



1993

United States Department of Energy v. Ohio & (and) the Federal Facility Compliance Act of 1992: The Supreme Court Forces a Hazardous Compromise in CWA and RCRA Enforcement against Federal Agencies

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Recommended Citation

Gregory J. May, *United States Department of Energy v. Ohio & (and) the Federal Facility 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 (1993).

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Casenotes

UNITED STATES DEPARTMENT OF ENERGY V. OHIO & THE FEDERAL FACILITY COMPLIANCE ACT OF 1992: THE SUPREME COURT FORCES A HAZARDOUS COMPROMISE IN CWA AND RCRA ENFORCEMENT AGAINST FEDERAL AGENCIES

I. INTRODUCTION

Despite Congress' enactment of several far-reaching environmental statutes within the past two decades, the federal government itself has earned the reputation as one of the nation's worst polluters.¹ States have attempted to bring certain federal agencies into compliance with both federal and state statutory requirements under the Clean Water Act (CWA)² and the Resource Conservation and Recovery Act (RCRA).³ Those agencies, how-

1. Within the past several years, many commentators in the area of environmental law have recognized the federal government's irresponsible handling of its own facilities. See generally Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, 6 NAT. RESOURCES & ENV'T 28 (Summer 1991); Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. CHI. L. REV. 845 (1991); Nancy E. Milstein, Note, *How Well Can States Enforce Their Environmental Laws When the Polluter Is the Federal Government?*, 18 RUTGERS L.J. 123 (1986); J.B. Wolverton, Note, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565 (1991).

Congressional studies of the subject have found that federal agencies' compliance rates with federal environmental statutes generally lag 10-15% behind those of private industry. See H.R. REP. NO. 111, 102nd Cong., 1st Sess., 3 (1991) [hereinafter H.R. REP. NO. 111], reprinted in 1992 U.S.C.C.A.N. 1287, 1288. With the CWA in particular, federal agencies have twice the non-compliance rates as those of private companies. *Id.* Furthermore, a General Accounting Office (GAO) study in 1986 discovered that half of the federal hazardous waste handlers were guilty of some sort of statutory violation. See S. REP. NO. 67, 102nd Cong., 1st Sess. 3 (1991) [hereinafter S. REP. NO. 67]. The situation at federal facilities has become so notorious that even ROLLING STONE magazine has commented on the issue. See Babich, *supra*, at 28 (citing Kohn, *America's Worst Polluter*, ROLLING STONE, May 3, 1990, at 47).

The Department of Defense (DOD) and Department of Energy (DOE), the two agencies which most often handle nuclear or other hazardous waste, have flouted federal and state statutory requirements the most often. *Id.* at 28; Wolverton, *supra*, at 568-69. "A combination of excessive secrecy, lack of independent oversight, and an overemphasis on [DOD's and DOE's] primary mission has resulted in some horrendously contaminated real estate." Babich, *supra*, at 28.

2. CWA §§ 101-67, 33 U.S.C. §§ 1251-1387 (1988).

3. RCRA §§ 3001-5006, 42 U.S.C. §§ 6921-6956 (1988 & Supp. 1992)).

ever, have repeatedly resisted those efforts and continue to pollute or to avoid remedying their past environmental transgressions.⁴

Indicative of this conflict is the State of Ohio's six-year struggle to force the United States Department of Energy (DOE) to clean up its highly-contaminated Fernald, Ohio uranium-processing plant.⁵ In response to Ohio's request for courts to impose civil penalties under the CWA and RCRA, the federal government, according to its custom in such matters, invoked the defense of sovereign immunity.⁶ The Supreme Court, agreeing with

RCRA is an amendment to the Solid Waste Disposal Act (42 U.S.C. §§ 6901-6992(k) (1988 & Supp. 1992)).

4. See Babich, *supra* note 1, at 28. For many years now, states have "[met] with no success in enforcing their environmental statutes against federal facilities." Milstein, *supra* note 1, at 124 (citing *Hancock v. Train*, 426 U.S. 167 (1976)). Federal agencies find litigation to be the best method of putting off compliance with state regulations; as one commentator noted, "[n]o loophole, it seems, is too small to be found by the federal government." Babich, *supra* note 1, at 28 (quoting Senator Stafford).

5. DOE's activities at the Fernald bomb-production plant demonstrate the magnitude of federal negligence in taking care of the environment. The plant, which holds radioactive waste dating from as far back as the Manhattan Project of the 1940's, has emitted an estimated 561,000 pounds of uranium into the air and water. Michael B. Lafferty, *Ohio Isn't Happy with Cleanup at Fernald*, COLUMBUS DISPATCH, Feb. 7, 1991, at 1A. The contractor hired by DOE to operate the plant warned the agency of the danger, but DOE failed to act to prevent contamination of the surrounding area. S. REP. NO. 67, *supra* note 1, at 3. The plant still poses a health hazard to surrounding neighborhoods' groundwater, as foot-ball-field-sized tanks filled with uranium waste are presently deteriorating. Lafferty, *supra*, at 1A; H.R. REP. NO. 111, *supra* note 1, at 3-4, reprinted in 1992 U.S.C.C.A.N. 1289-90.

The federal government already must pay \$78 million to citizens living near the plant in settlement of the neighbors' suit brought for present and future health costs. *Fernald Toxic Waste Case Goes Before U.S. Supreme Court*, COLUMBUS DISPATCH, Dec. 2, 1991, at 2B (Associated Press report). After learning of the extent of the contamination in 1986, the State of Ohio brought suit against DOE, asking a district court to enjoin the plant from operating in a manner inconsistent with state environmental requirements, and for \$250,000 in civil penalties. See *Ohio v. United States Dep't of Energy*, 689 F. Supp. 760 (S.D. Ohio 1986); Roger K. Lowe, *Court Says Federal Government Can't Be Fined for Pollution Mess at Fernald Plant*, COLUMBUS DISPATCH, Apr. 22, 1992, at 1A. The relevant Ohio statutes are OHIO REV. CODE ANN. § 3734 (Baldwin 1993) (Ohio Solid & Hazardous Waste Act (OSHWA) (authorized by RCRA)) and OHIO REV. CODE ANN. § 6111 (Ohio Water Pollution Control Act (OWPCA) (authorized by CWA)). The Fernald plant did not have a RCRA permit as required by OSHWA. *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1632 n.3 (1992). The plant also exceeded "'certain of the effluent limitations set forth'" in its OWPCA permit. *Id.* at 1640 (White, J., dissenting in part) (citing DOE's Answer at 28, 33).

6. See *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1632 (1992). "[T]he Federal Government often invokes the cloak of sovereign immunity to shield it from prosecution for its violations of those environmental laws and compliance plans." Elizabeth K. Hocking, Survey, *Federal Facility Violations of the*

DOE's arguments, held that the waivers of sovereign immunity present in the CWA and RCRA extend only to coercive (or procedural) fines and not to civil (or punitive) penalties.⁷

This Note illustrates how the Supreme Court's protection of the federal government from punitive fines on the basis of sovereign immunity in *United States Department of Energy v. Ohio*⁸ forced Congress to compromise with DOE in order to bring the agency's facilities into compliance with RCRA. Part I of this Note will address how the Court's tradition of requiring unequivocal statutory waivers of sovereign immunity prevented states from forcing federal agencies into compliance with federal and state environmental laws. Part II will review the *Ohio* Court's refined statutory analysis that found waivers of federal government immunity to coercive, procedure-based penalties, and will demonstrate that the Court more reasonably could have found waivers to all civil penalties in both the CWA and RCRA.⁹ Part III will discuss the Federal Facility Compliance Act of 1992 (FFCA), Congress' response to the *Ohio* Court's RCRA holdings, and the potentially troublesome loopholes it leaves open. Finally, Part IV will examine the gaps created by the *Ohio* decision in the original statutory plan to combat federal facility pollution and their possible effects on this environmental dilemma.

Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity, 5 ADMIN. L.J. 203, 205 (1991).

7. *Ohio*, 112 S.Ct. at 1635-40. Previously, the district court for the Eastern District of Ohio had found waivers of sovereign immunity to civil penalties within both the CWA and RCRA. *Ohio v. United States Dept. of Energy*, 689 F. Supp. 760 (E.D. Ohio 1988). The Sixth Circuit, however, decided that the CWA federal facilities section (33 U.S.C. § 1923) and the RCRA citizen suit section (42 U.S.C. § 6961) waived federal government immunity to civil penalties. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990).

For a detailed discussion of the Sixth Circuit's holding, see Colleen Kraft Shields, *The Federal Government: Finally Paying Its Environmental Dues: State of Ohio v. U.S. Dep't of Energy*, 2 VILL. ENVTL. L.J. 439 (1990).

8. 112 S. Ct. 1627 (1992).

9. This Note will not consider the Supreme Court's RCRA federal facilities analysis, as there appears to be general agreement among courts and other authorities that the section does not adequately waive sovereign immunity. See, e.g., *Ohio*, 112 S. Ct. at 1644 (White, J., concurring in majority's RCRA federal facilities analysis); *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990).

For opposing viewpoints, see generally Cheng, *supra* note 1, at 859-60; James B. Dilsheim, Note, *Sovereign Immunity Under Section 6001 of the Resource Conservation and Recovery Act—Mitzelfelt v. Department of Air Force*, 64 TEMP. L. REV. 833 (1991); Shields, *supra* note 7.

II. BACKGROUND

A. CWA and RCRA Waivers of Sovereign Immunity

Congress, in enacting the CWA and RCRA, intended to establish a "cooperative federalism" between state and federal environmental agencies whereby states would administer and enforce environmental provisions while the federal government would establish the minimum guidelines that state programs must meet.¹⁰ To aid in this enforcement, Congress enacted provisions within both statutes which permit citizens¹¹ to bring civil actions against polluters for failure to meet state requirements promulgated under the authority of the CWA and RCRA.¹²

During the mid-1970s, states recognized that certain federal agencies were among the most frequent, dangerous, and blatant

10. *Ohio*, 112 S. Ct. at 1643 (White, J., dissenting) (citing *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1054 (1992)); Milstein, *supra* note 1, at 124.

The structure of the CWA permit and enforcement program has been described as follows:

The National Pollutant Discharge Elimination System (NPDES) authorizes the Administrator of the EPA to issue a permit for the discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a)(1). The Administrator's permit program is subject to the same terms, conditions and requirements as apply to a State permit program under this section. 33 U.S.C. § 1342(a)(3). A State may submit a proposed permit program to the Administrator, who will approve the program unless he or she determines that the State lacks authority to administer. 33 U.S.C. § 1342(b). Among other things, the State must have authority to abate violations of the permit or the permit program through imposition of civil and criminal penalties and other ways and means of enforcement. 33 U.S.C. § 1342(b)(7). If the State program is approved, the Federal permit program must be withdrawn. 33 U.S.C. § 1342(c)(1). The State program must then be administered in accordance with Federal guidelines. 33 U.S.C. § 1342(c)(2).

Ohio v. United States Dep't of Energy, 689 F. Supp. 760, 767 (S.D. Ohio 1988). For a general discussion of the program, see Mike Rothmel, Note, *When Will the Federal Government Waive the Sovereign Immunity Defense and Dispose of Its Violations Properly?*, 65 CHI.-KENT L. REV. 581, 584-86 (1989).

RCRA also employs a permit system under which handlers of solid waste must meet federal or state standards. See RCRA § 3006, 42 U.S.C. § 6926. The state may issue its own permits if its standards are at least as stringent as the national standards and if it provides for adequate enforcement of the permit requirements. 42 U.S.C. § 6926(b).

11. According to the Supreme Court, states are within the CWA and RCRA definitions of "citizen," and therefore may bring suit against the federal government. *Ohio*, 112 S. Ct. at 1634 (citing 33 U.S.C. § 1362(5) and 42 U.S.C. § 6903(15)).

12. The CWA citizen suit provision is at CWA § 505(a), 33 U.S.C. § 1365(a). The RCRA citizen suit provision is at RCRA § 7002, 42 U.S.C. § 6972. The CWA federal facility provision is at CWA § 313(a), 33 U.S.C. § 1323(a).

violators of state and federal environmental laws.¹³ Initially, state environmental agencies tried to sign federal agencies to compliance agreements.¹⁴ However, even if the states were successful in concluding such agreements, the signatory federal agencies usually refused to honor the terms and failed to pay fines as stipulated.¹⁵ As a result, states brought suits against those offending federal agencies to force compliance by asking for monetary punitive fines.¹⁶

Those states soon encountered an obstacle when the Supreme Court held in *Hancock v. Train*¹⁷ and *EPA v. California ex rel. State Water Resources Control Board*¹⁸ that the United States was not subject to state requirements under either of the original

13. For an anecdotal and statistical description of the extent of the federal agencies' environmental negligence, see Douglas Pasternak, *A \$200 Billion Scandal*, U.S. NEWS & WORLD REP., Dec. 14, 1992, at 34-47. DOE and certain government contractors handled nuclear and other hazardous waste in startlingly careless ways. For example, at the DOE Rocky Flats (Colo.) nuclear warhead factory, contractors sprayed low-level radioactive and hazardous wastes into several "ponds" with the idea that the contaminated liquids would evaporate into the air. *Id.* at 40-41.

14. Wolverton, *supra* note 1, at 572. States have found these agreements to be worthless, however, because they are not legally enforceable. *Id.* at 573. These states argue that civil penalties are therefore necessary in order to force compliance by threatening the agencies with monetary loss. *Id.*

15. Babich, *supra* note 1, at 30. Not all noncompliance was intentional. For example, DOE often could not comply with these agreements because of the incompetence of the managers overseeing the cleanup projects, contractor fraud, or the sheer magnitude of the pollution problem. Pasternak, *supra* note 13, at 36-46.

16. Wolverton, *supra* note 1, at 577-80. Only those states whose CWA or RCRA permit programs have been approved by EPA retain the authority to bring such actions. See CWA § 402(b), 33 U.S.C. § 1342(b) (CWA provision authorizing state enforcement of own requirements upon EPA approval of program); RCRA § 3006, 42 U.S.C. § 6926 (RCRA provision authorizing state enforcement of permit program in lieu of federal program if former is at least as stringent as latter).

17. 426 U.S. 167 (1976). In *Hancock*, one of the first environmental claims against the federal government, the Commonwealth of Kentucky brought suit against the Department of the Army for violations of the Clean Air Act (CAA). See *id.* at 183. The Supreme Court held that Kentucky could not enforce its permit requirements promulgated under state CAA provisions against federal facilities because Congress failed to "clear[ly] and ambiguous[ly]" waive sovereign immunity. *Id.* at 182-83.

18. 426 U.S. 200 (1976) [hereinafter *EPA v. Calif.*]. In *EPA v. Calif.*, the State of California charged EPA with failure to enforce federal CWA provisions against federal facilities. *Id.* at 204. The Supreme Court found that neither EPA nor any federal facilities are required under the CWA to follow state requirements because: 1) Congress did not clearly waive sovereign immunity; and 2) EPA's obligation to review state permit programs indicated no intent to subject federal facilities to state law. *Id.* at 212-13.

CWA or RCRA statutes.¹⁹ Soon after the decisions, Congress passed amendments to both Acts possibly intending to more explicitly waive sovereign immunity for the federal government.²⁰ Unfortunately, the drafters of these amendments used language permitting different interpretations of the statutes' intent.²¹

B. Sovereign Immunity: How and Why Courts Protect the Government from Paying Penalties

American courts accepted the doctrine of sovereign immunity, developed in English common law,²² by as early as 1819, in *McCullough v. Maryland*.²³ Whereas the doctrine originally derived from the idea that "the king can do no wrong,"²⁴ modern courts normally invoke sovereign immunity to avoid satisfying individual claims against the government that would obstruct the state's ability to protect the general public's welfare.²⁵ Courts primarily wish to protect the federal treasury (or "fisc") from judgments that would drain away needed funds.²⁶ Furthermore, courts do not wish to grant individual citizens the types of relief, such as injunctions or heavy fines, that would "stop the government in its tracks" by preventing effectuation of government policy directed towards society as a whole.²⁷

Determined to protect the federal government from unin-

19. See *Hancock v. Train*, 426 U.S. 167 (1976); *EPA v. Calif.*, 426 U.S. 200 (1976).

20. See Michael D. Axline et al., *Stones for David's Sling: Civil Penalties in Civil Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1, 21-22 (citing H.R. REP. No. 294, 95th Cong., 1st Sess. 198 (1977)). Within the CWA and RCRA amendments' legislative history, however, there is no discussion as to whether sovereign immunity to coercive fines or civil penalties would be waived. See *id.*

21. For a discussion of the various interpretations reached by courts in examining the CWA and RCRA provisions, see *infra* notes 38-40 and accompanying text.

22. Axline et al., *supra* note 20, at 17 n.81.

23. 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall relied on the Supremacy Clause in Article VI, Paragraph 2, of the Federal Constitution to find that the federal government is supreme over the states and therefore is not subject to state laws without its consent. *Id.* at 426.

24. Axline et al., *supra* note 20, at 17 n.81.

25. Hocking, *supra* note 6, at 204-05.

26. Hocking, *supra* note 6, at 204-05; see also Lt. Col. Richard E. Lotz, *Federal Facility Provisions of Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties*, 31 A.F. L. REV. 7 (1989). The author's major assertion is that permitting fines against federal facilities is a dangerous policy because those penalties deprive the government of the funds necessary to clean up facilities. He emphasizes that the agencies are underfunded already and that allowing state or individual suits against the government for penalties would appropriate funds from the agencies without Congress' approval. *Id.*

27. See Hocking, *supra* note 6, at 204-05. Furthermore, there is the fear that

tended liability, the Supreme Court has often cited the rule that legislative acts purporting to grant citizens the right to civil relief from the federal government must be unambiguous and unequivocal.²⁸ The Court construes such waivers strictly in favor of the state or federal government and will “not enlarge[] [them] beyond what the language [of the statute] requires.”²⁹ Some Court decisions have tempered the severity of this analysis by positing that, although the sovereign should receive the benefit of all doubt as to statutory waiver provisions, construction of the statutes should be “fair”³⁰ and should not limit the scope of the waiver that the legislature intended.³¹ In several instances, however, the Court has been criticized for ignoring the latter line of decisions as its strict analysis has led to some unsavory outcomes.³²

undue judicial involvement in government dealings would also cause the same result. *Id.*

This argument, however, raises the question of what “government” must not be stopped in its tracks. If “government” includes Congress, passage of immunity waivers would appear to be voluntary and knowing stoppages. *Id.*

28. See, e.g., *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512 (1984); *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273 (1983); *Canadian Aviator v. United States*, 324 U.S. 215 (1945). The doctrine is eroding, however, in certain areas of law, such as tort claims. See *Milstein, supra* note 1, at 129 n.40.

29. See, e.g., *McMahon v. United States*, 342 U.S. 25, 27 (1951) (“[W]aivers of immunity must be construed strictly in favor of the sovereign”) (citing *United States v. Michel*, 282 U.S. 656, 659 (1931)); *Eastern Transp. Co. v. United States*, 272 U.S. 675 (1927) (“[W]aivers should not be enlarge[d] . . . beyond what the language requires.”).

30. *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 686 (1983). A “fair” reading would also be the “most natural” one. *Id.*; see also *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

31. See *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457 (1990) (Rehnquist, C.J., plurality opinion); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955)). In *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984), the Court remarked that it should not embark upon a line of reasoning that “seek[s] any hint of ambiguity that can be used to twist the statute into denying sovereign immunity,” but should instead seek to effectuate the underlying congressional policy when interpreting the scope of immunity waivers; see also *Canadian Aviator v. United States*, 324 U.S. 215, 222 (1945) (stating that waivers should not be “thwarted by an unduly restrictive interpretation”).

32. In *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1019-21 (1992), Justice Stevens condemned the Court’s “love affair” with sovereign immunity. He stated that “[t]he cost to litigants, to the legislature, and to the public at large, of this sort of judicial lawmaking is substantial and unfortunate [and] its impact on individual citizens engaged in litigation against the sovereign is tragic.” *Id.* at 1020-21; see also *William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 409-10 (1991) (criticizing Court decisions forcing Congress to revise Education of the Handicapped Act of 1975 three times “to achieve its original goal”); *Hocking, supra* note 6, at 229.

C. Judicial Confusion Over the CWA and RCRA Waiver Provisions

In response to increasing instances of federal environmental irresponsibility,³³ many states sought legal remedies under the CWA and RCRA citizen suit and federal facilities provisions in order to force federal compliance with state CWA and RCRA requirements.³⁴ These states read the federal provisions to permit state and federal courts to assess civil penalties against federal agencies for their past noncompliance with state laws.³⁵ States argued that such penalties were necessary if they were to effectively bring federal agencies into line with their federally-approved CWA and RCRA requirements.³⁶ By making an example of one or several agencies through attacks on their budgets, states hoped to persuade other agencies to comply with those requirements.³⁷

Federal district courts and circuit courts confronted with these state suits and with the poorly-drafted waiver provisions

33. By the late 1980's, the federal compliance rate with state CWA and RCRA requirements was far below that of private polluters. For example, 63% of federal facilities had violated RCRA compared to only a 38% violation rate in private facilities. S. REP. NO. 67, *supra* note 1, at 3.

34. For a list of cases involving state claims, see H.R. REP. NO. 111, *supra* note 1, at 5, *reprinted in* 1992 U.S.C.C.A.N. 1291. California appears to be the most active state in bringing these actions. *See id.*

The Ohio Court itself noted the impact of civil penalties on federal agencies' desire to comply with state law: "To be sure, an agency of the Government may break the law where it might have complied voluntarily if it had faced the prospect of punitive fines for past violations." *Ohio*, 112 S. Ct. at 1638.

35. *See, e.g., Ohio*, 112 S. Ct. at 1633; *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990).

36. State enforcement agencies are the only entities capable of bringing about federal facilities' compliance. *Babich*, *supra* note 1, at 32. The United States Justice Department forbids EPA to bring suit against federal agencies because of the "unitary executive" theory. *Id.* This theory suggests that suits by one branch of the executive department against another are worthless as they entail one branch of government suing itself. *Id.* "[W]hen a federal facility violates an environmental statute . . . all EPA can do is attempt to cajole the recalcitrant agency into compliance, an action which history has proved to have little impact on agency behavior." *Rothmel*, *supra* note 10, at 582.

37. *Wolverton*, *supra* note 1, at 576. The federal government apparently has found the threat of civil penalties to be an effective way to gain state agencies' compliance with federal requirements. A congressional study shows that 90% of environmental claims by EPA against states included requests for penalties. *Id.* (citing H.R. REP. NO. 141, 101st Cong., 1st Sess., at 39 (1989)).

States normally asked for penalties because of their "motivational potential rather than the revenues they generate." *Hocking*, *supra* note 6, at 225 (referring to small amounts in fines requested by some states). In fact, RCRA's civil penalties section requires those fines to go to the United States Treasury. *See RCRA* § 3008(a), 42 U.S.C. § 6928(a).

reached differing conclusions as to whether the CWA or RCRA provisions effectively waived federal sovereign immunity.³⁸ Much of this judicial confusion arose from the uncertain language of the CWA and RCRA provisions,³⁹ and from the ambiguous legislative history behind the 1977 amendments.⁴⁰ The various analytical methods with which courts attacked the statutes reflects this puzzlement; some focused on legislative history while others simply analyzed the bare statutory language.⁴¹ At best, the lower court decisions on sovereign immunity waivers under the CWA and

38. Some courts focused on the language in the federal facilities provisions ordering the federal government to comply with all state "substantive and procedural requirements." See *Colorado v. United States Dep't of Army*, 707 F. Supp. 1562 (D. Colo. 1989) (finding waivers); *California v. Walters*, 751 F.2d 977 (9th Cir. 1984) (finding no waivers); *Florida Dep't of Envtl. Regulation v. Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985) (finding no waivers). Other courts held that the CWA and RCRA citizen suit sections permitted states or other parties to sue the federal government for civil penalties. See *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991), *vacated*, 112 S.Ct. 1927 (1992) (finding waiver in CWA citizen suit and federal facilities provisions); *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990) (finding waivers in CWA federal facilities and RCRA citizen suit provisions); *California v. United States Dep't of Navy*, 845 F.2d 222 (9th Cir. 1990) (finding waiver of sovereign immunity permits only EPA Administrator to seek civil penalties under citizen suit provisions). On the other extreme, several courts held that no section's language unambiguously imparted a waiver. See *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990) (finding no waiver in RCRA federal facilities section); *Parola v. Weinberger*, 848 F.2d 956 (9th Cir. 1988) (finding no waiver in any part of CWA or RCRA); *McClellan Ecological Seepage Situation v. Department of Navy*, 655 F. Supp. 601 (E.D. Cal. 1986) (finding no waivers in either CWA or RCRA); *Meyer v. United States Coast Guard*, 644 F. Supp. 221 (E.D.N.C. 1986).

39. As the opinion in *McClellan Ecological Seepage Situation* stated, the statutes' language can be described as a "compilation of ambiguity." *McClellan Ecological Seepage Situation*, 655 F. Supp. at 604.

40. See *Maine v. Department of Navy*, 702 F. Supp. 322, 334-35 (D. Me. 1988), *vacated*, 973 F.2d 1001 (1st Cir. 1992) (legislative history of environmental laws yields little insight to issue of civil penalties in RCRA). *But see Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1065 (6th Cir. 1990) (waiver of sovereign immunity consistent with "underlying congressional policy of [RCRA] to eliminate the unsafe disposal of hazardous wastes").

Some commentators have argued that the legislative history behind the Clean Air Act (CAA) amendments that were passed at the same time as the CWA and RCRA amendments should indicate Congress' intent to waive sovereign immunity to civil penalties in all three statutes. See, e.g., Axline et al., *supra* note 20, at 28. However, at least one court has refused to "bootstrap" the legislative history of the CAA to the CWA. See *McClellan Ecological Seepage Situation v. Department of Navy*, 655 F. Supp. 601, 605 (E.D. Cal. 1986). No other court has made the connection, although one analyzed the similarity in the Acts' history without passing judgment as to whether the similarities were conclusive. See *Sierra Club v. Lujan*, 931 F.2d 1421, 1427-28 (10th Cir. 1991), *vacated*, 112 S. Ct. 1927 (1992) (finding waivers evident in statutory language alone).

41. See *Hocking*, *supra* note 6, at 222, 228.

RCRA were "erratic."⁴²

The wide disparity of the lower courts' conclusions failed to ease the tension between the federal government⁴³ and states seeking to enforce their environmental laws. Looking to settle the conflicts, the Supreme Court decided to review the Sixth Circuit's conclusion that waivers to sovereign immunity were present in both the CWA and RCRA.⁴⁴

III. UNITED STATES DEPARTMENT OF ENERGY V. OHIO

A. Discussion

In *United States Department of Energy v. Ohio*,⁴⁵ the Supreme Court elected to determine whether the citizen suit or federal facilities sections of either the CWA or RCRA waived sovereign immunity for the federal government.⁴⁶ According to its tradition, the Court promised to "construe [the provisions] strictly in favor of the sovereign" without enlarging the waivers beyond what the language of the statutes require.⁴⁷

42. *Id.* at 228.

43. Although the federal government settled a claim made by the Fernald plant's neighbors for \$78 million, "[t]he government is less willing to make a payout in [this case] because of the precedent" that would permit other states to bring similar actions against federal agencies. *Fernald Toxic Waste Case Goes Before U.S. Supreme Court*, COLUMBUS DISPATCH, Dec. 2, 1991, at 2B (Associated Press report).

44. The Sixth Circuit held that the CWA federal facilities section and the RCRA citizen suit section both allowed federal agencies to be subject to civil penalties. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990). For a detailed discussion of the Sixth Circuit's reasoning, see generally Shields, *supra* note 7.

45. 112 S. Ct. 1627 (1992).

46. *Ohio*, 112 S. Ct. at 1632-33. The Court consolidated Ohio's petition asking for reversal of the Sixth Circuit's decision finding no waiver in the RCRA federal facilities section and DOE's petition asking for reversal of the lower court's finding of waivers in the CWA federal facilities section. *Id.* at 1633; see also *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1062 (6th Cir. 1990). The Sixth Circuit did not consider the CWA citizen suit section as it felt that its ruling on the federal facilities section obviated the need for such analysis. *Id.*

47. *Ohio*, 112 S. Ct. at 1633 (citing *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)).

The Court did not consider any legislative history or possible statutory intent beyond the actual language of the provisions. *Cf.* *Maine v. United States Dep't of Navy*, 702 F. Supp. 322 (D. Me. 1988), *vacated*, 973 F.2d 1007 (1st Cir. 1992) (examining legislative history of RCRA). The only reference to such considerations was to reject Ohio's argument that the amendments were meant to solidify waivers of sovereign immunity for all fines. See *Ohio*, 112 S. Ct. at 1640 n.17.

In situations where there is ambiguous text and unhelpful legislative history, the Court will implement canons of statutory interpretation that reflect traditional policy preferences. Eskridge, *supra* note 32, at 374. The political

1. CWA and RCRA Citizen Suit Provisions

The Court considered both Acts' citizen suit provisions together because of the strong similarity of their language.⁴⁸ Conceding that the sections authorized civil penalties against a noncomplying polluter, the Court focused its attention on whether Congress clearly subjected the federal government to such sanctions.⁴⁹

In its analysis, the Court concentrated on what it perceived to be ambiguity with regard to the definition of "person" created by the incorporation of each statute's civil penalties section into each statute's citizen suit section.⁵⁰ Although both the CWA and RCRA citizen suit sections explicitly include the United States as a "person" subject to civil penalties, the Court found that neither

views of the justices therefore are important, as the policy tack they choose may determine the interpretation the Court reaches. *Id.* Congress, however, would prefer readings that reflect its policy choices. *Id.* at 375.

48. *See Ohio*, 112 S. Ct. at 1633-34. The citizen suit provision of the CWA reads:

Any citizen may commence a civil action on his own behalf-

(1) against any person (including the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation

The district courts shall have jurisdiction . . . to enforce an effluent standard or limitation, or such order . . . as the case may be, and to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)].

CWA § 505(a), 33 U.S.C. § 1365(a).

The RCRA provision reads:

(a) In general. . . . [A]ny person may commence a civil action on his own behalf-

(1)(A) against any person (including . . . the United States . . .) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act. . . . or

(B) against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person . . . and to apply any appropriate civil penalties under [42 U.S.C. §§ 6928(a) and (g)].

RCRA § 7002, 42 U.S.C. § 6972.

The only important difference between the two is that RCRA requires that the fines be paid to the United States. *See id.* § 6928(a).

49. *Ohio*, 112 S. Ct. at 1634 ("It is undisputed that each civil-penalties provision authorizes fines of the punitive sort.").

50. *Id.* The CWA civil penalties provision is at CWA § 309(a), 33 U.S.C. § 1319(d). The RCRA civil penalties provision is at RCRA § 3008(a), (g), 42 U.S.C. § 6928(a), (g).

statute's civil penalties section makes that incorporation.⁵¹ Relying on rules of statutory construction,⁵² the Court asserted that the incorporation of the civil penalties sections into the citizen suit sections brings into the latter section the former's definition of "person."⁵³ The Court then found that the definition of "person" in the civil penalties sections lay within the statutes' general definitions of the term; neither the CWA nor RCRA general definitions of the term, however, explicitly includes the United States as a "person."⁵⁴

The Court then concluded that the citizen suit sections permit only coercive sanctions to be imposed upon the federal government. The Court based its findings on the sections' inclusion of the United States as a "person" within the sections' first sentences, wherein only coercive fines are listed.⁵⁵ Distinguishing the citizen suit sections from other provisions which define "person" as applying to an entire section,⁵⁶ the Court inferred that Congress did not intend to subject the federal government to civil penalties. The Court viewed Congress' failure to expressly include the United States as a "person" throughout each entire citizen suit section as extending the immunity waivers only to the coercive penalties listed in the first sentences and not to the civil penalties referred to in the second sentences.⁵⁷

2. CWA Federal Facilities Section

The Court next examined the CWA federal facilities section⁵⁸ and again found Congress to have authorized only coercive pen-

51. *Ohio*, 112 S. Ct. at 1634.

52. *Id.* The rule applied was that the adoption of an earlier statute by reference "makes it as much a part of the later act as though it had been incorporated at full length." *Id.* (citing *Engel v. Davenport*, 271 U.S. 33, 38 (1926)).

53. *Ohio*, 112 S. Ct. at 1634-35.

54. *Id.* at 1635. The CWA general definition of "person" includes "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State or any interstate body." CWA § 502(5), 33 U.S.C. § 1362(5). The RCRA provision defines "person" similarly, except that it includes "joint stock company" and "government corporation." RCRA § 1004(15), 42 U.S.C. § 6903(15).

55. *Ohio*, 112 S. Ct. at 1635.

56. The Court referred to several sections of the CWA and RCRA where Congress defined "person" "[f]or the purpose of this subsection" or in similar language. *Ohio*, 112 S. Ct. at 1635 (citing 33 U.S.C. § 1321(a)(7), (8) and 42 U.S.C. § 6991(6)).

57. *Ohio*, 112 S. Ct. at 1635. For the text of the CWA and RCRA citizen suit sections, see *supra* note 48.

58. CWA § 313(a), 33 U.S.C. § 1323(a).

alties to be assessed against the federal government.⁵⁹ The majority's reasoning focused on Congress' vague use of the term "sanctions" and the phrase subjecting the federal government to "civil penalties arising under Federal law."⁶⁰

The Court first examined the submission of the federal government to "any process and sanctions" by "Federal, State, or local courts, or in any other manner."⁶¹ The majority believed the definition of "sanctions" to be "spacious" enough to create confusion as to whether Congress intended punitive and/or coercive fines.⁶² Looking to the term's context, the Court reasoned that the grammatical linkage of "sanctions" to "process" implied that the fines were to be imposed for procedural reasons, such as contempt of a court order.⁶³ Furthermore, the majority found a material distinction between "substantive requirements" which, according to the statute, are not to be enforced by courts, and "process and sanctions," which courts shall administer.⁶⁴ The Court took this distinction to mean that Congress used "sanctions" in its procedural meaning, thus excluding punitive (or "substantive") fines from the immunity waivers.⁶⁵

After resolving the "sanctions" issue, the Court considered whether the last clause in the federal facilities section was an unambiguous waiver of sovereign immunity.⁶⁶ The majority initially

59. *Ohio*, 112 S. Ct. at 1636-37.

60. *Id.*

61. The relevant portions of the CWA federal facilities section read: Each department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.

CWA § 313(a), 33 U.S.C. § 1323(a).

62. *Ohio*, 112 S. Ct. at 1636.

63. *Id.* at 1637.

64. *Id.* at 1636-37.

65. *Id.*

66. The clause reads, "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." CWA § 313(a), 33 U.S.C. § 1323(a).

recognized as apparent a waiver of immunity to substantive fines, as the clause subjects the United States to "civil penalties arising under Federal law."⁶⁷ However, the Court harkened back to its analysis of the CWA citizen suit section⁶⁸ and asserted that the CWA civil penalties section was the only applicable federal law under which civil penalties could arise.⁶⁹ Having already found that section inapplicable to the United States, the Court reasoned that the "arising under" clause of the federal facilities section also could not encompass the federal government.⁷⁰

The Court next addressed Ohio's argument that the CWA-authorized state statute prescribing penalties against the United States arises under federal law.⁷¹ The majority pointed out two cases from the 1930's, *Gully v. First National Bank in Meridian*,⁷² and *International Bridge Company v. New York*,⁷³ which held that such statutes do not arise under federal law even though they are "expressly permitted" by congressional acts.⁷⁴ The Court found it "likely" that Congress adopted those cases' narrow interpretation of the "arising under" language and did not intend Ohio's understanding of the law.⁷⁵ Conversely, the majority rejected Ohio's contention that Congress had relied on cases expansively interpreting language similar to the "arising under" clause of Article III of the United States Constitution.⁷⁶ The Court emphasized

67. *Ohio*, 112 S. Ct. at 1638.

68. For a discussion of the Court's CWA citizen suit and civil penalties sections analysis, see *supra* notes 48-57 and accompanying text.

69. *Ohio*, 112 S. Ct. at 1638.

70. *Id.* at 1638.

71. *See id.*

72. 299 U.S. 109 (1936).

73. 254 U.S. 126 (1920).

74. *Ohio*, 112 S. Ct. at 1638-39. In *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 116 (1936), the Court found that a suit over state taxation of a nationally chartered bank did not "arise under federal law" even if that taxation occurred only because of federal statutory authority. In *International Bridge Co. v. New York*, 254 U.S. 126, 133 (1920), the Court found that the construction of a bridge by a state-chartered company did not "arise under federal law" even though Congress authorized that construction. *Id.*

75. *Ohio*, 112 S. Ct. at 1639 (citing *ICC v. Locomotive Eng'rs*, 482 U.S. 270, 284-85 (1987)).

76. *Id.* at 1639 n.16. The Arising Under Clause provides that the federal judicial power shall extend to "all Cases . . . arising under [the] Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . [and to] Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III.

Other Supreme Court decisions regarding the Article III, "arising under" language have given that phrase a broad meaning. *See, e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). In *Verlinden*, the Court posited that its previous decisions reflect a "broad conception of [the "arising under"

that the precedents requiring narrow construction foreclosed acceptance of any interpretation in favor of a waiver if a contrary reading could also be reached.⁷⁷

The majority then had to dispose of the “arising under” clause that, because of the Court’s analysis, appeared devoid of meaning.⁷⁸ The majority could not give the phrase any logical effect within the statute and dismissed it as a probable drafting error.⁷⁹ In any event, the inconsistency did not appear to trouble the Court as it sought out only clear, unambiguous waivers of sovereign immunity.⁸⁰

B. Analysis: A Tortured Statutory Construction

The Supreme Court’s reasoning in *Ohio* is a vivid example of the lengths to which the Court will go in order to circumvent sovereign immunity waivers. Justice Souter’s refined and, perhaps, hair-splitting statutory analysis avoided any plain meaning that the CWA and RCRA provisions may have held. In doing so, however, the majority may have crossed the analytical threshold from narrow construction into an “overly ingenuous” interpretation of facially clear, although poorly-drafted, statutes.⁸¹ Moreover, the Court did not insist upon a “fair” reading of the statutes that would not limit the scope of the waivers that Congress intended.⁸² Instead, the majority produced an intricate interpreta-

clause] according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law.” *Id.* at 492 (interpreting *Osborn v. Bank of United States*, 9 U.S. (Wheat.) 738 (1824)).

77. *Ohio*, 112 S. Ct. at 1639.

78. *See id.* (“The question is still what Congress could have meant in using a seemingly expansive phrase like ‘civil penalties arising under Federal law’ . . . [t]he question has no satisfactory answer.”).

79. *Id.*

80. *See id.* For a discussion of the Court’s adoption of the narrow construction rule, see *supra* note 47 and accompanying text.

81. *See Ohio*, 112 S. Ct. at 1642 (White, J., dissenting). Justice White’s opinion, joined by Justices Blackmun and Stevens, criticized the majority’s reasoning on every point but that of the RCRA federal facilities provision. *See id.* at 1642-44. The thesis of his criticism is that the majority did not determine what the statutes actually said but rather found that the statutes should have been drafted more artfully. *Id.* at 1644. He finds the waivers in all sections but the RCRA federal facilities provision to be clear on their face. *See id.* at 1642-44.

82. *See Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (O’Connor, J.) (“[O]nce Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to ‘assume the authority to narrow the waiver that Congress intended.’”) (quoting *United States v. Kubrick*, 444 U.S. 111, 118 (1979)); *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (stating that

tion which may not appear self-evident from the statutory text and which may have subverted Congress' intent.

Perhaps the most striking example of the Court's tortured analysis is its disposal of the CWA and RCRA citizen suit sections.⁸³ There, the Court relied on certain rules of statutory construction⁸⁴ to conclude that the civil penalties sections' definition (and general statutory definitions) of "person" are incorporated into the citizen suit provisions.

The Court ignored extensions or opposites of these construction rules that appear equally well-accepted.⁸⁵ One such rule states that a statute of reference incorporates the provisions referred to from the incorporated statute without subsequent amendments, *unless* the legislature has expressly or by strong implication shown its intention to include subsequent amendments with the incorporated statute.⁸⁶ Arguably, Congress' inclusion of the United States within the citizen suit provisions' definitions of "person" would amend the term's definitions in any statute, including the civil penalties sections, incorporated into those provisions. In light of Congress' plausible intent to expand the sovereign immunity waivers by amending the CWA and RCRA, the initial inclusion of the United States could represent a strong indication of Congress' desire to subject the federal government to all civil penalties language in the entire section.⁸⁷

Another general rule of statutory construction that the Court did not consider is that in a statute of specific reference a court may consider only the appropriate parts of the statute alluded to

courts should not expand waiver beyond what a "fair" reading of statute requires).

While reciting the various rules of interpretation of sovereign immunity waivers, the Court did not mention any of the cases calling for a fair reading of the provisions in question. See *Ohio*, 112 S. Ct. at 1633. For a discussion of such cases, see *supra* notes 30-32 and accompanying text.

83. For a discussion of the Court's analysis of the CWA and RCRA citizen suit provisions, see *supra* notes 48-57 and accompanying text.

84. The Court relied not only on its own case law but also on the rules of statutory construction collected in 2A-B NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* (5th ed. 1992) [hereinafter *SUTHERLAND STATUTORY CONSTRUCTION*]. See *Ohio*, 112 S. Ct. at 1634.

85. See *SUTHERLAND STATUTORY CONSTRUCTION*, *supra* note 84, at § 51.08.

86. See *id.* (citing *Curtis Ambulance of Fla., Inc. v. Board of County Comm'rs*, 811 F.2d 1371, 1378 (10th Cir. 1987)); *EEOC v. Chrysler Corp.*, 546 F. Supp. 54 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984).

87. For a discussion of Congress' amendments to the CWA and RCRA provisions, see *supra* notes 20-21 and accompanying text.

by the referring statute.⁸⁸ By applying this rule, the Court could have found that the citizen suit sections refer only to those “*appropriate* civil penalties” that are listed within the civil penalties sections.⁸⁹ If the citizen suit sections were found to make specific reference to those potential civil penalties and not to the “person” definitions, the definitions would not be relevant to the citizen suit sections. The citizen suit penalties thus would incorporate those “appropriate” penalties and no other statutory language.⁹⁰

The Court’s selective use of construction rules continued in its analysis of the CWA federal facilities section.⁹¹ After determining that the term “sanctions” does not convey any plain meaning, the Court found that the term could mean *either* coercive fines *or* punitive penalties; according to the Court, “sanctions” could not entail both forms of fines.⁹²

While “sanctions” could imply that Congress intended “coercive fines,” the term could also plainly denote “punitive fines” or “penalties.” The Supreme Court and other authorities considering the issue have found “sanctions” to include both coercive and punitive fines.⁹³ The Court may have ignored the plain meaning rule by holding that “sanctions” has a narrower mean-

88. See SUTHERLAND STATUTORY CONSTRUCTION, *supra* note 84, at § 51.08 (citing Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924)).

89. See CWA § 505(a), 33 U.S.C. § 1365(a) (emphasis added); see also CWA § 309(d), 33 U.S.C. § 1319(d) (CWA civil penalties section).

90. In determining the “appropriate” civil penalties listed in the CWA civil penalties section, a court may consider such factors as “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violations, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” CWA § 309(d), 33 U.S.C. § 1319(d). The “appropriate” civil penalties listed in the RCRA provision are those issued after the EPA Administrator has “take[n] into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.” RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3).

91. For a discussion of the Court’s analysis, see *supra* notes 58-80 and accompanying text.

92. *Ohio*, 112 S. Ct. at 1636-37.

93. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987) (civil penalties authorized by CWA may be “sanctions”); *United States v. Ward*, 448 U.S. 242, 249, (1980); *Sierra Club v. Lujan*, 931 F.2d 1421, 1425-26 (10th Cir. 1991), *vacated*, 112 S. Ct. 1927 (1992).

Black’s Law Dictionary defines “sanction” as a “[p]enalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations [or] [t]hat part of a law which is designed to secure enforcement by imposing a *penalty* for its violation or offering a reward for its observance.” BLACK’S LAW DICTIONARY 1341 (6th ed. 1990) (emphasis added).

ing than that ordinarily employed.⁹⁴ However, defining “sanctions” as including punitive penalties would have nullified the Court’s argument that Congress meant to expose the federal government only to coercive, procedure-based fines.

The Court’s analysis of the final sentence of the section appears particularly flawed.⁹⁵ As the majority acknowledged, the language is “troublesome” to an analysis resistant to finding a waiver;⁹⁶ the sentence apparently subjects the United States to “those civil penalties arising under Federal law.”⁹⁷ The Court avoided a waiver by indicating that its CWA citizen suit analysis revealed no basis for imposing civil penalties on the federal government under the only applicable federal law, the CWA.⁹⁸

In so concluding, the Court failed to give the clause any forceful effect within the statute.⁹⁹ This holding contravenes an established rule of statutory construction noted in the Court’s own analysis. Earlier in the opinion, the Court strove to meet “the test of giving effect to all the language of the citizen-suit sections.”¹⁰⁰ In its “arising under” analysis, however, the majority failed to give an entire sentence any effect whatsoever and dismissed the language as a likely drafting error.¹⁰¹ If the Court had accepted Ohio’s contention that Congress used the language within the context of Article III of the United States Constitu-

94. There is a “strong presumption” that the legislative purpose is expressed by the ordinary meaning of the words used. *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991). This presumption is lifted only in “rare and exceptional circumstances” when a contrary congressional intent is “clearly expressed.” *Id.*; see also *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 600-01 (1963) (courts should not defeat congressional intent by narrowing scope of waivers).

95. The final sentence of the federal facilities section reads: “The United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.” CWA § 313(a), 33 U.S.C. § 1323(a).

96. *Ohio*, 112 S. Ct. at 1638.

97. CWA § 313(a), 33 U.S.C. § 1323(a).

98. *Ohio*, 112 S. Ct. at 1638-39. For a discussion of the Court’s analysis of this section, see *supra* notes 48-57 and accompanying text.

99. See *Ohio*, 112 S. Ct. at 1643 (White, J., dissenting) (“The Court acknowledges that its distortion of the statute leaves the phrase . . . devoid of meaning.”).

100. *Id.* at 1635 (“This textual analysis passes the test of giving effect to all the language of the citizen-suit sections.”); see also *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring); *Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 249 (1985); *F.A.A. Admin’r v. Robertson*, 422 U.S. 255, 261 (1975); *Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 633 (1973).

101. See *Ohio*, 112 S. Ct. at 1639.

tion,¹⁰² or as a reasonable description of the “cooperative federalism” structure of the CWA,¹⁰³ it would have given the sentence effect. However, a waiver of sovereign immunity to civil penalties necessarily would follow from that conclusion, as there would be a “federal law” basis for a waiver independent of the CWA citizen suit provision.

Moreover, the majority may have unrealistically attributed to Congress an understanding of the Court’s construction of the phrase “arising under Federal law” in *Gully v. First National Bank in Meridian*.¹⁰⁴ In general, Congress has closely monitored Supreme Court interpretations of federal statutes over the past few decades.¹⁰⁵ The *Ohio* Court, however, imputed to Congress knowledge of an interpretation which has appeared in only two cases, each almost sixty years old.¹⁰⁶ The Court’s presumption

102. For a discussion of the Article III language and the Court’s analysis of Ohio’s argument, see *supra* notes 71-80 and accompanying text. The Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983), held that, at its broadest, the Arising Under Clause may permit “‘assertion of original federal jurisdiction on the remote possibility of presentation of a federal question.’” *Id.* (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 482 (1957) (Frankfurter, J., concurring) (emphasis added)). Since the federal CWA and RCRA require states to implement permit programs (or face preemption by federal programs), a federal question may be remotely possible in such areas. For a discussion of the CWA and RCRA permit programs, see *supra* note 10 and accompanying text.

103. For a discussion of the federal-state relationship behind the CWA and RCRA, see *supra* note 10 and accompanying text. Because the state statutes must meet minimum federal standards imposed by the CWA and RCRA, and must permit suits under the federal facilities and citizen suit provisions of the CWA and RCRA, it would appear that those state laws arise under federal law. *Ohio v. United States Dep’t of Energy*, 904 F.2d 1056, 1061 (6th Cir. 1990). The types of suits that would *not* arise under federal law would be those based on state statutes that fail to meet EPA approval under the CWA. *See id.*

104. 299 U.S. 109 (1936). The *Ohio* Court relied on the holding in *Gully* to find that state laws enacted because of federal authorization do not “arise under” federal law for the purpose of the federal facilities section. *See Ohio*, 112 S. Ct. at 1628-39. For a discussion of the *Gully* holding, see *supra* note 74 and accompanying text.

105. *Eskridge*, *supra* note 32, at 336. Almost half of the Court’s statutory interpretation decisions have been or will be the specific focus of legislative hearings. *Id.*

106. The cases citing *Gully* on similar grounds discuss the more “selective process” of defining federal courts’ jurisdiction over federal questions. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“[F]ederal jurisdiction exists only when a federal question is presented on the face of plaintiff’s well-pleaded complaint.”); *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 811, 813 (1986) (considering “selective process” behind federal jurisdiction based on federal questions).

A recent Court opinion held that the Court can presume congressional familiarity with common rules of statutory construction, and then factor such familiarity into its analysis of federal statutes. *See McNary v. Haitian Refugee Ctr.*,

that Congress intended to use the *Gully* construction of “arising under Federal law” therefore may not be a reasonable rebuttal to Ohio’s contention that its requirements arise under federal law.

According to its custom when grappling with this issue, the Court chose the path of statutory analysis leading furthest away from sovereign immunity waivers.¹⁰⁷ The Court did not consider any of the legislative history or possible congressional intent behind the waivers.¹⁰⁸ The majority simply examined the bare language of the statutes in a mechanical fashion, selectively applying rules of construction to form interpretations vulnerable to attack by contrary rules left neglected.¹⁰⁹ In the end, the Court found a poorly-drafted statute ambiguous. The majority’s line of reasoning, however, could find a well-drafted statute equivocal.¹¹⁰

IV. THE FEDERAL FACILITY COMPLIANCE ACT OF 1992

In October 1992, President Bush signed into law the Federal Facility Compliance Act of 1992 (FFCA), an amendment to RCRA.¹¹¹ Reacting to the *Ohio* decision, Congress enacted FFCA to override the Court’s interpretation of the RCRA federal facilities section and, perhaps unintentionally, the Court’s citizen suit

111 S. Ct. 888 (1991); see also *Ohio*, 112 S. Ct. at 1633 (citing *McNary*). The *McNary* Court, however, cited a rule of statutory construction that the Court had applied recently. *McNary*, 111 S. Ct. at 898 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)).

107. For a discussion of the Court’s practice of construing waivers of sovereign immunity narrowly, see *supra* notes 22-32 and accompanying text.

108. Some lower courts that considered this issue have examined the legislative history or other evidence of Congress’ intent before attempting to construe the CWA and RCRA provisions. See, e.g., *Maine v. United States Dep’t of Navy*, 702 F. Supp. 322 (D. Me. 1988), *vacated*, 973 F.2d 1007 (1st Cir. 1992) (examining legislative history of RCRA and finding it ambiguous as to congressional intent).

109. One author has criticized the shortsighted “blind adherence” that courts sometimes have to strict interpretation of sovereign immunity waivers. See Hocking, *supra* note 6, at 229. The author urges courts to weigh long-term effects of such restrictive readings into their analysis. *Id.*

110. See *Ohio*, 112 S. Ct. at 1644 (White, J., dissenting) (criticizing majority for “imput[ing] to Congress a desire for incoherence”). Justice White sarcastically remarked during oral argument that the majority and DOE believe that “Congress rewrote the laws to cover the federal government yet did it so subtly that they really didn’t do it?” Roger K. Lowe, *Ohio Argues for Fernald Pollution*, COLUMBUS DISPATCH, Dec. 4, 1991, at 5D.

111. Act of Oct. 6, 1992, Pub. L. No. 102-386, 1992 U.S.C.C.A.N. (106 Stat.) 1505 (to be codified at 42 U.S.C. § 6961) [hereinafter FFCA]. Congress passed the House of Representatives’ version of the bill instead of the Senate version. H.R. CONF. REP. No. 886, 102nd Cong, 2d Sess. 18 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1287 [hereinafter H.R. CONF. REP. No. 886]. For the bill’s legislative history, see *id.* at 1287-1337.

section holdings.¹¹² In order to enact the legislation, FFCA's proponents made some concessions to the President and his congressional allies who resisted the bill on the grounds that it would expose federal agencies to penalties they could not afford to bear.¹¹³ The short-term benefits gained by DOE from these compromises, however, may become onerous over time as FFCA leaves unanswered many questions as to the future relationship between states affected by agencies' pollution and the federal government.

A. FFCA's Structure

In unmistakable terms, but with some exceptions, FFCA waives sovereign immunity for all federal agencies to actions brought for any type of civil penalty under the RCRA federal facilities section.¹¹⁴ Similarly but indirectly, FFCA also abrogates immunity for the federal government to claims brought under the RCRA citizen suit sections by modifying the RCRA definition of "person" to include all departments and agencies of the United States.¹¹⁵ Both waivers appear to be sufficiently clear so as to withstand the Court's intensive inquiry.¹¹⁶ In effect, FFCA per-

112. See H.R. CONF. REP. NO. 886, *supra* note 111, at 18, reprinted in 1992 U.S.C.C.A.N. 1318.

113. See *Federal Facilities: Congress Clears Bill to Let States, EPA Enforce RCRA Provisions at Government Sites*, 23 Env't Rep. (BNA) 1462 (Sept. 25, 1992); *Federal Facilities: Bush Signs Federal Facilities Compliance Act Allowing RCRA Enforcement at DOD, DOE Sites*, 23 Env't Rep. (BNA) 1546 (Oct. 9, 1992) [hereinafter *Bush Signs*].

114. The amendment, to be inserted after the first sentence of the RCRA federal facilities section (42 U.S.C. § 6961), reads in pertinent part:

The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include . . . all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature. . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including . . . any injunctive relief, administrative order or civil or administrative penalty or fine . . .).

FFCA § 102(a)(3), reprinted in 1992 U.S.C.C.A.N. (106 Stat.) 1505.

115. FFCA § 103, 1992 U.S.C.C.A.N. (106 Stat.) 1507. The amendment changes the RCRA "person" definition (42 U.S.C. § 6903(15)) to include "each department, agency, and instrumentality of the United States." *Id.*

The Supreme Court had refused to find a waiver because the original RCRA definition did not include the United States, thus excluding the federal government from the civil penalties section. See *Ohio*, 112 S.Ct. at 1633-36. For a discussion of the Court's analysis, see *supra* note 48-57, 84-91, and accompanying text.

116. For a discussion of the Court's analysis of the CWA and RCRA sections, see *supra* notes 48-57, 83-91, and accompanying text.

mits EPA, states, and any citizen to sue the federal government for noncompliance with RCRA requirements and to expect courts to impose punitive penalties.¹¹⁷

The FFCA exceptions, however, give federal agencies a three-year grace period from civil penalties if their facilities are handling "mixed waste," a combination of nuclear and any other hazardous waste.¹¹⁸ DOE in particular¹¹⁹ is exempt from civil penalties until the end of that period; during that time, that agency must formulate compliance plans describing how it intends to meet with state or federal RCRA requirements.¹²⁰ If a state has the authority under RCRA to establish its own hazardous waste requirements,¹²¹ it alone has the power to approve or disapprove the plan; neither EPA nor any other branch of the federal government may intercede.¹²² Should a state disapprove a plan, it is then free to sue DOE for civil penalties provided that

117. *Bush Signs*, *supra* note 113, at 1546. The explicit grant of authority to enforce RCRA against its fellow agencies may run afoul of the Justice Department's view that the "unitary executive" theory makes such intra-branch enforcement unlawful. See Babich, *supra* note 1, at 32 (explaining enforcement problems caused by theory).

118. FFCA § 102(c)(2), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1506 (pertaining to delayed effective date of sovereign immunity waiver). Congress included the three-year delay because DOE claimed the period "both necessary and adequate" to develop the plans. H.R. CONF. REP. NO. 886, *supra* note 111, at 21, *reprinted in* 1992 U.S.C.C.A.N. 1321.

FFCA also amends 42 U.S.C. § 6902 (RCRA definitions section) to include the term "mixed waste," defined as "waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*)." FFCA § 105(b), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1512.

119. DOE was singled out from other federal agencies because its control over the most dangerous radioactive sites put it in a "unique situation[.]" *Bush Signs*, *supra* note 113, at 1546.

120. FFCA § 102(c)(3)(B), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1506-07. DOE formulation and submission of compliance plans is covered under FFCA § 105(a). See *id.* at 1508-12. DOE must first submit to EPA and to each affected state an inventory of all mixed wastes generated by DOE and of all mixed waste treatment capacities and technologies. *Id.* at 1508 (to be codified as 42 U.S.C. § 6940(a)). The agency must then develop a plan under which it will clean up those facilities currently generating or backlogged with mixed waste. *Id.* at 1510 (to be codified as 42 U.S.C. § 6940(b)(1)). The plan must include schedules demonstrating when each step in the cleanup process (including applying for permits, entering into contracts, and commencing operation) will occur and when new treatment technologies will be developed. *Id.* (to be codified as 42 U.S.C. § 6940(b)(1)(B)).

121. For a discussion of how states may become eligible to enact RCRA requirements that can replace federal regulation, see *supra* note 10 and accompanying text.

122. FFCA § 105(a) (to be codified as 42 U.S.C. § 6940(b)(2)(A)), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1510. When reviewing the submitted DOE plan, a state is required only to consult with EPA. *Id.*

the three-year period has expired.¹²³ If the period has not expired, the state may still petition a court for coercive penalties, as FFCA's legislative history indicates that those penalties will continue to exist within RCRA.¹²⁴

Once it submits an approved compliance plan, DOE is subject to civil penalties only for violations of that plan and not for violations of state RCRA requirements.¹²⁵ Any civil penalties received by states under FFCA for violation of compliance plans must be directed towards improvement or protection of those states' environment.¹²⁶ According to the House committee report on FFCA, the source of these penalties is to be DOE appropriations if the agency admits to a violation; if the agency denies wrongdoing, however, the Federal Judgment Fund, not DOE, would pay the penalties.¹²⁷

B. Analysis

In general, FFCA appears to be a rational partial solution to the DOE-DOD environmental quagmire. The amendment grants DOE time to coordinate and commence cleanups while it threatens the agency with liability should it fail to submit a plan to a particular state's satisfaction or should it violate a state-approved plan. Since DOE claims it is unable to initiate cleanups within the near future, FFCA may provide for a fairer and more realistic timetable than if states were permitted to ask for civil penalties immediately.¹²⁸ Apparently, both states and DOE are satisfied;

123. FFCA § 102(c)(3)(B), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1507 (DOE exempted from civil penalties only if plan has been approved by state under RCRA § 3021, 42 U.S.C. § 6940).

124. *See* H.R. CONF. REP. No. 886, *supra* note 111, at 21, *reprinted in* 1992 U.S.C.C.A.N. 1321.

125. FFCA § 102(c)(3)(B), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1507. FFCA also permits only prospective use of civil penalties; the House Conference Report indicates that the waiver is not intended to have retroactive effect. H.R. CONF. REP. No. 886, *supra* note 111, at 18, *reprinted in* 1992 U.S.C.C.A.N. 1318.

126. FFCA § 102(b), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1506 (to be codified at 42 U.S.C. § 6961(c)).

127. *See* H.R. REP. No. 111, *supra* note 1, at 15, *reprinted in* 1992 U.S.C.C.A.N. 1301 (citing 31 U.S.C. § 1304 as authority for Judgment Fund appropriation). The report relies on a Comptroller General decision with regard to the Clean Air Act civil penalties. The reporting House committee also states that such a system would provide for agency accountability due to congressional oversight over the Judgment Fund. *Id.* *But see* Cheng, *supra* note 1, at 865 (structure of payments would permit agencies to "pass the buck" of judgment liability to Judgment Fund).

128. For example, DOE has stated that the Fernald cleanup will take six years to complete at a cost of \$2.9 billion to United States taxpayers. Roger K. Lowe, *Court Says Federal Government Can't Be Fined for Pollution Mess at Fernald Plant*,

states have veto power over plan formulation and may collect civil penalties for future violations of approved schemes while DOE receives a reprieve from past and present pressure from states to comply with RCRA.¹²⁹

Despite its potential effectiveness, FFCA may leave unresolved several important issues that could seriously affect the federal-state relationship envisioned by Congress. First, the amendment and its legislative history do not adequately answer the question of how penalties, civil/punitive or procedural/coercive, are to be paid. A House report claims that the money is to come from either the Judgment Fund or agency appropriations, depending on whether the agencies contest the claims in court.¹³⁰ Conversely, President Bush, in his signing statement, declared that the penalties are to be paid from agency appropriations alone; drawing them from the Judgment Fund, he said, would "take away the coercive effect penalties might have on the agencies and [create] a revenue sharing plan."¹³¹

Either source of payment could portend enforcement problems for states seeking civil penalties. Taking the penalties from the Judgment Fund would defeat Congress' intent to enforce DOE compliance with RCRA requirements. The threat of civil penalties would not compel DOE to follow its own compliance plan because it would not feel the pain associated with monetary loss.¹³²

On the other hand, states or EPA may receive no money at all if the source is special congressional appropriations. In such an event, Congress would determine on an ad hoc basis whether or not to appropriate funds for a particular facility's debt. Although Congress probably would approve the appropriations so as to

COLUMBUS DISPATCH, Apr. 22, 1992, at 1A. Recent estimates claim that cleanup of all contaminated federal sites may cost \$200 billion over the next 30 years. Pasternak, *supra* note 13, at 34.

129. The National Governors Association, a strong proponent of FFCA, was "enormously pleased" with President Bush's signing of the bill, although its chairman had reservations about some aspects. *Bush Signs*, *supra* note 113, at 1546. The President and DOE have also registered their approval. *See id.*; H.R. CONF. REP. NO. 886, *supra* note 111, at 21, *reprinted in* 1992 U.S.C.C.A.N. 1321.

130. H.R. REP. NO. 111, *supra* note 1, at 15, *reprinted in* 1992 U.S.C.C.A.N. 1301.

131. *Statement by President George Bush upon Signing of H.R. 2194*, 1992 U.S.C.C.A.N. 1337.

132. *See id.* The House report on the bill, however, seems to maintain that agencies would still be coerced by the imposition of civil penalties because of congressional oversight of the Judgment Fund. *See* H.R. REP. NO. 111, *supra* note 1, at 15-16, *reprinted in* 1992 U.S.C.C.A.N. 1301-02.

meet with its own laws, the process could be time-consuming and therefore frustrating to states seeking either satisfaction of their judgments or, more importantly, the coerced agency compliance. Moreover, Congress may simply disapprove the appropriations, thus leaving the liable agencies "judgment-proof" against states' claims for civil penalties.¹³³

Another problem left unresolved by FFCA is the continued lack of waivers of sovereign immunity within the CWA. Congress did not extend the FFCA sovereign immunity waivers to the CWA, thus leaving in place only the waivers to coercive penalties found by the *Ohio* Court.¹³⁴ Although the dangers posed by the DOE and DOD contaminated sites are caused mainly by mishandled radioactive waste subject to RCRA regulation, federal facilities still fail to comply with CWA requirements two times more often than private industry.¹³⁵ As a result of Congress' inattention to the CWA, those facilities are free to pollute navigable waters in violation of state permits without fear of incurring civil penalties. While the federal radioactive waste crisis rightfully warrants immediate congressional attention, many states would argue that federal neglect of CWA problems is of major consequence as well.¹³⁶

V. IMPACT: FEDERAL MISBEHAVIOR COULD RUIN THE CWA AND RCRA ENFORCEMENT SCHEMES

FFCA and the *Ohio* decision will greatly change the manner in which states enforce their environmental laws. Although FFCA's enactment probably will aid state enforcement of RCRA laws in that it gives states control over cleanup planning through validation of both coercive and civil penalties, some problems may arise that could complicate the relationship envisioned by FFCA's drafters. Moreover, Congress' disregard of the *Ohio* Court's CWA

133. A National Governors' Association spokesman articulated his organization's fear of this result. However, he also indicated that states would have to "assume that the federal government would act in good faith and honor any judgments against it." *Bush Signs, supra* note 113, at 1546.

134. For a discussion of the *Ohio* holding, see *supra* notes 48-80 and accompanying text.

135. See *Ohio*, 112 S. Ct. at 1641 (White, J., dissenting in part) (citing United States General Accounting Office Report).

136. Many states have expressed concern over water pollution by federal facilities through their requests for civil penalties under the CWA. See, e.g., *Ohio*, 112 S. Ct. at 1632; *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991), *vacated*, 112 S. Ct. 1927 (1992); *California v. United States Dep't of Navy*, 845 F.2d 222 (9th Cir. 1990).

holding will detract from states' attempts to enforce their own CWA requirements against federal facilities. In the end, the federal government may pay more in coercive penalties under the CWA than it would have paid in punitive penalties.

The major catalyst for any future disputes between states and DOE could be state environmental officials' negative attitudes toward the federal government due to the latter's environmental mismanagement.¹³⁷ Realization of the "cooperative federalism" that Congress envisioned in enacting the CWA, RCRA, and FFCA has been made exceedingly difficult by the federal government's noncompliance with its own environmental laws.¹³⁸ This nonfeasance has served to irritate and embitter those state officials who must enforce local environmental programs and who have seen their states ravaged by federal agencies' negligence.¹³⁹

Such animosity could complicate the FFCA scheme by causing states to ride roughshod over DOE activity. Under the amendment, states have the authority to approve, disapprove, or modify proposed DOE compliance plans¹⁴⁰ and to sue for punitive and/or coercive penalties if a facility is not in compliance with an approved plan.¹⁴¹ However, FFCA gives states few standards by which they must act on submitted plans; presumably, they will have the discretion to determine what timetable for compliance would be appropriate.¹⁴² States fearing continued federal neglect may reject DOE proposals and insist upon even more stringent cleanup timetables or procedures than those DOE suggests. They may also closely monitor DOE progress on cleanups and quickly move for civil and/or coercive penalties upon the slightest sign of deviation from compliance plans. As a result, the federal

137. The enforcement officers of several states faced with the federal facility pollution dilemma vented their anger toward federal noncompliance with their states' laws at a 1991 House committee hearing. See H.R. REP. NO. 111, *supra* note 1, at 6-12, *reprinted in* 1992 U.S.C.C.A.N. 1292-1301. The high cost and repeated hassle of litigating issues such as sovereign immunity under the CWA and RCRA also have frustrated state officials. See *id.* at 11 (testimony of Chris Gregoire, Director, Washington State Dep't of Ecology).

138. For a discussion of the CWA and RCRA structures, see *supra* note 10 and accompanying text.

139. See H.R. REP. NO. 111, *supra* note 1, at 6-11, *reprinted in* 1992 U.S.C.C.A.N. 1292-98.

140. FFCA § 105, *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1510 (to be codified at 42 U.S.C. § 6940(b)(2)(A)).

141. FFCA § 102(c)(3), *reprinted in* 1992 U.S.C.C.A.N. (106 Stat.) 1506-07.

142. See FFCA § 105(b), *reprinted in* 1992 U.S.C.C.A.N. 1512 (to be codified as 42 U.S.C. § 6902(41)). EPA will only promulgate regulations regarding appropriate levels and methods of treatment of mixed waste. H.R. CONF. REP. NO. 886, *supra* note 111, at 27, *reprinted in* 1992 U.S.C.C.A.N. 1327.

government may have less control over the cleanup process or may owe more penalties than Congress foresaw when considering FFCA.

The ambiguity over the source of any judgment against DOE could spark even more intense state action against the federal government because of the latter's perceived bad faith.¹⁴³ States may become more suspicious should the federal government delay payment of judgments due to special appropriations proceedings. Likewise, Congress could frustrate the coercive nature of the FFCA-authorized civil penalties by making them drawable from the Judgment Fund.

Deprived of a means of forcing immediate compliance, states may choose more radical ways of attracting Congress' attention. Judging from officials' remarks after the restrictive *Ohio* decision and FFCA's passage, anxious states are likely to bring suits "early and often" to obtain court orders for coercive and civil penalties against DOE.¹⁴⁴ The federal government could then be subject to mounting coercive fines as well as to civil penalties for continued noncompliance with their FFCA plans.¹⁴⁵ Past claims by many federal agencies that instant compliance with state requirements or fast cleanup action is impossible due to technology limitations and cost may foreshadow those agencies' future difficulties in meeting court orders.¹⁴⁶ As a result of continued and unrectifiable noncompliance, the federal government could face coercive and punitive fines claimed concurrently by many states on a daily basis.¹⁴⁷

Any further upheaval within the sensitive RCRA arena may then lead to greater state scrutiny of federal compliance with CWA requirements. The *Ohio* decision, which divested states of the civil-penalties weapon, and federal neglect of FFCA mandates may increase the states' animosity toward the federal govern-

143. For a discussion of the dispute over the source of any incurred penalties against federal agencies, see *supra* notes 131-34 and accompanying text.

144. See David O. Stewart, *Advantage Government: Is It Easier for the Government to Win in the Supreme Court?*, A.B.A. J., July 1992, at 49 (quoting Ohio Assistant Attorney General Jack Van Kley shortly after *Ohio* decision announced). Ohio already had petitioned its state courts for an injunction. *Id.*

145. See 42 U.S.C. § 6928(c) (RCRA citizen suit provision); *Ohio*, 112 S. Ct. at 1638 ("[I]t could be a very expensive mistake [for federal agencies] to plan on ignoring the law indefinitely on the assumption that contumacy would be cheap.").

146. For a discussion of the length of time DOE is likely to need in complying with RCRA, see *supra* note 129 and accompanying text.

147. For example, the RCRA civil penalties section authorizes imposition of fines of up to \$25,000 per day. 42 U.S.C. § 6928(a)(3).

ment.¹⁴⁸ Furthermore, states still have the option of asking courts for coercive penalties for federal agencies' failure to meet with compliance orders.¹⁴⁹ State officials' comments made after the *Ohio* decision indicate that these hard feelings will translate into a proliferation of requests for injunctive relief and contempt fines brought quickly by state agencies in state¹⁵⁰ or federal courts.¹⁵¹

The net adverse effect on the federal government would be twofold. First, the agencies would have to pay coercive penalties assessed for their failure to meet the terms of a court order.¹⁵² In light of federal agencies' previous difficulties in complying with state requirements, they may be subject to large fines growing at a daily rate over an extended period of time.¹⁵³ Over the long run, the federal government could owe more in coercive penalties than what it would have owed in the comparatively mild punitive penalties states had previously requested.¹⁵⁴

148. See *Ohio*, 112 S. Ct. at 1641 (White, J., dissenting). EPA itself has testified that "penalties serve as a valuable deterrent to noncompliance and [] help focus facility managers' attention on the importance of compliance with environmental requirements." S. REP. NO. 67, *supra* note 1, at 4.

149. For a discussion of the *Ohio* holdings, see *supra* notes 48-80 and accompanying text.

150. Although state enforcement agencies probably would prefer to bring sanctions claims in state courts so that local biases against the polluting federal agencies can be played upon, federal agencies have always removed such cases to federal court. Wolverton, *supra* note 1, at 585.

151. See H.R. REP. NO. 111, *supra* note 1, at 6-12, *reprinted in* 1992 U.S.C.C.A.N. 1292-98 (complaints of state environmental officials regarding deficient federal environmental behavior). Before *Ohio*, states regarded litigation over such matters as desirable only under the "most dire circumstances." *Id.* at 11. Jack A. Van Kley, the attorney who argued in front of the Supreme Court for Ohio, summed up state officials' attitudes by predicting increased state requests for injunctions and by commenting that "[n]egotiation [with federal agencies] is a waste of time." Stewart, *supra* note 144, at 1A. The aggravation caused by increased litigation and its attendant costs probably will not serve to improve the federal-state relationship envisioned by the CWA and RCRA. See H.R. REP. NO. 111, *supra* note 1, at 6-12, *reprinted in* 1986 U.S.C.C.A.N. 1292-98 (negative comments of state officials regarding relationship).

152. See *Ohio*, 112 S. Ct. at 1635-40.

153. "Once punitive fines start running they can be every dollar as onerous as their punitive counterparts" *Ohio*, 112 S. Ct. at 1638.

154. As of 1991, 10 states had brought *Ohio*-type suits against federal agencies for violations at 25 sites and had asked for civil penalties totalling \$602,654. H.R. REP. NO. 111, *supra* note 1, at 14, *reprinted in* 1992 U.S.C.C.A.N. 1300-01. By comparison, the expected cleanup costs for DOE sites alone is over \$70 billion. Lowe, *supra* note 128, at 1A. The average amount actually collected was \$5,000 per claim. Wolverton, *supra* note 1, at 585.

Although federal agencies may have to pay penalties, those agencies may benefit in the long run from FFCA and state requirements that the penalties be used for environmental restoration. See FFCA § 102(b), *reprinted in* 1992

Second, federal agencies attempting to manage an orderly, priority-based cleanup of federal facilities might lose substantial control over their own remedial programs. Once a state acts swiftly upon discovering federal noncompliance with state CWA provisions and obtains a court order requiring instant compliance, federal agencies will have the Hobson's choice of cleaning up a particular area quickly or of watching coercive penalties pile up against them. Agency discretion over prioritization of facility cleanups will then be tempered by the fear of mounting coercive fines and by the terms set out in the court order.¹⁵⁵

Before *Ohio*, by contrast, states could successfully browbeat federal agencies into compliance agreements with the threat of punitive fines.¹⁵⁶ Under such agreements, federal agencies were able to gain concessions as to how and when compliance would be reached, and frequently managed to avoid their obligations altogether.¹⁵⁷ Because states do not have the inchoate ability to sue for civil penalties under the CWA, however, they may not bother to seek compliance agreements with the federal government as they have been deprived of their primary enforcement weapon. Confronted with more obstacles to CWA enforcement by the federal government, states probably will seek court orders and coercive fines to ensure federal compliance with requirements.¹⁵⁸

The Supreme Court, through its *Ohio* decision, and Congress and the President, through FFCA's enactment, therefore may have created a situation where all parties with an interest in CWA or RCRA enforcement lose. The federal government may have to pay heavy and numerous coercive fines under the CWA, punitive

U.S.C.C.A.N. (106 Stat.) 1506 (to be codified as 42 U.S.C. § 6961(c)); Wolverton, *supra* note 1, at 593 (citing IDAHO CODE § 39-4417B (1990); OHIO REV. CODE ANN. § 3734.13(C), (E) (Anderson 1988 & Supp. 1990); VA. CODE ANN. § 10.1-1406 (Michie 1990)).

155. The federal government and its defenders raise the fear that court-imposed penalties will wreak havoc with priority-based federal cleanup plans during litigation with states over these issues. See Lotz, *supra* note 26, at 22-23. In addition, one of the reasons behind sovereign immunity is to prevent undue judicial interference with governmental activity; whether undue or not, such interference would occur through court orders. Hocking, *supra* note 6, at 204-05.

156. For example, Ohio signed DOE to a compliance agreement in 1988. Stewart, *supra* note 144, at 48. DOE, however, violated the agreement by 1989. *Id.* States have discovered that such agreements are not enforceable in practice unless they can threaten federal agencies with the prospect of punitive fines. Wolverton, *supra* note 1, at 584.

157. Wolverton, *supra* note 1, at 584.

158. For a discussion of the likelihood of states to seek court orders immediately, see *supra* notes 143-55 and accompanying text. *But see* Cheng, *supra* note 1, at 863-64 (noting ineffectiveness of coercive fines on federal agencies).

finer under FFCA, and/or restructure its cleanup plans completely under the RCRA amendment.¹⁵⁹ States may grow even more antagonistic should federal agencies fail to comply with FFCA or with state CWA requirements, and may resort to asking courts for punitive and coercive fines. Most importantly, the public may fund the federal government's judgment debts yet see no appreciable improvement in federal cleanup activity.¹⁶⁰

VI. CONCLUSION

Ultimately, the Supreme Court's rule of construing sovereign immunity waivers may cause serious problems for federal and state environmental officials. The *Ohio* Court had the opportunity to find a complete waiver of sovereign immunity to civil penalties, yet resorted to "analytical gymnastics" in order to save the federal government from pending and future civil fines.¹⁶¹ The decision forced the passage of FFCA, the result of congressional compromise with an adamant executive branch. The new arrangement may disrupt the federal-state relationship more than would the statutory scheme envisioned by the Sixth Circuit.¹⁶² In order to avoid such outcomes in the future, the Court should abandon its mechanical rules of statutory construction and become more sensitive to policy considerations and to congressional intent expressed in facially-clear statutes.

Although the *Ohio* decision pushed Congress and the President to begin constructive action on an overwhelming environmental problem, Congress must move further to head off latent conflicts. First, Congress should immediately clarify through legislation the penalty-payment issue by making the penalties drawable from agency appropriations. This scheme would sustain the penalties' coercive effect on DOE and would also alert Congress

159. This assumes that federal agencies have effectively prioritized cleanup plans. As of 1989, only 29 of 724 federal facilities that require cleanup have had a "Remedial Investigation" or "Feasibility Study." Wolverton, *supra* note 1, at 589. Only 30 of those facilities have been properly cleaned up. S. REP. No. 67, *supra* note 1, at 3.

160. Even if coercive or injunctive relief is granted, the federal agency, through litigation delays, will have gained a "free period" during which the environmental situation could worsen. H.R. REP. NO. 111, *supra* note 1, at 7, *reprinted in* 1992 U.S.C.C.A.N. 1293.

161. See *Ohio*, 112 S. Ct. at 1641 (White, J., dissenting).

162. The Sixth Circuit held that the CWA and RCRA permitted states to petition courts for civil penalties against federal agencies for noncompliance with state requirements. See *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990).

to the size and frequency of state requests for those fines.¹⁶³

As an additional example of good faith, Congress should give states reassurance that judgments will be paid by immediately honoring those claims. If the penalties become too burdensome upon the federal government, Congress could then re-examine DOE's behavior and the environmental situation to determine whether additional remedial legislation is necessary. Furthermore, Congress should also amend the CWA to permit states to receive civil penalties under that Act. This would further heal the federal-state environmental enforcement relationship and would aid in preventing dangerous federal facilities from threatening the nation's waters. Conceivably, Congress and the Clinton Administration will have the capacity and the will to implement these changes and thus fully circumvent the barriers to federal facility compliance erected by the *Ohio* Court.

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163. See, e.g., H.R. REP. No. 111, *supra* note 1, at 14, *reprinted in* 1992 U.S.C.C.A.N. 1300 (showing congressional awareness of amounts and frequency of state requests for civil penalties).

