plaintiffs also argued, separately under the Coordination Act, that the agency had failed to prepare a report for Congress detailing the environmental effect of the power plant.[97] In granting the plaintiffs' request for a temporary injunction, the court analyzed the two claims separately.[98] The court recognized that *Gilham Dam* allowed a good faith effort under NEPA to satisfy the Coordination Act.[99] At the same time, the court distinguished the plaintiffs' claims because of the Coordination Act's requirement of a congressional report, which is not necessitated by NEPA.[100] Most courts have continued to follow *Gilham Dam*, but *Andrus* does provide a route for independent review under the Coordination Act when compliance with the Act would impose additional requirements that would not be addressed by an agency's compliance with NEPA.[101]

C. Procedural and Substantive Review

Before review under the Coordination Act can be accomplished, it must be distinguished from NEPA.[102] The basic difference between a fish and wildlife complaint under NEPA and one under the Coordination Act is that before an agency acts, NEPA requires only a consideration of impacts, while the Coordination Act requires a specific mitigation plan to be in place.[103] Recognizing this fundamental difference is key to understanding the deficiency of most judicial review under the Coordination Act.[104] NEPA merely demands the investigation and disclosure of environmental impacts and alternatives.[105] On the other

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95. *Id.* at 1247.

96. *Id.* at 1250-52.

97. *Id.* at 1255. See *supra* notes 53-54 and accompanying text for a further discussion of the Coordination Act's applicability in preparing and submitting reports to an applicable legislative body.

98. *See Andrus*, 440 F. Supp. at 1255.

99. *Id.*

100. *Id.*

101. *Id.* ("[P]laintiffs have identified a [Coordination Act] policy, that of informing Congress of environmental effects, which may not be duplicated by NEPA. In such circumstances, strict compliance with [the Coordination Act] should be required."). See, for example, *County of Bergen v. Dole*, 620 F. Supp. 1009, 1064 (D.N.J. 1985), for a more recent case rejecting such separate consideration of NEPA and the Coordination Act.

102. Houck, *supra* note 1, at 50046.

103. *Id.*

104. *Id.*

105. *Id.*

hand, the Coordination Act compels a specific plan focused on fish and wildlife losses and remedies to be prepared and implemented in the case of a permit, or to be submitted in a report to the authorizing body, when applicable.[106]

Therefore, compliance with NEPA does not guarantee compliance with the Coordination Act.[107] NEPA itself explains that "[t]he policies and goals set forth in this [Act] are *supplementary to* those set forth in *existing authorizations* of Federal agencies."[108] NEPA also addresses its broad applicability and provides a disclaimer as to how it should relate to environmental and otherwise relevant law:

> *Nothing* in [this Act] *shall in any way affect the specific statutory obligations of any Federal agency* (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.[109]

The Coordination Act presents an example of precisely the type of "existing" authority that NEPA was designed not to override, but to "supplement."[110]

As such, a *procedural* failure could be argued at any of the steps that the Coordination Act requires, including the following:

1. consultation between the construction agency and the resource agencies;
2. preparation of a report by the Department of the Interior, detailing damage and possible mitigation measures;
3. modification of projects by the construction agency to adopt the appropriate "means and measures" for conservation;
4. submission of agency recommendations to Congress, along with an estimation of wildlife benefits and losses; or
5. implementation of the plan by the construction agency.[111]

An appropriate procedural review may be similar to that afforded under section 102 of NEPA.[112]

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106. *Id.*
107. *Id.* at 50046-47.
108. 42 U.S.C. § 4335 (2000) (emphasis added).
109. *Id.* § 4334 (emphasis added).
110. *See* Houck, *supra* note 1, at 50046-47.
111. Fish and Wildlife Coordination Act, 16 U.S.C. § 662(a)-(d), (f) (2000); Houck, *supra* note 1, at 50046.
112. 42 U.S.C. § 4332; Houck, *supra* note 1, at 50050. See, for example, *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), for a case involving NEPA section 102 review.

Review for a *substantive* violation would have to examine the particular plan at issue in each individual case. The most analogous review would be that of an EIS prepared under NEPA.[113] As such, the review should test the proposed mitigation plan against the criteria put forth in the statute.[114] A court may find a substantive violation if the agency action failed to give weight to appropriate factors or made a decision based on inappropriate factors.[115] Specifically in the case of the Coordination Act, a violation may result if the mitigation plan failed to offset fish and wildlife losses adequately or even if it neglected to give "equal consideration" to environmental factors (basing a decision on an economic consideration, for example).[116]

V. *ENVIRONMENTAL DEFENSE*

Part V reviews in-depth the background and decision of the D.C. district court in *Environmental Defense* to illustrate both the merits and the shortcomings of this decision with respect to the application of the Coordination Act, as well as to reveal the case's potential implications.[117]

A. Case Background

In 1882, the Corps began to construct about 1600 miles of levees along the lower Mississippi River.[118] The levee system was completed in 1933, with the exception of a quarter-mile gap along the New Madrid Floodway in southeast Missouri.[119] At the time, this gap was left in order to serve as a release point for high river waters.[120] The gap further

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113. Houck, *supra* note 1, at 50050. At the same time, however, it should be noted that the EIS and the Coordination Act mitigation plan may be distinguished because, among other reasons, they serve different purposes. *See generally id.* at 50050 n.113 (explaining that the two plans are different, but arguing for similar treatment upon review).

114. *Id.*

115. *Id.*

116. 16 U.S.C. § 661; Houck, *supra* note 1, at 50050. With regard to the responsibilities of the FWA and other resource agencies, the Second Circuit has specified that the Coordination Act imposes a duty on the applicable resource agency to consult on a project when requested to do so by the EPA. *See* Sun Enters. v. Train, 532 F.2d 280, 290 (2d Cir. 1976) ("Interior's position that funding and personnel are inadequate to meet the burdensome demands of reviewing [permit applications] is entitled to little weight . . . Whatever the reason, while we appreciate the difficulties involved in reviewing the large number of applications forwarded by EPA to Interior, we cannot condone what amounts to administrative or executive repeal of an act of Congress." (citing *Calvert Cliffs*, 449 F.2d 1109); Sierra Club v. Dep't of Interior, 398 F. Supp. 284 (N.D. Cal. 1975)).

117. Envtl. Def. v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 69 (D.D.C. 2007).

118. *Id.* at 75.

119. *Id.*

120. *Id.*

allowed for the reproduction of fish during flooding by providing an area along the floodplain that was free of stronger river currents.[121] Seasonal flooding in the area, however, caused problems for both farming and economic development.[122] For this reason, the Corps was given authorization by Congress in 1954 to close the gap, but spent over 45 years gaining support, working on supplementary projects, obtaining financing, and overcoming environmental problems to move toward the execution of the project.[123] Finally, in 1999, the project began to move forward again with the release of a Draft Supplemental EIS.[124] The Corps continued to revise its plans and released a Final Supplemental EIS (2000), a Revised Supplemental EIS (2002), and a second Revised Supplemental EIS (2006).[125]

B. Procedural History

In September 2004, Environmental Defense and the National Wildlife Federation joined as plaintiffs and brought suit against the Corps and Pete Geren, Secretary of the Army, in the D.C. district court.[126] The lawsuit alleged violations of the APA, the RHAA, the CWA, the Water Resources Development Act of 1974, and the Water Resources Development Act of 1986.[127]

In their motion for summary judgment, the plaintiffs advanced three challenges to the project, summarized by the court as follows:

> First, plaintiffs argue that the Corps' proposed mitigation will not fully offset the project's environmental impacts on fish and waterfowl. Second, they argue that the Corps conducted a deficient analysis of alternative projects and selected a project that insufficiently addresses a primary

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121. *Id.*
122. *Id.*
123. *Id.*
124. *See id.*
125. *Id.* For further information, including materials prepared in conjunction with the project, the Corps has maintained a Web site that is periodically updated. U.S. Army Corps of Eng'rs, Memphis Dist., St. John's Bayou & New Madrid Floodway Project, http://www.mvm.usace.army.mil/StJohns/default.asp (last visited Mar. 10, 2008).
126. Complaint at 4-5, *Envtl. Def.*, 515 F. Supp. 2d 69. The original complaint was based on the 2002 REIS. *Id.*
127. Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (2000); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000); Water Resources Development Act of 1974, 42 U.S.C. §§ 1962-15 through 17 (2000); Water Resources Development Act of 1986, 33 U.S.C. §§ 2201-2330 (2000); *Envtl. Def.*, 515 F. Supp. 2d at 74. The alleged violations of the RHAA and CWA involved the preparation of models prescribed by the Coordination Act in conjunction with Corps permitting activities.

> project purpose. Third, plaintiffs argue that the Corps' project is built upon a severely flawed economic analysis.[128]

The court first confirmed that the 2002 REIS, 2006 REIS, and other Corps activity would be subject to the APA's arbitrary and capricious standard of review of final agency action.[129] After a review of the evidence relied upon by the Corps, the court found no issue with the waterfowl mitigation models, the alternatives analysis, or the economic analysis.[130] In regard to fish mitigation models, however, the court found that the use of manipulation and otherwise flawed data amounted to an arbitrary and capricious action on the part of the Corps.[131] Further, the court held that the agency violated the APA, the CWA, and NEPA by using defective models to indicate that the plan would fully mitigate the impact to fisheries in order to justify the project.[132]

C. Fish Mitigation Fails

While the court briefly reviewed the history of the case and the applicable legal standards, the majority of the decision engaged in a detailed review of Corps mitigation plans.[133] The court began by examining the portions of the mitigation plan with respect to fish and separately looked at those portions concerned with waterfowl.[134]

The plaintiffs first argued that the Corps' plan for fish mitigation failed to account for reduced fish access to the floodplain where fish could more easily spawn.[135] The court agreed with the plaintiffs, stating that the HEP model did not recognize that the flooded areas created under the plan would not always be accessible to fish, especially because the fish spawned seasonally.[136] Although the Corps argued that it had a plan in place strategically to manipulate the levee gates, the court noted that the flood gates would be closed during any significant flooding, which is the exact time the fish would require access to the floodplain.[137]

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128. *Envtl. Def.*, 515 F. Supp. 2d at 76-77; *see supra* note 7 and accompanying text (defining the focus of this Comment as the flawed mitigation calculations, which are represented by the first of the plaintiffs' claims).

129. *Envtl. Def.*, 515 F. Supp. 2d at 74. Even though the Corps had revised the 2002 REIS, it was never withdrawn, and the portions that were not superseded by the 2006 REIS were also under review. *Id.* at 79 n.5.

130. *Id.* at 85-88.

131. *Id.* at 88.

132. *Id.*

133. *Id.* at 77-88.

134. *Id.* at 77, 85.

135. *Id.* at 80.

136. *Id.*

137. *Id.* at 80-81.

Moreover, the system of gates, even when open, would reduce the ability of fish to navigate to the flooded areas.[138] The court found that the Corps' failure to incorporate such issues into their calculations violated NEPA's requirement for scientific integrity in an EIS as well as the CWA's mitigation requirements.[139]

The court next targeted the HEP's calculation of habitat quality.[140] The Corps proposed to mitigate damage by intentionally flooding a "sump area" each spring, leaving a large area flooded to increase fish habitat.[141] By doing this, the Corps was able to change the classification of the area from a "sump area" to a "spawning and rearing pool," which is considered a permanent body of water.[142] This manipulation accounted for ninety-seven percent of the total value of the proposed mitigation.[143] The court stated this was a matter of "word play" and that the resulting "HEP model grossly overstat[ed] the total value of the proposed mitigation."[144]

The Corps also adjusted HEP calculations by selecting and manipulating the time periods that the model would take into consideration.[145] Some areas were flooded on a far less frequent basis than others, and by focusing calculations based upon the most commonly flooded areas, less acres of land appeared to be affected by the project.[146] Moreover, after examining the data on flooding and fish life spans, the court found that the Corps acted improperly in relying on two-year flooding estimates when the lifespan of affected fish species would be better represented by a three-year plan.[147] The court found the omissions compromised the Corps' finding of full mitigation.[148]

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138. *Id.* at 80.

139. *Id.* at 81. The court also notes that the flawed studies undermined the Corps' claim that it was in compliance with the CWA. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* This is important because "[p]ermanent water bodies are assigned much greater habitat value under the HEP model." *Id.* at 81-82.

143. *Id.* at 81. The alternative to the flooding plan would have been for the Corps to reforest some 124,000 additional acres at a cost of $200 million. *Id.*

144. *Id.* at 82.

145. *Id.*

146. *Id.* Every two years, 27,000 habitat acres were flooded; every three years, 50,000 habitat acres were flooded; and less often than every three years, up to 130,000 habitat acres were flooded. *Id.*

147. *Id.* at 82-83.

148. *Id.* at 83. The court continued to explain, "The agency cannot reliably conclude that the selected project has minimalized adverse impacts on aquatic ecosystems to the extent practicable when its habitat mitigation calculations are infected with an underestimate of the floodplain habitat impacted." *Id.* (citing 40 C.F.R. § 230.10(d); Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng'rs, 479 F. Supp. 2d 607, 627 (S.D. W. Va. 2007)).

The court found further manipulation problems where the Corps attempted to give the same value to "borrow pits" as to permanent water body habitats.[149] That is, even though the borrow pits would be permanent, they were only small, "permanent ponds," and were afforded a far greater mitigation value than the court found they warranted.[150] As a result, the Corps exaggerated the mitigation value in relation to the amount of actual habitat that would have been lost to the project.[151] Further, the court found that the Corps exaggerated the effect that seasonal flooding would have in connecting the ponds and the river.[152] Again, the court found such manipulations to be devoid of the requisite scientific integrity.[153]

The court also was distressed with the HEP approach of reducing all different habitat types to a simple category of "habitat units," which did not address the unique habitats needed by various species.[154] The court stated that the Corps could not merely provide one "substitute" body of water in place of another when different species were reliant on different types of water bodies for survival.[155]

The Corps argued "that its mitigation team w[ould] implement, monitor, and adjust mitigation techniques" over time as necessary in order to "balance the project's twin aims of flood control and environmental protection."[156] The court dismissed this argument, however, stating that permitting a project to go forward without full mitigation plans "would effectively gut the environmental safeguards that Congress enacted in the CWA and NEPA."[157]

In all, the court found that the Corps' procedure seemed to work backwards, tweaking the mitigation formulae in order to reach a positive cost-benefit ratio and placing the emphasis on cost alone instead of genuine mitigation of damage.[158] The court did not, however, agree with the plaintiffs' contention that the Corps claimed the project's impacts would be fully mitigated.[159]

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149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 83-84.
153. *Id.* at 84.
154. *Id.*
155. *Id.* For example, a "borrow pit" is only acceptable to mitigate for the loss of a permanent body of water, and is not a suitable replacement for a seasonal wetland, which would support different wildlife. *Id.*
156. *Id.*
157. *Id.* at 84-85.
158. *Id.* at 85.
159. *Id.* at 85 n.9.

After finding the fish mitigation failures, the court turned to the issue of waterfowl mitigation.[160] To examine effects on waterfowl, the Corps relied on a waterfowl model developed by Corps and other agency experts.[161] The plaintiffs argued that the model did not have expert support, even among members of the Corps team, and that there were mathematical errors in the waterfowl model's calculation.[162] In particular, the plaintiffs argued that the Corps attempted to mitigate the loss of dry lands with wetlands, where the waterfowl would more quickly exhaust their food supply.[163] The Corps responded with a defense that the court described as "complicated and unclear."[164] The court accepted the defense nonetheless, pointing out that despite the plaintiffs' claims, the agency had, in fact, consulted with experts.[165] Upon this finding, the court noted that agencies are entitled to deference when "agency determinations are based upon highly complex and technical matters."[166] Even though the court did not find any violation as to the waterfowl mitigation, the decision indicates that the court engaged in a thorough review of the Corps' model.[167]

VI. ANALYSIS

After decades of disappointing results under the Coordination Act, it still remains to be seen whether the judiciary will ever force compliance with the Act on a large scale.[168] Of course, simply because the Coordination Act has not been effective in the courtroom does not necessarily mean that it has failed. It is *possible* that agencies acting within the scope of the Act have complied with the statutory requirements without the judiciary acting as a constant watchdog.[169] As one might expect, however, such an optimistic viewpoint is not supported by the evidence.[170]

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160. *Id.* at 85.
161. *Id.*
162. *Id.*
163. *Id.* at 85-86.
164. *Id.* at 86.
165. *Id.*
166. *Id.* (quoting Appalachian Power Co. v. EPA, 249 F.3d 1032, 1051-52 (D.C. Cir. 2001) (omitting internal quotations)).
167. *See id.*
168. *See, e.g.*, Houck, *supra* note 1, at 50050 (lamenting that "failures under the [Coordination Act] have become the rule").
169. BEAN & ROWLAND, *supra* note 10, at 416.
170. *Id.* (citing GEN. ACCOUNTING OFFICE, IMPROVED FEDERAL EFFORTS NEEDED TO EQUALLY CONSIDER WILDLIFE CONSERVATION WITH OTHER FEATURES OF WATER RESOURCE DEVELOPMENT, B-118370, at 43 (1974); Oliver A. Houck, *Promises, Promises, Promises: Has Mitigation Failed?*, 10 WATER SPECTRUM 31 (Spring 1978)). As Houck summarized the reality of

At the same time, if earlier cases under the Coordination Act can be divided into an equivalence approach and a direct approach, *Environmental Defense* may have introduced a "backdoor" approach. The decision does not subordinate the Coordination Act to NEPA, but at the same time, it does not specifically identify the statute as a central issue in the case.[171] In fact, the court does not explicitly reference the Coordination Act in its decision, but instead only indirectly deals with the Act through a discussion of section 404 of the CWA and its implementing regulations, which require Coordination Act compliance.[172] This failure to identify the Coordination Act as the crux of the Corps' violations makes it all the more difficult for a subsequent litigator or court to recognize a violation, make out a claim, and utilize case law favoring enforcement of the Act.

Compliance with the Coordination Act is a paramount issue because it deals with what has probably become the most essential tool in promoting environmental matters: education. By educating and informing government officials and the public, it is more likely that government officials will be aware of the environmental effects of their choices and that the public may pressure those same officials to make responsible decisions.[173] The judiciary's role is to act as a check on the agencies when a challenge is raised precisely because courts have the ability not only to analyze particular projects, but also to compel compliance.[174]

Environmental Defense provides an example of the proper *ends* of Coordination Act review, accomplished through indirect *means*. The court, through its assessment of CWA compliance, engaged in the in-depth review of mitigation methodology and calculations that had been

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the situation: "The construction agencies have failed to consult. The wildlife agencies have failed to prepare mitigation reports. The construction agencies have failed to make mitigation recommendations to Congress which, in turn, has simply looked the other way." Houck, *supra* note 1, at 50043 (citing GEN. ACCOUNTING OFFICE, *supra*; *Hearings Before the Subcomm. on Fisheries and Wildlife, Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. (2d Sess. 1974)).

171. *See* Envtl. Def. v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 69, 76-86 (D.D.C. 2007).

172. *See id.*

173. *See* RONALD E. BASS ET AL., THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT 61-62 (2d ed. 2001) (relating the benefits of disclosure under NEPA).

174. Houck, *supra* note 1, at 50050 n.113. Such a particularized inspection of a project is extremely difficult for a legislative body. *Id.* ("Congress is in no better position to evaluate the adequacy of the bases for a mitigation plan than it is the bases for an EIS. The legislature is not structured to make the case-by-case inquiries necessary to unmask agency noncompliance on specific projects.").

lacking since the passage of the Coordination Act.[175] Even though the court found problems with only the mitigation of fish and not waterfowl, its detailed analysis in both areas is precisely the type of substantive review envisioned by the Act to keep construction agencies in check.

Regrettably, because the court did not explicitly trace its analysis to the Coordination Act's requirement for a specific mitigation plan to be in place before an agency takes action, it will remain to be seen whether future courts will continue to look rigorously for a detailed mitigation plan in each instance. More likely, the failure to bring the provisions of the Coordination Act to the forefront will lead to a continued conflation with the mere disclosure of impacts and alternatives compelled by NEPA.

VII. CONCLUSION

Looking back today, the Coordination Act appears to have been an incredibly progressive statute for its time—authorizing environmental considerations some thirty-six years before the enactment of NEPA. Even through its two major revisions, however, the Coordination Act continued to fail to generate much success in the judicial system—first through the denial of a private right of action, then through *Gilham Dam*'s misplaced doctrine of "NEPA equivalence," and finally through a misunderstanding or misapplication of the Act's basic provisions.[176]

With the decision in *Environmental Defense*, the court gave force to the Coordination Act by invalidating the models prepared under its provisions.[177] Even if the court reached the proper conclusion with respect to this case, it is difficult to say that the court engaged in the *proper* analysis of the models, because this review occurred only indirectly through the plaintiffs' CWA claims.[178] Because the court did not engage in a direct review or even specify the relation between the mitigation plans and the Coordination Act, it may take another challenge to give plaintiffs specific case law illustrating correct judicial review under the Act.

While *Environmental Defense* may be a step in the right direction, the Coordination Act has not reached its full potential. If other courts can build upon this lead by properly interpreting and applying the provisions of the Coordination Act and the laws associated with it, the

175. *See id.*
176. *See supra* Part IV.
177. *Envtl. Def.*, 515 F. Supp. 2d at 76-88.
178. *Id.* at 77.

country's wildlife resources will stand to benefit greatly from its protections.