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# THE FIELD CITATION PROGRAM UNDER THE CLEAN AIR ACT: CAN EPA APPLY IT TO FEDERAL FACILITIES?

MAJOR KEVIN J. LUSTER\*

## I. INTRODUCTION

In 1990, Congress amended the federal enforcement provision of the Clean Air Act ("CAA" or the "Act").<sup>1</sup> The amendment expanded the Environmental Protection Agency's ("EPA" or the "Agency") enforcement options and considerably enhanced the Agency's administrative enforcement powers.<sup>2</sup> In section 113(d)(3), Congress authorized the Administrator of EPA to implement, through regulations, a field citation program for minor violations of the CAA.<sup>3</sup> On May 3, 1994, EPA published a notice of proposed rulemaking for a field citation program pursuant to CAA section 113(d)(3).<sup>4</sup> EPA intends to apply the program to federal agencies, and it expects to publish the final rule either in late March or early April of 1998.<sup>5</sup> This will be the first program under which EPA assesses civil penalties against a unit

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<sup>1</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 701, § 113, 104 Stat. 2399, 2672-80 (codified at 42 U.S.C. § 7413 (1994)).

<sup>2</sup> See ARNOLD W. REITZE, JR., AIR POLLUTION LAW § 20-4, at 1008-09 (1995).

<sup>3</sup> See 42 U.S.C. § 7413(d)(3) (1994).

<sup>4</sup> Field Citation Program, 59 Fed. Reg. 22,776 (1994) (to be codified at 40 C.F.R. pt. 59).

<sup>5</sup> See Telephone Interview with Cary Secrest, Environmental Protection Specialist, Air Enforcement Specialist, Air Enforcement Division, United States Environmental Protection Agency (November 24, 1997).

of the federal government for violations of the CAA.<sup>6</sup> In this article, I will discuss various aspects of EPA's proposal and whether the CAA gives EPA the authority to apply the field citation program to federal agencies. I will conclude that EPA has such authority. I will begin by discussing federal enforcement under section 113 of the Act.

## II. BACKGROUND

### A. *Enforcement Under the Clean Air Act*

Section 113 is the basic federal enforcement provision of the CAA. The 1990 amendments to the CAA significantly expanded the administrative enforcement authorities that the 1977 version of the CAA had given EPA.

Under the 1977 CAA, EPA's enforcement options were limited to commencing a civil action against any person violating certain requirements under the Act and to obtaining an injunction and/or civil penalties of up to \$25,000 per day of violation.<sup>7</sup> To impose a civil penalty, EPA typically had to first issue a notice of violation ("NOV") to the violator and provide a copy to the appropriate state.<sup>8</sup> The NOV described the violation and gave the violator thirty days to cure the problem.<sup>9</sup> If the violator continued the violation thirty days after receiving the NOV, EPA either issued an administrative order or commenced a civil action in a U.S. district court under CAA section 113(b).<sup>10</sup> If EPA decided to issue an administrative

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<sup>6</sup> See Telephone Interview with Sally Dalzell, Director, Site Remediation and Enforcement Staff, United States Environmental Protection Agency (May 25, 1995).

<sup>7</sup> See Clean Air Act § 113(b), 42 U.S.C. § 7413(b) (1988) (current version at 42 U.S.C. § 7413(b) (1994)).

<sup>8</sup> Section 113(a)(1) of the CAA required NOVs for a violation of any requirement of an applicable implementation plan. See 42 U.S.C. § 7413(a)(1) (current version at 42 U.S.C. § 7413(a)(1) (1994)). Section 113(a)(3) stated that EPA did not have to issue NOVs for violations of new source performance standards (section 111(e)), hazardous emissions standards (section 112(c)), and certain inspection and reporting requirements (section 114). See *id.* § 7413(a)(3) (current version at 42 U.S.C. § 7413(a)(3) (1994)).

<sup>9</sup> See *id.* § 7413(a)(1) (current version at 42 U.S.C. § 7413(a)(1) (1994)).

<sup>10</sup> See *id.* § 7413(a)(2) (current version at 42 U.S.C. § 7413(a)(2) (1994)).

compliance order, it had to afford the violator an opportunity to consult with the Administrator concerning the violation.<sup>11</sup> The compliance order described the violation and specified a reasonable deadline by which time the violator had to comply.<sup>12</sup> If the violator failed to comply in time, EPA commenced a civil action under CAA section 113(b).<sup>13</sup> Under the 1977 version of the CAA, section 113 did not provide for administrative penalties.<sup>14</sup> This meant that, in order to impose penalties against a violator, EPA had to commence civil judicial action in a federal district court. This also meant that EPA had to rely upon the Department of Justice ("DOJ") to prosecute the civil judicial actions.<sup>15</sup> Thus, the 1977 CAA did not provide EPA with a flexible enforcement tool to address minor violations of the Act.

The 1990 amendments to the CAA addressed this problem by scrapping old subsection 113(d) (*Final compliance orders*) and by authorizing EPA to impose administrative penalties under new subsection 113(d) titled *Administrative assessment of civil penalties*.<sup>16</sup> Under subsection 113(d)(1), EPA may issue an administrative order against any person incurring a civil administrative penalty of up to \$25,000 per day of violation

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<sup>11</sup> CAA section 113(a)(4) afforded a violator the opportunity to confer with the Administrator before a compliance order could take effect unless the violation involved hazardous air pollutants. *See id.* § 7413(a)(4) (current version at 42 U.S.C. § 7413(a)(4) (1994)).

<sup>12</sup> *See id.*

<sup>13</sup> *Id.* § 7413(b)(1) (current version at 42 U.S.C. § 7413(b)(1) (1994)).

<sup>14</sup> *See id.* § 7413(a)(2) (current version at 42 U.S.C. § 7413(a)(2) (1994)). CAA section 120 (*Noncompliance penalty*), however, authorized delegated states and EPA to impose administrative penalties upon owners or operators of noncomplying stationary sources. *See* 42 U.S.C. § 7420(a)(2)(A) (1994). Within 30 days of discovering the noncompliance, EPA or the state issued the source a notice of noncompliance. *See id.* § 7420(b)(3). The source had 45 days to challenge the notice and request a formal, public administrative hearing. *See id.* § 7420(b)(4)(B). Otherwise, the source could concede the violation and calculate its own penalty, which could be no less than the economic value of the delay in compliance to the source. *See id.* § 7420(b)(4)(A). The penalty attempted to eliminate the economic advantage of noncompliance. *See* REITZE, *supra* note 2, § 20-18(a), at 1036-37.

<sup>15</sup> The DOJ conducts and supervises all litigation involving the United States. *See* 28 U.S.C. §§ 516-519 (1994); *see also* REITZE, *supra* note 2, § 20-18(a), at 1036.

<sup>16</sup> *See* Pub. L. No. 101-549, sec. 701, § 113, 104 Stat. 2399, 2677 (1990) (codified as amended at 42 U.S.C. § 7413 (1994)).

if the person has violated or is violating an applicable implementation plan or any other provision under subchapters I, III, IV-A, V, or VI of the CAA.<sup>17</sup> Before EPA can assess a civil administrative penalty against any source for violating an applicable implementation plan, EPA must issue a NOV and wait thirty days.<sup>18</sup> Unless the Administrator and Attorney General agree otherwise, an administrative civil penalty may not exceed \$200,000, and EPA may not impose one for any violation older than twelve months.<sup>19</sup> Additionally, EPA must afford any source receiving a civil administrative penalty under subsection 113(d)(1) an opportunity for a formal administrative hearing in accordance with sections 554 and 556 of the Administrative Procedure Act ("APA").<sup>20</sup> Finally, subsection 113(d)(3) authorizes the Administrator to create a field citation program for minor violations of the CAA.<sup>21</sup> Before discussing subsection 113(d)(3) in detail in Part III, I will discuss other field citation programs in existence when Congress authorized the program in the 1990 CAA.

### B. *Early Field Citation Programs*

The term "field citation" defines a class of enforcement documents that inspectors issue for minor violations they discover in the field.<sup>22</sup> An inspector may issue a field citation on the spot when he discovers a violation, or from his office after completing the inspection report.<sup>23</sup> A field citation

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<sup>17</sup> Under subsection 113(d)(1), EPA may assess civil administrative penalties for violations of applicable implementation plans and requirements under subchapters I (*Programs and Activities*), III (*General Provisions*), IV-A (*Acid Rain Deposition Control*), V (*Permits*), and VI (*Stratospheric Ozone Deposition*). See 42 U.S.C. § 7413(d)(1)(B) (1994). Subsection 113(d) does not apply to subchapter II, *Emission Standards for Moving Sources*. See *id.* § 7413(d)(1).

<sup>18</sup> See *id.* § 7413(d)(1)(A).

<sup>19</sup> See *id.* § 7413(d)(1).

<sup>20</sup> See *id.* § 7413(d)(2)(A); see also 5 U.S.C. §§ 554, 556 (1994).

<sup>21</sup> See 42 U.S.C. § 7413(d)(3).

<sup>22</sup> See William W. Sapp, *Improving Wetlands Enforcement Through Field Citation*, 1 ENVTL. LAW. 751, 754 (1995).

<sup>23</sup> See *id.* at 754-55.

can be in the form of any one of several types of legal documents such as: an administrative order, a notice of violation, a short-form settlement agreement, or a summons.<sup>24</sup> Field citations are similar to traffic tickets in that they usually address clear-cut violations, require violators to correct the violations, usually impose small penalties, and provide an appeals process.<sup>25</sup>

In 1985, Dade County, Florida developed a field citation program to enforce county environmental codes.<sup>26</sup> Upon discovering a violation, an inspector from the County's Department of Environmental Resources Management would issue a warning citation to the violator which set a deadline for the violator to correct the violation.<sup>27</sup> The inspector reinspected the facility at the end of the period, and if the violator had not cured the problem, the inspector issued a citation with a \$50 to \$150 penalty.<sup>28</sup> Inspectors carried calendars with them so that they could schedule hearing dates for those violators who objected to the citations.<sup>29</sup> Overall, seventy-five percent of the violators complied within thirty days of receiving citations.<sup>30</sup>

In 1988 the State of California developed a "Toxic Ticket" field citation program for minor violations of the Solid Waste Disposal Act, also called the Resource Conservation and Recovery Act ("RCRA").<sup>31</sup> When an investigator issued a citation in the field, he would schedule an informal conference for the violator.<sup>32</sup> The violator could argue his case before the informal conference or request a formal hearing.<sup>33</sup> Before California developed the program, it took an average of 592 hours for the State's

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<sup>24</sup> See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, HOW TO DEVELOP YOUR OWN UST FIELD CITATION PROGRAM 1 (EPA/530/UST-91/014, 1991) [hereinafter SOLID WASTE AND EMERGENCY RESPONSE].

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* at 2; see also Sapp, *supra* note 22 at 751.

<sup>27</sup> See SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 24, at 14.

<sup>28</sup> See at 14, 22.

<sup>29</sup> See *id.* at 24.

<sup>30</sup> See *id.* at 2.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 24.

<sup>33</sup> See *id.*

enforcement staff to process each minor violation.<sup>34</sup> The "Toxic Ticket" program reduced this time to seven to ten hours per case.<sup>35</sup> Additionally, the State reported "a very high compliance rate since instituting the 'Toxic Ticket' program."<sup>36</sup>

In late 1987, EPA's Office of Mobile Sources initiated a field citation program to enforce EPA regulations for fuel dispenser nozzles.<sup>37</sup> Under the program, EPA inspectors issued \$200 citations to gasoline retailers who violated the fuel dispenser nozzle regulations governing fuel pumps dispensing leaded gasoline.<sup>38</sup> The citations operated as modified settlement agreements in which EPA, in issuing a citation, offered to settle an enforcement action at a fixed amount.<sup>39</sup> The violator could either correct the problem and pay a modest penalty or face traditional enforcement procedures with penalties as high as \$25,000 per violation.<sup>40</sup> The program substantially reduced the number of civil judicial cases, reduced the average time the office

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<sup>34</sup> *See id.* at 2.

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> Section 211 of the CAA authorized EPA to regulate sales of leaded gasoline. 42 U.S.C. § 7545(a), (c) (1994). Under the nozzle regulations, retailers selling leaded gasoline had to equip their leaded gasoline pumps with nozzles with spouts wider than normal ends—diameters not less than 2.363 centimeters. *See* 40 C.F.R. § 80.22(f)(1) (1995) (current version at 40 C.F.R. § 80.22(f)(2)(i) (1996)). This helped to prevent consumers from introducing leaded gasoline into motor vehicles labeled "Unleaded Gasoline Only," because the fuel tank intakes for new, unleaded vehicles were less than 2.363 centimeters in diameter. By 1992, EPA had stopped issuing field citations for nozzle violations because of the phase-out of leaded gasoline. *See* Telephone Interview with Richard Ackerman, Environmental Specialist, Office of Enforcement, United States Environmental Protection Agency (June 16, 1995).

<sup>38</sup> *See* SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 24, at 2.

<sup>39</sup> *See id.* at 10.

<sup>40</sup> Under the 1977 version of the CAA, EPA could initiate a civil action in a U.S. district court to recover a \$10,000 civil penalty for each day a person violated any regulation EPA had promulgated under section 211. *See* 42 U.S.C. § 7545(d) (1988). Under the 1990 CAA, EPA can initiate a civil action in a U.S. district court to recover a civil penalty of \$25,000 for each day a person violates a section 211 regulation, plus the amount of any economic benefit or savings the person gains from violating the regulation. *See* 42 U.S.C. § 7545(d)(1) (1994).

spent on a case from three months to one month, and nearly eliminated the office's enforcement backlog.<sup>41</sup>

These early programs demonstrated that field citations were quick, inexpensive, and encouraged prompt compliance. However, since these programs were relatively new, they lacked long track records.<sup>42</sup> Even so, in 1989 EPA decided to pursue authority to establish a field citation program in the upcoming amendments to the CAA.<sup>43</sup>

### III. THE 1990 AMENDMENT

#### A. *Authority to Implement a Field Citation Program*

In the 1990 amendments to the CAA, Congress authorized the Administrator of EPA to issue regulations to create a field citation program after consulting with the Attorney General and the states.<sup>44</sup> Under the

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<sup>41</sup> See SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 24, at 2.

<sup>42</sup> See Telephone Interview with Jane Engert, Environmental Scientist, Office of Compliance, United States Environmental Protection Agency (May 25, 1995).

<sup>43</sup> See Sapp, *supra* note 22, at 751-53.

<sup>44</sup> Clean Air Act § 113(d)(3) states:

The Administrator may implement, after consultation with the Attorney General and the States, a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed \$5,000 per day of violation may be issued by officers or employees designated by the Administrator. Any person to whom a field citation is assessed may, within a reasonable time as prescribed by the Administrator through regulation, elect to pay the penalty assessment or to request a hearing on the field citation. If a request for a hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence. Payment of a civil penalty required by a field citation shall not be a defense to further enforcement by the United States or a State to correct a violation, or to assess the statutory maximum penalty pursuant to other authorities in the chapter, if the violation continues.

42 U.S.C. § 7413(d)(3) (1994).



program, EPA could assess civil penalties, not to exceed \$5000 per day of violation, for "appropriate minor violations."<sup>45</sup> Though CAA section 113 did not define "minor violations," Congress intended for EPA to issue field citations for minor violations discovered during inspections and for violations of routine reporting and recordkeeping requirements.<sup>46</sup> The amendment does not specifically state to whom EPA may issue field citations; though it does state that "[a]ny person to whom a field citation is assessed may . . . elect to pay the penalty assessment or to request a hearing on the field citation."<sup>47</sup> Congress also directed that a hearing on a field citation shall not be subject to the formal administrative hearing procedures of sections 554 or 556 of the APA, and instead required that EPA provide the person who has received a field citation a "reasonable opportunity to be heard and to present evidence."<sup>48</sup>

### B. *Appellate Review*

Any person incurring a penalty under a field citation may seek review in the United States District Court for the District of Columbia or for the district in which the alleged violation occurred, or where the person or business resides.<sup>49</sup> The violator has thirty days from the date of the final agency decision on the assessment in which to file his appeal.<sup>50</sup> The district court may only review the record and it may only set aside or remand the order if it finds that there is no substantial evidence in the record to support the finding of a violation or that the order or penalty constitutes an abuse of discretion.<sup>51</sup>

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<sup>45</sup> See *id.*

<sup>46</sup> See S. REP. No. 101-228, at 365 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3748.

<sup>47</sup> 42 U.S.C. § 7413(d)(3).

<sup>48</sup> *Id.* The APA is codified at 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994).

<sup>49</sup> See 42 U.S.C. § 7413(d)(4).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

## IV. EPA'S PROPOSAL

## A. Background

Upon receiving Congressional authorization to create a field citation program, EPA did not immediately propose regulations for the program;<sup>52</sup> it did not publish a notice of proposed rulemaking ("NPRM") until May 3, 1994.<sup>53</sup> In January 1991 the Administrator appointed a working group to consider alternatives and to propose a rule.<sup>54</sup> The group discussed various state and federal programs in existence. In particular, they considered EPA's underground storage tank ("UST") program and the Coast Guard's oil spill program under section 311 of the Clean Water Act ("CWA").<sup>55</sup> The group analyzed EPA's UST program for its citation format, the types of violations

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<sup>52</sup> In promulgating the regulations for the field citation program, EPA must satisfy the rulemaking procedures Congress enumerated in CAA section 307 (*Administrative proceedings and judicial review*). See 42 U.S.C. § 7607 (1994). Under the section 307 rulemaking procedures, EPA must publish a notice of proposed rulemaking ("NPRM") in the Federal Register and invite public comments. See *id.* § 7607(d)(3). The NPRM must state the basis and purpose for the rule. See *id.* The agency must summarize in the NPRM any factual data, major legal interpretations, and policies it considered in developing the rule. See *id.* § 7607(d)(3)(A)-(C). EPA must maintain all documents and comments concerning the proposed rule in a rulemaking docket available for public inspection. See *id.* § 7607(d)(4)(A). The agency also must publish the final rule in the Federal Register. See *id.* § 7607(d)(5). It must restate the basis and purpose of the rule, explain why it changed the proposed rule, and respond to each significant comment. See *id.* § 7607(d)(6)(A). The agency may not base the rule on any information or data not in the rulemaking docket. See *id.* § 7607(d)(6)(C). The rulemaking docket is the agency's record for the purpose of any judicial review of the rulemaking. See *id.* § 7607(d)(7)(A). Generally, a person will not have standing to bring suit and object to the rulemaking unless he raised the objection during the public comment period. See *id.* § 7607(d).

<sup>53</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,776 (1994) (to be codified at 40 C.F.R. pt. 59).

<sup>54</sup> See *Field Citation Rule for Air Act Violations Will Be Proposed in June*, EPA Official Says, 22 Env't Rep. (BNA) 2517 (March 13, 1992).

<sup>55</sup> See Telephone Interview with John Hannon, Staff Attorney, Air and Radiation Division, Office of the General Counsel, United States Environmental Protection Agency (May 25, 1995).

it addressed, its program guidance, and the training and discretion it provided to inspectors.<sup>56</sup> The group analyzed the Coast Guard's oil spill program primarily for its appellate procedures.<sup>57</sup> Before discussing the NPRM, I shall briefly describe the UST and oil spill programs.

### 1. *The Underground Storage Tank Field Citation Program*

In 1988, EPA's Office of Underground Storage Tanks ("OUST") began developing a field citation program to enforce subchapter IX of the Solid Waste Disposal Act.<sup>58</sup> EPA worked with several states to develop "expedited enforcement" programs to enable the states to enforce efficiently their UST regulations.<sup>59</sup> At the same time, OUST began developing a field citation program for the regional offices to administer.<sup>60</sup> The Agency developed the program to fill a gap in EPA's UST enforcement scheme by "addressing many prevalent, clear-cut violations that are relatively easy to correct."<sup>61</sup> It sought an enforcement tool that would deter violations while requiring less agency resources than the traditional methods of UST enforcement.<sup>62</sup> At the time, the "traditional methods" available consisted of war-

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<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See Sapp, supra* note 22, at 751. *See generally* Solid Waste Disposal Act §§ 9001-9010, 42 U.S.C. §§ 6991-6991i (1994) (as amended by the Resource Conservation Act of 1976) [hereinafter RCRA]. Subchapter IX is commonly referred to as subtitle I; it covers regulation of underground storage tanks. *See id.*

<sup>59</sup> *See* SOLID WASTE AND EMERGENCY RESPONSE, *supra* note 24, at 1.

<sup>60</sup> *See* Memorandum from David W. Ziegele, Acting Director of the Office of Underground Storage Tanks, to Waste Management Division Directors for Regions I-III and V-IX, Water Division Directors for Regions IV and X, and Regional Counsel for Regions I-X (March 20, 1991) (on file with the *William and Mary Environmental Law and Policy Review*).

<sup>61</sup> OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, DIRECTIVE NO. 9610.13: GUIDANCE FOR FEDERAL FIELD CITATION ENFORCEMENT 1 (March 20, 1991) (on file with the *William and Mary Environmental Law and Policy Review*) [hereinafter DIR. NO. 9610.13].

<sup>62</sup> *See id.*

nings, compliance orders, and civil judicial actions.<sup>63</sup> The Agency found that warning orders deterred few violations and that part 22 procedures<sup>64</sup> for minor, clear-cut violations consumed too much staff time and resources.<sup>65</sup>

The EPA did not implement the UST field citation program through rulemaking; rather, it developed the program pursuant to its authority to issue compliance orders under RCRA section 9006(a).<sup>66</sup> The UST field citation is actually a compliance order with a short-form settlement agreement. The OUST entitles the UST field citation form "Expedited Enforcement Compliance Order and Settlement Agreement."<sup>67</sup> The form consists of two parts. Part I is the compliance order; it specifies the violations, lists the penalty

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<sup>63</sup> See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, DIRECTIVE NO. 9610.16: GUIDANCE FOR FEDERAL FIELD CITATION ENFORCEMENT 2-3 (October 6, 1993) (on file with the *William and Mary Environmental Law and Policy Review*) [hereinafter DIR. NO. 9610.16]. RCRA section 9003(a) directs the Administrator to promulgate release, detection, prevention, and correction regulations for USTs. See 42 U.S.C. § 6991b(a) (1994). Section 9006 of RCRA establishes the federal enforcement scheme for USTs. See *id.* § 6991e. Under RCRA section 9006(a)(1), EPA can either issue a compliance order or seek injunctive relief in a federal district court against anyone who violates a UST regulation. See *id.* § 6991e(a)(1). The compliance order specifies the violation, a reasonable time to comply, and it may assess an appropriate penalty. See *id.* § 6991e(c). The maximum civil penalty for failing to comply with a UST regulation is \$10,000 per tank. See *id.* § 6991e(d). If a violator fails to comply with an order, he also may be liable for a \$25,000 civil penalty for each day of continued noncompliance. See *id.* § 6991e(a)(3). Upon receiving a compliance order, a violator has thirty days in which to request a public hearing on the order. See *id.* § 6991e(b).

<sup>64</sup> EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("part 22") govern the public hearings for the RCRA section 9006 compliance orders and civil penalties. See 40 C.F.R. § 22.01(a)(4) (1996); see also *infra* note 71.

<sup>65</sup> See DIR. NO. 9610.13, *supra* note 61, at 1.

<sup>66</sup> See 42 U.S.C. § 6991e(a); Sapp, *supra* note 22, at 757.

<sup>67</sup> See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY, DIRECTIVE NO. 9610.14: GUIDANCE FOR FEDERAL FIELD CITATION ENFORCEMENT 9 (April 9, 1992) (on file with the *William and Mary Environmental Law and Policy Review*).

amount, and gives the violator thirty days to cure the violation.<sup>68</sup> Part II is the settlement agreement.<sup>69</sup> The violator accepts EPA's offer to settle by certifying on Part II that he has corrected the violation and by returning the form to the regional office within thirty days with a check for the amount of the penalty.<sup>70</sup> If the violator rejects the citation, the agency will withdraw the enforcement order, issue a new enforcement order, and seek a higher penalty through part 22 procedures, which govern the administrative assessment of civil penalties.<sup>71</sup> To ensure that violators comply, the regional offices often conduct follow-up inspections.<sup>72</sup>

The OUST provided guidance to ensure consistency among the regions in selecting appropriate violations for field citations, selecting penalty amounts, training inspectors, and exercising discretion. According to OUST, "[e]xperience shows that field citation programs work most effectively in achieving compliance if the violations are clear-cut and the inspectors exercise little discretion in citing the violations."<sup>73</sup> For this reason, OUST compiled a list of common violations with corresponding penalties ranging

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<sup>68</sup> See U.S. ENVIRONMENTAL PROTECTION AGENCY, EXPEDITED ENFORCEMENT COMPLIANCE ORDER AND SETTLEMENT AGREEMENT FORM, reprinted in DIR. NO. 9610.16, *supra* note 63, at 26.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See DIR. NO. 9610.16, *supra* note 63, at 6, 11. Part 22 procedures refer to the formal administrative hearing procedures set forth at 40 C.F.R. §§ 22.01-.43, which EPA must follow in assessing civil penalties under several of the statutes it administers, including the Solid Waste Disposal Act and the CAA. See 40 C.F.R. § 22.01 (1996). Part 22 procedures satisfy the adjudicative hearing standards of sections 554 and 556 of the APA. 5 U.S.C. §§ 554, 556 (1994). Among other procedural rights, part 22 procedures include hearings before impartial presiding officer or administrative law judge (section 22.21(a)), written motion practice (section 22.16), prohibition against ex parte communications (section 22.08), discovery (section 22.19(7)(b)(f)), subpoenas (sections 22.33(b), .34(c), .37(f), .39(b), .40(b), .43(c)), right to cross-examine witnesses (section 22.22(b)), interlocutory appeals (section 22.29(a),(b)), and appeals to the Environmental Appeals Board (sections 22.29-.30). See 40 C.F.R. pt. 22. Part 22 procedures govern proceedings for persons receiving administrative penalties under CAA § 113(d)(1). See *id.* § 22.01(a)(2).

<sup>72</sup> See DIR. NO. 9610.16, *supra* note 63, at 11.

<sup>73</sup> *Id.* at 5.

from \$50 to \$300.<sup>74</sup> In selecting the penalty amounts, OUST selected amounts it believed were high enough to deter violations, but low enough to encourage violators to settle.<sup>75</sup> Each region could develop its own list of violations and penalties; however, a region could not select any violation or penalty not on OUST's list.<sup>76</sup> In determining which violations to cite, OUST advised the regions to select violations that were clear-cut, easy to verify and easy to correct.<sup>77</sup> The OUST also told the regions to only issue field citations to first time violators.<sup>78</sup> The agency decided to apply more formal enforcement measures, such as part 22 procedures, to repeat offenders.<sup>79</sup> Finally, OUST relied upon the regions to develop training programs for their inspectors.<sup>80</sup>

## 2. *The Coast Guard's Oil Spill Program*

Under section 311 of the Clean Water Act ("CWA"), the U.S. Coast Guard may assess civil penalties against any owner, operator, or person in charge of a vessel or facility that discharges oil or hazardous substances into U.S. waters or fails to comply with the Coast Guard's pollution prevention regulations.<sup>81</sup> The Coast Guard may assess either a Class I or Class II penalty.<sup>82</sup> In 1994, the Coast Guard created a field citation program for oil

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<sup>74</sup> *See id.* at 16-24.

<sup>75</sup> *See id.* at 9.

<sup>76</sup> *See id.* at 5.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 6.

<sup>80</sup> *See id.* at 12.

<sup>81</sup> *See* Federal Water Pollution Control Act § 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) (1994). The Federal Water Pollution Control Act is more commonly referred to as the Clean Water Act.

<sup>82</sup> If the Coast Guard assesses a Class I penalty, the penalty may not exceed \$10,000 for each violation, and the total penalty amount may not exceed \$25,000. *See* 33 U.S.C. § 1321(b)(6)(B)(i). A person receiving a Class I penalty may request a hearing on the penalty. *See id.* Hearings for Class I penalties are not subject to either section 554 or 556 of the APA, which cover adjudication and hearing procedures. *See id.* A Class II penalty may not exceed \$10,000 per day for each day of violation, and the total penalty amount may not exceed

spills of 100 gallons or less and for minor violations of Coast Guard pollution prevention regulations.<sup>83</sup> It adopted the new program after determining that the subpart 1.07 civil penalty procedures were too lengthy for small oil spills and minor violations of pollution prevention regulations.<sup>84</sup> The Coast Guard needed an option that would quickly resolve minor violations, reduce costs of internal reviews, deter violations, and promptly notify violators of what they were doing wrong.<sup>85</sup> Therefore, the Coast Guard amended subpart 1.07 of its regulations to permit its officers to issue notices of violations and to propose penalty settlements.<sup>86</sup>

Under the new program, a Coast Guard officer discovering a small release or a minor violation of the pollution prevention requirements issues a NOV.<sup>87</sup> The NOV describes the violation and proposes a penalty amount.<sup>88</sup> The violator has forty-five days to accept the penalty by paying the penalty amount.<sup>89</sup> If he declines to pay the penalty, the Coast Guard submits the case to a hearing officer.<sup>90</sup> Upon receiving the case, the hearing officer examines the case file and determines whether there is sufficient evidence of a violation.<sup>91</sup> If she finds a violation, the hearing officer notifies the violator in writing of: the violation, the maximum penalty amount, the nature of the proceedings, the penalty deemed appropriate, and the violator's rights to a hearing.<sup>92</sup> The violator has the option of an in-person hearing before the hearing officer, or he can submit written evidence and argument in lieu of a

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\$125,000. *See id.* § 1321(b)(6)(B)(ii). Hearings on Class II penalties are subject to the adjudication procedures in section 554 of the APA. *See id.* The Coast Guard's informal hearing procedures for Class I penalties are codified at 33 C.F.R. subpart 1.07.

<sup>83</sup> *See* Simplified Alternative Procedure for Resolving Civil Penalty Cases, 59 Fed. Reg. 66,477 (1994) (codified at 33 C.F.R. § 1.07-11 (1997)).

<sup>84</sup> *See id.* at 66,477.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See* 33 C.F.R. § 1.07-11(a) (1997); *see also* Simplified Alternative Procedure for Resolving Civil Penalty Cases, 59 Fed. Reg. at 66,477.

<sup>88</sup> *See* 33 C.F.R. § 1.07-11(b)(1)-(3).

<sup>89</sup> *See id.* §§ 1.07-11(b)(4), -11(d).

<sup>90</sup> *See id.* § 1.07-11(b)(5).

<sup>91</sup> *See id.* § 1.07-20(a).

<sup>92</sup> *See id.* § 1.07-20(b).

hearing.<sup>93</sup> The violator may obtain a free copy of the case file and may examine all physical evidence.<sup>94</sup> He also has the right to have an attorney represent him at the hearing.<sup>95</sup> The violator may present witness testimony, "either through a personal appearance or through a written statement," and any other evidence relevant to the allegations or an appropriate penalty.<sup>96</sup> The hearing officer issues a decision in writing; if she assesses a penalty, she must base it on "substantial evidence in the record."<sup>97</sup> The violator then has thirty days to appeal the penalty through the Hearing Officer to the Commandant of the Coast Guard.<sup>98</sup> The procedures in subpart 1.07 of the new regulations do not mention whether the violator has the right to cross-examine witnesses.

## B. *The Notice of Proposed Rulemaking*

### 1. *Purpose and Goals*

In the preamble to the NPRM for the field citation program, EPA states that the field citation program will enable the Agency to respond quickly to a wider range of violations without committing the resources necessary for civil judicial actions.<sup>99</sup> It will enable the Agency to address minor violations which, due to limited resources, the Agency often chose not to address in the past.<sup>100</sup> EPA hopes to create a streamlined enforcement tool to "save agency resources, reduce backlogs, and send a clear enforcement message to violators that minor violations will not be overlooked."<sup>101</sup> In

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<sup>93</sup> See *id.* § 1.07-25(a). The hearing officer is an unbiased agency employee who can administer oaths and issue subpoenas. See *id.* § 1.07-15; see also *id.* § 1.07-5(b).

<sup>94</sup> See *id.* § 1.07-30.

<sup>95</sup> See *id.* § 1.07-40.

<sup>96</sup> *Id.* §§ 1.07-50, -55(b).

<sup>97</sup> See *id.* § 1.07-65(a).

<sup>98</sup> See *id.* §§ 1.07-70(a), -75(a), -75(b).

<sup>99</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,777 (1994) (to be codified at 40 C.F.R. pt. 59).

<sup>100</sup> See *id.* at 22,781.

<sup>101</sup> *Id.*



essence, it will fill a void in the CAA's enforcement scheme that the more resource intensive enforcement tools do not address. In developing the field citation program, EPA sought to instill three characteristics. First, it should only issue field citations for clear-cut violations that are "truly minor in nature."<sup>102</sup> Second, it should issue field citations soon after a violation is discovered, if not at the time of discovery.<sup>103</sup> Third, the program procedures and the penalty amounts should induce violators to promptly correct their violations and pay their penalties.<sup>104</sup>

## 2. *Defining "Minor Violations"*

In devising an appropriate definition for "minor violations" EPA considered three options. In the first option, EPA considered preparing a comprehensive list of minor violations, but it promptly rejected the option because it found such a list too difficult to compile.<sup>105</sup> Second, EPA considered and just as quickly rejected the idea of defining "minor violations" as violations of particular categories of regulatory requirements.<sup>106</sup> In the end, EPA decided to define "minor violations" by compiling a list of factors that tend to make violations minor.<sup>107</sup>

### a. *Comprehensive List of Violations*

For the first approach, the Agency considered the method that the OUST employed in developing the UST field citation program—compiling "a comprehensive list of all possible violations suitable for field citations."<sup>108</sup> This method would have limited inspector discretion by providing clear and

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<sup>102</sup> See *id.* at 22,777.

<sup>103</sup> See *id.*

<sup>104</sup> See *id.* In its proposed rule, EPA states that the two goals of the field citation program are "to deter minor violations of the Act and to expedite enforcement against such violations." *Id.* at 22,792 (to be codified at 40 C.F.R. § 59.1).

<sup>105</sup> See *id.* at 22,777-78.

<sup>106</sup> See *id.* at 22,778.

<sup>107</sup> See *id.*

<sup>108</sup> *Id.* at 22,777-78; see also *supra* Part IV.A.1.

objective criteria for issuing field citations.<sup>109</sup> It also would have streamlined further the field citation program and made it more consistent throughout the nation.<sup>110</sup> However, EPA felt that this method was unworkable because “[a]lmost any violation might be considered significant or minor depending on the circumstances.”<sup>111</sup> The Agency concluded that it could not avoid relying on an inspector’s discretion in weighing individual circumstances to determine whether a violation is minor.<sup>112</sup> According to EPA, a comprehensive list would not guide an inspector in applying his discretion to determine whether a violation is minor.<sup>113</sup>

b. *Categories of Regulatory Requirements*

The Agency next considered limiting “minor violations” to specific categories of regulatory requirements, such as “recordkeeping, reporting, labeling, monitoring, workplace standards, etc.”<sup>114</sup> However, EPA decided that this approach suffered from the same weaknesses as the comprehensive list option because any violation within one of the broad categories of violations could vary in significance depending on the circumstances.<sup>115</sup> The agency felt that this second approach did not provide a useful method for an inspector to apply in determining whether a violation is minor.<sup>116</sup>

c. *List of Factors*

Ultimately, EPA decided to define “minor violations” as those violations that are “minor in nature, in light of a list of factors that must be con-

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<sup>109</sup> See Field Citation Program, 59 Fed. Reg. at 22,778.

<sup>110</sup> See *id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

sidered as a whole."<sup>117</sup> Therefore, now EPA will consider a violation to be minor if, for example, it is: easy to recognize; "poses little risk of environmental harm;" easy to correct; infrequent and of a short duration; and does not violate a requirement significantly important to the regulatory program.<sup>118</sup> The Agency intends to evaluate the factors as a whole and does not plan to put specific requirements on the factors, such as specific times for the duration of a violation or a dollar amount for the cost of correcting a violation.<sup>119</sup> EPA, however, reserved the discretion to determine which enforcement option is appropriate in any particular case.<sup>120</sup> In addition, EPA declined to give any violator the right to claim that, since a violation is minor in nature, EPA has no enforcement option other than to issue a field citation.<sup>121</sup> The Agency states in the NPRM: "A violation is not a minor violation under the definition proposed today unless it is minor in nature as described above, and unless the Agency, in its discretion, decides to address it as a minor violation."<sup>122</sup> The EPA plans to describe in more detail the process for determining whether a violation is minor in a subsequent guidance

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<sup>117</sup> *Id.* The proposed rule states:

The following factors shall be considered in determining whether a violation is minor under the Act:

- (1) Whether the violation is readily recognizable;
- (2) Risk of environmental harm;
- (3) Time required to correct the violation;
- (4) Effort required to correct the violation;
- (5) Expense required to correct the violation;
- (6) Frequency of the violation;
- (7) Duration of the violation;
- (8) Importance of the violated requirement to the specific program; and
- (9) Other factors as appropriate.

Criminal violations shall not be addressed through issuance of field citations.

*Id.* at 22,792 (to be codified at 40 C.F.R. § 59.5(a)).

<sup>118</sup> *See id.* at 22,778.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *Id.*

document.<sup>123</sup>

### 3. *Maximum Penalty Amount*

In the NPRM, EPA proposes a maximum penalty of \$5000 per day “for each separate violation cited in the field citation.”<sup>124</sup> EPA believes that case law, the program’s underlying intent, and the Act’s legislative history all support this interpretation.<sup>125</sup>

The Agency argues that it has a long history of applying the same interpretation to a similar provision in the pre-1990 CAA section 113(b).<sup>126</sup> It reasons that Congress, by adopting this language for section 113(d)(3) in the 1990 amendments, “clearly authorized EPA to continue this interpretation for purposes of the new field citation program.”<sup>127</sup> The Agency points out that the courts construing pre-1990 section 113(b) have supported the Agency’s “per day, per each separate violation” interpretation in several decisions.<sup>128</sup>

According to EPA, its interpretation is also consistent with Congress’s underlying intent.<sup>129</sup> The Agency asserts that Congress intended to “provide EPA with a flexible enforcement tool that [will] focus on the less

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<sup>123</sup> *See id.*

<sup>124</sup> *Id.*; *see also id.* at 22,792 (to be codified at 40 C.F.R. § 59.5(b)).

<sup>125</sup> *See id.* at 27,778-79.

<sup>126</sup> *See id.* at 22,778. Under the 1977 version of the CAA, the relevant portion of section 113(b) stated: “The Administrator shall . . . in the case of any person that is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action . . . to assess and recover a civil penalty of not more than \$25,000 per day of violation . . . .” 42 U.S.C. § 7413(b) (1988) (current version at 42 U.S.C. § 7413(b) (1994)). Compare with the relevant portion of 1990 CAA section 113(d)(3) which states: “The Administrator may implement . . . a field citation program through regulations establishing field citations assessing civil penalties not to exceed \$5,000 per day of violation may be issued . . . .” 42 U.S.C. § 7413(d)(3) (1994).

<sup>127</sup> Field Citation Program, 59 Fed. Reg. at 22,778-79.

<sup>128</sup> *See id.* The Agency cited two district court cases: *United States v. SCM Corp.*, 667 F. Supp. 110 (D. Md. 1987) and *United States v. Chevron U.S.A., Inc.*, 639 F. Supp. 770 (W.D. Tex. 1985). *See id.* at 22,779 n.4.

<sup>129</sup> *See id.* at 22,779.

significant, presumably simpler and less complex violations, with assessment of significantly lower penalties than expected through [the] two other civil penalty provisions of section 113, administrative penalty orders (section 113(d)(1)) and judicial civil penalty actions (section 113(b)).”<sup>130</sup> The Agency argues that its interpretation will result in significantly lower penalties than under the other two programs “because of the large reduction in the maximum penalty from \$25,000 to \$5,000, the minor nature of the violations, and the penalty assessment criteria in section 113(e).”<sup>131</sup> Additionally, EPA argues that its approach for the maximum penalty amount for each violation allows the Agency to “fairly and flexibly implement a field citation program in a manner consistent with Congress’ apparent objectives . . . .”<sup>132</sup> It suggests that a more restrictive approach that would limit the maximum penalty to \$5000 per day, regardless of the number of violations, may hinder these goals.<sup>133</sup> Such an approach would limit the Agency’s ability to account for differences between violators when assessing penalties because, for example, two violators with different numbers of penalties would face the same maximum penalty.<sup>134</sup> This approach may drive EPA to issue more administrative orders for multiple violations in lieu of field citations in order to achieve a fair result.<sup>135</sup>

The Agency believes that the subsection’s legislative history, though

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* The pertinent portion of CAA section 113(e)(1) states:

In determining the amount of any penalty to be assessed under this section . . . , the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1) (1994).

<sup>132</sup> Field Citation Program, 59 Fed. Reg. at 22,779.

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

limited, supports its interpretation.<sup>136</sup> First, Congress implicitly approved EPA's interpretation when it adopted language the Agency had consistently interpreted to mean \$5000 per day for each violation.<sup>137</sup> Second, EPA points to the Senate's legislative history on the amendment. The original Senate bill authorized a maximum civil penalty of "\$5,000 per day for each violation."<sup>138</sup> The Senate eventually passed a bill that, instead, provided for a maximum civil penalty of "\$5,000 per inspection."<sup>139</sup> The conference committee, however, rejected the Senate's "\$5,000 per inspection" language in favor of "\$5,000 per day of violation."<sup>140</sup> Finally, EPA argues that the legislative history of Title II's (*Emission Standards for Moving Sources*) enforcement provisions supports their interpretation.<sup>141</sup> The Senate Committee on Environment and Public Works reported that the language it proposed for section 211(d)(1) of the CAA, which provided for maximum penalties of "\$25,000 per day of violation," applied to each day for each violation.<sup>142</sup> According to EPA, this legislative history shows that Congress intended for the term "per day of violation" to mean "per day for each violation."<sup>143</sup>

In order to limit the penalty amount for each violation and to provide greater uniform structure for the field citation program, EPA proposed limiting each citation to a maximum cumulative penalty amount in the range

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<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.* (citing S. REP. NO. 102-228, at 550 (1989)).

<sup>139</sup> See *id.* (citing S. 1630, 101st Cong. (1990)).

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

<sup>142</sup> See *id.* (citing S. REP. NO. 101-228, at 126 (1989)). The pertinent portion of CAA section 211(d)(1) now states:

Any person who violates subsection (a), (f), (g), (k), (l), (m), or (n) of this section or regulations prescribed under subsection (c), (h), (i), (k), (l), (m), or (n) of this section or who fails to furnish any information or conduct any tests required by the Administrator under subsection (b) of this section shall be liable to the United States for a civil penalty of not more than the sum of \$25,000 for every day of such violation and the amount of economic benefit or savings resulting from the violation.

42 U.S.C. § 7545(d)(1) (1994).

<sup>143</sup> See Field Citation Program, 59 Fed. Reg. at 22,779.

of \$15,000 to \$25,000.<sup>144</sup> EPA, however, is considering ending, or “sun-setting,” the cap after a certain period of time ranging between one to two years or longer.<sup>145</sup> Finally, EPA plans to develop detailed guidance to implement its policy to impose penalties that are “significant enough to deter violations and to ensure a high rate of compliance.”<sup>146</sup> The Agency intends to establish the penalty assessment guidance for evaluating the section 113(e) penalty assessment criteria for determining penalty amounts.<sup>147</sup> The Agency also may issue guidance that will standardize “penalty amounts [for] specific categories of violations.”<sup>148</sup> This guidance may involve creating a “penalty matrix” that will address such factors as violation seriousness, degree of environmental harm, and other appropriate criteria.<sup>149</sup>

#### 4. *Program Guidance*

In addition to creating guidance for determining when violations are minor and for assessing penalties, EPA plans to develop detailed guidance to implement several other aspects of the field citation program.<sup>150</sup> For example, the proposed guidance will address when investigators should issue citations in the field and when they should issue them from an EPA office.<sup>151</sup> The program guidance will also cover such issues as: coordinating inspections with state and local officials, how to revoke field citations, how to record and track field citations, how to complete field citation forms, and

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<sup>144</sup> See *id.* at 22,780.

<sup>145</sup> See *id.*

<sup>146</sup> *Id.* The agency believes that, since it has very few inspectors to actively enforce the program or conduct follow-up inspections, it needs a maximum penalty amount to deter violations. See Telephone interview with Cary Secrest, Environmental Protection Specialist, Stationary Source Compliance Division, Office of Air and Radiation, United States Environmental Protection Agency (May 24, 1995).

<sup>147</sup> See Field Citation Program, 59 Fed. Reg. at 22,780.

<sup>148</sup> *Id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

training for inspectors.<sup>152</sup>

### 5. *Role of the States*

According to EPA, section 113(d)(3) does not authorize the Administrator to delegate the field citation program to state or local officials.<sup>153</sup> The subsection provides that “officers or employees designated by the Administrator” may issue field citations.<sup>154</sup> Thus, only EPA employees will issue field citations under the new program.<sup>155</sup> However, EPA plans for its employees and officers to issue field citations based on information gathered by state and local inspectors.<sup>156</sup> The Agency believes that this reliance on state obtained information will be the only effective way to apply the program because the States conduct the overwhelming majority of inspections.<sup>157</sup>

### 6. *Hearing Procedures*

EPA discusses in the NPRM three alternative procedures for governing hearings on field citations: consolidated APA penalty assessment procedures under 40 C.F.R. pt. 22; consolidated non-APA procedures under 40 C.F.R. pt. 28; and new streamlined procedures under the part 59 proposal.<sup>158</sup> Although section 113(d)(3) states that the hearing shall not be subject to APA style hearing procedures, it requires the agency to afford persons “a reasonable opportunity to be heard and to present evidence.”<sup>159</sup> The Agency interprets this provision as giving it wide discretion in selecting hearing procedures, including APA adjudication procedures.<sup>160</sup> However, in order to

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<sup>152</sup> See *id.* at 22,781.

<sup>153</sup> See *id.* at 22,780.

<sup>154</sup> 42 U.S.C. § 7413(d)(3) (1994).

<sup>155</sup> See Field Citation Program, 59 Fed. Reg. at 22,781.

<sup>156</sup> See *id.* at 22,780.

<sup>157</sup> See Telephone Interview with Jane Engert, Environmental Scientist, Office of Compliance, United States Environmental Protection Agency (May 24, 1995).

<sup>158</sup> See Field Citation Program, 59 Fed. Reg. at 22,781.

<sup>159</sup> 42 U.S.C. § 7413(d)(3).

<sup>160</sup> See Field Citation Program, 59 Fed. Reg. at 22,782.



deter violations and minimize the drain on the Agency's resources, EPA intends to select the procedures that are quick and inexpensive.<sup>161</sup> Under the proposed part 59 procedures, the presiding officer will be an impartial agency employee who may not necessarily be a lawyer.<sup>162</sup> After the hearing, the presiding officer will recommend a decision to the Regional Administrator<sup>163</sup> based on "substantial evidence in the administrative record."<sup>164</sup> The Regional Administrator may then either "affirm, reverse, modify, or remand the case to the Presiding Officer for further proceedings."<sup>165</sup> The Regional Administrator's order becomes final agency action in thirty days unless the Environmental Appeals Board ("EAB") suspends the order pursuant to its sua sponte review authority.<sup>166</sup> Ultimately, all penalty payments will go directly to the United States Treasury.<sup>167</sup>

### 7. *Federal Facilities*

The preamble of the NPRM does not mention federal agencies or facilities. However, in its proposal for section 59.7 (*Issuance and service of field citations*), EPA proposes to serve process on federal agencies "in the manner prescribed by the applicable law for service of process."<sup>168</sup> This proposal indicates that EPA intends to issue field citations to federal facilities. Unfortunately, the NPRM does not offer any legal or policy arguments supporting EPA's apparent plan to apply the field citation program to federal agencies. This is not surprising because, while preparing its proposal, EPA did not fully consider the issue.<sup>169</sup>

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<sup>161</sup> See *id.* at 22,789.

<sup>162</sup> See *id.* at 22,787.

<sup>163</sup> See *id.* at 22,788.

<sup>164</sup> *Id.* at 22,795 (to be codified at 40 C.F.R. § 59.22).

<sup>165</sup> *Id.* at 22,788.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 22,795.

<sup>168</sup> *Id.* at 22,792-93.

<sup>169</sup> See Telephone Interview with Cary Secrest, Environmental Protection Specialist, Air Enforcement Division, United States Environmental Protection Agency (May 24, 1995) [hereinafter Secrest Interview].

## V. ANALYSIS

## A. Defining "Minor Violations"

Before implementing a field citation program, EPA must first promulgate regulations defining "minor violations." In section 113(d)(3) of the Act, Congress authorized the Administrator to "implement . . . a field citation program through regulations establishing appropriate minor violations for which field citations . . . may be issued . . ."<sup>170</sup> In the NPRM, EPA proposes to define "minor violations" as those violations that are "minor in nature" considering a list of factors.<sup>171</sup> The Agency rejected two other alternative methods as unworkable, in part because the Agency decided that it could not avoid giving inspectors some degree of discretion in determining whether a violation under the circumstances is a minor violation.<sup>172</sup> In doing this, EPA rejected the approach it applied under the UST field citation program. Under the UST field citation program, EPA limited its employees' discretion by compiling a comprehensive list of violations from which the regions could choose in establishing their field citation programs.<sup>173</sup> The regions could not list violations that were not on the headquarters' master list.<sup>174</sup> The Agency did this because it had discovered from experience that field citation programs with easily identifiable violations are the most effective.<sup>175</sup> Lists of violations provide clear guidance to inspectors. They enable the program to rely less on inspector discretion, and they facilitate program consistency.<sup>176</sup> However, the UST field citation program enforces fewer and less complex requirements than what the CAA's field citation program will enforce. Thus, EPA believes that it will be neither easy nor practicable to devise a comprehensive list of minor violations for the CAA

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<sup>170</sup> 42 U.S.C. § 7413(d)(3) (1994).

<sup>171</sup> See Field Citation Program, 59 Fed. Reg. at 22,778; see also *supra* note 117.

<sup>172</sup> See Field Citation Program, 59 Fed. Reg. at 22,778.

<sup>173</sup> See DIR. NO. 9610.16, *supra* note 63, at 5-6.

<sup>174</sup> See *id.* at 5.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

field citation program.<sup>177</sup>

Much of the regulated community and several states do not agree with EPA's approach in defining "minor violations." The American Feed Industry Association, the Utility Air Regulatory Group, the National Aeronautics and Space Administration, the Department of Defense, and the Northeast States for Coordinated Air Use Management submitted comments to the proposed rule suggesting that EPA compile comprehensive lists of appropriate violations and/or categories of violations.<sup>178</sup>

The American Feed Industry Association ("AFIA")<sup>179</sup> believes that EPA must develop a list of minor violations to ensure that the program is consistent throughout the nation and fair to industry.<sup>180</sup> The members argue that many companies operate facilities in different areas, and to be consistent in managing their environmental compliance programs, these companies need to know that "what constitutes a minor violation in Kansas will also be interpreted as a minor violation in Nebraska."<sup>181</sup>

The Utility Air Regulatory Group ("UARG")<sup>182</sup> believes that EPA's definition for "minor violations" is too open-ended to be workable.<sup>183</sup> It argues that the Agency's definition will give too much discretion to inspectors, create inconsistency among the regions, engender confusion and

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<sup>177</sup> See Secret Interview, *supra* note 169.

<sup>178</sup> See *infra* notes 179, 182, 194, 203.

<sup>179</sup> The AFIA is a national trade association for livestock and poultry feed manufacturers and ingredient suppliers. More than 700 companies and 3000 individual establishments are AFIA members. They produce and sell more than 70% of the nation's livestock and poultry feed. See American Feed Industry Association Comments to the Field Citation Program at 1 (June 30, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 06) [hereinafter AFIA Comments].

<sup>180</sup> See *id.* at 3.

<sup>181</sup> *Id.*

<sup>182</sup> The Utility Air Regulatory Group (UARG) is a voluntary group of over 70 electrical utilities, including the Potomac Electric Power Company ("PEPCO"), which participates collectively in federal CAA rulemaking and related litigation that may affect the electric utility industry. See Utility Air Regulatory Group Comments to the Field Citation Program at 1 (July 8, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 46) [hereinafter UARG Comments].

<sup>183</sup> See *id.* at 8.

uncertainty in the regulated community, and result in fewer settlements.<sup>184</sup> It also argues that EPA's plan to use information from state and local inspections will exacerbate the confusion in the regulated community.<sup>185</sup> The UARG suggests that EPA develop a "list or matrix of specific minor violations and narrowly defined categories."<sup>186</sup> This listing will make the program similar to a local traffic enforcement program, and it will foster consistency throughout the nation, enable the agency to easily compile statistics on categories of violations, and encourage violators to promptly pay penalties and correct their violations.<sup>187</sup> Finally, the UARG suggests that EPA can revise its list/matrix as the program progresses.<sup>188</sup>

The Chemical Manufacturers Association ("CMA")<sup>189</sup> supports EPA's approach of basing a general definition of "minor violations" on a list of several factors.<sup>190</sup> However, CMA is concerned that EPA will fail to give its inspectors the discretion to decide not to issue citations for truly de minimis violations.<sup>191</sup> It also wants an inspector to be able to consider a facility's efforts to identify and promptly address environmental problems.<sup>192</sup> It argues that the "no penalty" option is essential to encourage facilities to audit and evaluate their environmental compliance programs.<sup>193</sup>

Both the National Aeronautics and Space Administration ("NASA") and the Department of Defense ("DOD") believe that the factors that EPA

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<sup>184</sup> *See id.*

<sup>185</sup> *See id.* at 8 n.9.

<sup>186</sup> *Id.* at 9.

<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> The CMA is a trade association of companies which produce over 90% of the nation's industrial chemicals. *See* Chemical Manufacturers Association Comments to the Field Citation Program at 4 (July 8, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 51) [hereinafter CMA Comments].

<sup>190</sup> *See id.* at 6.

<sup>191</sup> *See id.* at 7.

<sup>192</sup> *See id.*

<sup>193</sup> *See id.* at 7-8.

relies upon for defining "minor violations" are too vague and ambiguous.<sup>194</sup> They both argue that this ambiguity leaves too much discretion to the inspectors.<sup>195</sup> NASA believes that EPA is making a mistake by trying to instantly implement a comprehensive program.<sup>196</sup> It suggests that EPA list minor violations by subject categories.<sup>197</sup> The Agency can modify periodically the lists as the field citation program evolves and both EPA and the regulated community gain experience with the program.<sup>198</sup> The DOD wants EPA to either compile a comprehensive list of minor violations or fully explain each of the defining factors in the rule.<sup>199</sup> For example, DOD points out that a violation that is "readily recognizable" may be either serious or minor depending on the context.<sup>200</sup> Also, a violation that requires considerable effort and expense to correct may minimally impact air quality and involve minor regulatory requirements.<sup>201</sup> If EPA does not fully explain each defining factor, the rule will lack objective guidance; it will create a program that treats violators inconsistently and inequitably.<sup>202</sup>

The Northeast States for Coordinated Air Use Management ("NESCAUM")<sup>203</sup> believes that the factors that EPA intends to apply in

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<sup>194</sup> See Department of Defense Comments to the Field Citation Program at 6-7 (July 1, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 11) [hereinafter DOD Comments]; National Aeronautics and Space Administration Comments to the Field Citation Program at 2 (July 5, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 22) [hereinafter NASA Comments].

<sup>195</sup> See DOD Comments, *supra* note 194, at 6-7; NASA Comments, *supra* note 194, at 2.

<sup>196</sup> See NASA Comments, *supra* note 194, at 2.

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> See DOD Comments, *supra* note 194, at 6-7.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* at 7.

<sup>203</sup> NESCAUM represents the Connecticut Bureau of Air Management, the Maine Bureau of Air Quality Control, the Massachusetts Division of Air Quality Control, the New Hampshire Air Resources Division, the New Jersey Office of Energy, the New York Division of Air Resources, the Rhode Island Division of Air and Hazardous Materials, and the Vermont Air Pollution Control Division. See Northeast States for Coordinated Air Use Management Comments to the Field Citation Program at 1 (July 8, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 48) [hereinafter NESCAUM

defining “minor violations” are too broad and will ultimately undermine state compliance and enforcement programs.<sup>204</sup> The member states note that under EPA’s approach, EPA inspectors will issue citations without considering state enforcement actions.<sup>205</sup> They want EPA to devise a comprehensive list of minor violations and to define specific categories of regulatory requirements appropriate for field citations.<sup>206</sup> According to NESCAUM, this approach will produce a nationally consistent enforcement program.<sup>207</sup> It also will improve overall compliance by enabling EPA to target source categories and better coordinate its activities with state agencies.<sup>208</sup>

Perhaps EPA is correct when it says that it can not practicably develop a comprehensive list of appropriate minor violations or categories.<sup>209</sup> Such a list of potential minor violations may be unwieldy. However, EPA has selected an approach that is not optimum for achieving its goals for the field citation program. A comprehensive list of minor violations will do more to deter minor violations because the regulated community will know which problems to look for and address. Additionally, a comprehensive list will enable inspectors to respond quickly in the field because an inspector will not have to weigh numerous factors before deciding whether to issue a field citation. A list with enumerated penalties will significantly discourage violators from challenging their citations. Since the regulations will set the penalty amount, the violators will only be able to challenge whether they violated a requirement. Also, a comprehensive list will lead to greater national uniformity and fairness. As the AFIA noted, it will provide a level playing field for companies to compete in the national market.<sup>210</sup> Finally, a comprehensive list of appropriate violations will help create a true field citation program where inspectors can issue citations in the field for pre-determined violations and pre-determined penalty amounts.

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Comments].

<sup>204</sup> See *id.* at 2.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> See *id.*

<sup>209</sup> See *supra* Part IV.B.2.

<sup>210</sup> See AFIA Comments, *supra* note 179, at 3.

### B. *Maximum Penalty Amount*

The EPA proposes applying a maximum penalty of \$5000 per day for each violation and applying a temporary cap in the range of \$15,000 to \$25,000 per citation.<sup>211</sup> The Agency argues that case law, the program's underlying intent, and the amendment's legislative history support its interpretation.<sup>212</sup> However, the vast majority of the private companies and federal agencies who commented on EPA's proposal challenge EPA's interpretation for the maximum penalty amount.<sup>213</sup> These critical comments typically raise three arguments. First, critics argue that the case law does not support EPA's interpretation.<sup>214</sup> Second, they argue that the language in CAA section 113(d)(3) clearly provides that the maximum penalty may not exceed "\$5,000 per day of violation," not "\$5,000 per day for each violation."<sup>215</sup> Congress amended the language in section 113(b) to provide for a maximum penalty of "no more than \$25,000 per day for each violation" for civil judicial actions.<sup>216</sup> The critics argue that "[s]ince Congress included that language in [section] 113(b) and at the same time included other, more restrictive language in [section] 113(d)(3), Congress intended that total daily penalties

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<sup>211</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,778, 22,780 (1994) (to be codified at 40 C.F.R. pt. 59).

<sup>212</sup> See *id.* at 22,778.

<sup>213</sup> These commentators included the Steel Manufacturers Association, the UARG, the Duquesne Light Company, the CMA, the Clean Air Implementation Project, the DOD, the Coalition for Clean Air Implementation, and the Washington Legal Foundation.

<sup>214</sup> See Coalition for Clean Air Implementation Comments to the Field Citation Program at 5-6 (July 8, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 50) [hereinafter Coalition Comments]; CMA Comments, *supra* note 189, at 15-16; Washington Legal Foundation Comments to the Field Citation Program at 2-3 (July 12, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 56) [hereinafter Legal Foundation Comments].

<sup>215</sup> See Coalition Comments, *supra* note 214, at 4; CMA Comments, *supra* note 189, at 9; Legal Foundation Comments, *supra* note 214, at 1-2.

<sup>216</sup> See 42 U.S.C. § 7413(b) (1994).

for the field citation not exceed \$5,000.”<sup>217</sup> Finally, the critics argue that the legislative history of the amendment indicates that Congress intended to limit the total daily penalties to \$5000.<sup>218</sup>

### 1. *The Case Law*

In the preamble to the proposed rule, EPA argues that two federal district court decisions support their interpretation.<sup>219</sup> While both cases dealt with similar language in section 113(b) under the 1977 version of the CAA,<sup>220</sup> neither case directly addressed the issue.

#### a. *United States v. Chevron U.S.A., Inc.*

In *United States v. Chevron U.S.A., Inc.*,<sup>221</sup> the State of Texas and EPA sought civil judicial penalties against Chevron for violating the State’s implementation plan (“SIP”)<sup>222</sup> and EPA’s prevention of significant deterioration (“PSD”) regulations.<sup>223</sup> Chevron, while operating a refinery in El Paso, Texas, violated three Texas Air Control Board (“TACB”) rules that

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<sup>217</sup> UARG Comments, *supra* note 182, at 11 (citing *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (“Congress acts ‘intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another.’”).

<sup>218</sup> See Coalition Comments, *supra* note 214, at 7; CMA Comments, *supra* note 189, at 10-14; Legal Foundation Comments, *supra* note 214, at 2.

<sup>219</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,779 (1994) (to be codified at 40 C.F.R. pt. 59) (citing *United States v. SCM Corp.*, 667 F. Supp. 1110 (D. Md. 1987) and *United States v. Chevron U.S.A., Inc.*, 639 F. Supp. 770 (W.D. Tex. 1985)).

<sup>220</sup> 42 U.S.C. § 7413(b) (1988); see also *supra* note 126.

<sup>221</sup> 639 F. Supp. 770 (W.D. Tex. 1985).

<sup>222</sup> Clean Air Act section 110(a)(1) requires each state to develop, adopt, and submit to EPA for approval, a SIP to implement, maintain, and enforce each national ambient air quality standard (“NAAQS”) in that state. See 42 U.S.C. § 7410(a)(1) (1994). For stationary sources, each SIP must establish emission limitations, compliance schedules, and any additional measures necessary to attain and maintain NAAQS. See *id.* § 7410(a)(2). On May 31, 1972 EPA approved Texas’ SIP. See *Chevron*, 639 F. Supp. at 775.

<sup>223</sup> See *Chevron*, 639 F. Supp. at 776-77; 40 C.F.R. § 52.21 (1997).



were part of the SIP.<sup>224</sup> Additionally, Chevron had failed to apply for a permit to modify an existing facility in violation of EPA's PSD regulations.<sup>225</sup> The court found that Chevron had violated the state and federal regulations between October 1, 1977 and March 6, 1979.<sup>226</sup> It found that Chevron had violated TACB rule 201.06 (limiting sulfur dioxide concentrations) 991 times, TACB rule 201.09 (limiting sulfur dioxide ground level concentrations) eleven times, and both the PSD regulation and TACB rule 601 (requiring stationary sources to apply for permits before constructing or modifying facilities) for 552 days.<sup>227</sup> The court did not specifically address the issue of whether the maximum limit of "\$25,000 per day of violation" meant "per day of violation for each violation." However, it fined Chevron, pursuant to CAA section 113(b), \$4000 for each of its 991 violations of the PSD regulation.<sup>228</sup> The court imposed a total penalty of \$4,530,000 under section 113(b), amounting to \$8,206.52 per day for 552 days.<sup>229</sup>

b. *United States v. SCM Corp.*

In *United States v. SCM Corp.*,<sup>230</sup> EPA sought penalties under CAA section 113(b) against SCM Corporation for violating the State of Maryland's

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<sup>224</sup> The three rules included TACB rule 201.06, which limited the concentration of sulfur dioxide emissions; TACB rule 201.09, which limited the net ground level concentration of sulfur dioxide; and TACB rule 60, which required facilities emitting any air contaminant to obtain permits before constructing any new facility or modifying any existing facility. *See Chevron*, 639 F. Supp. at 775.

<sup>225</sup> *See id.* (citing 40 C.F.R. § 52.21(d)(3)).

<sup>226</sup> *See id.*

<sup>227</sup> *See id.* at 777-79.

<sup>228</sup> *See id.* at 779. In total, the court imposed the following fines: \$5000 for each of the 991 TACB rule 201.06 violations—\$4000 each to the United States and \$1000 each to the State of Texas; \$5000 for each of the 11 TACB rule 201.09 violations—\$4000 each to the United States and \$1000 each to the State of Texas; \$1000 to the State of Texas for each of the 552 days Chevron violated TACB rule 601; and \$1000 to the United States for each of the 552 days Chevron violated the PSD regulations. *See id.*

<sup>229</sup> *See id.* at 779-80.

<sup>230</sup> 667 F. Supp. 1110 (D. Md. 1987).

SIP limitations for particulate matter and sulfuric acid mist.<sup>231</sup> The parties presented only two questions of law to the court. First, could the court impose civil penalties for violations occurring before EPA issued a NOV to SCM Corporation?<sup>232</sup> Second, once regulators show that a source is out of compliance, does the source have the burden of proving that it has achieved compliance?<sup>233</sup> The court held that civil penalties were available for the violations occurring before EPA issued the NOV, but not for violations outside the five year statute of limitations.<sup>234</sup> It also held that in enforcement proceedings under the CAA, the government has the burden of proving violations of applicable regulations.<sup>235</sup> The court found that EPA had proven fourteen daily violations of the SIP limits for particulate matter and sixteen daily violations of the SIP limits for sulfuric acid mist.<sup>236</sup> The court stated that the maximum available penalty for the thirty days of violations was \$750,000 (thirty multiplied by \$25,000).<sup>237</sup> The court subsequently fined SCM Corporation a total penalty of \$350,000.<sup>238</sup>

The district courts in both cases did not rule directly on the issue of whether the language of section 113(b) provided for penalties of \$25,000 per day of violation for each violation, but neither court disputed EPA's interpretation. In fact, the court in *SCM Corp.* applied EPA's interpretation when it calculated the possible maximum penalty as \$25,000 per day of violation for each violation.<sup>239</sup> However, neither court actually imposed a penalty that exceeded \$25,000 per day.

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<sup>231</sup> See *id.* at 1112.

<sup>232</sup> See *id.* at 1121-22.

<sup>233</sup> See *id.* at 1123.

<sup>234</sup> See *id.* at 1122-23.

<sup>235</sup> See *id.* at 1124 (citing *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 357 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973)).

<sup>236</sup> See *id.* at 1125-26. On seven dates, SCM Corporation had violated both particulate matter and sulfuric acid mist limits. See *id.*

<sup>237</sup> See *id.* at 1126.

<sup>238</sup> See *id.* at 1128.

<sup>239</sup> See *id.* at 1125.

## 2. *The Language of the Amendment*

Section 113 of the Act provides EPA with three enforcement opportunities to impose civil penalties. Section 113(b) authorizes EPA to commence a civil judicial action to assess "a civil penalty of not more than \$25,000 per day for each violation."<sup>240</sup> Section 113(d)(1) authorizes EPA to assess "a civil administrative penalty of up to \$25,000 per day of violation."<sup>241</sup> Lastly, section 113(d)(3) authorizes the Administrator to implement "a field citation program through regulations establishing minor violations for which field citations assessing civil penalties not to exceed \$5,000 per day of violation may be issued . . . ."<sup>242</sup> As discussed above, section 113(b) of the 1977 version of the CAA authorized civil judicial penalties of up to "\$25,000 per day of violation."<sup>243</sup> In 1990, when Congress amended section 113(b) to authorize civil judicial penalties of "\$25,000 per day of violation for each violation," it did not provide the same language for civil penalties sections 113(d)(1) and (3). The amended language of section 113(b) indicates that Congress knew how it should draft language authorizing separate daily maximums for each violation. Therefore, Congress must have intentionally omitted language authorizing a maximum penalty of "\$5,000 per day of violation for each violation" in section 113(d)(3).<sup>244</sup>

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<sup>240</sup> 42 U.S.C. § 7413(b) (1994).

<sup>241</sup> *Id.* § 7413(d)(1).

<sup>242</sup> *Id.* § 7413(d)(3).

<sup>243</sup> See 42 U.S.C. § 7413(b) (1988) (current version at 42 U.S.C. § 7413(b) (1994)); *supra* note 126; see also discussion *infra* Part IV.B.3.

<sup>244</sup> See *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 388 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another.") (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

### 3. *The Legislative History*

The legislative history for the 1990 amendments to the CAA is not completely clear about whether Congress intended for the maximum penalty for a field citation to be \$5000 per day for each violation. Originally, the EPA proposed the concept of a field citation program in the amendments to the CAA that the Bush administration introduced in 1989.<sup>245</sup> In his proposal to amend the CAA, President George Bush proposed authorizing the Administrator to implement a field citation program with “civil penalties not to exceed \$5,000 per day for each violation.”<sup>246</sup> Additionally, the President also proposed amending the civil judicial enforcement subsection, section 113(b), to allow for maximum penalties of “\$25,000 per day for each violation.”<sup>247</sup>

The original version of the House of Representatives’ bill included the President’s language. It proposed to authorize the Administrator to implement a field citation program with maximum penalties of “\$5,000 per day for each violation.”<sup>248</sup> The original version also proposed to amend section 113(b) of the CAA to provide for civil judicial penalties of up to “\$25,000 per day for each violation.”<sup>249</sup> The House Committee on Energy and Commerce changed the language for the field citation program to limit the maximum penalty for field citations to “\$5,000 per day of violation.”<sup>250</sup> The Committee retained the civil judicial enforcement language which provided

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<sup>245</sup> See Secrest Interview, *supra* note 169.

<sup>246</sup> H.R. DOC. NO. 101-87, at 265 (1989).

<sup>247</sup> See *id.* at 257.

<sup>248</sup> See H.R. 3030, 101st Cong. 283 (1989), *reprinted in* 2 SENATE COMM. ON ENV’T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1809, 4019 (1993).

<sup>249</sup> See *id.* at 281, *reprinted in* 2 SENATE COMM. ON ENV’T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1809, 4017 (1993).

<sup>250</sup> See H.R. Rep. No. 101-490, at 479 (1990), *reprinted in* 2 SENATE COMM. ON ENV’T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1809, 3503 (1993).

for penalties up to "\$25,000 per day for each violation."<sup>251</sup>

The Senate bill also began by limiting field citation penalties to "\$5,000 per day [of violation] for each violation."<sup>252</sup> The Senate Environment and Public Works Committee summarized the field citation proposal in the bill as limiting field citations to "\$5,000 per day for each violation."<sup>253</sup> However, while discussing the bill the Committee stated: "Civil penalties assessed in a field citation are to be specified by the regulations and may not exceed \$5,000 per day of violation."<sup>254</sup> Additionally, the Senate bill included the President's proposal to amend section 113(b) to allow for civil judicial penalties of "\$25,000 per day for each violation."<sup>255</sup> The Senate ultimately passed a bill which limited field citation penalties to "\$5,000 per inspection," and limited civil judicial penalties to \$25,000 during any six month period for a single facility.<sup>256</sup> Ultimately, the Conference Committee adopted the House's language limiting field citations to "\$5,000 per day of violation."<sup>257</sup> Unfortunately, the Conference Committee did not explain what "\$5,000 per day of violation" meant.

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<sup>251</sup> See *id.* at 475, reprinted in 2 SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1809, 3499 (1993).

<sup>252</sup> See S. 1630, 101st Cong. § 301(h) (1989), reprinted in 5 SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 7339, 9192-93 (1993).

<sup>253</sup> See S. REP. NO. 101-228, at 360 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3743.

<sup>254</sup> *Id.* at 365, reprinted in 1990 U.S.C.C.A.N. 3385, 3748.

<sup>255</sup> See S. 1630, 101st Cong. § 301(f) (1989), reprinted in 5 SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 7339, 9184-85 (1993).

<sup>256</sup> See *id.* § 601(i), reprinted in 3 SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 4119, 4723 (1993).

<sup>257</sup> See 150 CONG. REC. S16,933 (daily ed. Oct. 27, 1990) (Chafee-Baucus Statement of Senate Managers), reprinted in 1 SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 3, 942 (1993).

#### 4. *The Maximum Penalty Should Be \$5000 per Day*

At first glance, it appears that Congress has left to EPA the task of determining what “per day of violation” means.<sup>258</sup> However, the language is not ambiguous—“per day of violation” means for each day of violation.<sup>259</sup> Congress provided clear language in the civil judicial enforcement provision of section 113 when it wanted to set a maximum penalty for each separate violation. Additionally, a maximum penalty of \$5000 per day for each violation will not further the program’s goal of achieving prompt settlements; instead, it will lead to more complex field citations with higher penalty amounts. Consequently, recipients more readily will challenge these expensive penalties, hoping at least to reduce the penalty amounts. EPA, therefore, should limit its penalty amounts to encourage prompt settlements. It should cap its penalties at \$5000 per day, with a total penalty not to exceed \$25,000.<sup>260</sup>

#### C. *Agency Guidance*

In the NPRM, EPA states that it intends to issue additional guidance on a variety of matters, including guidance to describe the process for determining whether a violation is minor.<sup>261</sup> The Agency will develop guidance to help inspectors determine when to issue field citations and when to

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<sup>258</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (stating that if a statute is ambiguous or silent on a specific issue and Congress has empowered an agency to administer the statute, a court should defer to the agency’s reasonable interpretation of the statute).

<sup>259</sup> The definition of “per” is: “[t]o, for, or by each: for every (\$12 dollars *per* hour).” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 871 (1984).

<sup>260</sup> Twenty-five thousand dollars is a logical limit for field citations under section 113(d)(3). Section 113(d)(1) authorizes EPA to assess, for certain serious violations of the Act, civil administrative penalties of up to \$25,000 per day of violation, not to exceed a total penalty of \$200,000. See 42 U.S.C. § 7413(d)(1) (1994).

<sup>261</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,778 (1994) (to be codified at 40 C.F.R. pt. 59).

employ other enforcement tools.<sup>262</sup> The Agency expects to issue guidelines for determining whether to issue a citation in the field or from an EPA office.<sup>263</sup> Other guidance will cover such areas as coordinating inspections with state and local officials, calculating penalty amounts, revoking citations, and recording and tracking citations.<sup>264</sup> The Agency also will issue guidance to "explain how the Agency intends to evaluate the penalty assessment criteria in section 113(e) of the Act when determining penalty amounts."<sup>265</sup> This extensive list of topics for internal agency guidance raises an interesting issue—whether the Agency is evading its responsibility to implement the field citation program through rulemaking.

Section 113(d)(3) authorizes the Administrator to "implement . . . a field citation program through regulations establishing appropriate minor violations for which field citations . . . may be issued by officers or employees designated by the Administrator."<sup>266</sup> As discussed above, CAA section 307(d)(1)(P) requires EPA to submit any field citation program regulations to public review and comment rulemaking procedures.<sup>267</sup> The issue is whether the "guidelines" will constitute rules which the Agency must also promulgate through rulemaking. These "guidelines" may be interpretative rules, policy statements, or procedural rules; or, they may be substantive or legislative rules.<sup>268</sup> If they are substantive or legislative rules, EPA must promulgate them through the appropriate section 307(d) rulemaking procedures.<sup>269</sup> The Agency, however, does not have to employ

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<sup>262</sup> See *id.* at 22,780.

<sup>263</sup> See *id.*

<sup>264</sup> See *id.* at 22,781.

<sup>265</sup> *Id.* at 22,780.

<sup>266</sup> 42 U.S.C. § 7413(d)(3) (1994).

<sup>267</sup> See *id.* § 7607(d)(1)(P); see also *supra* note 52.

<sup>268</sup> See generally 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 6.1-.10 (3d ed. 1994).

<sup>269</sup> The pertinent portion of CAA section 307(d)(1) states:

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

the section 307(d) rulemaking procedures if the guidelines are interpretative rules, general statements of policy, or rules of procedure or practice.<sup>270</sup> The trick is determining whether a guideline is a substantive/legislative or an interpretative rule.

An interpretative rule clarifies or explains an existing law or requirement, while a substantive rule creates a law, a requirement, or otherwise significantly effects private rights.<sup>271</sup> An interpretative rule does

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42 U.S.C. § 7607(d)(1). Section 553 of Title 5 contains the rulemaking procedures of the APA, which is codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994). Section 553 provides in part:

(b) General notice of proposed rule making shall be published in the Federal Register . . . . The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

5 U.S.C. § 553(b), (c).

<sup>270</sup> See 1 DAVIS & PIERCE, *supra* note 268, §§ 6.2-.4, at 228, 234, 248.

<sup>271</sup> See *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989) (finding that a U.S. Park Service rule prohibiting storage of excessive property was not an interpretative rule but was a substantive rule because it imposed an additional condition upon the public); 1 DAVIS & PIERCE, *supra* note 268, §§ 6.3-.4, at 233-50.



not bind the Agency, the public, or the courts; whereas a substantive or legislative rule does.<sup>272</sup> Like interpretative rules, policy statements also do not bind the Agency or the public; nor do they create any rights or obligations.<sup>273</sup> If a guideline denies a decision maker the discretion to entertain challenges to the guideline's position, it is binding and therefore a legislative rule.<sup>274</sup> Thus, EPA will have to submit any guideline to the public review and comment procedures if the guideline does any of the following: creates requirements or obligations; significantly affects private rights; attempts to bind the Agency or the public; or does not permit a decision maker the discretion to entertain a challenge to the guideline's position.

Undoubtedly, most of the guidelines EPA plans to develop for the field citation program will not be legislative rules. Guidelines that help inspectors determine whether to issue field citations or employ other enforcement options will not be legislative rules if they do not bind the inspectors to specific options. The Agency will not need to submit to public review and comment its guidance for coordinating inspections and for recording and tracking field citations because these guidelines will cover agency procedure and practice.<sup>275</sup> However, the Agency will need to consult with the states in preparing its guidance for coordinating inspections with state and local authorities.<sup>276</sup> Most important, any guidelines that establish set procedures for determining what are "minor violations" or how to calculate penalty amounts are likely to be substantive or legislative rules because these types

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<sup>272</sup> See 1 DAVIS & PIERCE, *supra* note 268, § 6.3, at 233-34.

<sup>273</sup> See *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). McLouth Steel petitioned EPA to delist its waste sludge from the Agency's hazardous waste list. According to its policy, the Agency applied a vertical and horizontal spread ("VHS") model to predict the sludge's hazardous waste leachate levels. EPA denied the petition because of the VHS model results. The Court found that EPA had used the VHS model as a "binding norm." Thus, it was a legislative rule which EPA should have submitted to the public review and comment procedures of the APA. See *id.* at 1324.

<sup>274</sup> See *id.* at 1320.

<sup>275</sup> See 5 U.S.C. § 553(b)(A) (1994); see also *supra* text accompanying notes 267, 270.

<sup>276</sup> Section 113(d)(3) of the CAA requires the Administrator to consult with the states prior to implementing a field citation program through regulations. See 42 U.S.C. § 7413(d)(3) (1994).

of guidelines tend to deny decision makers discretion and will substantially affect private interests. Thus, the Agency must submit them to the public review and comment procedures.

#### D. *The Role of the States*

In the NPRM, EPA reads section 113(d)(3) as not authorizing the Administrator to delegate the field citation program to state or local agencies.<sup>277</sup> However, even though state and local officials may not issue field citations under the program, “EPA employees may rely on information gathered during State and local inspections as a basis for issuing field citations.”<sup>278</sup> The Agency believes that the field citation program will need to rely upon state and local inspection information because the state and local agencies perform the vast majority of the inspections.<sup>279</sup> Several states objected to EPA’s conclusion that the Administrator cannot delegate to the states the authority to issue field citations.<sup>280</sup> The states argue that the statute does not define “officers” or “employees” and that section 113(d)(3) does not expressly preclude the Administrator from delegating to state and local officials the authority to issue field citations.<sup>281</sup> The states believe that their interpretation is reasonable because Congress recognized in CAA section 101(a)(3) that air pollution prevention and control is the primary respon-

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<sup>277</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,781 (1994). The Agency notes that “[u]nder the Act, field citations ‘may be issued by officers or employees designated by the Administrator.’” *Id.* (quoting 42 U.S.C. § 7413(d)(3)).

<sup>278</sup> *Id.* at 22,780.

<sup>279</sup> See Telephone Interview with Jane Engert, Environmental Scientist, Office of Compliance, United States Environmental Protection Agency (May 25, 1995).

<sup>280</sup> See State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials (“STAPPA/ALAPCO”) Comments to the Field Citation Program at 4-5 (July 5, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 10) [hereinafter STAPPA/ALAPCO Comments]; State of Tennessee Department of Environment and Conservation Comments to the Field Citation Program at 1-2 (June 28, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 19); NESCAUM Comments, *supra* note 203, at 1.

<sup>281</sup> See STAPPA/ALAPCO Comments, *supra* note 280, at 5.

sibility of the state and local governments.<sup>282</sup> However, the amendment's legislative history does not support the states' argument. In discussing the language, which Congress ultimately adopted, the House Committee on Energy and Commerce reported:

The citations are to be issued by Federal officers or employees designated by EPA. The Committee, in adopting this provision, is concerned that this authority not be misused and expects that the rules will ensure that such EPA personnel will be well trained and will assess penalties on a reasonable and consistent and fair basis.<sup>283</sup>

Thus, EPA reasonably may conclude that it cannot delegate field citation issuing authority to state or local officials.

Not surprisingly, several private businesses and federal agencies object to EPA's plan to permit EPA employees to base field citations on information from state and local inspections. These critics argue that EPA should allow its employees to base field citations only on their own personal observation and knowledge.<sup>284</sup> They raise two points to support their argument. First, using state and local inspection information will undermine Congress's intent that EPA not delegate the program to the states.<sup>285</sup> Second, EPA employees cannot properly assess the circumstances surrounding the violations when they rely upon second-hand information from state and local

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<sup>282</sup> See *id.*

<sup>283</sup> H.R. REP. NO. 101-490, pt. 1, at 393-94 (1990), *reprinted in* 2 SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1809, 3417-18 (1993).

<sup>284</sup> See DOD Comments, *supra* note 194, at 5; Duquesne Light Comments to the Field Citation Program at 2 (July 1, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 35) [hereinafter Duquesne Light Comments]; Steel Manufacturers Association Comments to the Field Citation Program at 1-2 (July 6, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 41) [hereinafter Steel Comments]; Southern California Edison Company Comments to the Field Citation Program at 1-2 (July 8, 1994) (U.S. EPA Air Docket No. A-91-63, Category No. IV-D, Comment No. 60).

<sup>285</sup> See DOD Comments, *supra* note 194, at 5; Steel Comments, *supra* note 284, at 1.

inspectors; thus, EPA will not be able to ensure that the citations are accurate, fair, and consistent.<sup>286</sup>

The Agency's plan to rely upon information from state and local inspections raises other issues. For instance, if EPA employees rely upon second-hand information from state and local inspections, they will not issue the field citations in the field; they will issue them from their offices. This certainly will enable EPA to issue many more field citations. However, if EPA employees base citations on second-hand information, processing and serving the citations will take longer. The EPA employees will not be at the facilities to issue the citations immediately after discovering the violations. Also, conscientious employees will spend time verifying the second-hand information and/or considering the recipients' explanations. If EPA employees do not verify their second-hand information and consider the recipient's explanations, they might issue citations when circumstances do not justify the citations. This procedure may result in many more recipients challenging their field citations than the Agency expects. The Agency should ask itself if this will further its goals for the program to deter minor violations and encourage violators promptly to correct their violations and pay their fines.

Section 113(d)(3) does not expressly prohibit EPA from using state and local inspection information to issue field citations. Moreover, the legislative history does not address this issue directly.<sup>287</sup> However, section 113(d)(3) gives the Administrator the discretion to designate the "officers or employees" who may issue field citations.<sup>288</sup> This implies that Congress authorized the Administrator to supervise the officers and employees issuing field citations. This supervision easily may include determining the type of evidence on which officers and employees will base their field citations. Therefore, it is not unreasonable for EPA to conclude that it may permit its

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<sup>286</sup> See DOD Comments, *supra* note 194, at 5; Duquesne Light Comments, *supra* note 284, at 2; Steel Comments, *supra* note 284, at 2.

<sup>287</sup> The Senate Environment and Public Works Committee flirted with the issue when it stated: "The Act also is amended to authorize the Administrator to issue 'field citations' for minor violations discovered during the course of an inspection, and for violations of routine reporting and recordkeeping requirements." S. REP. NO. 101-228, at 365 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3748.

<sup>288</sup> See 42 U.S.C. § 7413(d)(3) (1994); *see also supra* note 44.

employees to base field citations on information from state and local inspections. This interpretation will significantly impact federal facilities if EPA applies the field citation program to them.

## VI. APPLYING THE FIELD CITATION PROGRAM TO FEDERAL AGENCIES

### A. *The Department of Defense's Argument Against EPA's Authority to Apply the Field Citation Program to Federal Agencies.*

Remarkably, though several federal agencies submitted comments to the field citation program, only DOD challenged EPA's authority to assess field citations against federal agencies.<sup>289</sup> In its initial comments to the rulemaking and in a subsequent memorandum to the DOJ's Office of Legal Counsel challenging EPA's authority to assess field citations against federal facilities,<sup>290</sup> DOD raised five arguments. First, EPA cannot apply the field citation program to federal facilities because it lacks clear statutory authority to do so.<sup>291</sup> Second, EPA should interpret its section 113 enforcement authority over federal agencies in light of CAA section 118 (*Control of pollution from Federal facilities*) and the Supreme Court's interpretation of similar federal facilities provisions in *United States Department of Energy v. Ohio*.<sup>292</sup> Third, if EPA applies the program against federal facilities, it will

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<sup>289</sup> See DOD Comments, *supra* note 194, at 7-10.

<sup>290</sup> Section 113(d)(3) of the CAA provides that "[t]he Administrator may implement, after consultation with the Attorney General and the States, a field citation program . . . ." 42 U.S.C. §7413(d)(3); see also *infra* note 473.

<sup>291</sup> See DOD Comments, *supra* note 194, at 8; see also Memorandum from Judith A. Miller, General Counsel, Department of Defense, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *DOD Response Memorandum: Assessment of Administrative Penalties Against Executive Branch Agencies Under Section 113(d) of the Clean Air Act* 3-7 (Dec. 15, 1995) (on file with the *William and Mary Environmental Law and Policy Review*) [hereinafter DOD Response].

<sup>292</sup> See DOD Comments, *supra* note 194, at 9; see also DOD Response, *supra* note 291, at 12-13. See generally Clean Air Act § 118, 42 U.S.C. § 7418 (1994); *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (finding that Congress had not waived the federal government's sovereign immunity from punitive fines under the Clean Water Act or Resource Conservation and Recovery Act).

interfere with the President's authority under Article II of the U.S. Constitution to supervise executive branch agencies.<sup>293</sup> Fourth, Congress could not have intended EPA to apply the field citation program to federal facilities because Article III of the U.S. Constitution precludes federal agencies from seeking judicial review under CAA section 113(d)(4).<sup>294</sup> Finally, if EPA has the authority to impose civil penalties on executive agencies, the unitary executive doctrine requires EPA to afford other executive agencies special procedural rules.<sup>295</sup>

### 1. *EPA Lacks Clear Statutory Authority*

DOD argues that EPA may not apply the field citation program to federal agencies unless the CAA gives EPA "clear and express authority" to do so.<sup>296</sup> Permitting EPA to assess administrative penalties against executive branch agencies will invite federal courts to intervene into "a purely Executive Branch function, thus raising significant constitutional separation of powers concerns, warranting the high standard of review."<sup>297</sup> To support its argument, DOD cites a 1994 DOJ Office of Legal Counsel opinion on whether the Department of Housing and Urban Development ("HUD") could initiate enforcement proceedings against the U.S. Department of Agriculture ("USDA") under the Fair Housing Act of 1968 ("FHA").<sup>298</sup>

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<sup>293</sup> See DOD Comments, *supra* note 194, at 1-2; see also DOD Response, *supra* note 291, at 7-10.

<sup>294</sup> See DOD Comments, *supra* note 194, at 8; see also DOD Response, *supra* note 291, at 10-11. Article III of the U.S. Constitution states in part, "[t]he judicial power shall extend . . . to controversies to which the United States shall be a party . . . ." U.S. CONST. art. III, § 2.

<sup>295</sup> See DOD Comments, *supra* note 194, at 2.

<sup>296</sup> See DOD Response, *supra* note 291, at 4.

<sup>297</sup> *Id.* at 4.

<sup>298</sup> Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to James S. Gilliland, General Counsel, Department of Agriculture, *Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Executive Branch Agencies* (May 17, 1994) [hereinafter Fair Housing Act Memorandum], available in 1994 OLC LEXIS 11. See generally Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1994).

Sections 810 through 812 of the FHA empower HUD to investigate discrimination complaints, subpoena evidence, conduct hearings, issue administrative orders, petition U.S. courts of appeal to enforce administrative orders, and bring civil action in U.S. district courts against "any respondent."<sup>299</sup> Also, FHA section 814 authorizes the Attorney General to bring civil actions on behalf of "the [HUD] Secretary" or persons denied rights under the FHA in U.S. district court.<sup>300</sup> In its May 17, 1994 memorandum, the Office of Legal Counsel noted that applying these enforcement measures against executive branch agencies would raise "substantial separation of powers concerns," unless the FHA contained an "express statement" of Congress's intent to apply the enforcement measures to executive agencies.<sup>301</sup> Involving the federal courts in disputes between executive branch agencies would affect the President's Article II authority to supervise and resolve disputes among his subordinates.<sup>302</sup> Additionally, "lawsuits between two federal agencies are not generally justiciable" under Article III because they are not cases or controversies between different parties.<sup>303</sup> Together, these concerns comprise the unitary executive doctrine.<sup>304</sup> The Office of Legal Counsel concluded that the FHA does not contain an express statement applying its enforcement measures against federal agencies.<sup>305</sup> The language

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<sup>299</sup> See 42 U.S.C. §§ 3610-3612.

<sup>300</sup> See *id.* § 3614.

<sup>301</sup> See Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*1, 8-9 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) and *Public Citizen v. Department of Justice*, 491 U.S. 440, 446 (1989)).

<sup>302</sup> See *id.* at \*11-12.

<sup>303</sup> See *id.* at \*12 (citing Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. Off. Legal Counsel 131, 138 (1989) (preliminary print)).

<sup>304</sup> See *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, House of Representatives*, 100th Cong. 182, 208-14 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, Department of Justice) [hereinafter *Habicht Statement*]; see also Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force, 13 Op. Off. Legal Counsel 131, 135-37 (1989) (preliminary print) [hereinafter *Barr Memorandum*].

<sup>305</sup> See Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*18.

in sections 810 through 812 and 814 does not expressly apply the enforcement measures to federal agencies, and the FHA's definitions of "person" and "respondent" do not include federal agencies.<sup>306</sup> Consequently, HUD could not apply the FHA's enforcement measures against USDA.<sup>307</sup>

DOD contends that section 113(d) does not provide the "clear and express authority" necessary for EPA to impose administrative penalties against other executive branch agencies.<sup>308</sup> Nowhere in section 113(d) does

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<sup>306</sup> Section 802(d) of the FHA states: "'Person' includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." 42 U.S.C. § 3602(d) (1994). Section 802(n) defines "respondent" to mean "the person or other entity accused in a complaint of an unfair housing practice" and "any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 3610(a) . . . ." *Id.* § 3602(n).

<sup>307</sup> The Office of Legal Counsel stated,

[W]e are inclined to agree with USDA that, in light of the [FHA's] various express references to the United States and the federal government, see, e.g., 42 U.S.C. §§ 3603(a), 3608(d), 3612(p), 3613(c)(2), 3614(d)(2), Congress's "failure to include the United States in the definition of respondent— . . . a term used repeatedly throughout the statutory description of the enforcement mechanism—evinces an intent that Federal agencies are not subject to the administrative procedure."

Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*14-15 (quoting Letter from James Michael Kelly, Associate General Counsel, U.S. Department of Agriculture, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel 3 (Jan. 6, 1994)). See generally 42 U.S.C. § 3603(a) (applying FHA prohibitions to dwellings owned, operated or provided by the federal government); *id.* § 3608(d) (directing executive agencies to cooperate with the furtherance of fair housing purposes); *id.* § 3612(p) (extending liability to the federal government for the attorney's fees of a prevailing party, other than the United States, in an administrative proceeding); *id.* § 3613(c)(2) (extending liability to the federal government for the attorney's fees of a prevailing party, other than the United States, in a citizen suit against the federal government); *id.* § 3614(d)(2) (extending liability to the federal government for the attorney's fees of a prevailing party, other than the United States, in a civil action brought by the Attorney General).

<sup>308</sup> See DOD Response, *supra* note 291, at 3-7.



Congress mention assessing civil penalties against federal agencies.<sup>309</sup> Nor does section 113(d)(3) specifically identify to whom EPA may issue field citations. In the first sentence of section 113(d)(3), Congress authorizes the Administrator to "implement, after consultation with the Attorney General and the States, a field citation program . . . ."<sup>310</sup> Section 113(d)(3) refers only to "any person" when discussing the procedural rights of persons receiving field citations.<sup>311</sup> Since section 113 does not define "person," DOD acknowledges that we must look to the Act's general definition of "person," which includes federal agencies.<sup>312</sup> However, DOD argues that the references to "any person" in sections 113(d)(3) and (4) cannot constitute an "express statement" of Congress's intent to apply the field citation program to federal agencies.<sup>313</sup> Since the unitary executive doctrine precludes executive agencies from seeking judicial review of administrative orders, "the full context of the program is not applicable to federal agencies."<sup>314</sup> This is particularly significant in light of section 118 (*Control of pollution from Federal facilities*), which subjects federal facilities to all federal requirements and "process and sanctions respecting the control and abatement of air pollution *in the same manner, and to the same extent as any nongovernmental entity*."<sup>315</sup>

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<sup>309</sup> Section 113(d)(1) states, "The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000, per day of violation . . . ." 42 U.S.C. § 7413(d)(1) (1994).

<sup>310</sup> *Id.* § 7413(d)(3); see DOD Response, *supra* note 291, at 4.

<sup>311</sup> The second sentence of section 113(d)(3) states: "Any person to whom a field citation is assessed may . . . elect to pay the penalty assessment or to request a hearing on the field citation." 42 U.S.C. § 7413(d)(3). Additionally, section 113(d)(4) states that "[a]ny person" receiving a field citation under subsection (3) may seek review in a U.S. district court. See *id.* § 7413(d)(4).

<sup>312</sup> See DOD Comments, *supra* note 194, at 8; DOD Response, *supra* note 291, at 4.

<sup>313</sup> See DOD Comments, *supra* note 194, at 8; DOD Response, *supra* note 291, at 4-5.

<sup>314</sup> DOD Comments, *supra* note 194, at 8.

<sup>315</sup> 42 U.S.C. § 7418(a) (emphasis added).

## 2. Case Law Limits the Waiver of Sovereign Immunity

According to DOD, section 118 prescribes the limits of EPA's enforcement authority over federal agencies, and it does not authorize EPA to assess administrative penalties against federal agencies.<sup>316</sup> In *United States Department of Energy v. Ohio*,<sup>317</sup> the Supreme Court reviewed section 313 of the Clean Water Act ("CWA")<sup>318</sup> and section 6001 of the Resource Conservation and Recovery Act,<sup>319</sup> both of which contained language substantially similar to that in CAA section 118.<sup>320</sup> The Court determined that the language did not subject federal facilities to administrative fines, but only to coercive, court-imposed sanctions for contempt.<sup>321</sup> "Congress was using 'sanction' in its coercive sense, to the exclusion of punitive fine."<sup>322</sup> In *Sierra*

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<sup>316</sup> See DOD Comments, *supra* note 194, at 9; DOD Response, *supra* note 291, at 12.

<sup>317</sup> 503 U.S. 607 (1992).

<sup>318</sup> 33 U.S.C. § 1323 (1988) (current version at 33 U.S.C. § 1323 (1994)).

<sup>319</sup> 42 U.S.C. § 6961 (1988) (current version at 42 U.S.C. § 6961 (1994)).

<sup>320</sup> The relevant portion of CWA section 313(a) states:

Each department, agency, or 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 or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. 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.

33 U.S.C. § 1323(a).

<sup>321</sup> See 503 U.S. at 623.

<sup>322</sup> DOD Comments, *supra* note 194, at 9 (quoting *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 623 (1992)); see DOD Response, *supra* note 291, at 12.

*Club v. Lujan*,<sup>323</sup> the Tenth Circuit, after concluding that the Supreme Court's opinion in *United States Department of Energy v. Ohio* applied to enforcement under both state and federal law, held that Congress had not waived sovereign immunity from punitive civil penalties for past violations of the CWA.<sup>324</sup> DOD argues that, because CAA section 118 is substantially similar to CWA section 313, the Supreme Court's reasoning in *United States Department of Energy v. Ohio* also applies to CAA section 118.<sup>325</sup> Therefore, DOD concludes that section 118(a) does not authorize EPA to assess administrative penalties against federal agencies, and EPA must narrowly interpret its section 113(d) enforcement authorities accordingly.<sup>326</sup>

### 3. *The Program Will Interfere With the President's Ability to Supervise Executive Branch Agencies*

DOD believes that applying the field citation program to federal facilities will interfere with the President's Article II ability to supervise executive branch agencies.<sup>327</sup> Any person who incurs a section 113(d)(3) penalty may request an administrative hearing under section 113(d)(3), and subsequently seek review of the penalty in a U.S. district court under section 113(d)(4).<sup>328</sup> If a person fails to pay a penalty, "the Administrator shall request the Attorney General to bring a civil action in an appropriate district court" to recover the penalty.<sup>329</sup> In essence, Section 113(d) neither provides an interagency dispute resolution process, nor grants the Attorney General adequate discretion to resolve an interagency dispute.<sup>330</sup>

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<sup>323</sup> 972 F.2d 312 (10th Cir. 1992).

<sup>324</sup> See *id.* at 316.

<sup>325</sup> See DOD Comments, *supra* note 194, at 9; DOD Response, *supra* note 291, at 13.

<sup>326</sup> See DOD Comments, *supra* note 194, at 9.

<sup>327</sup> See *id.* at 1-2.

<sup>328</sup> See 42 U.S.C. § 7413(d)(3), (4) (1994).

<sup>329</sup> *Id.* § 7413(d)(5)(B).

<sup>330</sup> See DOD Response, *supra* note 291, at 8-9.

#### 4. *The Program Does Not Account for Federal Agencies*

In granting EPA authority to implement the field citation program, Congress provided that “[a]ny person against whom a civil penalty is assessed under [a field citation program] . . . may seek review of such assessment in the United States District Court for the District of Columbia or [in another federal district court with jurisdiction] . . . .”<sup>331</sup> This ability to seek judicial review, according to DOD, is a crucial element of EPA’s authority to impose administrative penalties under the field citation program.<sup>332</sup> However, Article III of the U.S. Constitution bars independent judicial review of EPA penalty assessments against federal agencies.<sup>333</sup> DOD concludes that, since an essential element of the program does not apply to federal agencies, the entire program should not apply to federal agencies.<sup>334</sup>

#### 5. *The Unitary Executive Doctrine Requires EPA to Afford Federal Agencies Special Procedural Rules*

If EPA applies the field citation program to federal agencies, it must supplement its field citation rule to afford federal agencies an opportunity to consult with the Administrator before any penalty assessment becomes final.<sup>335</sup> The unitary executive doctrine and Article II of the U.S. Constitution require EPA to afford a federal agency the opportunity to contest admini-

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<sup>331</sup> 42 U.S.C. § 7413(d)(4).

<sup>332</sup> See DOD Comments, *supra* note 194, at 2; DOD Response, *supra* note 291, at 10-11.

<sup>333</sup> See DOD Comments, *supra* note 194, at 2 (citing *United States v. Shell Oil*, 605 F. Supp. 1064, 1081-84 (D. Colo. 1985) (barring Shell Oil from joining the U.S. Army as a defendant because the Army, being a unit of the United States government, could not be sued by the United States government, as such a suit would not be a “case or controversy” under Article III of the U.S. Constitution because the United States would be suing itself). Article III of the U.S. Constitution states in part, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and . . . to controversies to which the United States shall be a party . . . .” U.S. CONST. art. III, § 2, cl. 1.

<sup>334</sup> See DOD Comments, *supra* note 194, at 2.

<sup>335</sup> See *id.*

strative orders and penalties within the executive branch.<sup>336</sup> Additionally, as discussed above, Article III of the Constitution precludes federal agencies from appealing EPA penalty assessments in a federal district court.<sup>337</sup> These constitutional problems will preclude federal agencies from enjoying the same review procedures as nongovernmental entities under the field citation program.<sup>338</sup> Consequently, the field citation program will not treat federal agencies "'in the same manner and to the same extent as any nongovernmental entity,' as mandated by section 118(a)."<sup>339</sup> To remedy this problem, DOD suggests that EPA afford federal agencies the same procedures they enjoy under RCRA.<sup>340</sup> This will give federal agencies access to formal administrative hearings, comparable to the judicial review available to non-federal entities under the program.<sup>341</sup> Also, after exhausting the part 22 procedures, a federal agency still may consult with the Administrator.<sup>342</sup>

#### B. *The Department of Justice's Opinion*

In October 1995 EPA asked the DOJ's Office of Legal Counsel to settle the dispute between EPA and DOD concerning: (1) whether the Clean Air Act authorizes EPA to administratively assess civil penalties against federal agencies for CAA violations, and (2) whether EPA could exercise this

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<sup>336</sup> See *id.* at 1 (citing Habicht Statement, *supra* note 304, at 210).

<sup>337</sup> See *supra* note 333 and accompanying text.

<sup>338</sup> See DOD Comments, *supra* note 194, at 2.

<sup>339</sup> *Id.* (quoting Clean Air Act § 118(a), 42 U.S.C. § 7418(a) (1994)).

<sup>340</sup> See *id.* "In contesting RCRA penalty assessments, EPA affords federal agencies full 40 C.F.R. Part 22 procedures." *Id.* (citing Final Enforcement Guidance on Implementation of the Federal Facility Compliance Act, U.S. EPA (July 6, 1993)); see also 40 C.F.R. pt. 22 (1996). RCRA § 6001(b)(2) states: "No administrative order issued to such a department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator." 42 U.S.C. § 6961(b)(2) (1994).

<sup>341</sup> See DOD Comments, *supra* note 194, at 3.

<sup>342</sup> See *id.* at 2.

authority consistent with the Constitution.<sup>343</sup> The Office of Legal Counsel concluded that, even though it would raise “separation of powers concerns,” the Act clearly authorized EPA to administratively assess section 113(d) penalties against federal agencies, and that EPA could exercise this authority consistent with the Constitution.<sup>344</sup>

1. *The Clean Air Act authorizes EPA administratively to assess civil penalties against federal agencies for CAA violations*

The Office of Legal Counsel agreed with DOD that EPA may not assess section 113(d) penalties against federal agencies without a “clear statement” of Congress’s intent to apply section 113(d) enforcement measures to federal agencies.<sup>345</sup> Applying section 113(d) enforcement measures to federal agencies also will raise substantial separation of powers concerns.<sup>346</sup> First, the proceedings could affect the President’s Article II authority to supervise executive branch agencies and resolve disputes between them.<sup>347</sup> Second, federal agencies cannot seek section 113(d)(4) judicial review, nor will the Attorney General seek section 113(d)(5) judicial enforcement against federal agencies, because “lawsuits between two federal agencies are not generally justiciable.”<sup>348</sup> Both the Supreme Court and the

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<sup>343</sup> See Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act* 1 (July 16, 1997) (on file with the *William and Mary Environmental Law and Policy Review*) [hereinafter Cannon and Miller Memorandum]. Under Executive Order 12,146, the President has designated the Attorney General to resolve legal disputes between executive branch agencies. See Exec. Order No. 12,146, 3 C.F.R. 409 (1980), *reprinted as amended* in 28 U.S.C. § 509 (1994); see also *infra* note 473.

<sup>344</sup> See Cannon and Miller Memorandum, *supra* note 343, at 1, 3.

<sup>345</sup> See *id.* at 3, 5.

<sup>346</sup> See *id.*

<sup>347</sup> See *id.* at 4 (citing Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*13).

<sup>348</sup> *Id.* at 4 (citing Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*12); see also Barr Memorandum, *supra* note 304, at 138.

DOJ have consistently held that, due to "the dangerous constitutional thickets"<sup>349</sup> involved, the government may not apply an act of Congress in any manner that raises substantial separation of powers or federalism concerns without a "clear statement of congressional intent" to do so.<sup>350</sup>

In its legal opinion, the Office of Legal Counsel argued that CAA sections 113(d) and 302(e), together with the Act's legislative history, clearly express Congress's intent to apply section 113(d) enforcement measures to federal agencies.<sup>351</sup> In 1977, Congress expanded the definition of "person" in the Clean Air Act "to include 'any agency, department, or instrumentality of the United States . . . .'"<sup>352</sup> The House committee reporting on this amendment stated, "the committee is expressing its unambiguous intent that the enforcement authorities of section 113 may be used to insure compliance and/or to impose sanctions against any Federal violator of the act."<sup>353</sup> Consequently, in including federal agencies within the Act's general definition of "person," the Office of Legal Counsel concluded that Congress clearly intended to subject federal agencies to section 113(d) enforcement measures.<sup>354</sup>

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<sup>349</sup> See Cannon and Miller Memorandum, *supra* note 343, at 4 (quoting Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*14); see also Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); Public Citizen v. Department of Justice, 491 U.S. 440, 446 (1989); Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); United States v. Bass, 404 U.S. 336, 349 (1971).

<sup>350</sup> See Cannon and Miller Memorandum, *supra* note 343, at 4 (citing Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Jack Quinn, Counsel to the President, *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges* (Dec. 18, 1995)).

<sup>351</sup> See Cannon and Miller Memorandum, *supra* note 343, at 5-6; see also 42 U.S.C. §§ 7413(d), 7602(e) (1994).

<sup>352</sup> Cannon and Miller Memorandum, *supra* note 343, at 5 (quoting the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 301(b), 91 Stat. 685, 770); see also Clean Air Act § 302(e), 42 U.S.C. § 7602(e) (1994).

<sup>353</sup> Cannon and Miller Memorandum, *supra* note 343, at 7 (quoting H.R. REP. NO. 95-294, at 200 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1279).

<sup>354</sup> See *id.*

## 2. *EPA Can Exercise this Authority Consistent With the Constitution*

Since the Clean Air Act does not preclude the President from determining how to resolve disputes between EPA and other federal agencies, the Office of Legal Counsel concluded that the CAA does not conflict with the President's Article II authority to supervise executive branch agencies.<sup>355</sup> Any federal agencies incurring a section 113(d)(3) penalty may request an administrative hearing and consult with the EPA Administrator before the assessment is final.<sup>356</sup> Furthermore, the Act does not prevent the Attorney General from resolving any disputes before they reach the courts.<sup>357</sup> Section 113(d)(5) merely limits the authority of the courts; it does not restrict the Attorney General's Executive Order 12,146 or litigation review authority.<sup>358</sup>

Additionally, the Office of Legal Counsel noted that the Act does not conflict with Article III because it does not require federal agencies to dispute penalty assessments in court.<sup>359</sup> Under section 113(d)(5), the Attorney General determines whether to bring any enforcement action on behalf of EPA in federal court.<sup>360</sup> She will not permit EPA to sue another federal agency because "lawsuits between two federal agencies are not generally justiciable."<sup>361</sup> In short, since the Act permits the President and the Attorney General to resolve interagency conflicts and forestall litigation between federal agencies; it does not conflict with the Constitution.<sup>362</sup>

### C. *Analysis*

DOD raises three strong arguments against EPA's proposal.<sup>363</sup> First, the language of section 113(d) does not expressly state that EPA may assess

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<sup>355</sup> *See id.* at 7-8.

<sup>356</sup> *See id.* at 8.

<sup>357</sup> *See id.*

<sup>358</sup> *See id.*

<sup>359</sup> *See id.* at 9.

<sup>360</sup> *See* 42 U.S.C. § 7413(d)(5) (1994).

<sup>361</sup> *See* Cannon and Miller Memorandum, *supra* note 343, at 9-10.

<sup>362</sup> *See id.*

<sup>363</sup> *See supra* Part VI.A.



administrative penalties against federal agencies.<sup>364</sup> Second, the Supreme Court's holding in *United States Department of Energy v. Ohio*,<sup>365</sup> indicates that section 118(a) does not authorize EPA to assess civil penalties against federal agencies.<sup>366</sup> Third, since the unitary executive doctrine effectively precludes federal agencies from challenging section 113(d) penalties in court, the program will not apply to federal agencies "in the same manner, and to the same extent as any nongovernmental entity."<sup>367</sup> However, the Office of Legal Counsel correctly concluded that EPA may apply section 113(d) enforcement measures to federal agencies.<sup>368</sup> In passing the 1977 amendments to the CAA, Congress intended to subject federal agencies to section 113(d) enforcement measures.<sup>369</sup> Furthermore, by affording federal agencies opportunities to consult with the Administrator and seek review within the executive branch, EPA can exercise its section 113(d) enforcement authority consistent with the unitary executive doctrine.<sup>370</sup>

#### 1. *Congress Intended to Apply Section 113(d) Enforcement to Federal Agencies*

I will begin my analysis with the case that prompted Congress to include federal agencies within the CAA's definition of "person."

##### a. *Hancock v. Train*<sup>371</sup>

In *Hancock v. Train*, the Attorney General of Kentucky sought declaratory and injunctive relief to require federal facilities within the State to obtain state permits under the State's air pollution control program.<sup>372</sup> In

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<sup>364</sup> See *supra* Part VI.A.1.

<sup>365</sup> 503 U.S. 607 (1992).

<sup>366</sup> See *supra* Part VI.A.2.

<sup>367</sup> 42 U.S.C. 7418(a) (1994); see *supra* Part VI.A.5.

<sup>368</sup> See *supra* Part VI.B.

<sup>369</sup> See Cannon and Miller Memorandum, *supra* note 343, at 6-7.

<sup>370</sup> See *id.* at 7-8.

<sup>371</sup> 426 U.S. 169 (1976).

<sup>372</sup> See *id.* at 176.

May, 1972, EPA approved the State's implementation plan.<sup>373</sup> Chapter 7 of the SIP included the State's Air Pollution Control Commission Regulations, which prohibited any person from operating an air contaminant source within the State without a permit.<sup>374</sup> When the State sought to include federal facilities within the program, EPA directed the federal facilities within the State to provide the State with all of the information it needed to determine whether the facilities were complying with the state standards and discharge limitations.<sup>375</sup> However, EPA concluded that the CAA did not require federal facilities to apply for state operating permits.<sup>376</sup>

In response to EPA's directive, the State of Kentucky filed suit in the United States District Court for the Western District of Kentucky to compel EPA to use CAA section 113 to force the federal facilities within the State to comply with the State's permit requirements.<sup>377</sup> On cross-motions for summary judgement, the district court dismissed the complaint and the Court of Appeals for the Sixth Circuit subsequently affirmed.<sup>378</sup> The Sixth Circuit concluded that CAA section 118<sup>379</sup> did not subject federal agencies to state permit requirements.<sup>380</sup> On appeal to the U.S. Supreme Court, the State argued that, under CAA section 118, federal facilities within Kentucky had to meet state requirements and that "whatever is required by a state

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<sup>373</sup> See *id.* at 172.

<sup>374</sup> See *id.* at 172-73.

<sup>375</sup> See *id.* at 175.

<sup>376</sup> See *id.*

<sup>377</sup> See *Kentucky ex rel. Hancock v. Ruckelshaus*, 362 F. Supp. 360 (W.D. Ky. 1973).

<sup>378</sup> See *id.*, *aff'd*, 497 F.2d 1172 (6th Cir. 1974).

<sup>379</sup> Under the 1970 amendments to the CAA, the pertinent portion of section 118 (*Control of pollution from Federal facilities*) stated:

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

Pub. L. 91-604, § 5, *reprinted in* 1970 U.S.C.C.A.N. 1954, 1971.

<sup>380</sup> See 497 F.2d at 1177.

implementation plan is a 'requirement' under [section] 118."<sup>381</sup> The Supreme Court first noted that:

Taken with the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign" "without a clear expression or implication to that effect," this immunity means that where "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation.<sup>382</sup>

The Court further stated that only a clear and unambiguous Congressional action could subject federal agencies to state regulations.<sup>383</sup> It observed that the State, by claiming the authority to issue permits to federal facilities, is claiming the power to prohibit operations at federal facilities.<sup>384</sup> The Court stated that nothing in section 118, its relation to the CAA as a whole, or in its legislative history expressed "any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit."<sup>385</sup> The Court examined section 118 and pointed out that it did not provide that federal facilities "shall comply with *all* federal, state, interstate, and local requirements" nor that federal facilities "shall comply with *all* requirements of the applicable state implementation plan."<sup>386</sup> Next, the Court examined the legislative history of section 118 and concluded that Congress only intended to require federal agencies to comply with emission limitations and standards, not to empower states to force federal facilities to comply with all aspects of their SIPs.<sup>387</sup>

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<sup>381</sup> 426 U.S. at 183.

<sup>382</sup> *Id.* at 179 (footnotes omitted) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947), *United States v. Wittek*, 337 U.S. 346, 359 (1949), and *Mayo v. United States*, 319 U.S. 441, 447-48 (1943)).

<sup>383</sup> *See id.*

<sup>384</sup> *See id.* at 180.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 182.

<sup>387</sup> *See id.* at 187-90.

The Court concluded that section 118 did not subject federal facilities to state permit requirements.<sup>388</sup>

b. *Amendments of 1977*

Congress responded to *Hancock* in the 1977 amendments to the Clean Air Act by amending section 118 to require federal agencies to comply with: “all Federal, State, interstate, and local requirements, . . . (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever) . . . .”<sup>389</sup> Congress also amended section 302(e) to include within the Act’s definition of “person,” “any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.”<sup>390</sup> The House Committee on Interstate and Foreign Commerce, which proposed the change to sections 118 and 302(e) in House Bill 6161,<sup>391</sup> stated that the amendment was “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.”<sup>392</sup> In addition, the House Committee stated:

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

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<sup>388</sup> See *id.* at 198-99.

<sup>389</sup> Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116(a), 91 Stat. 685, 711 (codified at 42 U.S.C. § 7418(a) (1994)) (emphasis added).

<sup>390</sup> *Id.* § 301(b), 91 Stat. at 770 (codified at 42 U.S.C. § 7602(e) (1994)).

<sup>391</sup> H.R. 6161, 95th Cong. (1977).

<sup>392</sup> H.R. REP. NO. 95-294, at 199 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1278.

injunction), to civil or criminal penalties, and to delayed compliance penalties . . . . Finally, in defining the term "person" for the purpose of section 113 of the act to include Federal agencies, departments, instrumentalities, officers, agents, or employees, the committee is expressing its unambiguous intent that the enforcement authorities of section 113 may be used to insure compliance and/or impose sanctions against any Federal violator of the act.<sup>393</sup>

Congress eventually adopted House Bill 6161; however, the Conference Committee did not adopt the House Committee on Interstate and Foreign Commerce's broad interpretation of the amendment. Instead, the Conference Committee described the amendment as requiring federal facilities to comply with

all substantive and procedural air pollution requirements of Federal, State, interstate, or local law to the same extent as any person subject to such requirements . . . [and] that all Federal facilities must comply with all substantive and procedural requirements of applicable State implementation plans. Certain procedural requirements with which Federal facilities must comply are specified: construction and

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<sup>393</sup> *Id.* at 200, reprinted in 1977 U.S.C.C.A.N. 1077, 1279. The Senate did not attempt such a broad waiver in its amendment proposal (Senate Bill 252). See S. 252, 95th Cong. (1977). According to the Senate Committee on the Environment and Public Works, the Senate bill would have amended section 118 to

specify that, as in the case of water pollution, a Federal facility is subject to any Federal, State, and local requirement respecting the control or abatement of air pollution, both substantive and procedural, to the same extent as any person is subject to these requirements[,] . . . [including] any provisions for injunctive relief and such sanctions imposed by a court to enforce such relief, and the payment of reasonable service charges.

S. REP. NO. 95-127, at 58 (1977).

Additionally, the Senate did not attempt to change the act's definition of "person" to include federal agencies. See S. 252.

operating permits, reporting and monitoring; injunctive relief and sanction provisions and the payment of reasonable service charges . . . . The conferees intend . . . to authorize States to sue Federal facilities in State courts, and to subject facilities to State sanctions.<sup>394</sup>

Congress also adopted the House's amendment to section 302(e), thereby including federal agencies within the CAA's definition of "person."<sup>395</sup> However, the conference report did not discuss the change.

The legislative history indicates that Congress intended that CAA section 118 require federal facilities to comply with all federal, interstate, state, and local air pollution control requirements.<sup>396</sup> Congress even specifically listed several examples of the substantive and procedural requirements in both the statute and the legislative history.<sup>397</sup> Unfortunately, Congress did not specifically state which penalties and sanctions applied to federal facilities. The only available history addressing the amendment to section 302(e) indicates that Congress, by including federal facilities within the CAA's definition of "person," intended to subject federal facilities to the section 113 enforcement authorities and sanctions.<sup>398</sup>

c. *United States Department of Energy v. Ohio*<sup>399</sup>

Between 1951 and 1990 the United States Department of Energy

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<sup>394</sup> H.R. REP. NO. 95-564, at 137 (1977).

<sup>395</sup> See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 301(b), 91 Stat. 685, 770 (codified at 42 U.S.C. § 7602(e) (1994)).

<sup>396</sup> See *supra* notes 389-95 and accompanying text.

<sup>397</sup> See *supra* notes 389, 393-94.

<sup>398</sup> See H.R. REP. NO. 95-294, at 200 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1279.

<sup>399</sup> 503 U.S. 607 (1992).

("DOE") operated a uranium processing facility at Fernald, Ohio.<sup>400</sup> In 1986 the State of Ohio sued DOE in federal district court for violating state and federal pollution laws,<sup>401</sup> including the Clean Water Act ("CWA")<sup>402</sup> and the Resource Conservation and Recovery Act of 1976 ("RCRA").<sup>403</sup> Along with equitable relief and damages, Ohio sought both state and federal civil penalties against DOE for past violations of the CWA, RCRA, and supplementing state laws.<sup>404</sup>

The district court held that both the CWA and RCRA waived the federal government's sovereign immunity to civil penalties in both acts' citizen suit and federal facility sections.<sup>405</sup> The U.S. Court of Appeals for the Sixth Circuit affirmed in part; it held that Congress had waived sovereign immunity for civil penalties in the CWA's federal facilities section and in RCRA's citizen suit section, but not in RCRA's federal facilities section.<sup>406</sup> The Supreme Court granted certiorari to determine "whether Congress ha[d] waived the National government's sovereign immunity from liability for civil

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<sup>400</sup> A private contractor, on behalf of DOE, operated the Feed Materials Production Center ("FMPC") at Fernald, Ohio. The FMPC processed uranium for the nation's nuclear weapons program. The facility sat over Ohio's Great Miami aquifer, a sole source aquifer for southwestern Ohio. During its thirty-six years of operation, the FMPC disposed of approximately 892,000 cubic yards of waste, including 12.7 million pounds of uranium and 176,000 pounds of thorium, in waste pits at the facility. It also had released approximately 340,000 pounds of radioactive dust into the air. Eventually the waste in the pits began to leak into the aquifer. DOE permanently shut down the facility on October 1, 1990. Ohio alleged that DOE had improperly disposed of hazardous wastes into the air, water, and soil in violation of RCRA and the CWA. See Daniel Horne, *Federal Facility Environmental Compliance After United States Department of Energy v. Ohio*, 65 U. COLO. L. REV. 631, 641-43 (1994).

<sup>401</sup> See *Ohio v. Department of Energy*, 689 F. Supp. 760, 761 (S.D. Ohio 1988).

<sup>402</sup> 33 U.S.C. §§ 1251-1387 (1994).

<sup>403</sup> In this case, RCRA refers to the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §§ 6901-6992k (1994), as amended by the Resource Conservation and Recovery Act.

<sup>404</sup> See 503 U.S. at 612.

<sup>405</sup> See 689 F. Supp. at 767. The CWA's citizen suit provision is at section 505. See 33 U.S.C. § 1365 (1994). RCRA's citizen suit provision is at section 7002. See 42 U.S.C. § 6972 (1994). The CWA's federal facilities provision is at section 313. See 33 U.S.C. § 1323 (1994). RCRA's federal facilities provision is at section 6001. See 42 U.S.C. § 6961 (1994).

<sup>406</sup> See *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1062, 1065. (6th Cir. 1990).

finer imposed for past failure to comply with the CWA, RCRA, or state law supplementing the federal regulation.”<sup>407</sup> The Court, after analyzing the citizen suit and federal facilities sections of the two statutes, determined that Congress had not waived sovereign immunity from punitive fines<sup>408</sup> in either statute.<sup>409</sup>

The Court began its analysis by stating “that any waiver of the National Government’s sovereign immunity must be unequivocal,”<sup>410</sup> and that “[w]aivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires.”<sup>411</sup> Pursuant to this principle, the Court first examined the citizen suit sections, then the CWA’s federal facilities section, and then finally, RCRA’s federal facilities section.

The Court examined the two statutes’ citizen suit sections together because the sections were substantially similar.<sup>412</sup> Under both citizen suit

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<sup>407</sup> 503 U.S. at 612-13.

<sup>408</sup> The Court referred to the disputed fines in this case as “punitive.” *See id.* at 613-14.

<sup>409</sup> *See id.* at 619-20, 623, 626, 628-29.

<sup>410</sup> *Id.* at 615 (citing *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980)).

<sup>411</sup> *Id.* (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983)); *see also McMahon v. United States*, 342 U.S. 25, 27 (1951); *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927).

<sup>412</sup> *See* 503 U.S. at 615-16. The Court quoted portions of each statute’s citizen suits section that it determined to be pertinent. From CWA section 505(a) it quoted:

[A]ny citizen may commence a civil action on his own behalf—

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

. . . .

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

*Id.*; *see also* Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1994). From RCRA section 7002(a), the Court quoted:



sections, a state could sue as a citizen.<sup>413</sup> Also, both sections subjected the United States to citizen suits, and both sections incorporated each statute's civil penalties sections.<sup>414</sup> The Court refused to accept Ohio's argument that, by incorporating the statutes' civil penalties sections, the citizen suit sections subjected federal agencies to civil penalties.<sup>415</sup> The majority read the incorporation as "encompassing all the terms of the penalty provisions, including their limitations."<sup>416</sup> The Court noted that each statute applied civil penalties only to "persons," and that "neither statute define[d] 'person' to include the United States."<sup>417</sup> Thus, the Court concluded that the two statutes' civil penalties sections did not apply to the United States.<sup>418</sup> Consequently, neither

[A]ny person may commence a civil action on his own behalf—

- (1)(A) against any person (including . . . the United States) . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
- (B) against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

....

The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, . . . and to apply any appropriate civil penalties under [42 U.S.C. §§ 6928(a) and (g)].

*Id.* at 616; *see also* RCRA § 7002(a), 42 U.S.C. § 6972(a) (1994).

<sup>413</sup> *See* 503 U.S. at 613 n.5, 616.

<sup>414</sup> *See id.* at 615-16.

<sup>415</sup> *See id.* at 616-17, 620.

<sup>416</sup> *Id.* at 617.

<sup>417</sup> *Id.*

<sup>418</sup> *See id.* at 619.

statutes' citizen suit sections waived the United States' immunity to civil penalties.<sup>419</sup>

Next the Court examined the CWA's federal facilities section.<sup>420</sup> The State of Ohio argued that the section's use of the word "sanction" waived the United States' immunity to fines.<sup>421</sup> The Court found that the term "sanction" could imply either punitive fines or coercive fines.<sup>422</sup> Punitive fines encourage persons to obey the law by punishing substantive violations; on the

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<sup>419</sup> See *id.* at 619-20.

<sup>420</sup> Section 313 of the CWA has not changed since the Court examined it in *United States Department of Energy v. Ohio*. See 33 U.S.C. § 1323 (1994). It is similar to CAA section 118 (*Control of pollution from Federal facilities*), which states:

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 respecting the control and abatement of air pollution in the same manner, and to the same extent as any non-governmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any record-keeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, (C) to the exercise of any Federal, State, or local administrative authority, and (D) 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 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.

Clean Air Act § 118(a); 42 U.S.C. § 7418(a) (1994). Representative Peter DeFazio (Democrat-Oregon) recently introduced legislation to amend section 313 of the CWA to waive sovereign immunity for civil and administrative fines and penalties. The legislation also would amend section 502(5) of the CWA to include federal facilities within the statute's definition of "person." See H.R. 2222, 106th Cong. § 5 (1997).

<sup>421</sup> See 503 U.S. at 620.

<sup>422</sup> See *id.* at 621.

other hand, courts use coercive fines to compel parties to obey court orders.<sup>423</sup> Whenever the section employed the term “sanction,” the section included it within the phrase “process and sanctions.”<sup>424</sup> Thus, the Court reasoned that the section only referred to “sanction” in the context of enforcing “process.”<sup>425</sup> The Court concluded that the section only waived immunity to coercive fines, not punitive fines.<sup>426</sup>

Next, the Court examined modifying language in the federal facilities section, which stated that “the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.”<sup>427</sup> The Court conceded that this language could suggest that the civil penalties arising under federal law may include punitive fines.<sup>428</sup> However, it noted that, “[a]s far as federal law is concerned, the only available source of authority to impose punitive fines is the civil-penalties section, . . . [but] . . . that section does not authorize liability against the United States, since it applies only against ‘persons,’ from whom the United States is excluded.”<sup>429</sup> Conversely, had the statute’s definition of “person” included federal agencies, federal agencies would be subject to punitive fines.

Finally, the Court examined RCRA’s federal facilities section. It rejected Ohio’s argument that the section, by subjecting federal agencies to “all Federal, State, interstate, and local requirements,” explicitly waived federal sovereign immunity from punitive fines.<sup>430</sup> The Court, referring to its earlier rationale distinguishing between punitive and coercive penalties, determined that the section subjected federal agencies only to the substantive

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<sup>423</sup> See *id.* at 621-22.

<sup>424</sup> See *id.* at 622.

<sup>425</sup> See *id.* at 623.

<sup>426</sup> See *id.*

<sup>427</sup> *Id.* at 637 (quoting 33 U.S.C. § 1323(a) (1988)). CAA section 113(a) does not contain this language. See 42 U.S.C. § 7413(a) (1994). However, the Court’s analysis demonstrates that the civil penalties section can provide a separate waiver of sovereign immunity if the statute’s general definition of “person” includes federal facilities. See 503 U.S. at 624.

<sup>428</sup> See 503 U.S. at 624.

<sup>429</sup> *Id.*

<sup>430</sup> See *id.* at 627-28.

standards and coercive sanctions under RCRA.<sup>431</sup>

d. *The Federal Facility Compliance Act of 1992*

Soon following, but not directly in response to the Court's opinion in *United States Department of Energy v. Ohio*, Congress passed the Federal Facility Compliance Act of 1992 ("FFCA").<sup>432</sup> The FFCA amended RCRA section 6001 to expressly waive the United States' immunity to "all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."<sup>433</sup> Additionally, the FFCA included federal agencies in RCRA's general definition of "person."<sup>434</sup>

In June, 1991, while considering the FFCA legislation, the House Energy and Commerce Committee commented that, "the failure to explicitly mention federal agencies in the original definition of 'person' in RCRA has led some courts to the erroneous conclusion that federal agencies are not covered by the same sanctions and enforcement mechanisms as other persons."<sup>435</sup> The Committee stated that, by including federal agencies within RCRA's definition of "person," "RCRA will now parallel the Clean Air Act . . . which treat[s] federal agencies as 'persons.'"<sup>436</sup> While addressing the source of payments for civil penalties, the Committee noted that "[t]he United States is subject to civil penalties for violations of state or local air pollution regulations pursuant to Section 118 of the Clean Air Act."<sup>437</sup> Congress did

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<sup>431</sup> See *id.* at 628.

<sup>432</sup> Pub. L. No. 102-386, 106 Stat. 1505 (1992) (amending the Solid Waste Disposal Act).

<sup>433</sup> *Id.* § 102(a)(3), 106 Stat. at 1505 (codified at 42 U.S.C. § 6961(a) (1994)). Congress also inserted the following language into RCRA section 6001(a): "No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer." *Id.* § 102(a)(4), 106 Stat. at 1505 (codified at 42 U.S.C. § 6961(a) (1994)).

<sup>434</sup> See *id.* § 103, 106 Stat. at 1507 (codified at 42 U.S.C. § 6903(15) (1994)).

<sup>435</sup> H.R. REP. NO. 102-111, at 18 (1991), reprinted in 1992 U.S.C.C.A.N. 1287, 1304.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 15, reprinted in 1992 U.S.C.C.A.N. 1287, 1301.

not similarly amend the federal facilities sections in either the CWA or the CAA,<sup>438</sup> nor did it amend the CWA to include federal agencies within its general definition for "person."<sup>439</sup>

This history suggests that Congress specifically intended to subject federal agencies to section 113(d) enforcement measures when it included federal agencies within the Act's definition of "person" in the 1977 amendments. When the Supreme Court reviewed the federal facilities sections of the CWA and RCRA in *United States Department of Energy v. Ohio*, neither statute included federal agencies within their definitions of "persons." Thus, the Court's decision in *United States Department of Energy v. Ohio* should not prevent EPA from assessing section 113(d) penalties against federal agencies.

## 2. *The Constitution Does Not Preclude EPA from Assessing Section 113(d) Penalties against Federal Agencies*

The DOJ Office of Legal Counsel correctly concluded that EPA can assess section 113(d) penalties consistently with Articles II and III of the Constitution. EPA may avoid these constitutional concerns by affording federal facilities opportunities to consult with the Administrator and to resolve any disputes within the executive branch.<sup>440</sup>

### a. *Article III, Cases and Controversies*

According to the Office of Legal Counsel, "lawsuits between two

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<sup>438</sup> Congress last amended CAA section 118(a) in 1990 when it subjected federal agencies to "any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program." Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(e), 104 Stat. 2409, 2399 (codified at 42 U.S.C. § 7418(a) (1994)).

<sup>439</sup> CWA section 502(5) defines "person" as follows: "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (1994).

<sup>440</sup> See *supra* VI.B.2.

federal agencies are not generally justiciable.”<sup>441</sup> Although this is likely true for any possible disputes over section 113(d) penalties, the Supreme Court has not ruled that disputes between federal agencies are per se non-justiciable. Two significant cases help delineate the Court’s position.

In *United States v. Interstate Commerce Commission*,<sup>442</sup> the United States, as a shipper of goods, filed a complaint with the Interstate Commerce Commission (“ICC”) against several railroads claiming that they had imposed unreasonable rates upon the United States in violation of the Interstate Commerce Act.<sup>443</sup> The ICC ruled against the United States.<sup>444</sup> When the United States sued the ICC to set aside the Commission’s order, the district court dismissed the complaint on the theory that the United States could not sue itself.<sup>445</sup> The Supreme Court reversed.<sup>446</sup> The Court held that the controversy was the type that was “traditionally justiciable,” because the “basic question [was] whether [the] railroads [had] illegally exacted sums of money from the United States.”<sup>447</sup> The United States, as a shipper of goods, and the railroads were the “real parties in interest.”<sup>448</sup>

In *United States v. Nixon*,<sup>449</sup> President Richard Nixon had appointed an independent special prosecutor to investigate the Watergate scandal, but when the prosecutor subpoenaed the President’s tapes and records, President Nixon resisted.<sup>450</sup> He argued that the Court lacked jurisdiction to interfere in

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<sup>441</sup> Cannon and Miller Memorandum, *supra* note 343, at 4, 9 (quoting the Fair Housing Act Memorandum, *supra* note 298, available in 1994 OLC LEXIS 11, at \*12); see also Barr Memorandum, *supra* note 304, at 138. But see Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 910-14 (1991); Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317, 331-41 (1990).

<sup>442</sup> *United States v. Interstate Commerce Comm’n*, 337 U.S. 426 (1949).

<sup>443</sup> *See id.* at 428-29.

<sup>444</sup> *See id.* at 429.

<sup>445</sup> *See id.*

<sup>446</sup> *See id.* at 430.

<sup>447</sup> *Id.*

<sup>448</sup> *See id.* at 431-32.

<sup>449</sup> 418 U.S. 683 (1974).

<sup>450</sup> *See id.* at 683.

an intra-branch dispute.<sup>451</sup> The Supreme Court, rejecting President Nixon's argument, stated that "[t]he mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."<sup>452</sup> The Court found that the disclosure issues were "traditionally justiciable."<sup>453</sup> It also determined that the special prosecutor's asserted need for the tapes and the President's interest in protecting the confidentiality of his communications assured "concrete adverseness."<sup>454</sup> Finally, the Court concluded that "[i]n light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability."<sup>455</sup>

Together, *Interstate Commerce Commission* and *Nixon* create a two-pronged analysis: First, is the dispute the type that is traditionally justiciable? Second, does the setting of the dispute assure concrete adversity between parties?<sup>456</sup> Where the dispute is between two federal agencies, the court should ask: Who are the real parties in interest? If one of the agencies is simply standing in for private interests, the controversy most likely will be justiciable.<sup>457</sup> However, where both agencies are disputing their obligations to execute the laws, such as environmental compliance disputes between EPA and federal facilities, the disputes are non-justiciable and best resolved within

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<sup>451</sup> See *id.* at 692-93.

<sup>452</sup> *Id.* at 693.

<sup>453</sup> See *id.* at 697.

<sup>454</sup> See *id.*

<sup>455</sup> *Id.*

<sup>456</sup> See *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1082 (D. Colo. 1985); see also Steinberg, *supra* note 441, at 337.

<sup>457</sup> See *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89 (1983) (rejecting a FLRA ruling that required ATF to pay a union representative's travel expenses); *Udall v. Federal Power Comm'n*, 387 U.S. 428 (1967) (ruling in favor of the Secretary of the Interior and barring the Federal Power Commission from awarding a license for a hydroelectric power project); *Secretary of Agric. v. United States*, 347 U.S. 645 (1954) (permitting the Secretary of Agriculture to intervene on behalf of agriculture interests to challenge an Interstate Commerce Commission order).

the executive branch.<sup>458</sup>

The Office of Legal Counsel can claim confidently that these inter-agency disputes will not appear before any federal courts.<sup>459</sup> CAA section 113(d)(4) permits, but does not require, a person receiving either a section 113(d)(1) or (3) penalty to seek review in a federal district court.<sup>460</sup> A federal agency cannot seek judicial review of a section 113(d) penalty without first obtaining DOJ's approval and assistance.<sup>461</sup> Furthermore, under section 113(d)(5), the Administrator must request the Attorney General to bring civil actions in federal district courts to collect civil penalties under the program.<sup>462</sup> Thus, the Attorney General can ensure that no federal agency files suit in a

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<sup>458</sup> See *Ability of the Environmental Protection Agency to Sue Another Government Agency*, 9 Op. Off. Legal Counsel 99, 100 (1985).

<sup>459</sup> See Barr Memorandum, *supra* note 304, at 141.

<sup>460</sup> CAA § 113(d)(4) states in part: "Any person against whom a civil penalty is assessed under paragraph (3) of this subsection or to whom an administrative penalty order is issued under paragraph (1) of this subsection *may* seek review of such assessment in [a] United States District Court . . . ." 42 U.S.C. § 7413(d)(4) (1994) (emphasis added).

<sup>461</sup> Section 516 of Title 28 provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516 (1994). Section 519 of Title 28 provides:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

*Id.* § 519.

<sup>462</sup> CAA section 113(d)(5) states in part:

If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order—

(A) after the order or assessment has become final, or

(B) after a court in an action brought under paragraph (4) has entered a final judgement in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed . . . .

42 U.S.C. § 7413(d)(5).



federal district court against another federal agency under section 113(d), thereby avoiding any Article III justiciability issue.

b. *Article II, Unitary Executive*

The unitary executive doctrine does not preclude EPA from imposing administrative penalties upon federal agencies; it merely affords the President the opportunity to settle intra-branch disputes.<sup>463</sup> In 1987 F. Henry Habicht II, Assistant Attorney General for Land and Natural Resources Division of the DOJ, testified before a House of Representatives subcommittee concerning federal facility compliance with environmental laws.<sup>464</sup> In his prepared statement, Mr. Habicht explained that the unitary executive doctrine stems from the President's constitutional duty to supervise the affairs of the executive branch and to "take care that the Laws [are] faithfully executed."<sup>465</sup> Accordingly, this duty gives the President "authority to exert 'general administrative control over those executing the law.'"<sup>466</sup> The basic principle under this doctrine is that the Constitution vests the executive power in a single person, the President, who alone is accountable to the American people for the actions of all executive agencies.<sup>467</sup> Thus, the President, to ensure that the executive branch speaks with a single voice, is responsible for settling controversies within the executive branch either by himself or by establishing procedures to settle controversies within the branch.<sup>468</sup> The President is ultimately responsible "to ensure that executive agencies comply with environmental laws."<sup>469</sup> However, under the unitary executive doctrine no agency may sue another executive agency, nor order another agency to

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<sup>463</sup> See *infra* text accompanying notes 471-75.

<sup>464</sup> Habicht Statement, *supra* note 304, at 206-14.

<sup>465</sup> *Id.* at 207 (quoting U.S. CONST. art. II, § 3).

<sup>466</sup> *Id.* (citing *Myers v. United States*, 272 U.S. 52, 161-64 (1926) (stating that the President can remove an executive officer without the Senate's advice and consent and that Article II empowers the President to supervise and guide Executive Branch officers in order to secure a unitary and uniform execution of the laws)).

<sup>467</sup> See *id.* at 208, 210.

<sup>468</sup> See *id.* at 209.

<sup>469</sup> *Id.* at 210.

comply with an administrative order, “without the prior opportunity to contest the order within the Executive Branch.”<sup>470</sup>

The President already has established procedures to settle environmental compliance controversies within the executive branch. Under Executive Order 12,088, the Administrator of EPA must first attempt to resolve conflicts over pollution control standards.<sup>471</sup> If the Administrator cannot resolve the conflict, the agencies may submit the dispute to the Director of the Office of Management and Budget to resolve.<sup>472</sup> If there is a dispute over jurisdiction or other legal issues, the Attorney General resolves the controversy.<sup>473</sup>

Section 113(d) does not frustrate these mechanisms that the President

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<sup>470</sup> *Id.*

<sup>471</sup> See Exec. Order No. 12,088, 3 C.F.R. 243 (1979), *reprinted as amended in* 42 U.S.C. § 4321 (1994).

<sup>472</sup> Executive Order 12,088 provides in part:

I-602. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation between Executive agencies and, on request of any party, such conflicts between an Executive agency and a State, interstate, or a local agency. If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

*Id.* “Such violation” refers to pollution control standards. See *id.*

<sup>473</sup> Executive Order 12,146 provides in part:

I-401 Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

I-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding to any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

Exec. Order No. 12,146, 3 C.F.R. 409 (1980), *reprinted as amended in* 28 U.S.C. § 509 (1994). On July 16, 1997, pursuant to Executive Order 12,146, the DOJ’s Office of Legal Counsel resolved the dispute between DOD and EPA over whether EPA may apply section 113(d) enforcement measures against federal agencies. See Cannon and Miller Memorandum, *supra* note 343.

has created to resolve interagency disputes. As discussed above, section 113(d) does not require the courts to resolve any disputes between EPA and other federal agencies.<sup>474</sup> Additionally, the Attorney General can ensure that no federal agency files suit in a federal district court against another federal agency over a section 113(d) penalty.<sup>475</sup> In summary, EPA may assess section 113(d) penalties against other federal agencies as long as it abides by the President's dispute resolution mechanisms—namely, by providing an opportunity to consult with the Administrator and raise disputes to either the Office of Management and Budget or the Attorney General.

### 6. *Hearing Procedures for Federal Agencies*

EPA's current proposal does not provide an opportunity for federal agencies to either consult with the Administrator or seek review of disputes outside EPA. Under the part 59 procedures that EPA is proposing for the field citation program, any person, including a federal facility, receiving a citation, can request an informal administrative hearing before a hearing officer.<sup>476</sup> The hearing officer likely will be a regional office employee who otherwise is not involved in the case.<sup>477</sup> After the hearing, the hearing officer will recommend action to the regional administrator who will make the final agency decision.<sup>478</sup> The Environmental Appeals Board ("EAB") may sua sponte review the decision; however, the person receiving the citation does not specifically have the right to EAB review.<sup>479</sup> In denying a federal agency the opportunity to consult with the Administrator before a penalty becomes final, the proposed rule conflicts with Executive Order 12,088, which requires the Administrator of EPA to attempt to resolve environmental enforcement conflicts with executive agencies.<sup>480</sup> At a minimum, EPA must

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<sup>474</sup> See *supra* notes 459-62 and accompanying text.

<sup>475</sup> See *supra* note 462 and accompanying text.

<sup>476</sup> See Field Citation Program, 59 Fed. Reg. 22,776, 22,786, 22,792 (1994) (to be codified at 40 C.F.R. pt. 59) (proposed May 3, 1994).

<sup>477</sup> See *id.* at 22,787, 22,793.

<sup>478</sup> See *id.* at 22,788, 22,795.

<sup>479</sup> See *id.*

<sup>480</sup> See Exec. Order No. 12,088, *supra* note 471-72.

afford executive agencies the opportunity to appeal regional administrator decisions to the Administrator.<sup>481</sup>

DOD wants EPA to afford federal agencies part 22 hearing procedures for field citations.<sup>482</sup> It argues that section 118(a) requires EPA to treat federal facilities "in the same manner, and to the same extent as any nongovernment entity."<sup>483</sup> Since federal agencies cannot seek section 113(d)(4) judicial review, EPA should afford federal agencies part 22 hearing procedures as an alternative to judicial review.<sup>484</sup> This would be consistent with the procedures EPA affords federal agencies under RCRA.<sup>485</sup> Under a part 22 scheme, a federal facility incurring a field citation could request an administrative hearing before a regional hearing officer, appeal that officer's decision to the EAB, and appeal the EAB's ruling to the Administrator.

There are several reasons why EPA should afford federal agencies part 22 hearing procedures under the field citation program. First, it will substantially limit the number of disputes federal agencies will raise to the Administrator. Part 22 procedures, with appeal by right to the EAB, will address and resolve most issues federal agencies might raise. Second, taking the final agency decision away from the regional administrators and applying the part 22 procedures will make the program more consistent throughout the country. This is especially important for federal agencies, such as DOD, that operate throughout every region in the country. Third, agencies enjoying part 22 procedures are less likely to raise field citation disputes outside EPA to

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<sup>481</sup> EPA may have recently changed their position on this issue. In their memorandum to the Office of Legal Counsel, EPA stated that federal agencies will have the opportunity to consult with the Administrator before any penalty is final. See Cannon and Miller Memorandum, *supra* note 343, at 8 (citing *Memorandum on Assessment of Administrative Penalties Against Federal Facilities Under the Clean Air Act* (September 11, 1995), at 5).

<sup>482</sup> See DOD Comments, *supra* note 194, at 1-3.

<sup>483</sup> *Id.* (citing Clean Air Act § 118(a), 42 U.S.C. § 7418(a) (1994)).

<sup>484</sup> See *id.* at 2.

<sup>485</sup> EPA affords part 22 procedures for any civil penalties under RCRA sections 3008 (Hazardous Waste Management: Federal enforcement), 9006 (Regulation of Underground Storage Tanks: Federal enforcement), and 11005 (Medical Waste Tracking Program: Enforcement). See 40 C.F.R. § 22.01(a)(4) (1996); see also Federal Facility Compliance Act; Enforcement Authorities Implementation, 58 Fed. Reg. 49,044 (1993).

either OMB or DOJ. Thus, EPA will maintain greater control over the program. Finally, EPA will consistently enforce environmental laws on federal facilities if it affords federal facilities hearing procedures under the CAA similar to those under RCRA.

## VII. CONCLUSION

It appears that EPA is trying to create a field citation program that will give the regions greater flexibility and authority to enforce the CAA. It also appears that EPA is not creating a true field citation program. In developing the field citation program, EPA should not lose sight of the program's goals: to deter minor violations; to preserve the Agency's resources; and to encourage violators to promptly correct their violations and pay their penalties. The Agency's proposal has three problems: it does not adequately define "minor violations;" it attempts to impose an improper maximum penalty; and EPA officials will issue most field citations from their offices, rather than in the field.

The Agency has declined to fully define "minor violations." Instead, EPA lists several factors that determine whether violations are minor. However, the Agency does not completely explain the factors. Thus, the Agency gives considerable discretion to the various regional inspectors. To develop an efficient field citation program, EPA either should devise a comprehensive list of minor violations and appropriate penalties, or it should explain fully the factors that EPA officials should consider in identifying minor violations.

The Agency believes that it can impose penalties of \$5000 a day for each violation. This interpretation misreads the clear language of section 113(d)(3). It also conflicts with the goal of encouraging violators to promptly correct their violations and pay their penalties. While a greater maximum penalty amount will deter minor violations of the Act, it will also encourage recipients to challenge large penalties. The Agency will overextend its resources addressing these challenges. EPA should limit field citation penalties to \$5000 for each day of violation, and cap the total penalty amount at \$25,000.

The Agency plans to permit its officials to base field citations on information from state and local inspectors. Perhaps EPA needs to use such information because the state and local authorities perform the vast majority of the inspections under the Act. However, this reliance on state information will likely result in EPA officials issuing more field citations from their

offices than from the field. Thus, the citations will not have the direct and immediate impact of a traffic ticket that an officer issues to a violator on the spot. If EPA officials use second-hand information to issue field citations, they should verify the information and consider any explanations they receive from the citation recipients. Otherwise, EPA officials might issue field citations when circumstances do not justify them. This potential for unjustified citations, too, will encourage more recipients to challenge their citations.

If EPA intends to address the major issues through guidelines it will need to submit some of the guidelines for public comment. The Agency must submit to public comment any guidelines that identify minor violations or calculate appropriate penalties because they will affect significant private interests and restrict the EPA officials' discretion.

The CAA gives EPA authority to impose the field citation program on federal agencies, as federal agencies are "persons" under the CAA. Congress included federal agencies in the CAA's definition of "person" in order to subject them to all of the enforcement provisions in CAA section 113. While section 113(d)(3) does not state specifically that EPA may issue field citations to any person, it does refer to persons while discussing hearing procedures. Additionally, section 113(d)(1) of the CAA authorizes the Administrator to assess civil administrative penalties against any person.<sup>486</sup>

The Supreme Court's ruling in *United States Department of Energy v. Ohio* does not preclude EPA from applying the field citation program to federal agencies. In this case, the Court held that CAA section 118 does not waive the United States' immunity to civil penalties. However, the Court also stated:

As far as federal law is concerned, the only available source of authority to impose punitive fines is the civil-penalties section, [CWA] § 1319(d). But, as we have already seen, that section does not authorize liability against the United States,

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<sup>486</sup> CAA section 113(d)(1) states, in part: "The Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person . . . ." 42 U.S.C. § 7413(d)(1) (1994).

since it applies only against "persons," from whom the United States is excluded.<sup>487</sup>

Since a federal agency is a "person" under the 1990 version of the CAA, the CAA's civil-penalties section (CAA section 113) authorizes punitive fines against federal agencies for CAA violations.

The unitary executive doctrine does not preclude the EPA from imposing the field citation program against federal agencies. The Agency does not need to rely upon CAA section 118 for a waiver of sovereign immunity. Therefore, the section 118(a) requirement that federal agencies comply with administrative enforcement authority "in the same manner, and to the same extent as any nongovernmental entity," does not prevent EPA from applying the program to federal facilities. However, the unitary executive doctrine affords the President the opportunity to resolve disputes between agencies within the Executive Branch. The President issued Executive Orders 12,088 and 12,146 to resolve environmental enforcement disputes between executive agencies. Therefore, EPA must at least afford an executive agency the opportunity to consult with the Administrator when disputing a field citation. The best solution for EPA is to afford federal agencies part 22 procedures under the field citation program. This will keep administrative enforcement procedures for federal agencies consistent throughout the country and across the media statutes covering air pollution and solid waste. Also, part 22 procedures will free the Administrator from having to personally resolve numerous disputes between federal facilities and regional offices.

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<sup>487</sup> United States Dep't of Energy v. Ohio, 503 U.S. 607, 624 (1992).