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HUNTING ON NATIONAL WILDLIFE REFUGES: UNCHECKED EXPANSION OR FULLY COMPATIBLE USE?

*Kurt R. Moser**

Most of us began as ardent hunters, but later our viewpoint changed. To look back on wild life as it was half a century ago is saddening, but the change of sentiment in recent years brings cheer . . . A new era has begun, and more and more people demand that refuges be set aside where the wild creatures may live and man may not encroach on them.¹

George Bird Grinnell (1926)
Founding member of the Boone & Crockett Club

I. INTRODUCTION

In 2003, the Fund for Animals (“the Fund”), a non-profit animal advocacy/anti-hunting group, filed suit against the United States Fish & Wildlife Service (“FWS”), challenging six final agency rules, which had effectively expanded hunting opportunities on thirty-nine units of the National Wildlife Refuge System (“NWRs”).² The Fund prayed for declaratory and injunctive relief under the National Environmental Policy Act (“NEPA”) and the Administrative Procedure Act (“APA”) alleging that the FWS had acted arbitrarily and capriciously in issuing the aforementioned rules without conducting an Environmental Impact Statement (“EIS”).³ The Fund asked the U.S. District Court for the District of Columbia to set aside the agency’s rules and to require the FWS to increase the recreational use of refuges by 20% by 2005.⁴

This dispute highlights a reoccurring conflict throughout the history of the National Wildlife Refuge System – the compatibility of hunting versus wildlife preservation. The struggles between hunting and wildlife preservation were ever-present at the beginning of the American conservation movement and carried over to early policy disputes involving the NWRs. As *Fund for Animals v. Williams* clearly demonstrates, these conflicts are still occurring today, even after the enactment of the National Wildlife Refuge System Improvement Act of 1997 (“Improvement Act”).⁵ This is particularly significant because this groundbreaking legislation, which some have called the first “organic act” for the refuge system,⁶ creates a use hierarchy placing hunting on par with other wildlife-dependant uses such as wildlife observation and photography.

This paper will address this issue in two parts. First, I will present a chronology of the history of hunting policy on National Wildlife Refuges (pre-1997). Second, I will discuss the future challenges to hunting on refuges, which is largely influenced by the 1997 Improvement Act and its designation of hunting as a

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¹ STEPHEN FOX, JOHN MUIR AND HIS LEGACY; THE AMERICAN CONSERVATION MOVEMENT 164 (Little, Brown and Company 1985) (1981).

² *Fund for Animals v. Williams*, No. 03-0677, 2005 WL 2374104, at *1 (D.D.C. Sep 28, 2005). [hereinafter referred to as “Fund for Animals”].

³ Complaint, *Fund for Animals v. Williams*, No. 03-0677, 2005 WL 2374104 (D.D.C. Sep 28, 2005). [hereinafter “Complaint”].

⁴ *Id.*

⁵ National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, § 1(a), 111 Stat. 1252 (amended Oct. 9 1997).

⁶ ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 76, 79 (Island Press 2003).

wildlife-dependant/priority public use. As a backdrop to the second part, I will explore the merits of *Fund for Animals*.

II. HISTORY OF HUNTING POLICY ON NATIONAL WILDLIFE REFUGES

On March 14, 1903, President Theodore Roosevelt proclaimed that Pelican Island, Florida, should be preserved in order to protect the breeding grounds for native birds.⁷ In doing so, many believe Roosevelt established America's first National Wildlife Refuge.⁸ Such measures did not receive universal support, however, as one western legislator remarked, Roosevelt's action was "the fad of game preservation run stark raving mad."⁹ Undeterred, Roosevelt decreed a total of 52 bird and 4 big game refuges between 1903 and 1909.¹⁰ Congress followed suit, declaring the following as refuges and game preserves: the Wichita Mountain Forest and Game Preserve (1905); the National Bison Range (1908); and the National Elk Refuge (1912).¹¹ While Congress played a role in early refuge designations, the majority of early refuges were established through executive action.¹²

In 1929, Congress passed the Migratory Bird Conservation Act ("MBCA").¹³ The MBCA established a system of waterfowl refuges but did not include a public shooting grounds provision for which the gun lobby and several sportsmen groups had advocated.¹⁴ The shooting grounds provision would have allowed hunting on refuges, but many were opposed to the provision for ethical or historical reasons.¹⁵ The MBCA also established an on-going system whereby refuge lands could be added (with state permission).¹⁶ Even more significant, the MBCA established the standing rationale that refuges were to serve as "inviolable sanctuaries" for migratory birds.¹⁷ This protection can amount to a complete prohibition of hunting, including those lands in the immediate vicinity of refuges.¹⁸ While those advocating against hunting on refuges (i.e., William Hornaday of Audubon) arguably won the early battles,¹⁹ the first refuge that allowed hunting was actually created in 1924, five years before MBCA established the "inviolable" mandate.²⁰

In 1924, the Upper Mississippi River Wildlife Refuge, an area that spanned some 300 miles along the Mississippi River, was designated as a refuge on the condition that hunting would continue to be allowed.²¹ Ten years after this, the director of the Biological Survey,²² J. N. "Ding" Darling, introduced the federal duck stamp as a measure to increase refuge lands and ultimately increase declining waterfowl populations.²³ Under the Migratory Bird Hunting Stamp Act of 1934, hunters were required to purchase, for \$1, a yearly stamp in

⁷ *Id.* at 35.

⁸ *See id.*

⁹ CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 55 (Island Press 1992).

¹⁰ FISCHMAN, *supra* note 6, at 35.

¹¹ *Id.*

¹² *Id.* at 36.

¹³ *Id.* *See* Migratory Bird Conservation Act of 1929, ch. 257, 45 Stat. 1,222 (codified at 16 U.S.C. § 715 (2005)).

¹⁴ *See* FOX, *supra* note 1, at 164.

¹⁵ *See id.* at 164-65. The first wildlife refuges, established by Theodore Roosevelt and William Howard Taft, did not allow hunting. *Id.* at 164. Furthermore, many suspected gun companies had an inordinate amount of influence in drafting the "shooting grounds" provision. *Id.* at 164-65.

¹⁶ FISCHMAN, *supra* note 6, at 36.

¹⁷ *Id.* at 36-37. "Inviolable" is a term used throughout the history of refuges, meaning absolutely safe from violation (i.e., birds safe from hunting and other life-threatening influences of man). *See* BLACK'S LAW DICTIONARY 573 (6th ed. 1991).

¹⁸ *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942).

¹⁹ FOX, *supra* note 1, at 172.

²⁰ Jennifer A. Heck, *National Wildlife Refuges: Places to Hunt?* Congressional Research Service Report No. 92-597 (1992), available at <http://ncseonline.org/NLE/CRS/abstract.cfm?NLEid=16421> (follow "92-597 – National Wildlife Refuges: Places to Hunt?").

²¹ *Id.*

²² In 1939, the Bureau of Biological Survey was transferred from the U.S. Department of Agriculture to the Department of the Interior. "In 1940, the Bureau of Biological Survey and the Bureau of Fisheries merged to form the [U.S.] Fish and Wildlife Service." NANCY LANGSTON, *WHERE LAND & WATER MEET: A WESTERN LANDSCAPE TRANSFORMED* 189 n. 93 (University of Washington Press 2003).

²³ Heck, *supra* note 20.

order to hunt migratory waterfowl on federal or non-federal lands.²⁴ However, hunting was only allowed on a few refuges until 1949, when hunting groups proposed an increase in the duck stamp to \$2, provided they gain hunting access to one-quarter of the acreage of each refuge.²⁵ Beginning with the 1949 Migratory Bird Hunting Stamp Act, Congress progressively backed away from the “inviolable” mandate of 1929.²⁶ As hunter contributions (through duck stamps) continued to increase, so did the political influence of the hunting community on FWS policy.²⁷ About the same time the FWS raised the duck stamp fee to \$7.50, Congress agreed to open as much as 40% of refuge areas to hunting.²⁸

In 1962, the Refuge Recreation Act (“RRA”)²⁹ introduced the concept of compatibility to the NWRS.³⁰ While this concept is now the cornerstone of refuge administration, it was a decidedly new, yet reactive approach, employed to manage conflicts between public recreation and the primary objectives of individual refuges.³¹ From 1954 to 1960, the NWRS had witnessed the number of visitor days increase by more than 200%.³² This dramatic increase led to compatibility problems with the primary objectives of the individual refuges.³³ Congress passed the RRA to address these problems.³⁴ The RRA specifically prohibited “those forms of recreation that are not directly related to the primary purposes” for which an individual refuge area was established.³⁵ Of course, one of these recreational uses was hunting. At the time, hunting was authorized in areas of up to one-quarter of *each refuge*.³⁶ Even so, hunting was still considered a secondary use and would not be allowed unless the Secretary of the Interior (“Secretary”) determined that the use was compatible with the primary management objectives established for each individual refuge.³⁷ The 1962 RRA also mandated that the Secretary only allow certain recreational uses if the funds to develop and maintain such uses were available.³⁸ Therefore, if the Secretary determined it was cost-prohibitive to allow hunting on a refuge, no hunting was allowed.

The next major step in refuge management came when Congress passed the National Wildlife Refuge System Administration Act of 1966 (“NWRSA”).³⁹ The first major accomplishment of the 1966 legislation was a consolidation of the refuges into the National Wildlife Refuge System.⁴⁰ More pertinent to this discussion, however, is the NWRSA’s comprehensive management mandate that expanded upon the compatibility principles of the 1962 RRA.⁴¹ Under this policy, “the FWS may open areas of refuges to

²⁴ The Migratory Bird Hunting Stamp Act of 1934, c. 71, 48 Stat. 451 (1934) (codified at 16 U.S.C. § 718 (2000)). This Act is also known as the “Duck Stamp Act.” *Id.*

²⁵ Heck, *supra* note 20.

²⁶ FISCHMAN, *supra* note 6, at 37.

²⁷ Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 475 (2002).

²⁸ Fish and Wildlife Improvement Act of 1978, Pub. L. 95-616, 92 Stat. 3110 (1978) (codified at 16 U.S.C. § 668dd(d)(1)(A)(2000)). In some cases hunting may be opened in more than 40% if the Secretary finds it would be “beneficial to the species.” Fischman, *supra* note 27, at 475. *See* § 668dd(d)(1)(A)(2000).

²⁹ Refuge Recreation Act, Pub. L. No. 87-714, 76 Stat. 653 (1962) (codified at 16 U.S.C. §§ 460k-k(4) (2000)).

³⁰ *Id.*

³¹ Fischman, *supra* note 27, at 477-78. Prior to 1962, Congress established the primary objectives for each individual refuge, but “had never put forward a comprehensive vision for how the U.S. Fish & Wildlife Service should administer the System.” *Id.* at 477.

³² In 1960, visitor days had grown to 11 million. U.S. GENERAL ACCOUNTING OFFICE, NATIONAL WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION, GAO/RCED-89-196, at 9 (September 1989) (hereinafter “GAO Report”).

³³ Fischman, *supra* note 27, at 477-78.

³⁴ *Id.*

³⁵ Refuge Recreation Act, *supra* note 29.

³⁶ This one-quarter provision was as of 1949, the 40% rule did not come into affect until the Fish and Wildlife Improvement Act of 1978.

³⁷ Fischman, *supra* note 27, at 478.

³⁸ *Id.*

³⁹ Pub. L. No. 89-669, 80 Stat. 926 (1966).

⁴⁰ FISCHMAN, *supra* note 6, at 46. The subject matter of the NWRS is still the same today, “all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas.” *Id.*; *see* NWRSA, *supra* note 39, § 4.

⁴¹ FISCHMAN, *supra* note 6, at 48.

compatible uses by regulation, individual permit, or public notice.”⁴² The NWRSAA prohibits hunting on all refuges without explicit permission.⁴³ However, this sweeping prohibition does not apply to: (1) the actions of refuge managers themselves; (2) areas where certain uses were designated upon establishment (i.e. Upper Mississippi Wildlife Refuge allowed hunting when established); or (3) where FWS regulations allow an activity.⁴⁴

The third exception provided the avenue for the most controversy and challenge. By issuing regulations that allow certain uses to occur, the Secretary must determine if a use is compatible with the established purposes of the individual refuge. While this sounds like a simple concept, with so many different establishment purposes for individual refuges, implementing broad-based regulatory measures was difficult.⁴⁵

Upset by the increasing popularity of hunting on wildlife refuges, several animal protection and environmental groups formed the Refuge Wildlife Reform Coalition (“Coalition”).⁴⁶ The Coalition’s purpose was to promote legislation that would ban hunting and trapping on all refuges.⁴⁷ Efforts by the Coalition and the Humane Society led to the introduction of the Refuge Wildlife Protection Act in 1987.⁴⁸ This legislation was effectively a ban on hunting in refuges.

The struggle of compatibility and a series of other events culminated in the 1989 General Accounting Office (“GAO”) Report entitled, “National Wildlife Refuges: Continuing Problems with Incompatible Uses Call for Bold Action.”⁴⁹ Recognizing that Congress had never defined “compatible” refuge uses, the House Merchant Marine and Fisheries Committee’s Subcommittee on Fisheries and Wildlife Conservation and the Environment asked the GAO to conduct a study to determine “whether or not secondary uses were compatible with the primary management purposes of wildlife refuges.”⁵⁰ The resulting GAO Report concluded that many secondary uses were, in fact, interfering with the establishment purposes of many wildlife refuges.⁵¹ The Report found that hunting, along with other secondary uses, was requiring the FWS to divert scarce resources away from primary wildlife management activities.⁵²

At the time the data was compiled for the GAO Report, waterfowl hunting and small game hunting were allowed at 163 and 162 refuges, respectively.⁵³ Refuge managers, when questioned, believed that waterfowl hunting was harmful in 25% of these cases and small game hunting was harmful in 11% of these cases.⁵⁴ Furthermore, among the situations where refuge managers believed harm was occurring, 68% of refuge managers believed harmful waterfowl hunting uses should be discontinued and 50% believed harmful small game hunting uses should be discontinued.⁵⁵ In addition, most refuge managers cited military air and ground exercises, mining, logging, and waterfowl hunting as the most harmful uses that merited discontinuance.⁵⁶ Managers stated that when conflicts with secondary uses became contentious, nearly all of their time and energy

⁴² *Id.* at 49; see 50 C.F.R. § 25.21(a) (2005).

⁴³ NWRSAA, *supra* note 39, § 4.

⁴⁴ FISCHMAN, *supra* note 6, at 50.

⁴⁵ *Id.* at 52. Lacking clear management criteria, the 1966 Act was amended in 1997 in “an effort to impose a uniform System mission against which to measure the compatibility of uses.” *Id.*

⁴⁶ Heck, *supra* note 20.

⁴⁷ *Id.*

⁴⁸ “The Refuge Wildlife Protection Act was first introduced during the 100th Congress as H.R. 2724 by Representative Bill Green (NY).” *Id.*

⁴⁹ GAO Report, *supra* note 32.

⁵⁰ Heck, *supra* note 20.

⁵¹ *Id.*

⁵² GAO Report, *supra* note 32, at 3.

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 20.

⁵⁵ *Id.* at 21.

⁵⁶ *Id.*

was required to resolve such conflicts.⁵⁷ The refuge managers further stated that in many of the harmful use cases, political pressure and non-biological factors were driving irrational FWS policy.⁵⁸

In response to the GAO Report, President Clinton issued an executive order to reform the administration of the NWRs.⁵⁹ One year later, Congress enacted the National Wildlife Refuge System Improvement Act of 1997 (“Improvement Act”).⁶⁰

III. NATIONAL WILDLIFE REFUGE SYSTEM IMPROVEMENT ACT OF 1997: IMPLICATIONS FOR HUNTING & HUNTING CHALLENGES

It is clear from legislative history that Congress believed the Improvement Act represented the first “organic act” for the refuge system; the perceived need for such legislation was a powerful advocacy tool during Congressional debate.⁶¹ The designation of a federal public land law as “organic” has debatable significance. In general terms, the designation invokes the perception that Congress is giving a solid management directive to a specific agency.⁶² More specifically, an organic act can be described as “a comprehensive, organizing, unifying framework for a public land system.”⁶³

Prior to the enactment of the Improvement Act, the FWS had received little guidance from Congress on the purposes for consolidating refuges into a system.⁶⁴ While a general conservation purpose had always been present, the refuges had been established for a plethora of distinct conservation purposes such as, ecosystem preservation, endangered species recovery, and sustaining game populations for hunting.⁶⁵ The Improvement Act’s overarching mission for the NWRs is as follows: “[t]he mission of the system is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States.”⁶⁶ Nonetheless, the establishment purposes of individual refuges will trump this mission statement if a conflict arises.⁶⁷

A. *Hunting as a Wildlife-Dependant Priority Use*

As the GAO Report detailed, hunting can conflict with the conservation purposes of refuges. The Improvement Act specifically sought to address or dispose of this conflict by creating a hierarchy of uses.⁶⁸ The hierarchy contains three basic tiers, listed from highest to lowest priority: (1) conservation; (2) wildlife-dependant recreation; and (3) other uses.⁶⁹ This three-tiered approach is only functionally different from past approaches with the creation of the wildlife-dependant use. The Improvement Act recognizes and promotes the following as wildlife-dependant uses: hunting, fishing, wildlife observation and photography, and environmental education.⁷⁰ Prior to 1997, hunting was recognized as a secondary use (secondary to individual refuge management purposes).⁷¹ Recently, some have suggested that Congress, under the Improvement Act,

⁵⁷ *Id.* at 18.

⁵⁸ *Id.* at 25.

⁵⁹ FISCHMAN, *supra* note 6, at 61.

⁶⁰ Pub. L. No. 105-57, 111 Stat. 1252 (1997) (codified at 16 U.S.C. § 668dd (2000)) [hereinafter “Improvement Act”].

⁶¹ FISCHMAN, *supra* note 6, at 64.

⁶² *Id.* at 69-70.

⁶³ *Id.* at 70.

⁶⁴ *Id.* at 79.

⁶⁵ *Id.*

⁶⁶ Improvement Act, *supra* note 60, § 668dd(a)(2).

⁶⁷ *Id.* at § 668dd(a)(4)(D).

⁶⁸ Fischman, *supra* note 27, at 526.

⁶⁹ *Id.*

⁷⁰ *Id.* at 527.

⁷¹ *Id.*

may have already made the determination that hunting is a compatible use for most refuges.⁷² Nonetheless, this new approach still, in theory, subordinates hunting to conservation. The distinction of hunting as a wildlife-dependant use is significant because it may work to insulate hunting from compatibility challenges from other wildlife-dependant uses, while giving it priority over the other third-tier uses.

The Improvement Act specifically provides that “compatible wildlife-dependant recreational uses are the priority general public uses of the System and shall receive consideration in refuge planning and management.”⁷³ Once the Secretary determines that such uses are compatible on a specific refuge, the Secretary must facilitate the use “subject to such restrictions or regulations as may be necessary, reasonable, and appropriate.”⁷⁴ Arguably this language means that a refuge manager should try to find a way to allow hunting (and other wildlife-dependant priority uses), unless hunting is simply not compatible.⁷⁵

One writer suggests that the prioritization of wildlife-dependant uses, particularly hunting and fishing, simply recognizes the “traditional relationship between the hunting and fishing constituency and the [National Wildlife Refuge] System.”⁷⁶ By implementing the Improvement Act, the FWS has given wildlife-dependant uses significant priority, placing them on a nearly equal plane with the overarching conservation uses of the System. In making compatibility determinations for the third-tier or other uses, a refuge manager is instructed to deny the use if he or she has insufficient data regarding compatibility of the use.⁷⁷ However if the use is hunting, the refuge manager is instructed to work with proponents in gathering compatibility data *before* denying the use.⁷⁸ Wildlife-dependant uses are also favored over third-tier or other uses based upon a longer compatibility evaluation period.⁷⁹ The Improvement Act mandates that refuge managers evaluate most existing uses every ten years, but the evaluation period for existing wildlife-dependant uses is fifteen years.⁸⁰ Additionally, in preparing required refuge management plans, a refuge manager must include a section considering the “opportunities for compatible wildlife-dependant recreational uses.”⁸¹ Finally, the Improvement Act specifically repeals the 1962 Refuge Recreation Act’s “hammer provision,” which required the Secretary to conduct a budgetary analysis for wildlife-dependant uses.⁸²

B. The Compatibility of the Hunting Use: Whittlesey Creek National Wildlife Refuge

The classification of hunting as a wildlife-dependant priority use has made it more likely that hunting will be allowed on refuges in the future. In *Fund for Animals*, the Fund challenged the FWS’s actions in allowing or expanding hunting opportunities on thirty-nine refuges nationwide.⁸³ Arguably the Congressional mandate to the FWS, which promoted hunting, facilitated this conflict by instructing refuge managers to allow hunting wherever possible. However, while hunting is certainly more favored as a use under the Improvement Act, refuge managers must still make compatibility determinations. This section will briefly outline the

⁷² Holly Doremus et al., *Fish, Farms and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 319 (2003) (finding former secondary uses, like hunting, have been deemed compatible under the Improvement Act).

⁷³ Improvement Act, *supra* note 60, § 668dd(a)(3)(C).

⁷⁴ *Id.*

⁷⁵ In fact, former Secretary of the Interior Bruce Babbitt stated, “[t]he law will be whispering in the manager’s ear that she or he should look for ways to permit the use [including hunting] if the compatibility requirement can be met.” Fischman, *supra* note 27, at 532.

⁷⁶ *Id.* at 533.

⁷⁷ *Id.* at 534-35.

⁷⁸ *Id.* See Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 *Fed. Reg.* 62,484, 64,494 (Oct. 18, 2000).

⁷⁹ Fischman, *supra* note 27, at 535.

⁸⁰ Fischman, *supra* note 27, at 532; see Improvement Act, *supra* note 60, §§ 668dd(d)(3)(B)(vii-viii).

⁸¹ See Improvement Act, *supra* note 60, § 668dd(e)(2)(F).

⁸² *Id.* at § 668dd(d)(3)(iii).

⁸³ Complaint, *supra* note 3.

compatibility regulations⁸⁴ by analyzing and commenting upon the compatibility determination for Whittlesey Creek National Wildlife Refuge (“WCNWR”), located in northern Wisconsin. In this case, the Fund challenged the Secretary’s allowance for waterfowl hunting.

In order to ensure standing at WCNWR, the Fund and one of its Plaintiffs, Cynthia Lott (“Lott”), claimed the following:

Plaintiff Cynthia Lott lives in Madison, Wisconsin . . . and would like to visit the Wittsley [sic] Creek Refuge in northern Wisconsin to watch and photograph wildlife, but she is concerned for her safety because the Fish and Wildlife Service has decided to allow hunting on the refuge. She is also concerned that fewer animals and birds will be available for viewing or will be more skittish due to the hunting, or that she may see wounded and dying birds on the refuge. Ms. Lott would visit the Wittsley [sic] Creek Refuge if hunting were not permitted in the refuge.⁸⁵

Clearly, Lott desires to engage in wildlife observation and photography at the WCNWR. As already mentioned, this particular use is designated as a wildlife-dependant priority use.⁸⁶ Based upon the established hierarchy, Lott’s use is on equal footing with hunting. Because waterfowl hunting (or wildlife observation and photography) had not previously been allowed at the WCNWR, the FWS required the refuge manager to undertake a use compatibility analysis.⁸⁷

Established in 1999, WCNWR was created to “protect, restore, and manage coastal wetlands and spring-fed creek habitat” along the shores of Lake Superior.⁸⁸ The goals of the refuge included, among other things, the restoration of native coaster brook trout habitat as well as the restoration of wetland habitat for the use of migratory waterfowl.⁸⁹ Currently the refuge allows the following wildlife-dependant uses: fishing, waterfowl hunting, and wildlife observation and photography.⁹⁰ In order to allow each of these uses (especially since the refuge was created after the 1997 enactment of the Improvement Act), the refuge manager was required to complete detailed compatibility determinations for each of these uses. For the purposes of this article, I will analyze the compatibility analysis conducted by the refuge manager at WCNWR, which found waterfowl hunting to be “compatible” with the general purpose of the refuge (i.e., conservation).

The required format for all compatibility determinations is laid out in the FWS regulations.⁹¹ In the case of WCNWR, the refuge manager followed the specific format required. Nonetheless, a closer look at the Whittlesey Creek compatibility determination for waterfowl hunting demonstrates that, as conducted, the compatibility determination was little more than an administrative “rubber stamp” exercise involving little research or analysis. In fact, while the compatibility determination for waterfowl hunting (finding the use compatible) was made available for public comment on December 30, 2000,⁹² the final waterfowl hunting plan

⁸⁴ See Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62484 (Oct. 18, 2000).

⁸⁵ Complaint, *supra* note 3.

⁸⁶ See *Improvement Act*, *supra* note 60.

⁸⁷ See 50 C.F.R. § 25.21(b) (2004).

⁸⁸ U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK NATIONAL WILDLIFE REFUGE OVERVIEW, *available at* <http://www.fws.gov/refuges/profiles/index.cfm?id=32620> [hereinafter WCNWR Overview].

⁸⁹ *Id.*

⁹⁰ U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK NATIONAL WILDLIFE REFUGE, RECREATION AND EDUCATION OPPORTUNITIES, *available at* <http://www.fws.gov/refuges/profiles/recEdMore.cfm?ID=32620>.

⁹¹ See Final Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62484, 62496 (Oct. 18, 2000).

⁹² U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK NATIONAL WILDLIFE REFUGE COMPATIBILITY DETERMINATION FOR WATERFOWL HUNTING, at 3 (July 16, 2001) (available by request at Pam_Dryer@fws.gov). The compatibility determination further states that “[n]o [public] comments substantially changed our proposal or compatibility determination.” *Id.* The environmental assessment for public uses was made available for public comment, along with the compatibility determination, on December 30, 2000. *Id.*

for Whittlesey Creek was not even completed until January 28, 2002.⁹³ This span of time is noteworthy, especially in light of the fact that the FWS deemed an “Interim Hunting Plan” adequate to issue a Finding of No Significant Impact (“FONSI”) for the environmental assessment conducted for all proposed public uses at Whittlesey Creek.⁹⁴

Pursuant to the mandate of the Improvement Act, the refuge manager stated the following, “[t]his compatibility determination will allow waterfowl hunting to take place at Whittlesey Creek National Wildlife Refuge, in fulfillment of that mandate.”⁹⁵ The refuge manager stated the identical justification in the compatibility determination for wildlife observation, wildlife photography, environmental education and interpretation.⁹⁶ The refuge manager, therefore, suggests in both aforementioned compatibility determinations that the mandate of the Improvement Act is to *find such uses compatible*, as opposed to merely *considering* their compatibility. Although the Improvement Act specifically places the conservation purpose (or use) above that of the priority public uses (e.g., hunting), in practice it appears any such distinction is fiction or, at best, has been reduced to mere lip service.

C. Merits of *Fund for Animals v. Williams*

More generally, the Complaint in *Fund for Animals* alleged that the FWS acted arbitrarily and capriciously in “categorically excluding” the six agency rules which allowed or expanded hunting on thirty-nine refuges.⁹⁷ The FWS answered by claiming that each individual refuge had conducted Environmental Assessments (“EA”s) prior to the openings or expansions of hunting and that the FWS had merely categorically excluded the publication of the rules, not the actions to allow or expand hunting.⁹⁸

1. Weaknesses in the Fund’s Position

As already mentioned, the Fund has argued that individual plaintiffs, like Cynthia Lott, are harmed when hunting compromises their chosen use.⁹⁹ Ms. Lott apparently is concerned for her safety and the quality of her refuge experience due to waterfowl hunting.¹⁰⁰ Yet, according to the Improvement Act, Ms. Lott’s chosen use of wildlife observation and photography receives equal, but not greater, consideration than hunting.¹⁰¹ In its Complaint, the Fund seems to imply that the wildlife observation and photography use, desired by the individual Plaintiffs, is virtually equivalent to the conservation use (or purpose) of the individual refuges. While the Fund likely *believes* this to be the case, the Improvement Act clearly mandates otherwise. Under the Improvement Act, wildlife observation and photography must be deemed compatible in the same manner as hunting. Furthermore, many of the same negative impacts which the Fund attributes to hunting are also

⁹³ See U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK WATERFOWL HUNTING PLAN (Jan. 28, 2002), at http://www.fws.gov/midwest/ashland/whitt-crik/hunting_pl.html (also available by request at Pam_Dryer@fws.gov) [hereinafter “Hunting Plan”].

⁹⁴ See U.S. FISH & WILDLIFE SERVICE, SELECTION OF ALTERNATIVE AND FINDING OF NO SIGNIFICANT IMPACT: PROPOSED PUBLIC USE, WHITTLESEY CREEK NATIONAL WILDLIFE REFUGE ENVIRONMENTAL ASSESSMENT (August 6, 2001) (available by request at Pam_Dryer@fws.gov). The environmental assessment contained a preferred alternative that would allow waterfowl hunting. See *id.*

⁹⁵ U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK NATIONAL WILDLIFE REFUGE COMPATIBILITY DETERMINATION FOR WATERFOWL HUNTING, at 4 (July 16, 2001) (available by request at Pam_Dryer@fws.gov).

⁹⁶ U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK NATIONAL WILDLIFE REFUGE COMPATIBILITY DETERMINATION FOR PRIORITY PUBLIC USES SPECIFIC TO WILDLIFE OBSERVATION, WILDLIFE PHOTOGRAPHY, ENVIRONMENTAL EDUCATION AND INTERPRETATION, at 6 (July 16, 2001) (available by request at Pam_Dryer@fws.gov).

⁹⁷ Complaint, *supra* note 3. The Complaint also alleges that the FSW failed to prepare an adequate NEPA documentation for adopting a policy to increase public use of refuges by 20% by 2005. *Id.*

⁹⁸ Answer, *Fund for Animals v. Williams*, No. 03-0677, 2005 WL 2374104 (D.D.C. Sep 28, 2005) [hereinafter “Answer”]. The FWS argues that NEPA requirements had already been satisfied, prior to taking the final action to categorically exclude publication of the rules. *Id.*

⁹⁹ Complaint, *supra* note 3.

¹⁰⁰ *Id.*

¹⁰¹ See Improvement Act, *supra* note 60.

attributable to wildlife observation and photography. For example, the Fund alleges that hunting causes “disturbance to feeding or resting waterfowl, trampling of low ground vegetation and soil compaction and/or erosion” and “abandonment of nest sites and subsequent reduced productivity or survival.”¹⁰² All of these negative effects could be caused by the non-consumptive use of wildlife observation and photography. Furthermore, the programmatic EIS to which the Fund cites for hunting’s negative effects (“Refuges 2003”) also contains a plethora of negative effects specifically attributed to wildlife observation.¹⁰³ For example, wildlife observation may: (1) negatively affect water quality through an increase in runoff attributed to the proliferation of human use activities; (2) significantly increase the disturbance to wildlife and habitat as a result of expanded wildlife observation activity; and (3) lead to some disturbance of feeding and resting waterfowl and other game birds.¹⁰⁴

In detailing the negative impacts of wildlife observation, it is important to note the context in which the FWS presented them. In Refuges 2003, the FWS analyzed the impacts, both positive and negative, of implementing specific alternatives for the entire refuge system. Some of the hunting impacts the Fund points to come from a Refuges 2003 EIS alternative that stresses consumptive uses of wildlife.¹⁰⁵ The negative impacts of wildlife observation, some of which the author lists herein, are taken from a Refuges 2003 EIS alternative stressing wildlife observation (and excluding most hunting).¹⁰⁶ Cherry-picking such comments from a rather large and very general EIS is probably not sufficient to provide justification for finding the impacts of hunting “significant” for the purposes of NEPA. Nonetheless, the author includes the comparison to demonstrate that such assertions, even if credibly used in the Fund’s Complaint, can easily be countered.

Finally, as an interesting side note in the discussion, the waterfowl hunting season at the WCNWR (based upon Wisconsin regulations) is usually only sixty days in length.¹⁰⁷ Since waterfowl hunting is the only hunting allowed at the WCNWR, even if hunting *does* conflict with the wildlife observation uses, the Fund’s Plaintiff (Cynthia Lott) could enjoy the WCNWR free from hunters for ten out of twelve months every year. Since, by law, the wildlife observation and photography use has no greater standing than hunting, and because wildlife observation and photography can be conducted “hunter-free” for the vast majority of each year, the Fund’s conflicting use claims seem hollow.¹⁰⁸

2. Strengths in the Fund’s Position

NEPA states that an EIS must be prepared for any “major [f]ederal actions significantly affecting the quality of the human environment.”¹⁰⁹ Here, the Fund alleged that the opening or expansion of hunting on refuges represented a major federal action and, thus, required an EIS.¹¹⁰ While refuge specific EAs can more adequately address the effects of hunting species that typically travel within smaller ranges (e.g. whitetail

¹⁰² Complaint, *supra* note 3.

¹⁰³ U.S. FISH & WILDLIFE SERVICE, DRAFT ENVIRONMENTAL IMPACT STATEMENT: REFUGES 2003, A PLAN FOR THE FUTURE OF THE NATIONAL WILDLIFE REFUGE SYSTEM, at 4-5 (Jan. 15, 1993) (available for purchase at <http://www.elistore.org/guidance>) [hereinafter “Refuges 2003”].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1-14.

¹⁰⁶ *Id.*

¹⁰⁷ WISCONSIN DEPT. OF NATURAL RESOURCES, 2004 WISCONSIN MIGRATORY BIRD REGULATIONS, at <http://www.dnr.state.wi.us/org/land/wildlife/regs/04Waterfowl.pdf>. While this argument is less convincing for refuges allowing numerous types of hunting, the lengths of hunting seasons, as well limited hunting access within individual refuges, still affords the vast majority of wildlife observation users significant time periods or refuge areas free from hunting.

¹⁰⁸ In addition, waterfowl hunting is only allowed in very specific areas of the WCNWR. See Hunting Plan, *supra* note 97. Those wishing to pursue wildlife observation and photography could probably use the refuge during waterfowl hunting season with little conflict.

¹⁰⁹ 42 U.S.C. § 4332(C) (2000).

¹¹⁰ Complaint, *supra* note 3.

deer),¹¹¹ it is arguable that the cumulative effects of opening refuges to waterfowl hunting cannot be analyzed as easily because of the migratory nature of waterfowl.

The Fund's Complaint names refuges that were opened for a number of hunting uses, including waterfowl hunting.¹¹² Because individual refuge managers are probably in the best position to open or regulate hunting for game species with more limited ranges, any challenge to a FWS regulation allowing hunting of such species probably lacks merit. However, it is likely that an EIS should have been prepared to assess the cumulative impacts of initiating and expanding waterfowl hunting especially where hunting has been allowed along a major migratory route, like the Mississippi Flyway.¹¹³

While it may be politically expedient for an administration to open up many new refuge areas to waterfowl hunting, such decisions made without foresight threaten the future of the sport. Allowing piecemeal expansion of waterfowl hunting across a major migratory route may lead to a reduction in waterfowl populations. For example, one-half of North America's waterfowl are born in the northern Midwest's prairie pothole region.¹¹⁴ Even though refuges, waterfowl production areas, and FWS easements only account for 5% of land in this region, they produce nearly one-quarter of the waterfowl.¹¹⁵ While refuge managers may err on the side of hunting and suggest that the discontinuance of hunting should only be imposed upon the decline of a species' population, such a "wait and see" action does not fit the general conservation priority of the NWRS. Furthermore, if refuge managers can justify the expansion of waterfowl hunting by only looking at localized data, it is difficult to determine what additional data they would use to make a determination to discontinue the use.¹¹⁶ By stating that waterfowl hunting on individual refuges "should not negatively affect the overall harvest and management needs the Service establishes for waterfowl populations on a regional and continent-wide basis,"¹¹⁷ the WCNWR EA seems to claim that hunting could never impact populations because total bird harvest, compared to national or continental populations, is insignificant.¹¹⁸ This analysis does not include the bigger picture of the overall impact of the Final Rule that allowed waterfowl hunting at WCNWR.¹¹⁹ The refuge manager at WCNWR is probably correct in her claim that the effects of waterfowl hunting on a 540-acre (proposed) wildlife refuge are comparatively insignificant. However, the Final Rule that included the approval for waterfowl hunting at WCNWR also included the approval for waterfowl hunting on approximately 50,000 acres of refuge land within the Mississippi Flyway.¹²⁰ Even though the FWS claims the Final Rule's "Categorical Exclusion" is justified in light of the individual refuge EA determinations, the adoption of the

¹¹¹ In its Answer, the FWS argues that refuges have generally conducted site specific EAs, thereby affording the FWS the ability to promulgate the disputed hunting regulations under a categorical exclusion. Answer, *supra* note 98. The FWS maintains this approach satisfies NEPA requirements. *Id.*

¹¹² Complaint, *supra* note 3.

¹¹³ The Fund alleges that twenty-one of the thirty-nine refuges in which the FWS has opened or expanded hunting, are located within the Mississippi Flyway. Complaint *supra* note 3.

¹¹⁴ JEANNE CLARK, AMERICA'S WILDLIFE REFUGES: LANDS OF PROMISE 23 (Graphic Arts Center 2003).

¹¹⁵ *Id.* at 24. A significant portion of the waterfowl produced in the Upper Midwest eventually migrate along the Mississippi Flyway. *Id.* For example, one-third of the entire Canvasback duck population (350,000 birds) gather within four pools within the Upper Mississippi National Wildlife & Fish Refuge. *Id.* While historically the Upper Mississippi National Wildlife & Fish Refuge has allowed hunting, it is currently restricted to certain areas only. *Id.*

¹¹⁶ For example, at Whittlesey Creek National Wildlife Refuge, the Waterfowl Hunting Plan states, "[h]unting affects waterfowl populations mostly on a regional and national basis. Harvest of waterfowl at the Refuge should not negatively affect the overall harvest and management needs the Service and the States establish for waterfowl populations on a regional and continent-wide basis." Hunting Plan, *supra* note 93.

¹¹⁷ U.S. FISH & WILDLIFE SERVICE, WHITTLESEY CREEK ENVIRONMENTAL ASSESSMENT, § 4.1.2 (December 30, 2000), at http://www.fws.gov/midwest/ashland/whitt-cr/EA_Public_Use.html (follow Section 4).

¹¹⁸ *Id.*

¹¹⁹ See 2002-2003 Refuge -Specific Hunting and Sport Fishing Regulations: Final Rule, 67 Fed. Reg. 58936 (Sept. 18, 2002) [hereinafter "Final Rule"].

¹²⁰ *Id.* at 58938. This represents the approximate acreage "opened" to waterfowl hunting from only one of the five rules that the Fund is challenging. Since much of this land was in private ownership prior to federal acquisition, the rules opening the refuges to hunting are in a sense continuing a prior use. Nonetheless, if waterfowl populations are below desired population targets, keeping these refuges closed to hunting may be a prudent conservation practice.

Final Rule through this process leaves a gaping hole and a question: who is considering the cumulative impacts on the migratory waterfowl population by allowing expansion of the hunting use? As the FWS has carried out this procedure through compatibility determinations, refuge-specific EAs, and the Final Rule promulgation, no one has looked seriously at the cumulative impacts on waterfowl populations.

The FWS claimed that its Final Rule allowing or expanding waterfowl hunting on six refuges in the Mississippi Flyway did not “constitute a major Federal action significantly affecting the environment” and therefore an EIS was not required for the promulgation of the regulations.¹²¹ However, the Council on Environmental Quality (“CEQ”) requires cumulative actions to be considered in a single EIS.¹²² “Cumulative actions” are defined as actions “which when viewed with other proposed actions have cumulatively significant impacts.”¹²³ Based upon the CEQ regulations and case law, one can argue that the Final Rule contains at least six individual government actions that should be included within a single EIS.¹²⁴ Simply looking at the Waterfowl Hunting Plan for the WCNWR demonstrates why the FWS should be concerned about the actions to expand waterfowl hunting. The plan states, “[h]unting affects waterfowl populations mostly on a regional and national basis. Harvest of waterfowl at the Refuge should not negatively affect the overall harvest and management needs the Service and the States establish for waterfowl populations on a regional and continent-wide basis.”¹²⁵ These comments remind us of the very reasons that federal regulation of migratory waterfowl was necessary in the first place.

In *Missouri v. Holland*,¹²⁶ the state of Missouri challenged the federal regulation of hunting waterfowl.¹²⁷ The U.S. Supreme Court found that federal regulation was necessary to protect “a national interest [on waterfowl populations] of very nearly the first magnitude.”¹²⁸

Approving new hunting regulations in a piecemeal fashion arguably ignores the national management precedent established over the past century. If refuge managers are merely superficially considering the nationwide population impacts from individual refuge waterfowl hunting, and the FWS subsequently uses these decisions to satisfy NEPA requirements, the FWS is falling short of its mandate “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States.”¹²⁹ The Improvement Act still empowers the FWS with the authority to manage the refuge System on a national or federal basis. Waterfowl management has only been successful by avoiding the race-to-the-bottom that decidedly local decision-making can produce. Pursuant to NEPA, FWS is required take a “hard look” at the overall impacts of its decisions. Seemingly, the FWS did not take any such “hard look” at the cumulative impacts of waterfowl hunting when it approved the challenged rules. Deferring to individual refuge managers for waterfowl hunting determinations ignores the national mandate of the Improvement Act and replaces it with a result decidedly local in nature. If the Improvement Act is truly “organic” as Congressional proponents have claimed, the FWS must evaluate the cumulative impacts of expanding waterfowl hunting on refuges.

In this case, the preparation of an EIS may have actually benefited waterfowl hunters, because such a study would work to serve, and ultimately save, the priority use of hunting, both on and off refuges. Preserving wildlife and creating refuges has long been recognized as necessary in order to preserve the future of hunting, especially waterfowl hunting. Instead of viewing litigation such as *Fund for Animals* as a frontal assault on

¹²¹ Answer, *supra* note 98.

¹²² 40 C.F.R. § 1508.25(a)(2) (2005).

¹²³ *See id.*

¹²⁴ *See e.g.*, *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (describing cumulative actions).

¹²⁵ Hunting Plan, *supra* note 93.

¹²⁶ 252 U.S. 416 (1920).

¹²⁷ *Id.* at 430-31.

¹²⁸ *Id.* at 435 (finding piecemeal state regulation of waterfowl to be “vain”).

¹²⁹ *See Improvement Act*, *supra* note 60.

hunting, groups like Ducks Unlimited¹³⁰ should unite in urging the FWS to proceed with caution when opening such refuges to hunting.¹³¹

Pro-hunting groups that focus their efforts on the theme of hunters versus non-hunters may actually cause more damage to the future of hunting by ignoring the importance of maintaining certain refuges as inviolate sanctuaries. Those who wish to preserve the future of waterfowl hunting should welcome enhanced scrutiny of the FWS's rules, especially concerning the cumulative effects of expanding waterfowl hunting opportunities in major flyway areas. Even though many of these refuge lands were recently purchased with hunting dollars, and many previously allowed private hunting, the future of hunting may actually benefit from a cumulative analysis, detailing the impacts of limiting hunting in some refuges.

IV. CONCLUSION

The history of hunting on National Wildlife refuges has at times been contentious. The enactment of the 1997 Improvement Act indicates that the arguments of hunters have largely carried the day. The conception that refuges comprise "inviolable sanctuaries" has progressively been eroded over the last fifty years. This erosion represents the reality that hunters, as a group, are largely responsible for the creation and maintenance of National Wildlife Refuges. As a wildlife-dependant priority use, hunting is on an equal plane with other wildlife-dependant priority uses (e.g., wildlife observation and photography). Such a designation was designed to insulate the consumptive wildlife uses of hunting and fishing from the other wildlife-dependant use conflicts. The mandates of the Improvement Act are such that individual refuge managers must seek to incorporate and allow hunting whenever possible and will likely result in the continued expansion of hunting on refuges. This result was arguably contemplated and desired when Congress enacted the Improvement Act. The expansion of any use, however, requires a finding that such a use is compatible with the general conservation purposes (or use) of the refuge. Presently it would appear that the FWS compatibility determination is little more than a rubber stamp when a priority public use is considered.

Overall, most of the Plaintiffs' arguments in *Fund for Animals* seem to ignore the elevated status that hunting receives in the Improvement Act. Like it or not, Congress intended to promote hunting on refuges. Ironically, many of the refuges which are the subject of *Fund for Animals* have only recently been established and were probably never "inviolable sanctuaries" to begin with. In addition, most of the dollars for the purchase of these lands came from hunters, and it is likely hunting was allowed on most of these areas prior to their designation as refuges. Nonetheless, the designation of these lands as refuges allows the FWS to limit those areas open to hunting; once an area is opened to hunting it is likely to receive increased hunting pressure. Refuge managers are in the best position to evaluate the compatibility of all types of hunting, but the FWS may not be able to utilize refuge-specific EAs to satisfy NEPA requirements in all cases.¹³² If waterfowl populations are indeed threatened or declining, as some studies have suggested, conducting an EIS *prior* to allowing the expanded use of hunting is sound policy.

While individual refuges may find the hunting use compatible, many have recognized that waterfowl populations do not belong to one place, but rather come and go.¹³³ Truly, waterfowl management has been practiced on a decidedly federal basis¹³⁴ since the 1913 enactment of the Weeks-McLean bill.¹³⁵ Refuge-by-

¹³⁰ Ducks Unlimited remains steadfast in its opposition to the Fund's lawsuit. Ducks Unlimited, *Ducks Unlimited and Partners Stand Fast in Defense of Hunting on National Wildlife Refuges*, at <http://www.ducks.org/News/RefugeLitigationUpdate.asp>.

¹³¹ Of course, the Fund for Animals did not initiate this action to preserve the sport of waterfowl hunting. Nonetheless, the merits of the case should at least be considered by those wishing the sport of waterfowl hunting to endure.

¹³² As previously suggested, the FWS should be able to satisfy NEPA requirements in this fashion when expanding hunting for species with smaller ranges. This article argues that this method is not appropriate for properly assessing waterfowl hunting impacts.

¹³³ CLARK, *supra* note 114, at 24.

¹³⁴ While the rule promulgations taken by the Department of the Interior are certainly federal actions, their adoption seems to result in the very kind of piecemeal waterfowl management the Supreme Court discredited in *Missouri v. Holland*.

refuge compatibility determinations, if used as the sole rationale for expanding the hunting use, will not appropriately account for the cumulative population impacts of widespread increases in waterfowl hunting.

While the continued loss of wetland habitat is regarded as the most significant threat to continental waterfowl populations, this reality only underscores the importance of maintaining a refuge system that diligently considers hunting's expansion. Although groups like Ducks Unlimited have been successful at preserving wetland habitat, some estimate that the United States is losing as much as 800 acres of wetlands per day.¹³⁶ If wetland losses continue at this pace, the Refuge System must assume an even greater role in preserving waterfowl populations. The promulgation of the disputed Rules may also present the proverbial "tip of the iceberg" in terms of resource depletion. As refuge managers seek to apply the mandates of the Improvement Act, it may become a foregone conclusion that most refuges will be opened to hunting; once this steam engine begins to roll down the track, hunting's expansion, irresponsible or not, may be unavoidable. By never considering the cumulative impacts of opening many refuges to waterfowl hunting, the FWS is not providing the requisite "hard look" that NEPA requires. If such policies continue, waterfowl hunters may soon wonder, as hunters did in the early Twentieth Century: "what happened to all the ducks?"

¹³⁵ FOX, *supra* note 1, at 157. The Weeks-McLean Act was passed in 1913 when President William Howard Taft signed it without reading it. *Id.* President Taft later said he would not have signed it had he known it expanded federal powers to the area of waterfowl management. *Id.* The Act empowered the Biological Survey to regulate hunting seasons and to protect some species and was ultimately incorporated in a treaty with Canada and upheld by the Supreme Court in *Missouri v. Holland*. 262 U.S. 416 (1920).

¹³⁶ CLARK, *supra* note 114, at 15.