CONSTITUTIONAL LAW—SOVEREIGN IMMUNITY—STATES MAY NOT IMPOSE CIVIL PENALTIES ON THE UNITED STATES GOVERNMENT FOR VIOLATIONS OF STATE STATUTES PROMULGATED UNDER THE AUTHORITY OF THE CLEAN WATER ACT AND THE RESOURCE CONSERVATION AND RECOVERY ACT—*United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992)

During the last several decades, Congress has responded to concerns about the deteriorating conditions of the environment by passing major legislation aimed at preventing further harm.[1] Chief among these legislative enactments are: the Clean Air Act[2] (CAA); the Federal Water Pollution Control Act[3] (the Clean Water Act or CWA); the Resource Conservation and Recovery Act of 1976[4] (RCRA); and the Comprehensive Environmental Resource and Liability Act of 1980[5] (CERCLA).[6] To reduce fu-

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[1] Lieutenant Colonel Richard E. Lotz, *Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties*, 31 A.F. L. REV. 7, 7 (1989). The presence of pollutants in the environment presents a significant health threat to the American public. David W. Goewey, Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513, 513 (1987). Historically, pollution control was treated at local levels. *Id.* But with the increased technological complexity of our society, especially the proliferation of toxic chemicals, the problem posed by environmental contaminants is increasingly viewed as national in scope. *Id.* To combat this problem, Congress enacted various environmental statutes. *Id.*

[2] 42 U.S.C. §§ 7401-7642 (1988). The Clean Air Act (CAA) was the model on which later environmental statutes were based. Kenneth M. Murchison, *Waivers of Intergovernmental Immunity in Federal Environmental Statutes*, 62 VA. L. REV. 1177, 1177-78 (1976). The CAA utilized a joint federal-state approach to improve air quality. *Id.* at 1178. The federal government was responsible for establishing air quality standards, and the states were responsible for developing plans to achieve these standards by regulating emissions within their borders. *Id.*

[3] 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1992). The underlying goal of the Federal Water Pollution Control Act (Clean Water Act or CWA) was different from the goal of the CAA, in that the CWA was to entirely eliminate any harmful discharge into navigable waters. Murchison, *supra* note 2, at 1178 n.9. The CAA was to achieve acceptable standards of air quality without entirely eliminating pollutants.

[4] 42 U.S.C. §§ 6901-6992 (1988 & Supp. II 1992). The Resource Conservation and Recovery Act (RCRA), which was enacted in 1976, utilizes a "cradle-to-grave" tracking system which monitors waste from its origination to its ultimate disposition. Nancy E. Milsten, Note, *How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government?*, 18 RUTGERS L.J. 123, 126 (1986). There are two categories of waste: hazardous and other solid waste. *Id.* Hazardous wastes are either: 1) ignitable; 2) corrosive; 3) reactive; or 4) toxic. *Id.* Other solid waste consists of sewage or large materials disposed of in dumps or landfills. *Id.*

[5] 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1992).

[6] Goewey, *supra* note 1, at 513-14.

ture contamination and diminish the effects of already existing pollutants, Congress promulgated the Environmental Protection Agency (EPA).[7] The EPA, among other duties, develops standards for the control of pollutants, allows the states to implement regulatory programs consistent with these standards and transfers control of the programs to the individual states.[8]

As a result of federal noncompliance with pollution control laws,[9] Congress declared that federal agencies should lead the battle against environmental pollution.[10] States encountered problems in enforcing environmental regulations against the federal government[11] because the doctrine of sovereign immunity

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7 *Id.* at 513. The Environmental Protection Agency (EPA) was established in 1970 as an independent agency of the federal executive branch. 61 AM. JUR. 2d *Pollution Control* § 7 (1981). *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), *reprinted in* 5 U.S.C.S. § 903 (1980) (creating the EPA). The EPA's mission was to consolidate the primary anti-pollution activities of the federal government. *Id.* Its primary responsibilities included developing and enforcing environmental standards, studying and evaluating environmental conditions, and supporting the states in administering their environmental programs. *Id.*

8 Milsten, *supra* note 4, at 124. A partnership approach utilizes the strengths of the different levels of government. Goewey, *supra* note 1, at 517. A state government is generally more aware of the needs and concerns of its citizens, the impact of insufficient contaminant control is felt more directly at the state level, and a state may have more assets to devote to the problem than the federal government. *Id.* at 517-18. In contrast, the federal government has greater technical expertise and can establish uniform minimum standards. *Id.* at 517. Two conceivable weaknesses of the partnership approach are the possibility that the states might refrain from performing their functions in reliance on the federal government and that standards might go unenforced in some states. *Id.* Another reason for the partnership approach was that Congress did not want to saddle the EPA with the complete burden of enforcing anti-pollution statutes. *Id.* at 513.

9 Commander Charles W. Tucker, J.A.C.G., U.S.N., *Compliance by Federal Facilities with State and Local Environmental Regulations*, 35 NAVAL L. REV. 87 (1986). For example, a Senate Report concerning the 1972 Amendments to the CWA acknowledged: "Evidence received in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities." *Committee on Public Works, Federal Water Pollution Control Act Amendments of 1971*, S. REP. No. 414, 92d Cong., 1st Sess. 67 (1971) [hereinafter Committe on Public Works].

10 *Id.* The Senate Report pronounced that the objective of the Amendment was to "require every Federal agency with control over any activity or real property, to provide national leadership in the control of water pollution in such operations." *Id.*

11 Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities under RCRA*, 57 U. CHI. L. REV. 845, 846 (1990). The enforcement problems were compounded by the Department of Justice's policy not to initiate suits against federal polluters. Goewey, *supra* note 1, at 546-47. Further, if a federal agency, for example the EPA, had instituted a suit against a federal entity, the Justice Department would have intervened against that agency. *Id.* at 546. The Justice Department contended that a suit could not be maintained by one federal agency against another, because such a suit was nonjusticiable. *Id.* at 547.

precluded enforcement without the assent of the government.[12]

The lack of strong judicial enforcement prompted Congress to equip the major anti-pollution statutes with waivers of sovereign immunity for federal facilities.[13] Congress also included in the CWA and the RCRA, provisions enabling citizens[14] to sue the United States for environmental violations.[15] The waivers did not specifically address, however, whether immunity extended to

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[12] Hancock v. Train, 426 U.S. 167, 179 (1976). Sovereign immunity is a judicially-created doctrine which is based on the premise that "activities of the Federal Government are free from regulation by any state." *Id.* at 178 (citing Mayo v. United States, 319 U.S. 441, 445 (1943) and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819)). See *infra* notes 33-44 and accompanying text for a general discussion of sovereign immunity and the Supreme Court's holding in *McCulloch v. Maryland*.

[13] Goewey, *supra* note 1, at 539. The CWA's federal facilities section provided in pertinent part:

> 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 and to the same extent as any nongovernmental entity. . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner . . . . [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.

33 U.S.C. § 1323(a) (1988).

The RCRA stated that the federal government

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

42 U.S.C. § 6961 (1988).

[14] Under CWA, "citizen" was defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (1988). The RCRA provided that "any person" may initiate a citizen suit. 42 U.S.C. § 6972(a) (1988). States were included in the definition of person under the RCRA. 42 U.S.C. § 6903(15) (1988).

[15] United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1632 n.5 (1992). The CWA read in pertinent part:

> [a]ny citizen may commence a civil action on his own behalf—
> (1) against any person (including (i) the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation

punitive civil penalties against the United States for past violations.[16]

Recently, the United States Supreme Court, in *United States Dep't of Energy v. Ohio*,[17] refused to allow punitive civil penalties to be imposed against a federal agency pursuant to the CWA or the RCRA.[18] The Court recognized, however, that injunctions and other equitable remedies can be used to prod the federal government into compliance with environmental regulations.[19]

The *Department of Energy* suit concerned hazardous waste generation at a plant in Fernald, Ohio, owned by the United States Department of Energy (DOE).[20] In March, 1986, the State of Ohio filed an action in the United States District Court for the

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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 an order . . . to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a) (1988). *See infra* note 89 for text of 33 U.S.C. § 1319(d).

The RCRA stated in relevant part:

[a]ny person may commence a civil action on his own behalf—
(1)(A) against any person (including (a) 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 chapter; 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, condition, requirement, prohibition, or order referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such action as may be necessary, or both, . . . and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

42 U.S.C. § 6972 (1988).

16 Lotz, *supra* note 1, at 7-8.

17 112 S. Ct. 1627 (1992).

18 *Id.* at 1631. The Court could not find a waiver of sovereign immunity explicit enough to permit imposition of civil penalties against the United States. *Id.*

19 *Id.* at 1640.

20 Ohio v. United States Dep't of Energy, 904 F.2d 1058, 1059 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992). The 1050 acre facility, which processed uranium for nuclear weapons, was operated by private parties under a management contract. *Id.* Although there was no nuclear reactor at the site, these processes discharged radioactive as well as nonradioactive wastes as byproducts. *Id.*

Southern District of Ohio.[21] Ohio sought civil penalties and damages, as well as injunctive and declaratory relief against the Department of Energy (DOE) and the Secretary of Energy, for improper disposal of radioactive substances, and chemical and radioactive pollution of surface and ground water.[22] Ohio based its suit on various federal and state anti-pollution laws and requested that civil penalties be assessed against the defendants.[23] The DOE moved for dismissal, contending that the doctrine of sovereign immunity protected the agency from such claims.[24] The court denied the DOE's motion, ruling that Congress, through the RCRA and the CWA, had waived sovereign immunity by allowing states to enforce their environmental statutes and to bring action against federal polluters.[25]

The United States Court of Appeals for the Sixth Circuit affirmed in part.[26] The court found an immunity waiver with respect to punitive penalties assessed by states under the CWA, but not the RCRA and a waiver under the citizen suit section of the

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[21] Ohio v. United States Dep't of Energy, 689 F. Supp. 760, 761 (S.D. Ohio 1988), *aff'd*, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

[22] *Dep't of Energy*, 689 F. Supp. at 761. Ohio also requested similar remedies against the private contractors who operated the plant. *Id.*

[23] *Id.* Ohio's original complaint was based on the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675; the RCRA, 42 U.S.C. §§ 6901-6991; the Clean Water Act, 33 U.S.C. §§ 1251-1387; the Ohio Solid and Hazardous Waste Control Act, OHIO REV. CODE ANN. §§ 3734.01-3734.99 (Anderson 1982); and the Ohio Water Pollution Control Act, Ohio Rev. Code Ann. §§ 6111.01-6111.99 (Anderson 1977). *Id.* By the time the case came to trial, Ohio had withdrawn its claims for injunctive relief, so only the demands for civil penalties remained. *Id.* Ohio had either withdrawn or agreed to a stay of the claims arising under CERCLA, leaving the court to decide only the claims under the CWA, the RCRA, and the state statutes. *Id.*

[24] *Id.* at 761-62. As a consequence of this doctrine, "[f]ederal installations are subject to state regulation only when and to the extent that Congressional authorization is clear and unambiguous." EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 211 (1976) (citing Hancock v. Train, 426 U.S. 167, 179 (1976)); *see also* Lotz, *supra* note 1, at 8 (discussing the doctrine of sovereign immunity); *infra* text accompanying notes 39-44 (discussing in greater detail sovereign immunity).

[25] *Dep't of Energy*, 689 F. Supp. at 765-67. Ohio argued that the RCRA had waived sovereign immunity to civil penalties under 42 U.S.C. § 6961, which subjected the national government to all process and sanctions otherwise available under the Act. *Id.* Ohio also argued that the CWA had made the same waiver through 33 U.S.C. § 1323(a), which has similar provisions. *Id.* at 765, 767. Additionally, Ohio contended that the RCRA, under 42 U.S.C. § 6972(a), and the CWA, under 33 U.S.C. § 1365(a), had allowed civil penalties to be assessed against the United States. *Id.* at 763, 765.

[26] Ohio v. United States Dep't of Energy, 904 F.2d 1058, 1062 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

RCRA.[27] The court, however, did not contemplate the issue of federal immunity from citizen suits brought pursuant to the CWA.[28]

The United States Supreme Court granted the DOE's request for certiorari[29] to determine the extent of a federal facility's liability for punitive penalties under the CWA and the RCRA.[30] The Supreme Court reversed the court of appeals, employing various technical statutory analyses to demonstrate that Congress, when enacting the CWA and the RCRA, did not intend to retroactively waive sovereign immunity with respect to civil penalties for past practices.[31] The Court recognized, however, that states may impose coercive fines to induce present and future compliance with state statutes enacted under the CWA and the RCRA schemes.[32]

Historically, courts have not allowed states to mandate federal compliance with state statutes.[33] In *McCulloch v. Maryland*,[34] the seminal case establishing this immunity, Chief Justice Marshall concluded that the State of Maryland had no authority to tax a bank lawfully chartered by the United States.[35] The Chief Justice opined that the Supremacy Clause[36] elevated the federal government above the control of state governments and thereby

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27 *Id.* at 1062-63, 1064, 1065. The court reasoned that the plain language of the Acts permitted civil penalties to be levied against United States agencies. *Id.* at 1060-65. See *infra* notes 87-92 and accompanying text for a discussion of the court's reasoning.

28 *Dep't of Energy*, 904 F.2d at 1062.

29 United States Dep't of Energy v. Ohio, 111 S. Ct. 2256 (1991) (mem.).

30 United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1631 (1992).

31 *Id.* at 1640.

32 *Id.* at 1638.

33 Tucker, *supra* note 9, at 87-88.

34 17 U.S. (4 Wheat.) 316 (1819).

35 *Id.* at 425. The Second Bank of the United States was chartered by Congress in 1816, against severe political opposition, to help with national economic problems. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW—CASES—COMMENTS—QUESTIONS 78 (1986). Many people perceived the Bank as mishandling its mission, and thus it became very unpopular. *Id.* As a result, several states sought to keep the Bank from operating within their borders by imposing burdensome taxes on it. *Id.*

36 U.S. CONST. art. VI, cl. 2. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Id.

precluded states from manipulating and dissolving the federal government.[37] Specifically, the Chief Justice posited that an opposite holding would allow the states to destroy the federal government through taxation.[38]

While the doctrine of sovereign immunity originally emerged from a tax controversy, courts have not limited its application to the sphere of taxation,[39] but have applied it in other areas as well.[40] This doctrine is not an absolute protection, however, and courts have recognized exceptions to federal governmental immunity.[41] A major exception is the judiciaries' recognition of Congress's authority to permit state regulation of federal entities.[42] Courts have insisted, however, upon strict interpretation of the language at issue and a showing of Congress's unambiguous intent to waive immunity before finding the existence of such a waiver.[43] While the sovereign immunity doctrine has survived judicially, statutory enactments have eroded its application in some areas of the law.[44]

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37 *McCulloch*, 17 U.S. (4 Wheat.) at 426.

38 *Id.* at 431.

39 *See generally* Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 700-11 (1976) (discussing the doctrine of sovereign immunity and its impact on taxation and regulatory issues).

40 Murchison, *supra* note 2, at 1180-81 & nn. 26, 27 (citing cases demonstrating the wide range of issues where courts have applied federal sovereign immunity). *See, e.g.*, Paul v. United States, 371 U.S. 245, 247, 270 (1963) (declaring that the United States Government does not have to pay minimum milk prices established by state law); Mayo v. United States, 319 U.S. 441, 447-48 (1943) (asserting that state law cannot give an agricultural inspector the right to inspect federally disbursed fertilizer); Arizona v. California, 283 U.S. 423, 464 (1931) (permitting the federal government to dam a navigable waterway despite state law prohibiting the dam); Johnson v. Maryland, 254 U.S. 51, 56-57 (1920) (holding that federal employee may operate an automobile without a license while performing his duties).

Not all jurists agree with the scope of the application of sovereign immunity. *See, e.g.*, Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 388-89 (1939) (Justice Frankfurter espousing the view that the presumption in favor of sovereign immunity should be reversed when the defendant was a federal agency rather than the United States itself).

41 *See, e.g.*, Virginia v. Stiff, 144 F. Supp. 169, 172-73 (W.D. Va. 1956) (holding that federal vehicles must comply with reasonable state-mandated weight restrictions).

42 *See, e.g.*, United States v. Sharpnack, 355 U.S. 286, 286, 296-97 (1958) (upholding Congress's intent to apply state criminal law to federal enclaves).

43 United States v. N.Y. Rayon Imprinting Co., 329 U.S. 654, 659 (1946).

44 Cheng, *supra* note 11, at 860. During the last century, Congress has become increasingly inclined to waive the sovereign immunity of the federal government, partly because the extent of the harm caused by the government has widened. *Id.* For example, the Federal Tort Claims Act (FTCA) waives sovereign immunity for:

> [all] civil actions on claims against the United States, for money dam-

Over the past several decades uncertainties have developed regarding the scope of federal supremacy in environmental regulation.[45] The National Environmental Policy Act of 1969 (NEPA)[46] proclaimed a policy for federal cooperation with state and local governments in ensuring a clean environment.[47]

Congress sought to implement this general policy with specific legislation creating joint federal-state programs designed to enhance environmental quality.[48] Particularly, under the CAA, the federal government was primarily responsible for the establishment of national standards for environmental contaminants.[49] The principal role of the states, on the other hand, was the development and enforcement of specific compliance procedures consistent with the national standards.[50]

> ages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1988).

Rayonier, Inc. v. United States serves as an example of a judicial application of this Act. Rayonier, Inc. v. United States, 352 U.S. 315 (1957). In that case, the United States Government owned land in Washington State over which it permitted a railroad company to operate trains. *Id.* at 316. The United States Government had negligently allowed highly inflammable brush, dry grasses, and other materials to accumulate near the railroad right-of-way. *Id.* A railroad engine spewed sparks onto these materials, causing six fires to ignite and spread onto adjoining lands. *Id.* Pursuant to an agreement with the State of Washington, the United States Forest Service had the exclusive duty to fight the fires. *Id.* The Forest Service, however, used improper fire-fighting techniques, and the fires became one conflagration "spreading as much as twenty miles in one direction," destroying buildings, timber and other property. *Id.* at 316-17. The Supreme Court held that Congress had intended to shift the harm caused by federal negligence from the injured party to the negligent governmental party, even if this represented a large sum of money, as would be the case if entire communities were incinerated. *Id.* at 319-20.

45 Tucker, *supra* note 9, at 88.

46 42 U.S.C. §§ 4321-4347 (1970).

47 Tucker, *supra* note 9, at 88. The National Environmental Policy Act of 1969 (NEPA) enjoined the federal government, ordering the government to:

> cooperate with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a) (1970).

48 Murchison, *supra* note 2, at 1177-78.

49 *Id.* at 1178.

50 *Id.* at 1178-79.

Congress, recognizing that federal agencies and facilities are major contributors to environmental problems, sought to include those federal entities under the regulatory scheme.[51] At first this inclusion was voluntary.[52] Congress became dissatisfied with the extent of noncompulsory federal compliance,[53] however, and added provisions to the major environmental enactments prescribing mandatory federal observance of the regulations "to the same extent that any person is subject to the requirements."[54]

A question immediately arose concerning the precise meaning of "requirements."[55] Federal agencies argued that the term only included state substantive requirements and not state proce-

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[51] *See, e.g., Committee on Public Works, Federal Water Pollution Control Act Amendments of 1971*, S. REP. No. 414, 92d Cong., 1st Sess. 67 (stating that federal facility compliance with the CWA was required, citing blatant water and air pollution violations by federal facilities).

[52] Hancock v. Train, 426 U.S. 167, 171 (1976). The Supreme Court noted:

> Before 1970, § 111(a) of the Clean Air Act simply declared "the intent of Congress" to be that federal installations "shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with" federal and state air pollution control authorities "in preventing and controlling the pollution of the air in such area."

Id. at 171 (quoting 42 U.S.C. § 1857f(a) (1964 & Supp. V)).

[53] Murchison, *supra* note 2, at 1184-85. The United States Supreme Court, in *Hancock*, noted that Congress had concluded that simply "admonishing" federal entities for failing to cooperate under such voluntary regulations was inadequate. *Hancock*, 426 U.S. at 171.

[54] Murchison, *supra* note 2, at 1185 (quoting 42 U.S.C. § 1857f (1970)). In 1970 Congress added § 118 to the CAA, ordering federal compliance with state and local air pollution laws equal to the compliance demanded of "any person." *Id.* Section 118, 42 U.S.C. § 1857(f), provided in pertinent part:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

42 U.S.C. § 1857(f) (1970).

Also in 1970, Congress amended the CWA to include a virtually identical provision with respect to water pollution, except it stated that federal compliance included "reasonable service charges." Murchison, *supra* note 2, at 1184 (quoting 33 U.S.C. § 1323 (Supp. III 1970)).

Recognizing that a total waiver of sovereign immunity might allow states to dictate the fiscal priorities of the federal government, Congress added a sentence to each of these amendments, allowing the President to exempt a federal facility from the regulatory requirements upon a finding that such would be in accord with the national interest. Goewey, *supra* note 1, at 523, 525.

[55] Murchison, *supra* note 2, at 1187.

dural requirements.[56] The judiciary first addressed this issue in *California v. Stastny*,[57] holding that federal agencies did not have to comply with state permitting procedures before operating an apparatus capable of producing air pollution.[58]

Divergent views among the federal circuit courts soon arose,[59] prompting the United States Supreme Court response in the companion cases of *Hancock v. Train*[60] and *EPA v. Cal. ex rel. State Water Resources Control Bd.*[61] In *Hancock*, the issue was whether section 118 of the CAA allowed the states to require federal facilities to obtain state permits as a precondition of their operation.[62] The Court could not find from the language of the statute or its legislative history, an indication of Congressional intent to condition operation of federal facilities on the acquisition of a permit from a state official.[63] In *State Water Resources Control Bd.*, the Court applied similar reasoning to the CWA and suggested that Congress "legislate to make [its] intention mani-

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56 *Id.* The primary importance of drawing a distinction between substantive and procedural requirements is that the latter often include, among other things, the necessity of obtaining a license prior to operating a pollution source. *Id.*

57 382 F. Supp. 222 (C.D. Cal. 1972).

58 *Id.* at 224. A United States Naval base at Long Beach, California was planning to operate equipment which might potentially foul the air. *Id.* at 223. The State argued that local regulations required the facility to seek permits before such operation. *Id.* at 222. In the court's findings of fact, District Judge Gray noted:

> To the extent that [the local regulation] requires defendants to apply for and obtain permits from [the local authorities] prior to the operation or use of the equipment and machines at the naval base in Long Beach, a federal facility, it is outside the scope of the requirements imposed upon federal facilities by Section 118 of the Clean Air Act (42 U.S.C. § 1857(f)).

Id. at 224. This finding was without any authority. Murchison, *supra* note 2, at 1188.

59 *Compare* Kentucky *ex rel.* Hancock v. Ruckelshaus, 362 F. Supp. 360, 365 (W.D. Ky. 1973) (holding that § 118 of the CAA did not require federal agencies to comply with state procedural regulations, but only substantive ones), *aff'd*, 497 F.2d 1172 (6th Cir. 1974), *aff'd sub nom.* Hancock v. Train, 426 U.S. 167 (1976), *with* Alabama *ex rel.* Seeber, 502 F.2d 1238, 1245 (5th Cir. 1974) (noting that the distinction between procedural and substantive requirements had no basis and was only a "semantical red herring"), *vacated and remanded*, Seeber v. Alabama, 426 U.S. 932 (1976), *and* California *ex rel.* State Water Resources Control Bd. v. EPA, 511 F.2d 963, 974-75 (9th Cir. 1975) (stating that sovereign immunity with respect to procedural requirements under the CWA was waived), *rev'd*, 426 U.S. 200 (1976). *See also* Murchison, *supra* note 2, at 1190-97 (discussing the differing courts of appeals decisions).

60 426 U.S. 167 (1976).

61 426 U.S. 200 (1976); Murchison, *supra* note 2, at 1197.

62 *Hancock*, 426 U.S. at 177, 198. See *supra* note 54 for text and discussion of § 118 of the CAA as amended in 1970, the statute amendment at issue in *Hancock*.

63 *Hancock*, 426 U.S. at 198.

fest" if the Court's decision distorted the legislature's design.[64]

Congress responded to these decisions by enacting the RCRA in 1976 and amending both the CAA and the CWA within a year.[65] The exact boundaries to which these statutes waived sovereign immunity were still not clearly defined, however, leaving unanswered the issue of whether, or when, states may impose fines and penalties on federal agencies.[66] In *California v. Walters*,[67] the Ninth Circuit addressed the issue of whether the RCRA waived sovereign immunity from criminal sanctions under its federal facilities section.[68]

The City of Los Angeles instituted a criminal action in *Walters* against the Veterans Administration and its Administrator, Walters, for improper medical waste disposal.[69] The city contended that state criminal sanctions were among the "substantive or procedural requirements" that could be imposed on the federal government under the RCRA's immunity waivers.[70] The court proclaimed that criminal sanctions were not a requirement but rather an enforcement mechanism and thus were not applicable to federal entities.[71] The court rejected the city's contention that Congress, in response to *Hancock*, intended to include criminal sanctions in the waivers when revising the federal pollution statutes to include a waiver of "all" requirements.[72]

The Ninth Circuit revisited the issue in *United States v. Washington*,[73] addressing whether the RCRA federal facilities section allowed states to impose punitive civil penalties against federal

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64 *State Water Resources Control Bd.*, 426 U.S. at 227-28.

65 Tucker, *supra* note 9, at 91, 92-93. The CWA provided that 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, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a) (1988).

66 Lotz, *supra* note 1, at 14.

67 751 F.2d 977 (1985) (per curiam).

68 Tucker, *supra* note 9, at 97.

69 *Walters*, 751 F.2d at 978.

70 *Id.*

71 *Id.*

72 *Id.* at 978-79. Not only was such an intent not manifest from the language or from the legislative history of the statute, stated the court, but probably contradicted by the clear waiver of immunity for injunctive sanctions and the silence regarding criminal sanctions. *Id.*

73 872 F.2d 874 (9th Cir. 1989).

agencies.[74] Judge Alarcon, writing for the court, stated that the plain language of the RCRA did not connote such an allowance.[75] The court also rejected the argument that Congress, as a statutory response to *Hancock*, intended to incorporate civil penalties as part of the procedural requirements.[76] Specifically, the court determined that the statutory language referred to procedural issues of permits, not punitive issues.[77] Therefore, the court concluded, a state may only employ equitable remedies to compel federal compliance with its hazardous waste disposal laws.[78]

In *California v. United States Dep't of Navy*, the Ninth Circuit also contemplated whether the CWA's federal facilities section waived sovereign immunity regarding state imposed civil penalties.[79] Ultimately, the court held that the CWA authorized only penalties imposed by the EPA Administrator, not the states.[80]

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74 *Id.* The State of Washington had attempted to levy $49,000 in administrative penalties against a Department of Energy nuclear facility pursuant to a state anti-pollution statute. *Id.*

75 *Id.* at 877.

76 *Id.*

77 *Id.* at 878-79.

78 *Id.* at 881. The Court of Appeals for the Tenth Circuit utilized similar reasoning in *Mitzelfelt v. Dep't of the Air Force*, to reach the same conclusion. Mitzelfelt v. Dep't of the Air Force, 903 F.2d 1293, 1295, 1296 (10th Cir. 1990). In that case, the State of New Mexico attempted to assess a $5000 civil penalty against Cannon Air Force Base for past infractions of hazardous waste laws. *Id.* at 1294.

On other occasions, courts have similarly found no waiver of sovereign immunity for civil penalties under RCRA. *See, e.g.*, Meyer v. United States Coast Guard, 644 F. Supp. 221, 222-23 (E.D. N.C. 1986) (stating that a strict interpretation revealed no waiver); McClellan Ecological Seepage Situation (MESS) v. Wienberger, 655 F. Supp. 601 (E.D. Cal. 1986) (stating that the "plain face, common sense reading" of the RCRA does not indicate an unequivocal waiver).

79 845 F.2d 222 (9th Cir. 1988). Section 313 of the CWA mandates compliance by federal facilities with all state permit requirements authorized by the Act. 33 U.S.C. § 1323(a) (1988). California had such an authorized program embodied in Chapter 5.5 of the California Water Code §§ 13370-13389 (West Supp. 1982), and sought to recover penalties from the Navy for its past violations. *Dep't of Navy*, 845 F.2d at 223. The CWA § 1319(d) provided for civil penalties up to $25,000 per day for violations. 33 U.S.C. § 1319(d) (1988).

80 *Dep't of the Navy*, 845 F.2d at 224. The court reasoned that the states were not given clear authority to impose civil penalties on federal agencies because the CWA § 309(a), (b) and (f) authorized enforcement by the Administrator, and because § 309(e) suggested that § 309 actions be brought by the Administrator. *Id.* This interpretation was further supported by citing legislative history from a House Report stating: "The provisions of section 309 [as amended by § 1319] are supplemental to those of the State and are available to the Administrator in those cases where . . . State . . . enforcement agencies will not or cannot . . . enforce the requirements of this Act." *Id.* (quoting H.R. REPORT No. 911, 92d Cong., 2d Sess. 115 (1972)).

The court rejected California's argument that it be allowed to seek penalties

Juxtaposed to the *California v. United States Dep't of Navy* decision, the Tenth Circuit Court of Appeals, in *Sierra Club v. Lujan*,[81] determined that the term "sanctions" in section 1323(a) of the CWA included civil penalties.[82] The court concluded that the plain language of the sanctions included penalties[83] which were applicable to the federal government because they arose under federal law, for which sovereign immunity was waived.[84] Judge Aldisert, writing for the court, reasoned that the section of the CWA which specifically allowed civil penalties to be assessed,[85] also applied to the federal government in citizen suits.[86]

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under 33 U.S.C. § 1365(a), which allowed for citizens to sue water polluters. *Dep't of Navy*, 845 F.2d at 225. In addition to finding no Congressional intent for citizens to sue for past violations, the court feared that such a result might frustrate plea bargaining type negotiations between the federal government and polluters, because after a settlement polluters might still be subject to penalties. *Id.*

81 931 F.2d 1421 (10th Cir. 1991).

82 *Id.* at 1426. The Bureau of Reclamation and the Department of Interior, both federal agencies, jointly owned the Leadville Tunnel in Colorado. *Id.* at 1422. In 1975, the EPA issued a permit to the Bureau allowing, up to a specified amount, discharges of pollutants from the tunnel. *Id.* The EPA required the Bureau to submit a schedule for elimination of these pollutants, but subsequently reissued the permit for several periods. *Id.* The Sierra Club and the Colorado Environmental Coalition filed suit in federal court against the Interior Department and the Bureau alleging noncompliance with the permit. *Id.* The plaintiffs sought an injunction against further violations, civil penalties, and a declaration that the agencies were in violation of the CWA. *Id.* The defendants sought to dismiss the civil penalties action, claiming that under the doctrine of sovereign immunity there was lack of subject matter jurisdiction. *Id.* at 1422-23. The plaintiffs argued that the CWA had waived sovereign immunity for civil penalties, because 33 U.S.C. § 1323(a) made the federal government liable for process and sanctions, and that sanctions included civil penalties. *Id.* at 1423.

83 *Id.* at 1429. The defendants argued that the CWA did not waive sovereign immunity with respect to civil penalties because "process and sanctions" must be read as one phrase which included only monetary penalties imposed by a court to achieve compliance with judicial process. *Id.* at 1425. The court rejected this argument, declaring that §§ 1323(a) and 1365(a) "contain language that *ipsissimis verbis* waives sovereign immunity" for civil penalties. *Id.*

84 *Id.* at 1427. The court stated that 33 U.S.C. § 1323(a) waived immunity to civil penalties arising under federal law and that, because the cause of action involved an EPA permit, it arose under federal law. *Id.*

85 Section 1319 of the CWA provided:

> [a] person who violated § 1311, 1312, 1316, 1317, 1318, 1328, or 1325 of this title, or any permit condition or limitation implementing any such sections in a permit issued . . . by a State . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. § 1319(d) (1988).

86 *Sierra Club*, 931 F.2d at 1427. The question raised was whether the United States was a person for purposes of § 309(d), now amended as 33 U.S.C. § 1319(d) (1988). *Id.* The CWA general defines a person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (1988). But because 33 U.S.C.

The Sixth Circuit confronted similar issues in *Ohio v. United States Dep't of Energy*,[87] where the court concluded that civil penalties were encompassed by the term "sanctions" in section 1323(a).[88] Furthermore, the court drew support from the proposition that Congress had amended the CWA to subject the federal government to "all" requirements, including sanctions.[89] Noting that the CWA waived sovereign immunity only to civil penalties arising under federal law, the court allowed the State of Ohio to impose civil penalties by finding that Ohio's statute arose under federal law.[90]

The court declined to find a general waiver of sovereign immunity under the RCRA, noting that the Act subjected the United States to sanctions only to enforce injunctive relief.[91] When considering the issue of civil penalties in citizen suits, however, the court reached an opposite conclusion and found federal responsibility for such penalties.[92]

Responding to the conflicting courts of appeals decisions, the United States Supreme Court determined in *United States Dep't of Energy v. Ohio*,[93] that the United States government waived sovereign immunity from state-imposed fines for past infractions of the CWA or the RCRA.[94] Justice Souter, writing for

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§ 1365(a) provided for citizen suits against any person, including the United States, the court held that "person," for purposes of citizen suits, including penalties, included the United States. *Sierra Club*, 931 F.2d at 1427.

87 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

88 *Id.* at 1061.

89 *Id.* at 1061-62 (citing 33 U.S.C. § 1323(a) (1988)).

90 *Id.* The court viewed the Ohio statute as arising under federal law because it sprang from a joint federal-state legislative scheme. *Id.*

91 *Id.* at 1063. The most telling consideration for the court was that Congress had, in response to *Hancock*, included in the CWA provisions that subjected federal facilities to "all requirements" and "sanctions," but had not included the term "sanctions" in the RCRA. *Id.* If "requirements" were interpreted to include sanctions, the court noted, then the term sanctions in the CWA were superfluous and contrary to standard statutory analysis. *Id.*

92 *Id.* at 1064-65. The court found Congress's intent evident from the language of the citizen suit section, which provided "any person may commence a civil action . . . against any person (including the United States)" and the district court "shall have jurisdiction . . . to apply any appropriate civil penalties." *Id.* at 1064 (quoting 42 U.S.C. § 6972 (1982 & Supp. IV 1986). The court rejected the argument that since the United States was a person only for purposes of § 6972 and not the Act in general, and that since "appropriate civil penalties" were provided in § 6928(a) and (g), that the United States was not a person for purposes of civil penalties. *Id.* at 1064-65. The court stated that "[s]ection 6972 incorporates the civil penalty sections, not vice versa . . . [thus] the definition of 'person' within section 6972 applies, not the general definition in 42 U.S.C. § 6903(15)." *Id.* at 1065.

93 112 S. Ct. 1627 (1992).

94 *Id.* at 1631. In resolving the issues, the Court began by explaining the pur-

the Court, began by expressing the general proposition that under the doctrine of sovereign immunity, the national government was shielded from suits absent unequivocal waiver of immunity.[95] The Justice stated that such a waiver must be unambiguous[96] and could be applied only to the extent that the

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pose of the statutes involved and their interrelation. *Id.* at 1631-32, 1634-35. The *Sierra Club* court, in a similar case, stated:

> The litigants pick and choose parts of a comprehensive statute to sustain their respective positions. Because certain provisions, at least facially, have the capability of appearing inconsistent, it is necessary to set forth the statutory provisions in detail. We emphasize that our task requires correlating and coordinating parts of each provision. Indeed, in jumping from section to section, we will be fitting together pieces of a statutory jigsaw puzzle.

Sierra Club v. Lujan, 931 F.2d 1421, 1423 (10th Cir. 1991).

[95] *Dep't of Energy*, 112 S. Ct. at 1633. *See, e.g.*, United States v. Sherwood, 312 U.S. 584 (1941) (holding that the United States government did not consent to the suit and therefore could not be sued). In *Sherwood*, a person named Kaiser had a contract with the United States for construction of a post office building. *Id.* at 585. The government breached its contract, causing damage to Kaiser in the amount of $14,448.49. *Id.* at 586. Sherwood, who had a $5567.22 judgment against Kaiser issued by the New York Supreme Court, sought to enforce this judgment against the United States. *Id.* at 585-86. Sherwood relied on § 795 of the New York Civil Practice Act which allowed for suits by a judgment creditor to be maintained against a person who owed the judgment debtor money. *Id.* at 586. The plaintiff also relied on the Tucker Act, codified at 28 U.S.C. § 41(20), which conferred jurisdiction in the district courts "[c]oncurrent with the Court of Claims" to hear suits against the United States in contract matters to the extent the United States would be liable to the plaintiff. *Id.* at 585-87. The Court held that because the Court of Claims derived its power from the legislature and not the judiciary, it had no jurisdiction over Kaiser. *Id.* at 587-88. The Court further held that because the statute conferred concurrent power on the Court of Claims and the district court, the district court had no more jurisdiction than the Court of Claims. *Id.* at 590-91. The Court reasoned that if there were no jurisdiction over Kaiser, there could be no jurisdiction over the United States. *Id.* at 588. The Court concluded that this action could not be maintained because the United States had not given its express consent to be sued. *Id.* at 592.

In *Turner v. United States*, the Court reached a similar conclusion. Turner v. United States, 248 U.S. 354 (1919). In that case, Turner had entered into a contract with the Creek Indians to allow him to construct an eighty mile fence to enclose grazing cattle. *Id.* at 355-56. The Indians expressed dissatisfaction with the fence even before construction began. *Id.* at 356. Despite an injunction issued by a federal court, the Creek Indians destroyed the structure. *Id.* Congress enacted special legislation to enable the Court of Claims to hear the case. *Id.* at 356-57. Turner sued the Creek Nation and the United States as its trustee. *Id.* at 357. The Supreme Court held that the Creek Nation was not subject to liability without its consent, and that the United States was improperly joined because it had not consented to the suit. *Id.* at 359.

Further, only Congress has the authority to waive the sovereign immunity of the United States. Minnesota v. United States, 305 U.S. 382, 388 (1939). Additionally, "the activities of the Federal Government are free from regulation by any state." Mayo v. United States, 319 U.S. 441, 445 (1943).

[96] *Dep't of Energy*, 112 S. Ct. at 1633. The Justice relied on *United States v. Mitch-*

waiver necessarily followed from the statutory language.[97] According to the Court, the language of a statute waiving sovereign immunity would be strictly construed to the benefit of the United States.[98]

The Court first analyzed the citizen suit section of the CWA to determine whether that section waived sovereign immunity and allowed citizens[99] to sue the federal government, seeking civil penalties.[100] The majority examined Ohio's argument that the literal language of the CWA subjected federal entities to penalties by providing that the United States was subject to suit and potentially liable for civil penalties in citizen suits.[101] The majority also noted that punitive fines were generally authorized by the civil penalties provision.[102] Nevertheless, the Court rejected Ohio's argument.[103]

According to the majority, the fundamental flaw in Ohio's proposition was that when the civil penalties section was incorporated into the citizen suit section, its applicability to the federal government was ambiguous.[104] Standard statutory analysis, explained the majority, required inclusion of all the provisions in the incorporated section, including any qualifications or limitations.[105] Applying this principle, the Court noted that the civil

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ell, in which the Court stated that "[a] waiver of sovereign immunity 'cannot be implied, but must be unequivocally expressed.' " *Id.* (quoting 445 U.S. 535, 538 (1980)).

97 *Dep't of Energy*, 112 S. Ct. at 1633. The Court quoted *Ruckelshaus v. Sierra Club* in which the Supreme Court stated that the waiver of immunity cannot be "enlarged . . . beyond what the language requires." *Id.* (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86 (1983)).

98 *Id.* at 1633. The Court invoked *McMahon v. United States* in which the Court mandated strict construction of waivers of sovereign immunity. *Id.* (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)). Justice Souter stated that any examination of the extent to which Congress intended to waive the immunity of the federal government from suit under both the CWA and the RCRA must be conducted with these considerations in mind. *Id.*

99 *See id.* at 1634. The Court conceded that the state is a "citizen" and "person" authorized to sue the federal government under the CWA by citing 33 U.S.C. § 1365(a) and (g) (any "citizen" can bring suit under the CWA), and 33 U.S.C. § 1362(5) (defining person for purposes of CWA to include a state). *Id.*

100 *Id.* at 1633-34 n.7.

101 *Id.* at 1634.

102 *Id.* The Court observed that this contention remained undisputed. *Id.*

103 *Id.* at 1634-35.

104 *Id.* The Court posited that "[t]he effect of incorporating each statute's civil-penalties section into its respective citizen-suit section is not, however, as clear as Ohio claims." *Id.* at 1634.

105 *Id.* (citing Engel v. Davenport, 271 U.S. 33, 38 (1926)). The Court in *Engel v. Davenport* noted that "[t]he adoption of an earlier statute by reference, makes it as

penalties provided by the CWA applied to "persons" but the definition of persons did not explicitly encompass the federal government.[106] Thus, the Court explained that since this narrow meaning of the word "person" must be adopted, civil penalties were not statutorily applicable to the United States.[107]

Justice Souter rejected the argument that because the United States was specifically subject to suit as a "person" in the citizen suit provision of the CWA,[108] Congress therefore intended the United States to also be a "person" when incorporating the civil penalties section.[109] The Court based this rejection on the more explicit definitions in other sections of the CWA which deviated from the general definition.[110] Thus, Justice Souter reasoned that such differences revealed Congress's intent to include the United States as a person in "clauses [explicitly] subjecting the United States to suit, but no further."[111] The Court utilized parallel reasoning to conclude that RCRA, which involved language essentially congruent with the CWA, also did not allow for punitive penalties to be assessed against the federal government in citizen-initiated suits.[112]

The Court then addressed the extent to which the federal

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much a part of the later act as though it had been incorporated at full length." Engel v. Davenport, 271 U.S. 33, 38 (1926).

106 *Dep't of Energy*, 112 S. Ct. at 1634-35 (citing 33 U.S.C. § 1319(d)). For purposes of the CWA, 33 U.S.C. § 1362(5) defined "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State or any interstate body." 33 U.S.C. § 1362(5) (1988). The Court found dispositive of Congress's intent the absence of statutory language treating the United States as a person for purposes of the CWA. *Dep't of Energy*, 112 S.Ct. at 1634-35.

107 *Id.*

108 33 U.S.C. § 1365(a).

109 *Dep't of Energy*, 112 S. Ct. at 1635.

110 *Id.* The Court specified as an example 33 U.S.C. § 1321(a)(7) defining "person" to exclude some of the governments and agencies mentioned in the definition of "person" for the Act as a whole in 33 U.S.C. § 1362(5). *Id.* Another example cited was 33 U.S.C. § 1322(a)(8), which excludes "for purposes of this section" people on board public vessels and the governmental entities mentioned in the general definition. *Id.*

111 *Id.* The majority found that this analysis fit the text of the statute—allowing a citizen suit against the United States, which could include coercive sanctions, while not allowing for punitive fines. *Id.* The Court referred to and agreed with the concession made by the United States Department of Energy that coercive sanctions may be sought in a citizen suit brought against the United States pursuant to CWA. *Id.* at 1635 n.15. It also viewed favorably what it considered to be an implied concession by the DOE of the same issue under RCRA. *Id.*

112 *Id.* at 1633-36. Under the RCRA, 42 U.S.C. § 6972, citizen suits may be brought by any "person;" and RCRA considers a state to be a "person." *Id.* at 1634 n.11 (citing 42 U.S.C. § 6903(15) (1988))).

facilities section of the CWA waived federal sovereign immunity to the "requirements," including fines, imposed upon federally-operated facilities under both the CWA and state law regulatory schemes functioning under the EPA.[113] The State of Ohio contended that the federal government's subjection to state sanctions under the statute included punitive civil penalties.[114] The Court decided that the State's position, however, was undermined by the state's own definition of sanctions, which implied that a sanction was intended to only coercively affect prospective behavior not punish past acts.[115]

Justice Souter further strengthened the proposition that Congress intended the CWA sanctions to be used coercively by referring to the context in which the word "sanction" appeared.[116] The Justice commented that each time the word "sanction" was used, the word was part of the phrase "process and sanction[s]."[117] The Justice also noted that the phrase initially appeared as part of a trifurcated statement regarding levels of governmental authority with which the federal government must comply: 1) substantive or procedural requirements; 2) administrative authority; and 3) any process or sanction whether or not enforced by any court.[118] The Court found the differentia-

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113 *Dep't of Energy*, 112 S. Ct. at 1636.

114 *Id.* The court referred to 33 U.S.C. § 1323(a) which provided that the "Federal Government . . . shall be subject to . . . any process and sanction, whether enforced in Federal, State or local courts." 33 U.S.C. 1323(a) (1988).

115 *Dep't of Energy*, 112 S. Ct. at 1636-37. Ohio had quoted Black's Law Dictionary which defined "sanction" as a "[p]enalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations. That part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance." *Id.* at 1636 (quoting BLACK'S LAW DICTIONARY 1341 (6th ed. 1990)). Ohio had also submitted a definition from Ballantine's Law Dictionary which included in its definition of sanction that it is a "coercive measure." *Id.* (quoting BALLENTINE'S LAW DICTIONARY 1137 (3d ed. 1969)).

The Court gave many examples of this use of the BALLENTINE definition. *Dep't of Energy*, 112 S. Ct. at 1636-37. *See, e.g.*, Penfield Co. v. SEC, 330 U.S. 585, 590 (1947) (noting that "fines and imprisonment are 'coercive sanctions' [imposed] to compel the contemnor to do what the law made it his duty to do"); Hicks v. Feiock, 485 U.S. 624, 633-34 n.6 (1988) (stating that the " 'sanction' in *Penfield* was civil because it was conditional; contemnor could avoid 'sanction' by agreeing to comply with discovery order"). The Court then referred to caselaw citing Federal Rule of Civil Procedure 37(b) for a list of sanctions that a court could impose to persuade a noncompliant party to abide by discovery orders. *Id.* at 1636-37 (citations omitted). For additional caselaw interpreting the term sanction in the coercive sense, see *id.*

116 *Id.*

117 *Id.*

118 *Id.*

tion between substantive requirements and judicial process significant.[119] The Court concluded that because Congress paired sanctions with process and not requirements, Congress must have intended to use the word "sanction" in its coercive sense, not its punitive sense.[120] The Court reached this conclusion because "requirements" were understood to include both prospective enforcement mechanisms and retrospective punitive measures.[121] In contrast, the term "process" was generally understood to apply to only prospective enforcement mechanisms, which were typically coercive equitable remedies.[122]

Justice Souter then addressed the CWA section that imposed liability on the United States "for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or process of such court."[123] The Justice reasoned that this provision obviously limited the civil penalties available to state or local courts to coercive sanctions and deemed this reading of the statute an affirmation of the Court's earlier interpretation of sanctions.[124]

The Justice had difficulty, however, in interpreting the meaning of the phrase "for those civil penalties arising under Federal law."[125] The Justice postulated that this phrase appeared to expand the meaning of civil penalties beyond what the Court had already accepted.[126] Justice Souter explained that if Congress had intended to limit civil penalties "arising under federal law" to coercive sanctions, then Congress would have simply included these civil penalties in the phrase authorizing state and local enforcement of orders or processes.[127] Such an inclusion would therefore have made the phrase "arising under federal law" superfluous, a result contrary to statutory interpretation.[128] The

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119 *Id.* The Court also considered it notable that "sanction" was paired with "process" and not substantive requirements, pointing out that process generally connotes enforcement provisions used by judicial tribunals to obtain compliance with orders and decrees. *Id.* The majority also noted the statute's reference to sanctions as being enforced by courts. *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* at 1637-38 (quoting 33 U.S.C. § 1323(a) (1988)).

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* The Supreme Court has stated that "[i]t is axiomatic that all parts of an Act 'if at all possible, are to be given effect.' " FAA Adm'r v. Robertson, 442 U.S. 255, 261 (1975) (quoting Weinberger v. Hynson, Wescott & Dunning, 412 U.S.

Justice posited, therefore, that the wording of the statute implied a Congressional intent to expand the meaning of civil penalties beyond the merely coercive.[129] The Justice warned, however, that such an implication created a dilemma as to the federal statutory source for such penalties because there was no foundation in federal law for these penalties.[130] The Justice supported this contention by noting that the CWA prescribed civil penalties only in its civil penalties section,[131] which the Court had already determined did not apply to the United States.[132]

The Court next considered whether the phrase "arising under federal law" could refer to the state regulatory scheme that supplanted the federal EPA regulations.[133] The Court considered and rejected Ohio's assertion that the common objectives

609, 633 (1973)). In an earlier case, *Jarecki v. Searle & Co.*, the Court determined the applicability of a statutory provision to exempt income from taxes. Jarecki v. Searle & Co., 367 U.S. 303, 304 (1961). In one section, the statute exempted income which resulted from "exploration, discovery, or prospecting," while in another section it exempted income "from the sale of patents, formulae, or processes." *Id.* at 305, 307 (citations omitted). The Court, in rejecting claims that discovery included the development of a new drug or a new photographic system, postulated that if discovery were such a broad term, the inclusion of the exemption for the sale of patents, formulae, and processes would be unnecessary. *Id.* at 307. Chief Justice Warren, writing for the Court, borrowed "the homely metaphor of Judge Aldrich in the First Circuit, '[i]f there is a big hole in the fence for the big cat, need there be a small hole for the small one?' " *Id.*

129 *Dep't of Energy*, 112 S. Ct. at 1638.

130 *Id.*

131 33 U.S.C. § 1319(d) (1988).

132 *Dep't of Energy*, 112 S. Ct. at 1638.

133 *Id.* The CWA provided that the states may promulgate their own water pollution control regulations, stating:

> The Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program . . . . The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist.

33 U.S.C. § 1342(b) (1988). Additionally, 33 U.S.C. § 1342(c), which provides that if the state programs comply with certain requirements, then the state program will supplant the federal program, stated:

> Not later than ninety days after the date on which a State has submitted a program (or a revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the state permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title.

33 U.S.C. § 1342(c) (1988). Section 1342(k) stated that compliance with the state program would be deemed compliance with the federal program: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for pur-

and the interrelation of the federal and state plans, coupled with the state subservience to the federal purpose, supported the interpretation of the state system as arising under federal law.[134] The Court interpreted the phrase "arising under federal law" consistent with the Court's earlier interpretation of that phrase in 28 U.S.C. § 1331, which limited federal court jurisdiction to solely federal claims.[135] Justice Souter said that in the past the

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poses of sections 1319 and 1356 of this title [state program] with sections 1311, 1312, 1316, 1317 and 1343 of this title." 33 U.S.C. § 1342(k) (1988).

In addition, the introduction to the CWA stated that "[i]t is the policy of Congress that the States . . . implement the permit programs under sections 1342 and 1344 of this title." 33 U.S.C. § 1251(b) (1988). Additionally, 33 U.S.C. § 1319(a) authorized the EPA to enforce state permits as though they were federal, stating:

> (1) Whenever . . . the Administrator finds that any person is in violation of any condition (or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328 or 1348 of this title) in a permit issued by the state under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection . . . .
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> . . . .
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> (3) Whenever . . . the Administrator finds that any person is in violation . . . of any permit condition or limitation implementing any of such sections in a permit issued under . . . this title . . . or by a state . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a) (1988).

Ohio established such a water pollution regulatory scheme which subsequently received federal approval. Ohio v. United States Dep't of Energy, 904 F.2d 1058, 1061 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

[134] *Dep't of Energy*, 112 S. Ct. at 1638. The Court rejected outright Ohio's argument that because the states can accomplish federal compliance with the Act only by using punitive measures such penalties are necessary to achieve the purpose of CWA. *Id.* The Court expressed its opinion that punitive penalties are not necessary to achieve the purpose of the CWA in ensuring compliance by federal facilities. *Id.* The Court reasoned that coercive fines could be just as effective, stating that "once such fines start running they can be every dollar as onerous as their punitive counterparts." *Id.* It is the view of both the EPA and the Department of Justice that the EPA may not institute suit against another federal agency, because such a suit would be nonjusticiable. *See Cleanup at Federal Facilities, 1988: Hearings on H.R. 3781, H.R. 3782, H.R. 3783, H.R. 3784 and H.R. 3785 before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 186-87 (1988) (expressing a similar view).

[135] *Dep't of Energy*, 112 S. Ct. at 1638. "Arising under federal law" has more than one interpretation. *See generally* JACK H. FRIEDENTHAL ET AL. CIVIL PROCEDURE § 2.3, at 16-17 (1985). The term appears in Article III, § 2 of the Federal Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST., art III, § 2.

The meaning of "arising under federal law" has been understood as allowing Congress to permit adjudication by federal courts of a case or controversy where federal law "forms an ingredient." Osborn v. Bank of the United States, 22 U.S. (9

Supreme Court has construed this phrase restrictively, excluding cases where a state's jurisdiction was explicitly allowed under federal law but the case was based on state law.[136] Using this analysis, the Justice posited that the Ohio pollution regulatory statute provided a right to sue that did not arise under federal law.[137]

The majority then addressed the dilemma created by the statute prescribing federal liability for civil penalties arising under federal law when federal law did not create such penalties.[138] The majority speculated that this inconsistency was the result of an intent to encompass future statutory provisions, a

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Wheat.) 738, 823 (1824). The phrase also appears in 28 U.S.C. § 1331, which gives the federal courts jurisdiction to hear cases or controversies arising under federal law: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331 (1988). Current interpretation of the phrase, however, has settled that federal law must be more than just an "ingredient" in a controversy for federal courts to gain jurisdiction. FRIEDENTHAL et al., *supra* § 2.3, at 17. In *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, the United States Supreme Court stated that "the statutory phrase 'arising under the Constitution, laws or treaties of the United States' has resisted all attempts to frame a single precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983). The Court opined that "[t]he most familiar definition of the statutory 'arising under' limitation is Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.' " *Id.* at 8-9 (quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)).

Justice Souter adopted this definition for purposes of the present case. *See Dep't of Energy*, 112 S. Ct. at 1639 n.16. The Justice observed:

> Ohio . . . has offered no reason to believe that Congress intended [the] broader [Constitutional] reading rather than the narrower statutory reading. Even assuming an equal likelihood for each intent, our rule requiring a narrow construction of waiver tips the balance in favor of a narrow reading.

Id. The Justice also posited that because Congress had adopted the same language in 33 U.S.C. § 1323(a), after it was aware of how the Supreme Court interpreted this language as it appeared in 28 U.S.C. § 1331, that the intent of Congress was probably to have that narrower interpretation apply. *Id.* at 1639.

136 *Id.* at 1638-39. Justice Souter cited Gully v. First Nat'l Bank, 299 U.S. 109 (1936). *Id.* at 1638. *Gully* concerned a state tax on a national bank. Gully v. First Nat'l Bank, 109, 115 (1936). When the Mississippi tax collector brought an action against the bank for payment of back taxes, the bank argued that the suit arose under federal law. *Id.* at 111-12. In denying the argument, the Court held that the cause of action sprung from a state statute which allowed assessing taxes against the bank. *Id.* at 115. Even though the federal statute was necessary to allow the taxation and therefore the suit, the right to be vindicated was not federal, but state. *Id.*

137 *Dep't of Energy*, 112 S. Ct. at 1639.

138 *Id.* The Court was referring to 33 U.S.C. § 1323(a), which allowed for federal liability for civil penalties arising under federal law. *Id.*

possible mistaken belief that such penalties did exist or plain carelessness.[139] The majority deemed unnecessary a thorough examination of the reasons for this wording because two possible interpretations of such civil penalties existed: coercive and punitive.[140] The majority concluded that there was no waiver for punitive penalties because sovereign immunity must be clearly and unequivocally waived, and, in this instance, immunity was explicitly waived only for the coercive sense of civil penalties not the punitive sense.[141]

The Court then examined the extent to which the RCRA waived sovereign immunity with respect to punitive fines.[142] Ohio emphasized that because the RCRA stated that the federal government was subject to all "requirements" of the RCRA, this statement should serve as a waiver of sovereign immunity with respect to the punitive fines allowed under the statute.[143] The Court found no merit in this proposition, reasoning that a plausible construction of all requirements did not necessarily include punitive penalties.[144] The Court reiterated the two methods for enforcing requirements, punitive and coercive, and reasoned that the congressionally-intended method could be inferred from the context.[145]

The Court pointed out that the reasonableness of this interpretation was greatly amplified by the "drafters' silence" regarding punitive sanctions in the last sentence of the waiver clause which "waive[d] immunity from any process or sanction" regard-

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139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.* at 1639-40. The Court agreed with the reasoning expressed by the Tenth Circuit Court of Appeals in *Mitzelfelt v. Department of Air Force*. *Id.* The *Mitzelfelt* court stated that a "requirement" could include "substantive standards and the means for implementing those standards, but excluding punitive measures." Mitzelfelt v. Department of Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990). *See also* Missouri Pac. Ry. v. Ault, 256 U.S. 554, 563-64 (1921) (stating that even when Congress mandates compliance by federal facilities with state requirements, explicit Congressional authorization is still necessary for state imposition of sanctions for noncompliance).

145 *Dep't of Energy*, 112 S. Ct. at 1640. The Court postulated that congressional intent to apply only coercive penalties to the federal government could be inferred for two reasons: 1) all statutory examples of the kinds of requirements meant to apply to the federal government included either substantive compliance or enforcement mechanisms involving future compliance; and 2) no examples of mechanisms for enforcing punitive penalties existed. *Id.*

ing injunctive relief.[146] The Court considered it extremely significant that the word "sanction" was specifically referred to as a form of injunctive relief.[147]

Justice White, joined by Justices Blackmun and Stevens, while agreeing that the RCRA did extend sovereign immunity to federal facilities, presented a thoughtful dissent with respect to the other issues.[148] Justice White first noted that federal facilities have a low rate of compliance with the CWA and the RCRA,[149] and that this lack of compliance could be expensive for the taxpayers.[150] The Justice asserted that Congress, in an effort to alleviate these problems, intended to subject the federal government to civil penalties in the federal facilities of the CWA and the citizen suit sections of both the CWA and RCRA.[151] The dissent insisted that this intent was clear from the language of the CWA federal facilities provision which held the federal government liable for "any process or sanction" enforced in any court.[152] The dissent rejected as "analytic gymnastics" the majority's reasoning which excluded civil penalties from the ambit of sanctions.[153] All that remained to be resolved, declared Justice White, was which civil penalties arose under federal law.[154]

The dissent maintained that both the citizen suit section of CWA and the Ohio pollution enforcement statute authorized by the CWA arose under federal law.[155] Because the CWA allowed

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146 *Id.* (citation omitted).

147 *Id.* The Court reasoned that because there was only one allusion to an enforcement mechanism, that characterized sanction as a coercive way to enforce injunctions, did not necessarily extend a waiver of sovereign immunity from requirements to punitive fines. *Id.*

148 *Id.* at 1641 (White, J., dissenting).

149 *Id.* Justice White pointed out that federal facilities do not comply with CWA twice as often as private facilities. *Id.*

150 *Id.* at 1640-41 (White, J., dissenting) (citing *Cleanup at Federal Facilities: Hearing on H.R. 765 Before the Subcomm. on Transportation and Hazardous Materials on the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 44 (1989)). The Justice cited a Department of Energy estimate that it may cost between $40 and $70 billion to decontaminate DOE facilities over the next 20 years. *Id.*

151 *Id.* at 1641 (White, J., dissenting). The Justice referred to 33 U.S.C. § 1323 and § 1365(a) as specifically waiving federal sovereign immunity from civil penalties under the CWA. *Id.* Justice White also stated that the RCRA waived federal sovereign immunity from civil penalties in 42 U.S.C. § 6972(a). *Id.*

152 *Id.* The dissent was referring to 33 U.S.C. § 1323(a). *Id.*

153 *Id.* Buttressing his conclusion, Justice White stated: "[T]he United States shall be liable for only those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or process of such court." *Id.* (citing 33 U.S.C. § 1323(a) (1988)).

154 *Id.* at 1642 (White, J., dissenting).

155 *Id.*

for suits to be brought against "any person (including . . . the United States . . .)" and allowed for "any appropriate civil penalties," the dissent insisted that this was a clear waiver of sovereign immunity for civil penalties against the federal government.[156] Justice White rejected the majority's reasoning that the enforcement provisions did not apply to the United States because the word "person" was not redefined from the general definition.[157]

Justice White concluded that Ohio's statute arose under federal law based upon three considerations: 1) the close confederation of the state's regulatory scheme with the federal government; 2) the fact that the statute's authority was derived from a federal statute; and 3) because the statute was subject to federal oversight.[158] The Justice concluded that, in limiting federal liability to penalties arising under federal law, Congress intended to protect against penalties under state laws that had not been approved by the EPA, not against penalties in EPA approved sections.[159]

Unfortunately, the majority chose to engage in linguistic acrobatics to frustrate the clear intent of the Congress, and to deny the states a powerful enforcement weapon in the fight against pollution. Historically, federal facilities have been a significant contributor to the stream of environmental pollutants.[160] Congress expressed intent in amendments to the CWA and the CAA, to subject federal agencies to the same requirements under federal, state and local pollution laws as those imposed on other pol-

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156 *Id.* (quoting 33 U.S.C. § 1365(a) and 33 U.S.C. § 1319(d)).

157 *Id.* The Justice noted that 33 U.S.C. § 1362 calls for application of the general definitions "[e]xcept as otherwise specifically provided." *Id.* (quoting 33 U.S.C. § 1362 (1988)). The Justice considered the direct reference to the United States as a person to be one of these exceptions which could, in turn, apply to the "civil penalty enforcement provisions it incorporates." *Id.*

158 *Id.* at 1642-43 (White, J., dissenting). Justice White referred to an EPA assertion that "the showing necessary to determine under the CWA whether there is compliance with any particular state [pollution] standard is itself *a matter of federal, not state, law.*" *Id.* at 1643 (White, J., dissenting) (quoting Brief for Petitioner, OT 1991, No. 90-1266, at 18 n.21).

159 *Id.* The Justice asserted that the majority could only "reach a contrary result" by applying a "restrictive" analysis to the CWA and interpreting the "arising under the law" phrase. *Id.*

160 *Department of Defense Appropriations for Fiscal Year 1985: Hearings Before the Subcomm. on Defense of the Senate Comm. on Appropriations*, 98th Cong., 2d Sess. 430 (1984) (statement of Josephine S. Cooper, Assistant Administrator for External Affairs, EPA). For example, "[o]f the 544 major industrial and municipal facilities in significant noncompliance with Water Final Effluent Limits . . . 32 or 6% were Federal facilities . . . . Of the 523 major RCRA handlers with Class I violations at the beginning of FY [fiscal year] 1984, 30 or 5.75% were Federal facilities." *Id.*

luters.[161] The United States Supreme Court first attempted to thwart this Congressional plan in *Hancock v. Train*,[162] by concluding that state requirements to which Congress had subjected federal facilities did not include procedural requirements.[163] Now, after Congress amended the major pollution enactments in 1977 to overrule the *Hancock* decision, the Supreme Court once again elected to obstruct Congress's design by excluding civil penalties from the states' arsenal of enforcement weaponry.[164]

The citizen suit section of the CWA allows citizens to sue any person, including the United States, and recover appropriate civil penalties under the civil penalties section.[165] The majority used

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161 *Senate Committee on Environment and Public Works, Clean Water Act of 1977*, S. REP. No. 370, 95th Cong., 1st Sess. 67 (1972). The Senate Committee Report on the 1977 CWA Amendments declared:

> The Act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by the Federal agencies, has misconstrued the original intent.

Id.

Although the Clean Air Act was not under consideration in this case, the Clean Water Act was amended to conform with its parallel provision in the Clean Air Act. H.R. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4468. The House Report on the 1977 Amendments to the Clean Air Act proclaimed:

> This amendment is also intended to resolve any question about the sanctions to which noncomplying Federal agencies, facilities, officers, employees or agents may be subject. The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners and operators thereof. This means that Federal facilities and agencies may be subject to injunctive relief (and criminal and civil contempt citations to enforce any subject injunction), *to civil or criminal penalties, and to delay compliance penalties.*

House Committee on Interstate and Foreign Commerce, Clean Air Act Amendments of 1977, H.R. REP. No. 294, 95th Cong., 1st Sess. 200 (1977) (emphasis added).

162 426 U.S. 167 (1976).

163 *Id.* at 198.

164 United States Dep't of Energy v. Ohio, 112 S. Ct. 1627, 1631 (1992).

165 The citizen suit section of CWA, 33 U.S.C. § 1365(a), stated:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States . . .) . . . The district Courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and *to apply any appropriate civil penalties under section 1319(d) of this title.*

33 U.S.C. § 1365(a) (1988) (emphasis added). According to § 1319(d), the civil penalties section, such penalties were not to "exceed $25,000 per day for each violation" and the court had the discretion to consider "the seriousness of the viola-

convoluted logic to infer that civil penalties do not refer to the United States because the United States is not a person under the general definition in the Act.[166] Such a textual analysis seems to ignore the clear wording of the statute.[167]

Addressing the federal facilities section of the CWA,[168] the majority deduced that civil penalties were not included in sanctions against the federal government because the word "sanctions" could possibly be used in a sense which does not necessarily involve civil penalties.[169] This reasoning, particularly in light of the legislative histories surrounding the various pollution control acts, seems conspicuously flawed. Although a sanction does not always include a civil penalty, it frequently does, and the phrase "all sanctions" certainly should include civil penalties.[170]

The majority failed to reasonably and logically interpret the phrase "the United States shall be liable only for those civil penalties arising under Federal law" as it is used in CWA's federal facilities section.[171] By the majority's deduction, there are no such civil penalties, and therefore this clause must be superfluous.[172] The majority weakly answered this dilemma with the convenient supposition that

> perhaps [Congress] used it just in case some later amendment might waive the government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps someone was careless. The question has no satisfactory

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tion or violations, the economic benefit (if any) resulting from the violation, 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." 33 U.S.C. 1319(d) (1988).

166 *Dep't of Energy*, 112 S. Ct. at 1634-36 & n.11. The Court referred to the general definitions of person for each act, found in 33 U.S.C. § 1362(5) (in the CWA) and 42 U.S.C. § 6903(15) (in the RCRA), neither of which specifically included the United States. *Id.* at 1634 & n.11.

167 Justice White, dissenting, similarly argued: "It is impossible to fathom a clear statement that the United States may be sued and found liable for civil penalties. *Id.* at 1642 (White, J., dissenting) (citing 33 U.S.C. § 1365(a) (1988)).

168 33 U.S.C. § 1323(a) (1988). This section subjects the federal government to all sanctions regarding water pollution control abatement. *Id.*

169 *Dep't of Energy*, 112 S. Ct. at 1636-37.

170 In this case, the Court explicitly acknowledged the existence of punitive sanctions. *Id.* at 1639. Once the Court has recognized the reality of punitive sanctions, and that the Congress has waived immunity for all sanctions, it defies logic to conclude that Congress did not intend to waive immunity for punitive sanctions.

171 33 U.S.C. § 1323(a) (1988).

172 *Dep't of Energy*, 112 S. Ct. at 1638.

answer.[173]

The majority's assertion that federal compliance can be accomplished with injunctive remedies to the exclusion of punitive penalty deterrents[174] opposes an intuitive view that frequently this compliance will not occur.[175] Because pollution emanating from a federal facility is just as detrimental as pollution originating elsewhere, civil penalties should foster the beneficial intent of Congress in cleaning the environment.

There exists a paucity of evidence that states have abused limited waivers of sovereign immunity for environmental enforcement. This paucity rebuts the fear that an unlimited waiver of sovereign immunity would allow states to dictate federal spending, and thus endanger the federalist approach. In addition, the federal government can litigate penalties improperly assessed and any actions involving the federal government will be heard in federal, not state, court.[176] Congress can also amend its laws as required to deal with any state abuse of the immunity waiver.

Peter McKenna

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173 *Id.* at 1639.

174 *Id.* at 1638.

175 *See* Cheng, *supra* note 11, at 864 (explaining the advantages, disadvantages and varying effectiveness of injunctions and civil penalties). Also, injunctive penalties are imposed only at the end of court proceedings, which may be prolonged, while civil penalties accrue during the course of the violations, thus providing incentive for earlier compliance. *Id.*

176 *Id.* at 867.