

42 U.S.C. Section 7418(a), of the federal Clean Air Act

- “Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.”



7418(a) continued

- The proceeding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any state or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in federal, state, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.



Legal Issues that need to be Addressed Relative to Fire and Air Quality

1. Can States require federal agencies to pay civil penalties under Section 118 of the Federal Clean Air Act?
2. Can States require federal agencies that use prescribed fire to follow State issued “Go-No Go” decisions to regulate when prescribed fires can be ignited?
3. Can States require federal agencies to use alternatives to prescribed fire?



Legal Issues

- 4. Can State air regulatory agencies cite federal agencies for causing a nuisance from prescribed fire smoke? (Has federal sovereignty been waived for nuisance?)
- 5. Can State air regulatory agencies cite federal land managers for causing a safety problem (reducing highway visibility because of smoke)? (Has federal sovereignty been waived for safety?)
- 6. Can States require federal agencies to comply with regulations pertaining to prescribed burning that do not apply to other users of prescribed fire in the State?

Legal Issues

- 7. Can States require federal agencies to comply with regulations pertaining to prescribed burning if the State does not have regulations that apply to agricultural burning?
- 8. Can States prohibit a federal agency from using prescribed fire if the area where the proposed prescribed fire is within a nonattainment area?



Sovereign Immunity

- Nearly all federal pollution statutes provide waivers of sovereign immunity to require compliance by federal agencies and their facilities. On each of three occasions that the Supreme Court has considered the scope of such a waiver, the Court has interpreted the waiver narrowly. Congress has acted to override these decisions as to some, but not all, of the environmental statutes containing waivers that were called into doubt by the Supreme Court's decisions.



Sovereign Immunity

The Supreme Court has long held that, to be valid, any waiver of the United States' sovereign immunity must be expressed clearly and unequivocally and that such waivers must be "construed strictly in favor of the sovereign."



Sovereign Immunity

- The Supreme Court has stated that, in analyzing a waiver of sovereign immunity, legislative history cannot provide the requisite clarity of congressional intent that is otherwise lacking in the statutory text. Further, the Court has stated: "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."

