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WHEN UNCLE SAM SPILLS: A STATE REGULATOR'S GUIDE TO ENFORCEMENT ACTIONS AGAINST THE FEDERAL GOVERNMENT UNDER THE CLEAN WATER ACT

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Abstract: The U.S. government is one of the largest polluters on the planet. With over 700 domestic military bases and countless more federal facilities and vessels operating within state borders, there exists an enormous potential for spills and discharges of pollutants into state waters. The regulatory burden for enforcing environmental laws against the federal government falls on the Environmental Protection Agency and state regulators. But enforcing laws and regulations against the federal government and its progeny is a daunting regulatory task.

Other scholarship addresses some of the vexing peculiarities involved when regulating Uncle Sam. Those works discuss the "confusing mess" that waivers of sovereign immunity in federal environmental statutes present, the "[l]imitations" of sovereign immunity under the Clean Water Act, and the challenges of regulating even just one action (vessel discharges) by one federal department (the Navy).

This Comment aims to help state regulators navigate the often-oily waters of the pseudo-regulatory relationship that exists between states and the federal actors operating within their borders. To accomplish this, the piece outlines a four-part framework to assess a state's ability to regulate federal actors' conduct. It then applies that framework to assess Washington State's regulatory authority over point source pollution from federal facilities pursuant to the Clean Water Act. It concludes by offering recommendations and best practices to state regulators to facilitate state regulatory action against federal actors when necessary.

INTRODUCTION

On January 17, 2019, the Washington State Attorney General's Office (Washington AGO) penned a strongly worded letter to Acting Secretary of Defense Patrick Shanahan, Secretary of the Navy Richard Spencer, and Captain Edward Schrader. The letter announced the State's intention to join a citizen suit "challenging the U.S. Navy's process to scrape the hulls of decommissioned vessels" at the Puget Sound Naval Shipyard.[1] The

* J.D. Candidate, University of Washington School of Law, Class of 2023. Many thanks to my editors on *Washington Law Review*, my advisor, Professor Sanne Knudsen, and my mentor, Julian Beattie, without whom this piece would not have been possible. This piece is dedicated to Puget Sound and the people, plants, and animals who call it home.

1. Press Release, Wash. State Office of the Att'y Gen., AG Ferguson to Sue if Navy Continues to Pollute Puget Sound, Harming Salmon, Orcas and Other Marine Life (Jan. 17, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-sue-if-navy-continues-pollute-puget-

section headings made it clear that this suit would seek to enforce federal law—specifically, the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). Yet, throughout the body of the letter, the Washington AGO referenced violations of federal *and state* environmental laws as the basis for the suit.[2]

Two years prior, the Navy released roughly "seventy-three dump-truck loads of solid material into [the Sinclair Inlet in] Puget Sound" while blasting debris from the hull[3] of a 60,000-ton, decommissioned aircraft carrier, the ex-U.S.S. *Independence*.[4] Among the debris were "significant amount[s]" of highly toxic metals (e.g., copper and zinc) from the paint used to coat the hull of the Independence.[5]

The State of Washington never had the chance to litigate the merits of these claims. On January 29, 2020, the parties reached a settlement and filed a joint motion to enter a consent decree in the Western District of Washington.[6] But what if they hadn't? Could the State of Washington enforce federal (let alone state) environmental laws and regulations against the federal government, and, if so, how? It's complicated.

Enforcing state and federal laws and regulations against the federal government and its progeny is a daunting regulatory task. Frequent settlements limit available case law. Additionally, federal regulators are often reluctant to regulate the federal government or are uncooperative with state regulators. And sovereign immunity—an expansive legal doctrine that protects the State from suit—shields many federal actors and actions. Furthermore, even when there is an apparent delegation of

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sound-harming-salmon-orcas-and [https://perma.cc/4HJN-YHV5]; *see also* Letter from Kelly T. Wood, Assistant Att'y Gen., Wash. State Office of the Att'y Gen., to Patrick Shanahan, Sec'y of the Navy (Jan. 17, 2019) [hereinafter Wood Letter], http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/60%20Day%20Notice%20Letter%20Signed.pdf [https://perma.cc/Y8EM-DYP5] (providing the Navy with notice of the Attorney General of the State of Washington's intent to sue under the Clean Water Act).

2. *See generally* Wood Letter, *supra* note 1.

3. The "hull" is the main body of the ship. *Hull*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/hull [https://perma.cc/9G3R-C6KM]. In this case, "hull" refers generally to the bottom and sides of the vessel.

4. Press Release, Wash. State Office of the Att'y Gen., Victory for Puget Sound: Navy Signs Legally Enforceable Agreement to Stop Polluting Puget Sound with Ship Scrapings, Take Steps to Prevent Additional Environmental Damage (Jan. 29, 2020) [hereinafter Victory for Puget Sound], https://www.atg.wa.gov/news/news-releases/victory-puget-sound-navy-signs-legally-enforceable-agreement-stop-polluting-puget [https://perma.cc/E6EZ-B5CQ].

5. *Id.*

6. Joint Motion to Enter Consent Decree, Puget Soundkeeper All. v. U.S. Dep't of the Navy, No. 3:17-cv-05458-RBL (W.D. Wash. Jan. 29, 2020) [hereinafter Joint Motion to Enter Consent Decree], https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/VesselScrapingConsentDecree.pdf [https://perma.cc/AD6W-GRMB].

regulatory authority to the states or a seemingly broad waiver of immunity, courts construe those waivers strictly and narrowly in favor of the sovereign.[7] Federal liability is slippery.

Why is this important? The ex-Independence hull-scraping incident was not the first time the Navy violated state and federal environmental laws by releasing pollutants into Puget Sound,[8] and it would not be the last.[9] In the thirty years since the Washington State Department of Ecology (Ecology) began consistently keeping records of oil spills, the Navy spilled oil into Washington waters dozens of times, releasing thousands of gallons of oil into Puget Sound and other state waterways.[10] In 1996, the chief spill responder for Ecology's Northwest Regional Office expressed concern over the frequency with which the Navy spilled oil into Puget Sound and frustration at the inability of state regulators to penalize the Navy for such spills.[11] Over twenty years later, it seems little has changed.[12]

This problem is not unique to Washington State.[13] The U.S. Military is

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7. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 460–61 (2005) ("[T]he Supreme Court has directed that the contours of a statutory waiver of sovereign immunity are to be construed strictly and narrowly."); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 607 (1992) ("Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983))).

8. *A History of Navy Oil Spills in Puget Sound*, KITSAP SUN (Apr. 18, 1998), https://products.kitsapsun.com/archive/1998/04-18/0015_a_history_of_navy_oil_spills_in_p.html [https://perma.cc/BRM3-C7RM].

9. *4,000 Gallons of Sewage Spills from Puget Sound Naval Shipyard*, KOMO NEWS (Mar. 5, 2019), https://komonews.com/news/local/4000-gallons-of-sewage-spill-from-puget-sound-naval-shipyard [https://perma.cc/WTC6-2LQ9]; Chris Daniels, *Suquamish Tribe Accuses Navy of Spilling Raw Sewage into Puget Sound*, KING 5 (Mar. 28, 2019), https://www.king5.com/article/news/local/tribe-accuses-us-navy-of-multiple-raw-sewage-spills-in-16-months/281-a4a1a41d-c4c0-4402-91c3-8a537a28395f [https://perma.cc/TV95-URXP]; *Navy Destroyer Causes Oil Spill in Port Townsend Bay*, SEATTLE TIMES (June 6, 2021), https://www.seattletimes.com/seattle-news/navy-destroyer-causes-oil-spill-in-port-townsend-bay/ [https://perma.cc/4RXN-7DC3].

10. *A History of Navy Oil Spills in Puget Sound*, *supra* note 8; *supra* note 9 and sources cited therein.

11. Christopher Dunagan, *State Says Navy Has Too Many Oil Spills*, KITSAP SUN (Aug. 30, 1996), https://products.kitsapsun.com/archive/1996/08-30/350292_state_says_navy_has_too_many_oi.html [https://perma.cc/BL44-5RE3]; *A History of Navy Oil Spills in Puget Sound*, *supra* note 8.

12. In 2019, the Suquamish Tribe accused the Navy of spilling *330,000 gallons* of raw sewage into Puget Sound over a period of sixteen months. Daniels, *supra* note 9.

13. The Department of Defense and the Government Accountability Office are currently investigating the use of per- and polyfluoroalkyl substances (PFAS) at 687 installations. U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL COMMITTEES 12 (June 2021), https://www.gao.gov/assets/gao-21-421.pdf [https://perma.cc/W7HC-9H46]; Oliver Belcher, Patrick Bigger, Ben Neimark & Cara Kennelly, *Hidden Carbon Costs of the "Everywhere War": Logistics,*

one of the largest polluters on the planet,[14] and with over 700 domestic military bases,[15] there exists an enormous potential for spills and discharges of pollutants into state waters—inadvertent and otherwise. Without effective legal tools, state regulators can do little more than watch while the federal government exploits the waters the states hold in trust for their residents,[16] often in clear violation of federal and state law. This does not have to be the case.

What can be done to curb this decades-long pattern of unfettered pollution by the U.S. government? This Comment posits that vigilant state regulatory action—where authorized—is needed. Such action requires an understanding of a given state's regulatory authority as well as familiarity with the suite of enforcement tools available to it. That regulatory authority is determined by both the means through which it is delegated to the state and, importantly, the scope of the waiver of sovereign immunity in the governing federal statute as it applies to both the actor(s) and the action(s) the state seeks to regulate.

Other scholars have addressed the "confusing mess" that waivers of

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Geopolitical Ecology, and the Carbon Boot-Print of the US Military, 2019 TRANSACTIONS INST. BRIT. GEOGRAPHERS 1, 8 ("Given its extensive institutional infrastructure and operations, both domestically and overseas, the US military consumes more liquid fuels and emits more CO2e (carbon-dioxide equivalent) than many medium-sized countries." (citations omitted)); Farrel Kramer & Hal Spencer, *Navy Consistently Spills Pollutants into U.S. Waters*, KITSAP SUN (Nov. 22, 1998), https://products.kitsapsun.com/archive/1998/11-22/0016_navy_consistently_spills_pollutan.html [https://perma.cc/CP9C-KJQQ]; Julie Turkewitz, *Toxic 'Forever Chemicals' in Drinking Water Leave Military Families Reeling*, N.Y. TIMES (Feb. 22, 2019), https://www.nytimes.com/2019/02/22/us/military-water-toxic-chemicals.html (last visited Nov. 17, 2022) ("[T]he drinking water system [in Fountain, Colorado] was one of at least fifty-five polluted by the military.").

14. Jangira Lewis, *US Military Pollution: The World's Biggest Climate Change Enabler*, EARTH.ORG (Nov. 12, 2021), https://earth.org/us-military-pollution/#:~:text=In%202019%2C%20a%20report%20released,equivalent)%20than%20most%20countries%E2%80%9D [https://perma.cc/LC6P-LJQ4].

15. *Military Bases*, OPENDATASOFT, https://public.opendatasoft.com/explore/dataset/military-bases/information/ [https://perma.cc/X62C-FHFW] (Dec. 31, 2020). This dataset, which comes from the Bureau of Transportation Statistics' National Transportation Atlas Database, includes 753 active Department of Defense sites, installations, ranges, and training areas in the United States and its Territories. The dataset is visible under the "Table" tab at the link provided. Initially, the table only displays eighty rows. The remaining rows can be viewed by scrolling up with one's cursor placed over the table, allowing the table to load, and scrolling down again. This will reveal additional rows. Repeat this step to view all 753 sites. Note, the "Oper Stat" variable on the left side of the page at the link provided states that 753 of the sites are "Active." The status of each site is indicated by this same variable in the table.

16. This trustee-beneficiary relationship is established by the public trust doctrine. "Broadly stated, the public trust doctrine provides that government holds certain submerged and adjacent lands, waters, and (increasingly) other resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes." David L. Callies, *The Public Trust Doctrine: A Background Principle Exception to Categorical Regulatory Takings After* Lucas, 42 NO. 10 ZONING AND PLANNING L. REPS. NL 1, 2 (2019).

sovereign immunity in federal environmental statutes present,[17] the "[l]imitations" of sovereign immunity under the CWA,[18] and the challenges of regulating even just one action (i.e., vessel discharges) by one federal department (i.e., the Navy) in light of increasing tensions between the "ability to defend the nation" and "sound environmental stewardship."[19] This Comment builds on the existing scholarship by considering these issues from the perspective of state regulators and providing a legal road map for navigating this murky and, at times, contentious regulatory relationship. In particular, this Comment provides state regulators with a framework to begin to assess the source and scope of their regulatory authority; determine whether the actor(s) and conduct they seek to regulate fall within their regulatory purview under federal law(s) and regulation(s); and recognize the potentially narrowing effects of judicial interpretation of federal sovereign immunity waivers on state regulatory authority.

Part I outlines the process for assessing state regulatory authority over federal actors with particular attention paid to provisions of the Clean Water Act. Part II describes relevant portions of the Clean Water Act and how the Act is administered in Washington. Part III applies the analysis laid out in Part I to the ex-U.S.S. *Independence* hull-scraping incident as a case study. This involves assessing aspects of Washington State's regulatory authority over federal actors pursuant to the Clean Water Act. Part IV makes recommendations to state regulators generally, in light of the precipitous threat posed by human-made environmental harms and the current state of federal environmental regulation. This analysis focuses on violations of the CWA and analogous Washington law as well as the enforcement actions authorized under the CWA. However, the methodology and general principles discussed can be readily applied to other federal environmental statutes and state regulatory schemes.

I. WHAT TO DO WHEN UNCLE SAM SPILLS

Before a state regulator can enforce federal or state laws and regulations against the federal government, its agencies and departments, or its officers and agents, they must consider and answer four questions.

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17. Kenneth M. Murchison, *Waivers of Immunity in Federal Environmental Statutes of the Twenty-First Century: Correcting a Confusing Mess*, 32 WM. & MARY ENV'T L. & POL'Y REV. 359, 388 (2008).

18. Corinne B. Yates, *Limitations of Sovereign Immunity Under the Clean Water Act: Empowering States to Confront Federal Polluters*, 90 MICH. L. REV. 183, 187 (1991).

19. Daniel E. O'Toole, *Regulation of Navy Ship Discharges Under the Clean Water Act: Have Too Many Chefs Spoiled the Broth?*, 19 WM. & MARY ENV'T. L. & POL'Y REV. 1, 42 (1994).

(1) *What is the source of the state's regulatory authority?* Some sources include delegation of regulatory authority pursuant to a federal statute or agency, a cause of action created by federal law, or state laws or regulations paralleled or incorporated by their federal counterparts.[20]

(2) *What is the scope of that regulatory authority?* Once a state regulator identifies the source of their regulatory authority, they must determine the bounds of that authority: To whom and to what conduct does it apply?[21]

(3) *Is there an express waiver of sovereign immunity?* Enforcement actions and suits against the federal government require a waiver of sovereign immunity. Before a state regulator can take regulatory action against a federal actor pursuant to a federal statute, they will need to confirm the statute contains an express waiver of sovereign immunity.[22]

(4) Finally, *is the state's apparent regulatory authority pared back in any way—either by the waiver itself or case law that interprets the waiver?* In cases where immunity is waived, regulators must evaluate the scope of the waiver as it applies to the specific federal entity, conduct, and regulatory action. Answering this question requires close examination of the relevant waiver of sovereign immunity as well as the applicable case law, which may compromise even the most comprehensive of waivers.[23]

The question of a state's regulatory authority over a federal entity or actor is highly dependent on the federal statute under which the state is acting.[24] This Comment applies each of the four questions in turn to the ex-U.S.S. *Independence* hull-scraping incident to assess the ability of Washington State regulators to regulate point source water pollution[25] by federal actors. This state-level analysis focuses on the regulatory authority bestowed by the Clean Water Act. The outcome of the analysis as applied to the Clean Water Act will be different than the outcome if the same analysis were applied to the Equal Employment Opportunity Act, for example, or even the Clean Air Act (upon which much of the language in the Clean Water Act is based). That being said, the general framework—the four questions—is broadly applicable to questions of state regulators'

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20. *See infra* section I.A.

21. *See infra* section I.B.

22. *See infra* section I.C.

23. *See infra* section I.D.

24. *See* discussion *infra* section I.D.

25. 33 U.S.C. § 1362(14):

> The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

authority over federal actors.

With these four questions in mind, this Comment begins by examining the various sources of state regulatory authority over federal actors with particular attention paid to the relevant provisions of the Clean Water Act and sources of regulatory authority in Washington State.

A. The Source(s) of State Regulatory Authority

In recent years, states have taken it upon themselves to pass increasingly progressive environmental legislation,[26] and many states now have statutory and regulatory standards that differ from or exceed those imposed by analogous federal laws and regulations.[27] This dynamic places state regulators in a difficult position when it comes to federal actors operating within their borders. To what extent can states enforce their own environmental standards against federal actors when the state environmental standards match or exceed those set by the federal government?

This is a question borne out of federalism. "Federalism" refers broadly to "the distribution of power between the national government and the states (or Indian tribes)."[28] The Constitution confers certain powers to the federal government and impliedly reserves non-conferred powers for the states, but the Constitution does little to clarify the relationship between the powers of these sovereigns.[29] The balance between state and federal power in any given area exists on a spectrum bounded by exclusive state power on one end and exclusive federal power on the other.[30] Cooperative federalism refers to instances where a state government and the federal government act in coordination to implement a federal program and exists somewhere between these power-balance extremes.[31]

Cooperative federalism has played a robust role in environmental law since the passage of the Clean Air Act in 1970[32] and is ubiquitous in the

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26. Sam Ricketts, *States Are Laying a Road Map for Climate Leadership*, AM. PROGRESS (Apr. 30, 2020), https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/ [https://perma.cc/5D78-SLUZ]; David Roberts, *A Closer Look at Washington's Superb New 100% Clean Electricity Bill*, VOX (Apr. 18, 2019), https://www.vox.com/energy-and-environment/2019/4/18/18363292/washington-clean-energy-bill [https://perma.cc/8ET7-5F2B].

27. CAL. AIR RES. BD., LOW-EMISSION VEHICLE PROGRAM (2002), https://ww2.arb.ca.gov/our-work/programs/low-emission-vehicle-program/about [https://perma.cc/A8S7-AH2G]; Roberts, *supra* note 26.

28. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179, 183 (2005).

29. *Id.*

30. *Id.*

31. *Id.* at 183–84.

32. *Id.* at 189.

realm of pollution control.[33] The Environmental Protection Agency (EPA) administers federal pollution control laws. States implement and enforce these federal standards through their own environmental agencies. The federal government may employ a carrot-and-stick approach to "encourage" state cooperation with federal standards.[34]

Similarly, states are not powerless to enforce their own statutes and regulations against the federal government, but that power must come from somewhere. A state may secure regulatory authority over federal actors in various ways. Often, this authority comes from a federal statute,[35] but it can also stem from state law.[36] Additionally, some states form agreements with federal entities that vest regulatory authority with the state.[37] These agreements are distinct from the cooperative federalism framework, but they serve to facilitate and structure state-federal cooperation.[38] Finally, states may seek to compel regulation of a federal entity or challenge how such an entity is regulated through administrative or judicial review.[39]

1. Federal Statutes

Federal statutes are one of the most common avenues for Congress to assign or permit delegation of regulatory authority to a state or a specific state agency.[40] This delegation of regulatory authority to states is not uncommon in federal environmental statutes[41] and is seen in numerous

33. *Id.*

34. "Carrots" may include federal funding for state environmental agencies to facilitate implementation of federal standards. "Sticks" often take the form of withheld federal funding for other state programs such as highways. Fischman, *supra* note 28, at 190.

35. *See infra* section I.A.1.

36. *See infra* section I.A.2.

37. *See infra* section I.A.3.

38. *Id.*

39. *See infra* section I.A.4.

40. *See* 8 U.S.C. § 1252(c) ("[a]uthorizing State and local law enforcement officials to arrest and detain certain illegal aliens"); *see also* 18 U.S.C. § 1162 (delegating civil and criminal "jurisdiction over offenses committed by or against Indians" in Indian country to listed states); 42 U.S.C. § 18041(b)(2) (providing states the option to adopt "a State law or regulation that . . . implements the standards [of the Affordable Care Act] within the State").

41. *See, e.g.*, 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."). Under the Clean Air Act, states may develop State Implementation Plans (SIP) to implement and enforce the state's National Ambient Air Quality Standards. "SIPs are generally enforced by the state." *Basic Information about Air Quality SIPs*, EPA, https://www.epa.gov/air-quality-implementation-plans/basic-information-about-air-quality-sips#:~:text=enforcing%20a%20SIP%3F-,What%20is%20a%20SIP%3F,of%20the%20Clean%20Air%20Act [https://perma.cc/H3L4-HQX5] (Jan. 25, 2022).

provisions of the CWA.[42]

For example, section 401 of the Clean Water Act[43] delegates authority to states. Section 401 of the CWA requires those seeking federal permits to discharge pollution into navigable waterways to obtain a certification from the State in which the discharge originates.[44] The language in this provision is broad and vests substantial, albeit indirect, power over the National Pollutant Discharge Elimination System (NPDES) permitting process—the process that regulates point source pollution—with the states:

> Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . . *No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.*[45]

This provision means exactly what it says: conduct that may result in the discharge of pollutants to navigable waters requires *both* a permit from the entity authorized to administer the permit program (i.e., the state, the tribe, or the EPA depending on the location of the discharge and the structure of the permit program) *and* certification from the state or tribe in which the discharge originates.[46] Section 401 affords states the power to indirectly "deny federal permits or licenses by withholding certification" and "to impose conditions upon federal permits by placing limits on certification."[47]

The certification requirement enables states to ensure permits issued by the EPA comply with the CWA as well as specific "state water quality standards and other requirements of the state water pollution control act."[48] Like their federal counterparts, state water quality standards specify

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42. *See* Fischman, *supra* note 28, at 189; 33 U.S.C. §§ 1313(a)(1), 1341, 1342(a)(5).

43. The CWA is codified in Title 33 of the United States Code, but, in practice, some of the provisions of the Act and the corresponding regulatory processes are still referred to by the original section numbers (e.g., "section 401 certification" and "404 permits"). Clean Water Act § 401, 33 U.S.C. § 1341.

44. Clean Water Act § 401(a)(1), 33 U.S.C. § 1341(a)(1).

45. *Id.* (emphasis added).

46. States may waive their certification authority if they so choose. CLAUDIA COPELAND, CONG. RSCH. SERV., 970488, CLEAN WATER ACT SECTION 401: BACKGROUND AND ISSUES 4 (2014), https://sgp.fas.org/crs/misc/97-488.pdf [https://perma.cc/U3TY-GBC3]; Clean Water Act § 401, 33 U.S.C. § 1341.

47. *Id.*

48. *Certifications for NPDES Federal Permits*, WASH. STATE DEP'T OF ECOLOGY,

designated uses for water (e.g., water supply, recreation, and irrigation); pollutant limits in the form of narrative (i.e., non-quantitative) and numeric criteria aimed at protecting the designated use(s); and policies to prevent degradation of water quality.[49] This provision applies to federal NPDES-permitted facilities (i.e., "building[s] or structure[s] that [are] owned or leased by the United States or a federal agency," such as government buildings, energy facilities, or facilities located on federal land) as well as permits for private parties.[50]

Congress and the courts recognize the role section 401 certification plays in preserving state water quality and have at times pushed back against narrow interpretations of the provision.[51] One of the most prominent section 401 certification cases, *PUD No. 1 of Jefferson County v. Washington Department of Ecology*,[52] arose out of a conflict between Washington State regulators and a federally licensed hydroelectric project. In that case, the Supreme Court held "[s]tates may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other 'appropriate requirements of State law.'"[53] The certification process is particularly important in states like Washington where the Department of Ecology does not administer NPDES permits for federal facilities[54] and state water quality standards often exceed the federal standards.[55] This provision represents a major delegation of regulatory authority to states by way of a federal statute.

Alternatively, Congress may give a federal agency discretion to delegate regulatory authority to a state or state agency. Congress did just

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https://ecology.wa.gov/Regulations-Permits/Permits-certifications/401-Water-quality-certification/Certifications-for-NPDES-federal-permits [https://perma.cc/DY3A-AAZ6] (Apr. 6, 2022); COPELAND, *supra* note 46.

49. COPELAND, *supra* note 46.

50. *Certifications for NPDES Federal Permits*, *supra* note 48.

51. *Water Pollution Prevention and Control Act of 1991: Hearing on S.B. 1081 Before the S. Subcomm. on Environmental Protection*, 102d Cong. 1 (1991) (statement of Clive J. Strong, Nat'l Assoc. of Att'ys Gen.) [hereinafter 1991 Senate Hearing] ("[A]n overly narrow reading of section 401 would deprive the States of the ability to maintain the very beneficial uses that the Clean Water Act was designed to protect . . . . States are best situated to determine whether a federally permitted activity will fully protect beneficial uses."); PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 700 (1994) (holding "[a] state's ability to impose water quality limitations did not have to be specifically tied to a 'discharge'").

52. 511 U.S. 700 (1994).

53. *Id.* at 729.

54. "Federal facilities" are defined under 15 U.S.C. § 205(c) and include thirteen specific types of facilities. *Enforcement and Compliance at Federal Facilities*, EPA, https://www.epa.gov/enforcement/enforcement-and-compliance-federal-facilities [https://perma.cc/SKT3-3VJL] (Jan. 18, 2022).

55. *Certifications for NPDES Federal Permits*, *supra* note 48; COPELAND, *supra* note 46.

that in section 402 of the CWA. Section 402 authorizes the EPA to issue permits for the discharge of pollutants from discrete, identifiable sources (i.e., point sources) into navigable waters as part of the NPDES permit program.[56] Under this provision, states may apply to the EPA to administer the entirety or components of their own NPDES permit program.[57]

The permitting process is essential to effective enforcement because it forms the basis for a cause of action against a party who violates a permit. In *EPA v. California ex rel. State Water Resources Control Board*,[58] the Supreme Court held that any discharger of water pollution could be sued to enforce permit conditions and that federal dischargers were not exempt from suit.[59] This holding applies to violations of permit conditions based on standards and limitations promulgated by the EPA as well as more stringent standards imposed by the state.[60]

Absent agency- or statutorily-delegated regulatory authority, states may still enforce state and federal statutes and regulations. Citizen-suit provisions provide one such enforcement mechanism by creating a cause of action authorizing private citizens to enforce statutory requirements where the government fails to do so.[61] These provisions empower citizens to act as private attorneys general by seeking equitable remedies (e.g., injunctions)[62] or civil penalties against those who violate federal law.[63]

Section 505 of the CWA authorizes citizen suits.[64] This section creates an expansive cause of action that empowers citizens—i.e., "a person or persons having an interest which is or may be adversely affected"—to take civil action "against any person . . . ." who violates the CWA.[65] This definition of "citizen" includes states, and the term "person" includes "(i) the United States, and (ii) any other governmental instrumentality or

56. Clean Water Act § 402, 33 U.S.C. § 1342.

57. *Id*.

58. 426 U.S. 200 (1976).

59. *Id.*

60. *Id.*

61. James M. Hecker, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?*, 8 NAT. RES. & ENV'T 31, 31 (1994).

62.

> An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof, and when granted by a judge, it may be enforced as an order of the court.

CAL. CIV. PROC. CODE § 525 (West 2011).

63. Hecker, *supra* note 61, at 31.

64. Clean Water Act § 505, 33 U.S.C. § 1365.

65. 33 U.S.C. §§ 1365(g), 1365(a)(1).

agency . . . ."[66] In *United States Department of Energy v. Ohio*,[67] the Supreme Court held "[a] State is a 'citizen' under the CWA . . . and is thus entitled to sue under [the citizen suit provision]."[68] As seen in the ex-U.S.S. *Independence* hull-scraping incident, these provisions can be powerful regulatory tools. In that case, the mere threat of suit was enough to bring the Navy to the table to reach a settlement.[69]

2. State Law

It is not uncommon for federal laws to parallel, reference, or adopt state laws. When this occurs, states may enforce their own laws and regulations by way of the federal statute. The Washington AGO took advantage of this fact to shoehorn state law claims in alongside claims brought pursuant to RCRA and the CWA in its letter to the Navy.[70] As the letter notes, "[f]ederal facilities must still comply with Washington's Water Quality Standards . . . , and the incorporated Sediment Management Standards."[71] The EPA approves these standards.[72]

The Clean Water Act refers to "[f]ederal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution," and indicates that all subdivisions of the Federal Government including officers, agents, and employees shall be subject to such rules and authorities.[73] Section 303 of the CWA outlines the process for establishing water quality standards and implementation plans.[74] Importantly, this section allows states to promulgate new water quality standards or revise existing standards for waters of that state and to submit those standards to the EPA for approval to make them effective under the Clean Water Act.[75] Washington State

66. 33 U.S.C. § 1365(a)(1); U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992) (holding states may sue the United States under the citizen-suit sections of the CWA and RCRA).

67. 503 U.S. 607 (1992).

68. *Id.* at 616.

69. Victory for Puget Sound, *supra* note 4; Joint Motion to Enter Consent Decree, *supra* note 6; Wood Letter, *supra* note 1.

70. Wood Letter, *supra* note 1.

71. Washington Water Quality Standards and Sediment Management Standards are established under Chapters 173-201A and 173-204 of the Washington Administrative Code, respectively. Wood Letter, *supra* note 1, at 2.

72. *Id.*

73. The CWA applies to individuals only when performing their official duties. 33 U.S.C. § 1323(a).

74. Clean Water Act § 303, 33 U.S.C. § 1313.

75. *State Standards in Effect for CWA Purposes*, EPA, https://www.epa.gov/wqs-tech/water-quality-standards-regulations-washington#state [https://perma.cc/XS5M-NP55]; Clean Water Act § 303, 33 U.S.C. § 1313.

has taken advantage of this process with varying success, but the approved state standards are binding and enforceable.[76]

3. Modes of State-Federal Cooperation

States may also choose to structure their relationship with the federal government by relying on principles of cooperative federalism mentioned above.[77] Separately, states may rely on other non-statutory instruments for facilitating that cooperation. Many states form agreements—typically in the form of a memorandum of understanding (MOU) or a memorandum of agreement (MOA)[78]—with federal and private actors operating within their borders.[79] These agreements are intended to establish a joint framework for accomplishing mutually agreeable objectives through mechanisms and procedures codified in a governing document (i.e., the MOU or MOA). For example, a number of federal agencies, federally recognized tribes, the State of Washington, and other stakeholders from Canada and the United States formed an MOU to promote "a healthy and sustainable Puget Sound ecosystem that provides for a high-quality and resilient long-term ecological and economic state and restores the environmental integrity and sustainability of the system."[80] The Washington State Department of Ecology (Ecology) also has an MOA with the EPA.[81] Under this agreement, the EPA retains NPDES permitting authority over federal facilities.[82] While useful for structuring relationships and establishing objectives and guidelines, these agreements lack the binding legal authority of statutes and regulations and do not supersede existing statutory and regulatory frameworks. At best, MOUs and MOAs are voluntary and (often expressly) nonbinding.[83]

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76. *Id*. The EPA does not approve all updates to Water Quality Standards (WQS) submitted by states. *Id.*

77. *See supra* section I.A.

78. These terms are used interchangeably.

79. *See, e.g.*, Agreement for Shared Stewardship of California's Forest and Rangelands, Between the State of Cal. and the U.S. Dep't of Agric. Forest Serv., Pac. Sw. Region (Aug. 12, 2020) [hereinafter Agreement for Shared Stewardship of California's Forest and Rangelands], https://www.gov.ca.gov/wp-content/uploads/2020/08/8.12.20-CA-Shared-Stewardship-MOU.pdf [https://perma.cc/6CMP-WXD4] (offering one example of such an agreement between a state government and a federal entity.).

80. Puget Sound Fed. Task Force Memorandum of Understanding Among Fed. Agencies 2 (2016) [hereinafter Puget Sound MOU], https://www.epa.gov/sites/default/files/2016-11/documents/puget-sound-federal-task-force-mou-2016.pdf [https://perma.cc/WNP7-BTHV].

81. Wood Letter, *supra* note 1, at 2.

82. *Id.*

83. *See, e.g.*, Puget Sound MOU, *supra* note 80, at 2 (stating MOU was "voluntary"); *see also*

4. Administrative or Judicial Review

Finally, where a state lacks direct regulatory authority over a federal actor, the state may choose to challenge a federal agency's decisions, actions, or inactions with respect to that federal actor's conduct. This can be accomplished through either administrative proceedings (e.g., an agency petition) or judicial review.[84] Generally, parties challenging agency actions must exhaust all administrative remedies prior to seeking judicial review.[85] This means jumping through administrative "hoops" before challenging the agency in a state or federal court.

The Administrative Procedure Act (APA)[86] imposes an additional layer of structure for agency conduct and establishes the default processes for challenges to and judicial review of final agency actions. This structure and related processes may be altered by the agency's organic act[87] or a subsequent federal statute.[88] Section 706 of the APA requires reviewing courts to

> compel agency action unlawfully withheld or unreasonably delayed; and . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority or limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence . . . ; or unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[89]

When appropriate, a state may rely on this section of the APA or the language in the agency's organic act to compel the agency to fulfill its regulatory obligations under its organic act or another federal statute

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Agreement for Shared Stewardship of California's Forest and Rangelands, *supra* note 79 (stating MOU was "[n]onbinding").

84. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, Washington v. EPA & Andrew Wheeler, Adm'r, EPA, No. 2:19-cv-00884 (W.D. Wash. June 6, 2019) [hereinafter Complaint for Declaratory and Injunctive Relief] (challenging EPA's revision of Washington's proposed water quality standards).

85. *See* Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 553 (1954) (("[I]t would be premature action on our part to rule upon these [other arguments] until after the required administrative procedures have been exhausted.").

86. 5 U.S.C. §§ 551–559.

87. An "[o]rganic statute is a statute that establishes an administrative agency or local government and defines its authorities and responsibilities." *Organic Statute*, USLEGAL.COM, https://definitions.uslegal.com/o/organic-statute/ [https://perma.cc/RVK2-NQPE].

88. COPELAND, *supra* note 46.

89. 5 U.S.C. § 706.

through judicial review.[90]

Consider, for example, the EPA. The EPA is responsible for enforcing environmental laws and assessing corresponding fines against federal facilities that violate those laws.[91] Despite this broad authority, the EPA "does not have civil judicial enforcement authority to address environmental violations by a federal facility."[92] This means the EPA cannot sue another federal agency to enforce federal environmental laws and regulations. Instead, the EPA employs informal enforcement measures—e.g., Notices of Violation (NOVs) or warning letters—and formal enforcement measures, which are determined by the violated statute.[93] Many federal environmental statutes, including the Clean Water Act, do not confer to the EPA authority to issue penalties or orders against federal facilities.[94] In cases where a federal facility violates a federal environmental statute, the EPA typically issues the facility a notice of non-compliance (NON)[95] and negotiates a Federal Facilities Compliance Agreement (FFCA).[96] States have some latitude to challenge the EPA's regulatory decisions or indecision. In *Massachusetts v. EPA*,[97] the Supreme Court held the state of Massachusetts had standing to challenge the EPA's refusal to exercise its regulatory authority to regulate

90. *See, e.g.*, 42 U.S.C. § 7521(b)(1) ("The [EPA] Administrator shall . . . prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines . . . ."); Complaint for Declaratory and Injunctive Relief, *supra* note 84, at 3 ("Washington seeks judicial review of final agency action pursuant to 5 U.S.C. §§ 701–706, a declaratory judgment pursuant to 28 U.S.C. § 2201, and injunctive relief pursuant to 5 U.S.C. § 705.").

91. *Enforcement at Federal Facilities*, EPA, https://www.epa.gov/enforcement/enforcement-federal-facilities [https://perma.cc/B5SC-WBSU] (Oct. 21, 2022).

92. *Id*. ("This limitation stems from the Department of Justice's (DOJ) interpretation of the Unitary Executive Theory, which prohibits one federal agency from suing another agency in federal court.").

93. *See, e.g.*, News Release, EPA, Air Force Agrees to Pay $206,811 EPA Penalty for Hazardous Waste Violations at Eareckson Air Station in Alaska (June 23, 2022), https://www.epa.gov/newsreleases/air-force-agrees-pay-206811-epa-penalty-hazardous-waste-violations-eareckson-air [https://perma.cc/LW39-D5LX].

94. *Overview of the Enforcement Process for Federal Facilities*, https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities [https://perma.cc/E46H-PR6S]. "Generally, the Clean Water Act, the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, and the Emergency Planning and Community Right-to-Know Act do not confer penalty or order authority upon EPA against federal facilities." *Id.* Other federal environmental statutes, including "the Resource Conservation and Recovery Act (Subtitle C/Hazardous Waste, Subtitle D/Solid Waste, and Subtitle I/Underground Storage Tanks), the Safe Drinking Water Act, and the Clean Air Act confer penalty or order authority upon EPA against federal facilities." *Id.*

95. "NON" and "NOV" are used interchangeably in this context. *Id.*

96. *Id.*

97. 549 U.S. 497 (2007).

greenhouse gas emissions under the Clean Air Act.[98] It is important to note that states are not unique in this respect and are not entitled to special treatment when seeking judicial review under the APA. Individuals who seek relief under the APA do so on equal footing with states,[99] although at times courts have viewed state claimants differently than private parties in the realm of environmental protection.[100]

It is important to note the difficulty of compelling federal agency action.[101] In *Norton v. Southern Utah Wilderness Alliance*,[102] an environmental non-profit sought to compel action by several public entities—including the Department of Interior (DOI) and the Bureau of Land Management (BLM)—to manage off-road vehicle use in federal lands designated as wilderness study areas (WSA) pursuant to section 706 of the APA.[103] Despite a clear non-impairment mandate, which requires the BLM to manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness,"[104] the Supreme Court declined to compel agency action.[105] As support for its determination, the Court noted that the Act left the BLM discretion to determine how best to achieve the non-impairment objective and that section 706 only allows a plaintiff to assert "an agency failed to take a *discrete* agency action that it is *required* to take."[106] This "discrete" and "required" language dramatically narrows the scope of section 706's application with respect to compelling agency action.

Once a state has identified its source(s) of regulatory authority, it needs to determine if it can apply that regulatory authority to a given federal actor and that actor's specific conduct.

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98. *Id.* at 526.

99. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

100. *See, e.g.*, Georgia. v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) ("If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be."); *cf. id.* at 240 (Harlan, J., concurring) ("If this were a suit between private parties, and if, under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a state, possessing some powers of sovereignty. Georgia is entitled to the relief sought, not because it is a state, but because it is a *party* which has established its right to such relief by proof." (emphasis in original)).

101. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004).

102. 542 U.S. 55 (2004).

103. *Id.*

104. 43 U.S.C. § 1782(c).

105. *Norton*, 542 U.S. 55.

106. *Id.* at 55 (emphasis added).

B. The Scope of State Regulatory Authority

The scope of a state's regulatory authority over federal actors is a function of the source of that authority. In most cases this means looking at the relevant federal statute(s) to determine what parties and conduct the statute is intended to reach and what enforcement actions the statute makes available.

The text of the Clean Water Act is seemingly unambiguous on this point. The Federal Facilities Pollution Control provision identifies who it regulates:

> [e]ach *department, agency*, or *instrumentality* of the . . . Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each *officer, agent*, or *employee* thereof in the performance of his official duties.[107]

This provision ostensibly governs all subdivisions of the federal government—including individual employees acting in their official capacity—in possession of facilities or engaged in activities that could result in the discharge of pollution. It also identifies (albeit indirectly) what conduct it regulates, namely, conduct that falls under "*all Federal, State, interstate, and local requirements, administrative authority*, and *process and sanctions* respecting the control and abatement of water pollution."[108] Finally, the statutory text provides some sense of the enforcement actions available to regulators:

> The preceding sentence 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), (B) to the *exercise of any Federal, State, or local administrative authority*, and (C) to *any process and sanction*, whether enforced in Federal, State, or local courts or in any other manner.[109]

This provision, its purpose, and its legislative history make clear that Congress intended the CWA to bind federal actors to a broad range of requirements and enforcement actions.[110] These requirements and

107. 33 U.S.C. § 1323(a) (emphasis added).

108. *Id.* (emphasis added).

109. *Id.* (emphasis added).

110. 33 U.S.C. § 1323(a); 33 U.S.C. § 1251(a) ("The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); S. REP. NO. 95-370, at 67 (1977) ("The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act

enforcement actions include—or at least appear to include—substantive and procedural requirements.[111] The statute expressly mentions recordkeeping and reporting, permitting, and *any other requirement*; the exercise of *any* administrative authority; and *any* process and sanctions enforced in any court.[112]

Taken at face value, each of these provisions are seemingly all-encompassing. One would be forgiven for believing that any and all conduct by any federal actor relating to the discharge or runoff of pollutants would fall under the purview of the Clean Water Act, and, as a result, within the administrative authority of the affected state. The doctrine of federal sovereign immunity says otherwise.

C. Federal Sovereign Immunity

The United States is anything but a typical litigant.[113] The federal government enjoys a long list of special privileges and immunities in the American legal system, including "special procedures, defenses, and limitations on liability not available to others."[114] Chief among these are two fundamental federal principles: the doctrine of sovereign immunity and federal immunity from state taxation and regulation.

Sovereign immunity refers to "the immunity of the government from suit without its express permission."[115] This doctrine has arguably tenuous constitutional roots.[116] "When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts."[117] At least some of the framers publicly supported adoption of the doctrine during the ratification of the U.S. Constitution.[118] Alexander Hamilton, James Madison, and John Marshall—later Chief Justice Marshall—all endorsed sovereign immunity.[119] Whether the doctrine was a necessary presupposition for the

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Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.").

111. S. REP. NO. 95-370, at 67 (1977) ("[A] Federal facility is subject to any Federal, State, and local requirement respecting the control or abatement of water pollution, *both substantive and procedural*, to the same extent as any person is subject to these requirements." (emphasis added)).

112. 33 U.S.C. § 1323(a).

113. Sisk, *supra* note 7, at 440.

114. *Id.*

115. *Id.*

116. *Id.*

117. John H. Alden v. Maine, 527 U.S. 706, 715 (1999).

118. Sisk, *supra* note 7, at 443.

119. *Id.*; THE FEDERALIST NO. 81, at 486–87 (Alexander Hamilton) (Clinton Rossiter ed., 1961); 3

Constitution or an anachronism in a post-Revolutionary America no longer matters. After nearly two centuries of jurisprudential insistence, the doctrine of sovereign immunity is now an accepted limit on the liability of the state and federal governments.[120]

Under the modern doctrine of federal sovereign immunity, the United States may not be sued without its consent.[121] In practice, this means the United States may not be sued without a statutory waiver of its sovereign immunity.[122] A civil action pleaded directly against the federal government—or its agencies or departments—will be barred absent an act of Congress removing that bar.[123] The doctrine also bars civil suits brought against federal officers or agents acting in their official capacity.[124] Such suits are viewed substantively as suits against the federal government and are therefore subject to the limitations imposed by the doctrine of federal sovereign immunity.[125] Sovereign immunity does not apply when individual officers or agents act outside of the authority delegated to their office by statute or when their alleged actions violate the Constitution.[126]

In addition to having immunity from suit absent an express Congressional waiver, the federal government and its agencies are generally immune from taxation and regulation by the states.[127] This concept traces its roots to the landmark case, *M'Culloch v. Maryland*,[128] in which the Supreme Court held the state of Maryland could not impose

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THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533, 555–56 (photo. reprt. 1941) (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott Co. 1836).

120. Sisk, *supra* note 7, at 443; Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 541–42 (2003).

121. Malone v. Bowdoin, 369 U.S. 643, 648 (1962) (affirming District Court dismissal of action against the United States without its consent).

122. Sisk, *supra* note 7, at 456; Jackson, *supra* note 120, at 537. Waivers of sovereign immunity will be discussed in more detail in section II.D.

123. Sisk, *supra* note 7, at 456; Kansas v. United States, 204 U.S. 331, 341–42 (1907) ("[T]he United States is the real party in interest as defendant, and has not consented to be sued, which it cannot be without its consent." (citations omitted)).

124. *See, e.g.*, *Malone*, 369 U.S. at 643 (holding a "suit was rightly dismissed as one against the United States without its consent . . . where it was not asserted that federal officer [against whom the claim was brought] was exceeding his delegated powers as an officer of the United States . . . , or that he was in possession of the land in anything other than his official capacity").

125. *Id.*

126. Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 701–02 (1949) ("[T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.").

127. Murchison, *supra* note 17, at 360–61.

128. 17 U.S. 316 (1819).

taxes on the bank of the United States.[129] Chief Justice Marshall grounded this fledgling doctrine—what came to be known as the doctrine of federal sovereign immunity—in the Supremacy Clause, and in doing so, set the rules of the state-federal regulatory game for centuries to come.[130] Later decisions reaffirmed and extended the doctrine with respect to taxes[131] and state regulations, resulting in the full-feathered version of the doctrine that exists today.[132]

The Court has also recognized three limitations on the federal government's immunity: (1) federal immunity is typically only available where the state regulation is imposed directly on the federal government;[133] (2) generally, federal agencies must comply with state regulations that do not significantly impede the agency's ability to perform its duties;[134] and (3) Congress can waive the federal government's immunity.[135] The Supreme Court narrowed the applicability of this third limitation by adopting a rule of strict

129. *Id.* at 436 ("[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.").

130. *Id.* at 327 ("The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any State to the contrary notwithstanding."); U.S. CONST. art. VI, cl. 2.

131. *See, e.g.*, United States v. New Mexico, 455 U.S. 720, 733 (1982) ("[T]he court has never questioned the propriety of absolute federal immunity from state taxation."); United States v. Boyd, 378 U.S. 39, 44 (1964) ("The constitution immunizes the United States and its property from taxation by the States . . . ."); James v. Dravo Contracting Co., 302 U.S. 134, 162 (1937) ("[T]he principle [of sovereign immunity] forbids taxation by a state of property of the federal government, or of the office or salary of any of its officers.").

132. *See, e.g.*, Arizona v. California, 283 U.S. 423, 451 (1931) ("The United States may perform its functions without conforming to the police regulations of the state."); Ohio v. Thomas, 173 U.S. 276, 284 (1899) (holding a "[state] court had no jurisdiction to hear or determine the criminal prosecution in question" where the acts complained of were those of a federal officer done in the course of his duties pursuant to valid federal authority).

133. "[A] State may not, consistent with the Supremacy Clause, U.S. Const., art. VI, cl. 2, lay a tax 'directly upon the United States.'" *New Mexico*, 455 U.S. at 733 (quoting Mayo v. United States, 319 U.S. 441, 447 (1943)) (holding state use tax levied on property purchased by private government contractors with government funds were not shielded by sovereign immunity); *see also* Esso Standard Oil Co. v. Evans, 345 U.S. 495, 499–500 (holding state tax imposed on storage and distribution of gasoline by government contractor was not barred by sovereign immunity even though the gasoline in question was owned by the federal government).

134. *See, e.g.*, Johnson v. Maryland, 254 U.S. 51, 55, 57 (1920) (reversing a state court conviction of the driver of a government motor truck for not having a proper state license citing the State's inability to interrupt the acts of the general government); Virginia v. Stiff, 144 F. Supp. 169, 172 (W.D. Va. 1956) ("[I]n performing these federal duties the carriers of the mails are subject to reasonable local regulations which are not inconsistent with the directions of their responsible superiors and observance of which is not in derogation of sovereign authority of the United States.").

135. *See* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 705 (1949) ("But it is not for this Court to examine the necessity [of sovereign immunity] in each case. That is a function of the Congress.").

construction of Congressional waivers.[136] This means any waiver of the Government's sovereign immunity must be unequivocal, construed strictly in favor of the sovereign, and not enlarged beyond what the statutory language requires.[137]

Notably, the federal government does not enjoy the same immunity from federal laws that it does from state laws and regulations. In 1970, Congress amended the Clean Air Act (CAA) to require federal agencies to comply with its provisions.[138] Subsequent federal environmental statutes, including the Clean Water Act (CWA), also reflect Congress's intent to hold federal agencies accountable to federal environmental standards.[139] Federal agencies have pushed back on these requirements, claiming exemptions from some of the enforcement mechanisms allowed under federal laws as well as immunity from enforcement actions filed by private parties pursuant to federal statutes.[140] Much of this pushback dealt with whether or not Congress had in fact waived the federal government's sovereign immunity and how a given waiver should be interpreted.[141] These decisions are ad hoc, piecemeal, and often inconsistent.[142]

D. Lowering the Shield: Statutory Waivers of Sovereign Immunity

Congress can waive sovereign immunity as it applies to the federal government as well as its agencies, departments, officers, and agents.[143] Over the last 150 years, Congress gradually incorporated these waivers into a growing number of statutes.[144] This change ostensibly lowered the

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136. *See* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 607 (1992) ("Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.").

137. *Id*. at 615 (first citing United States v. Mitchell, 445 U.S. 535, 538–39 (1980); and then citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983)).

138. *Id.*

139. Sisk, *supra* note 7, at 459.

140. *Id.*

141. *Id.*

142. *See infra* section I.D.

143. Sisk, *supra* note 7, at 459.

144. Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1887) (waiving sovereign immunity with respect to certain claims for damages arising under the Constitution—e.g., Fifth Amendment takings claims—a federal statute or regulation, and claims not based in tort); Indian Claims Commission Act, 25 U.S.C. § 70 (1946) (terminated 1978); U.S. DEP'T OF JUST., *Lead Up to the Indian Claims Commission Act of 1946*, https://www.justice.gov/enrd/lead-indian-claims-commission-act-1946#:~:text=The%20ICCA%20was%20the%20culmination,the%20United%20States'%20sovereign%20immunity [https://perma.cc/PDN7-3CYH] ("The [Indian Claims Commission] Act . . . constituted a broad waiver of the United States' sovereign immunity."); Federal Tort Claims Act, 28 U.S.C. § 2410(a)(1) (1946) ("[T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter . . . ."); Clean

tightly-held shield of sovereign immunity and opened the United States to suit "in most areas of substantive law and . . . most situations in which an injured party would desire relief."[145] This is generally true in the area of federal environmental law as well.[146] The CAA, the CWA, and the Resource Conservation and Recovery Act (RCRA) all contain seemingly broad waivers of sovereign immunity.[147] The waiver of sovereign immunity in the CWA is indicative of the language contained in most such waivers. It states:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and 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. The preceding sentence 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), (B) to the exercise of any Federal, State, or local administrative

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Air Act, 42 U.S.C. § 7604(e)(1)–(2) (1970) ("Nothing in this section shall restrict any right which any person . . . bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or . . . bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution."); Clean Water Act, 33 U.S.C. § 1323(a) (1972) ("This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.").

145. Sisk, *supra* note 7, at 458; *see, e.g.*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111–12 (codified as amended at 42 U.S.C. § 2000e-16 (2000)) (extending employment discrimination provisions of Title VII of the Civil Rights Act of 1964 to federal employees); Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842 (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680 (2000)) (authorizing common law tort claims against the United States); Suits in Admiralty Act, ch. 95, § 2, 41 Stat. 525, 525–26 (1920) (codified as amended at 46 U.S.C. § 742 (2000)) (authorizing admiralty claims against the United States); Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.) (authorizing non-tort money claims against the federal government based upon the Constitution, a statute, or a contract); Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612 (authorizing the United States Court of Claims to hear statutory and contractual money claims against the United States, since superseded by the Tucker Act).

146. Sisk, *supra* note 7, at 459.

147. *See* 42 U.S.C. §7604(e); 33 U.S.C. § 1323(a); 42 U.S.C. § 6961, respectively.

> authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. *This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law*.[148]

The use of "any[s]," "all[s]," and "shall[s]" in this statute is misleading. Before a state regulator can say with certainty that Congress has waived any scintilla of the federal government's immunity, they must consider the waiver in light of the general rule of statutory construction. The widespread and deeply rooted nature of the doctrine of sovereign immunity "significantly affects the manner in which the courts approach the task of construing statutory waivers."[149] Specifically, the Supreme Court has held that waivers of sovereign immunity must be expressly stated and construed strictly and narrowly in favor of the sovereign—i.e., in favor of preserving immunity.[150] The Court further constrained the application of waivers of sovereign immunity by refusing to apply a waiver where its language was ambiguous and declining to consider non-textual interpretive materials such as legislative history or statutory purpose when considering the scope of the waiver.[151]

Subsequent court decisions only muddied the waters surrounding this seemingly uncomplicated, albeit unforgiving doctrine. In the years since this doctrine first entered the judicial lexicon, courts have distinguished virtually identical waivers of sovereign immunity contained in different statutes on several occasions.[152] The Supreme Court has even gone so far

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148. 33 U.S.C. § 1323 (emphasis added).

149. Sisk, *supra* note 7, at 460.

150. Libr. of Cong. v. Shaw, 478 U.S. 310 (1986).

151. *See, e.g.*, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) ("Such a waiver [of sovereign immunity] must also be 'unequivocally expressed' in the statutory text."); Lane v. Pena, 518 U.S. 187, 192 (1996) ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims. A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text . . . ." (citations omitted)); *Lane*, 518 U.S. at 200 (Stevens, J., dissenting) (noting "[t]o reach this unfortunate result, the majority ignores the [Rehabilitation] Act's purpose, text, and legislative history"); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (declining to apply a waiver to monetary claims where the waiver was ambiguous and could be interpreted so as not to include such claims); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) ("[A]ny waiver of the National Government's sovereign immunity must be unequivocal . . . ."); Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 137 (1991) ("Our conclusion that any ambiguities in the legislative history are insufficient to undercut the ordinary understanding of the statutory language is reinforced in this case by the limited nature of waivers of sovereign immunity.").

152. *See, e.g.*, Bates v. Dow Agrosciences LLC, 544 U.S. 431, 436 (2005) (stating that prohibition against state "requirements for labeling or packaging in addition to or different from those required under" federal pesticide law covered common law duties as well as regulations); Cipollone v. Liggett

as to provide contradictory interpretations of the same waiver of sovereign immunity just four years apart.[153]

The waiver of sovereign immunity in the CWA did not escape this confusion. The Supreme Court applied the rule of strict construction to the Federal Facility Pollution Control section of the CWA in *Department of Energy v. Ohio*.[154] Despite a seemingly expansive waiver that applied to "any process and sanction,"[155] the Court held that the waiver applies only to *coercive* sanctions, to the exclusion of *punitive* sanctions.[156] In other words, the waiver applies only to coercive penalties imposed by judges to enforce past court orders and injunctions and not "to administrative or judicial penalties imposed for past violations."[157] The Court reconciled this discrepancy by reasoning that "any statement of waiver [must] be unequivocal."[158]

The similarities and differences between analogous waivers of sovereign immunity in different statutes require close examination. Courts scrutinize differences and highlight similarities between waivers in favor of narrow construction,[159] and courts may reach wholly different conclusions about the scope of a particular waiver. This was the case in two federal circuit opinions that adopted opposing interpretations of the scope of the CAA's waiver of sovereign immunity as it applies to civil penalties. In *City of Jacksonville v. Department of the Navy*,[160] the Eleventh Circuit went to great lengths to highlight the similarities between

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Group Inc., 505 U.S. 504, 515 (1992) (noting that a statute forbidding any "requirement or prohibition . . . with respect to the advertising . . . of any cigarettes the packages of which are labeled in conformity with" federal law regulating labeling of cigarettes preempted state tort claims, not just state regulations); *cf.* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 259 (2004) (finding that prohibition against a stricter local "standard relating to the control of emissions from new motor vehicles" covered mandate to purchase low-emission vehicles as well as emission control standards for engines).

153. *See Shaw*, 478 U.S. at 319–21 (interpreting the waiver of sovereign immunity contained in Title VII of the Civil Rights Act of 1964 narrowly so as to not include prejudgment interest on attorney's fees); *cf.* Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 94–96 (1990) (interpreting the same waiver of sovereign immunity contained in Title VII more broadly to allow claims to be brought outside limitations period under the Title VII).

154. *Dep't of Energy*, 503 U.S. at 609.

155. 33 U.S.C. § 1323(a).

156. *Dep't of Energy*, 503 U.S. at 615, 627 (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983)).

157. Murchison, *supra* note 17, at 374.

158. *Dep't of Energy*, 503 U.S. at 627.

159. *See, e.g.*, City of Jacksonville v. Dep't of the Navy, 348 F.3d 1307, 1313 (11th Cir. 2003) (comparing similar provisions of waivers contained in the Clean Water Act and the Clean Air Act and noting that while the CWA "explicitly and unambiguously gives the federal government the right to remove actions . . . to federal court," the CAA "does not unequivocally prohibit removal").

160. 348 F.3d 1307 (11th Cir. 2003).

the CWA's and the CAA's respective waivers of sovereign immunity.[161] In doing so, the Circuit Court stretched the Supreme Court's narrow interpretation of the CWA's waiver in *Department of Energy* to apply to the CAA as well.[162] The Eleventh Circuit's interpretation limited the application of the CAA's waiver as it applies to sanctions, permitting only coercive sanctions employed to enforce procedural requirements (e.g., decrees or orders) to the exclusion of punitive sanctions (i.e., fines) employed to enforce substantive requirements.[163]

The Sixth Circuit found its own path to the opposite conclusion in *United States v. Tennessee Air Pollution Control Board*.[164] There, the court *ignored* the similarities between the CWA and the CAA highlighted in *City of Jacksonville*, choosing instead to focus on key differences that indicated Congress's intent to waive immunity for punitive sanctions imposed for past violations of the Act.[165]

Over the years, courts have also disagreed about the "requirement" language contained in section 313 of the CWA.[166] In applying the doctrine of narrow construction, some lower courts have concluded that the waiver in the Federal Facilities Pollution Control provision does not extend to state water quality standards (i.e., "requirements") that are not numerical criteria.[167] These decisions narrow dicta from a Supreme Court case, *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*,[168] which noted that the legislative history of section 313 "seem[ed] to indicate" that "requirements . . . refer[red] simply and solely to substantive standards, to effluent limitations and standards and schedules of compliance."[169] They also run counter to the Supreme Court's reading of the same "requirements" language in other statutes.[170]

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161. *Id.* at 1315–16.

162. *Id.*

163. *Id.* at 1316.

164. 185 F.3d 529 (6th Cir. 1999).

165. *Id.*; Murchison, *supra* note 17, at 396.

166. Clean Water Act § 313, 33 U.S.C. § 1323.

167. *See* Kelley for & *ex rel*. Michigan v. United States, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (holding state statues did not constitute "requirements" under section 313 of the CWA where neither statute "provide[d] objective, quantifiable standards subject to uniform application"); *see also* McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1198 (E.D. Cal. 1988) ("This Court agrees with the cases that have defined 'requirements' to mean objective and administratively preestablished water pollution control standards."), *vacated sub nom*. McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325 (9th Cir. 1995).

168. EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200 (1976).

169. *Id.* at 215 (internal quotes omitted).

170. *See California* ex rel. *State Water Res. Control Board*, 426 U.S. at 215.

The Ninth Circuit expressly rejected this interpretation. In *Idaho Sporting Congress v. Thomas*,[171] the court held that the waiver *is applicable* to water quality standards applied to *nonpoint sources*.[172] And the Ninth Circuit is not alone in its interpretation of the "requirements" language in the CWA.

A more recent lower court decision, *Ohio v. U.S. Army Corps of Engineers*,[173] took a similar position when interpreting the "requirements" language in section 404 of the CWA governing permits for dredged or fill material.[174] In that case, the district court held the U.S. Army Corp of Engineers (USACE) must comply with "applicable state water quality standards, and all other State substantive and procedural requirements,"[175] including a requirement to dispose of dredged material at a confined disposal facility (CDF) rather than in the open water as USACE wished.[176] The Ninth Circuit also addressed "requirements" language in the federal facilities provision of RCRA.[177] In *United States v. Washington*,[178] the Ninth Circuit held that "the word 'requirements' in section 6961 referred solely to waste disposal standards, permits, and reporting duties," and that "criminal sanctions are not 'requirements,' but 'the means by which the standards, permits, and reporting duties are enforced.'"[179]

Other statutes and statutory provisions within the same law may also narrow or supersede the application of that statute's waiver of sovereign immunity. Under the CWA, "the President may exempt any effluent source of any department, agency or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so."[180] All this to say, while there are well-established rules guiding construction and application of waivers of sovereign immunity, there remains widespread disagreement regarding the correct interpretation of these waivers.

II. WHEN UNCLE SAM SCRAPES HIS HULL IN PUGET SOUND

The previous section outlined the four-part framework for assessing a

171. 137 F.3d 1146 (9th Cir. 1998).

172. *Id.* at 1153.

173. 259 F. Supp. 3d 732, 750 (N.D. Ohio 2017).

174. *Id.* at 750.

175. *Id.* (quoting S. REP. NO. 95-370, at 93 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4418).

176. *Id*.

177. United States v. Washington, 872 F.2d 874, 879 (9th Cir. 1989).

178. 872 F.2d 874 (9th Cir. 1989).

179. *Id.* at 879 (quoting California v. Walters, 751 F.2d 977, 978 (9th Cir. 1984)).

180. 33 U.S.C. § 1323(a).

state's regulatory authority over a federal actor. Before a state regulator can regulate a federal actor, they must (1) identify a source of regulatory authority; (2) determine the scope of that regulatory authority; (3) identify an express waiver of sovereign immunity that empowers the state regulator to regulate the specific federal actor and conduct; and (4) consider whether the state's regulatory authority is pared back in any way. The following section provides the background necessary to apply this framework to the ex-U.S.S. *Independence* incident and revisits and expands upon relevant portions the CWA and Washington State law.

A. The ex-U.S.S. Independence *Incident*

The ex-U.S.S. *Independence* incident presents a compelling case study to which to apply the four-part framework. The Sinclair Inlet is a shallow, navigable embayment in the southwestern portion of Puget Sound near Bremerton, Washington.[181] It is a water of the United States under the CWA.[182] The Navy has owned and operated multiple facilities on the northwestern portion of the Inlet for over a century, including the Puget Sound Naval Shipyard (Shipyard).[183] The Navy uses the Shipyard to "overhaul, maint[ain], moderniz[e], repair, dock[], and decommission[] . . . ships and submarines."[184] The culmination of these activities over the decades resulted in the release and accumulation of a significant amount of hazardous waste into Sinclair Inlet, including heavy metals (i.e., zinc, copper, cadmium), arsenic, chromium, polychlorinated biphenyls (PCBs), and other metals.[185] As a result of these discharges, the EPA designated the Shipyard as a Superfund site[186] under the Comprehensive Environmental Response Compensation and Liability Act,[187] and the state listed Sinclair Inlet as an impaired water body for several contaminants under section 303(d) of the CWA.[188]

As mentioned previously, the Navy uses the Puget Sound Naval Shipyard to moor decommissioned, non-operational former military vessels.[189] The ex-U.S.S. *Independence* was one of these decommissioned

181. Wood Letter, *supra* note 1, at 3–5.

182. *Id.*

183. *Id.*

184. *Id.* at 3.

185. *Id.* at 3–4.

186. "EPA's Superfund program is responsible for cleaning up some of the nation's most contaminated land and responding to environmental emergencies, oil spills and natural disasters." *Superfund*, EPA, https://www.epa.gov/superfund [https://perma.cc/YTE9-4C9R] (Sept. 7, 2022).

187. 42 U.S.C. ch. 103.

188. Wood Letter, *supra* note 1, at 3; 33 U.S.C. § 1313(d).

189. Wood Letter, *supra* note 1, at 4.

vessels.[190] At the time of the incident, the ex-U.S.S. *Independence* was set to be towed to Brownsville, Texas.[191] Before the Navy tows any decommissioned vessels, it consults with National Marine Fisheries Service (NMFS) to ensure towing will not pose a threat to endangered or threated species protected under the Endangered Species Act.[192] During this process, NMFS recommended the Navy remove marine debris (e.g., barnacles) from the hull of the ship prior to moving it to minimize the risk of unwittingly ferrying invasive species to other marine environments.[193] The Navy agreed, but it declined to abide by NMFS's other recommendations that it use a silt curtain during the cleaning process and remove accumulated debris in a timely manner.[194]

When the Navy announced its planned in-water hull cleaning of the ex-U.S.S. *Independence* in 2016, both Ecology and the EPA expressed concerns that the cleaning process would remove "anti-fouling" paint from the vessel's hull, which contained significant amounts of heavy metals.[195] The EPA recommended that the Navy conduct the hull scraping using a dry dock or employ pollution containment technology.[196] The Navy did not heed these recommendations, and on January 6, 2017, it went forward with the in-water hull scraping as planned, without an NPDES permit or a section 401 Water Quality Certification from Washington State.[197]

Sampling of the area conducted by the Navy before and after the scraping revealed the scraping added significant amounts of contaminants—the state claimed fifty dump truck loads worth—to the marine environment.[198] The Navy did not report its findings to Ecology, despite repeated requests from state regulators.[199] Two years later, the Washington AGO believed it had authority to regulate this conduct by the Navy as well as three agents of the federal government in their official capacity.[200] Did it?

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190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 5.
197. *Id.*
198. *Id.* at 1, 6.
199. *Id.* at 6 n.30.
200. *Id.* at 2–3.

B. The Clean Water Act and the Regulatory Framework in Washington State

As mentioned previously, "[t]he objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[201] The Act prohibits "the discharge of any pollutant by any person" except when otherwise compliant with the Act.[202] The Act makes "any addition of any pollutant to navigable waters from any point source" unlawful,[203] and defines pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[204]

Understanding what conduct the Clean Water Act (CWA) regulates requires an in-depth understanding of its structure and terminology as well as how it functions in Washington. The CWA distinguishes between "point sources" (i.e., discrete, identifiable sources) of pollution and "non-point sources" (i.e., diffuse sources) of pollution.[205] This analysis focuses on the former, which is defined in the Act as "any discernible, confined and discrete conveyance," such as a "pipe, ditch, channel, tunnel, conduit, well, . . . container, . . . or vessel or other floating craft, from which pollutants are or may be discharged."[206] Point source pollution is regulated and permitted under section 402 of the CWA through the NPDES program.[207] This program allows permit holders to discharge specified levels of designated pollutants if they comply with certain permit conditions.[208] By default, NPDES permits are administered by the EPA, though states may apply to the EPA to establish and administer part or all of their own NPDES permitting program.[209] Washington State's NPDES

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201. 33 U.S.C. § 1251(a).

202. *Id.* § 1311(a).

203. *Id.* § 1362(12)(A).

204. *Id.* § 1362(6).

205. *Id.* §§ 1251(7), 1329, 1344, 1362(14) (distinguishing between point sources and nonpoint sources by proscribing different management programs and requirements for each—NPDES permits for point source pollution and 404 dredge and fill permits for nonpoint source pollution).

206. 33 U.S.C. § 1362(14).

207. *Id.* § 1342.

208. *Id.*

209. *Clean Water Act, Section 402: National Pollutant Discharge Elimination System*, EPA, https://www.epa.gov/cwa-404/clean-water-act-section-402-national-pollutant-discharge-elimination-system [https://perma.cc/XV32-TZXH] (Dec. 6, 2021). Only Michigan, New Jersey, and Florida administer their own section 404 programs. *U.S. Interactive Map of State and Tribal Assumption Under CWA Section 404*, EPA, https://www.epa.gov/cwa404g/us-interactive-map-state-

permit program is "partially authorized," meaning Washington is authorized to administer components of its permit program.[210] Specifically, Washington is authorized to issue NPDES permits for its pretreatment program and for general permits but is not authorized to regulate federal facilities as noted previously.[211] Ecology has an MOA with the EPA that codifies this arrangement.[212]

To obtain a permit, a vessel, facility, or other aspiring polluter must satisfy certain requirements under the CWA such as installing monitoring equipment, allowing inspections, and imposing effluent limitations.[213] Though the CWA does not provide an express definition of "vessel," section 312 provides definitions of "new vessel" and "existing vessel."[214] New and existing vessels are defined as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters."[215] On its face, this definition would seem to include Naval vessels, but the Code of Federal Regulations leaves a warship-sized hole in this otherwise-broad category: "The following discharges do not require NPDES permits: (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel."[216] The language in the definitional provision of the CWA solidifies this regulatory position: "[T]he term 'pollutant' . . . does not mean (A) 'sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces.'"[217]

The Act also identifies the gubernatorially-designated state agency responsible "for enforcing State laws relating to the abatement of pollution" as the "State water pollution control agency."[218] In Washington

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and-tribal-assumption-under-cwa-section-404#:~:text=Michigan%2C%20New%20Jersey%2C%20and%20Florida,the%20rest%20of%20the%20country [https://perma.cc/D6PC-7W2C] (Mar. 10, 2022).

210. *NPDES Program Authorizations (as of July 2019)* (illustration), *in NPDES Permit Writers' Course*, EPA (July 2019), https://www.epa.gov/sites/default/files/2021-02/documents/authorized_states_2021.pdf [https://perma.cc/2KL8-LJ9N].

211. *NPDES State Program Authority*, EPA, https://www.epa.gov/npdes/npdes-state-program-authority [https://perma.cc/LMU2-MQBE] (May 17, 2022).

212. Wood Letter, *supra* note 1, at 2; *see* discussion *supra* section I.A.3.

213. 33 U.S.C. §§ 1342, 1318.

214. *Id.* § 1322(a)(1)–(2).

215. *Id.*

216. 40 C.F.R. § 122.3(a) (2013).

217. 33 U.S.C. § 1362(6).

218. *Id.* § 1362(1).

State, this agency is Ecology.[219] "Navigable waters" refers to the waters of the United States[220] and "person" as used throughout the Act includes "individual[s], corporation[s], partnership[s], association[s], State[s], municipalit[ies], commission[s], or political subdivision[s] of a State, or any interstate body."[221] Finally, "effluent limitation[s]" refer to restrictions[222] imposed by a state or the EPA Administrator "on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters."[223]

The CWA's requirements apply to departments, agencies, and other instrumentalities of the federal government—officers, agents, and employees acting in their official capacity—with control of a property or a facility or engaged in activities which may cause the discharge of pollutants.[224] These federal actors are generally protected by sovereign immunity.[225] *But*, the CWA waives that immunity with respect to certain requirements.[226] In the Ninth Circuit, such requirements include water quality standards as applied to nonpoint sources[227] and very likely point sources as well.[228] This waiver also allows courts to impose coercive sanctions to enforce past court orders (e.g., injunctions), but it does not allow a court or state agency to impose punitive sanctions for past violations.[229]

As mentioned, section 401 of the CWA represents a broad delegation of authority to the states from the EPA. This provision allows states like

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219. *Id.* § 1363(a)(1).

220. *Id.* § 1362(7).

221. *Id.* § 1362(5).

222. *Id.* § 1362(11).

223. *Id.*

224. 33 U.S.C. § 1323(a).

225. *See* discussion *supra* section I.C.

226. U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 611 (1992).

227. *See* Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1153 (9th Cir. 1998) ("Under the Clean Water Act, all federal agencies must comply with state water quality standards, including a state's antidegradation policy.").

228. *See* California *ex rel*. State Water Res. Control Bd. v. EPA., 511 F.2d 963, 971 (9th Cir. 1975) ("[U]nless they are forced to seek discharge permits like any other dischargers, federal agencies will not be complying with state requirements—substantive or procedural—'to the same extent that any person is subject to such requirements,' thus undermining the purpose of Section 313."), *rev'd sub nom. on other grounds*, EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 200 (1976) (reversing the Ninth Circuit on the issue of whether "requirements" language in section 313 of the CWA included obtaining an NPDES permit from the State. The Court did not address the issue of whether water quality standards as applied to point source pollution were within the meaning of "requirements").

229. *Dep't of Energy*, 503 U.S. at 623–24, 626–27.

Washington to impose conditions on the permit relating to compliance with state water quality standards and the requirements of the CWA.[230] Washington's water quality standards are laid out in Chapter 173-201A of the Washington Administrative Code (WAC).[231] The EPA approves these standards, and federal facilities are required to comply with them.[232]

III. CASE STUDY: APPLYING THE FRAMEWORK TO THE EX-U.S.S. *INDEPENDENCE* INCIDENT

This brings the conversation back to the question asked at the outset: could the State of Washington enforce federal (let alone state) environmental laws and regulations against the Navy and its officers in response to the ex-U.S.S. *Independence* hull-scraping incident, and, if so, how? Put another way, what is the scope of Washington's regulatory authority over federal actors under the Clean Water Act? To answer this question, this section applies the four-part framework established in Part I.[233]

First, state regulators need to identify their sources of authority. The Washington State Department of Ecology and the Washington AGO have a number of tools at their disposal to regulate the discharge of pollutants into state waters by federal actors. The Clean Water Act regulates water pollution in the waters of the United States and offers a robust source of regulatory authority by imposing permitting processes; referencing federal, state, and local law; and creating causes of action.[234]

As mentioned previously, Washington does not administer NPDES permitting for federal facilities in the state.[235] As a consequence, Washington State regulators may be limited in their ability to employ certain enforcement measures (e.g., notices of violation, administrative orders, notices of compliance) against federal facilities. However, Washington *does* have certification authority over NPDES permits issued to federal facilities pursuant to section 401, which is a requirement of NPDES permitting and allows Washington to impose conditions on NPDES permits issued by the EPA.[236] Furthermore, the CWA refers to state and local requirements.[237] The CWA's citizen suit provision also

230. COPELAND, *supra* note 46.

231. WASH. ADMIN. CODE ch. 173-201A.

232. Wood Letter, *supra* note 1, at 2.

233. *See* discussion *supra* Part I.

234. *See* discussion *supra* section I.A.

235. Wood Letter, *supra* note 1, at 2.

236. *See* 33 U.S.C. § 1341.

237. *See* EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 213–15 (1976).

empowers Washington to file suit against federal actors for violations of the Act under its citizen suit provision.[238]

Second, state regulators need to consider the scope of their authority. To what actors and conduct does it apply? The text of the CWA is unambiguous on this point: the prohibition on discharge of pollutants to waters of the United States without an NPDES permit applies to federal entities.[239] Federal facilities (i.e., buildings or structures owned or leased by the federal government) that hold NPDES permits are subject to the requirements imposed by those permits.[240]

Third, state regulators need to identify a waiver of sovereign immunity if they want to bring enforcement action against a federal actor. The CWA contains such a waiver, and that waiver applies to federal actors who violate the Act, including "requirements" of state and local law referenced in the Act.[241]

Fourth, there are considerations that pare back Washington's regulatory authority pursuant to the CWA and its waiver of sovereign immunity. Courts have construed this waiver narrowly such that its application is generally limited to enforcing effluent limitations, water quality standards, schedules of compliance, and reporting requirements.[242] It also allows courts to impose coercive sanctions (i.e., a penalty imposed to coerce compliance with a writ or court order).[243] The definition of "pollutant" in the CWA creates an exception for NPDES permitting for "discharge incidental to the normal operation of a vessel of the Armed Forces."[244]

In light of these considerations, Washington did have authority to take certain regulatory action against the Navy and its officers in response to the hull scraping at Puget Sound Naval Shipyard, assuming the Navy violated the CWA. To establish the Navy violated the CWA, Washington regulators must show that the Navy discharged pollutants into the waters of the United States from a point source without an NPDES permit from the EPA and certification from Washington State. This type of pollution—heavy metals and other marine debris—certainly falls within the broad definition of a pollutant under the CWA (i.e., solid waste and biological

238. 33 U.S.C. § 1365.

239. *Id.* § 1323(a).

240. *NPDES Permit Basics*, EPA, https://www.epa.gov/npdes/npdes-permit-basics [https://perma.cc/K966-QXSV] (Sept. 7, 2022); *Certifications for NPDES Federal Permits*, *supra* note 48.

241. 33 U.S.C. § 1323(a).

242. *See* discussion *supra* section I.D.

243. U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 613 (1992).

244. 33 U.S.C. § 1362(6).

material).[245] Furthermore, this pollution was discharged from a discrete, identifiable conveyance (i.e., the hull of the ship) and—depending on interpretation—a vessel, which is expressly listed in the definition of point source.[246] Despite the exclusion of discharges "incidental to the normal operations of a vessel of the Armed Forces,"[247] state regulators have a strong argument that the ex-U.S.S. *Independence* is no longer a vessel of the Armed Forces as it has been decommissioned, and that the hull scraping is not incidental to normal operations. Finally, it is undisputed that the Sinclair Inlet and the waters of Puget Sound constitute waters of the United States and that the Navy did not obtain a permit from the EPA for this discharge and did not obtain certification from Washington State.

Once Washington regulators establish that the Navy very likely violated the CWA by discharging pollutants without a permit, they must decide which of the available regulatory options they wish to take. In this case, there is no NPDES permit to enforce, so seeking to compel regulatory action by the EPA pursuant to section 706 of the APA is not an option.[248] And if there was a permit, it would not be within Washington's regulatory purview to enforce its terms through conventional regulatory means such as a notice of violation, as the permit is administered by the EPA.[249] In the absence of an enforceable permit, a citizen suit is likely the best option.[250] The CWA's waiver of sovereign immunity will permit suit against federal actors (including officers) by any citizen for violations of the Act, and states such as Washington can bring such suits on behalf of their citizens when state residents are adversely impacted as is the case here.[251]

This was the option the state seemed poised to take when it sent the Navy its notice of intent to sue.

IV. RECOMMENDATION TO STATE REGULATORS

State regulators and attorneys general would do well to remember their history of holding the federal government's feet to the fire when enforcing

245. *Id.*

246. 33 U.S.C. § 1362(14).

247. *Id.* § 1362(6).

248. *See* discussion *supra* section I.A.4.

249. *See* discussion *supra* section II.B. While Washington's NPDES program is authorized by EPA, Washington is not authorized to regulate federal facilities. *NPDES State Program Authority*, *supra* note 211. The table, "Status of State Approval," shows the approval status of NPDES programs in all fifty states. The blank in the column labeled "Authorized to Regulate Federal Facilities" indicates Washington does not have authorization from the EPA to regulate federal facilities.

250. *See* discussion *supra* section I.A.1.

251. 33 U.S.C. § 1365(h).

state and federal environmental laws and regulations. States and the federal government can pass expansive legislation and make aggressive pledges, but environmental laws and regulations are meaningless if not enforced.

State attorneys general have always played an integral role in protecting the environment through the enforcement of existing laws. "Attorney General advocacy" was a solid bulwark against the tides of federal abrogation of many environmental standards in recent years.[252] As states continue to adopt more progressive and expansive environmental policies, it is paramount that state regulators redouble their efforts to enforce existing laws and find novel ways to use their authority.

This Comment provides regulators with an analytical framework to begin evaluating the scope of their own regulatory authority over federal entities. State enforcement of environmental laws and regulations against the federal government presents fertile ground for state regulatory authority. The U.S. government is one of the largest polluters on the planet. It is unacceptable to allow federal departments and agencies to skirt state and federal environmental laws by way of the tentatively grounded and judicially expanded doctrine of sovereign immunity. States have enough tools under existing environmental laws to extend the reach of their authority to certain federal conduct within their borders. Understanding the reach of their authority is the key to effectively regulating conduct that too often evades regulation.

Previously, states may have been hesitant to apply what authority they did have against the federal government. It is important to recognize the challenges of maintaining a collegial relationship with federal entities in a cooperative federalist system. But if a federal department can pollute state waters consistently over a thirty-year period, is that relationship "cooperative"? This Comment argues it is not.

Expanding the regulatory authority of the states over federal actors by taking strategic enforcement actions against them where authorized will curb violations of state and federal law. Furthermore, taking such actions will build out case law to clarify many of the ambiguities in environmental statutes and their waivers of sovereign immunity and ultimately recalibrate the balance of power between the states and the federal

252. *See* Ellen M. Gilmer & Emily C. Dooley, *Environment-Focused AGs Find Their Place in Post-Trump World*, BLOOMBERG L. (May 20, 2021), https://news.bloomberglaw.com/environment-and-energy/environment-focused-ags-find-their-place-in-post-trump-world [https://perma.cc/B733-U8AE]; *see also State Attorneys General Environmental Actions*, COLUMBIA L. SCH., https://climate.law.columbia.edu/content/state-attorneys-general-environmental-actions [https://perma.cc/T7QZ-UDC6] (Apr. 7, 2017) (hosting a database developed by the Sabin Center showing environmental actions initiated by state attorneys general, including a number of suits filed against federal entities).

government with respect to environmental law.

CONCLUSION

The line indicating where federal immunity ends and where state regulatory authority begins is not always clearly drawn. Courts have stretched sovereign immunity thin while simultaneously misconstruing and paring back waivers of that immunity, limiting the options available to state regulators seeking to regulate the federal government, and, in some cases, decoupling the judicial interpretations of federal statutes from their stated goals. The language of the Clean Water Act's federal facilities provision clearly expresses Congress's intent for federal facilities to be treated as private polluters, but subsequent judicial interpretation says otherwise.

Confronted with noncompliant federal agencies and in the absence of adequate judicial construction of waivers of sovereign immunity, it falls to states to be vigilant regulators of their federal partners. This message may sound uncooperative or even antifederalist. In reality, it calls for the federal government to comply with, and for states to give effect to, the laws as Congress and the President—a whole two-thirds of our federal government—intended when they were enacted. States can and should do more to ensure federal laws bind the conduct of federal actors where appropriate. This Comment demonstrates that states still have a multitude of legal tools at their disposal to enforce environmental laws against federal actors and encourages state regulators to make use of them.