

OVERCOMING INTERPRETIVE
FORMALISM: LEGISLATIVE REVERSALS
OF JUDICIAL CONSTRUCTIONS OF
SOVEREIGN IMMUNITY WAIVERS IN
THE ENVIRONMENTAL STATUTES

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The use of public law to protect the environment has been hindered by the judiciary's use of statutory interpretation principles more appropriate for private law regimes. This problem is well illustrated by the history of efforts to compel federally owned facilities to comply with the environmental laws. Alarmed by severe environmental contamination at nuclear weapons plants and military installations, Congress repeatedly has declared that federal facilities must comply with the environmental laws. Federal agencies, however, have successfully resisted compliance with the laws by persuading courts to adopt exceedingly narrow interpretations of legislative waivers of sovereign immunity. Just last term the Supreme Court held in *United States Department of Energy (DOE) v. Ohio*¹ that federal facilities were immune from liability to states for civil penalties for past violations of the Resource Conservation and Recovery Act (RCRA)² or the Clean Water

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1. 112 S. Ct. 1627 (1992).
2. 42 U.S.C. § 6901 (1988).

Act (CWA).³ This decision was based on the presumption, derived from private law, that waivers of sovereign immunity are to be narrowly construed.

In a reaction remarkably similar to its response to two previous Supreme Court decisions limiting state enforcement against federal facilities,⁴ Congress quickly adopted legislation overriding a major portion of *DOE v. Ohio*. Less than six months after the Court's decision, Congress enacted the Federal Facility Compliance Act of 1992 (the Act).⁵ The Act, signed into law on October 6, 1992, expressly authorizes states to impose civil penalties on federal facilities that violate RCRA.⁶ The purpose of the legislation was to override not only *DOE v. Ohio*, but also a portion of the Court's holding in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*,⁷ a decision narrowly construing the citizen suit provisions of the environmental laws.⁸

This Article argues that this pattern of legislative reversals of Supreme Court decisions⁹ indicates that the judiciary has been inter-

3. 33 U.S.C. § 1231 (1988).

4. See *Hancock v. Train*, 426 U.S. 167 (1976) (holding that a Clean Air Act requirement that federal facilities comply with state "requirements respecting control and abatement of air pollution" was not a sufficiently clear and unambiguous waiver of intergovernmental immunity to permit application of state permit requirements to federal facilities). Congress overruled this case with the enactment of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended at 42 U.S.C. § 7418 (1988)). See also *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976) (holding that a Clean Water Act requirement that federal facilities comply with state "requirements respecting control and abatement of pollution" was not a sufficiently clear and unambiguous waiver of intergovernmental immunity to permit application of state permit requirements to federal facilities). The enactment of the Clean Water Act of 1977 also overrode this case. See Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. § 1323 (1988)).

5. Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 105 Stat. 1505 (1992).

6. *Id.*

7. 484 U.S. 49 (1987).

8. In *Gwaltney*, the Supreme Court interpreted the citizen suit provisions contained in most federal environmental statutes to preclude suits seeking penalties for past violations. *Id.* at 67. The Federal Facility Compliance Act overrides this decision with respect to suits against federal facilities by expressly authorizing suits seeking penalties for past violations.

9. This pattern of legislative reversals of interpretations of the environmental statutes is part of a larger trend of congressional action to override judicial interpretations of public law. For a comprehensive compilation of instances in which Congress has overturned Supreme Court interpretations of these statutes, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991). Eskridge identifies 101 instances in which Congress overrode Supreme

preting the environmental statutes by applying principles of statutory construction that are ill suited to a public law regime. The Article describes why this has impeded the implementation and enforcement of public law, focusing on the *DOE v. Ohio* decision and the traditional rule that waivers of sovereign immunity should be narrowly construed. Part I discusses the history of efforts to subject public entities to the environmental laws. Part II examines enforcement problems at federal facilities. The article then analyzes the Supreme Court's opinion in *DOE v. Ohio* in part III, and in part IV discusses the enactment of the Federal Facility Compliance Act. The article finds that, although Congress has responded to narrow judicial interpretations of waivers of sovereign immunity by enacting clarifying legislation, such narrow readings have impeded the effective implementation of the environmental statutes and forced greater accommodation of interests that did not prevail in the initial legislative process.

I. APPLICATION OF THE ENVIRONMENTAL LAWS TO FEDERAL FACILITIES

Since first establishing comprehensive regulatory programs to protect the environment in 1970,¹⁰ Congress has consistently sought to apply the environmental laws to public and private entities alike. Aided by narrow judicial interpretations of sovereign immunity waivers contained in the statutes, federal agencies have resisted efforts to require their compliance with these laws. The following section reviews the history of legislative efforts to apply the environmental laws to federal facilities.¹¹

A. *Early Efforts to Apply Environmental Law to Federal Facilities*

Prior to the establishment of national regulatory programs, Congress encouraged federal agencies to cooperate with state environmental offi-

Court statutory interpretation decisions between 1975 and 1990. His list, however, is not entirely comprehensive because it fails to include the 1977 Amendments to the Clean Water Act that overrode *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976).

10. See, e.g., National Environmental Policy Act, 42 U.S.C. § 4321 (1988); Clean Air Act Amendments, 42 U.S.C. § 7401 (1988).

11. For a more detailed history of federal waivers of sovereign immunity in the environmental statutes, see Kenneth M. Murchison, *Reforming Environmental Enforcement: Lessons from Twenty Years of Waiving Federal Immunity to State Regulation*, 11 VA. ENVTL. L.J. 179 (1991-92).

cial, but it did not require federal facilities to comply with state environmental laws. In the 1956 Water Pollution Control Act,¹² Congress directed federal agencies to cooperate with any state or local agency responsible for controlling water pollution "insofar as practicable and consistent with the interests of the United States and within any available appropriations."¹³ Expressing its desire that federal facilities cooperate with air pollution control agencies, Congress included virtually identical language in amendments to the forerunner to the modern day Clean Air Act.¹⁴ Consistent with the then-prevailing view that environmental protection was a state and local responsibility, neither of these acts established federal pollution control regulations. Instead, they provided financial assistance to encourage states to develop their own pollution control programs.

During the 1960s, environmentalists criticized federal agencies, complaining that they ignored environmental considerations and excluded the public from input into decisions affecting the environment.¹⁵ Congress enacted the National Environmental Policy Act of 1969 (NEPA)¹⁶ to make federal agencies more responsive to environmental concerns. In an executive order designed to implement NEPA, President Nixon directed federal agencies to operate their facilities in a manner that would conform to state air and water quality standards and implementation plans.¹⁷

Beginning in 1970, when it enacted legislation establishing the first national regulatory program to protect the environment, Congress shifted its approach from one of encouraging cooperation to one requiring compliance. In order to make environmental laws equally applicable to public and private entities, Congress specified in the Clean Air Act that, unless specifically exempted by the President, federal facilities "shall comply with federal, state, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."¹⁸ Congress

12. Water Pollution Control Act, Pub. L. No. 84-660, 970 Stat. 498, 506 (1956).

13. *Id.*

14. Clean Air Act, Pub. L. No. 86-365, § 2, 73 Stat. 646, 646 (1959).

15. *See, e.g.*, JOSEPH SAX, *DEFENDING THE ENVIRONMENT* 60-61 (1970).

16. 42 U.S.C. § 4321 (1988).

17. Exec. Order 11,507, 35 Fed. Reg. 2573 (1970).

18. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 5, 84 Stat. 1676, 1689 (1970) (codified at 42 U.S.C. §§ 7401-7642 (1970)). The President could exempt federal facilities only upon a determination that the paramount interests of the nation required the exemption. *Id.*

included similar provisions in the other national pollution control programs, including the Federal Water Pollution Control Act of 1972 (Clean Water Act),¹⁹ the Noise Control Act of 1972,²⁰ and the Safe Drinking Water Act of 1974.²¹

In addition to requiring federal facilities to comply with environmental regulations, the 1970 Clean Air Act Amendments included the first citizen suit provision. Section 304 of the Act authorized citizens to bring actions to enforce emissions standards against the United States, or any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment of the Constitution.²² This provision, which clearly authorized suits against federal facilities, became the model for the citizen suit provisions included in the other major federal environmental statutes.²³ In 1972 Congress included a

19. Pub. L. No. 92-500, § 2, 86 Stat. 816, 875 (1972).

20. Pub. L. No. 92-574, § 4, 86 Stat. 1234, 1235 (1972).

21. Pub. L. No. 93-523, 88 Stat. 1660 (1974). In addition to including the language used in the federal facilities provision of § 118 of the Clean Air Act, the 1972 Federal Water Pollution Control Act Amendments (Clean Water Act) directed federal agencies to make "payment of reasonable service charges" required by state water pollution control authorities. Clean Water Act, Pub. L. No. 92-500, § 2, 86 Stat. 816, 875 (1972) (codified as amended at 33 U.S.C. § 1323 (1988)). Congress probably included this reference in anticipation that states would want to collect service charges to defray the costs of implementing the Clean Water Act's new national permit program (the national pollution discharge elimination system, or NPDES program), though the Supreme Court declined to infer such congressional intent in *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 216-17 (1976). States can operate the NPDES program under delegated federal authority. The Clean Air Act did not require a permit program until it was amended in 1990. The Safe Drinking Water Act also specified that federal agencies were to comply with recordkeeping and reporting requirements for any applicable underground injection control programs, and it authorized presidential exemptions only on grounds of national security. Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974).

22. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 304, 84 Stat. 1676, 1706 (1970).

23. Beginning with § 304 of the Clean Air Act Amendments of 1970, most of the major federal environmental laws contain provisions authorizing citizens to sue violators of environmental regulations. See, e.g., Clean Water Act, 33 U.S.C. § 1323 (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1988). The citizen suit provisions of the environmental laws generally authorize "any person" to commence an action against "any person" alleged to be in violation of the laws. Before filing a suit, citizens usually must notify the alleged violator and federal and state authorities in order to give them an opportunity to take action. Sixty days notice usually is required, although some statutes have different waiting periods. For example, suits for violations of RCRA, Subtitle C can be brought immediately after notice is given, 42 U.S.C. § 6972(b)(1)(A), while suits against persons contributing to an imminent and substantial endangerment situation require 90 days notice under 42 U.S.C. § 6972 (b)(1)(A),

similar provision in section 505 of the Clean Water Act.²⁴ The Senate committee report on the legislation emphasized the importance of allowing citizens access to the courts in order to make the government comply with its obligations under the Act.²⁵

B. *Judicial Interpretations of Sovereign Immunity Waivers*

Federal agencies resisted congressional efforts to subject them to the full range of state environmental regulations. State officials sued some federal agencies that refused to comply with state permit requirements. Citing the doctrine that waivers of sovereign immunity should be narrowly construed, the agencies argued that they should not have to comply with state procedural requirements, such as obtaining a permit, but need only comply with substantive requirements. While this issue was being litigated in federal court, President Nixon revoked his 1970 executive order that directed agencies to comply with state air and water quality standards and implementation plans and replaced it with Executive Order 11,752.²⁶ The new executive order, which was designed to bolster the agencies' litigation position,²⁷ distinguished between state "substantive standards and limitations," with which federal compliance was desirable, and "state or local administrative procedures with respect to pollution abatement and control," with which compliance was not required.²⁸ In two 1976 cases, the Supreme Court relied upon this distinction to support extraordinarily narrow constructions of the

(B). Citizen suits usually are barred if federal or state authorities are diligently prosecuting an action to require compliance. 42 U.S.C. § 6972(b)(1)(B). The citizen suit provisions also generally authorize suits against agencies for failing to perform nondiscretionary duties, a type of action-forcing litigation that can be useful to ensure that agencies conduct required rulemaking activities. 42 U.S.C. § 6972 (a)(2).

24. Pub. L. No. 92-500, § 505, 86 Stat. 816, 888 (1972).

25. S. REP. NO. 414, 92d Cong., 1st Sess. 80 (1971).

26. Exec. Order No. 11,507, 35 Fed. Reg. 2573 (1970), reprinted in 42 U.S.C. § 4331 (1988).

27. At least one state had relied upon Executive Order 11,507 to support its argument that federal facilities should be required to comply with state permit requirements. See *Alabama ex rel. Baxley v. Seeber*, 502 F.2d 1238, 1248-49 (5th Cir. 1974), *rev'd*, 426 U.S. 932 (1976).

28. Executive Order 11,752 provided in pertinent part:

Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities

federal facilities provisions of the Clean Air Act and Clean Water Act.²⁹

In *Hancock v. Train*,³⁰ the Court held that federal facilities were not required to obtain state operating permits pursuant to state plans implementing the Clean Air Act.³¹ Under an EPA-approved plan for implementing and maintaining national ambient air quality standards, Kentucky required all facilities emitting air pollutants to obtain a state permit.³² In seeking to require facilities operated by the U.S. Army, the Tennessee Valley Authority, and the Atomic Energy Commission to apply for and obtain such operating permits,³³ Kentucky maintained that it could not meet its primary responsibilities under the Act without a permit program. While the Clean Air Act did not require states to establish a permit program, virtually every state had done so to ensure compliance with federal air quality standards.³⁴

The Supreme Court rejected Kentucky's argument that the state could require federal facilities to obtain operating permits under section 118 of the Clean Air Act.³⁵ Citing both the Supremacy Clause and the Plenary Powers Clause of the Constitution, the Court emphasized that only a "clear and unambiguous" congressional authorization could waive federal immunity from state regulation.³⁶ The Court narrowly interpreted section 118 of the Clean Air Act, which provided that federal facilities comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."³⁷ The Court noted that section 118 did not require that federal installations comply with "all federal, state, interstate, and local requirements to the same extent as any other person," nor that they "comply with all

to comply with State or local administrative procedures with respect to pollution abatement and control.

Exec. Order No. 11,752, 3 C.F.R. 380 (1974).

29. *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976); *Hancock v. Train*, 426 U.S. 167 (1976).

30. 426 U.S. 167 (1976).

31. *Id.* at 180.

32. *Id.* at 172.

33. *Id.* at 174.

34. *Id.* at 180.

35. *Hancock*, 426 U.S. at 182.

36. *Id.* at 179 (quoting *California ex rel. State Water Resources Control Bd. v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976)).

37. *See* 42 U.S.C. § 1857 (1988).

requirements of the applicable state implementation plan.”³⁸ Distinguishing between substantive requirements, such as emissions standards and compliance schedules, and the procedural requirements that are used to administer and enforce them,³⁹ the Court held that Congress did not intend to require federal facilities to comply with state procedural requirements.⁴⁰

While noting that states could bring enforcement actions against federal facilities under the citizen suit provisions of section 304 of the Act,⁴¹ the Court found it significant that section 304 mentioned only suits to enforce emissions standards or limitations and did not expressly provide for enforcement of state permit requirements.⁴² The Court noted that its holding was founded on the traditional presumption that waivers of sovereign immunity are to be construed narrowly, and that if it had misinterpreted congressional intent, Congress could amend the act to make its intentions clear.⁴³

In the companion case to *Hancock*, *EPA v. California ex rel. State Water Resources Control Board*,⁴⁴ the Supreme Court held that federal facilities were not required to obtain state permits even under the Clean Water Act's national permit program.⁴⁵ The Court again based its holding on the notion that waivers of sovereign immunity should be construed narrowly.⁴⁶ Unlike the Clean Air Act, which then did not mandate the use of operating permits, the Clean Water Act *required* the establishment of a national permit program that states could operate under delegated authority from EPA.⁴⁷ The Court dismissed this distinction, noting that states were not required to administer the Clean Water Act permit program while the Clean Air Act did require states to develop implementation plans.⁴⁸

38. *Hancock*, 426 U.S. at 187.

39. *Id.* at 185.

40. *Id.* at 189.

41. *Id.* at 195-96. The Court noted that § 304 of the Clean Air Act authorizes suits by “any person” and § 302(e) includes a “State” in the definition of a “person.” *Id.*

42. *Id.* at 198.

43. *Hancock*, 426 U.S. at 198. In a footnote, the Court noted that legislation expanding the waiver of sovereign immunity had been reported out of a Senate committee. *Id.* at 198 n.64.

44. 426 U.S. 200 (1976).

45. *Id.* at 227.

46. *Id.* at 211.

47. *Id.* at 223.

48. *Id.* at 226.

The federal facilities provision contained in section 313 of the Clean Water Act was virtually identical to section 118 of the Clean Air Act, but it also specified that federal facilities must comply with requirements for the "payment of reasonable service charges."⁴⁹ The Supreme Court declined to accept the reasoning of the court of appeals that Congress must have intended that federal facilities obtain state permits because there would be no reason to order them to pay fees for a permit that they were not required to obtain. The Court found no clear indication that such service charges were associated with permits.⁵⁰

While conceding that exempting federal facilities from state permit requirements would make it difficult for states to coordinate and administer water quality standards, the Court maintained that this was not an adequate reason for finding a clear waiver of sovereign immunity.⁵¹ As in *Hancock*, the Court observed that if it had misinterpreted congressional intent, Congress could make its intention manifest in subsequent legislation.⁵² In fact, that is precisely what Congress did shortly after the Supreme Court announced its decisions.

C. *Legislation Overriding Narrow Constructions of Sovereign Immunity Waivers*

Just four months after the Court decided *Hancock* and *Water Resources Control Board*, Congress enacted comprehensive federal hazardous waste legislation known as the Resource Conservation and Recovery Act (RCRA).⁵³ While a House committee had proposed that EPA be given exclusive enforcement authority against federal facilities,⁵⁴ Congress instead adopted an even more expansive waiver of

49. Section 313 specified that federal facilities "shall comply with Federal, State, interstate, and local requirements respecting the control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges." 33 U.S.C. § 1323 (1988).

50. *Water Resources Control Bd.*, 426 U.S. at 216-17.

51. *Id.* at 220-21.

52. *Id.* at 228.

53. 42 U.S.C. § 6361 (1988).

54. The House committee report on the legislation mentioned the Supreme Court's decisions in *Hancock* and *Water Resources Control Board* and noted that considerable controversy persisted concerning efforts to bring federal facilities into compliance with the environmental laws. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 45 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6283. Relying on a recommendation made by the Administrative Conference of the United States prior to the Supreme Court decisions, the committee recommended that EPA assume exclusive responsibility for enforcing hazardous

federal sovereign immunity in section 6001 of RCRA. Responding to the *Hancock* Court's observation that Congress had not specified that federal facilities must comply with *all* requirements, Congress inserted the word "all" into the statute and specified that this included "requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), . . . including the payment of reasonable service charges."⁵⁵ Congress also specified that neither federal agencies nor employees would be immune "from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief,"⁵⁶ and that only the President could exempt federal facilities from compliance by determining that it "is in the paramount interest of the U.S."⁵⁷ The President's authority to exempt federal facilities was limited by providing that such an exemption could not be premised on lack of funds for compliance unless Congress denied a specific presidential request for an appropriation for this purpose.⁵⁸

The year after it enacted RCRA, Congress adopted extensive amendments to the Clean Air Act,⁵⁹ the Clean Water Act,⁶⁰ and the Safe Drinking Water Act.⁶¹ In these amendments Congress adopted new federal facilities provisions expressly designed to override *Hancock* and *Water Resources Control Board*. The Senate committee report on the Clean Air Act Amendments complained that the Supreme Court, encouraged by federal agencies, had misconstrued Congress' intent.⁶² The House committee report explained that in adopting section 118 of the Act it had intended to remove all legal barriers to full federal compliance, except where it expressly provided exemption authority. The report stated that Congress had intended to waive the historic de-

waste regulations applicable to federal facilities. *Id.* at 6289. While the bill reported by the House committee would have given EPA authority to issue compliance orders and to file civil enforcement actions against other federal facilities upon 30 days notice, this proposal was not adopted.

55. 42 U.S.C. § 6961 (1988).

56. *Id.*

57. *Id.*

58. *Id.*

59. Pub. L. No. 95-95, 91 Stat. 685 (1977).

60. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

61. Pub. L. No. 95-190, 91 Stat. 1399 (1977).

62. S. REP. NO. 370, 95th Cong., 1st Sess. 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4371-75.

fense of sovereign immunity and to establish, as a matter of federal law, the duty of federal facilities to abide by all state and local substantive and procedural emission control requirements.⁶³

The report concluded that Congress had "intended to settle these matters once and for all" by enacting section 118. The House committee indicated that the 1977 amendments were "intended to overturn the *Hancock* case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local requirements — procedural, substantive, or otherwise — process, and sanctions."⁶⁴ Congress inserted the word "all" as a modifier to "requirements" in section 118 and specified that the waiver applied to any requirements whatsoever, including requirements respecting permits, "to the exercise of any Federal, State, or local administrative authority, and to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."⁶⁵

The House committee report explained that federal facilities and agencies could be "subject to injunctive relief, criminal or civil contempt citations to enforce injunctions, to civil or criminal penalties, and to delayed compliance penalties."⁶⁶ The report expressed the expectation that the amendment would end delays, excuses, or evasions by federal agencies and, except in the case of a presidential exemption in the interests of national security, would mandate complete compliance.⁶⁷

Congress inserted virtually identical language into the Safe Drinking Water Act and into section 313 of the Clean Water Act by amendments adopted in 1977.⁶⁸ The amendment to the Clean Water Act, however, added the qualification that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court."⁶⁹ An executive order issued by President Carter in 1978 directed federal

63. H.R. REP. NO. 240, 95th Cong., 1st Sess. 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1276-77.

64. 1977 U.S.C.C.A.N. at 1277-78.

65. 42 U.S.C. § 7418(b) (1988). Congress also amended § 118 to specify that no federal employee "shall be personally liable for any civil penalty for which he is not otherwise liable." *Id.*

66. H.R. REP. NO. 240, 95th Cong., 1st Sess. 200 (1977), *reprinted in* 1977 U.S.C.C.A.N. at 1077, 1279.

67. *Id.*

68. 33 U.S.C. § 1323(a)(2) (1988).

69. *Id.*

facilities to comply with environmental standards established under the major federal statutes and provided that they shall be subject to "the same substantive, procedural, and other requirements that would apply to a private person."⁷⁰

Thus, more than fifteen years ago, Congress made it abundantly clear that, in the absence of a presidential exemption, it intended to require federal facilities to comply with the same environmental standards and to be subject to the same enforcement sanctions as private parties. In subsequent years, virtually every time Congress reauthorized the major federal environmental statutes, it strengthened their enforcement provisions and increased the specificity with which it enunciated the policy of equal application of the law to public and private entities.⁷¹

II. COMPLIANCE AND ENFORCEMENT PROBLEMS AT FEDERAL FACILITIES

A. *Environmental Problems at Federal Facilities*

Despite Congress' efforts to apply the environmental law to federal facilities, such facilities have created some of the most severe environmental problems facing the nation today. As of February 1992, the National Priorities List for cleanup under the Superfund program listed 116 federal facilities. As of February 1993, EPA's Federal Agency Hazardous Waste Compliance Docket lists 1,930 federal facilities.⁷² Environmental contamination at federal facilities is so severe that the Congressional Budget Office estimates that the federal government now actually spends more money trying to bring its own facilities into compliance with the environmental laws than it does in administering and enforcing the laws against private parties.⁷³

70. Exec. Order No. 12,088, 3 C.F.R. 243 (1978). Exec. Order No. 12,580, 3 C.F.R. 193 (1988), issued by President Reagan, superseded Carter's executive order.

71. See, e.g., Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984); Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987); Medical Waste Tracking Act of 1988, Pub. L. No. 100-582, 102 Stat. 2954 (1988); 1990 Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990). As Kenneth Murchison notes with respect to waivers of federal sovereign immunity, "the more recent the waiver, the more inclusive it tends to be." Murchison, *supra* note 11, at 187.

72. 58 Fed. Reg. 7298 (1993). The Federal Agency Hazardous Waste Compliance Docket includes facilities being evaluated for inclusion on the National Priorities List.

73. CONGRESSIONAL BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS, S. DOC. NO. 95, 101st Cong., 2d Sess. (1990).

Nuclear weapons plants managed by the U.S. Department of Energy (DOE) have left a legacy of extreme levels of environmental contamination. In a July 1988 report, DOE estimated that the cost of cleaning up environmental contamination at the nuclear weapons complex would range from \$66 to \$110 billion.⁷⁴ The General Accounting Office believes that the total bill will range from \$100 to \$130 billion.⁷⁵ Contamination at Department of Defense (DOD) installations also is a serious problem. DOD estimates that it will cost more than \$1 billion and take nearly a decade to decontaminate just the military bases ordered closed in 1988.⁷⁶ The Bush Administration's budget request for the fiscal year 1993 included a total of \$3.7 billion to clean up pollution at closed and active military bases and \$5.5 billion for decontamination of the nuclear weapons complex.⁷⁷

Problems at federal facilities are the legacy of decades of environmental neglect. At its uranium processing center in Fernald, Ohio, DOE released more than 300,000 pounds of uranium particles into the air in thirty-five years.⁷⁸ More than 200 billion gallons of radioactive and hazardous waste contaminate unlined trenches and pits at the Hanford Nuclear Reservation in the State of Washington.⁷⁹ In 1986, the federal government revealed that it had deliberately concealed discharges of radioactive air and water pollutants that occurred at Hanford over the period from 1944 to 1971.⁸⁰ On June 6, 1989, a team of FBI agents raided the Rocky Flats plutonium processing facility near Denver, Colorado to seize evidence of criminal violations of the environmental laws. Safety problems led to a temporary shutdown of the plant in November 1989, and congressional investigators have estimated that the cost of cleaning up its radioactive and hazardous wastes

74. U.S. DEPARTMENT OF ENERGY, ENVIRONMENT, SAFETY, AND HEALTH REPORT FOR THE DEPARTMENT OF ENERGY DEFENSE COMPLEX (July 1988).

75. U.S. GENERAL ACCOUNTING OFFICE, DEALING WITH PROBLEMS IN THE NUCLEAR DEFENSE COMPLEX EXPECTED TO COST OVER \$100 BILLION (July 1988).

76. Keith Schneider, *Toxic Pollution at Military Sites is Posing a Crisis*, N.Y. TIMES, June 30, 1991, at A1.

77. Barry Cushman, *Bush to Ask More for Base Cleanups*, N.Y. TIMES, Jan. 24, 1992, at A15. This substantially exceeds EPA's FY1993 budget request of \$7 billion. *Id.*

78. H.R. REP. NO. 111, 102d Cong., 1st Sess. 4 (1991).

79. Dan W. Reicher & Jason Salzman, *One Hundred Billion Dollars and Counting*, 6 ENVTL. FORUM 15, 16 (Jan./Feb. 1989).

80. Keith Schneider, *Nuclear Complex Poses Risk for Indians*, N.Y. TIMES, Sept. 3, 1990, at A9.

could exceed \$7 billion.⁸¹

B. *Enforcement Authorities*

When it has reauthorized the major federal environmental statutes, Congress repeatedly has strengthened their enforcement provisions, increasing the size of possible penalties and broadening the range of enforcement authorities. The environmental laws now authorize judicial enforcement actions seeking both civil and criminal penalties and equitable relief.⁸² The principal pollution control statutes also authorize EPA to assess civil penalties administratively. Polluters may contest such penalties in hearings before an administrative law judge. Civil penalty decisions are subject to judicial review based on the administrative record.⁸³

Civil and criminal penalties are designed to punish violators and to deter violations of the environmental laws. EPA has developed a "Policy on Civil Penalties" designed to ensure that penalties imposed on violators recoup the economic benefit of violations while encouraging

81. Keith Schneider, *Study Foresees Closing Most Nuclear Arms Plants*, N.Y. TIMES, Feb. 7, 1991, at B12. Problems at Rocky Flats did not occur without warning. On February 11, 1970, the day the New York Times reported on President Nixon's landmark 1970 message to Congress on the environment, see Robert B. Semple, Jr., *President Offers Plan for Cleanup of Air and Water*, N.Y. TIMES, Feb. 11, 1970, at A1, another article on the front page reported a warning from a group of Colorado scientists that plutonium released into the air, water, and soil from Rocky Flats posed "a serious threat to the health and safety of the people of Denver." Anthony Ripley, *Colorado Atom Plant Is Called Radiation Hazard*, N.Y. TIMES, Feb. 11, 1970, at A1. While acknowledging that small amounts of plutonium had been released from the Rocky Flats plant, officials of the Atomic Energy Commission stated that the amount was too "minuscule" to pose any hazard to public health. The scientists had been investigating the impact of a major accident that occurred at the facility in May 1969 when plutonium caught fire in a workroom. To their surprise they discovered plutonium deposits not connected with the fire, but rather from years of environmental contamination from the plant. A spokesman for Dow Chemical Company, the government contractor who operated the plant, dismissed the scientists' warning as "just not credible." *Id.*

82. Most of the federal environmental statutes provide for criminal penalties for "knowing" or "willful" violations of environmental regulations. See, e.g., Clean Water Act § 309(c), 33 U.S.C. § 1319g (1988) ("knowingly"); RCRA § 3008(d) & (e), 42 U.S.C. § 6928 (1988) ("knowingly"); Clean Air Act § 113(c), 42 U.S.C. § 7413 (1988) ("knowingly"); CERCLA § 103(b), (c) & (d)(2), 42 U.S.C. § 9607 (1988) ("willfully"). The Clean Water Act goes even further by making negligent violations of the Act criminal. See, e.g., *United States v. Frezzo Bros., Inc.*, 703 F.2d 62 (3rd Cir. 1983) (upholding criminal sanctions for willfully and negligently discharging pollutants into U.S. waterways), *cert. denied*, 464 U.S. 829 (1983).

83. See generally Jonathan D. Libber, *Penalty Assessment at the Environmental Protection Agency: A View from Inside*, 35 S.D. L. REV. 189 (1990).

future compliance. Under this policy, civil penalties are calculated based on: the economic benefit of delayed compliance, as calculated by a computer program developed by the EPA's staff; the gravity of the offense, based on its actual and potential impact on public health and the environment and its effect on the EPA's ability to perform its regulatory functions; the willfulness of the offense; and the violator's past compliance and cooperation with enforcement authorities.⁸⁴

Until recently, federal facilities have had little incentive to take action to bring their operations into compliance with environmental laws. The minimal threat of enforcement action, coupled with limited budgets for environmental compliance, contributed to federal agencies' pervasive neglect of environmental standards.⁸⁵ The Justice Department's insistence that it would violate constitutional principles of separation of powers to allow one executive agency to sue another has limited the EPA's ability to pursue enforcement actions against facilities operated by other federal agencies.⁸⁶ While Congress has required EPA to reach formal remedial action agreements with federal facilities on the National Priorities List for cleanup under the Superfund program (known as CERCLA),⁸⁷ the agency otherwise has been "essentially limited to arm twisting and cajolery with respect to its sister agencies."⁸⁸

In 1988, a congressional committee found that EPA has little success in obtaining administrative consent orders or enforceable compliance agreements with federal facilities.⁸⁹ DOE did agree in 1991 to pay a \$100,000 fine for its failure to comply with a remedial action agreement

84. See generally Libber, *supra* note 83.

85. Despite considerable effort in recent years to improve the compliance record of federal facilities, the frequency of significant violations of the environmental laws at such facilities remains high and significantly greater than at private industrial facilities. See Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 COLUM. J. ENVTL. L. 1, 4-5 (1991).

86. These arguments are criticized in Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

87. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9620(e)(2).

88. Donald W. Stever, *Perspectives on the Problem of Federal Facility Liability for Environmental Contamination*, 17 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,114 (1987).

89. U.S. DEPARTMENT OF DEFENSE AND DEPARTMENT OF ENERGY, COMPLIANCE WITH HAZARDOUS WASTE LAWS, MEMORANDUM FROM SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF HOUSE COMM. ON ENERGY & COMMERCE (June 3, 1988).

reached with EPA under CERCLA, but such penalties are rare and unlikely to have much impact on a \$20 billion department.⁹⁰ While EPA could levy civil penalties against private contractors that operate many federal facilities, clauses in their government contracts often entitle such contractors to automatic reimbursement of such fines from the federal government.⁹¹ Government contracts also may allow contractors to recover CERCLA cleanup expenses.⁹²

In rare cases federal enforcement officials have brought criminal prosecutions against federal employees. In *United States v. Dee*,⁹³ the United States Court of Appeals for the Fourth Circuit affirmed the conviction of employees at a federal facility for criminal violations of RCRA for the first time in a prosecution brought by the U.S. Attorney's Office. The defendants, civilian engineers working for the U.S. Army, were convicted for knowing violations of RCRA regulations. The Fourth Circuit rejected the argument that sovereign immunity barred the prosecution, stating that "even where federal officers enjoy some immunity within a particular sphere of official actions, they are not protected by general immunity from criminal prosecution."⁹⁴

In March 1992, Rockwell International Corporation, a federal contractor that had operated the Rocky Flats nuclear weapons plant, pleaded guilty to five felony and five misdemeanor violations of the environmental laws. The company agreed to pay \$18.5 million in fines and to waive enforcement of a clause in its government contract that could require DOE to compensate it for paying the fines.⁹⁵ The Rockwell plea bargain resulted in prosecution of the corporation only, and not individual officials responsible for the violations. While the

90. Matthew L. Wald, *Department to Pay Fine for Waste Cleanup*, N.Y. TIMES, May 14, 1991, at A10.

91. *Catch 22 Language in Weapons Plant Contracts Impedes Safety Penalties*, BALTIMORE SUN, Sept. 26, 1989, at 18A. Donald Stever argues that indemnification clauses in contracts should be written to void any indemnification for unlawful acts of the contractor. Stever, *supra* note 88, at 10, 119. For a discussion of environmental indemnity provisions, see Penny L. Parker & John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?*, 44 SW. L.J. 1349 (1991).

92. GENERAL ACCOUNTING OFFICE, DOD ENVIRONMENTAL CLEANUP: INFORMATION ON CONTRACTOR CLEANUP COSTS AND DOD REIMBURSEMENTS (June 1992).

93. 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991).

94. *Id.* at 744.

95. Matthew L. Wald, *Judge Accepts Plea on Waste A-Bomb Site*, N.Y. TIMES, June 2, 1992, at A12.

Justice Department argues that the decision not to indict individuals was proper because they were only following years of company policy,⁹⁶ members of the grand jury have complained bitterly that they wanted to indict employees of both DOE and Rockwell, but were overruled by the U.S. Attorney.⁹⁷

C. *State Enforcement Actions Against Federal Facilities*

Most federal environmental laws rely heavily on state authorities, subject to federal supervision, to administer and enforce the national programs. The principal federal pollution control statutes authorize EPA to delegate the authority to administer and enforce environmental programs to states that meet minimum federal requirements. Thus, while the federal government drafts the regulations, state and local governments enforce them.⁹⁸ The federal government's inability to achieve effective enforcement of the environmental laws that apply to federal facilities leaves the states in which such facilities are located with an even greater enforcement burden.

While the environmental laws generally apply to federal facilities, states have had great difficulty enforcing them against federal violators. Citing the principle that waivers of sovereign immunity are to be narrowly construed, federal agencies have asserted numerous defenses to state environmental enforcement actions. In some cases, federal agencies have challenged the states' ability to impose certain substantive requirements on them.⁹⁹ In other cases the agencies have argued that

96. Matthew L. Wald, *Testimony Blocked on Bomb Factory, Agent Says*, N.Y. TIMES, Sept. 27, 1992, at A28.

97. Thomas W. Lippman, *Justice Defends Plea Bargain in Rocky Flats Case*, WASH. POST, Oct. 1, 1992, at A3. In a scathing report to the court, the grand jury charged that officials of both DOE and Rockwell conspired to violate the environmental laws and that the violations continued even after the plant was searched by FBI agents. Matthew L. Wald, *New Disclosures Over Bomb Plant*, N.Y. TIMES, Nov. 22, 1992, at A23. The grand jury concluded that "the D.O.E. explicitly discouraged Rockwell from complying with environmental laws" and that "Rockwell conspired with certain D.O.E. officials over a period of years to hide its illegal acts and the illegal acts of its employees behind the sovereign immunity [of D.O.E.]" *Id.*

98. Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,326 (1985).

99. See, e.g., *Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988) (rejecting argument that reference to "hazardous waste disposal" in federal facilities provision in § 6001 of RCRA does not extend the waiver of federal immunity to cover violations involving the collection of waste); *United States v. Pennsylvania Dep't of Env'tl. Resources*, 778 F. Supp. 1328 (M.D. Pa. 1991) (rejecting argument that CERCLA waived sovereign immunity only for state laws that were the equivalent of a "mini-CERCLA");

regulatory fees charged by states are actually impermissible taxes on federal property.¹⁰⁰ Among the most potent arguments federal agencies have made is that, except for violations of previously imposed injunctions, the environmental laws have not waived federal immunity from the imposition of civil penalties. Prior to the Supreme Court's decision in *DOE v. Ohio*, the lower federal courts' response to this argument was mixed.¹⁰¹

United States v. Colorado, No. 89-C-1646 1991 U.S. Dist. LEXIS 13138 (D. Col. August 14, 1991) (holding that § 113(h) of CERCLA deprives courts of jurisdiction over state enforcement action once site is listed on the NPL); *Colorado v. U.S. Dep't of Army*, 707 F. Supp. 1562 (D. Col. 1989) (holding that a pending CERCLA suit did not preclude state enforcement of RCRA for a site not yet listed on the NPL); *New York v. U.S. Dep't of Defense*, 620 F. Supp. 374 (E.D.N.Y. 1985) (holding that the Clean Water Act did not waive sovereign immunity for violations of state water quality standards); *Kelley v. U.S. Dep't of Transp.*, 618 F. Supp. 1103 (W.D. Mich. 1985) (holding that the Clean Water Act did not waive sovereign immunity from state enforcement action involving groundwater contamination); *Florida Dep't of Env'tl. Regulation v. Silvex Corp.*, 606 F. Supp. 159 (N.D. Mich. 1985) (holding that RCRA's federal facilities provision does not waive federal immunity from enforcement of state law imposing strict liability for releases of hazardous waste).

100. See, e.g., *New York Dep't of Env'tl. Conservation v. U.S. Dep't of Energy*, 772 F. Supp. 91 (N.D.N.Y. 1991) (postponing decision on the question of whether state regulatory fees are an impermissible tax because they are unreasonable in relation to the services rendered by the state); *United States v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732 (C.D. Cal. 1990) (rejecting argument that federal government is immune under the Clean Air Act from payment of air quality management district's fees).

101. See, e.g., *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991) (holding that Congress has not waived the federal government's sovereign immunity from liability for punitive or civil penalties imposed on federal facility for past violations of the Clean Water Act), *rev'd*, 112 S. Ct. 1927 (1992); *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990) (holding that the federal facilities provision of RCRA does not waive federal sovereign immunity from imposition of civil penalties); *United States v. Washington*, 872 F.2d 874 (9th Cir. 1989) (holding that RCRA federal facilities provision did not waive federal sovereign immunity from civil penalties); *California v. U.S. Dep't of Navy*, 845 F.2d 222 (9th Cir. 1988) (holding that the federal facilities provision of the Clean Water Act does not waive federal immunity from civil penalties); *United States v. Air Pollution Control Bd.*, No. 3:88-1030 1990 U.S. Dist. LEXIS 18996 (M.D. Tenn. Feb. 28, 1990) (rejecting argument that federal facilities are immune from imposition of civil penalties under the Clean Air Act); *Metropolitan Sanitary Dist. of Greater Chicago v. United States*, 737 F. Supp. 51 (N.D. Ill. 1990) (holding that sovereign immunity bars claim for civil penalties under the Clean Water Act where penalties did not arise under federal law); *Maine v. U.S. Dep't of Navy*, 702 F. Supp. 322 (D. Me. 1988) (holding that federal facilities provision of RCRA waives federal immunity from civil penalties), *vacated*, 973 F.2d 1007 (1st Cir. 1992) (holding that United States did not waive sovereign immunity from civil or punitive penalties in either RCRA or CERCLA); *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986) (holding that the Clean Water Act does not unambiguously waive federal

Justice Department officials argued that allowing states to impose civil penalties for environmental violations by federal agencies would provide a convenient means for states to line their coffers at federal expense and would disrupt federal priorities for environmental compliance.¹⁰² Proponents of allowing states to impose civil penalties argue that such authority is crucial to effective enforcement against federal facilities and that there already are means for preventing abuse, including the right to remove state enforcement actions to federal court.¹⁰³ Courts and scholars assumed that states at least could use the citizen suit provisions to require federal violators to pay civil penalties¹⁰⁴ that would be returned to the U.S. Treasury.¹⁰⁵ Nonetheless, in *California v. Department of Navy*,¹⁰⁶ a federal district court held that states cannot avail themselves of the citizen suit provisions of the Clean Water Act because they are not "citizens" within the meaning of the statute.¹⁰⁷

If states were not allowed to impose civil penalties on federal entities, it would be difficult for them to deter environmental violations at federal facilities. While knowing violations of the environmental laws can be the grounds for criminal prosecutions, there are substantial barriers to states conducting such prosecutions. Environmental crimes at federal facilities generally occur on property considered to be federal enclaves over which the federal government asserts exclusive criminal jurisdiction.¹⁰⁸ In *California v. Walters*,¹⁰⁹ the Ninth Circuit held that

sovereign immunity from civil penalties); *Alabama ex rel. Graddick v. Veterans' Admin.*, 648 F. Supp. 1208 (M.D. Ala. 1986) (rejecting argument that the Clean Air Act had not waived federal immunity from state enforcement actions seeking civil penalties); *Meyer v. U.S. Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986) (holding that RCRA does not waive federal immunity from civil penalties).

102. *Stewart Reflects on DOJ's Status, Limits in Environmental Enforcement, Litigation*, 21 Env't Rep. (BNA) 1564 (Dec. 14, 1990).

103. 20 U.S.C. § 1441 (1988). See Murchison, *supra* note 11, at 203, 208.

104. See, e.g., *Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982) (permitting Illinois to intervene in a federal action against an Illinois industrial polluter of Lake Michigan); *Massachusetts v. U.S. Veterans' Admin.*, 541 F.2d 119 (1st Cir. 1976) (allowing Massachusetts to sue as a citizen under the Federal Water Pollution Control Act). See also Stever, *supra* note 88, at 10,118-19.

105. See 31 U.S.C. § 3302 (1988).

106. 631 F. Supp 584 (N.D. Cal. 1986), *aff'd*, 845 F.2d 222 (9th Cir. 1988).

107. *California v. U.S. Dep't of Navy*, 845 F.2d 222 (9th Cir. 1988).

108. See generally Smith, *supra* note 85, at 23-24.

109. 751 F.2d 977 (9th Cir. 1984).

RCRA's federal facilities provision¹¹⁰ had not waived the immunity of the administrator of a Veterans' Administration hospital who was prosecuted for misdemeanor violations of state laws governing medical waste disposal.¹¹¹

In the absence of authority to impose a civil penalty, states must first seek to obtain injunctive relief or to negotiate a compliance agreement before federal facilities will be subject to any credible threat of sanctions. Even after states have succeeded in reaching compliance agreements with federal facilities, the federal agencies have often reneged on their commitments or failed to meet compliance deadlines. In May 1989, the U.S. Department of Energy, EPA, and the State of Washington entered into an agreement for cleaning up extensive radioactive waste contamination at the Hanford, Washington nuclear weapons complex. The agreement established a schedule for attaining compliance with federal and state environmental laws requiring construction of a waste processing plant that would treat the most dangerous wastes before they were immobilized in glass-like form. On January 30, 1991, however, the Department of Energy provoked an angry reaction from state officials when it announced a one- to two-year delay in construction of the waste processing plant based on concerns that wastes could not be safely moved to the \$1.5 billion facility.¹¹² A similar dispute occurred between Ohio officials and DOE over violations of an agreement to cleanup the Fernald, Ohio uranium fuel processing center, the plant that was the subject of the litigation that culminated in the Supreme Court's decision in *DOE v. Ohio*.

III. U.S. DEPARTMENT OF ENERGY V. OHIO

In *U.S. Department of Energy v. Ohio*,¹¹³ the Supreme Court held that Congress did not waive the United States' sovereign immunity from liability to states for civil penalties under the Clean Water Act and RCRA. The case began in 1986 when Ohio alleged that DOE's uranium processing facility in Fernald, Ohio had violated the Clean Water Act and RCRA. Emphasizing that the federal facilities provisions of RCRA and the 1977 amendments to the Clean Water Act were a response to *Hancock* and *Water Resources Control Board*, the

110. 42 U.S.C. § 6961 (1988).

111. *Walters*, 751 F.2d at 798.

112. Matthew L. Wald, *Cleanup of Nuclear Waste at Arms Plant Is Postponed*, N.Y. TIMES, Feb. 6, 1991, at A12.

113. 112 S. Ct. 1627 (1992).

district court found that both statutes waived federal sovereign immunity from state civil penalties.¹¹⁴ With one judge dissenting, a panel of the Sixth Circuit affirmed this decision, but held that the waiver of immunity from civil penalties under RCRA could be found only in RCRA's citizen suit provision and not in its federal facilities section.¹¹⁵ The Supreme Court then granted certiorari to review the Sixth Circuit's decision.¹¹⁶

In *DOE v. Ohio*, the Supreme Court reversed the Sixth Circuit's decision and held that federal agencies are immune from civil penalties for violations of the Clean Water Act and RCRA. The Court unanimously agreed with the Sixth Circuit's conclusion that the federal facilities provision of RCRA did not waive federal immunity from civil penalties. The Court refused to find that Congress intended to waive federal immunity from "punitive fines" or penalties for past violations. The DOE had conceded that there could be liability for "coercive fines" or fines designed to alter behavior prospectively, such as those imposed for violating an outstanding court order.¹¹⁷ The Court was unpersuaded that Congress had intended to authorize state imposition of civil penalties in section 6001 of RCRA by mandating federal compliance with "all" federal, state, interstate, and local requirements, and by specifying that this included both substantive *and* procedural requirements. The Court distinguished between compliance with these requirements and the "mechanisms for enforcing" them.¹¹⁸ Moreover, the Court viewed the addition of language clarifying that these requirements included "any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief" as indicating congressional intent to limit the states to coercive sanctions and not to include punitive ones.¹¹⁹ The Court found support for this conclusion in the final sentence of the federal facilities provision, which waives immunity "from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief," but does

114. The district court's decision is reported as *Ohio v. U.S. Dep't of Energy*, 689 F. Supp. 760 (S.D. Ohio 1988).

115. 904 F.2d 1058 (6th Cir. 1990).

116. 111 S. Ct. 2256 (1991).

117. 112 S. Ct. 1627 (1992).

118. *Id.* at 1640 n.17.

119. *Id.*

not refer to any waiver with respect to penalties for past violations.¹²⁰

With three Justices dissenting, the Court held that federal facilities were also immune from punitive fines under the citizen suit provisions of both RCRA and the Clean Water Act and under the federal facilities provision of the Clean Water Act. Justice Souter, writing for the majority, emphasized the traditional principle that waivers of sovereign immunity “must be unequivocal”¹²¹ and “must be ‘construed strictly in favor of the sovereign.’”¹²² He then analyzed the citizen suit provisions of both the Clean Water Act¹²³ and RCRA,¹²⁴ which expressly authorize citizen suits “against any person (including . . . the United States) . . . who is alleged to be in violation” of provisions of the laws. The majority opinion confirmed that states are “citizens” and “persons” authorized to sue federal facilities under the citizen suit provisions of both acts.¹²⁵ However, despite language in each citizen suit provision expressly authorizing courts to “apply any appropriate civil penalties” under the civil penalties provisions of each statute,¹²⁶ the Court found that Congress had not waived federal sovereign immunity with respect to such penalties.

The majority opinion conceded that the express reference to “the United States” in the list of persons against whom citizen suits may be brought makes it at least plausible that Congress intended to waive federal sovereign immunity for civil penalties. The Court concluded, however, that because the United States is not specifically included

120. *Id.* at 1633. Prior to enactment of the Federal Facility Compliance Act of 1992, § 6001 of RCRA, 42 U.S.C. § 6961, provided that federal facilities:

[S]hall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or *any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief*) . . . in the same manner, and to the same extent, as any person is subject to such requirements Neither the United States, nor any agency, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court *with respect to the enforcement of any such injunctive relief.*

42 U.S.C. § 6961 (emphasis added).

121. 112 S. Ct. at 1633 (citing *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980)).

122. *Id.* (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

123. 33 U.S.C. § 1365(a).

124. 42 U.S.C. § 6972(a).

125. 112 S. Ct. at 1634.

126. For the civil penalties provision of the Clean Water Act, see 33 U.S.C. § 1319(d). For the civil penalties provision of RCRA, see 42 U.S.C. § 6928(a), (g).

within each statute's general definition of "persons"¹²⁷ and because the penalty provisions of each statute authorize imposition of civil penalties on "persons,"¹²⁸ Congress has not waived federal immunity from such penalties with sufficient clarity and specificity. Dissenting from this conclusion, Justice White, joined by Justices Blackmun and Stevens, argued that it would be "impossible to fathom a clearer statement that the United States could be sued and found liable for civil penalties."¹²⁹

The majority also held that the federal facilities provision of the Clean Water Act¹³⁰ does not waive federal immunity from civil penalties. Unlike the federal facilities provision of RCRA, the Clean Water Act provision does not contain any specific reference to sanctions to enforce injunctive relief, which served as the basis for the conclusion that the RCRA provision had waived federal immunity only for coercive fines. Rather, the Clean Water Act refers "to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."¹³¹ The majority concluded, however, that because "the text speaks of sanctions in the context of enforcing 'process' as distinct from substantive 'requirements,'" it can "infer that Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fines."¹³² The majority also noted that the federal facilities provision of the Clean Water Act qualifies its waiver of immunity with the statement that "the United States shall be liable only for those civil penal-

127. See 33 U.S.C. § 1362(5) (defining "person" under the Clean Water Act); 42 U.S.C. § 6903(15) (defining "person" under RCRA).

128. See 33 U.S.C. § 1319(d) (Clean Water Act civil penalties provision); 42 U.S.C. § 6298(a), (g) (RCRA civil penalties provision).

129. 112 S. Ct. at 1642 (White, J., dissenting).

130. 33 U.S.C. § 1323(a) provides that federal agencies: [S]hall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.

33 U.S.C. § 1323(a).

131. *Id.*

132. *DOE v. Ohio*, 112 S. Ct. at 1637.

ties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.”¹³³ While noting that this speaks of “civil penalties” rather than “sanctions,” the majority held that immunity from civil penalties has not been waived because even violations of permits issued by a state with federally delegated authority to operate the Clean Water Act’s NPDES permit program do not “arise under Federal law.”¹³⁴ With remarkable candor, Justice Souter conceded that this interpretation renders the phrase “civil penalties arising under federal law” curiously meaningless.¹³⁵ But he concluded that the presumption favoring narrow construction of waivers of sovereign immunity warranted such a result.¹³⁶ The dissenting Justices criticized this position as tantamount “‘to imput[ing] to Congress a desire for incoherence’ as a basis for rejecting an explicit waiver.”¹³⁷

The majority rejected Ohio’s policy arguments for construing the congressional waiver of sovereign immunity more broadly. Responding to the argument that states had not been and could not be successful in gaining facility compliance without the penalty deterrent,¹³⁸ Justice Souter opined that such a position “assume[s] that without sanctions for past conduct a federal polluter can never be brought into future compliance, that an agency of the National Government would defy an injunction backed by coercive fines and even a threat of personal commitment.” In his dissenting opinion, Justice White, the author of the majority opinions in both *Hancock* and *Water Resources Control Board*, did not argue that the Court’s decision made federal facility compliance impossible, but rather that it “deprives the states of a powerful weapon in combatting federal agencies that persist in despoiling the environment.”¹³⁹

133. 33 U.S.C. § 1323(a).

134. 112 S. Ct. at 1638-39.

135. “Perhaps [Congress] used it just in case some later amendment might waive the government’s immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps someone was careless. The question has no satisfactory answer.” *Id.* at 1639.

136. *Id.*

137. *Id.* at 1644.

138. Brief for Respondent at 35, *DOE v. Ohio*, 112 S. Ct. 1627 (1992) Nos. 90-1341 & 90-1517.

139. *DOE v. Ohio*, 112 S. Ct. at 1638.

IV. THE FEDERAL FACILITY COMPLIANCE ACT OF 1992

Just as it had overturned *Hancock* and *Water Resources Control Board*, Congress acted swiftly to override part of the holding in *DOE v. Ohio* by enacting new legislation. On October 6, 1992, President Bush signed into law the Federal Facility Compliance Act of 1992 (FFCA),¹⁴⁰ which expressly waives the federal government's immunity from civil penalties for violations of RCRA. Since 1988, Congress had been considering legislation to improve enforcement against federal facilities. The House had approved such legislation by large margins on two occasions prior to the passage of FFCA. In 1989, the House approved legislation clarifying that federal facilities were not immune from civil penalties for RCRA violations by a vote of 380 to 39. Nonetheless, the bill died in the Senate after being reported out of committee.¹⁴¹ The legislation that became the Federal Facility Compliance Act of 1992 actually passed both houses of Congress during the previous session in 1991, prior to the Supreme Court's decision in *DOE v. Ohio*.¹⁴² The Court's decision served as a catalyst for convening a conference committee and achieving final passage of the legislation.

Supporters of the Federal Facility Compliance Act maintained that the legislation was essential to clarify the original intent of Congress to waive sovereign immunity for civil penalties.¹⁴³ They expressed regret that it was necessary to adopt legislation to return the law to what they

140. Pub. L. No. 102-386, 106 Stat. 1505 (1992).

141. See Elizabeth K. Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203, 222-23 (1991).

142. H.R. 2194, the bill that became the Federal Facility Compliance Act, was approved by voice vote in the House of Representatives on June 24, 1991, after having been reported out of the House Energy and Commerce Committee on June 4 by a vote of 42-1. 137 CONG. REC. H4878 (daily ed. June 24, 1991). The Senate approved similar legislation on October 24, 1991 by a 94-3 vote, after a filibuster by Senators concerned about opposition from DOE and DOD was broken by an 85-14 cloture vote on October 17, 1991. See 137 CONG. REC. S15,122 (daily ed. Oct. 24, 1991); 137 CONG. REC. S14,865 (daily ed. Oct. 17, 1991).

143. See, e.g., 138 CONG. REC. H9136 (daily ed. Sept. 23, 1992) (statement of Rep. Swift); 138 CONG. REC. S14,755 (daily ed. Sept. 22, 1992) (statement of Sen. Mitchell) ("This legislation will return to the States the enforcement tools we thought we had given them in 1976."); 137 CONG. REC. S15,136 (daily ed. Oct. 24, 1991) (statement of Sen. Metzenbaum) (stating that the "bill simply reaffirms Congress' original intent that States can impose and collect fines and penalties from Federal agencies and Departments for violations committed under State and Federal hazardous waste law."); 137 CONG. REC. S15,135 (daily ed. Oct. 24, 1991) (statement of Sen. Durenburger); 137 CONG. REC. S14,866 (daily ed. Oct. 17, 1991) (statement of Sen. Mitchell).

thought it had been when RCRA was enacted.¹⁴⁴ As described below, DOE and DOD officials claimed that it was impossible for them to comply fully with the environmental laws. This, coupled with the threat of a presidential veto, caused Congress to qualify the legislation's sovereign immunity waiver.¹⁴⁵ However, the politically irresistible notion that the environmental laws should apply equally to public and private entities generated overwhelming support for the Act.

The Senate committee report on the legislation described the principle that federal agencies must comply with the nation's environmental laws in the same manner as all other persons as a "cornerstone of Federal environmental law." The FFCA implements this principle by amending section 6001 of RCRA to waive federal sovereign immunity for civil or administrative penalties or fines, regardless of whether they are "punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."¹⁴⁶ This amendment effectively overrides the Supreme Court's unanimous holding in *DOE v. Ohio* that the previous version of section 6001 did not waive federal sovereign immunity for punitive penalties. The FFCA also amended the definition of "person" in section 1004(15) of RCRA to "include each department, agency, and instrumentality of the United States," thus effectively overriding the Court's holding that federal facilities are immune from civil penalties under RCRA's citizen suit provision.¹⁴⁷ The

144. See, e.g., 138 CONG. REC. H9138 (daily ed. Sept. 23, 1992) (statement of Rep. Eckart) ("In my view, it should not have even been necessary. But a recent Supreme Court decision affecting my State, *Dept. of Energy v. Ohio*, a decision that I believe was erroneous in its application, made it clear that the Congress indeed had to act.").

145. See 138 CONG. REC. S14,755 (daily ed. Sept. 23, 1992) (remarks of Sen. Mitchell):

I would have been comfortable with a simple clarification that sovereign immunity is waived, but the Departments of Defense and Energy claim that they cannot comply with the law as now written. We, therefore, responded to the administration's repeated requests that Federal agencies be given special consideration in four separate areas.

Id.

146. S. REP. NO. 67, 102d Cong., 1st Sess. 2 (1991). To clarify that RCRA's waiver of sovereign immunity extends to all waste management activities, including generation, transportation, storage or treatment, and not just to disposal, the FFCA inserts the words "and management" in the first sentence of RCRA's federal facilities provision before the words "in the same manner." Cf. Stever, *supra* note 88, at 10,117 (finding that sovereign immunity should be waived for all management activities).

147. To prevent the threat of civil penalties from deterring federal employees from performing their official duties, the Act provides that federal agents, officers, and employees shall not be held personally liable for civil penalties with respect to acts within the scope of their official duties. The Act does provide that federal employees may be

FFCA does not address, however, the Court's holdings with respect to waivers of sovereign immunity in the Clean Water Act.¹⁴⁸

Responding to concerns that states could abuse their civil penalty authority to line their coffers at federal expense, the legislation requires that all funds collected by states for violations by federal agencies be used "only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement." While the term "environmental protection" is not defined in the FFCA, supporters of the Act maintained that it should be construed broadly to include wetlands protection and preservation of open spaces, as well as pollution control.¹⁴⁹ The requirement does not apply to states with preexisting laws or constitutional provisions that bar earmarking of funds collected in enforcement actions.

The Departments of Energy and Defense opposed the legislation, arguing that their facilities produce so many diverse hazardous waste streams that full compliance with RCRA is impossible. These agencies maintained that the technology simply does not exist to ensure the safe treatment and disposal of many radioactive wastes they generate. To accommodate these concerns, the legislative waiver of sovereign immunity is not effective immediately for federal agencies who store radioactive waste that has been mixed with other hazardous waste (mixed waste) in violation of RCRA's prohibition on storage of hazardous waste that has been banned from land disposal.¹⁵⁰ The Act gives federal agencies storing mixed wastes not subject to an approved treatment plan and compliance order three years (or until October 1995) before the waiver of immunity from civil penalties becomes effective. The waiver is effective immediately for violations of existing compliance agreements, permits, or orders governing the storage of mixed waste.¹⁵¹

The three year delay in the effective date of the waiver of sovereign

subject to criminal sanctions for violations of federal or state hazardous waste laws, but it specifies that federal agencies, departments, or instrumentalities may not be subjected to criminal penalties in their institutional capacities.

148. As a result, *DOE v. Ohio* will continue to bar the imposition of civil penalties on federal agencies for violations of the Clean Water Act. See, e.g., *Sierra Club v. Interior Dep't*, 972 F.2d 312 (10th Cir. 1992).

149. 138 CONG. REC. S14,759 (daily ed. Sept. 23, 1992) (remarks of Sen. Chafee).

150. RCRA § 6001(c)(3), 42 U.S.C. § 6961(c)(3) (1988), amended by Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

151. RCRA § 6000(c)(4), 42 U.S.C. § 6961(c)(4) (1988), amended by Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

immunity for storage violations involving mixed waste was a compromise adopted to prevent a presidential veto of the legislation. Because Congress did not intend the provision to extend existing sovereign immunity, injunctive relief will remain available for violations of section 3004(j) in the interim. While DOE has petitioned EPA for a one year, case-by-case variance from the RCRA land ban for mixed waste, the conference report indicates that the Act's delay of the effective dates for fines and penalties for section 3004(j) violations obviates any need for such a waiver.

The Federal Facility Compliance Act also includes provisions to force DOE to develop a plan for cleaning up the enormous quantities of mixed waste it already has generated. They require the Secretary of Energy to provide EPA and the governor of each state where DOE stores or generates mixed wastes with a comprehensive state-by-state inventory of the sources and amounts of such wastes. This inventory is to include a five year estimate of the amount of each type of mixed waste that DOE expects to generate at each facility and information concerning the technology available for treating such wastes. The Act requires DOE to submit a detailed description of its plans for treating mixed wastes and for identifying and developing treatment technologies for wastes for which no treatment technology currently exists. Either EPA or states with delegated RCRA program authority must review and approve the plans, which are then to be incorporated in administrative orders requiring compliance with the plans.¹⁵²

To improve EPA enforcement, the Act also amends section 3007(c) of RCRA to require EPA to inspect annually each federal facility used for the treatment, storage, or disposal of hazardous waste even in states authorized to administer the RCRA program.¹⁵³ The 1984 Hazardous and Solid Waste Amendments had previously required EPA to make such inspections only in states without delegated program authority. The federal agency that owns or operates the facility must reimburse EPA for the costs of such inspection. The initial EPA inspection must include groundwater monitoring unless it has been performed during the year prior to enactment.

152. RCRA § 3021, *amended by* Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992). The Act also requires the General Accounting Office to submit a report to Congress on the DOE's compliance with these new requirements by April 6, 1994.

153. RCRA § 3007(c), 42 U.S.C. § 6927(c), *amended by* Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

A particularly significant provision in FFCA is its express authorization for EPA to bring administrative enforcement actions against other federal agencies. While EPA had contended that it had such authority under RCRA, the Justice Department maintained that it would violate constitutional principles of separation of powers for EPA to issue administrative orders against another executive agency, a position undermined by *Morrison v. Olson*.¹⁵⁴ The Conference report describes the Act's express endorsement of EPA administrative enforcement actions against federal facilities as an effort "to reaffirm the original intent" of RCRA.¹⁵⁵ The report states that EPA should use its section 3008(a) administrative order authority against federal facilities for the same types of violations for which it is used against private parties.¹⁵⁶ EPA had complained that other federal agencies were reluctant to negotiate compliance agreements because EPA had no credible threat of enforcement leverage to use against them in the absence of such an agreement. With the use of its new administrative enforcement authority, EPA will be able to move more rapidly to penalize recalcitrant agencies. The FFCA requires that EPA give a defendant agency an opportunity to confer with the EPA Administrator before any administrative order can become final.

To respond to concerns expressed by the Department of Defense, the Act requires EPA to clarify when military munitions become a hazardous waste regulated under RCRA Subtitle C.¹⁵⁷ To ease concerns about the application of Subtitle C to military vessels that generate and store hazardous waste, the Act exempts wastes generated on public vessels from RCRA until transferred to a shore facility unless the waste is stored on the vessel for more than ninety days after the vessel is no longer in service.¹⁵⁸ At DOD's behest, the Act also extends RCRA's domestic sewage exclusion to apply to federally owned wastewater treatment works.¹⁵⁹ This will exempt from RCRA regulation hazardous waste placed in sewage systems served by such treatment

154. 487 U.S. 654, 695-96 (1988).

155. 138 CONG. REC. H8865 (daily ed. Sept. 22, 1992) (conference committee statement).

156. *Id.*

157. RCRA § 3004(y), 42 U.S.C. § 6924(y), amended by Federal Facilities Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

158. RCRA § 3022, amended by Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

159. RCRA § 3023, amended by Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

works. The Conference report states that this is not to be interpreted "as an endorsement of the domestic sewage exclusion," which Congress pledges to revisit in the future.¹⁶⁰

The central purpose of the Federal Facility Compliance Act is to overturn the Supreme Court's decision in *DOE v. Ohio* and to "reaffirm the original intent of Congress that each department, agency, and instrumentality of the United States be subject to all of the provisions" of federal, state, or local solid and hazardous waste regulations.¹⁶¹ While the legislation effectively overrules the *DOE v. Ohio* Court's holding concerning RCRA, the scope of the congressional waiver of sovereign immunity is even broader than the penalties at issue in that decision. It makes the federal government subject "to the full range of available enforcement tools . . . to penalize isolated, intermittent or continuing violations as well as to coerce future compliance." This provision effectively precludes assertion by federal defendants of a *Gwaltney* defense in citizen suits alleging violations of RCRA.¹⁶²

In *Gwaltney* the Supreme Court held that citizen enforcement suits under the Clean Water Act could not be brought for wholly past violations. The Court stated that the language of section 505 of the Act, which authorizes suits against any person "alleged to be in violation" of the Act, required plaintiffs to make at least a "good faith allegation of continuous or intermittent violation" in order for a court to hear the case. By barring federal facilities from asserting a *Gwaltney* defense, Congress has indicated its belief in the importance of penalizing past violations as a means for promoting the goals of general deterrence.¹⁶³

160. 138 CONG. REC. H8868 (daily ed. Sept. 22, 1992) (conference committee statement).

161. 138 CONG. REC. H8864 (daily ed. Sept. 22, 1992) (conference committee reports).

162. As the Conference report explains:

By subjecting the federal government to penalties and fines for isolated, intermittent, or continuing violations, the waiver also makes it clear that the federal government may be penalized for any violation of federal, state, interstate or local law whether a single or repeated occurrence, notwithstanding the holding of the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

Id.

163. In a statement issued upon signing the Federal Facility Compliance Act, President Bush maintained that Congress could not overrule *Gwaltney* legislatively because the decision "rested in part on constitutional principles of standing and mootness." Statement on Signing Legislation Waiving Federal Immunity Relating to Solid and Hazardous Waste, 28 WEEKLY COMP. PRES. DOC. 1869 (Oct. 6, 1992). To support this position, the President's signing statement cited a portion of a concurring opinion in

Taken as a whole, the FFCA is a powerful reaffirmation by Congress of the principle that the environmental laws should apply equally to private and public entities. In the FFCA Congress rejected the Supreme Court's attempts to limit this principle only to application of the requirements and procedures of the laws and reaffirmed its intention to extend the principle also to the enforcement mechanisms available under RCRA. By removing uncertainty concerning the enforcement mechanisms states may use against federal facilities, the legislation should facilitate state efforts to bring federal facilities into compliance with hazardous waste regulations. Even those who argued that this uncertainty could have been avoided by better use of interpretive principles conceded that new legislation would be necessary to satisfactorily resolve the discrepancies in language between the federal facilities provisions in the various environmental laws.¹⁶⁴

While the enactment of the FFCA overrides the holding of *DOE v. Ohio* with respect to RCRA, it does not address the question of federal immunity under the Clean Water Act. This does not in any way reflect congressional support for the Court's conclusion that federal facilities are immune from punitive penalties under the Clean Water Act. Rather, it reflects the fact that the federal facilities legislation pending before a conference committee at the time *DOE v. Ohio* was announced addressed only RCRA. Legislation amending the Clean Water Act falls within the jurisdiction of a different set of congressional committees. Many people in the environmental community had assumed that courts would interpret the Clean Water Act's waiver of sovereign immunity to authorize states to recover civil penalties, particularly be-

Gwaltney, where Justice Scalia argued that if a defendant had come into compliance by the time a suit was filed, citizen plaintiffs would have "no remediable injury in fact that could support suit." *Id.* (citing 484 U.S. 49, 70 (Scalia, J., concurring in part and concurring in judgment)). However, this extreme view of the standing doctrine was rejected by the *Gwaltney* majority, 484 U.S. at 65-67, and by the Fourth Circuit on remand. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 698 (4th Cir. 1989). Justice Scalia's attempts to interpret the redressability prong of standing doctrine in a manner that would greatly limit access to the courts have not commanded a majority of the Court, as indicated most recently in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), where a majority of the Court found that citizen plaintiffs lacked standing, but only three justices joined Justice Scalia's opinion on the redressability issue. Moreover, the President's constitutional objection to the reversal of *Gwaltney* in the Federal Facility Compliance Act is particularly inapposite because civil penalties in state enforcement actions will be paid to the states, unlike the situation discussed by Justice Scalia in *Gwaltney* where civil penalties imposed in a citizen suit are returned to the federal treasury rather than being paid to the plaintiffs.

164. Murchison, *supra* note 11, at 202, 210.

cause Congress adopted the 1977 Amendments to the Act to override the Supreme Court's decision in *Water Resources Control Board*. If anything, the enactment of the FFCA virtually guarantees that similar legislation waiving federal immunity from civil penalties will be adopted when the Clean Water Act is reauthorized, perhaps in the next session of Congress.

While the Court's decision in *DOE v. Ohio* served as a catalyst for amending RCRA, it increased the administration's leverage during final negotiations on the FFCA by placing the burden of inaction on those seeking a waiver of sovereign immunity from civil penalties. As a result, DOE and DOD were successful in winning a three year delay in the effective date of the sovereign immunity waiver for violations involving storage of mixed waste. While this establishes a temporary statutory exception to the principle of equal application of the law to public and private entities, it appears to have been a necessary compromise in order to avoid a presidential veto. Because the FFCA's expanded waiver of immunity is prospective in nature, *DOE v. Ohio* also eliminates any prospect of recovery of civil penalties in cases pending at the time of the decision. However, noncompliance at federal facilities is so widespread that states and citizen groups are likely to file suit seeking civil penalties for violations in the near future. Even the three year delay in the effective date of the waiver of immunity with respect to mixed waste violations will not insulate facilities from immediate liability for violating existing compliance agreements. Coupled with the EPA's new administrative order authority that gives the agency more leverage in dealing with sister agencies, it is likely that previously unenforceable interagency agreements will be replaced with compliance orders enforceable in court by states and citizen groups.¹⁶⁵ While the FFCA will not have much impact on criminal enforcement, the controversy brewing over the Rocky Flats plea bargain may generate renewed pressure for more aggressive criminal enforcement against egregious federal violators.

By waiving sovereign immunity for civil penalties, the FFCA restores an essential tool for enforcement against federal agencies that violate RCRA. However, it is far from clear how powerful the prospect of civil penalties will be in inducing compliance by federal agencies. The penalties heretofore sought from federal agencies under

165. Telephone interview with Melinda Kassen, Environmental Defense Fund (Oct. 12, 1992).

RCRA have been remarkably small.¹⁶⁶ Moreover, there is considerable uncertainty concerning where the funds will come from to pay such penalties. While the House committee report indicated that the Justice Department's judgment fund would be the source for payment of penalties in contested cases, President Bush's signing statement on the FFCA specifies that "fines or penalties imposed as a result of this legislation will be paid from agency appropriations, unless otherwise required by law."¹⁶⁷ President Bush maintained that payment of penalties from the Justice Department's judgment fund "would take away the coercive effect penalties might have on the agencies and turn the waiver of sovereign immunity into a revenue sharing program."¹⁶⁸ However, if this policy makes penalties more difficult to collect from federal agencies, it could dilute some of the force of the FFCA. Ultimately, an effective remedy for environmental violations by federal facilities will require the combination of an executive branch truly committed to compliance with the environmental laws and a Congress willing to appropriate the funds necessary to overcome decades of willful neglect.

V. CONCLUSION: INTERPRETIVE FORMALISM AND THE IMPLEMENTATION AND ENFORCEMENT OF PUBLIC LAW

By repeatedly overriding the Supreme Court's narrow interpretations of waivers of sovereign immunity in the environmental laws, Congress has indicated that the traditional, private law principle that such waivers are to be narrowly construed has diminished vitality in public law contexts. The legislation overriding *DOE v. Ohio*, *Hancock*, and *Water Resources Control Board*, repudiates judicial decisions that were founded on application of this interpretive principle to trump arguments in support of equal application of the environmental laws to public and private entities. Yet the explosive growth of public law to protect the environment reflects a commitment to making government agencies more responsive to the beneficiaries of regulation by subjecting such agencies to legal sanctions when they violate the law or fail to

166. The House committee report on the FFCA identifies 27 instances in which states sought civil penalties against federal facilities under RCRA. The amounts ranged from \$61 to \$125,000 with an average penalty of \$4,750. H.R. REP. NO. 111, 102d Cong., 1st Sess. 14 (1991), reprinted in 1992 U.S.C.C.A.N. 128.

167. Statement on Signing Legislation Waiving Federal Immunity Relating to Solid and Hazardous Waste, 28 WEEKLY COMP. PRES. DOC. 1869 (Oct. 6, 1992).

168. *Id.*

perform their statutory responsibilities. By employing interpretive principles that narrowly construe legislative waivers of sovereign immunity, the Court forced Congress to spell out its intentions with greater precision; a laudable goal, but one that has been achieved only at a high cost given the consequences of the Court's decisions for the implementation and enforcement of public law.¹⁶⁹ The decisions contributed to a pattern of resistance and delayed compliance by federal facilities that has culminated in truly horrendous environmental contamination problems at many of them.¹⁷⁰

Ironically, the very ambiguities or omissions that the Court cited in defense of its narrow interpretations appear to be largely the product of the piecemeal manner in which Congress updates the environmental laws. Although Congress consistently has sought to embrace the principle of equal application of the environmental laws to federal facilities when reauthorizing major environmental statutes, the greater specificity of the language inserted into the newly reauthorized statutes can always be cited as a reason for inferring that the older statutes should not be construed as broadly.¹⁷¹ Thus, while "the year in which the

169. The litigation that culminated in *Hancock* and *Water Resources Control Bd.* effectively prevented states from regulating federal facilities under the Clean Air Act and Clean Water Act until seven years after their initial enactment. While Congress responded by amending these laws a year after the decisions, litigation over the ability of states to impose civil penalties on federal facilities has continued to make effective enforcement against them difficult. Immunity from civil penalties substantially reduced the incentives for federal agencies to obey the environmental laws. Only after a court imposed an equitable remedy would federal facilities face any credible threat of being penalized for environmental violations. Thus, Ohio officials were correct when they argued that civil penalties are an essential component of the regulatory scheme because they are necessary to deter illegal activity at federal facilities. *Cf.* Murchison, *supra* note 11, at 223 ("By relying on a dubious rule of strict construction and failing to place the statutory language in historical context, the federal courts have substantially assisted the executive agencies in delaying for more than two decades the environmental compliance that Congress has ordered.").

170. As Justice Stevens has argued:

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take the time to revisit the matter" and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.

West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1155 (1991) (Stevens, J., dissenting).

171. *See, e.g.*, *DOE v. Ohio*, 112 S. Ct. at 1634 n.12 (noting that the Medical Waste Tracking Act of 1988, 42 U.S.C. § 6992e(b) (1988) uses more specific language to define the term "person" as including the United States).

respective provisions were last amended provides the best explanation of differing statutory language,"¹⁷² courts narrowly construing waivers of sovereign immunity could find a basis for frustrating Congress' efforts to provide effective enforcement mechanisms against federal facilities. This principle of statutory construction, coupled with the ingenuity of federal agencies, meant that the early overrides were less successful than Congress anticipated because they often solved the problem of the last judicial decision instead of anticipating new disputes.¹⁷³

Cass Sunstein has argued that courts should employ a new set of interpretive principles in construing regulatory legislation in order to reflect the consequences of the shift from private law to public law regimes.¹⁷⁴ Among the interpretive principles that he deems obsolete in light of the ascendance of public law is the principle that statutes abrogating sovereign immunity should be narrowly construed.¹⁷⁵ The concerns upon which this principle is founded are not present when federal agencies engage in activities proscribed by public law. Thus, it would be more appropriate for courts to reverse the presumption and to refuse to recognize federal immunity under the environmental laws in the absence of clear congressional intent to authorize it. This conclusion is supported by the consistent history of congressional efforts to apply environmental legislation to public and private entities alike, with narrow exemptions authorized for federal facilities only in extraordinary circumstances.

While the *DOE v. Ohio* Court did not discuss Ohio's arguments in favor of a broader rule of construction of sovereign immunity waivers, in other cases the Court has indicated some willingness to eschew private law principles of statutory construction in public law contexts. For example, in *Bowen v. City of New York* the Court commented that it "must be careful not to 'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restric-

172. Murchison, *supra* note 11, at 186.

173. Murchison, *supra* note 11, at 202.

174. For a detailed description of these arguments, see CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990) [hereinafter *AFTER THE RIGHTS REVOLUTION*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) [hereinafter *Interpreting Statutes*].

175. See *Interpreting Statutes*, *supra* note 173, at 506; *AFTER THE RIGHTS REVOLUTION*, *supra* note 174, at 236.

tively.'"¹⁷⁶ Citing this language, the Court in *Irwin v. Veterans' Administration* announced that when Congress has waived sovereign immunity, rules of equitable tolling should be applicable to suits against the government in the same way that they are applicable to suits against private parties.¹⁷⁷ In similar fashion, the Court should reverse the traditional presumption in favor of narrow construction of waivers of sovereign immunity to require clear congressional intent before public entities are exempted from environmental laws applicable to private parties.

The Supreme Court's constructions of sovereign immunity waivers in the environmental statutes are not the only Court decisions in the environmental area which Congress has overridden.¹⁷⁸ While they have been of some value in encouraging Congress to update and clarify the laws,¹⁷⁹ the Court's decisions narrowly interpreting sovereign immunity waivers in the environmental statutes have delayed implementation and enforcement of the laws by employing interpretive principles ill-suited to the public law domain in which the modern environmental statutes operate. Application of a less formalistic approach to interpretation of the environmental statutes would promote the goals of public law and avoid the need for Congress to continue to override grudging judicial interpretations of the laws.

176. *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (quoting *United States v. Kubrick*, 444 U.S. 111, 118 (1979)).

177. *Irwin v. Veterans' Admin.*, 111 S. Ct. 453, 457 (1990).

178. William Eskridge identifies nine Supreme Court decisions in environmental cases that have been overridden at least in part by Congress since 1977: *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986); *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116 (1985); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1984); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Hancock v. Train*, 426 U.S. 167 (1976); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *Fri v. Sierra Club*, 349 F. Supp. 253 (D.D.C. 1982), *aff'g by an equally divided Court*, 412 U.S. 541 (1983). See Eskridge, *supra* note 9, at 424-37 (1991). As noted above, this list should also include the override of *Water Resources Control Bd.* by the 1977 Clean Water Act Amendments.

179. See Eskridge, *supra* note 9, at 407, 413.