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SPECIAL ISSUES IN ENVIRONMENTAL LAW INVOLVING FEDERAL AGENCIES

WILLIAM A. WILCOX, JR.†

I. INTRODUCTION

The federal government is one of the largest, if not the largest, industries in the United States. It is the largest landholder, owning millions of acres. It conducts training and construction operations with major environmental impacts and operates thousands of industrial-style facilities with a constant waste stream. Tanks maneuver through our forests, ships dock at our ports, jets soar through our skies and rockets and satellites orbit our planet. The federal government builds — or provides the funding for — prisons, highways, dams, power plants, office buildings, hospitals, laboratories, industrial shops, ammunition and hazardous material storage facilities, airplane hangars and motor pools. It drops explosive ordnance on the land and in the sea. The federal government is responsible for cattle grazing and hard rock mining on public lands and logging in national forests. The scope of the federal government's activity is awesome. Yet, it seems that the federal government plays by its own rules in regulating environmental and natural resources.

State regulators and the public are often frustrated or confused by the special body of environmental law that applies to the federal government. When dealing with the federal government under environmental and natural resources law, special issues often arise involving environmental regulation and environmental planning. If practitioners can gain an understanding of these common issues, this understanding will demystify the special body of environmental law applicable to the federal government.

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II. ENVIRONMENTAL REGULATION

A. Civil Penalties and Sovereign Immunity

The principle of sovereign immunity is perhaps the most misunderstood of the special issues arising in environmental regulation of the federal government’s activities. Under sovereign immunity, only Congress can waive the federal government’s immunity to lawsuits. States may regulate activities of federal agencies only after receiving “clear and unambiguous” authorization from Congress.\(^1\) However, each of the major environmental statutes provides a limited waiver of sovereign immunity requiring federal facilities to comply with state laws.\(^2\) Normally, federal and state regulators have broad power to enforce pollution control requirements. If a facility violates any of the numerous pollution standards, then the regulators have several civil remedies at their disposal, including injunctive relief.\(^3\) Limited waivers of sovereign immunity generally have not given states the power to fine federal facilities, although state attorneys general contend that these waivers do allow states to assess fines or civil penalties against the federal government.\(^4\) The Supreme Court’s decision in *Department of Energy v. Ohio* reinforced the view that sovereign immunity waivers may not include civil penalties.\(^5\) However, in dicta, the Court opined that some circumstances could arise under which the Clean Water Act (CWA) waiver might allow for civil penalties as “coercive sanctions.”\(^6\)

In 1992, Congress adopted the Federal Facilities Compliance Act (FFCA), which amended the Solid Waste Disposal Act (SWDA) — commonly known as the Resource Conservation and Recovery Act (RCRA) — allowing states to assess civil penalties against federal installations for noncompliance.\(^7\) The FFCA, however, applied only


\(^4\) Id. (addressing argument by state attorneys general of rights granted by waivers).


\(^6\) Id. at 615-620 (noting circumstances when waiver might allow civil penalties).

\(^7\) Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) [hereinafter FFCA]. The FFCA addressed not only sovereign immu-
to solid and hazardous waste.\textsuperscript{8} The FFCA's waiver of sovereign immunity did not apply to other environmental statutes.\textsuperscript{9} Congress has since passed similar legislation for the lead exposure amendments to the Toxic Substances Control Act (TSCA)\textsuperscript{10} and the Safe Drinking Water Act (SDWA).\textsuperscript{11}

The underlying premise supporting sovereign immunity originates from the Supremacy Clause of the U.S. Constitution and is "exemplified in the Plenary Powers Clause of the Constitution."\textsuperscript{12} This authority established that states could not constitutionally regulate federal activities unless Congress consented to such regulation. Congress, however, has not always crafted clear sovereign immunity language. Therefore, courts have developed rules of interpretation when sovereign immunity is claimed based on ambiguous language.\textsuperscript{13} The rules of interpretation, outlined in \textit{McClellan Ecological Seepage Situation (MESS) v. Weinberger}, state that a waiver of sovereign immunity cannot be recognized unless it is "clear, concise and unequivocal."\textsuperscript{14} Further, "if there is any doubt, waiver will not be found. Waiver cannot be implied, nor will it be presumed. It cannot be based on speculation, surmise or conjecture."\textsuperscript{15} The Supreme Court reiterated this premise in \textit{Department of Energy v. Ohio}, in which the Court determined that the Department of Energy could not be fined for past violations of the RCRA or the CWA.\textsuperscript{16}

\textsuperscript{8} \textit{Id.} (explaining that FFCA applies only to solid and hazardous waste).
\textsuperscript{11} 42 U.S.C. 300j-6 (stating that non-primary state may impose various state laws upon federal public water systems).
\textsuperscript{13} \textit{See generally} Hancock, 426 U.S. 167 (establishing limitations on states without Congressional consent).
\textsuperscript{14} \textit{See} \textit{McClellan Ecological Seepage Situation v. Weinberger}, 707 F. Supp. 1182, 1187 (E.D. Cal. 1988) (noting impermissible use of waiver if language not "clear, concise and unequivocal").
\textsuperscript{15} \textit{See id.} at 1187 (emphasizing that waiver cannot be based on speculation).
\textsuperscript{16} \textit{See Dep't of Energy v. Ohio}, 503 U.S. 607, 615-629 (1992) (stating that Department of Energy could not be fined for past violations of RCRA or CWA due to unclear waiver).
With regard to environmental statutes, the Supreme Court’s 1976 decision in Hancock v. Train prompted a new legislative trend toward more clearly drafted waivers of sovereign immunity. In Hancock, the Supreme Court held that state permit requirements did not apply to federal installations. Congress responded by amending the federal facility provisions of the Clean Air Act (CAA), the CWA and the SDWA and passed a more carefully drafted sovereign immunity waiver with the RCRA. The waiver language in these environmental statutes, although similar, is not uniform. Therefore, practitioners must carefully examine each waiver separately to fully understand its applications.

The language of section 1323(a) of the CWA provides for the waiver of sovereign immunity in a number of areas. For example, section 1323(a) of the CWA requires federal installations to “comply with all Federal, State, Interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.” Following the Supreme Court’s decision in Hancock, Congress added that the waiver “shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever).” The section further waives immunity “to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.” The CWA waiver also provides that the federal government may remove any sanction against it to federal district court and that no officer or employee of the federal government can be held liable for fines arising from “performance of his official duties.” Finally, the “United States shall be liable only for those civil penalties arising under Federal law or imposed

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17. Lotz, supra note 12, at 11 (addressing importance of Hancock regarding waivers of sovereign immunity).
18. See Hancock, 426 U.S. at 168 (stating Supreme Court’s holding).
19. See id. (noting Congress’s reaction to Hancock by passing carefully drafted waiver).
21. Id. (noting addition to application of waiver under CWA).
22. Id. (emphasizing waiver of immunity to any process or sanction whether enforced by federal, state or local courts).
23. Id. (stating federal government right to remove sanction under CWA waiver).
by State or local court to enforce an order or the process of such court.”

In *Department of Energy v. Ohio*, the Court’s decision on the CWA sovereign immunity waiver hinged, among other things, on the interpretation of the term “process and sanctions.” The State of Ohio had sought penalties for violations of state and federal pollution laws – including the CWA and the RCRA – at the Department of Energy’s uranium processing plant in Fernald, Ohio. The state contended that the “federal facilities” and “citizen-suit” sections of the CWA effectively waived sovereign immunity for fines. Ohio argued that the word “sanction” in the CWA’s federal facilities section was intended to encompass punitive fines. The Supreme Court, however, held that any waiver of sovereign immunity must be clear and unequivocal. The CWA sovereign immunity waiver also failed to meet the test for punitive fines.

The CWA is unique in that, pursuant to its language, a state may likely succeed in recovering “coercive sanctions.” The Court opined that states could impose civil penalties if assessed as “coercive sanctions.” Writing for the majority, Justice Souter stated that the language of the CWA waiver that federal facilities “shall be subject to . . . all Federal, State and local . . . sanctions” indicated Congress’s intent to allow civil penalties when used as a coercive tool in instruments such as court orders or judgments. Justice Souter also found support for this interpretation in the following language: the “United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.” The *Department of Energy v. Ohio* dicta indicates that, under the CWA waiver, local courts may be able to issue compliance orders followed by con-

24. *Id.* (clarifying instance when federal government is liable for civil penalties).


26. *See id.* at 612 (addressing claim of state of Ohio).

27. *See id.* at 620 (stating argument by Ohio that punitive fines are appropriate under CWA).

28. *See id.* at 627 (noting that narrow construction takes waiver no further than coercive variety).

29. *Id.* (explaining narrower waiver with greater antecedent text evinces greater clarity).

30. *See Dep’t of Energy*, 503 U.S. at 624 (noting “civil penalties” exemplify those imposed by state or local court to enforce order or process of such court).

31. *Id.* at 623-24 (stating that proviso is unlike preceding text speaking of “civil penalties” in that it still clarifies waiver of scope).

32. *Id.* at 624 (noting confirmation of previous waiver clarification).
attempt citations for violations, and possibly even stipulated penalties. This latter passage is unique to the CWA. Therefore, a state seeking "coercive sanctions" pursuant to any other environmental statute would be less likely to succeed.

In response to Department of Energy v. Ohio, Congress significantly altered the reach of sovereign immunity under the RCRA by passing the FFCA. Under the FFCA, state and federal regulators clearly can assess fines against federal facilities for violating solid and hazardous waste laws. In its present form, the federal facilities provision of the RCRA provides that the federal government be subject to "all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations." Furthermore, "[t]he United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). With the FFCA, Congress rendered obsolete any case law holding that the RCRA waiver of sovereign immunity was not "clear and unequivocal." The FFCA clarified the meaning of "reasonable service charge" to include charges in connection with processing necessary paperwork "as well as any other nondiscriminatory charges that are assessed in connection with a . . . solid or hazardous waste regulatory program." The FFCA also empowers the U.S. Environmental Protection Agency (EPA) to initiate administrative actions against federal facilities. While the FFCA states that the federal government is liable in RCRA actions "for isolated, intermittent, or continuing violations," federal facilities still have a defense against actions for past violations. President Bush, in his adoption press release, stated his belief that the FFCA was ratified "notwithstanding the holding of the Supreme Court in Gwaltney of

34. Id. (outlining federal, state, interstate and local substantive and procedural requirements of RCRA).
35. Id. (preserving federal waiver of sovereign immunity and describing circumstances for application).
36. Id. (clarifying service charge to encompass all federal, state and local costs).
37. Id. (noting that action would occur in same manner and circumstances as action against any other person).
Smithfield, Ltd. v. Chesapeake Bay Foundation." In Gwaltney, the Court held that the Chesapeake Bay Foundation could not compel the meat-packer defendant to pay civil penalties for wholly past permit violations but rather was required to allege that such violations were likely to continue.

Various federal agencies sought to limit the reach of the FFCA's waiver of sovereign immunity. In particular, the Department of Defense argued that the FFCA, by its own terms, applies only to solid and hazardous waste regulation — that it does not apply to other environmental laws, such as the RCRA sections governing underground storage tanks (USTs). Section 9007 of the RCRA provides its own waiver of sovereign immunity governing USTs that is comparable to other sovereign immunity waivers in substance and scope. The agencies argued that section 9007 provided the exclusive waiver of sovereign immunity for UST regulations. The EPA, however, began assessing penalties against federal facilities in 1998 for failure to meet UST compliance deadlines. The Department of Defense requested an opinion from the Department of Justice's Office of Legal Counsel (OLC) to clarify the issue. In an opinion dated June 14, 2000, the OLC concluded that "RCRA clearly grants EPA the authority to assess penalties against federal agencies for UST violations." Without relying on the FFCA waiver of sovereign immunity as authority, the OLC determined that section 9006(a)(1) of subtitle I of the RCRA gave the EPA authority to issue administrative compliance orders to "any person." Further, the OLC found that section 9006(c) gave the EPA authority to "assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." Under section 9001 of the RCRA, the definition of "person" in-

39. See generally Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987) (requiring reasonable likelihood past polluter will continue to pollute).
40. Id.
41. See 42 U.S.C. § 6991f(a) (2000) (outlining government's environmental responsibility as no different from that of private individuals).
43. Id., (citing 42 U.S.C. § 6991e(a)(1)) (noting application to underground storage tanks).
44. Id., (citing 42 U.S.C. § 6991e(c) (citing subtitle 1)).
cludes "the United States Government." Further, the OLC determined that, while the FFCA may have given states authority only to assess civil penalties for hazardous or solid waste violations, the federal facilities provision of the RCRA gave the EPA Administrator broader authority to assess fines against federal agencies.

Federal agencies still resist civil penalties assessed by states under UST regulations because the FFCA and the OLC opinion did not specifically address USTs. Section 9007 of the RCRA, its waiver of sovereign immunity for USTs, is similar to other sovereign immunity waivers. It differs, however, in several important respects that may prove crucial when state regulators deal with federal facilities. As with other federal facilities sections, Congress has waived sovereign immunity against "all Federal, State, interstate, and local requirements" for USTs. Section 9007, however, does not waive sovereign immunity explicitly against "process and sanctions," as do the other environmental sovereign immunity waivers. The waiver only mentions "process or sanction" regarding injunctive remedies. Therefore, Justice Souter's dicta in Department of Energy v. Ohio, indicating that states could impose civil penalties under the CWA if imposed as "coercive sanctions," cannot be construed to allow stipulated penalties for USTs. Justice Souter's discussion focused on the use of the term "sanction" in the CWA waiver. Accordingly, a state cannot make a credible argument for stipulated penalties regarding USTs. The absence of the "process and sanction" language in the UST sovereign immunity waiver represents sound public policy. The UST amendment regulates USTs that may have been placed in the ground many years ago. As with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), the UST amendments primarily address and attempt to correct pre-existing conditions, unlike the prospective compliance programs of the other statutes.

45. Id. (citing 42 U.S.C. § 6991(6) (reinforcing strongly supported view that United States is not exempt)).
46. Id. (citing 42 U.S.C. § 6961(b)(1) (noting enforcement follows to any brand of federal government pursuant to this title)).
47. See 42 U.S.C. § 6991f(a) (noting that all federal agencies are subject to compliance).
48. Id. (extending jurisdiction in same manner and extent as any other person).
49. Id. (including all agents, officers or employees of United States).
50. Id. (stemming from enforcement actions).
51. Dep't of Energy v. Ohio, 503 U.S. 607, 622-23 (noting that government's corresponding liability extends only to process and sanction).
52. See 42 U.S.C. §§ 9601-9675 (outlining comprehensive environmental response, compensation and liability statutes).
During the 1990s, most federal facilities upgraded USTs to meet required standards. Allowing the federal government to be fined for mistakes predating passage of the UST amendments would not be in the public's interest because it would serve no corrective purpose. Further, the FFCA applies only to environmental laws aimed at regulating solid and hazardous wastes. For example, the sovereign immunity principle traditionally has included exemption from local building codes and zoning ordinances. Therefore, if a local government attempts to limit a federal facility's solid waste activities, such as landfills, through zoning restrictions, sovereign immunity would still exempt the activity despite the FFCA.

As with the CWA, the federal government under section 118 of the CAA is required to comply with "all Federal, State, interstate and local requirements, administrative authority, and process and sanctions" regarding air pollution "in the same manner, and to the same extent, as any nongovernmental entity." However, regarding the payment of fines under the CAA, there is a split of authority in the federal courts that has yet to be resolved. Although the language of the CAA waiver of sovereign immunity is substantially similar to the language the Supreme Court considered in Department of Energy v. Ohio, the Sixth Circuit has held that the savings clause of the CAA's citizen suit provision contains an independent waiver of sovereign immunity authorizing state-imposed punitive civil fines. In Georgia, however, a federal district court has held that the Supreme Court's interpretation of similar federal facility section language in Department of Energy v. Ohio is controlling.

Because CERCLA is not a compliance statute in the nature of the CWA, the CAA and the RCRA, the federal facilities section of CERCLA operates substantially differently from the other environmental statutes. Pursuant to CERCLA section 120, federal facilities are liable for the clean-up costs of hazardous waste sites for

55. See United States v. Tennessee Air Pollution Control Bd., 185 F.3d 529, 534-35 (6th Cir. 1999) (holding that CAA waives United States' sovereign immunity from state civil penalties for past violations of state air pollution laws).
57. See 42 U.S.C. § 9620(a)(1) (explaining that federal government shall comply with this section as nongovernmental entities do).
which they are responsible.\textsuperscript{58} Normally, one may sue the federal government for releasing hazardous substances. Under CERCLA, however, no provision for punitive fines exists. Stipulated penalties, however, arguably could be included in a consent decree that would set cleanup milestones.\textsuperscript{59} Under CERCLA's enforcement section, stipulated penalties of up to $25,000 per day may be included in a consent decree.\textsuperscript{60} However, a federal agency could still argue that Congress has not "clearly and unequivocally" waived sovereign immunity for state regulation.

One creative way in which state regulators can hold federal facilities accountable, especially in situations in which punitive fines are questionable, is through supplemental environmental projects (SEPs). Under SEPs, a federal facility may agree to establish proactive environmental programs in lieu of penalties. This approach is often better for the environment and can avoid contentious wrangling over applicability of punitive fines, although the federal agency may resist agreeing to SEPs if it is well established under an environmental statute that there is no waiver of sovereign immunity for civil penalties. If an agreement for a SEP can be reached, it avoids the questionable public policy of fining one taxpayer funded agency by another.\textsuperscript{61}

B. Sovereign Immunity and the Applicability of State Law

Under the principle of sovereign immunity, federal environmental attorneys may also argue that certain state regulatory schemes are completely inapplicable to federal activities. This issue is emerging now between state regulators and federal agencies, with federal agencies contending that the scope of each environmental waiver of sovereign immunity is limited to the scope of the federal law. For example, numerous cases have held that the CWA does not apply to groundwater.\textsuperscript{62} Therefore, federal agencies can argue

\textsuperscript{58} See 42 U.S.C. § 9620(a)(2) (applying federal facilities section to federal government).

\textsuperscript{59} See id. § 9621(b) (detailing general rules for clean-up standards).

\textsuperscript{60} See id. § 9621(e)(2) (stating "[e]ach consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000.").

\textsuperscript{61} See David Howlett, Environmental Provisions of NDAA for FY01, 7 ENVTL. L. DIV. BULL. 10, 12 (Oct. 2000) (explaining that, in Section 315 of National Defense Authorization Act for 2001, for instance, Congress approved expenditure of $993,000 for hazardous substance management system at Walter Reed Army Medical Center in satisfaction of fine imposed by EPA).

\textsuperscript{62} See Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) (affirming judgment where clear that Congressional intent of federal statute was not to govern discharges on dry land that seeped into ground water); see also Vill.
that the waiver of sovereign immunity under the CWA does not apply to ground water regulation by states. Rather, these claims fall under the sovereign immunity waiver of the Safe Drinking Water Act, which is restricted by the scope of the Act to underground injection and wellhead protection. Further, depending on applicable facts, federal agencies may argue that state above-ground storage tank programs are inapplicable because there is no federal counterpart and therefore no waiver of sovereign immunity.

C. Payment of Reasonable Fees

Each of the federal facilities provisions of the environmental statutes provides that federal facilities have waived sovereign immunity to pay "reasonable" administrative fees or service charges. Pursuant to the Supremacy Clause of the U.S. Constitution, however, the federal government does not pay taxes to the state. To determine whether a charge is payable as a "fee" or must be paid because it is a "tax," federal government attorneys must examine the charges in light of the three prong test set forth in Massachusetts v. United States. First, the attorney must determine that the charge is nondiscriminatory in its application. That is, the charge cannot disproportionately penalize the federal agency as compared with nonfederal entities. Second, the attorney must determine that the charge is a fair approximation of the "benefits" the facility receives

64. 42 U.S.C. § 300j-6 (requiring substantive and procedural compliance by federal government).
65. See id. (stating that all branches of federal government must comply with requirements involving ground water); Clean Water Act, 33 U.S.C. § 1323 (2001) (detailing federal facilities pollution control as it relates to ground water); Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (outlining federal responsibilities and application of federal, state and local law to federal facilities); Clean Air Act, 42 U.S.C. § 7418 (explaining compliance with control of pollution from federal facilities and presidential exemptions).
67. See Massachusetts v. United States, 435 U.S. at 454-67 (laying out three-prong test in its entirety).
68. See id. at 454-63 (noting nondiscriminatory taxing measure operating to defray cost of federal program is no more offensive than tax on income earned by state employees).
from the state.69 If the charge is for some service for which the federal government is not eligible, for instance, such as a remediation fund for leaking USTs, then the federal government cannot pay the fee. Finally, the federal attorney must determine that the state structured the charge to produce revenues that will not exceed the total cost to the state of providing the benefits to be supplied.70 If a state charges a fee that produces revenue for the general revenue fund for use in other programs, then it is considered a tax which the federal agency cannot pay.71

III. ENVIRONMENTAL PLANNING

A. The National Environmental Policy Act

The major environmental planning statute is the National Environmental Policy Act (NEPA). The NEPA requires that federal agencies analyze the effects of an action on the environment when taking any "major [f]ederal action significantly affecting the quality of the human environment."72 The implementing regulations, developed by the White House Council on Environmental Quality (CEQ), establish rules for conducting the type of environmental analysis required for a given activity or project.73 Federal agencies have further elaborated on those regulations by adopting their own regulations.74

An agency must prepare different types of NEPA documentation depending on the level of possible environmental impact. If an action or project will not adversely impact the environment, no NEPA documentation or only minimal NEPA documentation will be required.75 If an action or project could cause significant environmental impacts, the agency must prepare an environmental assessment (EA).76 An EA is intended to evaluate whether significant

70. See id. (stating general rule for excessiveness).
71. See id. (taxing commercial aviation activity).
73. See 40 C.F.R. §§ 1500-1508 (2001) (mentioning purpose, policy, comments, NEPA requirements and agency compliance).
74. See, e.g., 67 Fed. Reg. 15290 (March 29, 2002) (to be codified at 32 C.F.R. § 651) (relying on purpose, policy, comments and requirements of NEPA and agency compliance); U.S. Dep’t of Army, Final Rule, Reg. 200-2, Environmental Effects of Army Actions.
75. See 40 C.F.R. § 1508.9 (2002) (defining environmental assessment and listing criteria that it serves).

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environmental effects would likely occur as a result of an activity or project. The EA can help the agency to determine whether to prepare an environmental impact statement (EIS), but an EA is not a prerequisite to an EIS. If an agency activity or project will have a significant impact on the quality of the environment, then the NEPA requires the agency to prepare an EIS.

Under their respective regulations, federal agencies have a number of "categorical exclusions" for which NEPA environmental documentation is not required. These categorical exclusions consist of routine actions, such as maintenance and repair, that the participating agencies have determined do not affect the environment either as an individual project or when considered together with other projects. The use of such categorical exclusions is encouraged under the CEQ regulations. An EA is appropriate if a categorical exclusion does not apply to a proposed action or project and some minor environmental damage could occur.

If an EA is completed and results in a "finding of no significant impact (FONSI)," then the NEPA requires no further environmental analysis. If the proposed action would cause significant environmental impact, however, then the agency must conduct an EIS, which is the highest level of environmental analysis. In addition, an agency may complete a higher level of analysis on a project than is required. Conducting an EIS analysis allows a federal agency to prepare and to present matters regarding controversial proposals. In a few select circumstances, an agency may also determine that, although completing an EIS would not be legally necessary, it would be prudent to conduct the EIS for strategic purposes, such as to garner public support for a proposed action or project.

77. See, e.g., 32 C.F.R. § 651.35 (2002) (describing decision process of EA resulting in either finding of no significant impact [hereinafter FONSI] or environmental impact statement [hereinafter EIS]).
82. See 40 C.F.R. § 1501.4(c) (2002) (listing factors in determining whether to prepare EIS).
83. See 40 C.F.R. § 1502 (2001) (mentioning decision to complete EIS, however, would likely be made only by policy-level officials in agency).
Major federal actions that will have an effect on the environment require NEPA documentation. Which projects constitute such actions can be a matter of contention. "Major federal actions" can include rule-making or licensing decisions that can affect the environment indirectly. Whether a proposed action requires an EIS is not always obvious. Projects affecting the environment have included a proposed low-income housing project on Manhattan’s Upper West Side and a proposed jail adjacent to the federal courthouse in New York City. In considering a court challenge to the proposed federal jail in New York City, the U.S. Court of Appeals for the Second Circuit determined that the NEPA requires a federal agency to consider at least two factors when analyzing the environmental impacts of a proposed action:

(1)[t]he extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

Determining whether an EA or an EIS is sufficient is highly subjective. To ensure that the documents in either the EA or the EIS are adequate, a federal agency environmental attorney will review each document and determine whether it meets the requirements of the CEQ regulations. For instance, the document must present an analysis of all reasonable alternatives, including a “no

84. See 40 C.F.R. § 1501.3 (2001) (stating when agencies shall prepare environmental assessments).

85. See Culvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1116 (D.C. Cir. 1971) (discussing that court was not reviewing construction permits or operating license but commission’s new rules on how environmental concerns should be considered in individual decisions).

86. See generally Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (holding that Department of Housing and Urban Development did consider environmental consequences of reclassifying proposed site from middle-income housing to low-income housing).

87. See generally Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972) (deciding memorandum of agency did not adequately consider environmental impact of proposed office jail portion of annex and construction was enjoined until proper consideration occurred).

88. Hanly v. Kleindienst, 471 F.2d 823, 830-831 (2d Cir. 1972) (stating factors to consider when determining if “major federal action will ‘significantly’ affect quality of human environment).
action” alternative. The document must also indicate that the agency proponent considered the issue of environmental justice—that is, whether minority or low-income populations would disproportionately suffer negative effects as a result of the proposed action.

The agency must apply the NEPA during the planning process prior to making any project decisions. If an agency makes a decision prior to applying the NEPA and uses an EA or an EIS for a post hoc rationalization of its decision, the agency’s action is illegal and vulnerable to a lawsuit. Under the CEQ regulations, an agency cannot take action on a project that will “limit the choice of reasonable alternatives.” Thus, any action on a project that would predispose a federal agency to a particular decision, such as awarding a contract to begin preparation work, makes the action vulnerable to a lawsuit.

A common error that proponents of federal projects make in preparation of an EA or EIS is “segmentation,” or “piecemealing,” which is the practice of dividing a single action “into component parts, each involving actions with less significant environmental effects.” “Segmentation” or “piecemealing” would occur if an agency analyzed different phases of a single project as separate projects in separate EAs to avoid conducting an EIS on the project as a whole. Separately analyzing a separate and distinct project, however, is legal and proper. In addition, “tiering” is also proper and encouraged by the CEQ regulations. When some or most of the aspects of a proposed action have already been discussed in an earlier EIS, an agency may “tier off” that earlier EIS with a more succinct environmental analysis to avoid “repetitive discussions” of the same issues. An EIS can also incorporate information by ref-

89. See 40 C.F.R. § 1502.14(d) (2001) (stating that alternatives for proposed action must also include possibility of no action).
92. 40 C.F.R. § 1506.1(a)(2) (2001) (stating limitation on actions that may be taken by agency during NEPA process).
93. Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) (defining “segmentation,” or “piecemealing” and stating that it should be avoided so that overall environmental impact is evaluated).
95. Id. (defining how tiering of EIS by agencies should be accomplished).
ference to other documents. If an agency chooses to produce an EIS for a proposal, however, it cannot be "tiered off" another EIS, because an EIS, by definition and practice, is a complete analysis of an action.

Beyond the rudimentary requirements, the better and more complete an EA or EIS, the more likely it is that the federal proponent agency will prevail in a court challenge. Federal agencies must apply a "rule of reason" to determine which factors to analyze. Agencies are not required to merely speculate or conduct a "worst case" analysis. The purpose of the process is to ensure that federal agencies consider the environmental effects of their planned projects and actions. Agencies must "give serious weight to environmental factors" when making project decisions. An "affected party" who notices a defect or deficiency in an EA or an EIS may have a legal cause of action. Early on, the Supreme Court recognized that the NEPA creates a right of action to enforce federal agency obligations to consider environmental impacts of their actions. As a result, the NEPA is a ripe area for litigation against the federal government and a means of holding it accountable. State officials and the public can make use of a federal agency's NEPA requirements to ensure that all potential environmental impacts of a project are considered.

B. The Endangered Species Act

Endangered Species Act (ESA) compliance will often occur in concert with the NEPA process. Section 7 of the ESA requires that federal agencies consult with the U.S. Fish and Wildlife Service (Service) to determine whether a proposed activity or project will

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96. See 40 C.F.R. § 1502.21 (2001) (explaining how incorporation by reference can be accomplished).

97. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-356 (1989) (explaining that at one time such "worst case" analysis was necessary under CEQ regulations but those regulations have been amended).

98. Town of Huntington, 859 F.2d at 1141 (quoting County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977)).


101. See 50 C.F.R. § 402.01 (2001) (explaining which service is consulted). Federal agencies consult with the U.S. Fish and Wildlife Service regarding land-based species and habitat or the National Marine and Fisheries Service regarding ocean-based species and habitat. Id.
subject any threatened or endangered species or its critical habitat to "jeopardy."¹⁰² When a federal agency proposes "major construction"¹⁰³ (or other activities having a similar impact on the environment) in an area where species included on the Endangered Species List are present, it must prepare a "biological assessment."¹⁰⁴ The Service will prepare a "biological opinion" (BO) that analyzes whether the proposed project or activity will jeopardize a threatened or endangered species (or critical habitat)¹⁰⁵ or whether an "incidental take"¹⁰⁶ will result that would jeopardize an endangered species.¹⁰⁷ The Service will issue a BO that describes the effects on the species, describes reasonable and prudent measures to minimize harm to the species and sets forth terms with which the proponent agency must comply to implement its proposed action.¹⁰⁸ If, after consultation, the Service still determines that the activity will "jeopardize" the species, the Service will issue a "jeopardy opinion."¹⁰⁹

Although there is a process for obtaining an exemption from endangered species requirements for an agency action,¹¹⁰ a finding

¹⁰². See 16 U.S.C. § 1536(a) (stating that agency must do consultation to determine possible harm under ESA).

¹⁰³. See 50 C.F.R. § 402.02 (2001) (defining "major construction activity"). "Major construction activity" is a "construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act." Id.

¹⁰⁴. A "biological assessment" is "information prepared by or under the direction of the [f]ederal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat." Id.

¹⁰⁵. See 50 C.F.R. § 402.12 (2001) (discussing issuance of biological opinion); see also 50 C.F.R. § 402.02 (2001) (defining biological opinion). A "biological opinion" states the opinion of the U.S. Fish and Wildlife Service "as to whether or not the [f]ederal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." Id.

¹⁰⁶. See C.F.R. § 402.02 (2001) (defining "incidental take"). This refers to damage to a species or its critical habitat "that result[s] from, but [is] not the purpose of, carrying out an otherwise lawful activity conducted by the [f]ederal agency or applicant." Id.; see also 16 U.S.C. § 1536 (defining "take"). "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Id.


¹⁰⁸. See 16 U.S.C. § 1536(b)(4) (explaining written statement provided by Secretary if the Secretary concludes that agency action will not violate such subsection or taking is authorized); see also 50 C.F.R. § 402.14(h) (2001) (stating biological opinion requirements).


by the Service that an agency action would place a listed species in jeopardy will normally terminate the proposed action. In *Tennessee Valley Authority v. Hill*, the snail darter, a tiny minnow-like fish, shut down the massive Tellico Dam project. In the Supreme Court’s opinion, Justice Burger wrote, “[i]t may be curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million.” Yet, that is exactly what the provisions of the ESA required.

Moreover, a BO from the Service finding that a federal activity will not adversely impact an endangered species is not necessarily the final word as to whether the federal activity can proceed. In *Center for Biological Diversity v. Rumsfeld*, an Arizona federal court held that both the U.S. Army and the Service were arbitrary and capricious in determining that activities at Fort Huachuca, Arizona would not jeopardize the Huachuca water umbel, a rare plant, or the Southwestern willow flycatcher, a rare bird. The decision concerned the Army’s efforts to create a plan to mitigate the effects of groundwater pumping attributable to the Army’s activities. The district court judge wrote:

The whole premise of the “no jeopardy” ruling which is that within three years the Army and other interested parties will come up with a long-term plan to remedy the groundwater deficit problem, is an admission that what is currently on the table as far as mitigation measures is inadequate to support the [Service’s] “no jeopardy” decision.

C. Wetlands Protection

Wetlands compliance should occur in concert with the NEPA process. Compliance generally requires the agency proponent to coordinate with the U.S. Army Corps of Engineers or to

112. *Id.* at 172 (stating Justice Burger’s comments on ESA appropriations).
113. *Id.* (stating Court’s conclusion).
115. *Id.* at 1154 (stating that Army’s mitigation measures were inadequate).
request special permits. Wetlands compliance is a controversial and difficult area of environmental law. At first glance, the law in this area may appear to be straightforward, but in reality, it is quite complex.

Under section 404 of the Clean Water Act, all discharges of dredged or fill material into "waters of the United States" require a permit from the U.S. Army Corps of Engineers (or a state with permitting authority). 117 "Waters of the United States" include wetlands that are adjacent to or tributary to other waters of the United States. 118 Courts have even found nonadjacent wetlands to be waters of the United States based on their use by migratory waterfowl or interstate travelers, which constitutes a nexus to interstate commerce sufficient to establish federal jurisdiction. 119 The Supreme Court, however, overruled the "Migratory Bird Rule" in its 2001 decision, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers. 120

"Wetlands" are areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that normally do support, vegetation that is typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas. 121 An area need not be saturated all year long to constitute a wetland. 122 Further, the concept of discharge or dredged or fill material can be broadly interpreted. Proposed activities that affect a small creek bed or western arroyo, for instance, could require a section 404 permit. The dredging or filling of a wetland is not the only wetland activity that requires a permit. 123 The incidental discharge into a wetland by bulldozers or military tracked vehicles, for instance, could also trigger the requirement for a section 404 permit. In those circumstances, the federal agency will normally consult with the Corps of Engineers to deter-

117. See generally 33 U.S.C. § 1344 (requiring permit for filling wetlands).
118. See, e.g., Riverside Bayview Homes, Inc., 474 U.S. 121 (holding that wetlands adjacent to waters fall within EDA definition of waters of United States).
119. See, e.g., Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755 (9th Cir. 1978); but see generally Tabb Lakes Ltd. v. United States, 10 F.2d 796 (Fed. Cir. 1993) (viewing this approach with disfavor).
120. 531 U.S. 159 (2001) (ruling that extending definition of "navigable waters" under CWA to include interstate waters used as migratory bird habitat exceeded corporation's authority under CWA).
121. See Riverside Bayview Homes, 474 U.S. at 129-30 (defining wetlands).
122. Id. (rejecting frequent flooding requirement in definition of wetlands).
mine whether a section 404 permit is required.\textsuperscript{124} Such consultation may even be required in desert environments. In addition, with regard to any federal construction project that may damage wetlands, Executive Order 11990 requires the proponent agency to make a determination that "there is no practice alternative" to the project and that the project includes "all practicable measures to minimize harm to wetlands."\textsuperscript{125}

D. Cultural Resources Requirements

Another responsibility federal agencies must assume in environmental planning comes from section 106 of the National Historic Preservation Act (NHPA).\textsuperscript{126} Under section 106, any federal "undertaking"\textsuperscript{127} triggers a requirement to consult with the federal government's Advisory Council on Historic Preservation (ACHP) regarding the fate of districts, sites, buildings, structures and objects that are eligible for the National Register of Historic Places.\textsuperscript{128} These areas include archeological sites as well as historic structures.\textsuperscript{129} Ordinarily, properties younger than fifty years old will not be considered eligible for the National Register.\textsuperscript{130}

Under the ACHP's regulations, when a federal agency determines that a proposed action falls within the NHPA definition of an undertaking, the agency must consult with the state historic preservation officer (SHPO).\textsuperscript{131} The agency must also solicit the views of public and private organizations, Native Americans, local govern-

\textsuperscript{124} See id. § 1344(a) (delegating permitting authority to Corporation of Engineers).


\textsuperscript{126} 16 U.S.C. § 470f (2000). In addition to section 106, section 110 of the NHPA requires that federal agencies use their historic properties "to the maximum extent feasible" rather than acquire or construct new properties. \textit{Id.} § 470h-2. Section 110 also requires that federal agencies locate agency owned historic properties and nominate those properties to the National Register of Historic Places. \textit{Id.}

\textsuperscript{127} "Undertaking" includes any project, activity or program that can result in changes in the character or use of historic properties, if the historic properties are located in the area of potential effects. Undertakings include new and continuing projects, activities or programs and any of their elements not previously considered under section 106. 16 U.S.C. § 470w(7).


\textsuperscript{129} For instance, archeologists at the U.S. Army's Fort Bliss, Texas estimate that the installation has more than 15,000 archeological sites within its boundaries. Interview with James Bowman, Chief Archeologist, Fort Bliss, Tex. (Nov. 12, 1997).

\textsuperscript{130} 36 C.F.R. § 60.4 (2001) (stating criteria for national historic preservation).

\textsuperscript{131} 36 C.F.R. § 800.4(a) (2001) (enumerating protocol for identification of historic properties).
ments and other groups that are likely to have knowledge of or concerns with the Historic Register eligible properties. The agency may proceed with the proposed project or action only if: (i) the agency determines that the project or action will have "no effect" on Historic Register eligible properties; (ii) the SHPO agrees with that determination; and (iii) there are no objections raised within fifteen days. If the agency determines that there is an effect but that it is not adverse and the SHPO agrees, then the agency may make a "no adverse effect" determination and advise the ACHP.

If there will be an adverse effect on historic properties, the agency must notify the ACHP and enter negotiations with the SHPO on a memorandum of agreement (MOA) to avoid or mitigate the adverse effect. The ACHP may enter this consultation process with or without a request from either the agency or the SHPO. If the agency and the SHPO (and sometimes the ACHP) cannot reach an agreement, only the head of the federal agency (for example, the commissioner of the Bureau of Reclamation) may overrule the SHPO and the ACHP. The agency head may not delegate this responsibility.

Federal agencies must follow section 106 requirements when they directly undertake federal activities and when they are involved indirectly through funding, approving, permitting or licensing. In its regulations, the ACHP includes in its definition of a federal undertaking "any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects." Courts have interpreted "undertaking" to include a wide variety of

132. See 36 C.F.R. § 800.2(c) (2001) (listing consulting parties).
133. This provision also applies to projects that will have no effect on the "area of potential effects," defined as the geographic area or areas within which the undertaking may cause changes in the character or use of historic properties. Id. § 800.2(c) (2001).
134. See 36 C.F.R. § 800.5(b) (2001) (requiring consultation with SHPO).
135. See 36 C.F.R. § 800.5(d)(2) (2001) (refusing to further consultation upon adverse effect finding).
136. Id. (specifying terms for council participation).
139. 36 C.F.R. § 800.2(o) (2001).
actions, including military operations, building leases, land exchange agreements, and revision of agency regulations.

In addition to the NHPA, the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archeological Resources Protection Act (ARPA) can play important roles in the federal environmental planning process. The NAGPRA requires that all federal agencies (and museums) that possess “Native American human remains and associated funerary objects” compile an inventory and notify tribes that may have a cultural link to the remains and associated objects. If the tribe so desires, the agency must return the remains and associated objects to the tribe. The agency must also provide a summary listing of “unassociated funerary objects, sacred objects, and cultural patrimony.” Because newly discovered remains or tribal objects would fall under the possession and control of the federal agency that discovers them, the federal agency would be required to provide similar notification to the tribes and give the tribes an opportunity for consultation and

143. See generally Illinois Interstate Commerce Comm’n v. Interstate Commerce Comm’n, 848 F.2d 1246 (D.C. Cir. 1988) (holding that changes to federal agency regulations may constitute federal activities).
146. See 25 U.S.C. § 3001(9). “Native American” means of or related to a “tribe, people, or culture that is indigenous to the United States.” Id.; see also § 3001(5)(A). “Associated funerary objects” means objects that were a part of the “death rite or ceremony of a culture” and were placed with the body at the time of burial or later. Id.
147. 25 U.S.C. § 3003. Each federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or federal agency, identify the geographical and cultural affiliation of such item. Id.
148. 25 U.S.C. § 3005 (providing for repatriation of Native American human remains and objects possessed or controlled by federal agencies and museums).
149. See 25 U.S.C. § 3001(3)(B). “Unassociated funerary objects” include objects that are not presently under the control of the federal agency. Id.; see also 25 U.S.C. § 3001(3)(C). “Sacred objects” are specific ceremonial objects for the practice of Native American religions. Id.; see also 25 U.S.C. § 3001(3)(D). “Cultural patrimony” includes objects that have cultural significance to an entire tribe, rather than to an individual member of the tribe. Id.
repatriation. Environmental planning in areas with a considerable historic presence of Native Americans must consider the potential effects of discovering Native American remains or tribal objects. Failure to comply with these requirements may cause conflicts with Native American tribes.

The ARPA provides requirements for the protection of archeological sites. If archeological resources are discovered during the course of a federal activity, and if they must be excavated, the proponent must seek approval for the excavation from the federal land manager. Unauthorized excavation is prohibited under the ARPA. In addition, the incidental discovery of an archeological site will trigger the requirements of section 106 of the NHPA.

E. Air Conformity Determinations

Section 176(c) of the Clean Air Act (CAA), which was adopted with the 1990 amendments to the CAA, requires that all federal actions conform to any applicable state implementation plan (SIP). Thus, federal facilities located in air pollution non-attainment and maintenance areas must ensure that any proposed action conforms to the SIP. Under the EPA's implementing regulations, a federal action means "any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency, or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves . . . ."

Archeological resource [means] any material remains of past human life or activities which are of archeological interest . . . [including] pottery, basketry, bottles, weapons, weapon projectiles, tools, structures, or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal remains, or any portion or piece of any of the foregoing items.

151. 16 U.S.C. § 470cc(b) (2000) (stating that "determination by Federal Land Manager" is "prerequisite to issuance of permit").

152. See 16 U.S.C. § 470cc. (showing that "no person may excavate . . . any archeological resource . . . unless such activity is pursuant to a permit issued under section 470cc of this title."); see also 16 U.S.C. § 470hh (2001).


154. See id. (determining "SIP" to be state's source-specific plan for meeting air quality standards).

155. "Nonattainment areas" are areas that do not meet national air quality standards for a particular pollutant. 40 C.F.R. pt. 50 (2001).

156. See 40 C.F.R. § 51.852 (2001) (defining "maintenance area" to be area that meets air quality standards but must have a plan to keep its emissions in compliance).

157. Id. (discussing maintenance area).
The air conformity rule sets standards for maximum emissions limits allowed for various air pollutants in non-attainment and maintenance areas. For actions exceeding these limits, the proponent federal agency must show that the action conforms to the SIP. The federal agency can demonstrate conformity by indicating that the action is already accounted for in the SIP, that the emissions are offset by emission reductions elsewhere within the nonattainment or maintenance area or that the action does not contribute to or increase the frequency of air standards violations.

When making a conformity determination, a federal agency "must consider comments from any interested parties." EPA regulations require a thirty-day notice and comment period. The proponent federal agency must also notify the EPA regional offices and state and local air quality agencies of the project or action.

158. 40 C.F.R. § 51.853(b)(1) (2001) (showing acceptable amount of tons per year allowed for each pollutant).

159. 40 C.F.R. § 51.851(b) (2001) (stating that federal conformity rules "establish the conformity criteria and procedures necessary to meet the act requirements until such time as the required conformity SIP revision is approved by EPA.").

160. 40 C.F.R. § 51.858 (2001) (determining that pollutant must meet specified criteria enumerated in this section).


Any Federal department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

Id.

162. 40 C.F.R. § 51.856(b) (2001).

A Federal agency must make public its draft conformity determination under §§51.858 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the NEPA process.

Id.


A Federal agency making a conformity determination under 51.858 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO a 30 day notice which describes the proposed action and the Federal agency's draft conformity determination on the action.
The conformity analysis will normally be conducted in conjunction with the NEPA process because it is required prior to taking any action and because it has a public notice requirement similar to the NEPA’s requirement. In its comments to the air conformity rule, the EPA noted that “[f]ederal agencies should consider meeting the conformity public participation requirements at the same time as the NEPA requirements.” This would allow the proponent agency to streamline the conformity determination process yet remain consistent with its requirements.

F. Western Water Rights

For federal agencies that operate in the Western United States, special rules regarding water rights also apply. The Western States generally follow a legal regime known as the “Prior Appropriation Doctrine” (Doctrine) in determining entitlement to scarce water resources. The history of the Doctrine is tied closely to the history of the West itself. The Doctrine was derived from the principles of mining law, in which the first prospector to stake a claim was entitled to work that claim exclusively. The first case to recognize a right of prior appropriation was Irwin v. Phillips, which settled a dispute over water rights between miners. As time passed, agricultural irrigation replaced mining as the primary use of water in the West and the Doctrine was applied to this new use as well. The basis of the Doctrine, like its mining law precursor, is “first in time, first in right.” In other words, the first person to take water from a stream and use it for a beneficial purpose becomes the “senior appropriator,” and his or her water right to the amount of water he or she diverts is superior to all other subsequent or “junior” appropriators. Beneficial uses normally include domestic uses, irrigation, industrial uses and general municipal uses. Sometimes they include aesthetic uses as well, such as swimming or boating. Water rights are typically monitored intensely by local associations of appropriators (often known as ditch companies), by local water dis-

165. 5 Cal. 140, 146 (1855) (finding that right by prior appropriation is firmly fixed by universal sense of necessity and propriety).
166. See DAVID H. GETCHES, WATER LAW IN A NUTSHELL 104 (1984) (explaining that priority is essential feature of doctrine of prior appropriation and person whose appropriation is first in time has highest priority).
167. See AMERICAN WATER WORKS ASSOCIATION, WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES 26 (1990) [hereinafter AWWA].
tricts and by state officials. The Doctrine, however, does not require that water rights be used either efficiently or wisely.168

Under the Doctrine, an appropriator can change the beneficial use of the water or transfer a water right to another party. An appropriator can change the point of diversion or the type of use, but only under conditions that would protect the rights of other appropriators.169 Water rights may be lost if they are not used consistently and beneficially. Failure to use a water right coupled with an intent to forfeit the right constitutes abandonment, freeing the right for appropriation by another party.170 In some states, statutes specify that nonuse for a specified period of time constitutes forfeiture.171

The Doctrine is not uniformly applied throughout the Western States. Nine states have adopted a pure form of the Doctrine, known as the "Colorado Doctrine."172 Ten states follow a hybrid water law system, which incorporates elements of riparian rights as well as prior appropriation.173 While federal facilities enjoy some distinct advantages over private users in the Western States, federal attorneys and engineers must be keenly aware of water rights systems in their respective states.

The biggest advantage federal agencies enjoy is derived from the Supreme Court's 1908 decision in Winters v. United States.174 The Winters Court held that, although no mention of water rights was made at the time lands were reserved for two Native American tribes in Montana, the reservation by the federal government of the land for the tribes constituted an implied reservation of water rights to support the tribes' agricultural pursuits, which was the purpose of the creation of the reservation.175


170. See id. at 28.

171. See id.

172. See generally Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882) (defining "Colorado Doctrine"). In addition to Colorado, the states of New Mexico, Wyoming, Montana, Idaho, Utah, Nevada, Arizona and Alaska follow the "Colorado Doctrine."

173. The hybrid states are Texas, Kansas, Nebraska, North Dakota, South Dakota, Oklahoma, Washington, California, Oregon and Mississippi.

174. See Winters v. United States, 207 U.S. 564, 577 (1908) (finding that government reserved waters for use necessarily continued through years).

175. See id. at 576-77 (finding that no act of Congress destroyed reservation).
The so-called Winters Doctrine was expanded in *Cappaert v. United States*,\(^{176}\) which held that the United States was entitled to instream flows of groundwater needed to support a species of wildlife at a national monument.\(^{177}\) The Court stressed that, because the proclamation creating the park referred specifically to a rare and unusual species of fish living in Devil's Hole, an underground spring at Death Valley National Monument, protection of that species was implied as a purpose for the reservation of the land.\(^{178}\) The Court held that the United States, in reserving public land for a specific purpose, was entitled to all previously unappropriated waters "necessary to accomplish the purposes for which the reservation was created."\(^{179}\)

In *United States v. New Mexico*,\(^{180}\) the Supreme Court rejected the U.S. Forest Service’s efforts to protect instream flows for aesthetic, recreational and fish-preservation purposes in the Gila National Forest in New Mexico. In *New Mexico*, the majority based its decision on the notion that protection of instream flows for aesthetic purposes was outside the "relatively narrow purposes for which national forests were to be reserved."\(^{181}\) In his dissent, Justice Powell questioned whether "the forests which Congress intended to ‘improve and protect’ are the still, silent, lifeless places envisioned by the Court . . . the forests consist of the birds, animals, and fish – the wildlife – that inhabit them, as well as the trees, flowers, shrubs and grasses."\(^{182}\)

Significantly, the *New Mexico* decision illustrates the Court’s reluctance to stretch the reserved water right beyond the purpose of the reservation of the land. Federal agencies that have responsibilities under the ESA or other statutes may have to work within the state appropriation system to acquire sufficient water rights to protect species. This sometimes makes it difficult for federal agencies

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177. *See id.* at 147 (finding that when United States reserved Devil’s Hole it acquired by reservation water rights).
178. *See id.* at 140-42 (noting that proclamation referred to "peculiar race of desert fish" and that pool was of outstanding scientific importance*).
179. *See id.* at 139 (explaining when intent to reserve water is inferred).
180. 438 U.S. 696 (1978) (rejecting notion of implied intent to reserve water rights when public land is reserved strictly for aesthetic or recreational purpose).
181. *See id.* at 709 (holding that national forests were reserved for two primary purposes: timber preservation and enhancement of water supply).
182. *See id.* at 719 (arguing that he would hold that United States is entitled to as much water as is necessary to sustain wildlife of forests, including plants).
to balance their legal obligations under the ESA and other environmental statutes with the demands of other water users.\(^\text{183}\)

For challenges to a federal agency's water rights under state systems, however, the McCarran Amendment\(^\text{184}\) provides only a limited waiver of sovereign immunity. This statute grants state jurisdiction over the United States in any suit:

(1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.\(^\text{185}\)

The statute only applies to "general adjudications" involving all the water rights of all appropriators on a stream.\(^\text{186}\) It does not waive sovereign immunity for challenges by individuals against the United States seeking to determine their relative priorities as against the United States.\(^\text{187}\)

A unique feature of the waiver of sovereign immunity under the McCarran Amendment is that it requires the federal government to defend itself in state courts.\(^\text{188}\) This differs from the process familiar to most federal attorneys, which calls for immediate removal to federal district court.\(^\text{189}\) Thus, the McCarran Amendment sacrifices the "home field advantage" federal attorneys normally enjoy. The rationale behind allowing the state adjudication process to consider federal water rights within the states is the as-

\(^{183}\) See generally William A. Wilcox, Western Flood Management in the 21st Century: A Tightrope Between Competing Values, W. WATER L. & POL’Y REP. 153 (discussing balance that must be reached between private interest in water rights and Federal interest in water rights necessary to preserve wildlife and environment).

\(^{184}\) 43 U.S.C. § 666(a) (2000) (describing suits in which consent is given to join United States as defendant in certain environmental actions).

\(^{185}\) See id. (outlining two circumstances in which U.S. may be subject to state regulations)


\(^{187}\) See Michael D. White, McCarran Amendment Adjudications – Problems, Solution, Alternatives, XXII LAND & WATER L. REV. 619, 621 (1987) (explaining that general state adjudications included multitude of parties whose ability to overcome doctrine of sovereign immunity may differ).

\(^{188}\) See 43 U.S.C. § 666(a) (stating that United States waives any right to plead that state laws are inapplicable and does not have right to remove case to federal court).

assumption that states are better equipped to deal with complex water rights questions. This rationale is not uniformly agreed upon. "There is nothing about the reserved right," one critic wrote, "that cannot be fully and more simply resolved consistent with principles of federalism in a federal court declaratory judgment action, if the parties were willing to see it done that way."\(^{190}\)

IV. CONCLUSION

While the federal government constitutes one of the largest industries in the United States and is a major consumer of natural resources, much of the conventional regime of state environmental laws either does not apply to the federal government or must be applied under special rules. This creates a perplexing problem for state environmental regulators and the public, who wish to ensure that environmental requirements are carried out equally by all entities. It appears to be a matter of simple fairness to hold federal agencies as accountable for their actions as all other entities.

Federal agencies do indeed follow their own set of rules with respect to environmental law. In some cases, sovereign immunity may provide a shield to regulation under state law. Some of the federal agencies' regulations, however, are significantly more stringent than regulations that apply to any state or private entities. Environmental planning regulations, for instance, afford the public and state and local governments an opportunity to shape federal programs and projects at their inception. When dealing with the federal government in the arena of environmental and natural resources law, practitioners must understand the special issues that arise involving environmental regulation and environmental planning. Only then can they enforce state environmental law against federal agencies effectively.
