

April 1986

## Assuring Federal Facility Compliance With the RCRA and Other Environmental Statutes: An Administrative Proposal

David W. Goewey

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Environmental Law Commons](#)

---

### Repository Citation

David W. Goewey, *Assuring Federal Facility Compliance With the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 Wm. & Mary L. Rev. 513 (1987),  
<https://scholarship.law.wm.edu/wmlr/vol28/iss3/5>

# NOTES

## ASSURING FEDERAL FACILITY COMPLIANCE WITH THE RCRA AND OTHER ENVIRONMENTAL STATUTES: AN ADMINISTRATIVE PROPOSAL

Environmental pollution poses a substantial threat to the health of the American public. Although pollution control traditionally has been considered a local concern, the continued industrialization and mechanization of society in general, and the manufacture and use of toxic chemicals in particular, pose a threat to the environment that is national in scope. In response to this threat, the federal government enacted numerous environmental laws and created the Environmental Protection Agency to curb further pollution and to neutralize contaminants already affecting the environment.

Rather than burden the EPA with full responsibility for rectifying the nation's environmental problems, Congress has relied on the states to enact legislation, to implement federal guidelines, and to enforce environmental standards. This reliance on the states is best characterized as a type of partnership between federal and state governments. A strain on the viability of the partnership occurs, however, when a federal facility itself pollutes excessively and a state tries to enforce federal or potentially more stringent state environmental law against the federal agency responsible.<sup>1</sup>

Four of the major federal environmental control statutes are: the Clean Air Act;<sup>2</sup> the Federal Water Pollution Control Act (FWPCA);<sup>3</sup> the Resource Conservation and Recovery Act of 1976

---

1. Federal facility compliance is essential if the goals of environmental legislation are to be met: "Because of its size and psychological importance, the federal government as an institution is in a position to affect the quality of . . . [pollution control] management . . . . Federal facilities can serve as models of cooperation with state authorities . . . [and] models of proper disposal techniques." Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 Wis. L. Rev. 635, 674.

2. 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985).

3. 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

(RCRA) (for hazardous waste);<sup>4</sup> and the Comprehensive Environmental Resource, Compensation and Liability Act of 1980 (CERCLA or Superfund) (for toxic dump sites).<sup>5</sup> These statutes require federal agencies to comply with state environmental standards, but do not make clear the extent to which and means by which a state can force a recalcitrant federal agency to comply. Whether a federal facility should be subject to all state environmental enforcement actions is an issue that has caused friction between the federal and state government partners. Resolution of the issue requires careful analysis of the federal environmental statutes and the limiting doctrine of sovereign immunity.

This Note examines the nature and extent of the waivers of sovereign immunity contained in the major environmental statutes, paying particular attention to the pertinent case law and legislative history of the RCRA. Although the major environmental statutes contain broad waivers of immunity, the Supreme Court's refusal to recognize these waivers, in conjunction with other legal doctrines and political limitations, often precludes effective state enforcement against federal polluters. Both separation of powers and supremacy clause considerations provide additional legal barriers to actions initiated against federal facilities. In addition, federal budget constraints force agencies to choose between expenditures which further their own goals and expenditures which safeguard the environment. In order to preserve the federal and state partnership while addressing the pertinent legal and political limitations on forcing federal facility compliance, environmental statutes should permit states to bring enforcement actions through an EPA administrative panel with authority to order prompt equitable and legal relief when warranted.

The current administrative system for addressing federal facilities' pollution problems is unacceptable. By the time the noncomplying agency exhausts its administrative remedies and Congress

---

4. 42 U.S.C. §§ 6901-6991 (1982 & Supp. III 1985).

5. 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985). This Note does not discuss all federal environmental legislation containing federal responsibility provisions. *See, e.g.*, Noise Control Act of 1980, 42 U.S.C. §§ 4901-4918 (1982 & Supp. III 1985). The administrative solution to the problems inherent in the current partnership approach, however, could apply to all federal environmental legislation relying on state enforcement to ensure federal facility compliance.

allocates funds, irreparable harm to human health and the environment may have occurred. Establishing an EPA-administered trust fund and hearing panel would allow a quick response to environmental threats within a federal structure that would balance the importance of promoting agency missions with state interests in preserving public health and welfare.

This Note concludes, therefore, that establishment of an EPA arbitration panel and environmental response fund, in lieu of the present protracted congressional budgetary allocation procedure, would best serve the nation's interest in improving the quality of our environment and preserving harmonious federal-state relations in the environmental field.

### FEDERAL FACILITY POLLUTION

The "federal environment" encompasses approximately one-third of the total land area of the United States.<sup>6</sup> In 1975, the federal government owned or operated more than 20,000 facilities ranging in size from vast military installations to small fish hatcheries.<sup>7</sup> The Department of Defense is responsible for eighty percent of the 1,100 to 1,400 federal facility hazardous waste Superfund sites.<sup>8</sup> Although the government spent \$2.4 billion between 1968 and 1975 to improve and install pollution abatement equipment,

---

6. Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,326, 10,326 n.1 (1985) (citing 1983 CEQ ANN. REP. 272, 273 (1984)).

7. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 47, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6285 (Administrative Conference of the United States Report to the Chairman of the House Subcomm. on Transp. and Commerce (July 21, 1975)); see also GENERAL SERVICES ADMINISTRATION, INVENTORY REPORT ON REAL PROPERTY OWNED BY THE UNITED STATES THROUGHOUT THE WORLD AS OF JUNE 30, 1974, at 8 (May 30, 1975). As of Sept. 30, 1983, GSA reported that the United States owned more than 27,000 facilities and leased more than 70,000 facilities throughout the world excluding certain military facilities which the Department of Defense does not report. GENERAL SERVICES ADMINISTRATION, SUMMARY REPORT OF REAL PROPERTY OWNED BY THE UNITED STATES THROUGHOUT THE WORLD AS OF SEPTEMBER 30, 1983, at 8 (July 1984); GENERAL SERVICES ADMINISTRATION, SUMMARY REPORT OF REAL PROPERTY LEASED TO THE UNITED STATES THROUGHOUT THE WORLD AS OF SEPTEMBER 30, 1983, at 8 (July 1984); Shaw, *The Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards*, 5 *Envtl. L. Rep. (Envtl. L. Inst.)* 50,211 (1975).

8. *Amending and Extending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund): Hearings Before the Senate Comm. on Environment and Public Works*, 98th Cong., 2d Sess., 452-53 (1984) [hereinafter *Senate*

the environmental performance of federal facilities, particularly of military installations, is poor.<sup>9</sup>

Navy ships and shore activities in the United States generate 35 million pounds of hazardous solid wastes every year.<sup>10</sup> In 1981 the military produced 92,000<sup>11</sup> of the 57 million metric tons of hazardous waste produced in this country.<sup>12</sup> Although this figure represents a small percentage of all wastes produced, waste generated by federal facilities, particularly by military and nuclear facilities, is often unusually hazardous. The Army's experience at the Rocky Mountain Arsenal near Denver, Colorado, highlights this fact. The

*Superfund Hearings*] (statement of Kenneth S. Kamlet, Director, Pollution and Toxic Substances Division, National Wildlife Federation).

9. H.R. REP. NO. 1491, *supra* note 7, at 47, 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, at 6285. For example, the inspector general of the Department of Defense stated:

The Department of Defense is not in full compliance with the Resource Conservation and Recovery Act and other environmental laws and regulations . . . . Overall management of hazardous materials/hazardous waste is unsatisfactory . . . . The hazardous waste disposal contracting method is inefficient, at times ineffective, and costly. Training and education of hazardous material handlers and commanders is inadequate.

Andersen & Spear, *Pentagon's Bad Record on Toxic Waste*, Wash. Post, Sept. 30, 1986, at C13, col. 1.

10. "Navy ships and shore activities in the U.S. [in addition] generate 19 million gallons of liquid hazardous wastes . . . [and] virtually every [Navy] facility that operates industrial processes or health-related services" generates these wastes. Shaw, *supra* note 7, at 50,211.

11. Note, "Beyond Judicial Scrutiny": *Military Compliance with NEPA*, 18 GA. L. REV. 639, 680 n.227 (1984).

12. Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307, 307 n.1 (1982) (citing U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE FACILITIES WITH INTERIM STATUS MAY BE ENDANGERING PUBLIC HEALTH AND THE ENVIRONMENT 1, (1981)).

[T]he portion of this country's pollution problem contributed by Federal facilities is significant. For example:

- . . . . Federal agency pollution control facilities made up 2-5% of the entire number of facilities in the U.S.
- . Of the 544 major industrial and municipal facilities in significant noncompliance with Water Final Effluent limits . . . 32 or 6% were Federal facilities.
- . Of the 328 significant air violators, 6 or nearly 2% were Federal facilities.
- . Of the 523 major RCRA handlers with [the most serious] violations . . . 30 or 5.7% were Federal facilities.

*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) [hereinafter *Senate Defense Appropriation Hearings*] (statement of Josephine S. Cooper, Assistant Administrator for External Affairs, EPA).

arsenal was the site of the production of chemical warfare and pesticide products through the 1960s. The site

now harbors corroded canisters of mustard gas, lethal phosphorus wastes from incendiary bombs, unexploded rockets and mortar shells embedded in a former firing range . . . Two vast man-made lagoons, once used as dump pits for toxic chemical and biological wastes, are the worst menaces of all . . . wastes have leached out of both ponds, infecting the area's ground water and killing crops.<sup>13</sup>

During the six years prior to 1982, the Army spent approximately \$50 million in cleanup attempts; however, experts estimate that complete detoxification would cost \$6 billion.<sup>14</sup> Pollution from the arsenal continues to threaten human health today.<sup>15</sup> Although the Rocky Mountain Arsenal is an extreme example of the potential economic and environmental costs of improper disposal of solid wastes, little spills also carry big price tags. At Fort Lewis, Washington, for example, an unknown person dumped several hundred gallons of the toxic chemical PCB on federal land, resulting in the contamination of 1,850 tons of soil. The resultant eight-day cleanup effort cost half a million dollars.<sup>16</sup>

#### THE RATIONALE BEHIND THE PARTNERSHIP APPROACH

The partnership approach envisioned for the enforcement of federal environmental statutes utilizes the strengths inherent in each governmental structure. The federal government provides technical expertise and uniform minimum standards. In contrast, state governments supply enhanced responsiveness and superior knowledge of local problems. As with any partnership, both parties must exercise their respective strengths for the system to work.

---

13. *Rockies Menace: Toxic Waste at an Arsenal*, TIME, Dec. 27, 1982, 70, 70.

14. *Id.*

15. "Don't go near the tap water . . . That's the state's warning to Adams County residents near Rocky Mountain Arsenal. The emergency's real. Adams County water contains increasing levels of the poisonous chemical TCE." Rocky Mountain News, Mar. 4, 1986, at 44, col. 1.

16. *Senate Superfund Hearing*, *supra* note 8, at 407 (statement of Dr. Lawrence J. Korb, Assistant Secretary of Defense).

An active pollution control role for state governments is desirable because local officials possess first-hand knowledge of pertinent economic, political, and environmental conditions and public sentiments. States also may have resources to devote to pollution control that are unavailable at the federal level. Finally, state residents and workers directly suffer the ill effects of inadequate pollution control and enjoy the benefits of adequate control.<sup>17</sup>

The example of solid waste disposal illustrates the need for a strong federal role in environmental policy. As one commentator notes, "Given the interstate mobility of waste and the national nature of many of the large waste generating industries [such as defense, chemical, and petroleum] there is no question that a comprehensive federal regulatory program is constitutional . . . . The need for national uniformity in many components of the hazardous waste program is obvious."<sup>18</sup> Aside from simplifying compliance, a uniform national program also would eliminate the potential for location-based competitive advantages.<sup>19</sup> Furthermore, the availability of federal expertise and resources for state supplementation

---

17. See Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 737 (1982):

States traditionally have engaged in a wide range of planning activities to promote economic activity and public health . . . .

State agencies tend to be more responsive to their citizens, act faster, and are more flexible in fashioning pragmatic solutions to problems. The "red-tape," rigidity, and distance of the federal government make it slow, inflexible, and sometimes awkward in addressing problems.

18. *Id.* at 736-37. Additional reasons for preserving a strong federal role in enforcement of hazardous waste and other environmental laws include the fact that states traditionally have refrained from hazardous waste management and have relied heavily on federal funding for the programs that they do have, the fact that the federal government possesses superior technical and research capabilities, and the fact that the federal government is less sensitive to political influences than many state agencies. *Id.* at 737.

19. A state could not set lower standards than neighboring states to attract firms interested in lower pollution control expenses. The United States Court of Appeals for the Fifth Circuit articulated the argument against a uniform national clean air program administered by the EPA in *Alabama v. Seeber*, 502 F.2d 1238 (5th Cir. 1974), *vacated and remanded*, 426 U.S. 932, *rev'd on remand*, 538 F.2d 96 (1976) (per curiam): "Because of variations in air quality between states and regions the emissions criteria established under state plans may vary considerably, thus making enforcement by EPA against scattered federal facilities administratively difficult." *Id.* at 1244. The court of appeals, however, went on to say, "The new source and hazardous pollutant criteria established by EPA . . . are not tied to air quality standards and may, therefore, vary little or not at all by area, making EPA enforcement against federal facilities more convenient." *Id.*

justifies active federal involvement as well. Finally, a federal backup enforcement authority is necessary.<sup>20</sup>

In 1973, the EPA submitted a report on hazardous waste disposal recommending that states be responsible for program implementation and that the EPA be responsible for promulgation of minimum national standards.<sup>21</sup> The EPA did not advocate a completely federal system because of "the difficulty in proving conclusively that the hazards [of hazardous wastes] . . . justify total Federal involvement, the prohibitive costs and administrative burdens . . . [and a desire not to preclude state involvement] in what is essentially a state problem."<sup>22</sup> State participation in planning and implementing environmental programs within broad federal guidelines and subject to administrative review presented a balance between the parochial pollution control interests of local governments on the one hand and the national agency mission interests of the federal government on the other.

Two perceived drawbacks to the partnership approach are the "potential for large expenditures of Federal manpower and funds should the states choose to sit back and 'let the Feds do it'; [and] . . . the possibility that Federal standards will be completely unenforced in laggard States simply because of the lack of adequate [state] funds . . . ." <sup>23</sup> The disheartening effect of unabated pollu-

---

20. The Senate Public Works Committee, when considering the Federal Water Pollution Control Act Amendments of 1972, commented: "The Committee . . . notes that the authority of the Federal Government should be used judiciously by the Administrator in those cases deserve [sic] Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State." S. REP. NO. 414, 92d Cong., 2d Sess., at 64, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3730.

21. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS—DISPOSAL OF HAZARDOUS WASTES (1974) [hereinafter EPA REPORT].

22. Schnapf, *supra* note 17, at 685 (citing EPA REPORT, *supra* note 21, at 22). The EPA envisioned a "partnership" approach with the following advantages:

utilizing the Federal Government's superior resources to set standards and design programs, while retaining the concept of State responsibility for what are traditionally recognized as State problems; minimal Federal involvement once the States' . . . programs are fully underway; uniform minimum national . . . standards, with States retaining the power to set more stringent standards . . . and reasonable assurance that the standards will be enforced. . . .

*Id.* (citation omitted).

23. *Id.* at 686 (citing EPA REPORT, *supra* note 21, at 23). Few foresaw the potential danger of state enforcement of more stringent state standards against federal facilities.



tion from federal facilities exacerbates these problems. For example, a state might find policing individual private septic systems futile when a neighboring government facility is dumping large amounts of raw sewage.<sup>24</sup>

## SOVEREIGN IMMUNITY AND THE SUPREMACY CLAUSE

### *Background*

Sovereign immunity and the supremacy clause are two major legal limitations that threaten the viability of the partnership between state and federal governments. In state actions against federal facilities for failure to conform with federal environmental laws, courts have construed narrowly the waiver of immunity provisions. The narrow construction arises primarily from supremacy clause considerations;<sup>25</sup> state governments cannot unilaterally mandate federal action. Examination of relevant environmental statutes, however, reveals that Congress did not intend the blunt instrument of sovereign immunity to be invoked whenever states turn to the judiciary to force federal facility compliance.<sup>26</sup>

Although supremacy considerations underlie federal preclusion of state pollution control enforcement, the ill-defined, oft-used judicial doctrine of sovereign immunity diverts attention from more fundamental supremacy clause concerns. In arguing for a relaxation of the canon of strict construction, Hart and Wechsler query, "Why should not the waiver of immunity be construed, if not liberally, at least sensibly—with a sympathetic assumption of an intention of Congress to introduce, in the area in question, a regime of law infused with a spirit of equity?"<sup>27</sup> Equity is served in most

---

24. See *California v. Davidson*, 3 Env't Rep. Cas. (BNA) 1157 (N.D. Cal. 1971); see also Shaw, *supra* note 7, at 50,220.

25. U.S. CONST. art. VI, cl. 2.

26. Environmental statutes usually contain broad federal facility compliance provisions indicating Congress's intent to ensure that public and private installations adhere to the same pollution control standards. See, e.g., the Noise Control Act, 42 U.S.C. § 7418(a) (1982); the Solid Waste Disposal Act, 42 U.S.C. § 6961 (1982); and the Water Pollution Control Act, 33 U.S.C. § 1323 (1982).

27. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* § 3, at 1351 (2d ed. 1973) [hereinafter HART & WECHSLER].

cases by subjecting federal and private facilities to identical enforcement provisions.<sup>28</sup>

### *Sovereign Immunity*

One commentator has stated that "[t]he increased reliance today on administrative techniques for effective governmental operation makes it timely to reexamine the problem of suits against officers of the government and to propose a possible solution of the difficulties which appear."<sup>29</sup> Although written forty years ago, this statement remains valid today. Sovereign immunity is a legal doctrine barring otherwise meritorious lawsuits against the federal government unless the government consents to being sued.<sup>30</sup> Sovereign immunity is a wholly judge-made doctrine; nothing in the Constitution expressly requires it.<sup>31</sup> Prevention of undue interference with governmental operations is the *raison d'être* of the doctrine.<sup>32</sup>

In 1939, Justice Frankfurter propounded the view that amenity to suit, rather than immunity, should be the assumption if a fed-

28. Given the fact that private officials need not request environmental control funds through the often protracted budgetary process and that private polluters' functions are at least arguably less important than federal missions, criminal liability should be imposed only against private facility administrators or corporate officials. Fining or incarcerating federal facility administrators or officials for violations that they may be powerless to stop, at least in the short run, is inequitable and contrary to the dictates of the supremacy clause.

29. Note, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060 (1946).

30. See, e.g., *United States v. Shaw*, 309 U.S. 495, 500-05 (1940) ("A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."); *Kawonankoa v. Polybank*, 205 U.S. 349, 353 (1907) (The doctrine "undoubtedly runs counter to modern democratic notions of the moral responsibility of the State."); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting) (Congress has, over time, successively broadened the consent of the United States to be sued.); see also C. WRIGHT, *THE LAW OF FEDERAL COURTS* 116 (4th ed. 1983).

31. See Note, *supra* note 29, at 1064-65. The doctrine has been disfavored for many years. See, e.g., *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939) (government corporation held liable to suit). *Keifer & Keifer* "marks the beginning of a series of Supreme Court expressions of misgivings about sovereign immunity generally. But the translation of these misgivings into an intelligible policy of interpretation in actions against the United States has been halting and irregular." HART & WECHSLER, *supra* note 27, at 1351.

32. See Note, *supra* note 29, at 1063.

eral agency rather than the United States itself is the defendant.<sup>33</sup> Although Justice Frankfurter may have overstated his case, rigid adherence to a canon of strict construction is antithetical to the current disfavor with the doctrine and congressional intent to preserve environmental quality. As the Appellate Court of Illinois said, "Sovereign immunity is of judicial origin and is a contemporary, although disfavored doctrine founded on the ancient principle that 'the King can do no wrong.'"<sup>34</sup> As the poor compliance record of federal facilities evidences, the King can do, and has done, wrong.

Courts tend to invoke the sovereign immunity doctrine after a cursory analysis of the current context in which the defense is raised and a quick reference to *McCulloch v. Maryland*.<sup>35</sup> As long ago as 1882, Justice Miller expressed dissatisfaction with the superficiality of the judiciary's sovereign immunity analysis in *United States v. Lee*,<sup>36</sup> writing that "while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has . . . been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."<sup>37</sup>

### *Federal Supremacy*

In the context of state suits against the federal government, sovereign immunity for the national government is closely related to the notion of federal supremacy, a strong policy in our federal system. Although state and federal interests in pollution control are,

---

33. See *Keifer & Keifer*, 306 U.S. at 388-89; see also *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943); *United States v. Shaw*, 309 U.S. 495, 501 (1940); *Federal Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940). See generally HART & WECHSLER, *supra* note 27, § 3, at 1339-57 (explaining sovereign immunity and its scope in actions to which the United States or a federal agency is a party).

34. *Lansing v. County of McLean*, 45 Ill. App. 3d 91, 93, 359 N.E.2d 165, 167 (1977).

35. 17 U.S. (4 Wheat.) 316 (1819); see also HART & WECHSLER, *supra* note 27, at 1339 ("Consider . . . whether the Supreme Court in modern times has not tended actually to enlarge the scope of sovereign immunity, out of misapprehension of its historical foundations, while at the same time professing to regard it with disfavor as an anachronism which should be narrowly confined.").

36. 106 U.S. 196 (1882).

37. *Id.* at 207 (citations omitted).

or should be, complementary, the supremacy clause presumes state and federal interests will sometimes be antagonistic. A full waiver of sovereign immunity would, in effect, permit state administrators to decide how to spend federal dollars by diverting funds earmarked for weapons procurement or salary hikes to waste-site cleanup or pollution control equipment. Local interests must be balanced with, not override, federal concerns. A complete waiver of federal immunity may prompt state agencies to "spend" money that Congress has not yet appropriated. The supremacy clause dictates that at some point federal interests must prevail.

Several fundamental policy considerations that underline the environmental programs instituted in the 1970s intersect with the notion of federal supremacy.<sup>38</sup> Foremost among these is the view that the primary responsibility for implementing the national policy to improve environmental quality should rest with state and local governments. Under the RCRA, Congress limited the federal government to a regulatory role in coordinating programs to protect public health and safety, an area of traditionally local concern.<sup>39</sup>

In evaluating the applicability of state enforcement provisions to federal facilities, a number of competing legal doctrines merit consideration. The judiciary tends to invoke the doctrine of strict statutory construction when state and federal laws conflict and the federal sovereign's preeminence allegedly is undermined. Basic to any assessment of the effect of federal legislation upon state action within the same sphere is a determination of whether a conflict actually exists.<sup>40</sup> Obvious conflict, actual or potential, between federal and state legislation leads to exclusion of state action based on well-established principles of federalism first articulated in *McCul-*

---

38. See *supra* text accompanying notes 17, 21-22.

39. See Andersen, *supra* note 1, at 650 ("The [RCRA] program can be envisioned as a carrot-stick approach: federal permits and enforcement are mandated, but the states have the option of accepting the task for themselves, with financial support.").

40. See, e.g., *People v. Broady*, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230, *cert. denied*, 361 U.S. 8 (1959).

*loch*.<sup>41</sup> Difficulty arises in the penumbral areas of concurrent authority such as the federal responsibilities section of the RCRA.<sup>42</sup>

In contrast to the tenet that clear and unambiguous expressions of congressional intent are required to waive sovereign immunity,<sup>43</sup> federal preemption of state legislation requires that Congress clearly manifest the intention to *exclude* state action.<sup>44</sup> Sovereign immunity thus constitutes a much broader limitation on state intrusion into federal affairs; however, federal sovereignty no longer requires such broad protection. The forces that precipitated the dissolution of the Articles of Confederation and the establishment of a strong central government created an entrenched, powerful federal sovereign. Slippery slope arguments that subjecting federal facilities to state enforcement will undermine our constitutional foundation are not as compelling today as they might have been if made in the eighteenth century.

Courts should not presume Congress's exercise of federal supremacy.<sup>45</sup> The test is whether both state and federal regulations or statutes can be enforced in a given field without impairing federal superintendence.<sup>46</sup> The mandate of the EPA to establish *minimum* national standards<sup>47</sup> undoubtedly permits additional state regulation in achieving comprehensive environmental protection.

41. See, e.g., *De Veau v. Braisted*, 5 A.D.2d 603, 174 N.Y.S.2d 596 (Sup. Ct. 1958), *aff'd*, 5 N.Y.2d 236, 157 N.E.2d 165, 183 N.Y.S.2d 793 (1959), *aff'd*, 363 U.S. 144 (1960).

42. 42 U.S.C. § 6961 (1982); see *infra* text accompanying note 89.

43. See, e.g., *Hancock v. Train*, 426 U.S. 167 (1976); *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976).

44. See, e.g., *California v. Zook*, 336 U.S. 725, 733 (1949); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).

45. See, e.g., *Schwartz v. Texas*, 344 U.S. 199 (1952), *overruled on other grounds*, *Lee v. Florida*, 392 U.S. 378 (1968).

46. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

47. For example, the Water Pollution Control Act, 33 U.S.C. § 1316(b)(1)(B) (1982), provides: "[T]he Administrator shall propose and publish regulations establishing Federal standards of performance for new sources . . ." The section continues:

If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to *at least* the same extent as required [by the EPA] such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

33 U.S.C. § 1316(c) (1982) (emphasis added). Section 1316(a)(2) defines "new source" so as to preclude application of more stringent pollution control requirements after construction of a facility has begun.

As a protection against state overreaching, each major federal environmental statute containing a waiver of sovereign immunity also contains a paramount interest exemption.<sup>48</sup> Under these provisions, the president may exempt a particular federal facility from compliance with any federal or state environmental requirements if deemed in the national interest.<sup>49</sup> Although the exemption has been used only once,<sup>50</sup> it provides a potentially more far reaching, yet selective, mechanism to further supremacy policies than does the doctrine of sovereign immunity. The need for an exemption clause also evidences an intent to provide a significant state role in environmental regulation. The exemption provisions would be unnecessary if the waiver provisions were intended to be limited in scope.

### *Judicial Interpretations of Immunity Waivers*

#### *Hancock v. Train*

Rarely has the judiciary considered the applicability of state environmental requirements to federal facilities. The United States Supreme Court most recently addressed the issue in *Hancock v. Train*,<sup>51</sup> a case involving the applicability of state permit requirements to federal installations under the Clean Air Act. The Court determined that, although federal facilities must comply with state "requirement[s] respecting control and abatement of air pollution,"<sup>52</sup> obtaining a permit to pollute from a state with a federally approved implementation plan was not a "requirement" within the

---

48. See, e.g., Noise Control Act of 1980, 42 U.S.C. § 4903(b) (1982), which provides in part: "The President may exempt any single activity or facility, including noise emission sources . . . of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so." See also Clean Air Act, 42 U.S.C. § 7418(b) (1982); RCRA, 42 U.S.C. § 6961 (1982); FWPCA, 33 U.S.C. § 1323(a) (1982).

49. See, e.g., Noise Control Act of 1980, 42 U.S.C. § 4903(b) (1982).

50. President Carter exempted the refugee facility of Fort Allen, Puerto Rico, from compliance with certain air, water, solid waste, and noise provisions for a one-year period. Exec. Order No. 12,244, 45 Fed. Reg. 66,443 (1980); see also Exec. Order No. 12,327, 46 Fed. Reg. 48,893 (1981), reprinted in 22 U.S.C. § 2601 (1982) (same exemption granted by President Reagan).

51. 426 U.S. 167 (1976).

52. *Id.* at 183 (quoting Brief for Petitioner at 21).

meaning of section 118 of the Act.<sup>53</sup> According to the Court, neither the language of the federal responsibilities section nor its legislative history evidenced a clear and unambiguous waiver of immunity with respect to the permit requirement.<sup>54</sup>

Justice White, writing for the majority, began the opinion by acknowledging the federal government's poor compliance record under the voluntary scheme instituted before 1970: "[i]nstead of exercising leadership in controlling or eliminating air pollution" 'Federal agencies have been notoriously laggard in abating pollution.'"<sup>55</sup> Congress enacted section 118 "both to provide leadership to private industry and to abate violations of air pollution standards by federal facilities."<sup>56</sup> Nevertheless, according to Justice White, the policy considerations underlying the doctrine of sovereign immunity justified a narrow interpretation of section 118. These principles are embodied in the supremacy clause and articulated in *McCulloch v. Maryland*.<sup>57</sup> "[T]he constitution and the laws made in pursuance thereof are supreme; . . . they control the constitution and laws of the respective states, and cannot be controlled by them."<sup>58</sup> One corollary to this principle is that "[i]t is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."<sup>59</sup>

---

53. *Id.* at 198-99.

54. *Id.* at 180-81. The Court stated that

[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

*Id.* at 179 (footnotes omitted)).

55. *Id.* at 171 (quoting H.R. REP. NO. 1146, 91st Cong., 2d Sess. 4, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 5356, 5360, and S. REP. NO. 1196, 91st Cong., 1st Sess. 37 (1970) (footnote omitted)).

56. *Id.* at 171.

57. 17 U.S. (4 Wheat.) 316 (1819).

58. 426 U.S. at 178 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 426).

59. *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 427). Three corollaries deduced from the supremacy clause are:

1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and preserve. 3d. That where this repugnancy exists,

The Court in *Train* expressed concern for the short-term effects of enforcing state permit requirements against federal polluters: "It is clear from the record that prohibiting operation of the air contaminant sources for which the State seeks to require permits is tantamount to prohibiting operation of the federal installations on which they are located."<sup>60</sup> The Supreme Court first expressed this compelling argument against relaxation of the sovereign immunity doctrine more than a century ago in *United States v. Lee*.<sup>61</sup> One commentator articulated the Court's concern: "[T]he subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property."<sup>62</sup> The immediate effect of strict enforcement would have been to close numerous nuclear facilities, military activities, hospitals, and other federal facilities with subsequent adverse effects upon national defense, employment, and health care. Ironically, Congress itself would have been shut down.<sup>63</sup>

A companion case brought under the federal responsibilities section of the FWPCA, *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*,<sup>64</sup> paralleled the *Train* decision. A majority of the Supreme Court again held that, although federal facilities must comply with "requirements respecting control and abatement of pollution," state permits do not fall within the Court's definition of "requirement."<sup>65</sup> The majority adhered to the traditional canon of strict construction in finding

---

that authority which is supreme must control, not yield to that over which it is supreme.

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

60. 426 U.S. at 180 (citation omitted).

61. 106 U.S. 196, 206 (1882).

62. Note, *supra* note 29, at 1061 (footnote omitted).

63.

One of the great ironies of the early years of environmental law was that, while these deliberations were taking place, the air outside in the Capitol was often fouled by emissions from the federal government powerplant providing the electricity to light the congressional offices. The District of Columbia, required by Congress to enforce the new Clean Air Act, found itself nearly impotent in trying to clean up Congress' own pollution.

Breen, *supra* note 6, Editor's Summary at 10,326.

64. 426 U.S. 200 (1976).

65. *Id.* at 227.



no clear and unambiguous waiver of immunity. The Court shifted the onus of interpretation to Congress, concluding: "Should it be the intent of Congress to have the EPA approve a state . . . program regulating federal as well as nonfederal point sources and suspend issuance[s] of . . . permits as to all point sources discharging [pollutants] . . . , it may legislate to make that intention manifest."<sup>66</sup> Congress enacted broad waivers of federal immunity shortly thereafter for the Clean Air Act and the FWPCA.<sup>67</sup>

### *The Lower Court Decisions*

Rarely have states attempted to enforce their *own* enforcement provisions against federal polluters. In *Kelley ex rel. People v. United States*,<sup>68</sup> however, plaintiffs brought a citizen suit, pursuant to section 505a of the FWPCA,<sup>69</sup> in the United States District Court for the Western District of Michigan. The plaintiffs alleged that Coast Guard personnel released toxic chemicals at a Coast Guard Air Station in violation of Michigan law. The state statutes at issue provided that the state attorney general may maintain actions for equitable and declaratory relief "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."<sup>70</sup> In denying plaintiffs'

66. *Id.* at 227-28.

67. See 42 U.S.C. § 7418(a) (1982); see also *infra* text accompanying notes 110-12. The House Interstate and Foreign Commerce Committee reported that the language of [the] existing law [Clean Air Act] should have been sufficient to insure Federal compliance . . . . Unfortunately, however, the U.S. Supreme Court construed section 118 narrowly in *Hancock v. Train* . . . . The new section . . . is intended to overturn the *Hancock* case and to express, with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State and local requirements—procedural, substantive, or otherwise—process, and sanctions.

H.R. REP. NO. 294, 95th Cong., 1st Sess. 199, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1278.

The Senate Environment and Public Works Committee reported, "The act [FWPCA] 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." S. REP. NO. 370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4392.

68. 618 F. Supp. 1103 (W.D. Mich. 1985).

69. 33 U.S.C. § 1365(a) (1982).

70. MICH. COMP. LAWS ANN. § 691.1202(1) (West Supp. 1986). Section 6(a) of the Michigan Water Resources Commission Act, MICH. COMP. LAWS ANN. § 323.6(a) (West 1975), prohibits "discharg[ing] into the waters of the state any substance which is or may become

claim, the district court held the statutes did not "provide objective, quantifiable standards subject to uniform application."<sup>71</sup>

In *California v. Walters*,<sup>72</sup> the United States Court of Appeals for the Ninth Circuit adjudicated criminal charges brought by the Los Angeles City Attorney against a Veterans Administration hospital and its administrator for the improper disposal of hazardous medical wastes. Based on the Supreme Court's earlier decision in *Hancock v. Train*,<sup>73</sup> the court of appeals focused its analysis on whether section 6961 of the RCRA clearly and unambiguously waived sovereign immunity for purposes of state criminal enforcement provisions. In a per curiam decision, the court held that criminal sanctions are not a "substantive or procedural requirement," but rather the means by which states enforce substantive standards, pollution permits, and reporting duties.<sup>74</sup> The court of appeals did not consider criminal sanctions to be within the ambit of the term "injunctive relief." "Section 6961 [of the RCRA] plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions."<sup>75</sup>

In *Florida Department of Environmental Regulation v. Silvex Corp.*,<sup>76</sup> Florida sought to hold the Navy strictly liable for removal costs and resource damage caused when a private handler improperly disposed of Navy-generated hazardous waste. In conformance with the traditional common law approach to sovereign immunity cases, the United States District Court for the Middle District of Florida interpreted narrowly section 6961. After a brief review of the legislative history behind section 6961 and the case law interpreting the term "requirements," Judge Block determined that the

---

injurious to the public health, safety or welfare . . . ." A violation of this provision constitutes "prima facie evidence of the existence of a public nuisance." MICH. COMP. LAWS ANN. § 323.6(c) (West 1975).

71. *Kelley*, 618 F. Supp. at 1108.

72. 751 F.2d 977 (9th Cir. 1984). Both parties agreed that the suit was in essence against the United States, thus raising sovereign immunity considerations, and requiring a clear and unambiguous waiver of immunity by Congress. See, e.g., *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

73. See *supra* text accompanying notes 51-67.

74. 751 F.2d at 978.

75. *Id.*

76. 606 F. Supp. 159 (M.D. Fla. 1985).

requirements referred to in Senate Report Number 988 are "more in the nature of regulatory guidelines and ascertainable standards that a federal agency dealing with hazardous waste would have to meet."<sup>77</sup> The district court noted, moreover, that the Supreme Court decisions demonstrated a "similar intent to have requirements defined as objective state standards of control" rather than the full range of state enforcement mechanisms.<sup>78</sup>

Judge Block posited that Congress partially waived sovereign immunity to preserve uniformity in state environmental regulations: "This narrow intrusion into federal sovereign immunity has required that courts strictly define requirements as objective and ascertainable state regulations; e.g., state pollution standards or limitations, compliance schedules, emission standards, and control requirements."<sup>79</sup> Quoting a standard adopted by the United States Court of Appeals for the First Circuit in a Noise Control Act case, the district court held that Florida's strict liability provision was not a "relatively precise standard . . . capable of uniform application."<sup>80</sup>

As relevant Supreme Court and lower court decisions indicate, courts analyze state enforcement of state environmental requirements promulgated pursuant to federal law under sovereign immunity doctrine. Strict interpretation of immunity waivers prevents effective state enforcement. Recalcitrant federal facilities are able to circumvent congressional intent to create a federal-state partnership by ignoring state environmental regulations. In addition to thwarting state environmental efforts, overbroad protection of federal supremacy through sovereign immunity doctrine leads to separation of powers complications. For example, a single military base, under direct control of the executive branch, should not always be permitted to ignore congressional intent.

---

77. *Id.* at 163.

78. *Id.* (citing *Train*, 426 U.S. at 188-89 & n.2).

79. *Id.*

80. *Id.* (quoting *Romero-Barcelo v. Brown*, 643 F.2d 835, 855 (1st Cir. 1981)).

*Federal Environmental Law Legislative History**Overview*

The legislative history of the Resource Conservation and Recovery Act and other environmental statutes provides insight regarding congressional efforts to balance state and federal interests in the environmental field. The RCRA is significant in one respect because it went beyond federal air and water pollution control laws in effect at the time by requiring federal facility compliance with federal, state, and local substantive and procedural requirements.<sup>81</sup> Federal environmental legislation generally reflects a trend toward broadening state authority to ensure federal and private facility compliance with the overriding legislative purpose of preserving the quality of our environment.<sup>82</sup> Today, the Clean Air Act and the FWPCA contain broad waivers of sovereign immunity for "any process and sanction, whether enforced in Federal, State, or Local courts on in any other manner."<sup>83</sup> The present waiver of govern-

---

81. 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4.02, at 4-109 (1985). "Given its pivotal role in each of the statutes, it seems likely that 'requirements' is a term of art with a specialized meaning common to all four [RCRA, Noise Control Act, Clean Air Act, and FWPCA] statutes." For a discussion of federal immunity from local requirements prior to passage of the RCRA, see Breen, *supra* note 6, at 10,329. See also Murchison, *Waivers of Intergovernmental Immunity in Federal Environmental Statutes*, 62 VA. L. REV. 1177 (1976).

Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (1978) ("Federal Compliance with Pollution Control Standards"), required executive agencies to cooperate and consult with state and local environmental agencies. Commenting on this Executive Order, Professor Breen said:

The Executive Order, like the statutes, defines the obligation to comply with state and local law in terms of "standards" and "requirements." Consequently, it probably puts no new obligations on federal agencies to comply with state nuisance law, liability allocations, directions to take response actions at federal hazardous waste sites, taxes, fines, or other matters which are not requirements.

Breen, *supra* note 6, at 10,331 (footnote omitted). Whatever the implications or interpretations of Exec. Order No. 12,088, only Congress can actually waive sovereign immunity. See *Hancock v. Train*, 426 U.S. 167, 179 (1976).

82. See Murchison, *supra* note 81, at 1177.

83. Clean Air Act, 42 U.S.C. § 7418(a)(2)(C) (1982). Section 7418(a) provides in full:

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

mental immunity in the RCRA is slightly narrower, as it is limited to injunctive relief.<sup>84</sup>

Aside from the perceived need for uniform application of the law to federal and nonfederal facilities, an oft-cited rationale for subjecting federal facilities to state and local environmental requirements is the belief that federal facilities should support state environmental protection efforts by serving as models of proper disposal techniques.<sup>85</sup> Congress has recognized that "[i]n the process of providing [this] support, a *good deal* of immunity from state regulation probably has been waived."<sup>86</sup> The extent of a "good deal" has been a subject of ongoing controversy between federal hazardous waste site operators and state environmental enforcement agencies.

### *The Resource Conservation and Recovery Act of 1976*

Congress's express purpose in enacting the Resource Conservation and Recovery Act of 1976 was to promote the protection of human health and environment and to conserve valuable material and energy resources.<sup>87</sup> To effectuate this purpose, the RCRA provides for intergovernmental cooperation in the belief "that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal [are] . . . national in scope and in con-

---

specting the control and abatement of air 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. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of the law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

The federal facilities provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1323 (1982), is virtually identical to the Clean Air Act provision above.

84. 42 U.S.C. § 6961 (1982); see *infra* text accompanying note 89.

85. See Andersen, *supra* note 1, at 674.

86. *Id.* (emphasis added).

87. See generally 42 U.S.C. § 6902 (1982 & Supp. III 1985) (lists Congress's objectives under the RCRA).

cern and necessitate Federal action."<sup>88</sup> In delineating federal compliance responsibilities under the RCRA, section 6961 provides in part:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste 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), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.<sup>89</sup>

Congress acknowledged the sovereign immunity ramifications of section 6961.<sup>90</sup> Senate Report Number 988 states that "[i]n any regulatory program involving Federal and State participation, the allocation or division of enforcement responsibilities is difficult."<sup>91</sup> In an effort to balance the state and federal roles, the Senate indi-

---

88. 42 U.S.C. § 6901(a)(4) (1982).

89. 42 U.S.C. § 6961 (1982).

90. Arguments that Congress actually intended to waive complete sovereign immunity in the RCRA, or that the differences in the language of the federal facility enforcement sections of the RCRA, the FWPCA, the Clean Air Act, and the Noise Control Act are insignificant, must fail.

Congress cannot be expected to specifically address each issue of statutory construction which may arise . . . Congress is "predominantly a lawyer's body," . . . and it is appropriate for us "to assume that our elected representatives . . . know the law." . . . As a result, if anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the rule [for example, clear and ambiguous waiver requirement for waivers of governmental immunity] and legislated with it in mind. It is not a function of [the] Court to presume that "Congress was unaware of what it accomplished . . ."

*Albernaz v. United States*, 450 U.S. 333, 342-43 (1981) (citations omitted).

91. S. REP. No. 988, 94th Cong., 2d Sess. 17 (1976).

cated that "the authority of the Federal Government [and limited EPA resources] should be used judiciously by the Administrator in those cases [which] deserve Federal action because of their national character, scope, or seriousness. The Committee intends that the great volume of enforcement actions be brought by the State."<sup>92</sup>

The House of Representatives also expressed its awareness of the uncertainty surrounding the applicability of state enforcement provisions to federal facilities. The House Interstate and Foreign Commerce Committee noted that "[t]he question . . . has generated controversy; legislative, executive and judicial action; and a Supreme Court decision. There still remain ambiguities as to what such [federal] responsibilities are and who should take [enforcement] action."<sup>93</sup> Unfortunately, the House and Senate reconciled their differences behind closed doors. Congress adopted the Senate language, but no conference report or statement of managers exists to explain whether adoption of the Senate version of the bill also implies adoption of the Senate committee's explanatory remarks. Attempts to discern legislative intent are particularly difficult in this instance because the original House and Senate versions of the RCRA, with respect to governmental immunity, were markedly different.<sup>94</sup>

### *The House Approach to Sovereign Immunity under RCRA*

The House bill did not include a waiver of sovereign immunity for federal facilities; instead, the House would have subjected federal agencies to a separate, uniform national scheme of regulation administered by the EPA. The House Committee advised against waiving sovereign immunity. House of Representatives Report Number 1491 endorsed the Supreme Court's interpretation of then existing Clean Air Act and FWPCA waivers, requiring federal facil-

---

92. *Id.* This language is identical to that adopted by the Senate Public Works Committee in the 1972 Amendments to the FWPCA. Compare *id.* with S. REP. NO. 414, *supra* note 20, at 64, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3730.

93. H.R. REP. NO. 1491, *supra* note 7, at 45, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6283.

94. Compare S. REP. NO. 988, *supra* note 91, at 63 (Federal Facilities § 223) with H.R. REP. NO. 1491, *supra* note 7, at 66, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6304 (Federal Responsibilities § 601).

ities to comply with local pollution standards, but not all enforcement measures incorporated in state plans.<sup>95</sup>

The House adopted the findings and recommendations of the Administrative Conference of the United States, which criticized the variations in state law requirements from one locality or media—such as air, water, solid waste—to another, and supported a uniform national EPA-run program for federal facilities. The Administrative Conference determined that “[i]f the authority of the States to impose their permit and other enforcement procedures upon federal facilities is upheld, some agencies will have to comply with a multitude of different State and local procedures.”<sup>96</sup> The advantages of this uniform national approach are threefold: clear standards, substantive and procedural; clear methods of enforcement by the EPA and through citizen suits against the EPA for failure to enforce standards; and relief for states from the expense of supporting environmental enforcement, implementation, and monitoring staffs for both private industry and federal facilities. The Administrative Conference report concluded:

[C]ommon sense in public administration suggests that the ‘front line’ of enforcements be maintained by the [federal] level of government posing the problem . . . . Should the Federal government fail to effectively police its own facilities, there exists in four of these statutes a citizen suit provision which proves a ‘second line’ of enforcement . . . .<sup>97</sup>

---

95. See H.R. REP. No. 1491, *supra* note 7, at 48-51, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6286-89. The report states that “many State officials would welcome the removal from their shoulders of the burden of enforcing environmental quality standards against Federal facilities. State and local officials repeatedly indicated . . . their willingness to transfer Federal facility enforcement problems to an effective Federal level enforcement program. . .” *Id.* at 49-50, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6288.

96. *Id.* at 48, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6286.

97. *Id.* at 50, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6288. The effectiveness of citizen suit provisions in assuring federal facility compliance with state or federal law is dubious: “These citizen suit provisions are valuable for plugging holes that develop in a Federal enforcement program. However, they should not be relied upon as a primary source of surveillance and enforcement . . . .” *Id.*, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6288. “[S]uch suits are too quixotic and fortuitous to be relied upon as a regular enforcement procedure.” Shaw, *supra* note 7, at 50,216. Eleven federal environmental statutes contain provisions whereby private citizens can bring suit for violations by the regulated public or against government authorities responsible for tardy or erroneous implementation: Clean Air Act, 42 U.S.C. § 7604 (1982); FWPCA, 33 U.S.C. § 1365 (1982); RCRA, 42 U.S.C. § 6972 (1982 & Supp. III 1985); Noise Control Act, 42 U.S.C. § 4911



*The Senate Approach to Sovereign Immunity under RCRA*

The Senate approach to federal sovereign immunity, embodied in section 6961 of the RCRA, is a narrower version of the sovereign immunity waivers expressed in section 118 of the Clean Air Act and section 313 of the FWPCA.<sup>98</sup> Apparently, the Senate Committee wanted to avoid creating a federal bureaucracy that would establish its enforcement authority and resist encroachments to that authority. Explaining the partial waiver of federal immunity provision, Senator Baker wrote that "this legislation does not create a major Federal program which could become so entrenched that future changes in direction are foreclosed."<sup>99</sup> In Baker's view, the RCRA represented a temporary, remedial measure designed to help stem the rising tide of solid waste until such time as pollution control technology and administrative programs advanced to the point where Congress could enact a comprehensive, permanent program.<sup>100</sup> This view appears to have prevailed. In adopting the Senate's version of section 6961, Congress preserved a significant, although ill-defined, enforcement role for the states that extends to federal as well as private waste facilities.<sup>101</sup>

*Superfund*

The legislative history of, and the administrative and implementational difficulties with, the closely related Comprehensive Environmental Response, Compensation, and Liability Act of

---

(1982); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (1982); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1982); Deepwater Port Act of 1974, 33 U.S.C. § 1515 (1982); Toxic Substances Control Act, 15 U.S.C. § 2619 (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1982); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (1982); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (1982). For a comprehensive two-part treatment of citizen enforcement suits see Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,309 (1983); Miller, *Private Enforcement of Federal Pollution Control Laws, Part II*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,407 (1984).

98. See *supra* note 83.

99. S. REP. NO. 988, *supra* note 91, at 31 (Individual Views of Mr. Baker).

100. *Id.*

101. See *id.* Summarizing the Committee members' position, Baker stated: "[T]he other members of the [Senate Public Works] Committee and I share the view that solid waste management should be primarily a State and local concern; that the Federal bureaucracy should not be given authority to dictate or procedures to State and local officials." *Id.*

1980—CERCLA or Superfund<sup>102</sup>—highlight the inadequacies of the federal responsibilities provision of the RCRA. The Superfund section entitled “Applicability to Federal Government Branches” is similar to the RCRA section 6961 in providing that “[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.”<sup>103</sup> Congress and the courts apparently differed in their reading of this provision. Senator Stafford, chairman of the Senate Committee on Environment and Public Works, commented:

We included these [governmental immunity waiver] provisions in the law for several policy reasons. First, based on our experience in other environmental laws, we believed there was a distinct possibility the Federal Government would seek to treat itself differently from private citizens. Second, we believed there was an inherent conflict in some cases between your obligations

---

102. 42 U.S.C. §§ 9601-9657 (1982).

103. 42 U.S.C. § 9607(g) (1982). Congress has recently amended CERCLA. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). In the Act, Congress sought to clarify its intent, and thus improve compliance, regarding federal facilities under Superfund. The new federal facilities compliance section represents an effort to redress the disparate treatment accorded private and public hazardous waste sites. The new section provides expressly that federal facilities shall comply with rules, regulations, standards, and all other hazardous material requirements promulgated by the EPA. Thus, while federal facilities must comply only with EPA pollution control criteria under CERCLA, the statute now explicitly provides that states shall have the authority to enforce removal and remedial actions against most federal sites. The statute now provides in part:

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by . . . the United States when such facilities are not included on the National Priorities List.

Pub. L. No. 99-499, § 120(a), 100 Stat. 1667 (1986).

Cognizant of the potential for overzealous enforcement against federal site “owners,” Congress also provided that the “waiver of immunity” provision applied only to the extent states did not seek to enforce more stringent removal or remedial action standards or requirements against federal facilities. *Id.*

Finally, in an effort to foster better federal-state “partnership” relations, Congress added a “State and Local Participation” provision affording state and local officials the opportunity to share EPA data and to participate in remedial clean-up action planning. *Id.*, 100 Stat. at 1670.

and implementation of your military [or other federal] mission[s], and the obligations of a private party charged with cleaning up in order to protect health and the environment.

Finally, we believed there should be no doubts in the minds of those living in and around military bases [or other federal installations] that . . . their health . . . was being adequately protected.<sup>104</sup>

If Senator Stafford's views reflect accurately Congress's intent, then this resolve became distorted at some time between enactment and enforcement. Senator Stafford summed up the state of affairs in 1983 with respect to Superfund, and arguably the RCRA, stating that "despite these explicit provisions, the law has been implemented in a way that, for practical purposes, exempts the Department of Defense and other Federal facilities from the Superfund requirement."<sup>105</sup>

### *The Clean Air Act and Federal Water Pollution Control Act*

Several of the same policy factors that Congress considered in enacting the RCRA also contributed to its decision to subject federal facilities to state enforcement under the Clean Air Act and the FWPCA. In 1972, Congress added a further policy justification for a broad immunity waiver by expressing its intent that the federal government lead by example: "This [federal facility responsibilities] section would 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."<sup>106</sup> Congressional hearings disclosed many incidents of flagrant violations by federal facilities of air and water pollution control requirements. The Senate Public Works Committee admonished, "The Federal Govern-

---

104. *Senate Superfund Hearings*, *supra* note 8, at 347.

105. *Id.* Stafford's remarks were prompted in part by a December 1982 EPA study revealing that nine of 13 Virginia facilities evaluated are, or have the potential to be, highly hazardous to human health and the environment. See ENVIRONMENTAL PROTECTION AGENCY, POLLUTION CONTROL COMPLIANCE BY FEDERAL FACILITIES IN VIRGINIA (1982).

106. S. REP. NO. 414, *supra* note 20, at 67, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3733. The Senate Public Works Committee used this language to express senatorial intent underlying § 313—Federal Facilities Pollution Control—of the FWPCA.

ment cannot expect private industry to abate pollution if the Federal Government continues to pollute."<sup>107</sup>

With a view toward establishing federal facilities as models for state and private emulation, Congress augmented federal accountability to state standards: "This section requires that Federal facilities meet all [pollution] control requirements as if they were private citizens."<sup>108</sup> Congress thus continued a fifteen-year trend by lowering further the legal shield of sovereign immunity protecting the federal government from liability for violating the FWPCA and the Clean Air Act.<sup>109</sup>

Despite language in the legislative history to the contrary, courts have interpreted narrowly the federal facility compliance of sections of the Clean Air Act and the FWPCA.<sup>110</sup> In response, Congress amended the Acts to ensure that implementation and enforcement conformed with legislative intent.<sup>111</sup> Congress expressly waived sovereign immunity to satisfy the judiciary's traditional canon of strict statutory construction in cases of governmental immunity waivers. Senate Report Number 370 indicated congressional dissatisfaction with the Court's initial, narrow interpretations: "Though this [broad waiver of immunity] was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies . . . misconstrued our original intent."<sup>112</sup>

In amending the Clean Air Act in 1977, the House of Representatives stated, "Adoption of section 118 of the Act was intended to remove all legal barriers to full Federal compliance, except as [exemptions are authorized] . . . . The historic defense of sovereign

---

107. *Id.*, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3733-34.

108. *Id.*, reprinted in U.S. CODE CONG. & ADMIN. NEWS 3668, 3734. Notwithstanding this seemingly broad congressional mandate, the Supreme Court interpreted narrowly the FWPCA waiver of governmental immunity in *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976). See *supra* text accompanying notes 64-66.

109. See Breen, *supra* note 6, at 10,326.

110. See *supra* text accompanying notes 51-71.

111. Act of Dec. 27, 1977, Pub. L. 95-217, §§ 60, 61(a), 91 Stat. 1566, 1597-98 (1977) (amending the FWPCA); Act of Aug. 7, 1977, Pub. L. 95-95, § 116, 91 Stat. 685, 711 (1977) (amending the Clean Air Act).

112. S. REP. NO. 370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4392.

immunity was waived by Congress. Consent to be sued was provided."<sup>113</sup> Anticipating similar constitutional objections and waiver misinterpretations as those arising under the FWPCA, the House Interstate and Foreign Commerce Committee reported:

[A]rguments regarding the supremacy clause no longer permitted a refuge for unwilling or tardy Federal agencies. Section 118 of the 1970 Clean Air Act Amendments . . . established, as a matter of Federal law, the duty of Federal facilities to abide by all State and local emission control requirements (including, of necessity, those procedural requirements and sanctions incidental to implementation and enforcement of the substantive requirements).<sup>114</sup>

After this unequivocal waiver, the federal enclave theory<sup>115</sup> of exclusion for federal facilities from states' jurisdiction has not been available to agencies attempting to avoid compliance with state standards. Supremacy clause arguments fail as well because Congress expressly subjected federal installations to state control requirements and enforcement mechanisms under the Clean Air Act.

#### THREATS TO THE PARTNERSHIP APPROACH

Once the obstacle of sovereign immunity is overcome, a number of potential threats to the viability of the environmental partnership still remain. Although each environmental statute contains laudable policy goals when considered separately, application of each may cause conflict. Further problems involve identification of the proper parties to include in enforcement proceedings—the source of federal reluctance to conform with state environmental regulations may be Congress itself; federal courts will be more than reluctant to mandate budgetary items. In addition, federal self-policing to augment state enforcement is problematic. Facility missions antithetical to pollution control, in many instances, prevent

---

113. H.R. REP. NO. 294, 95th Cong., 1st Sess. 198, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1276.

114. *Id.* at 198, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1277.

115. Regarding the jurisdictional problems of federal enclaves, see generally Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy*, 101 U. PA. L. REV. 124 (1952); Note, *Land Under Exclusive Federal Jurisdiction: An Island Within a State*, 58 YALE L.J. 1402 (1949).

all but grudging voluntary compliance; nevertheless, the Justice Department espouses a policy against interagency enforcement proceedings.

### *Statutory Interdependence*

The interdependence of the environmental statutes is a fundamental consideration in evaluating the application of environmental statutes to federal facilities. Ideally, proper disposal of solid waste under the RCRA need not be accomplished at the expense of air and water quality. Given existing disposal technology, however, "environmental trade-offs" may be unavoidable. For example, installation of smokestack scrubbers required under the Clean Air Act creates vast quantities of hazardous sludge that industries must dispose of properly under the RCRA.<sup>116</sup> Failure to comply with the RCRA in disposing of this sludge would defeat the purposes of both statutes: "A policy for air pollution only, a policy for water pollution only, a policy for solid waste disposal only, will not suffice. A broad policy and a coordinated effort are imperative" to fulfill Congress's vision of a comprehensive environmental program.<sup>117</sup> Holding federal facilities, like private facilities, accountable to both state and federal enforcement provisions fosters proper disposal of wastes. This view is incorporated in the Clean Air Act<sup>118</sup> and the FWPCA<sup>119</sup> and is arguably more compelling in the hazardous waste area because of the potentially lethal, irreversible effects of improper waste disposal.<sup>120</sup>

States, and more particularly, individuals living in close proximity to federal installations posing serious health threats, have a strong interest in obtaining relief from unabated pollution of their locality. At the same time, a complete waiver of sovereign immunity, even if constitutional, could result in great judicial diseconomy and unjustified impairment of agency objectives. As one com-

---

116. 42 U.S.C. § 6901 (1982).

117. S. REP. NO. 414, *supra* note 20, at 3, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3670.

118. *See* 42 U.S.C. § 7418 (1982).

119. *See* 33 U.S.C. § 1323 (1982).

120. *See* H.R. REP. NO. 1491, *supra* note 7, at 17-24, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6254-62.

mentator points out, any solution to this problem must take into account

[t]he danger of suspending a vital governmental function by an erroneous decree of a lower court . . . [which may] be mitigated by sound judicial administration in refusing to grant relief pending appeals in those cases in which the governmental interest in uninterrupted activity outweighs the private interest which the plaintiff is seeking to protect.<sup>121</sup>

### *The Budgetary Process*

Many disputes arise when a federal agency or facility administrator agrees that a certain environmental protection measure is appropriate, but compliance with state substantive requirements is not possible in the short run due to budgetary constraints or priorities. Federal agencies may in fact be *more* willing to invest in environmental protection than private industry because doing so will not put the agency at a competitive disadvantage or reduce dividends to shareholders. No other domestic firms compete with the Department of the Navy for the nation's maritime defense. By contrast, private businesses are understandably averse to investing in pollution control because increased expenditures mean less profit.

Even from the perspective of the federal government, waste cleanups and pollution control are expensive.<sup>122</sup> Federal installations request funds from the federal budget for various activities. A Defense Department agency consolidates typical operating activities into an "operations and maintenance" fund request which, because of its size, may be broken down as separate line-items in the departmental budget.<sup>123</sup> If, for example, the Navy wants \$25 million to install pollution control equipment required at a Norfolk

---

121. Note, *supra* note 29, at 1062.

122. See *supra* notes 14 and 16 and accompanying text; see also Note, *The Bankruptcy Code and Hazardous Waste Cleanup: An Examination of the Policy Conflict*, 27 WM. & MARY L. REV. 165, 165 n.1 (1985).

123. See A. SCHICK, CONGRESS AND MONEY BUDGETING, SPENDING AND TAXING 271-77 (1980). The Senate Budget Committee "officially eschews line-item decisions, insisting that the only numbers with legal effect are the budget aggregates and the amounts allocated to each function." *Id.* at 271. "[M]embers can afford to avoid line-item debate [however] only when they are sure that their programs will not be prejudiced thereby. When failing to

facility, the installation's request for this money may be scrutinized separately in committee.<sup>124</sup> In the course of Congress's deliberations over the requested DOD appropriation, this line-item may be reduced in order to "trim the fat" from the defense budget, to allocate funds to higher priority items, or in the belief that \$18 million, say, will do the job. As a result, the facility does not have sufficient funds to effect adequate pollution control measures. The importance of the budgetary process lies in the fact that Congress may decide to limit environmental compliance appropriations, even when the agency responsible for a particular facility makes the fund request as a good faith response to state environmental regulators.

To continue the illustration, suppose Virginia wants to cite the Norfolk facility for a violation of the RCRA. Should the state penalize the facility administrator or the members of Congress responsible for cutting requested pollution control appropriations? Congress would surely raise a separation of powers or political question defense to any federal court injunction (or a federal supremacy defense to a state court injunction) ordering appropriation of funds sufficient to effectuate "adequate" pollution control measures.

At present, injunctive relief under the major environmental statutes remains a matter of equitable discretion for the court; thus, a judge may order federal facility compliance without ordering a cessation of operations in the interim.<sup>125</sup> To prevent the type of confrontation inherent in ordering cessation of operations, a federal court will likely order such a limited injunction; however, the im-

---

itemize programs offers inadequate protection . . . the decision breaks out into line-item debate." *Id.* at 274.

124. For a lucid discussion of the politics of line-itemization in the budgetary process, see *id.* at 271-77. Schick writes:

[I]t would be truly startling if [Senate Budget Committee] members were interested only in the totals and not the parts . . . . They would be allocating billions of dollars without caring about which program got what, without trying to assist the programs they believed in or the constituencies they served . . . . The opportunities for logrolling would be greatly circumscribed, as would the possibility of buying budgetary agreement by offering line-item inducements to reluctant committee members.

*Id.* at 273.

125. See Breen, *supra* note 6, at 10,330.



petus to take corrective measures is thereby reduced. In considering the FWPCA, the Senate Environment and Public Works Committee noted that "if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct."<sup>126</sup> Whether state enforcement measures taken against federal facilities are constitutional, in light of Congress's mandate to provide for the national interests, is an issue requiring consideration of both constitutional and economic issues.

### *Facility Mission versus Environmental Responsibility*

Congressional expectations of federal facility leadership in the environmental field remain unfulfilled. Neither state agencies nor the EPA have the manpower to keep tabs on the environmental performance of federal facilities to the extent desirable. Ideally, facility administrators themselves would inform officials of pollution control violations or would request pollution control equipment when necessary. Not surprisingly, this has not been the case. A leading regulatory policy implementation theory provides one possible explanation for federal *recalcitrance* as opposed to leadership: "The more a target agency's mission is [perceived to be] inconsistent with, alien to, or hostile toward an environmental policy, the greater the amount of behavioral change required, and consequently the more likely implementation difficulty."<sup>127</sup>

---

126. S. REP. No. 414, *supra* note 20, at 65, reprinted in U.S. CODE CONG. & ADMIN. NEWS 3668, 3731. Each of the statutes waives sovereign immunity, to greater and lesser degrees. The *most* extensive waiver being "to the same extent as any private person." State attempts to penalize federal facilities more harshly than private facilities responsible for comparable violations, therefore, would be struck down. The Comptroller General noted that if "federally owned facilities are treated in the same manner as non-federally owned facilities" then federal facilities can be liable for state-imposed fines. See Breen, *supra* note 6, at 10,330.

127. Durant, *EPA, TVA and Pollution Control: Implications for a Theory of Regulatory Policy Implementation*, 44 PUB. ADMIN. REV. 305, 311 (1984).

[I]mplementation difficulties can be more accurately anticipated if the interaction patterns of those factors comprising the "noncompliance delay effect" are known: (1) the degree to which the application of a policy directly affects activities central to a regulatory target's mission, and (2) the extent to which the time delay inherent in challenging implementation is perceived by the target as adversely affecting the realization of that mission.

*Id.*

To continue with the Norfolk example, the Navy would not view the facility's military and environmental responsibilities as incompatible in the abstract. When formulating budget requests, the Department of the Navy would include desired new pollution control systems along with desired new weapons systems. In reality, however, the Navy knows it will not receive unlimited economic support. As Professor Shaw notes:

Regrettably, many facility operators and, in turn, their agency supervisors, have been cynical and suspicious. They have feared that the funds for the proposed [environmental protection] projects would be taken from elsewhere in their operating budgets and have recognized that related increases in operating and manpower budgets necessitated by the new [pollution control] equipment would not be given special consideration . . . . Consequently, some [agencies] have chosen not to initiate plans and budget requests, thereby aborting the whole strategy.<sup>128</sup>

Given their conflicting constituencies, facility and agency administrators "must weigh protection of the environment against production goals, personnel problems, budget restraints and other pressures or agency missions."<sup>129</sup>

The current internal system for ensuring federal facility compliance, therefore, is inadequate.<sup>130</sup> The long budgetary cycle of federal agencies accounts in part for the poor federal compliance record. A private facility may, at the "request" of enforcement authorities, be able to order, to purchase, and to install required pollution control equipment in a matter of months, securing funding through reduced dividends to shareholders, increased prices to consumers, or cuts in operating expenses. Federal agencies, in contrast, must submit funding requests to Congress. In light of budgetary constraints and the relatively low position of pollution con-

---

128. Shaw, *supra* note 7, at 50,213.

129. *Id.*

130. In light of responses such as this state official's, the efficacy of the "partnership" is questionable:

Q: How does your state office deal with the environmental problems caused by federal facilities?

A: We throw up our hands.

*Id.* at 50,222 (quoting conversation with the Compliance Counsel for the New York State Department of Environmental Conservation).

trol on the domestic political agenda, adequate funding may take years as opposed to months. As a result, fulfillment of state pollution control timetables is impeded and public health is affected adversely.

Yet another problem exists in that, although obtaining start-up funds for a pollution control project may be fairly difficult, *maintaining* adequate funding is often even more difficult. As Durant says, "While legislation is the product of conditions and coalitions at a single point in time, implementation must occur over time. Consequently, [federal programs—for pollution control, for example—are] vulnerable to shifting concerns, policy attitudes, and political agendas that can render implementation both unpopular and problematic."<sup>131</sup> Any viable federal facility compliance program must *attempt* to insulate pollution control programs from such political influences.

### *Department of Justice Policy*

Another reason agencies are reluctant to comply voluntarily with the enforcement of Superfund and other environmental statutes is the longstanding policy of the Department of Justice against suing sister agencies. In its debates on Superfund, the Senate stated, "Clearly, a polluting facility has little incentive to rectify deficiencies or to negotiate seriously when it knows that the responsible regulatory authorities have rendered themselves powerless to compel compliance by recourse to judicial enforcement action."<sup>132</sup> In fact, the Attorney General informed the EPA that he did not want to involve the judicial branch in resolving executive branch problems and that, if the EPA attempted to initiate legal actions on its own against federal polluters, the Justice Department would intervene against the EPA.<sup>133</sup> The Justice Department espouses

---

131. Durant, *supra* note 127, at 312; see also Sabatier, *Social Movements & Regulatory Agencies*, 6 POL'Y SCI. 301-42 (1975); Van Meter & Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 ADMIN. & SOC'Y. 445, 445-48 (1975).

132. *Senate Superfund Hearing*, *supra* note 8, at 460 ("DOD's sometimes cavalier attitude is perhaps not surprising in view of the facts that DOD does not regard environmental protection as a primary mission, and that EPA and the Department of Justice . . . have a longstanding blanket policy against ever taking court action against non-complying federal facilities.").

133. *Id.*

the view that " 'suing an agency of the United States' is not among the 'enforcement tools . . . necessary or appropriate for one unit of government to use against another' in the implementation of CERCLA [Superfund] or any other federal law."<sup>134</sup> Moreover, the Justice Department has taken the position that suit of one federal agency by another violates article III justiciability requirements.<sup>135</sup> If the EPA *will not* go after federal polluters and states *cannot*, then the federal facility compliance sections of the environmental statutes are emasculated.

#### PROPOSAL: EPA-ADMINISTERED PANEL AND TRUST FUND

Reconciliation of state and federal interests in the environmental law area is difficult. "[G]rave interference with the performance of a governmental function"<sup>136</sup> may result from a broad waiver of sovereign immunity. Erring on the side of local interests threatens values embodied in the supremacy clause. On the other hand, Senator James Buckley articulated the drawbacks of allowing federal interests to predominate:

[D]espite the pious references to the primacy of the state role . . . [federal predominance] may well threaten . . . to reduce the role of the states and local governments to that of "errand boy," so that the bill may, in fact, encourage states to withdraw from the national effort.<sup>137</sup>

An equitable balance between local and national interests is required to preserve constitutional values and promote Congress's purpose in enacting environmental statutes.

---

134. *Id.* at 460-61 (quoting letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, DOJ, to Representative John Dingell, Chairman, Subcommittee on Oversight and Investigations, House Energy and Commerce Committee (Oct. 11, 1983) (maintaining that federal agencies are willing to voluntarily pay their fair share of clean-up costs)).

135. *Id.* at 461. Kenneth Kamlet, of the National Wildlife Federation, counters this assertion by pointing out that "[g]iven the fact that various Federal Agencies have often been on different sides of the same litigation, one would have to exalt the fiction of a monolithic Executive Branch over the realities of everyday life for such an argument to prevail." *Id.* at 452.

136. *Federal Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940).

137. S. REP. NO. 414, *supra* note 20, at 102, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3668, 3763. Senator Buckley continued, "The active participation by state and local governments . . . and a mood of cooperation and interdependence between those units of

Undoubtedly, cases will arise in which, for reasons of national defense or fulfillment of other important federal facility objectives, compliance with state provisions would be inappropriate. Policies embodied in the supremacy clause must prevail. The presidential exemption provision is one means of ensuring that environmental policies do not predominate over more important national concerns. Obtaining an exemption takes time, however, and historically exemptions are offered infrequently.<sup>138</sup>

An alternative to a complete waiver of sovereign immunity—and the resultant court battle whenever federal agency and state environmental interests collide—is to take an administrative action or proceeding to the EPA. With its environmental expertise, the EPA could act as arbitrator; its determination would be binding and federal in nature, thereby assuaging sovereign immunity and federal supremacy concerns. Suit in state court—subject to removal to federal court—would be available if either the state or agency felt the EPA had not vindicated its rights.

Congress could establish a federal environmental board with authority to order diversion of agency or facility funds to pollution control purposes when deemed in the public interest. It could create a federal environmental response fund, along the lines of Superfund, but with a narrower purpose, funding compliance by federal facilities with environmental statutory programs. Federal agencies would contribute a pro-rata portion of their funds based on current and projected pollution control funding requirements.

The federal government, in addition to paying for actual cleanup expenses, is not prepared to spend the millions of dollars that states might levy as punitive provisions and fines under a full waiver of sovereign immunity. Harsh fines on private corporations alienate or bankrupt businesses, thus eliminating jobs and reducing tax revenues. Because federal facilities are not entities operating for profit and, therefore, not likely to react to fines by reducing business or leaving the state, states would not be subject to the

---

government and EPA, are essential to the success of the [environmental] program. The federal government cannot possibly . . . administer this program without the active cooperation of the states." *Id.* at 3767.

138. See *supra* note 50 and accompanying text.

same set of negative incentives inherent in prosecuting private entities.<sup>139</sup>

The trust fund approach mitigates the potential for disproportionate state enforcement against federal polluters because states would, in effect, serve as enforcement agents of the EPA. Fines assessed by state or federal courts would go to the EPA-administered trust fund for redistribution to federal facility control programs. Despite the fact that federal agencies retain control of the funds under this proposal, incentives for environmental responsibility are present in that agencies do not want to see their appropriated funds go back into a cleanup trust fund. Although state coffers are not enriched, state residents still benefit from improved pollution control.

Through the development of an environmental trust fund, agencies could circumvent the laborious congressional budgetary process and obtain relatively quick access to funds when the public health and welfare is at risk. Congress can address the problem posed by federal facility noncompliance by agreeing upon a mechanism for triggering an immediate allocation from the environmental response fund: a state court injunction, a federal court damage award, or an EPA panel decision, for example. Once implemented, the mechanism would prevent federal agencies from invoking the doctrine of sovereign immunity or claiming insufficient funds when called upon by a federal panel to right environmental wrongs.

This Note proposes establishment of both a new trust fund—distinct from Superfund—and an administrative panel to expedite federal cleanups. The same results could not be achieved through the existing Superfund mechanism because use of “Superfunds” is not permitted for cleanups when the site owner is known and solvent;<sup>140</sup> moreover, CERCLA prohibits expenditures

---

139. *But see California ex rel. State Water Resources Control Bd. v. Environmental Protection Agency*, 511 F.2d 963, 968-69 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200, 207 (1976) (“[T]he [FWPCA] in no way seeks to limit Congress’ ability to reassert exclusive control over the affected federal areas. Nor does it seem that in practice Congress would be politically compelled to retain the Act in its present form, if states attempted significant incursions into the federal prerogative.”).

140. *See generally* 42 U.S.C. § 9611 (1982).

from Superfund for long-term cleanups at federal sites.<sup>141</sup> The EPA's Assistant Administrator for External Affairs, Josephine Cooper, pointed out that "where there are *imminent substantial* endangerment situation[s]—where the public is at risk in an *emergency* type situation—the Superfund money can be used . . . when there is *really* a situation that warrants it."<sup>142</sup> The tone of Ms. Cooper's remarks highlights the EPA's unwillingness to use Superfund for federal facility cleanup. This reluctance is understandable, considering that Superfund was designed to clean up preexisting pollution problems in the vast number of private facilities and sites.

The goals envisioned for the separate trust fund and the federal facility pollution panel are ambitious: to prevent future problems, to expeditiously correct past abuses and, perhaps most importantly, to provide the environmental leadership model envisioned by Congress. Nevertheless, meeting those goals is necessary to effectuate the policies underlying federal environmental legislation. Avoiding the unwieldy, time-consuming Superfund<sup>143</sup> or budgetary allocation request process<sup>144</sup> through a streamlined EPA trust fund and panel would promote rapid federal compliance, preserve the "federal environment," and provide a public model for private emulation.<sup>145</sup>

---

141. See *Senate Defense Appropriation Hearings*, *supra* note 12, at 435 (statement of Josephine S. Cooper, Assistant Administrator for External Affairs, EPA).

142. *Id.* at 440 (emphasis added).

143. "For federal facilities, an administrative approach grounded in cooperative action is used rather than the enforcement/litigation approach grounded in compelled action used for non-federal facilities." EPA FEDERAL FACILITIES COMPLIANCE PROGRAM, STRATEGY FOR RESOLUTION OF COMPLIANCE PROBLEMS AT FEDERAL FACILITIES 6 (1984). For a discussion of the administrative process for assuring federal facility compliance, see *id.* at 12-15.

144. For a brief discussion of the budgetary process see *supra* text accompanying notes 122-24.

145. See *supra* text accompanying notes 106-09. Although referring to Superfund appropriations, Senator Stevens highlighted the merits of a separate federal facility trust fund as well: "We didn't want the DOD to have to wait for Superfund money. We believed they should have the money up front and proceed to spend the money and maintain what I think is the best image of the DOD and aggressive pursuit in accord with Federal law." *Senate Defense Appropriation Hearings*, *supra* note 12, at 440. Stevens sought to combat the negative perception of federal facility pollution control held by the public, the media, and many of the members of Congress:

[P]rogress of Federal installations is too little and too slow. Many also believe that Federal officials are not sufficiently sensitive to the pollution generated by

## CONCLUSION

The present statutory framework for federal environmental protection, as implemented, does not protect adequately the health of the American public. Agencies often need several years advance notice to factor environmental costs into budget requests and, in turn, to receive funding to comply with state requests. Herein lies the crux of the problem. State enforcement timetables, and quite possibly health concerns, do not allow for this lag between agency requests, congressional outlays, and facility implementation. Given the inertia of the budgetary process, the decentralization efforts of the Reagan administration,<sup>146</sup> agency perceptions of facility mission incompatibility with environmental responsibility, and the current fiscal conservatism, spurring rapid federal agency environmental response presents an elusive problem.

A complete waiver of sovereign immunity might create more problems than it would solve and would provoke serious constitutional objections. In light of the fact that federal facilities are not operating for profit, resistance to environmental compliance should be minimal *provided* that funds are available. The problem lies in the unique functions performed by the federal government in our society; the Navy, for instance, cannot sell off an air station or reduce its defense dividend to the citizenry to meet environmental obligations. At present, agencies must go through traditional congressional budgetary channels to obtain pollution control financing.

Rather than blustering that "The King can do no wrong" when states demand compliance with environmental law, a federal facil-

---

their current or past operations or the impact this pollution may have on the people using or living just outside the boundaries of these facilities.

*Id.* at 424.

146. Post-1981 funding patterns reflect the Reagan administration's emphasis on political decentralization and lowering regulatory compliance costs for industry. See C. Davis, *Implementing the Resource Conservation and Recovery Act of 1976: Problems and Prospects*, 9 PUB. ADMIN. Q. 218, 255 (1985).

The statutory language and the Reagan administration's policy may well result in mixed signals to facility administrators which undermine Congress's intent in enacting waivers of sovereign immunity and comprehensive environmental legislation. As a result, "[t]he exercise of discretionary authority becomes a more plausible option for the . . . administrator [because] policy standards are characterized by ambiguity or bureaucratic conflict at higher levels as well as continuing political support for program decentralization." *Id.* at 232.



ity administrator's response is more likely to be, "We don't have the funds." Meanwhile, public exposure to harmful pollutants continues unabated. If the nation is to fulfill the goals enunciated in the RCRA, the FWPCA, the Clean Air Act, and the Noise Control Act, Congress must relinquish some control over the purse strings so that federal agencies, through the EPA administrative panel and trust fund, can expedite allocation of funds needed to fulfill federal facility environmental obligations.

*David W. Goewey*