LAND USE AND ENVIRONMENTAL LAW

International Network of Boutique and Independent Law Firms
SelectUSA Program, U.S. Department of Commerce

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May 30, 2018

Introduction

An array of laws—federal, state, and local—governs the use and development of land in the United States and the effects of human activities on the environment. These laws present businesses with benefits and burdens. Businesses benefit from well established "rules of the road" governing their affairs with government agencies in regulatory matters and with customers and competitors in the marketplace. On the other hand, businesses face the burdens of complying with these laws and the risks of failing to do so.

Those planning to do business in the United States would do well to learn at least the general nature and scope of these laws given the major role they may play in the location, use, and operation of their business facilities—offices, equipment, vehicles, manufacturing and production facilities, storage and distribution centers, retail outlets, etc. This article offers an overview, a brief description of those laws.

Perhaps most fundamental to understanding these laws is to recognize that there are three levels of government in the United States—federal, state, and local—and each level may adopt laws regarding the land and environment. Activities on a particular parcel of land thus may be governed by laws of each level of government. In some instances federal laws may override state and local laws, and state laws may override local laws, but generally the laws of all three levels of government operate simultaneously and independently to govern the use of land and resulting effects on the environment. A business thus generally must comply with all of the laws—federal, state, and local—that govern activities at its facilities.

It is important to recognize as well that state and local governments often adopt laws governing activities within their boundaries that differ from those of other state and local governments. While many state and local laws on land use and the environment cover much the same subjects and follow similar patterns, they often differ in important respects from one government to another. When assessing the legal opportunities and constraints on a particular parcel of property therefore, it is critical to consult the specific laws of the state and local governments in which it is located, as well as the laws of the federal government.

I. LAND USE LAWS

A. Fundamentals: Common Law and U.S. Constitution and State Constitutions

Land Use and Property. At the outset, it is important to distinguish between land use law and property (or real estate) law. Property law is largely an aspect of the "common law"

developed over centuries by courts in Great Britain and then adopted by the states of the United States (except Louisiana) and extended by their courts. Many states have also enacted statutes codifying much of this law. It addresses title and ownership of property, easements, leases, boundaries, acquisition and conveyance of property, deeds, trespass, and water, mineral, and other rights incidental to ownership of property. While the common law also contributed some aspects of land use law, much of this body of law developed more recently and largely through statutes enacted in the last century. It covers government regulation of the use and development of land. These two bodies of law naturally overlap and intersect in various ways.

Constitutional Limitations. The U.S. Constitution and most state constitutions protect property owners by prohibiting the government from taking their property without "due process of law" or "just compensation." These constraints establish limits on how far federal, state, and local governments can go in regulating the use of land. While the law on this subject (developed largely in decisions of the U.S. Supreme Court) continues to change and generate controversy, as a general proposition (subject to qualifications beyond the scope of this short article), the government cannot (without due process and just compensation) physically take property or regulate the use of property to such an extent that it effectively deprives the owner of all economically viable use of the property (commonly termed "regulatory taking").

B. Local Laws

Traditional Province of Local Governments. Laws regulating the use of land for one or another purpose, e.g., residential, industrial, or commercial, have traditionally been the province of local governments, i.e., cities and counties, and to a lesser extent state governments. "Home rule" has been the watchword. While recent decades have seen state and even federal laws come to play greater roles in land use and development, cities and counties generally establish the basic rules on how land is to be used within their boundaries. In some areas where broad swaths of land are owned by the federal government or a state government, e.g., national or state forests or parks, federal or state regulations may hold greater sway.

Nuisance. Beginning long before enactment of modern land use laws and continuing today, localities have exercised some control over land use through the common law of "nuisance." Under common law, landowners generally are entitled to the quiet enjoyment of their land, but that property right does not extend to engaging in activities that create a nuisance—i.e., significantly and unreasonably interferes with others' use or enjoyment of their property or adversely affects the health, morals, safety, and welfare of the general public.

Planning and Zoning. Exercising their general "police power" to protect the public health, safety, and welfare of their residents, states have enacted "enabling" statutes authorizing and perhaps requiring cities and counties to regulate the use of land within their boundaries by (1) planning and (2) zoning.

First, local governments must develop and adopt comprehensive plans that establish goals and policies and general outlines of various elements, e.g., land uses, housing, circulation (transportation), open space, noise, and public safety (police and fire protection).

Second, they must adopt zoning ordinances that, consistent with the comprehensive plans, more particularly prescribe rules for specified types of uses and areas (zones). Zoning ordinances establish various districts and prescribe allowed uses within each district, e.g., single-family residential, multi-family housing, commercial, and industrial uses. They also spell out rules for minimum lot size, maximum building height, maximum floor area, building setbacks from lot boundaries, signs, parking, etc. Some uses may be automatically allowed as long as buildings are constructed according to standard codes designed to assure engineering integrity and the like. Other uses may be allowed but only if the landowner first obtains a "use permit" from the city or county, which enables it to review the project and perhaps prescribe detailed "conditions" to minimize adverse impacts and impose "exactions," such as fees or dedications of property, to account for some impact of the project. If circumstances peculiar to a site render compliance with all zoning rules unduly difficult or impossible, a landowner may apply to the city or county for a "variance" from those rules to allow use of the site.

Local ordinances often provide for "planned unit developments," "development agreements," and other tools that afford more flexibility than simple zoning to more creatively design projects consistent with the goals of the government's comprehensive plan.

Administrative Appeal. As politics naturally comes into play in local planning, zoning, and permitting decisions and landowners (and others) often disagree with decisions of administrators or planning commissions, local ordinances commonly provide for "administrative appeals" to the governing body (e.g., city council or board of supervisors) of the city or county.

Judicial Review. Those dissatisfied with the outcome of such an appeal may sue the local government and seek "judicial review,"i.e., ask a court to review the decision and, if found invalid, set it aside, in which case the matter typically is remanded to the local government for reconsideration in light of the court's decision. In suits of this sort, litigants commonly argue about whether the government has exceeded its statutory authority, or exercised its authority in some procedurally defective way, or violated some state or federal statute, or ran afoul of some constitutional constraint, e.g., due process of law, equal protection of the laws, taking of property without just compensation, vested rights, and freedom of speech, assembly, or religion.

C. State Laws

Apart from enacting enabling statutes calling for planning and zoning of land, states commonly pass various laws covering other aspects of land use.

Subdivision of Land. States regularly adopt rules prescribing whether and how parcels of land may be "subdivided" to create new or reconfigured parcels. Subdivisions may need to meet specified standards, e.g., minimum lot size or design and improvement specifications, and may require approval of the city or county, which may come with conditions and exactions.

Sale of Subdivided Lands. Some states establish consumer protection rules governing the sale of subdivided lands in order to protect against fraud and assure that adequate disclosures about parcels are made to buyers.

Transfer of Development Rights. Some states have adopted transfer of development rights ("TDR") programs aiming to further any of various goals, e.g., conserving farmland, open

space, or ecologically valuable areas, limiting urban sprawl, or guiding development to certain areas. Such programs allow for development rights to be transferred from one area to another, reducing or precluding development in "sending areas" where conservation is desired and permitting higher than baseline density in "receiving areas" where development is encouraged.

Eminent Domain. State laws typically enable state and local governments to exercise the power of "eminent domain" to take private property for public purposes provided they pay just compensation. Governments commonly use this power to accomplish public projects, e.g., roads or bridges, and sometimes to facilitate some aspects of private projects.

Building Code. States maintain building codes to establish rules specifying standards for the design and construction of buildings and other structures.

Annexation. State statutes typically provide a process by which cities and other public districts may expand their area of jurisdiction by changing their boundaries to encompass adjacent areas.

Government decision-making process. Critical to regulating land use is the process by which state and local governments make decisions about land use and development. State and local governments typically prescribe rules for submitting permit applications, conducting public hearings, considering evidence, and publicly deliberating, making, and documenting decisions.

Environmental review. Many states have enacted detailed rules prescribing how state and local governments study and evaluate the environmental effects of projects before they undertake, fund, or approve them.

Specific Subjects. States commonly adopt rules establishing goals, policies, and requirements regarding any of various subjects, e.g., housing, agriculture, mining, growth management, floodplains, coastal areas, and natural resources like streams, lakes, wetlands, wildlife habitat, and certain types of forests.

D. Federal Laws

Apart from laws governing the use and management of land owned by the federal government, few federal laws aim to directly regulate the use of land. A traditional hallmark of federalism is that such matters are left to the discretion of state and local governments.

Federal statutes enacted in the last several decades to address various environmental issues nonetheless have come to substantially influence the use and development of land throughout the United States. Those statutes are discussed below.

II. ENVIRONMENTAL LAWS

A number of federal statutes, most enacted since the 1960s, address various concerns about the environment. While generally sensible and seemingly simple, particularly when described conceptually in a sentence or two, these laws commonly embody prohibitions, requirements, and complexities that often challenge businesses, landowners, and others, and sometimes lead to litigation. As the saying goes, the devil is in the details.

The most prominent federal laws are described below—gathered into four categories: laws regarding (1) the administrative process federal agencies must follow in reviewing environmental issues, (2) specific media, i.e., land, water, or air, (3) specific activities, such as surface mining or releases of hazardous substances, and (4) specific places or things, such as wilderness areas or endangered species. Some statutes naturally do not fit neatly into a single category (but for convenience nonetheless appear in only one or another category below).

Many states have enacted statutes covering some of the same subjects. Sometimes states pattern their statutes after the corresponding federal statute; sometimes they approach the subject in different ways. While these many state statutes are not described here, the list of federal statutes serves to illustrate the range of subjects typically covered by state statutes.

A. Environmental Review Process

National Environmental Policy Act. NEPA is the nation's most extensive environmental law. Other laws typically focus on specific media, activities, places, or things. NEPA regulates the actions of all federal agencies in all of these respects by requiring those agencies to ascertain, disclose, and consider the environmental implications of their proposed actions before deciding whether to proceed with them. While NEPA directly governs only federal agencies, it effectively regulates many actions of private persons as well as state and local governments. The Act generally applies to any activity undertaken, funded, or permitted by a federal agency that affects the environment. Given the pervasive involvement of federal agencies in private, state, and local activities, NEPA reaches many public and private projects.

Generally, NEPA states national environmental policies and prescribes a process agencies must follow to ensure they consider environmental factors when deciding on proposed actions. That process generally entails preparing and circulating for public review reports on potential environmental impacts of proposals. The length and complexity of those reports typically varies depending on whether the impacts are found to be "significant." The most comprehensive of such reports, an Environmental Impact Statement ("EIS"), may comprise hundreds or even thousands of pages discussing a wide range of impacts: water (supply and quality), air quality, greenhouse gas emissions and climate change, biological resources (fish, wildlife, plants), ecologically critical resources (e.g., endangered species), soils and mineral resources, geology, aesthetics, traffic and transportation, noise, historic and cultural resources, land use conflicts, agriculture, population and housing, recreation, utilities and public services, hazards (floods, fires, landslides, etc.), hazardous materials, and economic and social effects.

While NEPA requires federal agencies to consider the environmental consequences of their actions and establishes procedures to ensure that happens, it does not compel agencies to reach particular decisions. After having prepared and considered the appropriate report, the agency may proceed with the proposed action or any alternative evaluated in the report. It must explain why it chose a particular course of action in writing.

B. Specific Media

1. Land

Federal Land Laws. The federal government plans and manages the use of millions of acres of land it owns. The government's control of land use, however, does not necessarily end at the boundary of federally-owned land. Activities on nearby state and private land sometimes conflict with the federal government's plans for its own land. In such cases, the government has the constitutional power to regulate conduct on state and private land that threatens to harm federal land and resources. While the existence of this power is well established, the full extent of the power remains unknown because the government seldom invokes it. As development of private lands around national parks, national forests, and other federal lands progresses, this power may more often come into play.

The federal government plans and manages activities on its lands through a variety of laws and administrative programs, including the National Park System, National Wildlife Refuge System, and National Wilderness Preservation System. Other lands include national forests, national monuments, lands administered by the Bureau of Land Management ("BLM"), and marine sanctuaries. Under the **Multiple Use, Sustained Yield Act**, the Forest Service administers national forests for wildlife and fish purposes, as well as for recreation, timber, range, and watershed. The **National Forest Management Act** requires the Service to prepare a plan for each national forest, calls for maintenance of the diversity of plant and animal communities, and discourages management practices that might adversely affect water conditions and fish habitat. The BLM administers its 300 million acres of land largely under the **Federal Land Policy and Management Act**, which calls for managing the land for multiple uses and sustained yield of renewable resources. The **General Mining Law** governs locatable minerals on federal lands and affords U.S. citizens opportunities to discover and purchase certain valuable mineral deposits.

2. Water

Clean Water Act. The primary federal statute regulating water pollution, this Act generally prohibits discharges of pollutants (broadly defined) into surface waters (also broadly defined) unless exempt or authorized through a collaborative federal and state program of permits and regulatory standards. Much economic activity—construction, manufacturing, municipalities, mining—leads to discharges of wastewater, stormwater, or solid fill material, all extensively regulated under this Act. The basic aim is to protect the quality of lakes, streams, and other waters (including wetlands) for recreation, fish and wildlife, and drinking water. The Environmental Protection Agency ("EPA") exercises primary responsible for administering the Act, the U.S. Army Corps of Engineers ("Corps") runs some aspects of the program, and states handle other aspects. States can as well assume responsibility for administering parts of the federal program.

Of the CWA's many regulatory aspects, several are primary. Under a permit program, the National Pollutant Discharge Elimination System ("NPDES"), the EPA regulates most types of discharges into surface waters, tailoring pollution control standards and permit limitations to particular facilities and bodies of water. The Act calls on the EPA to develop technology-based

effluent limitations that govern permits issued in the NPDES program. States must develop and implement water quality standards for all waterbodies within their borders; these standards may also be applied in NPDES permits. In waters where dischargers have achieved technology-based effluent limitations, yet the receiving waters do not meet water quality standards, the EPA may require dischargers to meet additional pollution control requirements. For each such "impaired water" the Act requires the state to set a total maximum daily load ("TMDL") of pollutants that ensures that applicable water quality standards can be attained and maintained. Owing to the historical role of the Corps to keep navigable waters open, Congress authorized the Corps, rather than the EPA, to permit discharges of two types of pollutants: dredged and fill materials. States are authorized to certify whether discharges the EPA or Corps would permit comply with state water quality standards—and thereby allow, veto, or condition any such discharges.

Oil Pollution Act. Enacted in 1990 in response to the Exxon Valdez oil spill, the OPA aims to prevent oil spills, ensure clean up, restore environments damaged by spills, and strengthen the EPA's ability to prevent and respond to spills. Owners of oil storage facilities and vessels generally must submit plans to prevent oil spills and contain and cleanup any spills that do occur. The OPA establishes a double hull requirement for newly constructed tankers and tank barges that operate in U.S. waters and a schedule to phase out existing tankers. It also sets up a trust fund supplied from taxes on oil to clean up spills when those responsible are unable or unwilling to do so themselves.

Safe Drinking Water Act. The SDWA aims to protect the quality of drinking water. It focuses on all waters actually or potentially designed for drinking use, whether from above ground or underground sources. The Act authorizes the EPA to establish minimum standards to protect tap water and requires all owners or operators of public water systems to comply with these primary (health-related) standards. State governments, which can be approved to implement these rules, also encourage attainment of secondary (nuisance-related) standards. The EPA also establishes minimum standards for state programs to protect underground sources of drinking water from endangerment by underground injection of fluids.

Ocean Dumping Act. This Act regulates intentional disposal of materials (other than dredged material) in any ocean waters under U.S. jurisdiction, by any U.S. vessel, or by any vessel sailing from a U.S. port.

3. Air

Clean Air Act. The CAA seeks to protect human health and the environment from emissions that pollute the air. It requires the EPA to set health-based standards for ambient air quality, and tasks states with developing and implementing plans to achieve those standards. Where those standards are not met, "nonattainment areas," states must implement specified pollution control measures. The EPA must set national emission standards for large stationary as well as mobile sources of air pollution, including motor vehicles, power plants, and industrial sites. The Act also mandates emission controls for sources of specified hazardous air pollutants, establishes a cap-and-trade program for emissions causing acid rain, calls for preventing deterioration of air quality in areas with clean air, requires a program to restore visibility impaired by regional haze in national parks and wilderness areas, and implements the Montreal Protocol to phase out most ozone-depleting chemicals.

C. Specific Activities

Comprehensive Environmental Response, Compensation and Liability Act. CERCLA, commonly known as "Superfund," is designed to remedy problems associated with releases of hazardous substances. The Act generally establishes an information-gathering and reporting system for spill sites, authorizes the federal government to respond to hazardous waste emergencies and clean up inactive spill sites, and creates a fund—the Superfund—to pay for cleaning up inactive spill sites. Most important, it imposes strict liability on a broad range of persons, more or less independent of any fault on their part, who have some connection to a site, including current owners and operators of facilities (i.e., places where hazardous substances come to be located), former owners and operators who owned or operated facilities when hazardous substances were released there, generators and arrangers (i.e., those who arranged for disposal of hazardous substances at facilities), and transporters (i.e., those who moved hazardous substances to facilities of their choice).

Resource Conservation and Recovery Act. RCRA defines solid and hazardous waste, authorizes the EPA to set standards for facilities that generate or manage hazardous waste, establishes a permit program for hazardous waste treatment, storage, and disposal facilities, and authorizes the EPA to set criteria for disposal facilities that accept municipal solid waste. Under RCRA and the Energy Policy Act, the EPA also regulates the operation and maintenance of underground storage tanks.

Toxic Substances Control Act. TSCA authorizes the EPA to regulate the manufacture and use of chemicals. Substantially amended in 2016, the Act generally requires the EPA to evaluate existing and new chemicals in a timely fashion to develop appropriate regulation, outline new risk-based safety standards, increase public transparency on chemical substances, and differentiate chemical risk evaluations based on whether they present a high or low risk. It requires manufacturers and importers of large quantities of chemicals to report information about the manufacturing, importing, processing, and use of the chemicals. Many aspects of the EPA's implementation of the recent amendments remain to be worked out.

Federal Insecticide, Fungicide, and Rodenticide Act. The EPA regulates pesticides under FIFRA. While such regulation often is associated with agriculture, it also affects other land uses, such as golf courses, parks, and housing. The EPA focuses largely on controlling the distribution and sale of pesticides. It is unlawful to distribute or sell any pesticide that is not "registered" by the EPA. The EPA registers pesticides if they meet statutory criteria, including that when used in usual ways they generally will not cause unreasonable adverse effects on the environment.

The EPA also exercises some control over the use of pesticides once they are out of the hands of distributors, which is important because a chemical may be safe for use in one place, e.g., a dry field, but unreasonably harmful to the environment if used elsewhere, e.g. a wetland. The Act prohibits making any registered pesticide classified for restricted use available for use, or using it, contrary to the registration and applicable regulations. It is also unlawful to use any registered pesticide in a manner inconsistent with its labeling.

Federal Food, Drug, and Cosmetic Act. Under this Act, the Food and Drug Administration ("FDA") governs the safety and accurate labeling of products worth a trillion dollars annually, including prescription and over-the-counter drugs, cosmetics, medical devices, blood and tissue products, and food (except meat and poultry). The Act aims to protect the public's safety by regulating the safety, purity, and in some cases the "effectiveness" of products. The FDA ensures food safety through inspections of products, controlling the manufacturing practices of companies, and if warranted recalling and seizing products. Unlike other goods, new drugs, medical devices, and food additives must be approved as "safe" by the FDA before being marketed to the public; drugs and devices must satisfy the added standard of "effectiveness." The Act also requires truthfulness and completeness in product labeling and other marketing communications. It also authorizes the FDA to require certain information on product labels, such as the standardized nutritional content box seen on nearly all food labels and the listing of possible side effects and drug interactions on pharmaceutical labels.

Emergency Planning and Community Right-To-Know Act. Following an accidental release of chemicals in 1984 in Bhopal, India, that killed thousands, Congress passed this Act to help communities plan for chemical emergencies. It requires the EPA to list extremely hazardous substances and requires industrial facilities to report on the storage and use of such substances to federal, state, and local governments. State and local governments and Indian tribes are directed to work with such facilities to develop response procedures, evacuation plans, and training programs for people who will be the first to respond in the event of an accident. The Act requires facilities to immediately report a sudden release of any hazardous substance in excess of a prescribed quantity to appropriate state, local, and federal officials.

Pollution Prevention Act. Thinking that preventing or reducing pollution at the source is preferable to later efforts to clean up, recycle, or treat pollution, Congress passed this Act to require the EPA to develop and promote such a pollution prevention strategy. Toward this end, the Act requires owners and operators of manufacturing facilities to report annually on source reduction and recycling activities, and calls on the EPA to collect data on pollution prevention.

Occupational Safety and Health Act. In order to ensure worker and workplace safety, this Act generally requires employers to provide their workers a place of employment free from recognized hazards to safety and health, such as exposure to toxic chemicals, excessive noise levels, mechanical dangers, heat or cold stress, or unsanitary conditions. The Act established the Occupational Safety and Health Administration ("OSHA"), which oversees administration of the Act and sets and enforces standards.

Surface Mining Control and Reclamation Act. This Act establishes a program largely run by states and overseen by the federal government to regulate surface mining activities and reclamation of coal-mined lands. Administered by the Office of Surface Mining, Reclamation and Enforcement, it sets uniform minimum requirements for all coal surface mining on federal and state lands, including exploration, reclamation, and surface effects of underground mining. Mine operators are required to minimize disturbances and adverse impacts on fish, wildlife, and natural resources. Restoration of approximate original topographic contours and land and water resources is prioritized in reclamation planning.

D. Specific Places or Things

Endangered Species Act. The ESA aims to protect and recover fish, wildlife, and plant species threatened with extinction. It calls on the National Marine Fisheries Service (for marine species) and U.S. Fish and Wildlife Service (for all other species) to list species determined to be threatened or endangered and generally prohibits any person from "taking" listed species without a permit. The ESA defines "take" to include "harass, harm, [or] kill." Regulations elaborate that "harm" includes "significant habitat modification" that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

The Act provides the Services two ways to authorize such taking. First, it calls on all federal agencies to ensure that any actions they authorize, fund, or carry out are not likely to "jeopardize" the continued existence of any listed species or result in the "destruction or adverse modification" of designated "critical habitat" of any such species. Toward this end, whenever a federal agency's action "may affect" listed species or critical habitat, the agency must "consult" with the pertinent Service. The consultation generally leads to the Service issuing a "biological opinion" whether the action would jeopardize a species or adversely modify its critical habitat. The Service also assesses whether the action would result in taking members of the species, and, if so, it includes an "incidental take statement" prescribing measures to minimize the effect of the take. Any taking resulting from activities in compliance with those measures is not prohibited.

Second, apart from federal agencies, anyone not seeking a federal permit triggering consultation may seek authorization directly from the Service to take listed species as long as the taking is "incidental" to otherwise lawful activity. Difficult and time-consuming to obtain, an "incidental take permit" requires approval of a "habitat conservation plan" that specifies the impact likely to result from the taking, steps the applicant will take to minimize and mitigate such impacts and the funding that will be available to implement those steps, alternative actions the applicant considered and the reasons those alternatives were not utilized, and such other measures that the Services may require as necessary or appropriate for purposes of the plan.

Fish and Wildlife Coordination Act. This Act seeks to assure that wildlife conservation receives "equal consideration" with other features of projects that impound, divert, or control waters from streams or other waters. Whenever a federal agency proposes to undertake or permit such a project, it must consult with the U.S. Fish and Wildlife Service and state wildlife resource agency and give "full consideration" to their recommendations concerning wildlife. The Act does not compel federal agencies to follow the advice of the wildlife resource agencies or reach particular conclusions. If a federal agency complies with NEPA, it will effectively take into consideration all of the factors required by the Fish and Wildlife Act.

National Historic Preservation Act. The NHPA establishes much of the current framework for preservation of historic properties and cultural resources. It sets up the Advisory Council and the National Register of Historic Places and arranges an interactive role between federal agencies and states and tribes. It requires that, before funding or approving an "undertaking" (i.e., a project, activity, or program), federal agencies "take into account" the effect of the undertaking on any historic property and afford the Advisory Council a reasonable opportunity to comment on the matter. In its implementing regulations, the Advisory Council spells out a process for federal agencies to consult with it, states, tribes, and others.

Coastal Zone Management Act. The CZMA seeks to protect and develop the resources of the nation's coastal areas not by direct federal regulation of land use (which is traditionally left to state regulation), but rather by encouraging and assisting states to implement management programs to achieve wise use of land and water resources in the coastal zone. State programs are reviewed for compliance with CZMA standards approved by the National Oceanic and Atmospheric Administration ("NOAA"). Approval of a coastal zone management program affords a state two benefits: (1) federal grants for the development and administration of the program and (2) the promise that various federal activities will be consistent with the state program. Various federal activities are subject to differing sorts of "consistency" review under the CZMA. Of these, most pertinent to landowners and businesses are those activities licensed or permitted by a federal agency "affecting any land or water use or natural resource of the coastal zone." An applicant for such a federal license or permit must provide the federal agency with a certification that the proposed project is consistent with the state coastal zone management program. If the state objects to this certification, the federal agency cannot approve the license or permit (unless it is necessary for national security).

Federal Power Act. Under this Act, the Federal Energy Regulatory Commission ("FERC") licenses and regulates dams, reservoirs, transmission lines, and other power projects. , When deciding whether to issue a license FERC must give "equal consideration" to all uses of a waterway, including power, environmental, recreational, and fish and wildlife values. Wildlife concerns have emerged as major issues in the renewal of licenses for projects built decades ago.

Wild and Scenic Rivers Act. This Act establishes a system for designating and preserving free-flowing rivers. Once included in the system, a river is managed by the pertinent agency in the Department of the Interior or Department of Agriculture with jurisdiction over the area. That agency classifies the river as wild, scenic, or recreational according to statutory criteria, defines the boundaries of the river area, and prepares a management plan for it. The managing agencies cannot directly control the use of private land in or near a designated river area. They are authorized, however, to acquire land in a river area up to a limit of 100 acres per mile on both sides of the river. Congress also directed the managing agencies to encourage state and local governments to cooperate in the planning and administration of river areas and authorized the federal agencies to enter into written cooperative agreements for that purpose.

Special provisions govern water development projects and mining. FERC is prohibited from licensing any dam or other project on or directly affecting any designated river. All federal agencies are forbidden from undertaking or assisting any water resources project that would have a direct and adverse effect on the values for which a river was established. The act allows the agencies to impose a variety of restrictions on hardrock mining activities.

Magnuson-Stevens Fishery Conservation and Management Act. This Act governs management and conservation of commercial and recreational fisheries in ocean waters within 200 miles of the nation's shore. It establishes eight regional councils; those councils develop fishery management plans for their regions. Apart from governing fishing activities, the Act may affect projects and activities on land as well. It generally requires federal agencies to consult with the National Marine Fisheries Service about actions they propose to permit or fund that may adversely affect "essential fish habitat" designated by a regional council. Federal agencies need not follow the Service's recommendations, but must explain their reasons if they do not.

Marine Mammal Protection Act. Congress enacted this Act largely in response to the killing of 600,000 dolphins in 1970 and 1971 by the U.S. tuna fishing fleet. It directs the Departments of the Interior and Commerce to develop management programs "to maintain the health and stability of the marine ecosystem." Whenever consistent with this primary objective, the goal of the management programs should be to maintain marine mammals at their "optimum sustainable population keeping in mind the carrying capacity of the habitat." Protected animals include whales, dugongs (sea cows or manatees), polar bears, dolphins, sea lions, seals, walruses, and sea otters. Subject to various exemptions, the Act prohibits anyone from taking, possessing, transporting, selling, or purchasing any marine mammal.

Nonindigenous Aquatic Nuisance Prevention and Control Act. Congress enacted this statute in 1990 in response to the spread of zebra mussels through waterways in the Great Lakes region. It calls for a program of studies and actions intended to control the mussels, which are feared to threaten the plant life and tiny animals at the base of the aquatic food chain.

Migratory Bird Treaty Act. This Act makes it unlawful for anyone to pursue, hunt, take, capture, kill, or possess migratory birds or their nests or eggs except in accordance with regulations of the U.S. Fish and Wildlife Service. The list of migratory birds covered by this Act is much more extensive than the list of endangered and threatened birds covered by the Endangered Species Act; in fact, nearly all birds found in the United States are included.

Bald Eagle and Golden Eagle Protection Act. This Act makes it unlawful to take, possess, sell, purchase, or transport bald eagles or golden eagles. It also prohibits taking, removing, or destroying the birds' nests or eggs.

Federal Noxious Weed Act. This Act seeks to prevent the spread on noxious weeds that interfere with the growth of other plants, clog waterways and interfere with navigation, cause disease, or impair agriculture. The Secretary of Agriculture is directed to identify weeds that are noxious and act to prevent their dissemination. The Act prohibits anyone from knowingly moving any noxious weed into or through the United States.

Plant Quarantine Act. This Act regulates importing nursery stock and other plants. It authorizes the Secretary of Agriculture to establish quarantine districts for plant diseases and pests and to control the movement of plants, fruits, and vegetables from the districts.

Plant Pest Act. This Act is intended to prevent the importation of plant pests. The Secretary of Agriculture is directed to carry out programs, in cooperation with Canada, Mexico, and other countries, to prevent the spread of plant pests.