

# Two Underdogs and a Mutual Interest Lost in the Wind: The Shortcomings of Environmental Law and Animal Law in Protecting Animals and Suggestions on How to Reconcile the Two Movements

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## INTRODUCTION

Environmental law and animal law are closely related and have both been successfully employed to protect animals. Both the environmental and animal rights movements reflect an overall shift in mentality that has taken hold throughout the latter half of the twentieth century and into the twenty-first: human beings must start taking responsibility for our actions and caring about how these actions impact our surroundings.

Environmental law started to expand in part due to Rachel Carson's 1962 book *Silent Spring*. Carson's views illustrated a fundamental paradigm shift, declaring that if society wishes to prosper, we must take account of the consequences of each individual decision and action.<sup>1</sup> Her views reflect utilitarianism, the idea that society will self-destruct by way of pollution and toxins so long as public and private enterprises continue to act as individuals, instead of as an interconnected being.<sup>2</sup> Carson asks us to view ourselves as mere pieces in the puzzle—rather than as the entire puzzle—because that is the only practical way to achieve greater environmental health.

Carson's paradigm shift is applicable to the animal rights movement as well because both environmentalism and animal rights activism ask humans to look within, recognize the interconnectedness and implications of our actions, and actively put the health and welfare of the natural world ahead of our monetary objectives. Despite this similar call to action, many environmentalists view animal rights activists as working against the interests of the environment. According to Mark Sagoff, a prominent environmentalist philosopher, "environmentalists cannot be animal liberationists. Animal liberationists cannot be environmentalists."<sup>3</sup> He claims the reduction of animal misery requires the sacrifice of the "authenticity, integrity, and complexity of ecosystems to protect the rights, or guard the lives, of animals."<sup>4</sup> This Note deconstructs Sagoff's belief that the movements are at odds with one another and instead argues that not only can the movements coexist, but they can work together to achieve harmony in the natural world.

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1. See generally RACHEL CARSON, *SILENT SPRING* (1962).

2. *Id.*; Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 *LOY. L.A. L. REV.* 981, 982 (1994).

3. Mark Sagoff, *Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce*, 22 *OSGOODE HALL L.J.* 297, 304 (1984).

4. *Id.*

The tension between the two movements is evident in the language and application of the most well-known environmental statutes. Environmental statutes, such the National Environmental Policy Act (“NEPA”), Endangered Species Act (“ESA”), Clean Water Act (“CWA”), and Clean Air Act (“CAA”), have been successfully employed to protect animal life.<sup>5</sup> However, these environmental statutes do not provide substantive animal protections and only produce animal protection as a by-product of environmental protection.<sup>6</sup> This Note argues that environmental statutes fail to comprehensively address animal welfare and adequately create a plan for implementation and enforcement of animal welfare standards. This failure not only disadvantages animals, but also the environment and human beings. This Note discusses several failures of environmental statutes but specifically delves into the ESA’s failure to protect hybrid species.

Part I of this Note outlines the basics and the shortcomings of the four most prominent environmental statutes: NEPA, CAA, CWA, and ESA. Part II outlines various animal protection laws and their contribution to animal welfare and protection. Part III explains why and how environmental law and animal law must work together, specifically focusing on the factory farming industry as an example of the mutual interests of both movements. Part IV offers suggestions for how environmental laws can be expanded to be more inclusive of animal protection concerns.

## I. THE ENVIRONMENTAL LAW PERSPECTIVE

### A. BACKGROUND ON ENVIRONMENTAL LAW

Environmental law is established in the United States legal system through numerous international, federal,<sup>7</sup> state, and local laws. Environmental law

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5. *See, e.g.*, *Humane Soc’y of the U.S. v. HVFG, LLC*, 2010 U.S. Dist. LEXIS 44961 (S.D.N.Y. May 6, 2010) (utilizing the Clean Water Act to target and sue a foie gras company for inhumane feeding practices, resulting in fines under the Act); *Concerned Area Residents for the Env’t v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (holding that defendant must obtain a permit for storing and disposing liquid manure on its large dairy farm under the Clean Water Act).

6. For an overview of various environmental laws and their purposes, *see infra* note 9. Each environmental statute protects a specific area of the environment, or the environment from a specific harm—air, water, endangered species, hazardous waste. These statutes’ primary purpose is to protect the environment and public health. *Laws and Executive Orders*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/HQE8-W9TN> (last accessed Oct. 28, 2021). The protection of animals is not a stated purpose of any environmental statute, save for the protection of endangered species under the Endangered Species Act. Thus, while possible to protect animals under these statutes, their protection is secondary to that of the protection of the environment.

7. Clean Air Act, 42 U.S.C. § 7401 et seq. (regulating air emissions from stationary and mobile sources); Clean Water Act, 33 U.S.C. § 1251 et seq. (establishing the basic structure for regulating discharges of pollutants into the waters of the United States, and regulating quality standards for surface waters); National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (assuring that branches of government give proper consideration to the environment prior to undertaking major federal actions that significantly impact the environment); Endangered Species Act, 16 U.S.C. § 1531 et seq. (establishing a program for the conservation of threatened and endangered plants and animals and their respective

became prominent due to the common law's shortcomings in adequately protecting air, water, and wildlife.<sup>8</sup> The common law did not provide sufficient protection for the environment nor did it provide remedies for environmental harms.<sup>9</sup> The first environmental cases were based on common law because statutory law did not exist at the time.<sup>10</sup> Environmental consciousness grew out of property and tort concepts as litigants brought common law private nuisance and public trust doctrine claims.<sup>11</sup> Although tort law and property law provided some environmental protections, they were ill-equipped to "effectively deal with environmental problems" because the doctrine was contingent on what courts, at any given time, believed to be "unreasonable."<sup>12</sup> What followed was an "environmental revolution" of sorts—a political and legal movement led by motivated and frustrated citizens and organizations hungry for change.<sup>13</sup>

Environmental statutes have been successfully employed in the court system to promote environmental protection and health in part due to their citizen suit provisions.<sup>14</sup> Citizen suit provisions increase accessibility of the courts to the public.<sup>15</sup> The provisions usually "include express language granting a private right of action" allowing for citizens to bring environmental harms to the courts for judicial review of agency actions.<sup>16</sup> The accessibility granted to citizens under these provisions is one reason why activists have utilized environmental statutes to promote and further animal protection through the judicial system.<sup>17</sup>

#### B. HOW DOES ENVIRONMENTAL LAW PROTECT ANIMALS?

Even though environmental statutes have been successfully implemented to demand better treatment of and protection for animals, these statutes only protect animals incidentally because their primary purposes are to protect the environment.<sup>18</sup> Therefore, activists settle for secondary protections to animals.

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habitats); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (providing a federal funding source to clean up uncontrolled or abandoned hazardous waste sites and other accidents, spills, and releases of pollutants and contaminants); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (giving EPA authority to control hazardous waste from cradle to grave, including the generation, transportation, treatment, storage, and disposal of hazardous waste).

8. Megan Senatori, *The Second Revolution: The Diverging Paths of Animal Activism and Environmental Law*, 8 WIS. ENV'T L.J. 31, 35 (2002).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 33.

13. *Id.*

14. De Anna Hill, *Combating Animal Cruelty with Environmental Law Tactics*, 4 J. ANIMAL L. 19, 19 (2008).

15. *Id.*

16. *Id.*

17. *Id.* at 20.

18. Senatori, *supra* note 8.

## 1. National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) provides the national charter for the protection of the environment.<sup>19</sup> NEPA requires federal agencies and entities acting on behalf of the federal government to carefully consider the environmental impacts of their actions.<sup>20</sup> For example, the Fish and Wildlife Service (“FWS”) provides “information for use in NEPA documents, and reviews and provides comments on these documents.”<sup>21</sup> The goal of the FWS in carrying out NEPA is to improve environmental decisions and further the conservation, protection, and enhancement of fish, wildlife, plants, and their habitats.<sup>22</sup>

Under NEPA, if a federal agency is going to take a “major federal action” that may have a significant impact on the environment, the agency is required to produce an Environmental Impact Statement (“EIS”).<sup>23</sup> Major federal actions tend to fall within one of the following categories: (1) adoption of an official policy, such as rules, regulations and interpretations under the Administrative Procedure Act; (2) adoption of form plans, such as official documents prepared or approved by Federal Agencies; (3) adoption of programs, such as a group of concerted actions to implement a specific policy or plan; or (4) approval of specific projects, such as construction or management activities located in a defined geographic area.<sup>24</sup> If the agency is unsure whether there will be a significant impact, the agency may perform an Environmental Assessment (“EA”) to determine whether an EIS is necessary. If the EA concludes that there will be no significant impact, the agency must issue a Finding of No Significant Impact (“FONSI”).<sup>25</sup> Because NEPA is procedural in nature, NEPA does not require agencies to make decisions that cause the least environmental harm nor change course when environmental harms result.<sup>26</sup> Agencies must merely *consider* environmental issues, not “act on those considerations.”<sup>27</sup>

NEPA can serve—and has served—as the basis for animal protection litigation. For example, the Humane Society has brought suits against agencies challenging the insufficiency of environmental review under NEPA.<sup>28</sup> Judges have

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19. 42 U.S.C. § 4321.

20. *Summary of the National Environmental Policy Act*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/HJ3K-GMAB> (last accessed Oct. 28, 2021).

21. *National Environmental Policy Act*, FISH & WILDLIFE SERV., <https://perma.cc/7E45-2JKB> (last accessed Oct. 28, 2021).

22. *Id.*

23. 42 U.S.C. § 4332(C).

24. 40 CFR 1508.1.

25. 40 C.F.R. § 1508.9 (2019).

26. Lars Johnson, *Pushing NEPA’s Boundaries: Using NEPA to Improve the Relationship Between Animal Law and Environmental Law*, 17 N.Y.U. ENV’T L.J. 1367, 1394 (2009).

27. *Id.*

28. *See Humane Soc’y of the U.S. v. Johanns*, 2007 WL 1120404 (D.D.C. Apr. 13, 2007) (challenging horse slaughter inspection system without first conducting any environmental review under NEPA).

been hesitant to grant substantive rights to animals in deciding cases based on animal welfare.<sup>29</sup> This hesitancy is lessened by NEPA's procedural nature, which has made NEPA a particularly powerful tool in animal advocacy.<sup>30</sup> However, because of NEPA's lack of substantive "teeth," its use in furtherance of animal protection is only relevant insofar as animal protection is vital to the procedural requirements set forth by the statute.

## 2. Clean Water Act

The Clean Water Act ("CWA") was enacted to "restore and maintain chemical, physical, and biological integrity of the Nation's Waters."<sup>31</sup> The Environmental Protection Agency ("EPA") administers permit programs, which establish limits on the amount of discharge which can come from specific sources.<sup>32</sup> CWA has a citizen suit provision to enforce EPA's duties.<sup>33</sup>

Some organizations have utilized the CWA to fight Concentrated Animal Feeding Operations ("CAFOs"), also known as factory farms.<sup>34</sup> Organizations bring suits under the CWA, in part, because they cannot file animal cruelty claims under the Animal Welfare Act.<sup>35</sup> CAFOs are large contributors to water pollution because livestock produce large amounts of waste that ends up in groundwater.<sup>36</sup> CAFOs typically spray farm animal waste onto croplands or store them in open-air waste pits called lagoons, which often leak and runoff into ground and surface waters.<sup>37</sup> Although CWA cases often have positive consequences for animals, the poor treatment of animals in CAFOs is not specifically at issue in CWA litigation. CAFOs may have to change their policies surrounding waste disposal to comply with the CWA, but that does not necessarily mean that their inhumane practices towards the farmed animals will end.<sup>38</sup>

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29. *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (finding that no mental anguish damages could be awarded for the death of a dog because an animal is property); *Rabideau v. City of Racine*, 627 N.W.2d 491, 491–99 (Wis. 2001) (categorizing pets as property and applying property law to them).

30. Johnson, *supra* note 26, at 1397.

31. 33 U.S.C. § 1251(a); Hill, *supra* note 14, at 24.

32. *Summary of the Clean Water Act*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/ET2K-9UFC> (last accessed Aug. 1, 2021).

33. 33 U.S.C. § 1365(a) ("any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of an effluent standard or limitation under this Act.").

34. See Section III.a. for a comprehensive look at CAFOs—what they are and how they function within both the environmental and animal rights movement.

35. Farm animals are excluded under the Animal Welfare Act. Hill, *supra* note 14, at 25. The Animal Welfare Act is discussed extensively in Section II.b.i.1.

36. *Agriculture and Food*, Sierra Club, <https://www.sierraclub.org/policy/agriculture/food> (last accessed Jan. 15, 2022).

37. Hill, *supra* note 14, at 26–27.

38. *Id.* at 30–31.

### 3. Endangered Species Act

The Endangered Species Act (“ESA”) provides a program for the conservation of threatened and endangered plants and animals and their habitats.<sup>39</sup> FWS works closely with the National Marine Fisheries Service (“NMFS”) to implement the ESA.<sup>40</sup> FWS maintains a list of endangered species, including birds, insects, fish, mammals, flowers, grasses, and trees.<sup>41</sup>

The ESA prohibits any taking—killing or harming—of any listed species of endangered fish or wildlife.<sup>42</sup> The ESA is a unique environmental statute, because it directly protects these endangered and threatened species. The statute protects animals and their habitats, as opposed to merely protecting the environment and incidentally protecting animals like other environmental statutes.<sup>43</sup> However, the ESA still has shortcomings that can be addressed by statutory amendment.

The ESA’s ambiguity in the protection of animals is evident in its treatment—or lack thereof—of hybrid species. The ESA requires the Secretary of the Interior (“Secretary”) to determine whether any species is threatened or endangered.<sup>44</sup> A species is endangered when it is “in danger of extinction throughout all or a significant portion of its range,”<sup>45</sup> and threatened when it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”<sup>46</sup> The Secretary must make endangered and threatened status determinations “solely on the basis of the best scientific and commercial data available to him.”<sup>47</sup> Endangered and threatened species are then listed in the Code of Federal Regulations.<sup>48</sup> Hybrid animals bred or propagated in captivity are not explicitly protected by the ESA. FWS, the agency charged with administering the ESA, defines a hybrid as “offspring of animals or plants whose parents are different species or subspecies and, in the case of the ESA, at least one parent is a listed species.”<sup>49</sup> Neither the ESA nor its related regulations reference hybrid animals in any of provision. Thus, the treatment of hybrid animals under the ESA is uncertain.<sup>50</sup>

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39. 16 U.S.C. §§ 1531–1544; *Summary of Endangered Species Act*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/9CZB-Z87E> (last accessed Dec. 10, 2019).

40. *ESA Implementation: Overview*, U.S. FISH & WILDLIFE SERV. (June 4, 2021), <https://perma.cc/4JBX-GFUX>.

41. U.S. ENV’T PROT. AGENCY, *supra* note 39.

42. William Buzbee, Professor, Lecture on the Endangered Species Act at Georgetown University Law Center (Nov. 25, 2019).

43. *Id.*

44. *American Wildlands v. Kempthorn*, 530 F.3d 991, 994 (D.C. Cir. 2008).

45. 16 U.S.C. § 1532(6).

46. *Id.* § 1532(20).

47. *Id.* § 1533(b)(1).

48. *See, e.g.*, 50 C.F.R. § 17.11(h) (2019).

49. U.S. FISH & WILDLIFE SERV., PERMITS FOR ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT (2013), <https://perma.cc/X7LU-ZPM7> (last accessed Oct. 28, 2021).

50. 16 U.S.C. §§ 1531–1544.



Consider, for example, the red wolf. Red wolves are “medium sized canids known for reddish fur along their neck and legs.”<sup>51</sup> Red wolves are listed, or designated, as endangered; however, there is controversy surrounding their listing.<sup>52</sup> To be listed, the group of animals or plants must be a “species.”<sup>53</sup> The term “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”<sup>54</sup>

Some studies classify red wolves as a species, some argue that the red wolf is a subspecies of the gray wolf, and others argue that the red wolf is a subspecies of coyote.<sup>55</sup> Under the ESA, if a red wolf is a discrete species, its protection is warranted due to its risk of extinction in the wild.<sup>56</sup> Further, if a red wolf is a subspecies of the gray wolf, it would also warrant listing because the ESA “specifically identifies subspecies as entities that may be eligible for listing.”<sup>57</sup> The same is true if red wolves are a subspecies of coyote.<sup>58</sup> The true dilemma arises if red wolves are hybrids produced by coyotes and gray wolves. FWS has not spoken on the issue, leaving open the question: are hybrids even species at all? The only guideline for whether a red wolf may be deemed a species is through the “best scientific and commercial data available.”<sup>59</sup> The best available science does not have a clear answer, given the split amongst scientists.<sup>60</sup> The implications of statutory and agency ambiguity on the issue affect environmental and animal lawyers alike. In *United States v. Kapp*, the Seventh Circuit held that crosses between listed species and non-listed species were not protected under the ESA.<sup>61</sup> Therefore, the lion-tiger hybrids (“ligers”) at issue in the case were not protected

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51. Oliver Frey, *When Science and the Statute Don't Provide an Answer: Hybrid Species and the ESA*, 26 DUKE ENV'T L & POL'Y F. 181, 189 (2015).

52. See NAT'L CTR. FOR ECOLOGICAL ANALYSIS AND SYNTHESIS, REVIEW OF PROPOSED RULE REGARDING STATUS OF THE WOLF UNDER THE ENDANGERED SPECIES ACT (2014), <https://perma.cc/T6HP-2349> (last accessed Oct. 23, 2021). A 2014 FWS peer reviewed report indicated that there was no scientific consensus on the status of the red wolf. FWS maintained the status quo of listing the red wolf as endangered, but it is unclear exactly how the FWS arrived at that conclusion.

53. 16 U.S.C. § 1531(a).

54. *Id.* § 1532(16).

55. Frey, *supra* note 51, at 190.

56. *Red Wolf*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/6F5J-VYF3> (last accessed Aug. 1, 2021).

57. Frey, *supra* note 51, at 191.

58. *Id.*

59. 16 U.S.C. § 1533(b)(1)(A).

60. See, e.g., Steven M. Chambers et al., *An Account of the Taxonomy of North American Wolves from Morphological and Genetic Analyses*, 77 N. AM. FAUNA 1, 19 (2012) (maintaining the red wolf as a distinct species). But see, e.g., Bridget M. vonHoldt et al., *A Genome-Wide Perspective on the Evolutionary History of the Enigmatic Wolf-like Canis*, 21 GENOME RES. 1294 (2011) (arguing that the red wolf is a subspecies of the gray wolf); Kevin D. Hill, *The Endangered Species Act: What Do We Mean by Species?*, 20 B.C. ENV'T AFF. L. REV. 239, 255 (1993) (arguing that the red wolf is a subspecies of coyote).

61. *United States v. Kapp*, 419 F.3d 666, 676 (7th Cir. 2005).



because lions were not listed in 2005.<sup>62</sup> With minimal caselaw exploring this issue, hybrid species remain minimally protected, and there is no indication that this will change soon.

#### 4. Clean Air Act

The enactment of the Clean Air Act (“CAA”) has similarly benefited animals. Animals, like humans, are affected by air pollution; thus, more stringent standards for air quality have benefited wildlife.<sup>63</sup> The CAA requires the establishment of federal standards for various “criteria” air pollutants, known as National Ambient Air Quality Standards (“NAAQS”).<sup>64</sup> Plans to achieve NAAQS are set by states through state implementation plans (“SIP”).<sup>65</sup> The CAA also sets standards for mobile sources, new and modified sources, and hazardous air pollutants (HAPs).<sup>66</sup>

The CAA also has a citizen suit provision.<sup>67</sup> The seminal CAA Supreme Court case is *Massachusetts v. EPA*,<sup>68</sup> which gave EPA the legal authority regulate greenhouse gas emissions as air pollutants under the CAA (although they are still not criteria pollutants subject to NAAQS). Incidentally, animals benefit from this regulation because, like humans, they are negatively impacted by climate change catastrophes.<sup>69</sup> The rise of greenhouse gas emissions and subsequent changing climate is linked to loss of wildlife and loss of habitats.<sup>70</sup> Global warming is melting sea ice, threatening polar bears, and leading to that species’ listing under the ESA.<sup>71</sup>

The CAA’s statutory language does not explicitly protect animals. However, CAA cases have had significant positive impacts on animal welfare. Controlling air pollutants by setting higher standards for air quality under the CAA has the potential to translate into better animal facilities in CAFOs. This includes: “ventilation for animals, larger quarters, different waste disposal, and possibly fewer animals in a facility.”<sup>72</sup> Furthermore, new sources of pollution are subject to more stringent regulation. Thus, new factory farms must meet a higher standard of air quality than existing farms.<sup>73</sup> These changes would not protect farm

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62. *Id.*

63. *The Clean Air Act: 40 Years of Protecting Wildlife from Pollution*, NAT’L WILDLIFE FED’N., <https://perma.cc/G2VX-XWB4> (last accessed Nov. 25, 2019).

64. Buzbee, *supra* note 42.

65. *Id.*

66. *Id.*

67. 42 U.S.C. § 7604(a).

68. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

69. NAT’L WILDLIFE FED’N, *supra* note 63.

70. *Id.*

71. *Id.*

72. Hill, *supra* note 14, at 33.

73. New Source Review requires a preconstruction review process for new and modified stationary sources. Existing stationary sources do not have to go through New Source Review and obtain

animals from other types of abuse, such as separation of mothers and their babies weeks after the babies are born.<sup>74</sup> However, any changes in animal living conditions as a result of increased air quality standards would be a large step in the right direction for animals.

## II. THE ANIMAL LAW PERSPECTIVE

This Section details Animal Law—its roots and inception, how legislation and litigation have pushed for more protective measures, and where it falls short in both its substantive protections of animals and its enforcement. Animal law's inception was not as clearly defined as that of environmental law, in part due to division within the animal movement.<sup>75</sup> As with environmentalism and other movements which focus on a better, more progressive future, animal activists have struggled to convince the world that *now* is the time to care and to act.<sup>76</sup> Statutes, such as the Animal Welfare Act and the Humane Methods of Slaughter Act (both explained later in this Note), were enacted long before the environmental movement; however, Congress has not continued this trajectory, causing stagnation in animal law. In Subsection A, this Note describes how the fragmented animal movement impedes the effectiveness of animal law. In Subsection B, this Note goes on to discuss legislation and litigation initiatives within the animal law movement.

### A. BACKGROUND ON ANIMAL LAW: A ANIMAL WELFARE VS. ANIMAL RIGHTS

The division among methodologies in the animal movement has hindered its progress, because those with differing views within the movement often refuse to work with one another.<sup>77</sup> The division in the animal movement is apparent through animal welfare and animal rights factions. Although this division is not the sole issue facing the animal movement, it scratches the surface of the pervasive, and often damaging, disconnect within the movement.

Animal welfare activists demand an ethical commitment against suffering<sup>78</sup> and support the proposition that animals have a right not to be mistreated.<sup>79</sup> Animal welfare activists demand that humans avoid causing harm and suffering to animals.<sup>80</sup> Animal rights activists, on the other hand, argue that nonhuman animals should enjoy legal rights similar to those enjoyed by human beings and

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preconstruction review and approval. *Regulatory and Guidance Information by Topic: Air*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/XFX9-MYS9>.

74. *The Dairy Industry*, PETA, <https://perma.cc/H3PX-KGQH> (last accessed Aug. 1, 2021).

75. David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87, 90 (2004).

76. *Id.* at 89.

77. *Id.* at 90.

78. Johnson, *supra* note 26, at 1369–70.

79. Senatori, *supra* note 8, at 40 (citing MARGARAT C. JASPER, ESQ., ANIMAL RIGHTS LAW 3–4 (1997)).

80. Johnson, *supra* note 26, at 1370.

should be granted standing in court.<sup>81</sup> The most common view of the animal rights movement is that the moral and legal equality that humans extend to one another should logically extend to animals because animals have the same capacity for pain and fear as humans.<sup>82</sup> Neither faction of the animal movement dominates the field; however, they do not always coexist in peace, causing clashes between the two movements.<sup>83</sup> Animal rights activists argue that animal welfare enthusiasts are not addressing the crux of the issue, and are instead offering surface level reform that upholds the complacency that is at the root of the problem for animals.<sup>84</sup> Animal welfare activists argue that animal rights activists' demands are unrealistic and unattainable.<sup>85</sup> As a result, animal welfare activists argue, animal rights activists undermine overall efforts to protect animals.<sup>86</sup> Animal law has still not progressed far enough and environmental law still represents the best way forward for protection of animals.

B. HOW SUCCESSFUL HAS ANIMAL LAW LEGISLATION AND LITIGATION BEEN IN ENSURING THE PROTECTION OF ANIMALS?

In theory, animal rights statutes and animal rights litigation both center on substantive protections for animals. However in reality, animal rights statutes and animal rights litigation have only achieved minimal results in securing the protection of animals. While some statutes were too broad and left out entire groups of animals, others only protected specific animal rights violations. In the end, lack of public awareness and lack of government enforcement renders many animal rights statutes virtually useless. This Section explores various animal rights statutes and animal protection techniques and offers insight into their shortcomings.

1. Legislation—What Has Legislation Accomplished and What Does it Still Fail To Do?

*a. The Animal Welfare Act and the Humane Methods of Slaughter Act*

The Animal Welfare Act (“AWA”) and the Humane Methods of Slaughter Act (“HMSA”) have provided the broadest protections to animals thus far in the

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81. See *Matter of Nonhuman Rights Project Inc. v. Stanley*, 49 Misc. 3d 746 (N.Y. Sup. Ct. 2015) (animal rights organization filed a writ of habeas corpus demanding recognition of legal personhood and right to bodily liberty for chimpanzees); *In re Nonhuman Rights Project Inc. ex rel Tommy v. Patrick C. Lavery*, 2014 N.Y. App. Div. LEXIS 9122 (App. Div. July 9, 2014) (filing a petition for common law writ of habeas demanding recognition of legal personhood and right to bodily liberty for chimpanzees).

82. Steven M. Wise, *Legal Rights for Nonhuman Animals: The Case for Chimpanzees and Bonobos*, 2 ANIMAL L. 179, 184 (1996).

83. Johnson, *supra* note 26, at 1370.

84. *Id.*

85. *Id.* at 1370–71.

86. *Id.*

United States. The AWA was signed into law in 1966 and regulates the treatment of animals in “research, exhibition, transport, and by dealers.”<sup>87</sup> The HMSA was originally passed in 1958 and is enforced by the United States Department of Agriculture (“USDA”) Food Inspection Service (“FSIS”). The HSMA requires the “proper treatment and humane handling of all food animals slaughtered in the USDA inspected slaughter plants.”<sup>88</sup> Notably, however, it does *not* apply to chickens or other birds.<sup>89</sup> The AWA and HMSA were passed before the environmental statutes, but are not as well-known by the public and have not been as effective in practice. Congress has failed to address animal welfare in more recent years for two reasons: (1) climate change entered the spotlight as a political issue demanding congressional and societal attention; and (2) Congress refused to spend time and money drafting and passing new animal law statutes after the AWA and the HSMA fell short of their goals.<sup>90</sup> The specific shortcomings of these statutes are addressed in Section III of this Note.

*b. Anti-Cruelty Statutes and Their Shortcomings*

Anti-cruelty statutes are another key legislative tool in animal law. Because Congress often struggles to pass legislation due to political gridlock, states possess more latitude to enact anti-cruelty laws.<sup>91</sup> Anti-cruelty statutes gained traction throughout the twentieth and early twenty-first centuries. By the end of 2003, forty-one states had codified anti-cruelty legislation with felony provisions.<sup>92</sup> However, the successful use of anti-cruelty statutes is hindered by the requirement that the action be brought through a prosecutor’s office.<sup>93</sup> Prosecutors as individuals “may or may not be motivated to act on behalf of animals.”<sup>94</sup> Because these statutes only operate in the criminal system, a person, for example, cannot sue another person to recover money for an injury to his pet.<sup>95</sup>

Federal anti-cruelty legislation exists; however, its implications are not yet known. In November 2019, President Trump signed a bipartisan bill making acts of animal cruelty a federal crime punishable with fines and up to seven years in prison.<sup>96</sup> This bill, the Preventing Animal Cruelty and Torture Act, expanded a 2010 law signed by President Obama, which banned videos showing animals

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87. See generally 7 U.S.C. § 2131.

88. *Humane Methods of Slaughter Act*, U.S. DEP’T OF AGRIC., <https://perma.cc/J2DF-832S> (last accessed Dec. 10, 2019).

89. *Id.*

90. *Id.*

91. Favre, *supra* note 75, at 93.

92. *Id.* at n.24.

93. *Id.* at 93.

94. *Id.*

95. Rebecca F. Wisch, *Brief Summary of State Cruelty Laws*, ANIMAL LEGAL & HISTORICAL CTR. (2010), <https://perma.cc/5ESJ-EMXJ> (last accessed Oct. 23, 2021).

96. Mihir Zaveri, *President Trump Signs Federal Animal Cruelty Bill Into Law*, N.Y. TIMES (Nov. 25, 2019), <https://perma.cc/D3H7-X2YA>.

being “crushed, burned, drowned, suffocated, impaled or subjected to other forms of torture.”<sup>97</sup> In April 2010, the U.S. Supreme Court ruled that Obama Administration’s law violated the First Amendment’s guarantee of free speech because the law was overbroad and facially invalid.<sup>98</sup> Even though Obama’s original law was deemed unconstitutional, Trump’s bill revived the law and displayed political unity between the right and left, showcasing the continued possibility for progressive legislative changes in terms of anti-cruelty.<sup>99</sup>

Lastly, at the state level, there are myriad possibilities for furthering animal protection through legislation. Activists often do not target state legislation in hopes of passing nationwide federal legislation that may be more advantageous.<sup>100</sup> Although national programs are most likely to result in uniform enforceable animal protections, state actions should not be disregarded. Although the AWA, HSMA, and state and federal anti-cruelty statutes provide more substantive protections for animals, animal law is still incomplete.

## 2. Litigation—How Has Animal Welfare Been Addressed in the Courts?

Citizen activists and animal lawyers challenge organizations that are in violation of existing animal protection laws. This is often ineffective due to lack of standing for animals.<sup>101</sup> Plaintiffs must prove direct harm to themselves.<sup>102</sup> Like the environmental law issue, litigation can end with positive results for animals. But, with no direct judicial mandate specifically addressing animal cruelty in its own right, protections for animals are not comprehensive. When standing is granted solely based on harm to human beings, the remedy in court is to stop the actions harming the human beings, which may not be enough to prevent the harms to nonhuman animals.<sup>103</sup>

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97. *Id.*

98. *United States v. Stevens*, 559 U.S. 460 (2010).

99. *Id.*

100. Favre, *supra* note 75, at 94.

101. *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004) (holding that cetaceans lack standing to bring suit on their own behalf under the Endangered Species Act because Congress and the President did not intend to authorize animals to sue); *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (holding that monkeys lacked statutory standing to sue for copyright infringement).

102. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (holding that a plaintiff must suffer an injury in fact, or an invasion of a legally protected interest which is concrete and particularized in order to have standing to sue in court).

103. In a D.C. Circuit case, the court found that an animal rights organization had standing to sue when the USDA incompletely applied the Animal Welfare Act to specific birds. However, the court also found that plaintiff did not plausibly allege that the USDA’s decade-spanning inaction was an “agency action,” as required by the Administrative Procedure Act. Thus, even though the organization had standing to sue, the animals could not sue on their own behalf, and thus the actual harms to the animals were not enjoined by the court. *People for the Ethical Treatment of Animals v. United States Dep’t of Agric.*, 797 F.3d 1087 (D.C. Cir. 2015).

Although animal law has seen successes in both legislation and litigation, the protection of animals can be furthered by the reconciliation of the environmental and animal movements.

### III. RECONCILIATION OF THE MOVEMENTS

In some instances, environmentalists and environmental lawyers view animal law as a threat to environmental law.<sup>104</sup> Where interest in the welfare of animals conflicts with the “ecosystem focus” of environmental law, the two movements lose valuable opportunities to work together.<sup>105</sup> This Section argues that reconciliation of the environmental and animal protection movements<sup>106</sup> is necessary for both the protection of animals and the environment. This Note posits that animal law needs environmental law to make any legitimate changes to animal protection in the United States, and briefly outlines what reconciliation would look like.

#### A. CAFOS SHOWCASE THE OVERLAP AND MUTUAL INTERESTS OF THE ENVIRONMENTAL AND ANIMAL RIGHTS MOVEMENTS

As detailed above, environmental and animal law share common legal issues. The most obvious common legal issues are those dealing with wildlife and habitat conservation, because these issues affect the welfare of animals and the health of the environment.<sup>107</sup> For example, in recent ESA litigation, plaintiffs have included “environmental organizations such as Waterkeeper Alliance, New York Coastal Partnership, Inc., Sierra Club, and the Center for Biological Diversity, as well as animal welfare organizations such as the Animal Protection Institute, the National Wildlife Federation, Defenders of Wildlife, the Animal Protection Institute, and the Fund for Animals, Inc.”<sup>108</sup> Factory farming is a prime example of an issue both movements face that could be more efficiently and adequately solved if the movements were more aligned.

CAFOs are industrial-sized livestock operations that house anywhere from hundreds to millions of animals.<sup>109</sup> CAFO animals are dairy cows, hogs, and chickens. They are confined at least forty-five or more days per year.<sup>110</sup> CAFOs include open feedlots and windowless buildings where animals are confined in

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104. Johnson, *supra* note 26, at 1377.

105. *Id.*

106. “Animal Protection Movement” encompasses both the animal rights and animal welfare movements. This phrase is used in this Note to reference the entirety of the movement, even though the factions differ on various issues.

107. *Id.* at 1378.

108. *Id.* at 1378–79. *See, e.g.*, N.Y. Coastal P’ship, Inc. v. United States, Dep’t of the Interior, 341 F.3d 112 (2d Cir. 2003).

109. *Why are CAFOs bad?*, SIERRA CLUB: MICHIGAN CHAPTER, <https://perma.cc/LKF4-4DU6> (last accessed Aug 2, 2021).

110. *Id.*

small spaces with little to no access to the outdoors.<sup>111</sup> CAFOs present both environmental and animal welfare concerns.

Because of the sheer size of the operations and the number of animals housed within, CAFOs produce high level pollutants, including ammonia, hydrogen sulfide, and methane.<sup>112</sup> Particulate matter carrying disease-causing bacteria are found in the air surrounding factory farms.<sup>113</sup> Further, waste from CAFOs can include antibiotic-resistant bacteria, hormones, chemicals used in livestock care, milkhouse wastes,<sup>114</sup> cleaning agents, ammonia and heavy metals, and silage leachate.<sup>115</sup> The waste is stored in large structures or pits for months before it is sent to farm fields for disposal.<sup>116</sup> Here, the waste often enters surface water.<sup>117</sup> Contamination in surface water causes buildup of nitrates, causing oxygen depletion and killing aquatic life.<sup>118</sup> Further, excessive nutrient concentrations, such as nitrates and phosphates, lead to algal blooms.<sup>119</sup> Algal blooms can block sunlight from underwater plant life or dominate resources and cause plants to die.<sup>120</sup> CAFOs also emit greenhouse gases and thus contribute to climate change.<sup>121</sup> Globally, CAFOs are responsible for approximately 18% of greenhouse gas production and account for 7% of greenhouse gas emissions in the United States.<sup>122</sup> These problems, however, are just the tip of the iceberg.

On the animal welfare side, CAFOs confine livestock animals in crowded spaces. These animals are not meant to be in this type of confinement, and their confinement leads to stress, boredom, and physical and mental illness.<sup>123</sup> Dairy cows are forcibly impregnated using artificial insemination, calves are torn away from their mothers on the day of their birth, and mother cows are hooked up to milking machines.<sup>124</sup> These issues are only a few examples of the harsh conditions that all animals face in CAFOs.

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111. *Id.*

112. *Id.*

113. *Id.*

114. Milkhouse wastes includes anything from bad milk, contaminated milk that cannot be sold, and chemicals or cleaners used to sanitize milking operations.

115. Silage Leachate is fermented, high moisture fodder. Silage leachate forms when water enters the silage and washes through the materials. The leachate often ends up in water.

116. SIERRA CLUB, *supra* note 109.

117. *Id.*

118. Carrie Hribar, *Understanding Concentration Animal Feeding Operations and Their Impact on Communities*, NAT'L ASSOC. OF LOCAL BDS. OF HEALTH 4 (2010), <https://perma.cc/C42B-KCV7> (last accessed Oct. 23, 2021).

119. *Id.*

120. *Id.*

121. *Id.* at 7.

122. *Id.*

123. Elizabeth A. Overcash, *Overview of CAFOs and Animal Welfare Measures*, ANIMAL LEGAL & HISTORIC CTR. (2011), <https://perma.cc/S3X9-K8HE> (last accessed Oct. 23, 2021).

124. PETA, *supra* note 74.



Despite the harms CAFOs pose for both the environment and animals, collaboration between environmental and animal rights movements has been minimal.<sup>125</sup> Environmental organizations focus on the environmental impacts of CAFOs.<sup>126</sup> Although organizations have utilized environmental statutes to benefit animals, that benefit is incidental. However, increasing animal protections would benefit both the environment and animals. Less confinement of animals will translate to less concentrated waste disposal, and less waste disposal creates less pollution stemming from individual farms. These represent benefits to the environment and to animals. Additionally, exposing the animal cruelty taking place in CAFOs would reveal “more about environmental impacts of farming, bolstering environmental campaigns to address farming’s effects on the planets.”<sup>127</sup> Collaboration between the two movements is the logical next step to further the goals of both the environmental and animal rights movements.

B. ANIMAL LAW HAS STRUGGLED TO GAIN ADEQUATE FOOTING AND ANIMAL WELFARE STATUTES HAVE NOT BEEN ENFORCED

Although environmental statutes are not comprehensively protective of animals, animal welfare statutes often fall even shorter. Farm animals are not covered by the AWA and even if they were, the USDA—which enforces the AWA—is frequently criticized for allowing inhumane practices to go unchecked.<sup>128</sup> USDA has failed to collect fines from violators, and has failed to re-inspect facilities that had serious violations.<sup>129</sup> Because of USDA’s failure to enforce the AWA nationally, states often struggle to protect animals with their own laws.<sup>130</sup> The AWA also does not have a citizen suit provision, unlike most environmental statutes.<sup>131</sup> There is no private cause of action, forcing citizens to use the Administrative Procedure Act (“APA”) to address their injuries.<sup>132</sup> This method is also limited because the suit is filed against the enforcement agency and not against the parties who are doing the harms (e.g., individuals or operators of CAFOs).<sup>133</sup> Further, the HMSA, which requires animals be stunned into unconsciousness before slaughter, is inapplicable to chickens, turkeys, and other birds.<sup>134</sup> Even for animals covered under the HMSA, enforcement of this law is inconsistent.<sup>135</sup> Lastly, anti-cruelty statutes pose more obstacles because classes

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125. Johnson, *supra* note 26, at 1388.

126. *Id.*

127. *Id.* at 1388–89.

128. *Laws that Protect Animals: Federal, State, & Local*, ANIMAL LEGAL DEF. FUND, <https://perma.cc/MYD2-WQ25> (last accessed Aug. 2, 2021).

129. Hill, *supra* note 14, at 21.

130. *Id.*

131. *Id.*

132. *Id.* at 22.

133. *Id.*

134. ANIMAL LEGAL DEF. FUND, *supra* note 128.

135. *Id.*

of animals are excluded, which diminishes any real protections under these statutes.<sup>136</sup> Anti-cruelty statutes also require direct action from the government for enforcement.<sup>137</sup>

In addition to poor enforcement of animal protection statutes, the animal movement does not have the traction that the environmental movement has.<sup>138</sup> A couple of reasons for the disparate popularity of the movements include: (1) environmental issues pose more tangible harms to humans; and (2) the environmental movement has been in the public spotlight for longer, gathering more supporters and offering more scientific information over the years than the animal protection movement.<sup>139</sup>

The animal movement needs environmental laws to make any significant changes in the treatment of animals. Environmentalism and environmental laws are both more established than animal rights movement and animal law. Environmental statutes contain citizen suit provisions, giving individuals a private right of action to redress injuries. By modifying environmental laws to include outright protections for animals, the two movements can achieve their common goal of protecting the natural world.

#### IV. SUGGESTIONS FOR STATUTORY CHANGES

Environmental statutes provide the perfect framework for animal protection; however, they simply do not address animal issues comprehensively. This Section suggests that changes to the environmental statutes present the best option to cure the lack of substantive animal protection in the law. This Section argues that overhauling animal law statutes and incorporating their animal protections into environmental statutes will lead to greater substantive rights for animals. Wiping out an entire set of laws may sound like a radical argument but, as this Note explains, it is more logical than it sounds. Including condensed versions of the AWA, HMSA, and other animal protection statutes into environmental statutes will increase their effectiveness and enforceability.

##### A. NEPA—REDEFINING TERMS AND HEIGHTENING PERMIT REQUIREMENTS

The procedural nature of National Environmental Procedure Act (NEPA) makes it well-suited as a tool for CAFO livestock animal protection. There are several ways to mold NEPA to better protect livestock animals. Redefining and creating new standards for what constitutes “environmental impacts,” and “major federal actions” is the clearest way forward.

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136. Hill, *supra* note 14, at 24.

137. *Id.* at 23.

138. Senatori, *supra* note 8, at 41.

139. *Id.*

NEPA review only applies to “major federal actions.”<sup>140</sup> Under current NEPA caselaw, federal permitting of CAFOs and the USDA practice of “providing Environmental Quality Incentive Program grants to CAFOs”<sup>141</sup> are major federal actions triggering NEPA protections. However, current permitting practices do not require outright protections during the CAFO permitting process. EPA must buckle down on its CAFO permitting requirements by requiring more CAFOs to obtain permits and enforce permitting requirements. These changes are necessary for animal rights activists to be able to successfully bring NEPA violation claims.<sup>142</sup>

First, the Council on Environmental Quality (“CEQ”), the agency charged with implementing NEPA, must draft new NEPA regulations clarifying 42 U.S.C. § 4332(C) that include animal harms as “environmental impacts” warranting NEPA review. NEPA review is only triggered by “major federal actions” that may have a significant impact on the environment; environmental impacts covered by NEPA must be redefined to include harm to animals.

CEQ must also redefine “major federal actions” in 40 C.F.R. § 1508.18 to include harm to animals to ensure NEPA substantively protects them. These harms should include the confinement of animals in small spaces, forced impregnation, the use of antibiotics to force animals to grow, genetic manipulation of farm animals, and forced starvation and dehydration.<sup>143</sup> This amendment would require any action that would harm animals to be considered a major action for NEPA purposes. Because of the “major *federal* action” requirement, not every person or farming operation harming animals can be required to perform a NEPA review. However, changing NEPA to include harms to animals as major actions will at least hold federal actors responsible for their treatment of animals, and may result in the rest of the country following suit.

NEPA should explicitly set out the conditions for CAFO permitting. This should include conditioning the permits on the humane treatment of animals and strictly enforcing permitting. The statute should require EPA, in conjunction with USDA, to do a *thorough* investigation of farms before giving a permit to a CAFO. EPA and USDA should set forth, by regulation, the specific conditions that must be met. These regulations should be specific and leave little room for interpretation. These amendments to NEPA should require EPA and USDA to shut down any CAFO that does not comply with the conditions. With a more stringent CAFO permitting standard in place, animal welfare advocates have a clearer way forward in bringing animal protection litigation under NEPA.

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140. NEPA (*National Environmental Policy Act*), THE U.S. DEP'T OF JUSTICE, <https://perma.cc/X7Z5-9VCN> (last accessed Nov. 28, 2019); see *supra* Section I.b.1. for a discussion of the current definition of “major federal actions.”

141. Johnson, *supra* note 27, at 1399–1400.

142. *Id.*

143. *Factory Farming: Misery for Animals*, PETA, <https://perma.cc/3ZBH-JGPW> (last accessed Nov. 27, 2019).

### B. CWA – CONDITIONING NPDES PERMITS ON ANIMAL WELFARE STANDARDS

Expanding the Clean Water Act (CWA) to protect animals is more complicated than the expansion of NEPA. Because the CWA's purpose is to protect the nation's waterways, animal rights activists will have a difficult time convincing the legislature and courts to utilize the CWA to create substantive protections for animals. However, expansion is necessary as a way forward for the animal rights movement. The CWA makes it unlawful to discharge "any pollutant from a point source into navigable waters, unless a permit was obtained."<sup>144</sup> These permits are granted and obtained through the National Pollutant Discharge Elimination System ("NPDES") permit program.<sup>145</sup>

The CWA should include a provision that animal cruelty is a necessary factor to be considered to receive an NPDES permit. For example: "the cruelty of animals must be considered in the granting of a pollution permit," or "permits shall not be granted to industries or individuals who have not met the requisite safety of animals standards." Like the suggestions for NEPA, under the CWA, EPA should dictate the requisite safety standards by regulation.<sup>146</sup>

The effects of this provision will be most apparent in the CAFO industry. CAFOs, as explained above, pollute waterways and commit some of the most severe animal cruelty atrocities. Under a modified CWA, CAFOs would be required to meet a higher standard for animal welfare as a condition for obtaining an NPDES permit, resulting in tangible benefits for both animals and the environment. Although it does not go so far as to make animal cruelty a crime, this standard will require factory farms and other individuals seeking a pollution permit to find ways to minimize harm to animals. Because the CWA has a citizen suit provision, this method will prove more effective in its enforcement than the HMSA and AWA.

### C. ESA – PROTECTING HYBRID SPECIES

The ESA's lack of substantive protections for hybrid species poses a unique issue that can be solved by statutory changes. Although there is no definitive scientific answer concerning whether hybrids should be protected, the ESA must be clearer in how hybrids are handled by the FWS and other agencies. Congress should revisit its placeholder phrase, "best scientific data available," and modify to include specific techniques that will guide FWS and other agencies in determining whether a species such as the Red Wolf is indeed a hybrid or merely a subspecies.<sup>147</sup> This Note does not, however, address which techniques will actually be "best." Congress should modify section 16 U.S.C. § 1531(a) of the

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144. *Summary of the Clean Water Act*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/ET2K-9UFC> (last accessed Nov. 28, 2019).

145. *Id.*

146. *Id.*

147. 16 U.S.C. § 1533(b)(1)(A).

ESA to include a provision explicitly addressing hybrid animals. This definition should be incorporated into the ESA's text so that future interpretation of the meaning of "hybrid" is not left up to individual agencies, but instead unambiguously set out by Congress. This definition should categorize all hybrids as "species" and should expressly protect hybrids whose existence does not threaten other listed species. Expanding the ESA to protect hybrid species will not only protect these specific species, but will also ensure that delicate ecosystems are not disturbed by the loss of hybrids. Through more precise scientific guidelines and stronger protections for hybrid species, the ESA could do more to ensure protections of threatened and endangered hybrid species in the wild.

#### D. CAA – SIP REQUIREMENTS

Similar to the changes this Note suggests for the CWA, Congress should amend the CAA to require protections of animals in SIPs. SIPs are revised by the states; however, the CAA should include an express statement within 42 U.S.C. § 7510 requiring SIPs to evaluate harms to animals in setting out their plans to achieve NAAQs SIPs for nonattainment areas<sup>148</sup> require states to develop detailed emission inventory, identify federal and state controls, evaluate technically and economically feasible controls on sources, conduct air quality modeling to evaluate air quality improvement, ensure reasonable progress towards attainment, adopt contingency measures to apply in the event the area fails to attain by its attainment date, and more.<sup>149</sup> Although requiring the consideration of animal welfare may not tip the scales in an already dense balancing scheme, the requirement is a necessary first step in recognizing that the effects of air pollution on animal welfare is similar and just as important to its effects on human beings.

#### CONCLUSION

Environmental law has been successfully employed to protect both the environment and animals. However, environmental statutes were not originally enacted to specifically protect animals, and thus often fall short in that regard. Any protection of animals that arises from environmental laws is incidental to environmental protections and is based in tangible statutory language. Animal welfare statutes, such as the AWA and HMSA, have provided a bare bones avenue for animal protection litigation. But due to their lack of citizen suit provisions and lax enforcement by United States agencies, such statutes have fallen flat, too.

The environmentalism and animal rights movements have mutual interests and environmental statutes provide the substantive teeth and citizen suit enforcement mechanisms that the animal movement requires to make change on behalf of

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148. Nonattainment areas are those who have not yet met the NAAQs for their designated area.

149. *The Basics of State Implementation Plans*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/XR9Y-NXW9> (last accessed Nov. 29, 2019).

animals. The NEPA, CWA, CAA, and ESA can and should be amended to create substantive protections for animals. Although this method presents challenges and may not effectively protect animals from every harm imaginable, environmental and animal welfare statutes on their own have not gone far enough to protect animals. Instead of dividing the two movements and treating the protection of the natural environment and the protection of animals as separate and unrelated goals, the movements must work together to achieve their common goals of environmental harmony and balanced ecosystems. Once the two movements recognize their common goals, reconciliation is the only logical move towards those goals. Thus, reconciliation of the movements through the modification of environmental statutes will provide the most benefits to animals, the environment, and human beings.