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Let's Clear the Air: Enforcing Civil Penalties Against Federal Violators of the Clean Air Act

Lisa M. Schenck
George Washington University Law School, lschenck@law.gwu.edu

LET'S CLEAR THE AIR: ENFORCING CIVIL PENALTIES AGAINST FEDERAL VIOLATORS OF THE CLEAN AIR ACT

by

Lisa M. Schenck*

The Clean Air Act (CAA) includes enforcement provisions by which violators of the Act can be held civilly liable for penalties. When federal agencies violate the CAA, however, the Constitution and the sovereign immunity doctrine serve as obstacles to civil enforcement. Federal agencies contend that the Constitution's separation of powers doctrine, unitary executive theory, and "case or controversy" justiciability requirement bar the United States Environmental Protection Agency (EPA) from proceeding against them in civil enforcement actions. This Article addresses these arguments and examines the executive branch's approach to enforcing the Act against federal agencies.

Federal agencies also have asserted the sovereign immunity doctrine as a defense to civil suits by states, local governments, and citizens. This doctrine protects the federal government from lawsuits unless Congress has explicitly waived sovereign immunity in a statute. While there is some evidence that Congress has intended to waive federal immunity in the CAA, federal courts have inconsistently applied such waivers. This Article examines the developing judicial applicability of the CAA's sovereign immunity waiver by comparing its language and legislative history to that of other environmental statutes. This Article provides a similar review of federal employee liability for civil penalties under the CAA and concludes that federal employees also enjoy a qualified common law and statutory immunity.

Based upon an evaluation of the obstacles various entities face in

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* Lieutenant Colonel, Judge Advocate General's Corps, United States Army. Currently assigned as Executive Officer, Criminal Law Division, Office of The Judge Advocate General, Headquarters, Department of the Army. J.S.D. Candidate, Yale Law School; L.L.M. 1998, Yale Law School; L.L.M. 1995, The Judge Advocate General's School, United States Army; J.D. 1989, Notre Dame Law School; M.P.A. 1986, Fairleigh Dickinson University; B.A. 1983, Providence College. The opinions and conclusions represented in this article are solely those of the author, and do not necessarily represent the views of the Department of Defense (DOD), the Department of the Army, The Judge Advocate General, or any governmental agency.

bringing a civil suit against a federal agency or an agency's employee, this Article concludes that civil liability is not the optimal means of enforcing the Act and proposes an alternate method of gaining federal facility compliance. It recommends that enforcement authorities and federal agencies establish a negotiation system designed to produce bilateral agreements. Through this system, parties could bargain towards the achievement of the ultimate shared goal of environmental preservation.

CONTENTS

I. Introduction 843

II. Obstacles to EPA, States, Local Governments, or Citizens Acting Against Agencies 844

A. Constitutional Concerns with EPA Enforcement . . . 844
1. Separation of Powers 845
2. Unitary Executive Theory 846
3. Article III "Case or Controversy" Justiciability Concerns 847
B. Executive Branch Response to EPA Enforcement Against Federal Violators of the CAA 848
1. The Chief Executive's Approach 848
2. The 1990 CAA Amendments Add Enforcement Options for EPA 850
3. DOJ's Position on the Unitary Executive Theory 850
4. DOJ's Position on Justiciability 851
5. EPA's Policy on Implementing its Penalty Authority 852
6. Congressional Interest in Department of Defense Spending for Environmental Penalties 853
C. The Sovereign Immunity Doctrine as an Obstacle to States, Local Governments, or Citizens Enforcing the CAA 854
1. Federal Common Law Immunity 855
2. RCRA and the CWA as Models for the CAA . . 857
3. Sovereign Immunity Waivers and the CAA . . . 863

III. Federal Employee Personal Liability for Civil Penalties 876

A. Qualified Immunity for Employees 876
B. Federal Employee Immunity in the CAA 877
C. A Comparative Analysis With Other Environmental Laws: Statutory Differences Lead to Varying Interpretations 879

IV. Proposed Solution: Using Bargaining to Gain Optimum Federal Facility Environmental Compliance with the CAA 880

A. Consequences of Civil Penalties on Federal Facilities 880
B. Viability of Federal Employee Liability 883
C. Bargaining Achieves Shared Goals 884
D. Realistic Limitations 888

V. Conclusion 889

I. INTRODUCTION

Courts have characterized the Clean Air Act (CAA or "Act")[1] as an "experiment in cooperative federalism."[2] This characterization is based on the structure of the Act itself, which requires the federal government to set air quality standards[3] and mandates that states implement the Act.[4] Very often, federal agencies do not meet federally-mandated air quality requirements. When federal agencies violate the CAA, the U.S. Environmental Protection Agency (EPA or "Agency"), state authorities, local governments,[5] and citizens all may become involved in air quality enforcement.[6] An issue that arises in such cases is whether these entities may impose CAA civil penalties against the federal facilities and their employees.

These cases often involve two types of conflicts: (1) federal agency versus federal agency and (2) state, local sovereign, or citizen versus federal sovereign. Recognizing that enforcement issues differ depending on whether EPA, a state, local government, or citizen initiates a lawsuit and whether the suit targets an agency or an agency's employee, this Article analyzes the obstacles faced by any entity that brings a civil suit against a federal agency or employee. Based upon this evaluation, this Article concludes that civil liability is not the optimal means of enforcing the CAA and proposes a method that would be more effective and potentially beneficial for both sides of the enforcement effort.

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[1] Clean Air Act (CAA) §§ 101–618, 42 U.S.C. §§ 7401–7671q (1994).

[2] Connecticut v. EPA, 696 F.2d 147, 151 (2d Cir. 1982).

[3] *See* CAA § 109, 42 U.S.C. § 7409.

[4] *See id.* § 110(a), 42 U.S.C. § 7410(a).

[5] *See id.* § 306(a), 42 U.S.C. § 7606(a).

[6] *See id.* § 304(a), 42 U.S.C. § 7604(a). Subsection (a) of section 304 allows citizens to bring civil suits. *See id.* In addition to civil penalties, the U.S. Environmental Protection Agency (EPA) may bring criminal charges under the CAA. *See id.* § 113(c), 42 U.S.C. § 7413(c). This article focuses only on the feasibility of using *civil* penalties to enforce the CAA against federal facilities or federal employees. For a discussion of federal employee criminal liability under environmental statutes, see James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279 (1991); Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees*, 18 HARV. ENVTL. L. REV. 137 (1994); 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 (1991). EPA also may impose administrative penalties without court action. *See* CAA § 113(d), 42 U.S.C. § 7413(d).

Part II of this Article discusses the constitutional concerns that impede EPA and others from enforcing the CAA against federal entities and examines the evolution of both the President's and the Department of Justice's (DOJ's) approaches to enforcing the Act against federal agencies. This part continues with an analysis of the manner in which the sovereign immunity doctrine impedes CAA enforcement against federal facilities, including the judicial inconsistencies in defining the extent to which the CAA exposes federal agencies to civil penalties. Part II concludes with the observation that civil penalties are not an effective means for enforcing the CAA against federal agencies.

Part III reviews whether enforcement authorities may impose civil penalties against federal employees under the CAA. This discussion considers common law protection provided to employees, analyzes the current law, reviews the CAA's legislative history, and compares the CAA to the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). All of these considerations lead to the conclusion that federal employees cannot, or should not, be held personally responsible for agency violations of the CAA.

Part IV suggests a method of gaining optimum federal facility compliance with the CAA. In particular, the Article recommends that enforcement authorities and federal agencies establish a negotiation system designed to produce bilateral agreements. Under such a system, parties would trade incentives while achieving the ultimate shared goal of environmental preservation.

II. OBSTACLES TO EPA, STATES, LOCAL GOVERNMENTS, OR CITIZENS ACTING AGAINST AGENCIES

When a federal agency violates the CAA, various entities may try to compel compliance through civil penalties. When EPA does this, it encounters constitutional obstacles that may hinder it from enforcing the CAA. Similarly, federal sovereign immunity sometimes prevents states, local governments, and citizens from being able to enforce the Act.

A. Constitutional Concerns with EPA Enforcement

Particular constitutional provisions impede EPA enforcement of the CAA against federal facilities. Federal agencies may contend that the Constitution's separation of powers doctrine, unitary executive theory, or "case or controversy" justiciability requirement bar EPA from proceeding against them in civil enforcement actions. While these

constitutional considerations may not necessarily preclude courts from hearing such cases, these considerations have caused DOJ to hesitate before proceeding against federal agencies.[7]

1. Separation of Powers

The separation of powers doctrine restricts one branch from encroaching on another branch's exercise of power.[8] This theory is not clearly reflected in the Constitution; it is a judicial creation that has evolved from the Supreme Court's interpretations of the Framers' intent.[9] The Supreme Court has construed the separation of powers doctrine to prohibit one branch from expanding its own authority at the expense of another branch, usurping power from another branch, and interfering with the exercise of another branch's power.[10]

One theory that has stemmed from this doctrine is that the judiciary is prohibited from resolving any dispute between two executive branch agencies.[11] Based on the belief that such a matter should be resolved within the executive branch itself,[12] some courts may consider resolving intrabranch disputes as an "encroachment and aggrandizement of one branch at the expense of another."[13] As all federal agencies are part of

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[7] *See* Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 896–97 (1991). Because federal statutes direct the Department of Justice (DOJ) to litigate the cases in which the United States is a party, DOJ provides judicial enforcement for EPA and controls what enforcement proceedings EPA and other federal agencies may litigate. *See* 28 U.S.C. §§ 516–519 (1994). DOJ has discouraged EPA from proceeding against federal facilities in the past, so the judiciary has not had the opportunity to address the constitutional defenses of separation of powers, unitary executive theory and justiciability as they relate to intrabranch disputes between EPA and federal agencies. *See* Kevin J. Luster, *The Field Citation Program Under the CAA: Can EPA Apply It to Federal Facilities?*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 71, 139–40 (1997).

[8] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872) ("It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others.").

[9] *See id.*

[10] *See* Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317, 341–42 (1990).

[11] *See id.*

[12] *See id.* at 342.

[13] Buckley v. Valeo, 424 U.S. 1, 122 (1976). The U.S. Supreme Court in Mistretta v. United States, 488 U.S. 361 (1989), reinforced the importance of the separation of governmental powers into three coordinate branches, but also recognized, "that while our

the executive branch, the separation of powers doctrine may apply in cases in which EPA sues another federal agency in federal court to enforce the CAA.

This separation of powers concern, however, seems to be more of a concern for DOJ than for the courts. When faced with an intrabranch dispute, courts are likely to find that because the branches are independent, judicial resolution would not violate "the principle of separation of powers by unduly interfering with the role of the Executive Branch."[14]

2. *Unitary Executive Theory*

A second constitutional hurdle that federal facilities, DOJ, or the judiciary may raise when EPA attempts to enforce the CAA against other federal agencies is the unitary executive theory.[15] This theory stems from the belief that because Article II of the Constitution grants power and control over the executive branch to the President,[16] the Executive Branch should resolve all disputes among federal agencies, including those that arise between EPA and a federal violator of the CAA.[17]

The unitary executive theory also calls for the executive branch to subscribe to a unified stance, derived from the President, for any given public policy issue.[18] Based on this principle, agencies may not

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Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others' . . . the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." *Id.* at 380 (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (citations omitted)). To unravel a separation of powers challenge, courts must determine whether one branch is interfering with another's constitutionally authorized functions, and if interference exists the court balances the interfering branch's need to promote its objective against the interference's impact. *See* Steinberg, *supra* note 10, at 343.

[14] Morrison v. Olson, 487 U.S. 654, 693 (1988).

[15] *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995) (examining the expansion and concentration of executive power over the past 200 years); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (finding that the unitary executive theory finds support by analogy to the Constitution's restriction on Congress' power to affect the jurisdiction of federal courts).

[16] U.S. CONST. art. II, § 1, cl. 1.

[17] *See* Steinberg, *supra* note 10, at 325.

[18] *See* Melinda R. Kassen, *The Inadequacies of Congressional Attempts to Legislate*

maintain opposing positions or take any judicial or administrative enforcement actions against other agencies.[19] Proponents of this theory call for resolutions within the executive branch, perhaps by arbitration conducted through the Office of Management and Budget (OMB).[20]

When enforcing the CAA against federal agencies, EPA has responded to concerns stemming from the unitary executive theory by highlighting that the CAA authorizes EPA to exercise administrative enforcement authority consistent with Article II.[21] EPA contends that the CAA provides "sufficient discretion to the affected parties so that complete resolution of the dispute may occur within the Executive Branch, up to and including referral to the President of any issues that are not otherwise resolved, and the President is not deprived of his opportunity to review the matter in dispute."[22]

3. *Article III "Case or Controversy" Justiciability Concerns*

A further consideration in determining whether EPA can bring an enforcement action for civil penalties against another federal agency is the "case or controversy" requirement found in Article III of the Constitution.[23] The Supreme Court has interpreted Article III to require an adversarial relationship between the parties involved in litigation to ensure that the judicial branch will address actual controversies and not render advisory opinions.[24] Therefore, because EPA and other federal agencies belong to the executive branch, any conflict between them may be a nonjusticiable request for an advisory opinion. This concern would

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Federal Facility Compliance with Environmental Requirements, 54 MD. L. REV. 1475, 1484 (1995).

[19] *See id.*

[20] *See id.*

[21] *See* Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, EPA, and Judith A. Miller, General Counsel, Department of Defense, *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act* pt. IV.A. (July 16, 1997) (citing EPA, Memorandum on Assessment of Administrative Penalties Against Federal Facilities under the Clean Air Act (Sept. 11, 1995)) [hereinafter DOJ Opinion Memorandum] (visited June 1, 2000) <http://www.usdoj.gov/olc/mem_ops.htm>.

[22] *Id.* (quoting Letter from Jonathan Z. Cannon, General Counsel, EPA, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, EPA, *Memorandum on Assessment of Administrative Penalties Against Federal Facilities Under the Clean Air Act* 1 (Sept. 11, 1995)).

[23] U.S. CONST. art. III, § 2.

[24] *See* Muskrat v. United States, 219 U.S. 346, 357 (1911).

particularly arise when EPA initiates civil actions to enforce administrative orders or obtain punitive civil penalties against another federal agency.[25]

These justiciability concerns especially influence the CAA's enforcement provisions in section 113(d) that appear to allow civil litigation between federal agencies.[26] Under CAA section 113(d), federal agencies may initiate civil actions contesting EPA administrative orders, increasing the likelihood that EPA will face another agency in court.[27] Federal agencies, however, have contended that the CAA should not be interpreted to authorize civil litigation between EPA and other federal agencies because this would raise Article II and Article III concerns.[28]

B. Executive Branch Response to EPA Enforcement Against Federal Violators of the CAA

Within the executive branch, the President, DOJ, and EPA have each addressed these constitutional obstacles to EPA's ability to enforce against federal violators of the CAA.

1. The Chief Executive's Approach

The President has attempted to ensure federal facility compliance and secure a unified front for EPA and federal agencies. In keeping with the unitary executive theory, the executive branch historically has attempted to resolve conflicts within the branch without resorting to enforcement options. Because DOJ is tasked with representing federal agencies in litigation, both presidential executive orders and EPA's program were designed to resolve conflicts without judicial action "either threatened or contemplated."[29]

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[25] *See* James B. Doyle, *"Who Will Watch the Watcher?": Using Independent Counsel to Compel Federal Facilities to Comply with Federal Environmental Laws*, 26 VAL. L. REV. 671, 684–85 (1992).

[26] CAA § 113(d)(4), 42 U.S.C. § 7413(d)(4) (1994).

[27] *Id.* § 113(d)(4)–(5), 42 U.S.C. § 7413(d)(4)–(5).

[28] *See* DOJ Opinion Memorandum, *supra* note 21, pt. II.

[29] Michael Donnelly & James G. Van Ness, *The Warrior and the Druid—The DOD and Environmental Law*, FED. B. NEWS & J. 37, 38 (1986).

In 1978, President Jimmy Carter issued Executive Order No. 12088, *Federal Compliance with Pollution Control Standards*,[30] and limited EPA's federal enforcement options against federal facilities. Through this order, President Carter directed each executive agency to cooperate and consult with EPA, state, and local environmental authorities, and required federal agencies to resolve conflicts and achieve compliance.[31] Additionally, the President directed the Office of Management and Budget to resolve intrabranch disputes.[32] President Carter, however, created this resolution process "in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards."[33] One year later, President Carter issued another executive order encouraging executive agencies to submit intrabranch legal disputes to the Attorney General before taking them to court.[34] Subsequently, in 1984, EPA established the Federal Facilities Compliance Program to facilitate negotiations for compliance agreements.[35]

In 1990, the National Governors' Association and National Association of Attorneys General Task Force on Federal Facilities commented that due to the unitary theory of the executive, EPA had "little muscle with other federal agencies."[36] The Task Force pointed to EPA's Federal Facility Compliance Program, in which EPA stated it would not bring civil suits against other executive branch agencies and would "not assess civil penalties against Federal facilities."[37] Today, however, EPA has a Federal Facilities Enforcement Office that is responsible for ensuring federal facility compliance and enforcement.[38]

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[30] Exec. Order No. 12,088, 3 C.F.R. 243 (1978).

[31] *See id.* at 244.

[32] *See id.* at 245.

[33] *Id.*

[34] *See Management of Federal Legal Resources*, Exec. Order No. 12,146, 44 Fed. Reg. 42,657, 42,658 (1979).

[35] Donnelly & Van Ness, *supra* note 29, at 38 & 42 n.3.

[36] NAT'L GOVERNORS' ASS'N AND NAT'L ASS'N OF ATT'YS GEN. TASK FORCE ON FED. FACILITIES, FROM CRISIS TO COMMITMENT: ENVIRONMENTAL CLEANUP AND COMPLIANCE AT FEDERAL FACILITIES 7 (1990).

[37] *Id.*

[38] *See* Office of Enforcement and Compliance Assurance, EPA, *Federal Facilities Enforcement Office* (visited June 1, 2000) <http://es.epa.gov/oeca/ fedfac/fflex.html>.

2. *The 1990 CAA Amendments Add Enforcement Options for EPA*

In 1990, Congress amended the CAA to provide EPA with additional enforcement options under section 113.[39] Section 113(d) grants EPA authority to impose administrative penalties for violations of the CAA without requiring court action. The result is that DOJ representation is not necessary unless there is a need for subsequent judicial enforcement.[40] Therefore, EPA now may issue administrative enforcement orders and assess civil penalties at an administrative hearing without a court order or DOJ representation.[41]

As part of the 1990 Amendments, EPA also obtained authority to establish a field citation program for minor CAA violations.[42] EPA has established such a program, and it "intends to apply [this] program to federal agencies."[43] This will serve as the first program through which EPA will assess civil penalties against federal agencies that violate the CAA.[44]

3. *DOJ's Position on the Unitary Executive Theory*

In the past, DOJ used the unitary executive theory to support its position that EPA may not issue administrative compliance orders against other federal entities[45] and asserted that the President should control all enforcement or disciplinary actions within the executive branch.[46] More recently, however, DOJ has agreed with EPA's position and abandoned the use of the unitary executive theory as a shield, observing that "it is not inconsistent with the Constitution for an executive agency to impose a penalty on another executive agency pursuant to its statutory authority so long as the President is not deprived of his opportunity to review the matter."[47] DOJ has

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[39] *See* CAA Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§ 7401–7671q (1994)).

[40] *See* CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1); Luster, *supra* note 7, at 74.

[41] *See id.*

[42] *See* CAA § 113(d)(3), 42 U.S.C. § 7413(d)(3).

[43] Luster, *supra* note 7, at 71 (footnote omitted).

[44] *See id.*

[45] *See* Doyle, *supra* note 25, at 681.

[46] *See id.* at 681–82.

[47] DOJ Opinion Memorandum, *supra* note 21, pt. II.A. (quoting Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. Off.

determined that the CAA provisions do not conflict with Article II because "the Act does not preclude the President from authorizing any process he chooses to resolve disputes between EPA and other federal agencies."[48] Essentially, the CAA does not limit the President's discretionary review authority because the Attorney General and the President may review the penalties that EPA assesses and may decide not to enforce them.[49]

4. DOJ's Position on Justiciability

DOJ also has used the "case or controversy" requirement as a ground for declining to enforce EPA administrative orders against federal agencies.[50] In 1985, the DOJ Office of Legal Counsel took a staunch position on this issue.[51] In response to EPA's desire to enforce RCRA against the Department of Energy, the Office of Legal Counsel noted that "[t]here are no cases in which disputes between two agencies, both of whose heads serve at the pleasure of the President, have been found justiciable . . . . Accordingly, a suit brought by the EPA against the Department of Energy, or any other Executive Branch agency whose head serves as [sic] the pleasure of the President, would be nonjusticiable."[52] From DOJ's perspective, this seems to be a justifiable position because DOJ would be representing both sides in the dispute.

In 1997, however, DOJ announced a modified position in an Office of Legal Counsel Memorandum for EPA and the Department of Defense (DOD).[53] This memorandum reflects DOJ's transition to supporting EPA enforcement against federal facilities. It noted that EPA's administrative enforcement authority under the CAA "can be exercised consistent with Article III . . . [and] does not require that civil actions be brought in the event of a dispute of an assessment by EPA; it merely authorizes the bringing of such actions."[54]

Legal Counsel 131, 136–37 (1989)).

[48] *Id.*

[49] *See id.* According to DOJ, EPA may administratively assess civil penalties against federal agencies for statutory and regulatory violations of the CAA without encountering Constitutional concerns, under Articles II and III. *See id.*

[50] *See id.* pt. II.

[51] *See* Ability of the Environmental Protection Agency to Sue Another Government Agency, 9 Op. Off. Legal Counsel 99 (1985).

[52] *Id.*

[53] *See* DOJ Opinion Memorandum, *supra* note 21.

[54] *Id.* pt. IV.B. In this memorandum, DOJ found that section 113(d)(1) of the CAA

In addition to supporting EPA's administrative authority under the CAA, DOJ defends EPA's position based on sections 113(d)(4) and 113(d)(5).[55] DOJ points out that the provision authorizing federal facilities to contest an EPA administrative order is merely a *permissive* action, rather than a mandatory one. This is largely due to the fact that "the Attorney General and the President possess the authority to forestall litigation between executive branch entities."[56] As a result, DOJ may find itself increasingly resolving conflicts between EPA and federal facilities before the cases reach the judiciary.

5. *EPA's Policy on Implementing its Penalty Authority*

Following DOJ's 1997 opinion, EPA saw a "green light."[57] Consequently, in October 1998, EPA issued guidance to its Regional Counsels and Air Program Directors, informing them that the CAA contains several provisions that authorize EPA to assess administrative civil penalties against federal agencies.[58] This memorandum also directs the Counsels and Directors to provide federal facilities with administrative procedures equivalent to those provided to private entities.[59] EPA's guidance "addresses hearing procedures and settlements, the opportunity to confer, compliance orders, waivers, penalties, and press releases."[60] In this manner, EPA has established the

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authorized EPA to assess administrative penalties of up to $ 25,000 per day after providing an opportunity for a hearing, and section 113(d)(3) authorized EPA to implement the field citation program against minor violators. *See id.* n.5.

[55] *See id.* at 9–10.

[56] *Id.* at 10.

[57] The guidance memorandum states that "[f]ederal agencies are liable for EPA-assessed CAA civil administrative penalties just like any other person. If violations occurred prior to July 16, 1997 [indicating the date of DOJ Office of Legal Counsel opinion] and are ongoing, EPA could assess penalties for the violations from July 16, 1997 until correction of the violation . . . and, in some cases may seek penalties for violations that occurred prior to July 16, 1997." Memorandum from Steven Herman, Assistant Administrator, to Regional Counsels and Air Program Directors, EPA, *Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the CAA* 7 (Oct. 9, 1998) [hereinafter Herman memorandum] (visited June 1, 2000) <http://es.epa.gov/oeca/fedfac/policy/caagui8.pdf> (footnote omitted).

[58] *See id.* at 1.

[59] *See id.*

[60] Office of Enforcement and Compliance Assurance, EPA, *The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities* V-3 (1999) (visited June 1, 2000) <http://es.epa.gov/oeca/fedfac/yellowbk/yellowbk.pdf>.

groundwork to proceed against federal facilities for civil penalties.

6. *Congressional Interest in Department of Defense Spending for Environmental Penalties*

While EPA is interested in its authority to collect civil penalties from federal facilities, Congress has an interest in ensuring that another federal agency, DOD, does not spend excessive funds on environmental enforcement actions.[61] Congress is concerned with both ensuring that the violating agency becomes environmentally compliant and providing for the most efficient use of federal resources in resolving military liability for environmental penalties.[62] In addition, because federal agency administrative penalty payments to EPA go to the United States treasury,[63] some politicians may consider DOD's payments for environmental enforcement actions to be a questionable transfer of appropriations.

These concerns became even more complicated on October 25, 1999, when President Clinton signed the Defense Appropriations Bill for Fiscal Year 2000.[64] Section 8149 bars DOD from using funds appropriated under the act toward payment of a fine or penalty arising from an environmental violation.[65] President Clinton directed "the Department to seek such authorization on any fine or penalty it receives, ensuring full accountability for all such violations."[66] Essentially, Congressional approval is required before DOD pays any fine or penalty or executes a Supplemental Environmental Project.[67]

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[61] *See* Christopher D. Carey, *Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects*, 44 A.F. L. REV. 1, 2 (1998).

[62] *See id.*

[63] *See* Miscellaneous Receipts Act, 31 U.S.C. § 3302 (1999); *see also* Carey, *supra* note 61, at 6.

[64] *See* Defense Appropriations Bill for Fiscal Year 2000, Pub. L. No. 106–79, 113 Stat. 1212 (1999).

[65] *Id.* § 8149, 113 Stat. at 1271–72.

[66] Statement on Signing the Department of Defense Appropriations Act, 2000, 35 WEEKLY COMP. PRES. DOC. 2260–61 (Nov. 4, 1999). Payment of fines or penalties for environmental violations would come from an installation's operations and maintenance account. *See, e.g.*, Statement on Signing Legislation Waiving Federal Immunity Relating to Solid and Hazardous Waste, 28 WEEKLY COMP. PRES. DOC. 1868–69 (Oct. 6, 1992).

[67] Memorandum from Gary D. Vest, Acting Deputy Under Secretary of Defense (Environmental Security), to Deputy Assistant Secretary of the Army (Environment, Safety & Occupational Health), Deputy Assistant Secretary of the Navy (Environment & Safety), Deputy Assistant Secretary of the Air Force (Environment, Safety & Occupational Health),

On November 23, 1999, Acting Deputy Under Secretary of Defense for Environmental Security, Gary D. Vest, provided instructions to the military services regarding the procedures for implementing section 8149.[68] According to these instructions, the military services "must negotiate with the regulator in good faith . . . to reach an administrative settlement."[69] Furthermore, the instructions remind the services that section 8149 "does not prohibit nor inhibit negotiations with regulators, not [sic] does it eliminate the Department's liability for fines and penalties. The provision only adds [the] step between settlement and payment [of] Congressional authorization."[70]

C. The Sovereign Immunity Doctrine as an Obstacle to States, Local Governments, or Citizens Enforcing the CAA

While EPA may encounter constitutional concerns when trying to impose CAA liability on federal agencies, non-federal enforcers may encounter a different obstacle in their civil suits to enforce the CAA against federal facilities. In suits by states, local governments, and citizens, federal agencies often seek the protection of sovereign immunity.[71] Federal agencies contend that these entities may take legal action against the federal government only if Congress has explicitly waived sovereign immunity.[72] Furthermore, when these entities try to overcome the federal government's claim of immunity, they often encounter narrow judicial interpretations of sovereign immunity waivers.[73]

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and Director, Defense Logistics Agency, *Implementation of Section 8149 of the FY 2000 Defense Appropriations Act* (Nov. 23, 1999) [hereinafter Vest Memorandum] (visited June 1, 2000) <http://denix.cecer.army.mil/denix/Public/ES-Programs/Compliance/Memos/Section 1849/note6.html>. Supplemental Environmental Projects are projects that federal facilities may agree to complete as part of an enforcement action settlement. *See* Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796, 24,797–98 (1998).

[68] *See* Vest Memorandum, *supra* note 67.

[69] *Id.*

[70] *Id.*

[71] *See* California *ex rel.* Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 29 F. Supp. 2d 652, 655–56 (E.D. Cal. 1998) (holding that the United States has sovereign immunity from liability for civil penalties imposed by a state for past violations of the CAA).

[72] *See* Cominotto v. United States, 802 F.2d 1127, 1129 (9th Cir. 1986) ("The United States, as a sovereign entity, is immune from suit unless it has consented to be sued.").

[73] *See, e.g.*, United States v. Idaho, 508 U.S. 1, 6–7 (1993) (stating that in order for the plaintiff to sustain its burden, the waiver of immunity must be clear on the face of the statute creating the cause of action); United States Dep't of Energy v. Ohio, 503 U.S. 607, 615

1. Federal Common Law Immunity

Under English common law, the government could not be sued because it was believed that "the King could do no wrong."[74] In *McCullough v. Maryland,* the Supreme Court used this principle, referred to as the sovereign immunity doctrine, to protect the federal government from paying state taxes.[75] Throughout the years, the Court has developed this doctrine, initially only noting that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States [without permission of the sovereign]"[76] and later unequivocally stating that a party may not sue the United States federal government without express congressional consent.[77]

Congress may waive sovereign immunity or express consent to suits through statutory provisions,[78] which are then subject to judicial interpretation.[79] Courts have inconsistently applied the sovereign immunity shield and supported their decisions with varying justifications. As a result, even the Supreme Court has acknowledged that reconciling all its sovereign immunity decisions "would be a Procrustean task."[80]

When interpreting waivers in the environmental enforcement arena, courts employ a rule of strict construction to determine whether the federal government has consented to a suit. This means that "courts will allow suit only if Congress has clearly and unambiguously waived immunity."[81] In February 1992, with the *United States v. Nordic*

(1992) (holding that waivers of sovereign immunity must be strictly construed in favor of the sovereign and will only be found where the waiver is unequivocal).

[74] *See, e.g.,* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 238 (1765); *see generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-27 (2d ed. 1988).

[75] McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819) (holding under the Supremacy Clause of the U.S. Constitution, the federal government is not subject to state laws without its consent).

[76] Cohens v. Virginia, 19 U.S. (Wheat.) 264, 411–12 (1821).

[77] *See* Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam).

[78] *See, e.g.,* Administrative Procedure Act, 5 U.S.C. § 702 (1994), Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1994), Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (1994).

[79] *See, e.g.,* Lane v. Pena, 518 U.S. 187, 192 (1996).

[80] Malone v. Bowdoin, 369 U.S. 643, 646 (1962).

[81] Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, 6 NAT. RESOURCES & ENV'T 28, 29 (1991).

Village, Inc.[82] decision, the Supreme Court issued guidance for courts interpreting sovereign immunity waivers. Attempting to resolve judicial inconsistencies, the Court determined that broad legislative waivers should be granted when interpreting "sweeping language" that clearly indicates the intent "to effect a wholesale abrogation of immunity."[83] However, the Court held that in most cases in which Congress has promulgated a waiver in a limited circumstance, courts must focus on the statutory text and not legislative history.[84]

Well aware of judicial deference to protecting the sovereign, Congress repeatedly has promulgated waivers of sovereign immunity, especially in environmental statutes.[85] Nevertheless, courts often have interpreted these statutory provisions narrowly and denied enforcement actions against federal facilities.[86] As one state attorney general explained, "[i]t appears that at every opportunity, no matter how clear and deliberate the attempt by Congress to waive immunity in environmental matters, the U.S. asserts that the waiver is ambiguous, and therefore, state enforcement efforts must fail."[87] Congress frequently has responded to these judicial interpretations by amending legislation to ensure federal facility liability and compliance by specifically addressing any judicially-raised issues.[88]

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[82] United States v. Nordic Village, Inc., 503 U.S. 30 (1992).

[83] Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 463 (1994).

[84] *See Nordic Village*, 503 U.S. at 37. The Court espoused that legislative history has no bearing on ambiguities because an unequivocal expression of waiver must be clear in the statute and clarity "cannot be supplied by a committee report." *Id.*

[85] *See, e.g.*, CWA § 313(a), 33 U.S.C. 1323(a) (1994); CAA § 118(a), 42 U.S.C. § 7418(a) (1994); CERCLA § 120(a), 42 U.S.C. § 9620(a) (1994).

[86] *See* U. S. Dep't of Energy v. Ohio, 503 U.S. 607, 627–28 (1992); Sierra Club v. Lujan, 972 F.2d 312, 316 (1992).

[87] Kyle Bettigole, Comment, *Defending Against Defense: Civil Resistance, Necessity and the United States Military's Toxic Legacy*, 21 B.C. ENVTL. AFF. L. REV. 667, 699 (1994) (quoting *Environmental Compliance by Federal Agencies: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong. 18 (1989) (statement of Kenneth O. Eikenberry, Attorney General, State of Washington)).

[88] *See* CWA Amendments of 1977, Pub. L. No. 95–217, 91 Stat. 1566 (1977) (codified as amended at CWA §§ 101-607, 33 U.S.C. §§ 1251–1387 (1994)); Safe Drinking Water Act, Pub. L. No. 95-190, 91 Stat. 1393, 1396–97 (1977) (codified as amended at 42 U.S.C. §§ 300h, 300j-8 (1994)); CAA Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685, 711 (1977) (codified as amended at CAA § 118, 42 U.S.C. § 7418 (1994)). This concept of

2. *RCRA and the CWA as Models for the CAA*

In 1992, the Supreme Court published the seminal opinion for interpreting environmental statutory sovereign immunity waivers in the context of RCRA and the CWA.[89] Congress responded to the Court's reluctance to waive sovereign immunity with legislation intended to make it even clearer that federal facilities must comply with state and local environmental regulations.[90]

a. *United States Department of Energy v. Ohio*[91]

An illustration of restrictive judicial interpretation of a sovereign immunity waiver and subsequent legislative override is the Supreme Court's interpretation of RCRA and the CWA in *United States Department of Energy v. Ohio* and Congress's response through the waiver provision of the Federal Facility Compliance Act ("FFCA").[92] In *Department of Energy*, the Supreme Court found that the citizen suit and federal facilities provisions in the CWA and RCRA did not explicitly waive sovereign immunity.[93]

The issue in *Department of Energy* was whether Congress had waived federal sovereign immunity from liability for civil fines imposed for violations of RCRA and the CWA.[94] The parties to the suit disagreed over whether the "federal-facilities" or "citizen-suit" provisions of these acts constituted an effective waiver of federal sovereign immunity.[95]

"Congressional response" as applied to enforcement of the CAA against federal violators is discussed *infra* Part II.C.3.

[89] *See* United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992).

[90] *See infra* notes 118-135 and accompanying text.

[91] 503 U.S. 607 (1992).

[92] Federal Facility Compliance Act (FFCA) of 1992 § 102(c), 42 U.S.C. § 6961 note (1994).

[93] *See Department of Energy*, 503 U.S. at 611.

[94] *See Department of Energy*, 503 at 612–13.

[95] *Id.* at 613–14. Ohio sued the U.S. Department of Energy (DOE) and its secretary seeking, among other forms of relief, civil penalties for past violations of the CWA and Resource Conservation and Recovery Act (RCRA), as well as for violations of state law. *See id.* at 613. Ohio alleged that a DOE uranium-processing plant improperly disposed of radioactive substances and polluted surface and ground water. *See* Ohio v. United States Dep't of Energy, 689 F. Supp. 760, 761 (S.D. Ohio 1988), *aff'd*, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 503 U.S. 607 (1992). As the Supreme Court noted upon review, the DOE had admitted liability for coercive civil penalties under the CWA and RCRA provisions. *See* 503

Limiting its analysis to punitive civil penalties, the Court examined the citizen suit provisions of the CWA and RCRA together because they were sufficiently similar.[96] Both citizen suit provisions authorized states, as citizens, to initiate suits against any *person* in violation of the Acts, "including the United States."[97] Neither statute, however, included the United States as a person within the civil penalties provisions or in their general definitions of "person."[98] The Court applied these general definitions to the civil penalties sections and incorporated the civil penalties definitions into the citizen suit provisions. Thereby, the Court distinguished "the citizen suit sections from other provisions which define 'person' as applying to an entire section . . . [and] inferred that Congress did not intend to subject the federal government to civil penalties."[99]

The Court then separately reviewed the federal facilities provisions of each statute to determine whether the federal government had waived immunity. First, the Court reviewed the CWA provision that subjected the federal government to all federal, state, and local "process and sanctions"[100] and the portion of this provision that held the United States liable for "civil penalties aris[ing] under federal law."[101] The Court considered the context of the clause to determine that "sanctions" included not only punitive fines but also coercive fines.[102] Noting that the statute grouped the term "sanctions" with "process" in two provisions, the Court declared that the CWA subjected the United States to "three manifestations of governmental power[:] . . . substantive and procedural requirements; administrative authority; and 'process and sanctions,' whether 'enforced' in courts or otherwise."[103] The Court

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U.S. at 619 n.15. Therefore, the Court limited its analysis to punitive civil penalties "imposed to punish past violations of those statutes or state laws supplanting them." *Id.* at 614.

[96] *See id.* at 615.

[97] *Id.* at 615–16.

[98] *See id.* at 617.

[99] Gregory J. May, Note, United States Department of Energy v. Ohio *& the Federal Compliance Act of 1992: The Supreme Court Forces a Hazardous Compromise in CWA and RCRA Enforcement Against Federal Agencies,* 4 VILL. ENVTL. L. J. 363, 374 (1993) (analyzing *Department of Energy*, 503 U.S. at 618).

[100] *Department of Energy*, 503 U.S. at 620 (citing CWA § 313(a), 33 U.S.C. § 1323(a) (1994)).

[101] *Id.* (citing CWA § 313(a), 33 U.S.C. § 1323(a)).

[102] *See id.* at 621.

[103] *Id.* at 623.

inferred from the fact that the statute reflected "sanctions" to enforce "process," and not "substantive requirements," that "Congress was using 'sanction' in its coercive sense to the exclusion of punitive fines."[104] Essentially, by authorizing sanctions "only to enforce court orders, the sanctions could not be available for 'substantive' (retroactive) purposes."[105] The Court, therefore, concluded that an "unequivocal" and "unambiguous" waiver of sovereign immunity did not exist.[106]

The Court then analyzed the federal facilities provision in RCRA. It construed this clause, which subjected the federal government to "all . . . requirements, both substantive and procedural,"[107] to include " 'substantive standards and the means for implementing those standards, but excluding punitive measures.' "[108] The Court examined the remainder of the provision that stated "[n]either the United States, nor any agent, 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."[109] It opined that the absence of an example of punitive fines indicated that Congress did not intend to expose the United States to an enforcement mechanism that could deplete federal funds.[110]

Following the *Department of Energy* decision, states could not effectively use citizen suits to obtain civil penalties against a federal facility.[111] In response, some scholars have contended that the legislative history shows that the Court misinterpreted the statutes by disregarding the legislative intent behind RCRA and the CWA.[112]

When drafting RCRA's 1984 Amendments,[113] "the House

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[104] *Id.*

[105] Daniel Horne, Note, *Federal Facility Environmental Compliance After* United States Department of Energy v. Ohio, 65 U. COLO. L. REV. 631, 647 (1994).

[106] *Department of Energy,* at 627.

[107] *Id.* (quoting RCRA § 6001, 42 U.S.C. § 6961 (1994)).

[108] *Id.* at 627–28 (quoting Mitzelfelt v. United States Dep't of the Air Force, 903 F.2d 1293, 1295 (1990)).

[109] *Id.* at 627 (quoting RCRA § 6001, 42 U.S.C. § 6961 (1994)).

[110] *Department of Energy*, 503 U.S. 607, 628 (1992).

[111] *See* Nelson D. Cary, *A Primer on Federal Facility Compliance with Environmental Laws: Where Do We Go from Here?* 50 WASH & LEE L. REV. 801, 810 (1993).

[112] *See* Karen M. Matson, Note, *Waiver of Sovereign Immunity—Did Congress Intend to Exempt Federal Facilities from Civil Penalties Under the Clean Water Act?*, 28 LAND & WATER L. REV. 489, 504 (1993); May, *supra* note 99, at 377–78.

[113] The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98–616, 98 Stat.

Committee on Energy and Commerce criticized and attempted to remedy EPA's inadequate civil and criminal enforcement efforts. The Committee also chastised DOJ's lackluster hazardous waste enforcement record."[114] Additionally, "[t]he Senate Committee explicitly stated that [the citizen suit provision providing civil penalties as an option] authorizes civil penalties against agencies disobeying court orders, as well as any federal 'noncomplying agency.' "[115]

The Court's *Department of Energy* decision also failed to consult the legislative history of the CWA. In response to federal circuit courts misinterpreting the statute prior to *Department of Energy*, "Congress attempted to use clear statutory language authorizing citizens to recover for pollution violations by federal facilities."[116] Additionally, the Senate Environment and Public Works Committee stated that the 1977 Amendments of the CWA were intended "to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws . . . [however,] the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent."[117]

b. The Federal Facility Compliance Act: Congressional Response to the RCRA Aspects of *United States Department of Energy v. Ohio*

The Court's *Department of Energy* decision highlighted the issues Congress needed to address in order to override judicial precedent and successfully waive sovereign immunity. This judicial opinion indicated to Congress the need to clarify sovereign immunity waivers in the areas of "state and federal administrative order authority, punitive civil

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3221 (codified as amended at 42 U.S.C. §§ 6901, 6902, 6905, 6917).

[114] Randall S. Abate & Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L. J. 1, 16 (1995) (footnotes omitted). However, as the court noted in *Meyer v. United States Coast Guard*, the legislative history of the original RCRA indicated "that Congress did not intend for federal facilities to be subject to civil penalties. In fact, Congress rejected a House of Representatives bill which specifically authorized the granting of civil penalties and instead chose to adopt the Senate bill which made no mention of waiving sovereign immunities for civil penalties." 644 F. Supp. 221, 223 (E.D.N.C. 1986) (citing 122 CONG. REC. 32,613 (Sept. 27, 1976)).

[115] Abate & Cogswell, *supra* note 114, at 16.

[116] *Id.* at 17.

[117] S. REP. NO. 95-370, at 67 (1972).

penalties, and criminal sanctions."[118]

Congress, therefore, responded to the restrictive judicial interpretation of RCRA with the Federal Facility Compliance Act (FFCA).[119] In the FFCA, Congress attempted to be as " 'clear and unambiguous as humanly possible' and also ma[k]e a plea to the Supreme Court . . . to not resort to 'ingenuity to create ambiguity.' "[120] Congress clearly established its legislative intent by stating that the purpose of the FFCA was to "make the waiver of sovereign immunity contained in [RCRA] clear and unambiguous with regard to the imposition of civil and administrative fines and penalties."[121]

The FFCA subjected the federal government to "substantive and procedural" requirements and "punitive or coercive" civil penalties. Thereby, Congress legislatively superceded the *Department of Energy* decision and granted states the authority to exercise various enforcement mechanisms under RCRA, including administrative orders, civil actions, and civil penalties.[122] Additionally, the FFCA amended the definition of "person" to provide states with the waiver required for citizen suits and accompanying punitive fines.[123] While it addressed sovereign immunity under RCRA, the FFCA did not address the issue under the CWA or the CAA.

c. The Congressional Response to the CWA Aspects of *United States Department of Energy v. Ohio*

In *Sierra Club v. Lujan*,[124] the Sierra Club and Colorado

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[118] Cary, *supra* note 111, at 811.

[119] FFCA, Pub. L. 102-386, 106 Stat. 1505 (codified in scattered sections of 42 U.S.C.).

[120] Mirth White, Note, *Can Congress Draft a Statute Which Forces Federal Facilities to Comply with Environmental Laws in Light of the Holding in* United States Department of Energy v. Ohio?, 15 WHITTIER L. REV. 203, 219–220 (quoting 138 CONG. REC. H9135, 9136 (daily ed. Sept. 23, 1992)).

[121] S. REP. NO. 101-553, at 1 (1990). The FFCA amended RCRA by subjecting federal entities to "[f]ederal, State, interstate, and local substantive and procedural requirements . . . not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature . . . hereby expressly waiv[ing] any immunity otherwise applicable to the United States . . . ." FFCA § 102(a)(3), 42 U.S.C. § 6901 note.

[122] *See* Cary, *supra* note 111, at 818.

[123] *See* FFCA § 103, 42 U.S.C. § 6903(15).

[124] Sierra Club v. Lujan, 728 F. Supp. 1513 (D. Colo. 1990), *aff'd*, 931 F.2d 1421 (10th Cir. 1991), *vacated*, 504 U.S. 902 (1992), *rev'd*, 972 F.2d 312 (10th Cir. 1992).

Environmental Coalition, acting under the CWA's citizen suit provision, sued the United States Department of Interior and the Bureau of Reclamation seeking mandatory and declaratory relief as well as civil penalties for past violations of EPA's pollution discharge permit requirements.[125] Although the Tenth Circuit held that Congress expressly waived sovereign immunity for civil penalties under the CWA,[126] the Supreme Court vacated this decision and remanded the case back to the Tenth Circuit for reconsideration in light of the *Department of Energy* decision. Subsequently, the Tenth Circuit held that Congress did not waive sovereign immunity for punitive civil penalties for past CWA violations.[127] Noting the Supreme Court's distinction, the Tenth Circuit found that civil penalties were not permitted under the CWA because they were "punitive" and not "coercive."[128] Additionally, based on the Supreme Court's analysis, the Tenth Circuit concluded that neither the federal facilities provision nor the citizen suit provision authorized civil penalties against federal entities.[129]

As noted earlier, Congress historically has reacted to restrictive judicial interpretations that have quashed enforcement efforts by enacting legislation.[130] Members of Congress responded to *Department of Energy* by attempting to waive federal sovereign immunity for civil penalties under the CWA.[131] In 1999, Senator Paul Douglas Coverdell and Representative Charles Norwood introduced a proposed waiver of sovereign immunity known as the Federal Facilities Clean Water Compliance Act of 1999 ("FFCWCA").[132] This legislation mirrors the

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[125] *See* 972 F.2d at 313.

[126] *See* 931 F.2d at 1425. The Tenth Circuit based its original decision on three provisions. First, within the federal-facilities provision the statute subjected the federal government to all federal requirements and process and sanctions, and "sanctions" include civil penalties. *See id.* at 1425–26. Second, the CWA federal facilities provision "makes the United States liable for 'civil penalties arising under federal law' " and violations of EPA-issued permits arise under federal law. *Id.* at 1426–27. Third, although the Act's general definition of "person" did not mention the United States, the court held that the inclusion of the United States within the definition of "person" in the citizen suit provision "manifest[ed] Congress' consent to the assessment of civil penalties against the United States." *Id.* at 1427.

[127] *See* 972 F.2d at 313.

[128] *Id.* at 314.

[129] *Id.* at 316.

[130] *See supra* Part II.C.2.a.

[131] *See* Federal Facilities Clean Water Compliance Act (FFCWCA) of 1999, S. 669, 106th Cong.; H.R. 2449, 106th Cong. (1999).

[132] S. 669; H.R. 2449.

FFCA's language, but would amend the CWA rather than RCRA.[133]

Both the Senate and the House bills provide an unambiguous waiver by requiring federal entities to comply with all requirements, both substantive and procedural, to the same extent as any "person is subject to such requirements."[134] Substantive and procedural requirements include "all administrative orders and all civil and administrative penalties or fines, regardless of whether [those] penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."[135] These bills include provisions stating that the United States expressly waives all immunity. Additionally, the FFCWCA changes the general definition of "person" to include federal entities.[136] Hence, like the FFCA does for RCRA, the FFCWCA would resolve the CWA sovereign immunity issues raised by *Department of Energy*. Until this bill is enacted, however, federal facility liability under the CWA remains in question.

3. *Sovereign Immunity Waivers and the CAA*

The development of CAA enforcement against federal entities has paralleled that of the RCRA and CWA enforcement saga. Essentially, CAA enforcement has suffered from the same restrictive judicial interpretations, followed by Congressional attempts to create legislative overrides.[137] Initially, the federal government was excluded from clean air mandates but asked to "cooperate" by abating air pollution.[138] Gradually, the president and Congress began to require federal facilities to comply with air pollution standards. Once Congress statutorily mandated federal compliance, however, courts began to construe restrictively what appeared to be a sovereign immunity waiver within the CAA. Consequently, Congress amended the CAA in an attempt to ensure federal facility inclusion.[139] Nevertheless, both EPA and state

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[133] *See id.*

[134] *See* S. 669, 106th Cong. § 2 (proposing to amend CWA § 313).

[135] S. 669, 106th Cong. § 2; H. R. 2449, 106th Cong. § 2.

[136] S. 669, 106th Cong. § 2 (proposing to amend CWA § 502); H. R. 2449, 106th Cong. § 2 (a) (proposing to amend CWA § 502).

[137] *See* discussion *supra* Part II.C.2.

[138] *See* discussion *infra* Part II.C.3.a.

[139] Clean Air Amendments of 1970, Pub. L. No. 91–604 § 5, 84 Stat. 1676, 1689 (1970) (codified as amended 42 U.S.C. § 7418 (1994)); Clean Air Amendments of 1977, Pub. L. No. 95–95 § 116, 91 Stat. 685, 711 (1977) (codified as amended 42 U.S.C. § 7418 (1994)); Clean Air Amendments of 1977, Pub. L. No. 101–549 § 101(e), 104 Stat. 2399, 2409 (1990)

enforcement authorities have encountered problems when attempting to enforce it against federal facilities. Although Congress amended the Act in 1970, 1977, and 1990, courts have restrictively interpreted the Act's sovereign immunity provisions and limited states' abilities to impose civil penalties on federal entities.[140]

a. Background of the CAA

The federal government identified air pollution as a problem requiring federal action in the Air Pollution Control Act of 1955.[141] Executive branch interest in federal facility compliance commenced in 1958 when President Dwight D. Eisenhower issued an executive order directing federal agencies to cooperate with state and local authorities "to insure the prevention or abatement of atmospheric pollution, caused by or resulting from Federal activities."[142]

The federal government's involvement in regulating air pollution began with the Clean Air Act of 1963.[143] Although the statute authorized the expansion of federal research, grants for state control agencies, and federal intervention to abate interstate air pollution,[144] it delegated primary responsibility for air pollution control to state and local governments.[145] This allowed federal facilities to escape control. Although Congress passed the Air Quality Act in 1967,[146] it again emphasized that "prevention and control of air pollution at its source is the primary responsibility of states and local governments,"[147] and that

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(codified as amended at 42 U.S.C. § 7418 (1994)).

[140] *See e.g.*, Sacramento Metro. Air. Quality Mgmt. v. United States, 29 F. Supp. 2d 652 (E.D. Cal. 1998); United States v. Georgia Dep't of Nat. Resources, 897 F. Supp. 1464 (N.D. Ga. 1995) (denying injunction against state agency seeking to fine U.S. Army and Federal Bureau of Prisons under CAA).

[141] Air Pollution Control Act of 1955, Pub. L. No. 84–159, 69 Stat. 322. This 1955 Act "provided for research and technical assistance and authorized the Secretary of Health, Education, and Welfare (HEW) to work toward a better understanding of the causes and effects of air pollution." ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 769 (2d ed. 1996) (citations omitted).

[142] Exec. Order No. 10,779, 3 C.F.R. 421 (1958).

[143] CAA of 1963, Pub. L. No. 88–206, 77 Stat. 392 (1963) (current version at 42 U.S.C. §§ 7401–7671 (1994)).

[144] *See id.* § 5, 77 Stat. at 396–99.

[145] *See e.g.*, Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 63–65 (1975).

[146] Air Quality Act of 1967, Pub. L. No. 90–148, 81 Stat. 485 (codified as amended at 42 U.S.C. § 7401).

[147] *Id.* § 2, 81 Stat. at 485.

federal agencies were expected merely to cooperate. By 1970, after four different executive orders had been issued to compel federal facilities to contribute to the control and prevention of air pollution,[148] federal compliance with the CAA was still not forthcoming.[149] Voluntary compliance by federal facilities failed to fulfill the objectives of the CAA. In fact, both the House and Senate noted when considering the 1970 CAA Amendments that " '[i]nstead of exercising leadership in controlling or eliminating air pollution, federal agencies [remain] notoriously laggard in abating pollution.' "[150]

After the initial slow pace of federal enforcement, the 1970 CAA Amendments replaced state air quality standards with uniform national standards and mandated EPA-approved state implementation plans.[151] Moreover, with the addition of the 1970 CAA's federal facilities provision, the practice of federal facility "cooperation" became a mandatory compliance requirement.

In 1970, Congress amended section 118, "Control of Pollution from Federal Facilities,"[152] which specifically stated that the federal government "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."[153] In subsequent reports, Congress stated that this provision had "declared the clear and unequivocal policy of the United States that the facilities . . . owned by the U.S. Government were to comply with all substantive and procedural requirements of Federal, State, interstate or local law intended to control air pollution" and "was intended to remove all legal barriers to full [f]ederal compliance."[154] Thus, Congress appeared to have waived the federal facilities' sovereign immunity. Additionally, the 1970 CAA Amendments included the first citizen suit provision that authorized citizens to bring actions to enforce emissions standards against "the United States [and] any other governmental instrumentality

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[148] *See* Exec. Order No. 11,507 (1970); Exec. Order No. 11,282 (1966); Exec. Order No. 10,779, 3 C.F.R. 421 (1958); Exec. Order No. 10,014, 3 C.F.R. 836 (1948).

[149] H.R. REP. NO. 95–294, at 200 (1977).

[150] Hancock v. Train, 426 U.S. 167, 171 (1976) (quoting H.R. REP. NO. 91-1146, at 4 (1970), and S. REP. NO. 91-1196, at 37 (1970)).

[151] *See* CAA Amendments of 1970, § 103, 42 U.S.C. § 7403 (1994).

[152] CAA Amendments of 1970, Pub. L. No. 91–604, § 5, 84 Stat. 1676, 1689–90 (1970) (codified as amended at 42 U.S.C. § 7418(a) (1994)).

[153] *Id.* § 5, 84 Stat. at 1689.

[154] H.R. REP. NO. 95-294, at 197–98 (1977).

or agency, to the extent permitted by the Eleventh Amendment of the Constitution."[155]

Despite the 1970 amendments, the Act still contained some major gaps that would later draw the attention of the judiciary. First, the 1970 amendments did not authorize federal enforcement of CAA violations against federal agencies. Moreover, as the United States Attorney General would note in 1997, "the 1970 version of section 118 referred only to federal agencies complying with substantive requirements; it did not contain any language subjecting federal agencies to enforcement authority."[156]

b. Historical Developments in Enforcing the CAA Against Federal Facilities

After Congress amended the CAA to include section 118, the focus moved from whether federal facilities should comply with, to how to enforce, the CAA against federal facilities.[157] The response to this question became even more difficult after the 1976 Supreme Court decision in *Hancock v. Train*.[158] This case provided a landmark interpretation of the Act's federal facilities provision. After the *Hancock* decision, enforcement provisions became the focus of legislation.[159] Specifically, Congress amended the CAA to include federal entities as subject to the Act.[160]

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[155] CAA Amendments of 1970 § 12(a), 84 Stat. at 1705–09 (codified as amended at 42 U.S.C. § 7604(a)(1) (1994)).

[156] *See* DOJ Opinion Memorandum, *supra* note 21, at 6. President Nixon issued executive orders supplementing the 1970 CAA Amendments. *See* Exec. Order No. 11,507, 3 C.F.R. § 889 (1966–1970); Exec. Order No. 11,752, 3 C.F.R. § 829 (1971–1975). These orders, however, only required federal facility "cooperation" with state and local authorities for substantive requirements such as effluent limitations and compliance standards, and authorized federal facilities to disregard administrative requirements such as permits. *See id.*

[157] *See e.g.*, Hancock v. Train, 426 U.S. 167, 172 (1976).

[158] *Id.*

[159] *See e.g.*, CAA Amendments of 1977, Pub. L. No. 95–95, § 116, 91 Stat. 685, 711 (1977) (codified as amended at 42 U.S.C. § 7418 (1994)).

[160] *See id.*

(1) The Landmark Case of *Hancock v. Train*

In *Hancock*, the Supreme Court held that section 118 of the CAA did not subject federal facilities to state and local permit requirements.[161] In determining whether a state could require a federally-owned or operated facility to acquire state permits pursuant to a state implementation plan,[162] the Court engaged in a three-step analysis. The Court reviewed section 118 of the CAA, the statute as a whole, and then its legislative history.[163]

In reviewing section 118, the court found that "[s]ince the statute said that federal installations should comply with 'requirements' but neither identified the specific requirements nor used the words 'all requirements,' . . . waiver of federal immunity for permit requirements was not sufficiently clear."[164] Turning then to the CAA as a whole, the Court determined that Congress intended to differentiate between provisions meant to reduce air pollution, such as emission standards and compliance schedules, and provisions directing states to establish and enforce the emission standards and compliance schedules.[165] The Court found "that the waiver was limited to compliance with substantive standards, such as effluent limitations and compliance standards, as opposed to procedural ones, such as acquiring a permit."[166] Further, the Court did not find any congressional intent to subject federal facilities to the enforcement mechanisms of state implementation plans.

The Court then reviewed the Act's legislative history in an attempt to clarify its ambiguities. It noted that the House Bill initially provided for federal facilities to comply with "Federal, State . . . and local Emission standards"[167] and that the House Report focused on federal compliance with emission standards.[168] The Senate amendment mandated that federal facilities "comply with the *requirements* of [the] Act in the same manner as any person"[169] and the Senate Report indicated that this only required federal entities to meet emission

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[161] *See Hancock*, 26 U.S. at 198–99.
[162] *See id.* at 168.
[163] *See id.* at 180–96.
[164] *See* White, *supra* note 120, at 221.
[165] *Hancock*, 426 U.S. at 167, 185–86.
[166] White, *supra* note 120, 221.
[167] *Hancock*, 426 U.S. at 188 (quoting H.R. 17255, 91st Cong. § 10 (1970)).
[168] *Id.* (citing H.R. REP. NO. 91-1146, at 4 (1970)).
[169] *Id.* (quoting S. 4358, 91st Cong. § 7 (1970)).

standards.[170] As a result, the Court found that Congress intended federal facilities to comply with emissions standards and compliance schedules but did not intend for them "to comply with every measure in [a state] implementation plan."[171] Thus, the Court determined that Congress did not waive sovereign immunity for state permit requirements under state CAA implementation plans.[172] Once again, a strict judicial interpretation exempted federal facilities from the CAA's enforcement provisions.

(2) The 1977 Amendments: Congressional Response to *Hancock v. Train*

Congress responded to the Court's strict interpretation of section 118 in *Hancock* with a specific legislative override. When the House Committee on Interstate and Foreign Commerce proposed changes for the 1977 amendments to the CAA, it specifically addressed the *Hancock* decision.[173] The committee report noted that "the language of existing law [in the CAA] should have been sufficient to insure Federal compliance . . . Unfortunately, however, the Supreme Court construed section 118 narrowly."[174] In an effort to overturn *Hancock*, Congress revised section 118 to subject federal facilities to, and require them to comply with, "all Federal, State, interstate, and local requirements . . . and process and sanctions . . . (including . . . any requirement respecting permits and any other requirement whatsoever)."[175]

While the conference report does not discuss a revision of the CAA's definition of "person" to include federal facilities, the House Committee on Interstate and Foreign Commerce's report reflects the Committee's "unambiguous intent that the enforcement authorities of section 113 may be used to insure compliance [and] to impose sanctions against any Federal violator of the act."[176]

Some scholars contend that the 1977 CAA Amendment of section

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[170] *Id.*

[171] *Id.* at 189 (citations and footnotes omitted).

[172] *See id.* at 198.

[173] See H.R. REP. NO. 95-294, at 199 (1977).

[174] *Id.*

[175] CAA Amendments of 1977, Pub. L. No. 95–95, § 116(a), 91 Stat. 685, 711 (codified as amended at 42 U.S.C. § 7418 (1994)) (parentheses omitted).

[176] H.R. REP. NO. 95-294, at 200 (1977).

118 provides a broad waiver of sovereign immunity.[177] They support this interpretation with Comptroller General opinions requiring federal facilities to pay civil penalties for violations of state and local air pollution regulations.[178] For example, a 1978 opinion held a federal facility liable for a civil penalty administratively imposed by a local authority for violation of local air quality standards.[179] A year later, after two local air pollution control agencies imposed administrative penalties against the Department of the Navy, the Assistant Attorney General for the DOJ's Land and Natural Resources Division requested a Comptroller General's Opinion on the available source of payment.[180] The Comptroller General's opinion stated that the federal government became subjected to these penalties by section 118 of the CAA as amended in 1977.[181]

c. Federal Courts Differ About the CAA's Waiver of Sovereign Immunity

While the legislative branch has moved to a more expansive approach to federal facility compliance and enforcement under the CAA, the judicial branch has not followed this lead. Rather, the judiciary has followed the Supreme Court's lead in interpreting the availability of punitive civil penalties against federal facilities under the CAA. Prior to the 1976 *Hancock* decision and the subsequent 1977 CAA Amendments,[182] some courts found that the policy of "cooperation" did not require federal facilities to apply and obtain state and local permits.[183] After the Supreme Court's *Hancock* opinion and

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[177] *See e.g.*, Michael D. Axline, et al., *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1, 22 (1987); Donnelly & Van Ness, *supra* note 29, at 38; Elizabeth K. Hocking, *Federal Facility Violations of the Resources Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L. J. 203, 216 & n.78 (1991).

[178] *See e.g.*, National Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards, Comp. Gen. Dec. B-191747, 1978 U.S. Comp. Gen. LEXIS 186 (June 6, 1978); Civil Penalties Imposed on Federal Agencies for Violations of Local Air Quality Standards—Source of Funds for Payment, Comp. Gen. Dec. B-194508, 1979 U.S. Comp. Gen. LEXIS 88 (July 19, 1979); *see also* Donnelly & Van Ness, supra note 29, at 38.

[179] 1978 U.S. Comp. Gen. LEXIS 186, at *6; Donnelly & Van Ness, *supra* note 29, at 38.

[180] *See* 1979 U.S. Comp. Gen. LEXIS 88, at *2.

[181] *See* 1978 U.S. Comp. Gen. LEXIS 186, at *7.

[182] CAA Amendments of 1977, 42 U.S.C. §§ 7401–7642 (1994).

[183] *See e.g.*, Kentucky *ex rel.* Hancock v. Ruckelshaus, 362 F. Supp. 360 (W.D. Ky.

the 1977 Congressional override, however, courts began to find that some CAA provisions explicitly waived sovereign immunity for punitive civil penalties. The Supreme Court's 1992 opinion in *Department of Energy v. Ohio*[184] has clouded this judicial perspective and, consequently, federal courts have held opposing views about whether the CAA contains a sovereign immunity waiver.[185] This inconsistency remains unresolved, and exacerbates the difficulties that states, local governments, and citizens face when attempting to enforce the CAA against federal facilities.

(1) Judicial Reaction to 1977 Amendments

Congress hoped to resolve all questions of the CAA's sovereign immunity waiver with the 1977 Amendments. Initially, the 1977 Amendments appeared to convince courts to take a less restrictive view of the CAA and to find a waiver of sovereign immunity for imposition of civil penalties. For example, in the 1986 case of *Alabama* ex rel. *Graddick v. Veteran's Administration*,[186] the Middle District Court of Alabama reviewed section 118 in conjunction with the enforcement provision of section 112 and the citizen suit provision of section 304 and found the CAA to contain a sovereign immunity waiver.[187] The court found that section 112 authorized states to implement and enforce their EPA-approved state implementation plans with the same enforcement powers as the Agency Administrator, section 118 mandated federal compliance with all state regulations, and section 304 provided states with a method to seek civil penalties and enforce state

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1973); California v. Stastny, 382 F. Supp. 222, 224 (C.D. Cal. 1972) (holding that federal facilities were not required to apply and obtain state or local permits because they were outside the scope of requirements the CAA imposed on federal facilities).

[184] United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992). *See* discussion *supra* Part II.C.2.

[185] *See, e.g.*, California *ex rel.* Sacramento Metro. Air Quality Control Dist. v. United States, 29 F. Supp. 652 (E.D. Cal. 1998); United States v. Tennessee Air Pollution Control Bd., 967 F. Supp. 975 (M.D. Tenn. 1997) (granting summary judgment to state agency seeking penalties against federal facility under CAA), *aff'd*, 185 F.3d 529 (6th Cir. 1999), *reh'g denied*, 1999 U.S. App. LEXIS 29,804 (Nov. 5, 1999); United States v. Georgia Dep't of Nat. Resources, 897 F. Supp. 1464 (N.D. Ga. 1995) (denying U.S. government's declaratory judgment action seeking to prevent state from collecting fines against a federal facility under the CAA).

[186] Alabama *ex rel.* Graddick v. Veteran's Admin., 648 F. Supp. 1208 (M.D. Ala. 1986).

[187] *See id.* at 1210–12.

and federal regulations.[188] The court authorized state suits by relying on the statutory language, legislative history, and congressional intent to override *Hancock*.[189]

One year after *Graddick*, the Southern District of Ohio held that the CAA's federal facilities provision in section 118 provided a sovereign immunity waiver for civil penalties imposed for violations of state regulations.[190] Specifically, in *Ohio* ex rel. *Celebrezze v. United States Department of the Air Force*, two federal facilities operating without permits were found to be in violation of Ohio's emission standards.[191] The court held that the federal facilities provision subjected federal agencies to state requirements, process and sanctions.[192] In reaching this conclusion, the court adopted the House of Representatives' definition of "sanctions" reflected in the CAA's legislative history and found that "sanctions" included both coercive and punitive remedies, as well as civil or criminal penalties.[193]

(2) Influence of *Department of Energy v. Ohio* on Judicial Interpretations of the CAA

Since the 1992 *Department of Energy v. Ohio* decision, federal courts have differed in their interpretations of the CAA's sovereign immunity waiver. Although *Department of Energy* considered whether the CWA and RCRA contained sovereign immunity waivers,[194] federal district courts have used that opinion as a framework to analyze the CAA's equivalent provisions. Two recent federal district court opinions reflect an inconsistency among the federal courts.

In the 1995 case of *United States v. Georgia Department of Natural Resources*,[195] the Northern District of Georgia held that the CAA did not waive sovereign immunity for state-imposed punitive civil fines.[196] The district court first noted that, based on the Supreme

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[188] *See id.* at 1211–12.

[189] *See* United States v. Georgia Dep't of Nat. Resources, 897 F. Supp. 1464, 1469 (N.D. Ga. 1995).

[190] *See* Ohio *ex rel.* Celebrezze v. United States Dep't of the Air Force, [1988] 17 Envtl L. Rep. (Envtl L. Inst.) 21,210 (S.D. Ohio Mar. 31, 1987).

[191] *See id.* at 21,211.

[192] *See id.* at 21,111–13.

[193] *Id.* at 21,113.

[194] United States Dep't of Energy v. Ohio, 503 U.S. 607, 611 (1992).

[195] United States v. Georgia Dep't of Nat. Resources, 897 F. Supp. 1464 (N.D. Ga. 1995).

[196] *See id.* at 1471.

Court's decision in *Nordic Village*,[197] a sovereign immunity waiver must be unequivocal; if legislative history is needed to clarify the statutory provision, then the waiver is ambiguous and such a waiver "has not been unequivocally expressed."[198] The court then examined the two lower court decisions of *Graddick*[199] and *Celebrezze*[200] in light of the Supreme Court's decision in *United States Department of Energy v. Ohio*. The Georgia court explained that the Supreme Court's *Department of Energy* opinion overruled *Graddick* because the Supreme Court had held that the words "all . . . requirements" did not effectively waive sovereign immunity for civil punitive fines.[201] Similarly, the Georgia court rejected the Alabama court's conclusion in *Celebrezze* that "sanction" included both coercive and punitive penalties because the Supreme Court's *Department of Energy* opinion specifically held that "sanctions" did not necessarily include both.[202]

The Northern District of Georgia found that the CAA did not waive sovereign immunity in light of the Supreme Court's *Department of Energy* decision. First, because the CAA citizen suit provision did not reference a civil penalty provision, the rationale of the *Department of Energy* decision did not apply. Therefore, the court turned to the federal facilities section 118, which the citizen suit provision referenced.[203] The court noted that although the CWA, RCRA, and the CAA all referred to "process and sanctions," the CAA was the only one that does not contain equitable language modifying that phrase.[204] The CWA modified "process and sanctions" with " 'the United States shall be liable only for those civil penalties arising under federal law.' "[205] The Georgia court found that the CAA's lack of "such language could hardly

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[197] United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992). *See supra* notes 82-88 and accompanying text.

[198] *Georgia Dep't of Nat. Resources*, 897 F. Supp. at 1466.

[199] Alabama *ex rel.* Graddick v. Veteran's Admin., 648 F. Supp. 1208, 1211–12 (M.D. Ala. 1986); *see supra* notes 186-188 and accompanying text.

[200] Ohio *ex rel.* Celebrezze v. United States Dep't of the Air Force, [1988] 17 Envtl L. Rep. (Envtl L. Inst.) 21,210 (S.D. Ohio Mar. 31, 1987); *see supra* notes 190-193 and accompanying text.

[201] *Georgia Dep't of Nat. Resources*, 897 F. Supp. at 1470.

[202] *See id.* at 1470. The federal district court explored an issue the *Celebrezze* court raised "the fact that the [CWA] and [RCRA] contain equitable language that modifies 'sanction' while the CAA does not." *Id.*

[203] *See id.*

[204] *See id.* at 1470–71.

[205] *Id.* at 1470.

serve to clarify the scope of the CAA" and the CAA, like the CWA, had an " 'expansive but uncertain waiver.' "[206] As for RCRA's federal facilities provision of " 'all . . . requirements (including . . . such sanctions imposed by a court to enforce such relief)', " the Georgia court held that "all . . . requirements" under the CAA excluded punitive measures (as in the *Department of Energy* opinion) and the parenthetical included in RCRA but absent in the CAA was not necessary to the Court's decision.[207] Therefore, the Georgia court held that the CAA included a clear waiver only for coercive fines.[208]

Another federal district court has taken the opposite position. In a 1997 motion for summary judgment in *United States v. Tennessee Air Pollution Control Board*,[209] the Middle District of Tennessee held that the CAA's federal facilities and citizen suit provisions did waive sovereign immunity for state punitive civil penalties.[210] In this case, the court affirmed an administrative law judge's finding that the CAA's federal facilities provision included a sovereign immunity waiver for state law civil penalties.[211]

In analyzing the CAA, the Tennessee court first pointed out that the broad statutory language of section 118 "necessitates an expansive

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[206] *Id.* at 1471.

[207] *Id.* at 1470–71.

[208] *See id.* at 1471. The United States District Court for the Eastern District of California also supported the federal facilities' position in *Sacramento Metropolitan Air Quality Control District v. United States* when it granted the United States' motion for summary judgment finding "no genuine issue of material fact" and holding that Congress did not waive the United States' sovereign immunity in the CAA. 29 F. Supp. 652, 653 (E.D. Cal. 1998). Turning to the *Department of Energy* decision, the court found that the provisions of the CWA on which the Supreme Court based its decision were "similar, and in some cases identical, to those contained in the federal facilities provision of the CAA" and that the Court was correct in "distinguish[ing] between substantive requirements and judicial process . . . [because] each time . . . 'sanction' appears is within the phrase 'process and sanction[s].' " *Id.* at 655–656. Further, the provision also refers to process and sanctions as being enforced in courts. *Id.* Moreover, the court held that the Supreme Court's analysis and holding applied to the case at bar because the *Department of Energy* decision is clear and unequivocal and based on the CWA federal facilities provision that the CAA "parallels, if not mirrors." *Id.* at 657.

[209] United States v. Tennessee Air Pollution Control Bd., 967 F. Supp. 975 (M.D. Tenn. 1997), *aff'd,* 185 F.3d 529 (6th Cir. 1999*), reh'g denied,* 1999 U.S. App. LEXIS 29,804 (Nov. 5, 1999).

[210] *See id.* at 984.

[211] *See id.* at 977–78.

reading of the term 'sanctions' to include civil penalties."[212] The court emphasized that the *Georgia Department of Natural Resources* court had misinterpreted the impact of *Department of Energy*, on the CAA because "[t]he CAA does not contain additional language confining 'sanctions' to 'coercive' or process related penalties."[213] Moreover, the court noted that the CAA includes a phrase not included in either the CWA or RCRA that states "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents or employees. . . ."[214] No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable."[215] Reasoning that Congress would not have included language about personal liability unless the federal government was subject to liability, the court interpreted this passage to mean that Congress had waived the government's sovereign immunity to civil penalties.[216]

The court also pointed out that its interpretation supports the goal of the 1977 CAA Amendments, which is to provide equal treatment of private and federal polluters.[217] Furthermore, the court supported its interpretation of the statute with the aforementioned 1978 Comptroller General Opinion[218] and the *Graddick* decision.[219] The Middle District Court of Tennessee found that the CAA citizen suit provision granted states the right to sue and to apply any sanction in section 118.[220] The court also relied on public policy reasons to show how civil penalties were necessary for enforcement against federal facilities.[221]

Subsequently, in a declaratory judgment suit in July 1999, the Sixth Circuit affirmed the Tennessee Middle District Court's decision in *United States v. Tennessee Air Pollution Control Board*.[222] The Sixth

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[212] *Id.* at 979.

[213] *Id.* at 980.

[214] *Id.* at 980 (quoting CAA § 118(a)(2)(D), 42 U.S.C. § 7418(a)(2)(D) (1994)).

[215] *Id.*

[216] *See id.* at 980–81.

[217] *See id.* at 981.

[218] Matter of National Oceanic Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standards, Comp. Gen. Dec. B-191747, 1978 U.S. Comp. Gen. LEXIS 186 (June 6, 1978). *See supra* notes 178–181 and accompanying text.

[219] Alabama *ex rel.* Graddick v. Veteran's Admin., 648 F. Supp. 1208 (M.D. Ala. 1986).

[220] United States v. Tennessee Air Pollution Control Bd., 967 F. Supp. 975, 981 (M.D. Tenn. 1997).

[221] *Id.* at 983.

[222] United States v. Tennessee Air Pollution Control Bd., 185 F.3d 529, 535 (6th Cir.

Circuit found it unnecessary to decide whether the CAA's section 118 waived sovereign immunity on the grounds that the citizen suit provision in and of itself provided a clear unequivocal waiver of sovereign immunity.[223]

The court further held that the phrase "any administrative remedy or sanction" could not be limited to prospective, coercive action because that would render the citizen suit provision "virtually meaningless, since administrative agencies are seldom empowered to take prospective, coercive action."[224] The court also noted that "the law of sovereign immunity" is included within the CAA's provision that " '[any] other law' " should not be construed to prohibit any State from bringing administrative enforcement actions.[225] Moreover, the CAA, unlike the CWA, further provides "that neither the citizen suit provision in [section 304(a)] nor 'any other law' shall restrict states from obtaining any judicial or administrative remedy or sanction."[226] The Sixth Circuit found that "[i]f words have meaning, this says that no law shall restrict the State of Tennessee from obtaining any administrative remedy or sanction against a federal air polluter."[227]

In light of the Supreme Court's *Department of Energy* opinion, the Sixth Circuit pointed out that the CWA has "no counterpart to the CAA's state suit provision" and the CWA's federal facilities provision, while closely analogous to that of the CAA, includes an express limitation on the liability of the United States for civil penalties not present in the CAA.[228] The CWA's limitation specifically holds the United States 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."[229]

As for the Supreme Court's interpretation of the use of "process and sanctions" in the CWA for compliance with "forward-looking orders," the Sixth Circuit advised the parties that the federal facilities provision (section 118) must be read in context within the CAA.[230]

1999), *reh'g denied,* 1999 U.S. App. LEXIS 29804 (Nov. 5, 1999).

[223] *Id.* at 533.

[224] *Id.* at 532 n.3.

[225] *Id.* (quoting CAA § 304(e), 42 U.S.C. § 7406(e) (1994)).

[226] *Id.* at 533.

[227] *Id.*

[228] *Id.* at 533–34.

[229] *Id.* at 534 (quoting CWA § 313(a), 33 U.S.C. § 1323(a)).

[230] *Id.*

Therefore, recognizing the significant differences between the Clean Water Act and the Clean Air Act, the Sixth Circuit rejected *Department of Energy* as controlling authority.[231]

III. FEDERAL EMPLOYEE PERSONAL LIABILITY FOR CIVIL PENALTIES

While EPA moves to enforce punitive civil penalties for CAA violations against federal facilities and Congress and the courts wrestle with the CAA's potential sovereign immunity waiver, another issue to examine is whether CAA enforcers can impose civil penalties on individual federal employees. When attempting to hold employees liable for federal CAA violations, enforcers encounter a number of difficulties.

A. Qualified Immunity for Employees

Federal employees acting within the scope of their employment have the same sort of sovereign immunity protection that the federal government enjoys regarding environmental statutory liability.[232] Even if a statute does not provide federal employees with immunity from civil liability, they may have a qualified immunity similar to federal facilities.[233] The common law recognized that to ensure governmental efficiency and effectiveness, officials needed to be able to perform their official functions without the threat of personal liability.[234] The Supreme Court has found that two main rationales justify this official immunity.[235] It has cited both "the injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; and the danger that the threat of such liability might deter his willingness to execute his office with the decisiveness and the judgment required by the public good."[236]

The Court has extended this protection to executive officials "when engaged in the discharge of duties imposed upon them by law"[237]

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[231] *See id.*

[232] *See* Minister, *supra* note 6, at 172.

[233] *See id.*

[234] *See* Scheuer v. Rhodes, 416 U.S. 232, 239 (1974).

[235] *See id.* at 240.

[236] *Id.*

[237] Spalding v. Vilas, 161 U.S. 483, 498 (1986).

because grants of immunity for federal employees provide incentives for effective and efficient government performance while protecting the officials from fear of litigation.[238] The Court later expanded federal employee immunity by holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[239] Therefore, courts may not hold federal officials personally liable in civil suits for discretionary actions taken in the line of duty without specific statutory waivers of official immunity.[240] This also applies to those actions that lie at the "outer perimeter" of a federal employee's official duties.[241]

B. Federal Employee Immunity in the CAA

Pursuant to the CAA's provisions, individual federal employee liability for civil penalties: (1) generally may be restricted due to statutory immunity, (2) "probably depends on the employee conscientiously attempting to comply with the statutes," and (3) involves an area of law that is "unsettled enough so that no warranties can be given." Therefore, "officials should conscientiously seek to understand and comply with the obligation imposed by the [statute]."[242]

The CAA's enforcement provision, section 113, states that

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[238] *See* Minister, *supra* note 6, at 172.

[239] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Westfall v. Erwin, 484 U.S. 292 (1988) (using a balancing test to limit absolute immunity for federal officials that weighs the contribution to effective government with harm to injured plaintiffs); Davis v. Scherer, 468 U.S. 183 (1984) (indicating that federal employees may have qualified immunity unless they violate statutory or constitutional rights).

[240] *See Harlow*, 457 U.S. at 818. For a discussion of the discretionary function exception see John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223 (1992). Although beyond the scope of this discussion, the Court has expansively defined what encompasses a protected "discretionary action." *See* United States v. Gaubert, 499 U.S. 315 (1991); *see also* Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997).

[241] *See Harlow*, 457 U.S. at 815–819 (1982). *See also* John J. Bartus, *Federal Employee Personal Liability Under Environmental Law: New Ways for the Federal Employee to Get in Trouble*, 31 A.F. L. REV. 45, 68 (1989) (footnote omitted).

[242] Bartus, *supra* note 241, at 68 (footnote omitted).

penalties may be assessed against any "person,"[243] and section 302(e) defines "person" to include "any agency . . . of the United States and any officer, agent, or employee thereof."[244] Section 118 of the CAA requires federal facilities and employees to comply with all federal, state, interstate, and local requirements and provides that this requirement "shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."[245] This section concludes, however, that "[n]o officer, agent, or employee of the United States *shall be personally liable for any civil penalty for which he is not otherwise liable.*"[246] Therefore, using plain meaning and context, the CAA seems to provide a broad immunity from individual liability.[247]

While the meaning of the CAA's federal employee liability provision seems clear, review of the CAA's legislative history further indicates that Congress, in grappling with waivers of federal facility sovereign immunity, has explicitly granted federal employee immunity from civil penalties. The Conference Report for the 1977 Amendments indicates that the House bill proposed that "[a]ny federal employee, officer or agency may be held liable personally for civil penalties as well as in his official capacity for a violation of [substantive and procedural air pollution requirements of Federal, State, interstate, or local law]."[248] However, the Senate refused to extend personal liability to federal employees, officers, or agents. The conference agreement assures that "[f]ederal employees, officers and agents are not made personally liable for civil penalties to which such person is not otherwise liable."[249]

Both the language of the CAA's section 118 and the legislative history behind the provision seem to "manifest a broad immunity from personal liability not confined to the limits of the federal common law concept of qualified immunity for official acts."[250] Therefore,

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[243] CAA § 113(b)–(d), 42 U.S.C. § 7413(b)–(d) (1994).

[244] *Id.* § 302(e), 42 U.S.C. § 7602(e).

[245] *Id.* § 118(a), 42 U.S.C. § 7418(a).

[246] *Id.* (emphasis added).

[247] The Supreme Court has stated when interpreting a statute that "the starting point in every case involving statutory construction is 'the language employed by Congress.' " *See* CBS v. FCC, 453 U.S. 367, 377 (1981) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

[248] H.R. CONF. REP. NO. 95-564, at 137 (1977).

[249] *Id.*

[250] Donnelly & Van Ness, *supra* note 29, at 39.

" 'otherwise liable' can only refer to liability arising from acts or omissions totally unrelated to the would-be defendants' federal service. Consistent with this interpretation, 'any civil penalty' should be read to include administratively-imposed penalties as well as those civil penalties imposed after a trial."[251] Although judicial interpretation is absent, scholars have noted that this provision of the CAA "seemingly slams the door on federal, state, and local authorities who would seek civil penalties, in any form, from individual[s]."[252]

C. A Comparative Analysis With Other Environmental Laws: Statutory Differences Lead to Varying Interpretations

The text and legislative history of the CAA indicate a statutory immunity for federal employees. In contrast, the RCRA and CWA provisions seem to incorporate the federal common law qualified immunity.[253]

Pursuant to section 313 of the CWA, any officer or employee of the federal government, in the performance of official duties, "shall be subject to, and comply with, all Federal, State, . . . and local requirements . . . [and] shall be personally liable for any civil penalty *arising from the performance of his official duties*, for which he is not otherwise liable."[254] Comparing this to the language of the CAA, (which provides that no officer "shall be personally liable for any civil penalty for which he is not otherwise liable"[255]), the CWA appears to provide a narrower protection for federal employees.[256] Although the CWA's legislative history does not clarify the boundaries of its waiver, scholars contend that the phrase "arising from"[257] encapsulates federal common law qualified immunity for employees' official acts or omissions performed reasonably and within the official's authority.[258] Moreover, if the statute or regulation clearly describes employee responsibilities, the employee will be presumed to know the law and

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[251] *Id.*

[252] *Id.*

[253] *Compare* CAA § 118, 42 U.S.C. § 7418 (1994), *with* Clean Water Act (CWA) § 313, 33 U.S.C. § 1323 (1994) *and* RCRA § 6001, 42 U.S.C. § 6961 (1994).

[254] CWA § 313(a), 33 U.S.C. § 1323 (emphasis added).

[255] CAA § 118, 42 U.S.C. § 7418.

[256] *See* Bartus, *supra* note 241, at 66.

[257] CWA § 313(a), 33 U.S.C. § 1323(a).

[258] *See* Bartus, *supra* note 241, at 66; Donnelly & Van Ness, *supra* note 29, at 39–40.

will not have immunity from civil penalties.[259]

Section 6001 of RCRA, the provision regarding federal employee liability, expressly waives any immunity with respect to any such substantive or procedural requirements including, but not limited to, any civil or administrative penalty or fine.[260] Moreover, under RCRA, "[n]o agent, employee or officer of the United States shall be personally liable for any civil penalty . . . *with respect to any act or omission within the scope of the official duties*."[261] The language in this provision also embraces the common law qualified immunity and limits available immunity from civil penalties for federal employees. Because this provision is the most recent amendment of the environmental statutes discussed,[262] the provision reflects a legislative response to the Supreme Court's strict rulings on federal sovereign immunity by clearly adopting the common law qualified immunity.

IV. PROPOSED SOLUTION: USING BARGAINING TO GAIN OPTIMUM FEDERAL FACILITY ENVIRONMENTAL COMPLIANCE WITH THE CAA

To obtain optimum environmental compliance by federal facilities, a legal structure must be established that provides punitive ramifications, furnishes incentives for federal facilities to comply, and ensures that federal facilities spend the right amount of time on compliance. To determine the role of civil penalties in such a legal structure, one must look at the benefits of assessing punitive civil penalties against both federal employees and federal agencies.

A. Consequences of Civil Penalties on Federal Facilities

Advocates of subjecting federal facilities to civil penalties cite deterrence as a primary advantage.[263] The legislative history of the Federal Facility Compliance Act of 1992 also reflects Congressional support of this enforcement option. In hearings before the Senate Committee on Environment and Public Works, the EPA testified that " 'penalties serve as a valuable deterrent to noncompliance and to help

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[259] *See* Bartus, *supra* note 241, at 66–67.

[260] *See* RCRA § 6001(a), 42 U.S.C. § 6961(a) (1994).

[261] *Id.* (emphasis added).

[262] *See id.*

[263] *See* Horne, *supra* note 105, at 655.

focus facility managers' attention on the importance of compliance with environmental requirements.' "[264]

EPA contends that substantial monetary penalties encourage compliance.[265] Without such sanctions, federal facilities would delay compliance until they are caught and forced to comply.[266] The agency also argues that such penalties promote environmental compliance, help protect public health, ensure a "national level playing field" by prohibiting violators from achieving economic advantages, and encourage regulated entities to engage in environmentally beneficial techniques.[267]

States also contend that they need this enforcement option within the CAA's citizen suit provision in order to enforce laws or compliance agreements. Without the ability to impose civil penalties on federal entities, states would encounter difficulty deterring environmental violations at federal facilities.[268] In effect, states would be forced to rely on federal "cooperation" and inconsistent, unpredictable methods of federal facility self-regulation. Moreover, applications for injunctions only present a threat that a court will order a facility to stop violating an environmental statute, while civil penalties accrue each time a facility commits a violation.[269] Therefore, without civil penalties as a threat, federal entities have no clear incentive to comply with discharge limitations.[270]

On the other hand, citizen suits allow "private attorneys general" and state environmental regulatory agencies to use civil penalties to deter federal noncompliance.[271] Civil penalties notify Congress about

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[264] S. REP. NO. 101-553, at 4 (1990).

[265] *See* Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796, 24,796 (1998).

[266] *See id.*

[267] *See id.*

[268] PERCIVAL, *supra* note 141, at 239.

[269] *See* Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. CHI. L. REV. 845, 863–64 (1990); Minister, *supra* note 6 at 169–72.

[270] *See* Abate & Cogswell, *supra* note 114, at 19–20.

[271] *Id.* The CAA also has a unique citizen suit provision that provides "the court with discretion to order that civil penalties are used in beneficial mitigation projects that improve the public health or environment in lieu of being deposited into the United States Treasury. The provision may allow a judge to order that money go to an environmental group." Natalie Bussan, Note, *All Bark and No Bite: Citizen Suits after* Steel Company v. CBE, 6 WISC. ENVTL. L. J. 195, 198 (1999) (citing CAA § 304(g), 42 U.S.C. §7604(g) (1994)) (footnote omitted).

agencies fined for misconduct, raise agency budgetary concerns, and encourage settlements by giving citizens or states bigger bargaining chips.[272] Furthermore, assessing civil penalties against federal violators under the CAA's citizen suit provisions supports the policy that "pollution has no place in effective government and the rights of states and citizens to sue officials who pollute should outweigh any governmental interest in placing [agency] mission over environmental values."[273]

In contrast, others argue that policy considerations support the need for federal immunity from state fines and penalties. A broad statutory waiver may allow state interests to override federal interests or disrupt federal priorities by diverting funds appropriated by Congress for other designated purposes.[274] This would punish the public at large by decreasing the agency's ability to fulfill its duties.[275] Some scholars complain that taxpayers pay the punitive penalties assessed against federal violators, and because "[p]enalties collected under citizen suit provisions go to the federal treasury[,] the penalty is really no penalty at all."[276] Moreover, federal facilities may be subjected to state prosecutorial discrimination in environmental law enforcement.[277]

Although structured similarly to private corporations, federal agencies fulfill an entirely different societal need. While maintaining air quality standards benefits the public at large, it may provide more public benefit at the time of noncompliance to maintain certain ongoing agency functions, such as the DOD's national security function, than to ensure the highest quality air.

Moreover, unlike corporate entities, federal agencies represent the public interest and do not obtain monetary profits from polluting. Thus, although assessing civil penalties may provide specific deterrence by encouraging the facility fined to comply in the future and general deterrence by discouraging other facilities from violating the CAA, the legal structure must promote the appropriate level of federal attention to

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[272] Horne, *supra* note 105, at 655–56.

[273] Stan Millan, *Federal Facilities and Environmental Compliance: Towards a Solution,* 36 LOY. L. REV. 319, 399 (1990).

[274] Richard E. Lotz, Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties, 31 A.F. L REV. 7, 22 (1989).

[275] *Id.*

[276] Minister, *supra* note 6, at 168.

[277] Lotz, *supra* note 274, at 23.

environmental compliance. The civil liability mechanism is not the best way to accomplish this goal.

B. Viability of Federal Employee Liability

Allowing individual federal employee liability for punitive penalties under the CAA could both hinder and help achieve the goal of federal facility compliance. Imposing civil liability on federal employees for agency environmental violations may be "appropriate because penalties assessed against federal facilities impose costs on the public and government enforcement agencies . . . . [L]itigation expenses deplete cleanup funds and potentially channel money away from other governmental projects, thereby imposing costs on the public and other governmental agencies. Imposing personal liability on government employees would reduce many of these costs."[278] Other proponents add that the most effective way to get the institution's attention is by getting the individual's attention.[279] Essentially, imposing sanctions on the individual may force government officials to observe "efficient care" in fulfilling statutory requirements.[280] Some contend that environmental fines on agencies alone do not serve as adequate incentives for federal employees to comply with environmental laws because of agency budgeting and methods to obtain money to pay fines.[281]

Opponents of sovereign immunity waivers contend that, unlike some corporate employees, federal employees do not gain any economic benefit from government noncompliance because their job performance is not measured by their impact on the "bottom line."[282] Unlike corporate or private employees, federal employees do not obtain monetary compensation as a reward when their employer profits. Further, imposing civil penalties on federal employees may freeze government action if "officials are frequently subject to damage suits whenever they discharge their public functions."[283]

Some contend that waivers may result in federal employee

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[278] Minister, *supra* note 6, at 169 (footnote omitted).

[279] *See* Millan, *supra* note 273, at 401.

[280] *See* Michael G. Faure, et al., *Imposing Criminal Liability on Government Officials Under Environmental Law: A Legal and Economic Analysis*, 18 LOY. L.A. INT'L & COMP. L.J. 529, 550 (1996).

[281] *See* Kassen, *supra* note 18, at 1476–77.

[282] *See* Lotz, *supra* note 274, at 23.

[283] Faure, *supra* note 280, at 534.

inefficiency[284] because exposing federal officials to personal liability for civil penalties could "paralyze the initiative of government officials."[285] Federal employment provides less incentive to take risks or become more efficient than private employment. Consequently, imposing individual civil liability on federal employees may adversely affect performance and the overall makeup of the federal workforce. Due to the lower salaries of federal employees, the pay may not be worth the threat of being subject to civil liability. Therefore, civil liability may deter qualified applicants from applying for civil service positions.[286]

A further risk of subjecting federal employees to civil liability is that they may be influenced to act in their own best interest rather than that of the agency. For example, instead of achieving federal facility compliance, the threat of penalties may cause employees to avoid any involvement in environmental compliance matters.

Enforcing civil penalties against federal employees also may prove to be problematic. Employees may be unable to pay, especially when total damages exceed their assets.[287] Additionally, certain personnel, such as those in the military, frequently move, making it difficult to identify the responsible party.[288] When enforcing civil judicial penalties, employees may receive a jury trial to determine penal liability, and such trials may raise due process concerns regarding standards of proof and excessiveness of penalties imposed.[289] Therefore, the disadvantages of imposing civil penalties on employees appear to outweigh the advantages and the minimal amounts of penalties EPA may ultimately collect.

C. Bargaining Achieves Shared Goals

A legal system designed to achieve optimum federal facility environmental compliance with the CAA should provide a prescriptive framework, describing both the methods and the guidance to achieve shared public goals. A system comprised of bilateral agreements between federal facilities and EPA and between federal facilities and

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[284] *See* Minister, *supra* note 6, at 172.

[285] Faure, *supra* note 280, at 534. However, unlike private parties facing civil penalties, public officials often do not have the option to "refuse to act." *Id.*

[286] *See* Minister, *supra* note 6, at 172.

[287] *See* Faure, *supra* note 280, at 552.

[288] *See* Lotz, *supra* note 274, at 23.

[289] *See* Millan, *supra* note 273, at 399.

state or local enforcement authorities could provide such a framework. Through offering and exchanging incentives, parties could reach a negotiated agreement and achieve environmental compliance.

As economist Ronald Coase identified in the Coase Theorem, assuming zero transaction costs, parties will negotiate or bargain until they reach an economically efficient outcome.[290] Following the logic of the Coase Theorem, bargaining could improve federal facility environmental compliance and provide incentives for federal agencies to care about conforming to air quality standards. One possible solution would entail a negotiation process whereby individual federal facility representatives would be authorized to deal directly with their respective regional EPA offices to resolve CAA violations and avoid civil penalties. Thereby, negotiated agreements may improve the environmental picture while protecting the public fisc and saving monetary resources from being wasted in litigation. Further, bargaining could help parties redefine their property rights and clarify any other interests involved.

As mentioned earlier, EPA civil enforcement against federal facilities raises constitutional concerns. Bargaining would avoid expenditure of federal funds to litigate such issues. Disputes regarding civil penalty enforcement undercut the credibility of the executive branch and reinforce negative public attitudes towards federal bureaucracy. In addition, this process does not work towards a common goal but merely induces noncompliance until EPA raises the debate to the DOJ level. Furthermore, DOJ has an interest in avoiding litigation between agencies and not just in reaching optimum federal facility environmental compliance. Therefore, negotiated agreements between the parties would have the optimum outcome for all involved.

As the Coase Theorem suggests, instead of arguing over civil penalties, EPA and federal facilities should negotiate agreements that lead to the shared goals of environmental protection and resource preservation.[291] Instead of imposing penalties on a federal violator of the CAA, the regional EPA may take a more comprehensive, flexible

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[290] *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1–44 (1960); *see also* Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L.REV. 397, 401 (1997).

[291] Such a negotiation procedure should involve a process more focused on the needs of federal facilities. This would differ from EPA's guidance (published in 1998) that equates many procedural steps afforded federal facilities to those afforded when EPA takes administrative action against "private parties."

approach that achieves the adequate level of federal compliance through incentive trading. This may include, for example, exchanging CWA compliance or a cleanup at a federal site for relaxed CAA requirements. Thereby, each federal facility would be able to meet its individualized needs and interests through agreements. Such a negotiation process also would leave key decisions to parties that are immediately concerned with environmental, technical, and operational issues.

This proposed bargaining system would be most effective if the President established it directly and mandated agency compliance. Regional EPA offices then could initiate and maintain contact with facilities within their regions and develop individualized goals for compliance. Such a negotiation system also might provide the same specific deterrence as civil penalties by labeling as "bad actors" those federal agencies that fail to establish an agreement or violate an agreement. This would subject such violators to direct ramifications from the chief executive. This process also could provide general deterrence by encouraging other federal agencies to comply. Ultimately, this program would redirect federal facility resources to environmental protection rather than merely avoiding liability. Similarly, EPA could dedicate its funds to environmental protection rather than CAA enforcement and litigation.

In dealing with civil penalties against federal facilities, EPA currently engages in bargaining as part of its enforcement policy. As far back as 1984, EPA recognized the advantages of negotiating "alternative payments."[292] As set forth by EPA in 1998, a federal facility may agree to undertake environmentally-beneficial projects, known as Supplemental Environmental Projects ("SEPs"). These are projects that the facility is not otherwise legally required to perform[293] but may be a part of a settlement for an EPA enforcement action.[294] SEPs meet EPA's traditional punitive goals of ensuring future compliance, punishing non-compliance, providing deterrence, and correcting harm.[295] Through an SEP, a federal agency also may mitigate the penalty amount.[296] Federal facilities have found that SEPs have

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[292] Carey, *supra* note 61, at 5.

[293] *See* Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796, 24,797–98 (1998).

[294] *See id.*

[295] *See* Carey, *supra* note 61, at 4 n.11 (citing Interim Revised EPA Supplemental Environmental Projects Policy ¶ A.1 (May 8, 1995)).

[296] *See* 63 Fed. Reg. at 24,796–97. However, federal facilities must ensure that the scope

resolved enforcement actions and served to accomplish goals that have been "otherwise desirable but, to date, [have] not been justified."[297] SEPs also may enhance the federal facility's public image, productively use funds that otherwise may have been lost to EPA for payment of civil penalties, and accomplish federal agency policies that favor SEPs.[298] The SEP bargaining process has proven successful, and this methodology should be used as a model for establishing a more comprehensive environmental negotiation system within the executive branch.

Negotiations also may help resolve state or local disputes with federal facilities. Some scholars and courts argue that the CAA does not include an unequivocal, unambiguous, and clear sovereign immunity waiver. They base their arguments on the Supreme Court's decision in *Department of Energy*, which held that the CWA federal facilities section did not waive sovereign immunity for civil penalties.[299] Because the CAA reflects language similar to the CWA,[300] a court could find that the CAA does not explicitly waive sovereign immunity. Moreover, the Court's recent decision in *Nordic Village, Inc.*, would require a court to disregard legislative history.[301] Thus, without a clear waiver, enforcement authorities and federal facilities will continue to litigate this unresolved issue.

Engaging in negotiations would avoid this costly and protracted litigation between states and federal agencies. Instead of arguing over whether the CAA contains a waiver, federal facility and state or local representatives should engage in resolving disputes through negotiated agreements. Negotiations between parties may achieve the common goal of environmental preservation more efficiently than litigation. Direct bargaining between state attorneys general and federal agency representatives, in coordination with DOJ may result in benefits for both sides. Through a bilateral agreement, states could provide federal entities with incentives to lower their sovereign immunity shields and ensure mandatory penalties for noncompliance. By including specific agreement terms, federal agencies could protect the federal fisc and avoid the uncertainties of state prosecutorial discretion.

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of the SEP is within the installations legal authority. Carey, *supra* note 61, at 9–12.

[297] Carey, *supra* note 61, at 3.

[298] *See id.*

[299] United States Dep't of Energy v. Ohio, 503 U.S. 607 (1992).

[300] *See supra* notes 195–208 and accompanying text.

[301] *See supra* notes 82–84 and accompanying text.

Either the executive branch or a combination of both the executive and legislative branches could mandate these negotiations. The President could order federal agencies to negotiate with state attorneys general to develop memorandums of agreement. Alternatively, a statutory framework may authorize different standards for federal facilities and require bargaining between states and federal agencies.[302]

D. Realistic Limitations

Practically speaking, this proposed bargaining system does have some limitations. The Coase Theorem supports the principle that when it is costless for the parties to negotiate and enforce an agreement, the parties will reach an efficient outcome.[303] Realistically, however, negotiations between regulators and federal facilities would not exist in a transaction cost-free vacuum. Costs associated with information, negotiation, policing and enforcement, and other transactions may lead to economically inefficient agreements.[304]

Additionally, incentives for reaching a common ground must exist among the parties. The federal representatives involved in this negotiation process may have the incentives discussed for resolving CAA violations, but they also must be given the freedom to negotiate without undue interference from those above their organizational level. Empowering lower level officials with the freedom to negotiate, however, may open the federal agency to liability. Once individual facilities begin to engage in bilateral agreements with regional EPA, state, or local authorities, the headquarters agencies may find themselves liable for certain violations. Therefore, an individual federal facility and regional EPA representatives should not be left wholly on their own to conduct negotiations that would have broad-sweeping impacts on the agencies.

Meanwhile, federal facility compliance has attracted congressional attention and, in all likelihood, will remain a politically sensitive issue. Any negotiation system that is devised must be mindful of Congress's

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[302] Although, according to the Coase Theorem bargaining will establish an economically efficient outcome regardless of the rule; bargaining expunges legal rules. Farber, *supra* note 290. Of course, litigation may result from statutory provisions. Executive branch action may be the better approach, assuming states would be willing to negotiate.

[303] *See* Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919, 922.

[304] *See id.*

watchful eyes that will continue to monitor whether federal agencies are complying and whether EPA is draining federal facility appropriations.

V. CONCLUSION

The ultimate goal of enforcing the CAA against federal violators is to ensure compliance. Authorities encounter difficulties enforcing civil penalties against federal facilities. Intrabranch disputes between EPA and federal entities divert federal resources to resolving legal issues such as separation of powers, the unitary executive theory, and justiciability questions, rather than directly protecting the environment. Inconsistencies between environmental statutes and restrictive judicial interpretations of sovereign immunity waivers impede state and local enforcement.

Imposing civil penalties on federal employees is less likely to deter federal facilities from violating the CAA and more likely to cause employees to focus on avoiding personal liability. Therefore, potential criminal sanctions against federal employees should provide the only punitive ramifications for knowing violations of the CAA.[305] The existence of such harsh penalties provides an adequate incentive for federal employee compliance.

Although achieving optimum federal facility compliance with the CAA requires punitive enforcement options, imposing punitive civil penalties on federal agencies seems to raise valid constitutional concerns. Enforcement authorities may more efficiently achieve specific and general deterrence, the primary goals of punitive civil penalties, through alternative dispute resolution.

Rather than wasting resources resolving these tensions, parties should engage in bargaining. Parties, such as state and local enforcement authorities, may achieve efficient pollution control and federal facilities may focus on compliance through negotiated agreements. Likewise, the executive branch should resolve CAA conflicts internally, and federal agencies should negotiate with EPA for an appropriate level of federal facility attention to CAA compliance. Federal agencies should not be required to spend their much-needed resources on contesting the civil penalty enforcement option but should be able to devote those funds to actual environmental compliance or

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[305] *See* CAA § 113(c), U.S.C. § 7413(c) (1994).

cleanups.[306] These goals may be achieved if the traditional civil enforcement method were replaced by a negotiation system.

[306] As Coase has stated, "[w]hat has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm." *See* Coase, *supra* note 290, at 27.