# FEDERAL ENVIRONMENTAL LAWS AFFECTING REAL ESTATE: A Review of Clean Water Act Section 404, the Endangered Species Act, the National Environmental Policy Act, and Section 106 of the National Historic Preservation Act

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## I. OVERVIEW

Standard practice for conducting due diligence as part of real estate transactions has long included an assessment of the potential for a site to have "recognized environmental conditions," i.e., hazardous substances or petroleum products released to the environment. In addition to this evaluation, sound due diligence practices should include an evaluation of the potential for federal regulatory requirements to significantly affect value. This paper will look at four general areas: the Clean Water Act[1] ("CWA"), the Endangered Species Act[2] ("ESA"), the National Environmental Policy Act[3] ("NEPA") and the National Historic Preservation Act[4] ("NHPA").

Section 404 of the CWA generally requires that a permit[5] be obtained from the U.S. Army Corps of Engineers to discharge dredge or fill material into "navigable waters."[6] The term "navigable waters" is defined as "the waters of the United States, including the territorial seas."[7] In turn, the Corps of Engineers and the Environmental Protection Agency ("EPA") have each adopted rules that define "waters of the United States" to include virtually every type of water body imaginable, as well as the tributaries of such waters.[8] Under the Section 404 permit program, regulated "discharges" include activities such as placing fill material into a watercourse or wetland area in connection with routine construction activities. Consequently, this program imposes significant burdens on the regulated community, and can complicate site development and thereby substantially affect value.[9]

Section 7 of the ESA requires federal agencies to consult with the United States Fish and Wildlife Service to insure that any action authorized by the agency is not likely to jeopardize the continued existence of any species of fish, wildlife, and plants that have been listed as endangered or threatened, or to adversely modify a listed species' critical habitat.[10] Section 9 of the ESA

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1. Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251–1387 (2012).
2. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012).
3. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h (2012).
4. National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6 (2000).
5. Commonly referred to as a "404 permit."
6. 33 U.S.C. §§ 1344(a), 1362(7) (2012).
7. *Id.* § 1362(7).
8. 33 C.F.R. § 328.3(a) (2014) (Corps' definition); 40 C.F.R. § 232.2 (2014) (EPA's definition).
9. *See* Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual [Section 404] permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.").
10. 16 U.S.C. § 1536(a)(2) (2012).

generally prohibits the actions that "take" (i.e., kill or injure) members of a listed species.[11] Section 9 applies to both federal agencies and private actors; Section 7 is only triggered if there is some discretionary federal involvement in the project (such as the need for a 404 permit, or access across federal lands).[12] Development of property in a manner that adversely affects that listed species or designated critical habitat can substantially complicate and impede development.

NEPA is often referred to as the "granddaddy" of federal environmental laws and requires federal agencies to consider the environmental impact of their actions.[13] Major federal actions significantly affecting the environment require preparation of an Environmental Impact Statement ("EIS").[14] Compliance with NEPA is required before making a final decision (such as issuance of a federal permit), and may delay that decision, particularly if an EIS is required. While NEPA applies only to federal actions, costs of compliance are often shifted to private applicants and those costs can be substantial. Moreover, delays associated with NEPA compliance can substantially affect the viability of a project.

Section 106 of the NHPA requires any federal agency "having authority to license any undertaking" to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register" before approving the project.[15] As with NEPA and Section 7 of the ESA, NHPA requirements are triggered by federal involvement in a project. While it is relatively unusual to come across sites actually listed on the National Register, it is quite common to encounter sites that are potentially eligible and require evaluation, triggering Section 106 obligations. Complying with those obligations (surveying, evaluating and mitigating adverse effects) can be quite costly and cause significant project delays.

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11. *Id.* § 1538(a). Different rules apply to the taking of listed plant species. *See id.* § 1538(a)(2).

12. *See* Defenders of Wildlife v. Bernal, 204 F.3d 920, 924 (9th Cir. 1999).

13. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

14. 42 U.S.C. § 4332(2)(C); *see also* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 763 (2004).

15. 16 U.S.C. § 470f; 36 C.F.R. § 800.16(y) (2000) (definition of undertaking).

## II. SECTION 404 OF THE CLEAN WATER ACT

The CWA, adopted in 1972, marked a significant change from prior law by requiring that all discharges of pollutants from "point sources" to "navigable waters" be subject to permit requirements.[16] The Act included two permit programs typically encountered in the construction industry: Section 402, or the National Pollutant Discharge Elimination System ("NPDES") program, and the Section 404 permit program.[17]

The NPDES program[18] applies to pollutant discharges (other than dredge and fill) to regulated waters and is administered by EPA. States may develop their own programs that provide equivalent or more stringent protections and seek EPA approval, which will allow for state-permitting in lieu of the federal program if the state program meets federal standards.[19] Arizona has its own approved program, the Arizona Pollution Discharge Elimination System or "AZPDES" program, which operates in lieu of a federal program. This is significant because the state-issued AZPDES permits are not federal actions that trigger ESA, NHPA or NEPA requirements.

Section 404 requires a permit to discharge "dredge or fill material" into regulated waters.[20] Section 404 permits are administered by the U.S. Army Corps of Engineers with EPA oversight.[21] While somewhat of an oversimplification, one way to think of the distinction between the NPDES and 404 programs is that the 404 program was intended to regulate construction activity designed to eliminate or change the bottom elevation of regulated waters, while the NPDES program was designed to cover all other discharges of pollutants from point sources to regulated waters.

16. 33 U.S.C. §1311(a) (2012).

17. *Id.*

18. *Id.* § 1342.

19. *Id.* § 1342(b)–(d); *see also* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 650 (2007).

20. 33 U.S.C. § 1344(a) (2012).

21. *Id.* § 1344. Like the NPDES program under Section 402, states are authorized to assume authority to issue permits under Section 404. *See id.* § 1344(g). While virtually all states have assumed authority under Section 402, very few have assumed the 404 program. *See National Pollutant Discharge Elimination System, State Program Status*, EPA, http://cfpub.epa.gov/npdes/statestats.cfm (last updated on Apr. 14, 2003); *see also State Wetland Programs Map*, ASS'N OF STATE WETLAND MANAGERS, http://www.aswm.org/state-summaries (last visited Jan. 8, 2014). Arizona has not assumed the 404 program.

### *A. EPA Oversight*

EPA was given the authority to develop guidelines (actually rules) governing the discharge of dredged or fill material.[22] The so-called "404(b)(1) guidelines" establish the primary permitting standards that the Corps and permit applicants must follow, along with the Corps' own standards for reviewing applications, including the "public interest review criteria."[23] EPA has the authority to veto permits issued by the Corps if such proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[24] This authority is rarely invoked but the threat of veto influences Corps permit decisions.

### *B. Jurisdiction*

EPA has primary authority to determine the scope of jurisdiction under the CWA, including geographic jurisdiction.[25] For the 404 program, the Corps generally determines jurisdiction except where EPA declares a "special case" and assumes the authority.[26] In addition, EPA has independent enforcement authority under Section 404.[27]

In determining whether a particular activity requires a permit, one must consider two separate questions: (a) whether the activity itself is regulated by Section 404 (i.e., is it a discharge of dredged or fill material and if so, whether it qualifies for an exemption from regulation); and (b) whether the activity occurs within a geographic area deemed to be jurisdictional waters. Both of these areas of jurisdiction have been heavily litigated over the years and in the interest of brevity, this paper addresses only the basic outlines of jurisdiction.

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22. 33 U.S.C. § 1344(b)(1) (2012).

23. *See* 45 Fed. Reg. 85,636 (Dec. 24, 1980) (the 404(b)(1) guidelines) (codified at 40 C.F.R. pt. 230; 33 C.F.R. § 320.4 (Corps permit standards)).

24. 33 U.S.C. § 1344(c) (2012); 40 C.F.R. pt. 231 (2014) (procedures).

25. *See* 43 Op. Att'y Gen. 15 (1979).

26. *See* U.S. ARMY CORPS OF ENG'RS, MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING DETERMINATION OF THE SECTION 404(F) OF THE CLEAN WATER ACT (1993), http://www.usace.army.mil/Portals/2/docs/civilworks/mous/404f2.pdf.

27. 33 U.S.C. § 1319 (2012).

1. Activity Jurisdiction

Corps' regulations define "dredged material" as material that is "excavated or dredged from waters of the United States."[28] "Fill material" means "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."[29] Activities such as draining or clearing land without a discharge or other activities that indirectly affect waters are not regulated under Section 404. In addition, certain types of excavation activities are not regulated.[30] There are a number of statutory exemptions but they are very narrow and rarely apply in the construction context.[31]

2. Geographic Jurisdiction

The CWA regulates "navigable waters" and defines such waters as "waters of the United States."[32] EPA and the Corps have adopted a regulatory definition of "waters of the United States" that includes essentially any wetlands or surface water connected in some way to interstate commerce.[33] The most controversial types of waters nationally are wetlands, but other types of waters are included too, such as lakes, rivers, streams (including intermittent streams), playa lakes or natural ponds, and impoundments and tributaries of waters otherwise defined as waters of the United States.[34] The validity of this rule has been called into question by the U.S. Supreme Court and no longer includes isolated waters or non-relatively permanent waters that have no "significant nexus" to "traditional" navigable waters.[35] EPA and the Corps have issued a proposed rule "clarifying" jurisdiction in April 2014.[36]

Wetlands jurisdiction is determined through application of the 2008 guidance, along with the 1987 Corps of Engineers Wetlands Delineation Manual

28. 33 C.F.R. § 323.2(c) (2014).
29. *Id.* § 323.2(e).
30. *See, e.g.*, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1402–03 (D.C. Cir. 1998).
31. *See generally* 33 U.S.C. § 1344(f) (2012).
32. 33 U.S.C. § 502(7) (2012).
33. 33 C.F.R. § 328.3(a) (2014).
34. *Id.*
35. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167–68 (2001) ("SWANCC"); Rapanos v. United States, 547 U.S. 715, 742 (2006) (plurality opinion), 784–85 (Kennedy, J., concurring in the judgment); US ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION (2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf.
36. *See* 79 Fed. Reg. 22,188 (Apr. 21, 2014).

and regional supplements.[37] The limit of jurisdiction for wetlands is determined by application of the manuals. For non-tidal waters other than wetlands, the limit of jurisdiction is the "ordinary high water mark" ("OHWM"), which is defined as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas."[38] When "adjacent" wetlands are present (i.e., wetlands adjacent to other waters of the United States), the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.[39] When the jurisdictional water consists only of wetlands, jurisdiction extends to the limit of the wetland.[40]

Importantly, there is no rule defining the upstream limit of jurisdiction on watercourses generally. In a short paragraph in the preamble to revisions to the regulatory program, the Corps explained the upstream limit of jurisdiction. Noting that 33 C.F.R. § 328.4(c)(1) established the lateral extent of the Corps jurisdiction in non-wetland areas as the ordinary high water mark, the Corps stated: "Therefore, it should be concluded that in the absence of wetlands the upstream limit of Corps jurisdiction also stops when the ordinary high water mark is no longer perceptible."[41]

In the Western United States, a common category of "waters" encountered in the development process are dry washes or arroyos. The regulatory definition of regulated waters includes "intermittent streams", and pre-*SWANCC* or *Rapanos* case law concluded that waters of the United States can include "normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream . . . ."[42]

37. *See Technical and Biological Information*, US ARMY CORPS OF ENG'RS, http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/techbio.aspx (last visited Apr. 4, 2014).

38. 33 C.F.R. § 328.3(e) (2014).

39. *See Rapanos*, 547 U.S. at 742 (plurality opinion).

40. 33 C.F.R. § 328.4(c) (2014).

41. Final Rule for Regulatory Programs of the Corps Eng'rs, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. pts. 320–30).

42. *See* United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975); *see also Rapanos*, 547 U.S. at 726 (plurality opinion) (describing the Corps' "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'").

### *C. Permitting Standards and Requirements*

Section 404 Permits are subject to a myriad of requirements and standards, the most significant of which are described below.

First, Section 404 Permit approvals are subject to what is known as an "alternatives analysis."[43] The 404(b)(1) guidelines[44] provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[45] The guidelines further provide:

> An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.[46]

In other words, one of the alternatives that must be assessed is an off-site alternative that looks at other locations to accomplish the applicant's project purpose. The guidelines also require the applicant to evaluate locations for the proposed project that do not involve any discharge to jurisdictional waters.[47] The guidelines contain a presumption against filling "special aquatic sites" (which are defined to include wetlands).[48]

Second, the Corps employs a generalized public interest standard in evaluating Section 404 permits.[49] This public interest review includes "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."[50] The regulations indicate that a permit will be granted *unless* it is contrary to the public interest, with

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43. *See* Friends of Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 995 (9th Cir. 1993).

44. The guidelines contain a number of requirements related to the discharge of fill beyond the alternatives analysis requirement. In fact, the bulk of the guidelines focus on ensuring that the discharge itself does not significantly degrade aquatic resources.

45. EPA Compliance with the Guidelines, 40 C.F.R. § 230.10(a) (2014).

46. *Id.*

47. *Id.*

48. *Id.*

49. Corps of Engineers, Department of the Army General Regulatory Guidelines, 33 C.F.R. § 320.4(a) (2014).

50. *Id.*

the huge qualification that the permit must comply with the 404(b)(1) guidelines.[51]

Third, Section 404 permits are subject to mitigation requirements that can be burdensome and costly. "Mitigation" broadly refers to efforts by the permit applicant to avoid, reduce or compensate for adverse environmental consequences of the proposed project. Mitigation is typically developed sequentially during the permitting process.[52] First, the Corps must ensure that jurisdictional waters are avoided to the maximum extent practicable. Next, the impact of discharges that are allowed must be minimized. This can be done in a number of ways, including ensuring that the material discharged will not cause a violation of water quality standards (e.g., use clean fill), ensuring that operation of the construction project will be done in a manner that minimizes other discharges (e.g., compliance with NPDES stormwater requirements for construction activities), and ensuring that the fill that is discharged is secured so that it does not wash downstream.[53] Finally, compensation is usually required for the loss of waters occasioned by the discharge. This is done to implement the national policy of "no net loss" of aquatic functions and values. The Corps and EPA adopted formal mitigation regulations in 2008, which provide detailed guidance on how mitigation is accomplished.[54]

The need to compensate for lost functions and values can be among the most challenging parts of a 404 permit application. This is generally accomplished through one or a combination of *restoration* of degraded aquatic areas; *enhancement* of existing aquatic areas (basically raising the functions of an area that is already aquatic but not degraded); *establishment* (also called "creation") of new aquatic areas; and *preservation* of existing resources.[55] Each of these methods can be executed through three basic approaches: (a) purchase of credits in a mitigation bank (i.e., a facility that for example has restored or enhanced wetlands or other aquatic areas in advance); (b) payment of an in lieu fee to an entity that will use the money to restore or enhance

51. *Id.*

52. *See* MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(B)(1) GUIDELINES (1990) ([Mitigation MOA]), http://www.usace.army.mil/Portals/2/docs/civilworks/mous/migrate.pdf.

53. *See generally* EPA Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. pt. 230 (2014).

54. Corps of Engineers, Department of the Army Compensatory Mitigation for Losses of Aquatic Resources, 33 C.F.R. pt. 332 (2014); 40 C.F.R. pt. 230, subpart J; Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594 (Apr. 10, 2008) (to be codified at 40 C.F.R. pt. 230).

55. 33 C.F.R. § 332.3(a)(2) (2014).

wetlands or other aquatic resources; or (c) development and implementation of a "permittee-responsible" mitigation plan. This plan can be accomplished onsite or off-site (but preferably within the same watershed) and can be in kind (addressing the same kind of aquatic resources impacted, which is preferred) or in some circumstances, out-of-kind (particularly if the resources that are being addressed are of higher function or value than the resources impacted.)[56]

Fourth, Section 401 of the CWA requires that before any federal permit can be issued under the CWA, the permit applicant must secure from the state in which the discharge occurs certification that the discharge will comply with state water quality standards and limitations (including effluent limitations).[57] This is commonly referred to as Section 401 certification, and normally involves demonstrating that construction practices will not cause or contribute to a violation of state water quality standards. If the state fails or refuses to act within a reasonable time, the certification requirement can be deemed by the Corps or EPA to be waived.[58] This part of the program has been substantially simplified by the adoption of the construction stormwater requirements under the NPDES program since those requirements (consisting primarily of best management practices to be employed during construction to limit sedimentation and erosion from exposed surfaces), are designed to ensure compliance with water quality standards.

Finally, the Corps permit decision is subject to a number of other laws and regulatory requirements that affect the processing of the permit both substantively and procedurally and may be determine whether a final permit is issued. These include NEPA, the NHPA and the ESA, among others. These laws are discussed in more detail later in this paper.

### *D. Permit Processing Procedures*

The permitting process can be lengthy and complex. It generally begins with a delineation of regulated waters (a "jurisdictional determination" or "JD"), a step which itself has become exceedingly complex in the wake of the *Rapanos* decision and related guidance. In general, a landowner or developer will retain a consultant to prepare a preliminary delineation of wetlands

56. *Id.* § 332.3(b). The Corps' compensatory mitigation regulations are further clarified in 40 C.F.R. pt. 230, subpart J.

57. 33 U.S.C. § 1341 (2012).

58. The certification is generally secured from the state pollution control agency. However, in cases where that agency does not have authority to act (such as on Indian reservations), the certification is secured from EPA.

and non-wetland waters, following local Corps practices for determining waters with a discernible OHWM and delineating wetlands. A Corps regulatory guidance letter ("RGL") allows processing of permits with either a final or preliminary jurisdictional determination ("PJD").[59] The difference between an approved JD and a PJD is that the PJD is not appealable according to the Corps appeal procedures, and the PJD delineates all waters on the site without an analysis of whether such waters are actually subject to federal jurisdiction (i.e., *SWANCC* and *Rapanos* are not applied). An approved JD is appealable and can be appealed before pursuing the actual permit.[60]

After the jurisdictional determination is settled and it is clear that activities at the site will result in a regulated discharge to waters of the United States, one must determine whether a general or individual permit is required under the CWA. General permits are authorized for discharges with minimal adverse effects. The CWA authorizes the Corps to issue general permits on a national, statewide or regional basis.[61] The most heavily used of these are the Nationwide Permits ("NWP"), which authorize activity-specific discharges of dredged or fill material, typically with very limited resource impacts.[62] The current suite of NWPs encompasses fifty permits including one for residential development (NWP 29) and one for commercial and institutional development (NWP 39).[63] Both limit loss of waters to no more than one-half acre.[64] Other NWPs commonly used in the development industry are NWP 12 (utility lines), NWP 13 (bank stabilization), and NWP 14 (linear transportation projects, i.e., roads). NWPs offer expedited permit processing. Notice to the Corps is typically required (but not always) and processing usually takes a matter of months (three to six) after the JD is approved. NHPA and ESA requirements apply, however, and may preclude the use of a NWP.

An individual permit is usually required for discharges with potentially significant impacts. Thus, individual permits require a more detailed analysis

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59. *See* Regulatory Guidance Letter from Don T. Riley, Major Gen., 08-02 (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf.

60. *See generally* Corps of Engineers, Department of the Army Administrative Appeal Process, 33 C.F.R. pt. 331 (2014); Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16,486 (Mar. 28, 2000) (to be codified at 33 C.F.R. pts. 320, 326, 331).

61. 33 U.S.C. § 1344(e) (2012).

62. *See generally* Corps of Engineers, Department of the Army Nationwide Permit Program, 33 C.F.R. pt. 330 (2014).

63. *See* U.S. ARMY CORPS OF ENG'RS, 2012 NATIONWIDE PERMITS, CONDITIONS, DISTRICT ENGINEER'S DECISION, FURTHER INFORMATION, AND DEFINITIONS 1–2 (2012), http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf.

64. *Id.* at 17.

of the project and more emphasis on avoidance of impacts to waters, including full application of NEPA requirements[65] as well as compliance with ESA, NHPA and other related laws. The applicant typically has to complete the Corps permit application form and prepare drawings showing both cross-sections and plan views of the proposed work.[66] Once the Corps has a complete application, it will prepare and distribute a public notice.[67] The Corps district offices maintain lists of interested parties and circulate public notices by e-mail and by posting on its website. The notices themselves are fairly short (typically five to ten pages) and include a location map, plan drawings and a short description of the work itself. Normally, thirty days are allowed for public comment. At the end of the public comment period, the comments are given to the applicant for a response.

As noted previously, EPA has veto authority over any permit based on specific environmental concerns,[68] but it is also required under Section 404(q) to enter in to an agreement with the Corps to ensure that "to the maximum extent practicable, a decision with respect to an application for a [404] permit . . . will be made not later than the ninetieth day after the date the notice of such application is published . . . ."[69] The veto authority is very rarely exercised, but EPA can take an elevated role in an individual permit application, ironically pursuant to the memorandum of agreement ("MOA") entered into under Section 404(q). In particular, if EPA believes that a particular discharge will cause unacceptable adverse effects to aquatic resources of national importance ("ARNI"), and it raises this concern in its response to a public notice, then the final Corps permit decision cannot be made without notice to the EPA regional office, which then has the opportunity to request headquarters review of the permit decision.[70]

The final processing of applications after public notice involves a complex negotiation process where the Corps (and possibly EPA) evaluate the efforts to avoid jurisdictional waters (typically asking for additional alternatives to

65. NWPs are issued based on an Environmental Assessment completed under NEPA, so no further NEPA documentation is required.

66. Corps of Engineers, Department of the Army Processing of Department of the Army Permits, 33 C.F.R. § 325.1 (2014).

67. *Id.* § 325.3.

68. 33 U.S.C. § 1344(c) (2012).

69. *Id.* § 1344(q).

70. *See generally* ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING CLEAN WATER ACT SECTION 404(Q) (1992), http://www.usace.army.mil/Portals/2/docs/civilworks/mous/moa_epa404q.pdf.

be assessed), and also working through NEPA, ESA and NHPA issues.[71] Despite the laudable language of 404(q), it is exceedingly unlikely that an individual permit will be issued within ninety days of the public notice, even for the smallest projects. A more typical timeline is one year from public notice, and permits for larger, complex projects have been issued several years (or longer) after public notice.

### *E. Due Diligence Considerations*

At a minimum, a due diligence evaluation should include a two-step inquiry: (a) whether a site has "aquatic" features that would be considered waters of the United States and (b) whether planned activities on the site will result in a regulated discharge to such waters. Varying levels of analysis can be made to more particularly identify the risks associated with possible 404 permitting on the site, depending on the anticipated land use and the likelihood that a jurisdictional watercourse could be impacted.

To determine whether there are waters of the United States on site, the prospective purchaser should retain an experienced consultant who has obtained Corps' approval of jurisdictional determinations in the past and is well acquainted with Corps procedures. The consultant should, at a minimum, review aerial photos of the site, conduct a site visit, and then advise on the likelihood of jurisdictional waters being present on the site. The consultant also could be asked to prepare a draft delineation (which is likely to require a more thorough site investigation). If the seller is willing and time permits, the consultant could submit the delineation for approval to the Corps, a process likely to take sixty to ninety days after submittal, although there are no set timeframes for processing. Advance analysis is important because some sites are very difficult to permit. While wetlands are rare in Arizona, if they are encountered, the regulatory presumption is that they can be avoided. Other challenging aquatic features include alluvial fans or floodplain areas, where washes spread out forming web-like patterns that are difficult to avoid and will be challenging to permit.

Assuming there are jurisdictional waters on site, the prospective buyer should conduct an analysis of whether site development activities will result in a discharge to such waters. The 404(b)(1) guidelines seem to impose this requirement on a buyer due to the need in the permitting context to evaluate

71. Increasingly, the Corps is requesting supporting documentation such as a mitigation plan before issuing its public notice, as well as additional documentation required for compliance with other laws, including completed cultural resource and biological reports identifying resources potentially protected under the NHPA and ESA.

available off-site locations for accomplishing the project purpose. There are instances of a 404 permit being denied based on the availability of a less environmentally damaging off-site location.[72] The general assumption in site planning is that if overall impacts to waters of the United States are one-half acre or less, then the project is likely to qualify for an NWP and permitting is likely to take (from submittal of preconstruction notice) less than a year. If impacts exceed an acre or wetlands would be filled, however, an individual permit will likely be needed, which may take up to one year to process. In the case of larger, more complex projects, with substantial impacts to jurisdictional water courses, processing time may take several years. Finally, the need for an individual 404 permit normally triggers ESA, NEPA and NHPA obligations, which must be satisfied before the permit can be issued.

It is unusual but not unheard of for a prospective purchaser to seek to permit a project in advance of closing. Technically, the seller would have to do so (or at least consent to do so) as the Corps generally insists that the landowner be the applicant.[73] Because of the uncertainty in timing of permit issuance (or even whether a permit will be issued at all), sellers do not generally allow this.

In some cases, the project has already been permitted. Due diligence then would focus on the validity of the permit itself, its anticipated expiration date (including whether the work can be completed in time or an extension of the permit be reasonably secured), whether there are any compliance issues, and whether the prospective buyer's plans can be accommodated under the existing permit. Amending permits to accommodate changes in plans is possible, but the prospective buyer must be cognizant of the fact that the current permittee represented to the Corps that the project is feasible with the level of impacts permitted. Obtaining an increase in impacts is thus challenging.[74]

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72. *See, e.g.*, Bersani v. U.S. EPA, 674 F. Supp. 405, 420 (N.D.N.Y. 1987), *aff'd*, 850 F.2d 36 (2d Cir. 1988) (veto by EPA of a Corps issued permit for a shopping center based on the availability at "market entry" of an alternative, less damaging site). This is a rather astounding extension of federal jurisdiction—basically giving the agencies the authority to determine that you purchased the wrong property. The facts of *Bersani* are unique and we have not seen a permit denied on this basis in over twenty-five years of working on Section 404 permit issues.

73. Corps rules provide that the "signature of the applicant . . . will be an affirmation that the applicant possesses or will possess the requisite property interest to undertake the activity proposed in the application . . . ." Corps of Engineers, Department of the Army, 33 C.F.R. § 325.1(d)(8) (2014). This language can be read to allow a prospective buyer to submit with the permission of the landowner.

74. A simple example of where an amendment might succeed is if the permitted project has been demonstrated, after the permit was issued, to not be feasible.

## III. THE ENDANGERED SPECIES ACT ("ESA")

The ESA is a comprehensive regulatory scheme designed to protect species under threat of extinction.[75] From the standpoint of real estate due diligence, the ESA has two key provisions that can substantially affect the timing and nature of development that can occur on property. These are Section 9,[76] which restricts the "taking" of listed species of fish and wildlife as well as protecting listed plant species, and Section 7,[77] which applies only to federal agencies and requires them to consult with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"), which is responsible for certain marine and anadromous fish species, to ensure that any action authorized by the agency is not likely to jeopardize the continued existence of any species that has been listed as endangered or threatened or adversely modify such species' designated critical habitat.

### *A. General Background*

FWS uses rulemaking procedures to list species and designate critical habitat.[78] FWS and NMFS have promulgated joint regulations dealing with listing species and designating critical habitat.[79] In both cases, the agency's determination must be based on the best scientific data available.[80]

The term "species" is specifically defined in the statute and includes any "subspecies" of fish, wildlife or plants, as well as any "distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[81] A species may be listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range."[82] A species may be listed as "threatened" if it is "likely to become endangered in the foreseeable future throughout all or a significant portion of its range."[83] As a practical matter, for domestic species, there is little regulatory difference between species classified as "endangered" and species classified as "threatened."

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75. *See* Conservation Cong. v. U.S. Forest Serv., 720 F.3d 1048, 1050 (9th Cir. 2013).
76. 16 U.S.C. § 1538(a) (2012).
77. *Id.* § 1536(a)(2).
78. *See generally id.* § 1533.
79. *See* Joint Regulations Listing Endangered and Threatened Species and Designating Critical Habitat, 50 C.F.R. pt. 424 (2014).
80. *See* 16 U.S.C. § 1533(b)(1)(A) (2012) (listing species); *id.* § 1533(b)(2) (designating critical habitat).
81. 16 U.S.C. § 1532(16) (2012).
82. *Id.* § 1532(6); *see* Babbitt v. Sweet Home Chapter. of Cmtys. for a Great Or., 515 U.S. 687, 691 n.1 (1995).
83. 16 U.S.C. § 1532(20) (2012); *see Sweet Home*, 515 U.S. at 692 n.5.

Section 7 consultation requirements apply to both categories of listed species, and by rule, FWS has extended the ban on the taking of endangered species to threatened species.[84]

Under the statute, "critical habitat" means:

> (1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[85]

Areas outside of the geographic area occupied by a species may be designated as critical habitat "only when a designation limited to its present range would be inadequate to ensure the conservation of the species."[86] In contrast to listing a species, however, FWS must take into consideration "the economic impact, the impact on national security, and any other relevant impact, of specifying a particular area as critical habitat."[87]

It is important to note that critical habitat designations apply only under Section 7, i.e., consultation on proposed federal actions; there is no formal protection for designated critical habitat from purely private action.[88] It is also important to keep in mind that critical habitat is designated through a formal rulemaking process, with maps and descriptions published in the Federal Register, and thus is distinct from (but can overlap) "suitable habitat" (habitat deemed suitable by FWS or someone else as capable of supporting a listed species) or "occupied habitat" (habitat actually determined to be supporting individual members of a species, usually through surveys).

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84. *See* 50 C.F.R. § 17.31(a) (2014). With respect to species listed as threatened, however, FWS and NMFS are authorized to issue "protective regulations" that may allow certain activities even though they may result in the taking of members of the species. *See* 16 U.S.C. § 1533(d) (2012).

85. 16 U.S.C. § 1532(5)(A) (2012); Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1107 n.4 (9th Cir. 2012).

86. 50 C.F.R. § 424.12(e) (2012).

87. 16 U.S.C. § 1533(b)(2) (2012); *see* Bennett v. Spear, 520 U.S. 154, 172 (1997).

88. Take prohibitions could be triggered if the critical habitat is actually occupied by members of a listed species and would be killed or injured by land use activities.

### *B. Section 9*

Section 9 of the ESA provides that it is "unlawful for any person subject to the jurisdiction of the United States to . . . take any [listed endangered species of fish or wildlife] within the United States . . . ."[89] FWS has extended this prohibition by regulation to threatened species.[90] The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" with respect to listed species.[91] The meanings of most of the terms used in this definition are readily apparent. Terms such as "shoot," "wound," "pursue," "trap," "capture" and "collect" are common verbs that describe specific actions that in most cases involve the risk of death or injury to wildlife.

Two of the terms in the definition, "harm" and "harass," are vague. For this reason, FWS has promulgated rules defining these terms. Unfortunately, the precise application of the terms "harm" and "harass" to particular conduct remains unsettled, and these terms have been the focus of considerable debate and litigation.

"Harm" is defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[92] FWS explained in its preamble to the rule: "The final definition [of harm] adds the word "actually" before the words "kills or injures" in response to comments requesting this addition to clarify that a standard of actual, adverse effects applies to Section 9 takings."[93] This additional language makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to Section 9.[94] To violate Section 9, habitat modification must be *significant*, must *significantly impair essential* behavioral patterns, and must result in *actual* injury to a protected wildlife species.

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89. 16 U.S.C. § 1538(a)(1)(B) (2012).

90. *See* 50 C.F.R. § 17.31(a) (2014) (protections for threatened wildlife).

91. 16 U.S.C. § 1532(19) (2012).

92. 50 C.F.R. § 17.3 (2014); Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54,748 (Nov. 4, 1981).

93. 50 C.F.R. § 17.3 (2014); Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54,748 (Nov. 4, 1981).

94. *See* Babbitt v. Sweet Home Chapter. of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995) ("[E]very term in the regulation's definition of 'harm' is subservient to the phrase 'an act which actually kills or injures wildlife.'"); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 873–74 (D. Ariz. 2003), *aff'd* No. 03-16874 (9th Cir. 2005) (mem.) (rejecting claim that reducing water level of reservoir would cause a "catastrophic fishkill" and result in the taking of several listed species).

"Harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[95] Notably, the term "harass" does not include the "concept of environmental damage," such as the modification of habitat, which is instead encompassed by the term "harm."[96] Rather, "harass" includes actions that *annoy* individual members of a species. Two elements must be shown: (1) the likelihood of injury to wildlife, and (2) some degree of fault, either an intent to harass or negligence.[97] In addition, like the definition of "harm," the action must *significantly* disrupt essential behavioral patterns to constitute harassment.

Section 9 also applies to endangered species of plants. Section 9 makes it illegal to:

> [R]emove and reduce to possession any such species [endangered species of plants] from areas under [f]ederal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law . . . .[98]

This provision has at least two important implications for projects within Arizona. First, given the large amount of federal land in the state (such as national forests, Indian reservations, National Parks, and land administered by the Bureau of Land Management (BLM)), many projects may involve activities on these lands, requiring consideration of possible impacts to listed plant species. Second, Arizona has a native plant statute that provides for lists of protected species of native plants by the Arizona Department of Agriculture.[99] If a plant is listed under the ESA and is removed in contravention of the state native plant laws, that violation could also be considered a violation of the ESA.

Despite the statute's broad prohibition against taking, there are two ways to obtain permission to take members of a listed species. The first is through

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95. 50 C.F.R. § 17.3 (2014).

96. Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,413 (Sept. 26, 1975).

97. Endangered and Threatened Wildlife and Plants; Proposed Redefinition of "Harm," 46 Fed. Reg. 29,490, 29,491 (June 2, 1981).

98. 16 U.S.C. § 1538(a)(2)(B) (2012).

99. *See* ARIZ. REV. STAT. ANN. §§ 3-901 to 3-916 (2013); ARIZ. ADMIN. CODE R3-4-601 (2012).

the Section 7 consultation process, which is discussed in more detail below. The second is through a separate FWS-issued incidental take permit under Section 10 of the ESA.[100]

FWS has the authority to issue an incidental take permit ("ITP") authorizing the taking of members of listed species, provided that the taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[101] The holder of an ITP is not liable for any takings that fall within the scope of, and are consistent with, the ITP. Unfortunately, since the ESA was amended in 1982 to provide for the issuance of ITPs, the process has become increasingly onerous, discouraging their use.

To obtain an ITP, an applicant must submit a habitat conservation plan or "HCP." The HCP must specify (1) the impact that will result from the taking; (2) the steps the applicant will take to mitigate the impact and the funding available to ensure implementation of such mitigation; (3) alternatives to the applicant's proposed action and the reasons why none of the alternatives was chosen; and (4) any other measures that FWS may require.[102] Depending on the size and nature of the applicant's project and the number of species addressed, the development of an HCP acceptable to FWS may take a number of months or, in the case of a complex HCP, substantially longer to complete.

After an acceptable HCP has been developed and an ITP application has been filed, there are several important procedural steps that must be completed.[103] FWS must publish notice of ITP application in the Federal Register and invite the submission of "written data, views or arguments" from "interested parties."[104] Moreover, because the issuance of an ITP by FWS is a federal action, the agency must comply with Section 7 of the ESA, as well as NEPA and the NHPA.

The decision to seek an ITP is voluntary, subject, of course, to the risk of incurring liability if members of a listed species are present and are actually killed or injured as a consequence of the project.[105] Because of the delay, expense and restrictions typically imposed, the decision to apply for an ITP should not be made lightly. The project proponent should conduct a risk analysis to determine whether a take is likely to occur and whether eliminating the risk of violating Section 9 outweighs difficulties the landowner is likely to encounter with an ITP and a HCP.

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100. 16 U.S.C. § 1539(a)(1)(B), (a)(2) (2012).
101. *Id.* § 1539(a)(1)(B); *see* Bennett v. Spear, 520 U.S. 154, 170 (1997).
102. 16 U.S.C. § 1539(a)(2)(A) (2012).
103. *See, e.g.*, 50 C.F.R. §§ 17.22(b), 17.32(b) (2014).
104. 16 U.S.C. § 1539(c) (2012).
105. Defenders of Wildlife v. Bernal, 204 F.3d 920, 927 (9th Cir. 1999).

### *C. Section 7*

Section 7(a)(2) of the ESA requires federal agencies to ensure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species" which has been designated as critical.[106] Thus, federal actions may not proceed if they would either jeopardize the existence of a listed species, or destroy or adversely modify a listed species' critical habitat, unless an exemption is granted by the so-called "God Squad" under Section 7(h).[107] FWS and the federal agency proposing the action must use the best scientific and commercial data available.[108]

The requirements of Section 7 technically apply only to federal agencies and only to activities "in which there is discretionary [f]ederal involvement or control."[109] The term "action" in the regulations is very broad, and includes federal contracts, permits, easements and other types of approvals.[110] As a practical matter, a number of activities occurring on private land require some sort of federal permit or approval, or have some other discretionary federal nexus that may trigger Section 7's requirements.

A federal agency that is proposing an action must initially determine if the proposed action "may affect" listed species or critical habitat. Consequently, the initial question is whether any listed species or critical habitat are present in the area affected by the action. The federal agency may either request that FWS provide a list of listed species and critical habitat in the area or provide notification of the listed species and critical habitat believed to be in the area to the FWS.[111] FWS must respond, in either case, within thirty days, based on the best scientific and commercial data available.[112]

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106. 16 U.S.C. § 1536(a)(2) (2012).

107. *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 687 (2007). Because the "God Squad" has the authority to approve the extinction of an endangered species, Congress carefully laid out requirements for the squad's membership, procedures and the factors it must consider in deciding whether to grant an exemption. *Id.*; *see also* 16 U.S.C. §§ 1536(e)–(*l*) (2012).

108. 16 U.S.C. § 1536(a)(2) (2012); *see* Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 924 (9th Cir. 2008).

109. 50 C.F.R. § 402.03 (2014); *see Nat'l Ass'n of Home Builders*, 551 U.S. at 668; Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1021–25 (9th Cir. 2012) (discussing Ninth Circuit case law on when a federal action is "discretionary").

110. 50 C.F.R. § 402.02 (2014); *see Nat'l Ass'n of Home Builders*, 551 U.S. at 678.

111. 50 C.F.R. § 402.12(c) (2014).

112. *Id.* § 402.12(d).

If no listed species or critical habitat is present, nothing further is required: the action may proceed without violating Section 7.[113] However, if listed species or critical habitat are present, then the federal agency proposing the action will perform an analysis to determine whether the action "may affect" the relevant listed species or critical habitat. A formal biological assessment is required only if the proposed action constitutes a "major construction activity." A "major construction activity" is defined as "a construction project (or other undertaking having similar physical impacts) which is a major federal action significantly affecting the quality of the human environment" under NEPA.[114] If the proposed action is not a "major construction activity," the federal agency may perform a less formal evaluation of the proposed action's impacts, typically called a biological evaluation. In either case, if the federal agency determines that any listed species and critical habitat that are present in the area will not be affected by the proposed action (a "no effect" determination), then the proposed action may proceed.[115]

If the federal agency proposing the action believes that the action, while having some effects on listed species or critical habitat, is not likely to adversely affect the listed species or critical habitat, the federal agency may request that FWS concur with its evaluation. If FWS concurs, no additional consultation is required. This process is known as informal consultation.[116]

If the federal agency proposing the action believes that the action is likely to adversely affect listed species or critical habitat, or if FWS does not concur with the federal agency's determination that the impacts on listed species or critical habitat will not be adverse, formal consultation is required.[117] During formal consultation, a more thorough evaluation of the proposed action is undertaken, and at the conclusion of consultation, FWS provides a biological opinion regarding the impacts of the proposed action.[118] The biological opin-

113. *See* U.S. FISH AND WILDLIFE SERVICE AND NATIONAL MARINE FISHERIES SERVICE, ENDANGERED SPECIES CONSULTATION HANDBOOK 3-3 (1998), http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf (flow chart of informal consultation process).

114. 50 C.F.R. § 402.02 (2014).

115. *Id.* § 402.12(k); *see* Defenders of Wildlife v. Flowers, 414 F.3d 1066, 1069–70 (9th Cir. 2005) (affirming "no effect" determination made by the Corps in connection with Section 404 permit for real estate development).

116. *See* 50 C.F.R. §§ 402.12(j)–(k), 402.13, 402.14(b)(1) (2014).

117. *Id.* §§ 402.12(k), 402.14(a); *see* Conservation Cong. v. U.S. Forest Serv., 720 F.3d 1048, 1051 (9th Cir. 2013).

118. 16 U.S.C. § 1536(a)(3) (2012); 50 C.F.R. § 402.14(g), (h) (2012); *see* Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency, 812 F. Supp. 2d 1089, 1100 (E.D. Cal. 2011).

ion will state whether FWS believes the proposed action is likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat.[119]

If FWS determines that the proposed action is likely to jeopardize a listed species or adversely modify its critical habitat, FWS must suggest reasonable and prudent alternatives that can be taken to avoid a violation of Section 7(a)(2).[120] Any reasonable and prudent alternatives must be consistent with the intended purpose of the action, be implemented consistent with the federal agency's legal authority and jurisdiction, and be economically and technologically feasible.[121] To ensure that these criteria are met, FWS is required to utilize the expertise of the federal agency and any applicant in identifying alternatives.[122]

The "jeopardy" and "adverse modification" standards present high thresholds. To "jeopardize the continued existence of" is defined as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both* the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[123] The term "destruction or adverse modification" has a similar definition: "a direct or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival and the recovery of a listed species. Such alterations include, but are not limited to alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."[124]

In *Gifford Pinchot Task Force*, however, the Ninth Circuit Court of Appeals invalidated the regulatory definition of "destruction or adverse modification," ruling that the definition was too narrow because it "explicitly requires appreciable diminishment of the critical habitat necessary for survival" before the adverse modification standard would be triggered.[125] According to the court, the agency's definition conflicted with the statutory definition of critical habitat, which includes the term "conservation"—a separately defined term that incorporates the concept of recovery, as opposed to insuring that

119. 50 C.F.R. § 402.14(h)(3) (2014).

120. 16 U.S.C. § 1536(b)(3) (2012); 50 C.F.R. § 402.14(g)–(h) (2014).

121. 50 C.F.R. § 402.02 (2014) (providing the definition of "reasonable and prudent alternatives").

122. *Id.* § 402.14(g).

123. *Id.* § 402.02 (emphasis added).

124. *Id.* (emphasis added).

125. Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1069 (9th Cir.), *modified*, 387 F.3d 968 (2004).

the species' survival will not be jeopardized.[126] After *Gifford Pinchot*, a proposed federal action may be found to adversely modify critical habitat by simply impairing recovery, even though the action is not likely to impede the survival of the species through impacts to critical habitat. Thus, an activity may not violate the jeopardy standard, even in an occupied area, but may still be prohibited by impairing recovery through impacts to critical habitat.

The statutory time limit for consultation is ninety days or such time as is mutually agreed to between the federal agency and FWS.[127] However, when a permit or license applicant is involved, the ability of the agencies to mutually extend the consultation period is limited.[128] The agencies may extend the ninety-day consultation period without the consent of the applicant by an additional sixty days, but only if FWS, prior to the close of the ninety-day period, provides the applicant a written statement setting forth (i) the reasons why a longer consultation period is required; (ii) the information that is required to complete the consultation; and (iii) the estimated date on which the consultation will be completed.[129] In any case, a consultation involving an applicant cannot be extended beyond 150 days unless the applicant expressly consents to an additional time extension.[130]

During consultation, the action may proceed subject to two prohibitions. First, all actions (whether federal or non-federal) are subject to the prohibition against the "taking" of individual members of a listed species contained in Section 9 of the ESA.[131] In addition, the federal agency and any applicant are prohibited from making any "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives" which would avoid jeopardy.[132]

Even though consultation is completed, a federal agency may be required to reinitiate consultation on the project or activity if any of the following circumstances occurs: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or

126. *Id.* at 1069–71.
127. 16 U.S.C. § 1536(b)(1)(A) (2012).
128. *Id.* § 1536(b)(1)(B).
129. *Id.* § 1536(b)(1)(B)(i); 50 C.F.R. § 402.14(e) (2014).
130. 16 U.S.C. § 1536(b)(1)(B)(i) (2012).
131. *Id.* § 1538(a)(1)(B).
132. *Id.* § 1536(d).

critical habitat that was not considered in the biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action.[133] However, reinitiation of consultation is required only "where discretionary [f]ederal involvement or control over the action has been retained or is authorized by law."[134]

If FWS determines during consultation that, notwithstanding a "no jeopardy" opinion, the proposed federal action will unintentionally take members of a listed species, FWS will provide the federal agency with an incidental take statement ("ITS").[135] An ITS acts like a permit, authorizing the taking of members of listed species notwithstanding the prohibition found in Section 9.[136] It must, at a minimum, specify the following: (a) the impact, i.e., the amount or extent of incidental take that is authorized; (b) any reasonable and prudent measures that FWS considers necessary or appropriate to minimize such impact; and (c) the terms and conditions that must be complied with by the federal agency or any applicant to implement the reasonable and prudent measures, including any reporting requirements.[137]

An ITS protects the federal agency proposing the action triggering consultation under Section 7, provided that the statement's terms and conditions are followed.[138] In addition, if the proposed action is the issuance of a permit, license or other approval to a non-federal entity (i.e., an "applicant"), the ITS will also be provided to the applicant.[139] Moreover, other parties may also receive protection under an ITS, provided that their activities are contemplated by the ITS and are conducted in compliance with it.[140]

In the event that the amount or extent of incidental taking specified in the ITS is exceeded, consultation must be reinitiated.[141] Moreover, the federal agency and the applicant may be subject to fines and penalties for violating Section 9 if the protection provided by the ITS is lost and a taking occurs. For this reason, it is obviously important that the incidental take statement specify the amount or extent of the incidental take that is authorized in clear and verifiable terms.

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133. 50 C.F.R. § 402.16 (2014).

134. *Id.*; *see also* Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1081–82 (9th Cir. 2001) (holding that there is no duty to reinitiate consultation for previously issued permits where FWS lacked discretion to impose additional protection for listed species).

135. 16 U.S.C. § 1536(b)(4), (o) (2012); *see also* Bennett v. Spear, 520 U.S. 154, 158 (1997); Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1239 (9th Cir. 2001).

136. *See Bennett*, 520 U.S. at 169–70; *Ariz. Cattle Growers*, 273 F.3d at 1239 ("[T]he [ITS] functions as a safe harbor provision immunizing persons from Section 9 liability . . . .").

137. 16 U.S.C. § 1536(b)(4) (2012); *see also* 50 C.F.R. § 402.14(i)(1) (2014).

138. *See Bennett*, 520 U.S. at 170.

139. 16 U.S.C. § 1536(b)(4) (2012).

140. *See* Ramsey v. Kantor, 96 F.3d 434, 440–41 (9th Cir. 1996).

141. 50 C.F.R. §§ 402.14(i)(4), 402.16(a) (2014).

### *D. Due Diligence Considerations*

A base level of analysis should assess, first, whether members of a listed species and/or critical habitat are present and, second, whether site development will trigger any federal permits or other discretionary federal involvement. The latter circumstance will determine whether Section 7 will apply. The former is relevant to both the extent to which Section 7's requirements may make permitting more difficult, and whether members of a species may be taken in violation of Section 9.

FWS maintains a list by county of listed species and associated critical habitat, but these lists are general and do not identify specific areas in which species are actually found. Consequently, since counties in Arizona generally support listed species, a more particularized site-specific analysis should be done, particularly where a project is located in a rural area with previously undisturbed ground. Such an analysis should also include a look forward to species that are proposed for listing or are listing candidates. One of the most disruptive things that can occur during site planning and development is the listing of species or designation of critical habitat on the property. In many cases, a simple screening analysis can be done (reviewing the list of species and likely to be listed species and then comparing that to the site in question).

If there is a possibility of species being present, it may be appropriate to conduct surveys. Particularly if one anticipates the need to obtain a 404 permit, the Corps and FWS will have expectations regarding the need to conduct surveys to support effects determinations for Section 7 purposes. Where there are no federal permits anticipated, surveys can assist in determining the likelihood of incidental take and the need for take authorization. Be aware that surveys for listed wildlife (such as migratory birds) may be confined to certain times of the year, which can complicate site planning and permitting. Also, older surveys may be of limited usefulness as survey protocols evolve over time and wildlife and plant populations can shift, requiring current surveys to determine if an area is occupied.

Finally, if the property being purchased is already subject to a federal permit or approval or covered by incidental take authorization (i.e., an HCP or an ITS in a prior biological opinion), the existing obligations imposed to offset and minimize take need to be reviewed with care. For example, there may be existing obligations restricting site development or requiring on going surveying that can be quite expensive.

## IV. THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

NEPA is a procedural statute intended to make federal agencies aware of the impact of their decisions on the human environment.[142] It does not dictate substantive results or expand a federal agency's jurisdiction. For example, the Supreme Court has explained that "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[143] Thus, unlike statutes such as the CWA and the ESA, NEPA does not impose substantive requirements on federal agencies to avoid or mitigate environmental impacts that may result from their actions. "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action."[144]

Although NEPA applies only to federal agencies, compliance with NEPA is required before the action triggering NEPA can be authorized. From a real estate due diligence standpoint, this means that if a federal permit or other approval is required for site development (such as a Section 404 permit or a right-of-way over federal land), compliance with NEPA is likely to complicate the permitting process and may cause significant delays and costs that can undermine the economic viability of a project. Consequently, the impact of NEPA should be factored into project timing if a federal permit or approval is needed.

NEPA compliance is governed by regulations promulgated by the Council on Environmental Quality ("CEQ").[145] Agencies also adopt their own NEPA procedures tailored to the specific programs they administer, which must be consistent with the CEQ's regulations.[146] The procedures used by agencies to evaluate and disclose foreseeable environmental impacts of their actions are generally tied to the overarching statutory obligation to prepare an Environmental Impact Statement ("EIS") (described in greater detail below).

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142. *See, e.g.*, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756–57 (2004).

143. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989); *see also* Cold Mountain v. Garber, 375 F.3d 884, 892 (9th Cir. 2004) (NEPA "does not mandate particular substantive results, but instead imposes only procedural requirements") (quoting Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.2d 517, 523 (9th Cir. 1994)); City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1150 (9th Cir. 1997) ("One rule bears repeating: [NEPA] sets forth procedural mechanisms to ensure proper consideration of environmental concerns, it does not mandate particular substantive results.").

144. *Robertson*, 490 U.S. at 351.

145. 40 C.F.R. §§ 1500–1508 (2014). The courts have held that the CEQ's regulations are entitled to "substantial deference." *See* Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 372 (1989).

146. 40 C.F.R. § 1507.3 (2014); s*ee also, e.g.*, 33 C.F.R. § 325 app. B (2014) (the Corps' regulations governing NEPA compliance).

For the purposes of this paper, we will only briefly discuss the requirements of NEPA, focusing on major issues, which are complex and driven by the extensive case law addressing compliance with the statute, particularly in the Ninth Circuit.

### *A. The Levels of NEPA Review and Documentation*

Generally, there are three levels of NEPA review, which correspond to the type of NEPA document that must be prepared. The most detailed is an EIS, which is required for "major [f]ederal actions significantly affecting the quality of the human environment."[147] An EIS serves two purposes: "First, '[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' Second, it 'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.'"[148]

An EIS must discuss:

1. The environmental impact of the proposed action;
2. Any adverse effects which cannot be avoided should the proposed action be implemented;
3. Alternatives to the proposed action;
4. The relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
5. Any irreversible and irretrievable commitment of resources which would be involved in the proposed action.[149]

The EIS process begins with a Notice of Intent published in the Federal Register announcing the proposed action and possible alternatives, the agency's intent to prepare an EIS, and the agency's scoping process.[150] The scoping process is used to determine the range of issues to be addressed in an

147. 42 U.S.C. § 4332(C) (2012).

148. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004) (quoting *Robertson*, 490 U.S. at 349).

149. 42 U.S.C. § 4332(C) (2012); *see also* 40 C.F.R. §§ 1502.10–1502.18 (2014) (describing the contents of an EIS).

150. 40 C.F.R. § 1508.22 (2014).

EIS and to identify significant issues related to a proposed action.[151] At this point, other environmental requirements applicable to the proposed action are identified, responsibilities are allocated among the various federal agencies, and, in general, the process is established for compliance with NEPA.[152] When there is more than one federal agency proposing an action or involved in the same action or group of actions, a "lead agency" supervises preparation of the EIS with input from the "cooperating agencies."[153]

Next, a draft EIS is prepared and circulated by the lead agency to other federal, state and local agencies with expertise or jurisdiction over any part of the proposed project as well to members of the public for comment.[154] It is important to keep in mind that NEPA is a public process, and the lead agency must invite comments, including "affirmatively soliciting comments from those persons or organizations who may be interested or affected."[155] At the close of the comment period, the lead agency must "assess and consider" all comments received and respond to them in the final EIS.[156]

Once the final EIS is complete, no decision can be made concerning the proposed action until at least thirty days after notice of the availability of the EIS or ninety days after publication of the notice of availability of the draft EIS, whichever is later.[157] At the conclusion of this process, the lead agency will prepare and sign a record of decision ("ROD"). The ROD states what the decision is, identifies alternatives considered by the agency, specifies which alternatives were considered to be environmentally preferable, and discusses the factors balanced by the agency when making its decision.[158]

As the foregoing suggests, the preparation of an EIS is often a lengthy process that results in significant project delays. Fortunately, the impacts of most federal actions are not significant enough to require an EIS to comply with NEPA.

First, some agency actions are of such limited impact that they obviously do not either individually or cumulatively require the preparation of an EIS.

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151. *Id.* § 1501.7. "Scope consists of the range of actions, alternatives, and impacts to be considered in an [EIS]," and may include other federal actions which are connected or cumulative. *Id.* § 1508.25.

152. *Id.* § 1501.7.

153. *Id.* §§ 1501.5 (lead agencies), 1501.6 (cooperating agencies).

154. *Id.* §§ 1502.19(a), 1503.1.

155. *Id.* § 1503.1(a)(4).

156. *Id.* § 1503.4(a).

157. *Id.* § 1506.10.

158. *Id.* § 1505.2.

These are referred to as "categorical exclusions" and are typically identified by agencies as part of their own NEPA procedures.[159]

More commonly, however, the agency will perform an abbreviated analysis of the effects of the proposed action, which is documented in an "environmental assessment" or "EA." According to the CEQ regulations, an EA is "a concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]."[160] If the agency concludes that an EIS is not needed, it will issue a "Finding of No Significant Impact" or "FONSI," which briefly explains the reasons why the proposed action will not have a significant impact on the environment, obviating the need to prepare an EIS prior to acting.[161]

The preparation of an EA is usually a much simpler and faster process, with less involvement by other agencies and the public. Consequently, it is normally desirable to have the permitting agency prepare an EA rather than an EIS. In cases where a project may have significant impacts or there is concern about the possibility of a legal challenge, however, it may be desirable to prepare an EIS. As a practical matter, an EA is more susceptible to being challenged as inadequate under NEPA. Therefore, if a project is controversial, it may be prudent to prepare an EIS and reduce litigation risk.

### *B. The Corps' NEPA Regulations*

The most common trigger for NEPA compliance in the development context is the 404 permit. Thus, the Corps NEPA procedures are of particular interest. The vast majority of 404 permits are processed by an EA rather than an EIS. Often the pivotal question in determining whether an EIS is required is determining the Corps' scope of analysis for the project. In other words, does the Corps look just at the impacts of the discharge of fill material into a water of the U.S. – the activity subject to regulation under Section 404? Or is the Corps required to consider the impacts caused by other aspects of the projects, even though the Corps technically has no jurisdiction over them?

This situation is not unique to the Corps, and is sometimes called the "small handle" problem. Boiled down, the issue is whether the nature and

159. 40 C.F.R. § 1508.4 (2014) (Categorical exclusions represent "a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which therefore neither an [EA] nor an [EIS] is required.").

160. *Id.* § 1508.9(a).

161. *Id.* §§ 1501.4(e), 1508.9, 1508.13; *see also* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 757–58 (2004).

extent of federal involvement in an otherwise private project is sufficient to require the scope of analysis under NEPA to extend to the entire project.[162]

To provide a framework for determining the proper scope of analysis, the Corps adopted an appendix to its regulations addressing NEPA process requirements.[163] It requires that the NEPA analysis "address the impacts of the [Corps'] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant federal review."[164] Factors in determining whether sufficient "control and responsibility" exist to expand the scope of analysis are as follows:

> (i) whether or not the regulated activity comprises "merely a link" in a corridor type project;
>
> (ii) whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity;
>
> (iii) the extent to which the entire project will be within Corps jurisdiction; and
>
> (iv) the extent of cumulative federal control and responsibility.[165]

The regulations further provide:

> Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative [f]ederal involvement of the Corps and other [f]ederal agencies is sufficient to grant legal control over such additional portions of the project.[166]

Thus, where the Corps' jurisdiction over a non-federal project is limited to a small portion of the project, and there is no other federal involvement in or control over the project, the Corps should not be required to evaluate the environmental impacts of the entire project. Unfortunately, the courts have issued conflicting decisions, which have muddled the Corps' NEPA obligations and makes due diligence more difficult.[167]

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162. *See, e.g.*, *Public Citizen*, 541 U.S. at 768–70 (holding that an agency's scope of analysis under NEPA is limited by its statutory authority).

163. 33 C.F.R. § 325, app. B (2014); *see also* Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 399–400 (9th Cir. 1989) (as amended) (holding the Corps' NEPA regulations are entitled to deference).

164. 33 C.F.R. pt. 325 app. B § 7(b)(1) (2014).

165. *Id.* § 7(b)(2)(i)–(iv).

166. *Id.* § 7(b)(2)(A).

167. *Compare, e.g.*, White Tanks Concerned Citizens, Inc. v. Strock, 563 F.3d 1033 (9th Cir. 2009), *with* Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105 (9th Cir.

### *C. Costs of NEPA Compliance*

For private projects that require federal approvals, the general expectation is that the private party will pay for the contractor hired by the federal agency to prepare the documents required to comply with NEPA, as well as pay for any biological, cultural resources, and other studies necessary to conduct an adequate environmental analysis. For some EAs and categorical exclusions, the agencies are willing to do the work necessary to comply with NEPA themselves, but they may still expect the private party to assist the agency by gathering data and preparing supporting studies.[168] Thus, completion of the NEPA process may entail substantial costs for consultants in addition to causing permitting delays that affect project timing.

### *D. Due Diligence Considerations*

Because NEPA is a procedural statute that requires federal agencies to evaluate the environmental effects of proposed actions, there is not much that can be done from a due diligence standpoint other than assess whether NEPA will be triggered. For larger, more complicated projects, this involves an assessment of what federal permits and approvals are needed and whether the preparation of an EIS is likely given the environmental impacts of the project and the common practices of the federal agencies involved. It is also important to assess whether the project is controversial and opposition is likely. Public opposition tends to lengthen the time it takes to complete the NEPA process and may influence the agency's level of analysis (including whether an EIS is prepared), thereby increasing project delays and costs.

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2000), *abrogated on other grounds by* Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011). Although the *White Tanks* panel quoted from the Corps Appendix B regulations, it stated "that where a development could not go forward without a permit, then the federal involvement was sufficient to grant '[f]ederal control and responsibility' over the project within the meaning of the regulation." *White Tanks*, 563 F.3d at 1040. Boiled down, the court judicially transformed the "federal control and responsibility test" in the Corps' regulations into a "but for" causation test.

168. *See* 40 C.F.R. § 1506.5 (2014).

## V. SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

### *A. General Overview*

Similar to NEPA, the NHPA is a procedural statute that does not impose substantive responsibilities and, instead, requires federal agencies to investigate impacts on historic and cultural resources before acting. Consequently, courts have called it a "stop, look and listen" statute.[169] Section 106 of the NHPA requires federal agencies to consult with parties such as the State Historic Preservation Office ("SHPO"), Indian tribes, local governments, the project proponent (in the case of private actions), and the Advisory Council on Historic Properties ("ACHP") to identify historic properties and properties with cultural significance, assess a project's effects on these properties, and to find ways to resolve or mitigate the adverse effects.[170]

Section 106 applies when there is a federal "undertaking" and that undertaking has the potential to affect properties listed or eligible for listing on the National Register of Historic Places ("National Register"). An undertaking is a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval."[171] Thus, for an action to be subject to the consultation requirements of Section 106, there must be a federal trigger.[172]

The ACHP regulations define "historic property" as:

> [A]ny prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.[173]

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169. *See* Apache Survival Coal. v. United States, 21 F.3d 895, 906 (9th Cir. 1994).

170. 16 U.S.C. § 470f (2012); *see* Mont. Wilderness Ass'n v. Connell, 725 F.3d 988, 1005 (9th Cir. 2013).

171. 36 C.F.R. § 800.16(y) (2014).

172. *See* Shanks v. Dressel, 540 F.3d 1082, 1092 (9th Cir. 2008).

173. 36 C.F.R. § 800.16(*l*)(1); *see* Te-Moak Tribe of Western Shoshone v. United States Dep't of Interior, 608 F.3d 592, 607–08 (9th Cir. 2010).

To be eligible for inclusion on the National Register, a property generally "must be significant, be of a certain age, and have integrity . . . ."[174] The regulations provide:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.[175]

In practical application, virtually any archaeological site of significance or any building or structure more than fifty years old are potentially considered eligible.

Compliance with Section 106 is the responsibility of the federal agency, which must first determine whether the undertaking could affect listed or eligible historic properties.[176] In making that determination, the federal agency must identify the area of potential effect ("APE") and whether any eligible historic properties exist within the APE.[177] The APE is defined by regulation as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist."[178] The determination of the APE does not "federalize" cultural resources occurring on private land, state land or land administered by a local government within the APE, however.[179] The APE only determines

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174. ADVISORY COUNCIL ON HISTORIC PRES., PROTECTING HISTORIC PROPERTIES: A CITIZEN'S GUIDE TO SECTION 106 REVIEW 6 (2010), http://www.achp.gov/docs/CitizenGuide.pdf.

175. 36 C.F.R. §60.4 (2014).

176. *See* Sierra Club v. Clark, 774 F.2d 1406, 1410 (9th Cir. 1985).

177. *See* Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency, 658 F.3d 460, 463 (5th Cir. 2011).

178. 36 C.F.R. § 800.16(d) (2014).

179. *See* MeGehee v. U.S. Army Corps of Eng'rs, No. 3:11-CV-160-H, 2011 WL 3101773 (W.D. Ky. July 19, 2011) (discussing that issuance of a federal permit for a limited portion of a project does not make the entire project a federal undertaking for purposes of the NHPA, and thus the Corps did not improperly segment an undertaking by limiting application of NHPA to crossings required by a federal permit instead of defining it to cover the entire road project).

the extent of federal analysis for purposes of a determination of adverse effects on historic properties.

Once the APE is determined, the federal agency, in consultation with the SHPO and representatives of Indian tribes (and any applicable tribal historic preservation officer ("THPO")) must identify historic properties within the APE and determine whether there will be any adverse effects.[180] Along with the federal permit applicant, other consulting parties may include local governments with jurisdiction over the area in which the effects of an undertaking may occur.[181]

If adverse effects are found, the federal agency consults with the included parties to develop and evaluate alternatives or modifications to avoid, minimize or mitigate the adverse effects.[182] It is at this point in the process that the ACHP is notified in writing and may be invited to participate in the consultation.[183] If the ACHP participates in the consultation, they usually act as a gatekeeper to insure process compliance and may serve as a "mediator" seeking common ground in instances of disagreement between consulting parties. Consultation efforts conclude with execution and implementation of a MOA, which evidences the agency's compliance with Section 106.[184] The federal agency is then responsible to ensure the undertaking is carried out in accordance with the terms of the MOA.

Anyone contemplating the destruction of a potentially eligible property before approaching a federal agency for approval would be well-advised to reconsider. The NHPA includes a provision that directs a federal agency to withhold grants, loans, permits, or licenses or other assistance to an applicant who, with the intent to avoid Section 106 obligations, "has intentionally significantly adversely affected a historic property . . . or having legal power to prevent it, allowed such significant adverse effect to occur . . . ."[185] This is often referred to as "anticipatory demolition." This provision does allow the agency to proceed with the permit or other approval if, after consultation with the ACHP, the agency determines that circumstances justify granting the assistance.

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180. 36 C.F.R. §§ 800.4(a)–(c), 800.5(a), 800.6(a), 800.16(f) (2014); *see* Mont. Wilderness Ass'n v. Connell, 725 F.3d 988, 1010 (9th Cir. 2013).

181. 36 C.F.R. §§ 800.2(c)(3), 800.16(n) (2014).

182. *Id.* § 800.6(a); *see Friends of St. Frances*, 658 F.3d at 463.

183. 36 C.F.R. § 800.6(a)(1) (2014).

184. *Id.* § 800.6(c).

185. 16 U.S.C. § 470h-2(k) (2012).

The Corps has its own set of NHPA regulations that are used in connection with the agency's regulatory program,[186] which are in the (extremely slow) process of being revised to reflect changes in the NHPA regulations.[187] In the meantime, several guidance memoranda have been issued clarifying how the two sets of regulations interact.[188] The ACHP and Corps regulations differ in various ways, and the agencies have not been in complete agreement on exactly how they should be applied.[189]

Historic preservation and cultural resources concerns are also addressed under a variety of laws outside of the NHPA. For example, the State of Arizona has its own historic preservation law, which provides: "The chief administrator of each state agency is responsible for the preservation of historic properties which are owned or controlled by the agency."[190] The State also has a strict law preventing disturbance of human remains, which provides:

> A person shall not intentionally disturb human remains or funerary objects on lands, other than lands owned or controlled by this state, any agency or institution of this state or any county or municipal corporations within this state, without obtaining the written permission of the director of the Arizona state museum.[191]

The law also addresses unintentional disturbances:

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186. 33 C.F.R. pt. 325, app. C; 55 Fed. Reg. 27,003 (June 29, 1990).

187. 69 Fed. Reg. 57,662 (Sept. 27, 2004) (advance notice of proposed rulemaking for revising Appendix C).

188. *See* U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS REGARDING CLARIFICATION OF REVISED INTERIM GUIDANCE FOR IMPLEMENTING APPENDIX C OF 33 C.F.R. PART 325 WITH THE REVISED ADVISORY COUNCIL ON HISTORIC PRESERVATION (ACHP) REGULATIONS AT 36 C.F.R. PART 800 DATED 25 APRIL 2005 (2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf; U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS, DIST. COMMANDS REGARDING REVISED INTERIM GUIDANCE FOR IMPLEMENTING APPENDIX C OF 33 C.F.R. PART 325 WITH THE REVISED ADVISORY COUNCIL ON HISTORIC PRESERVATION REGULATIONS AT 36 C.F.R. PART 800 (2005), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf.

189. *See* U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS AND DISTRICT. COMMANDS REGARDING CLARIFICATION OF REVISED INTERIM GUIDANCE FOR IMPLEMENTING APPENDIX C OF 33 C.F.R. PART 325 WITH THE REVISED ADVISORY COUNCIL ON HISTORIC PRESERVATION (ACHP) REGULATIONS AT 36 C.F.R. PART 800 DATED 25 APRIL 2005 (2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf; U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS, DISTRICT COMMANDS REGARDING REVISED INTERIM GUIDANCE FOR IMPLEMENTING APPENDIX C OF 33 C.F.R. PART 325 WITH THE REVISED ADVISORY COUNCIL ON HISTORIC PRESERVATION REGULATIONS AT 36 C.F.R. PART 800 (2005), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf.

190. ARIZ. REV. STAT. ANN. § 41-861 (2014).

191. *Id.* § 41-865(A).

> A person who unintentionally disturbs human remains or funerary objects on lands, other than lands owned or controlled by this state, any agency or institution of this state or any county or municipal corporations within this state, shall report the disturbance to the director and shall not further disturb the remains or objects without obtaining the written permission of the director.[192]

In addition to these State law requirements, certain counties and municipalities have adopted cultural resource ordinances.[193] Consequently, real estate developers should investigate what local requirements might apply prior to acquiring property with cultural resource significance or engaging in ground-disturbing activities.

### *B. Due Diligence Considerations*

A starting point for due diligence on cultural resource issues is determining the regulatory environment in which the site will be planned and developed. This includes determining whether there will be federal involvement and if so, the extent of that involvement. A similar evaluation should be conducted to determine any whether State and local standards will apply.[194]

Unless it is clear that the project is entirely private and there are no applicable cultural resource regulations, a base level of due diligence would include a cultural resources survey by a qualified consultant. It is important to note that the ultimate use of the property may not be known at the time of its acquisition, and the extent of regulation can be subject to change (for example, the local government may adopt an historic preservation ordinance). Thus, there may be value in doing a survey to determine if significant resources are present. If none are identified, there remains the potential for inadvertent discovery during ground disturbing activity and care should be taken to follow state law if that occurs.[195]

For projects that have already been permitted, a review of cultural resource compliance and permit conditions associated with that compliance is warranted. For example, an MOA may have been negotiated in connection with the Section 106 process requiring that specific cultural resource sites be excavated and catalogued before ground-disturbance can begin. This work can

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192. *Id.* § 41-865(B).

193. *See, e.g.*, City of Scottsdale Code § 46-133 (review procedures for archaeological resources); City of Phoenix Zoning Ordinance Ch. 8 (Protection of Historic Properties) and Pima County Ordinance 18.63 (Historic Zone Overlay).

194. For example, purchase or development of state land will always trigger compliance with state historic preservation requirements.

195. ARIZ. REV. STAT. ANN. § 41-865(B) (2014).

be quite expensive and may result in project delay. Similarly, the permittee may have failed to undertake obligations required by the permit, raising questions about the continued validity of the permit itself. Therefore, it is important to make certain that any existing requirements are disclosed and taken into account in acquiring a previously permitted project.