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WHEN IS BROAD TOO BROAD? ENVIRONMENTAL LEGISLATION AND INTERPRETATION OF GOVERNMENT LIABILITY AT FEDERAL FACILITIES

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Although World War II concluded nearly a half-century ago, the effects of the most destructive war in our history are being felt far beyond the current political forum. Beyond the political effects so visible today in the new Germany, Russia, and so painfully clear in Bosnia-Herzegovena are the war's environmental effects.

One might imagine that the environmental impact of a conventional war would be limited to the physical destruction of man-made structures and loss of life and further restricted to the geographic region in which the fighting took place. This is far from true, however, as the extent of environmental damage becomes apparent at Department of Defense ("DOD") and Department of Energy ("DOE") facilities in the U.S. The government primarily developed and used these facilities during the build-up of the U.S. war machine in preparation for World War II and the subsequent Cold War.¹

In addition to its own munitions and research facilities, the federal government, through the President's wartime executive power, used differing degrees of force and coercion to enlist the resources and industrial manufacturing expertise of private corporations to help in its preparation for war.² Fifty years later the U.S. Government is attempting to place the burden of cleaning up the environmental disasters at these sights back onto the shoulders of private industry, in some cases corporations that did not even exist at the time the damage was done. Although the Government's attempt at avoiding liability is entirely understandable, its actions seem particularly insidious in light of the fact that the official estimate for a complete cleanup of the DOD sites alone is forty billion dollars over a

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1. *Cleaning Up Closing Bases Will Cost More, Take Longer than Estimated*, CBO Predicts, 23 Env't Rep. (BNA) 1385 (Sept. 11, 1992).

2. See generally Van S. Katzman, Note, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA. L. REV. 1191, 1197-1200 (1993).

span of thirty years, with some commentators predicting that actual costs will reach up to ten times that amount.³

Because of the growing tide of public concern for the environment and the subsequent legislative reaction by Congress, the question most often asked in response to this incredible problem is not "Should we clean it up?" but instead "Who will pay?" Congress addressed the issue of cleaning up the environment by enacting aggressive environmental policies throughout the 1970s and 1980s. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")⁴ and the Resource Conservation and Recovery Act ("RCRA")⁵ embody the most effective tools of the federal government's crusade against environmental destruction.

In each of these pieces of legislation, Congress has created a very broad power for the government to regulate all past, current and future environmental polluters. Included among these powers is the ability of the federal government to determine potentially liable parties and classes of parties.⁶ Although the liability originally created by these and other pieces of environmental legislation was intentionally broad, many courts have interpreted the legislation too narrowly when determining government liability for its pollution at federal facilities.⁷

In the majority of cases attempting to enforce environmental laws against the government for its own destructive activities, the government has invoked the traditional defense of sovereign immunity.⁸ Although sovereign immunity is a well-entrenched doctrine designed to protect our government's structure, it has frequently proven to be a barrier to achieving Congress' true intent rather than protection from unreasonable claims against the federal government.⁹

3. Keith Schneider, *Military Has New Strategic Goal in Cleanup of Vast Toxic Waste*, N.Y. TIMES, Aug. 5, 1991, at A1.

4. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992)).

5. Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992)).

6. See 42 U.S.C. § 9607(a) (defining persons or entities liable under CERCLA); see also, 42 U.S.C. §§ 6922-6924 (defining persons or entities liable under RCRA).

7. See Nelson D. Cary, Note, *A Primer on Federal Facility Compliance with Environmental Laws: Where Do We Go from Here?*, 50 WASH. & LEE L. REV. 801, 837-41 (1993).

8. See discussion *infra* part I.C.

9. See *id.*

The primary goal of this article is to give an overview of the trends in both the federal courts and in Congress of defining and clarifying the statutory intent underlying the environmental legislation. This article will also argue for a definite broadening of the interpretation given to the government liability schemes created by Congress in the environmental statutes. Most immediately, government liability can be increased through a judicial and arguably justifiable narrowing of the application of the defense of sovereign immunity. Ultimately, however, Congress needs to address its own shortcomings by clarifying its intent for the courts and government agencies.

As a result of the recent drastic changes in our nation's political landscape resulting from the election of a Republican-dominated Congress, the issues discussed in this article have become increasingly timely. The new Congress is faced with several approaches to environmental issues in general. First, Congress may play the hand that it has been dealt by keeping the existing statutory schemes in their current forms. Second, the new Congress could make the necessary clarification of intent as discussed in this article. Third, Congress could take this opportunity to learn from the mistakes made in the first generation of environmental legislation by creating an entirely new approach to environmental issues.

Although the third option, if exercised correctly, could prove to be the most efficient and effective method of furthering a more conservative agenda, it seems rather unlikely given the amount of time and political energy which such a change would require. It seems more likely, therefore, that the greatest source of clarification and change will come in the form of more minor adjustments to existing laws and regulations.

Part I of this paper will discuss the basic statutory schemes of CERCLA and RCRA and the federal government's sovereign immunity defense. Part II will briefly discuss two recent federal district court opinions, *Rospach Jessco Corp. v. Chrysler Corp.*¹⁰ and *Redland Soccer Club v. Department of the Army*,¹¹ prime examples of judicial legislation that have created an exception to what should become a trend in expanding government liability. The unfounded reasoning used by the courts in these two cases sends a call to Congress to act quickly to close the exception these courts have attempted to create. Part III will address Congress' recent response to the Supreme Court case *United States Department of*

10. 829 F. Supp. 224 (W.D. Mich. 1993).

11. 801 F. Supp. 1432 (M.D. Pa. 1992).

Energy v. Ohio,¹² which includes a clarification of its intent to hold the government liable through the Federal Facilities Compliance Act of 1992 ("FFCA").¹³ Part IV will look into the important decision *FMC Corp. v. United States Department of Commerce*,¹⁴ which has the potential to expand government liability to the numerous privately owned facilities that the DOD enlisted for use during the war effort in the 1940s. Finally, Part V will argue that when substantial questions of statutory interpretation arise, Congress needs to clarify its intent in order to provide courts the opportunity and direction to follow an established and clear path toward expanded government liability and a potentially cleaner, healthier environment. Without action by Congress to clarify its intent, the courts will most likely continue to infer from the environmental statutes that Congress intended to place the entire burden of the cleanup process on the shoulders of private entities while leaving the government free from responsibility for its own actions.

I. THE STATUTORY BASIS FOR FEDERAL ENVIRONMENTAL REGULATION

A. RCRA and the Management of Hazardous Waste

Congress passed RCRA in 1976 to provide a statutory scheme for the Environmental Protection Agency ("EPA") to regulate and control current and future disposal of hazardous and solid wastes¹⁵ which have the potential to directly affect the quality of groundwater, often used as drinking water.¹⁶ RCRA proceeds on the realistic notion that, while the complete prevention of all hazardous waste disposal is impossible, effective treatment of all such waste is unlikely.¹⁷ RCRA's statutory scheme is therefore not based on a series of bans but instead on a permitting process which requires every waste disposer to obtain a permit before it may

12. 112 S. Ct. 1627 (1992).

13. Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992).

14. 786 F. Supp. 471 (E.D. Pa. 1992), *aff'd*, 10 F.3d 987 (3d Cir. 1993).

15. WILLIAM H. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 6.3 (1977 & Supp. 1984), cited in Andrea Gross, Note, *A Critique of the Federal Facilities Compliance Act of 1992*, 12 VA. ENVTL. L.J. 691, 692 n.8 (1993).

16. RODGERS, *supra* note 15, § 4.3.

17. See generally 42 U.S.C. §§ 6901-6902.

dispose of that waste.¹⁸ Within RCRA's permitting system, Congress broadly defined waste disposers as "person[s]" in its attempt to prevent any entity, either public or private, from avoiding potential liability.¹⁹

In an attempt to ease the federal government's burden, RCRA encourages state involvement in the waste control process by providing states the opportunity to apply to EPA to have a state plan supplant the federal plan.²⁰ This crossover of jurisdiction has created numerous problems of enforcement, primarily when states attempt to enforce their own, often more stringent requirements, on federal facilities.²¹

In order to clearly define the liability of the federal government for waste disposal at its own facilities, Congress included within RCRA a provision that clearly requires that any entity of the federal government must comply with:

[a]ll Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . to the same extent, as any person is subject to such requirements Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.²²

Although this section intended to clarify the relationship between individual states' regulations and federal facility compliance,²³ it has

18. *Id.* § 6902.

19. *Id.* § 6903(15) (defining "person" to be "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.").

20. *Id.* § 6926.

21. *See infra* part III.

22. 42 U.S.C. § 6961.

23. *Ohio v. United States Dep't of Energy*, 689 F. Supp. 760, 762 (S.D. Ohio 1988). The court describes Congress' enactment of RCRA's then present form as a response to the Supreme Court's decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), (holding Clean Air Act and Federal Water Pollution Control Act did not clearly and unambiguously demonstrate congressional intent to subject federal facilities to state permit requirements).

spawned its own questions about the amount and types of liability to which Congress has intended the government to be subjected.²⁴

B. CERCLA and Liability for Cleanup of Past Wrongs

Congress passed CERCLA in 1980 for the purpose of cleaning up existing hazardous waste sites and determining who should pay the potentially enormous costs of those cleanups.²⁵ One of the most powerful and vital sections of CERCLA is its application of joint and severable liability to: any present or past owner or operator of a facility where hazardous wastes have been disposed, any person who "arranged for" the disposal of any hazardous waste at a site, or any person who transported waste to a site.²⁶

Congress also provided CERCLA with a federal facilities compliance section that appears to apply broad liability very much like the federal compliance requirements in RCRA. Congress subsequently amended CERCLA to require expressly federal facilities to comply with all of the rules, regulations, standards and all other hazardous material requirements established by EPA.²⁷ Those amendments also created the explicit authority for states to enforce removal and remedial actions at most federal sites.²⁸

Although Congress intended CERCLA to be a very broad and powerful tool with which to clean up both public and private hazardous waste sites, statutory interpretation of CERCLA has created an incredible amount of litigation. Much of this litigation stems from what one court called "vaguely drafted provisions and an indefinite, if not contradictory, legislative history."²⁹ The general rule of statutory construction in cases involving federal laws is to look first to the language of the statute and then to the legislative history if the statute is unclear.³⁰ The lack of legislative history promotes vastly differing views of Congress' true intent.

24. See *infra* part III.

25. 42 U.S.C. § 9607 (describing the liability created under the Act).

26. *Id.* § 9607(a)(1)-(4).

27. *Id.* § 9620(a)-(b), amended by Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

28. 42 U.S.C. § 9620(a).

29. *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985). See generally *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465 & n.1 (1986).

30. *Mottolo*, 605 F. Supp. at 901-02 (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Russello v. United States*, 464 U.S. 16, 20 (1983)).

Multiplying the potential cleanup costs of one site by DOD's more than eighteen hundred installations accentuates the magnitude of the government's potential liability under CERCLA.³¹ The situation is even more tenuous when one considers that courts have the power to assess such high amounts of liability based on their interpretation of the meaning of a single word in a statute. Along with this tenuous balance comes the unfortunate potential for judicial abuse and judicial legislation. As discussed below courts in several decisions have come perilously close to overstepping the bounds of their power by offering interpretations of statutes seemingly based more on the desired outcome than on the arguably true and clear intent of Congress.³²

C. *Sovereign Immunity as the Primary Government Defense*³³

The bases of sovereign immunity reach far beyond our nation's history into our Anglo-Saxon political roots and the concept that "the King can do no wrong."³⁴ This well established law in U.S. jurisprudence dates from the Supreme Court's early interpretation of the Supremacy Clause³⁵ and its decision in *McCulloch v. Maryland*,³⁶ providing that the federal government may not be sued absent its consent.³⁷ Waiver of the government's sovereign immunity must be unequivocal,³⁸ and even then the court must strictly construe the waiver in favor of the sovereign and not expand the doctrine "beyond what the language requires."³⁹

The doctrine of sovereign immunity has not gone without judicial criticism, and yet, as evidenced by Justice Miller's comments in *United States v. Lee*,⁴⁰ "while the exemption of the United States . . . from being subjected as defendant[] to ordinary actions in the courts has . . . been

31. Schneider, *supra* note 3.

32. See discussion *infra* parts II-IV.

33. See generally David W. Goewey, Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 WM. & MARY L. REV. 513 (1987).

34. See *Lansing v. County of McLean*, 359 N.E.2d 165, 167 (Ill. App. Ct. 1977).

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

36. 17 U.S. (4 Wheat.) 316 (1819).

37. *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941).

38. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

39. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)).

40. 106 U.S. 196 (1882).

repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."⁴¹ Significant problems arise when courts apply sovereign immunity blindly, without close consideration of the true congressional intent behind the legislation. Although the inquiry into the justifications for sovereign immunity has not been significantly furthered or discussed, modern courts should consider, even if only narrowly, the context outside the specific language of the statute to reach what might be a more accurate interpretation of congressional intent. In attempting to effectuate Congress' intent, courts should view both the statutory context of the language applied and the factual context of the case at hand.

Both the mass of legislation passed each session and especially the speed with which Congress drafted the environmental legislation precluded Congress from articulating its intent as clearly as possible. Therefore, it is judicious, as well as judicially efficient, to permit at least a small degree of flexibility in the application of sovereign immunity. This makes even more sense in light of the complex liability schemes in environmental legislation and the relative lack of informative legislative history behind acts such as CERCLA.

Despite the common law concept that the court should construe statutory language against the drafter, it is not clear what policy concern would cause a court to ignore the overall objective of a statute in order to provide the government with a degree of sovereign immunity that Congress almost certainly did not intend. In the end, the American taxpayer shoulders the burden either directly through taxes used for the government's cleanup of its sites or indirectly through lost jobs and decreased productivity of private industry when forced to clean up sites it is not responsible for polluting.

The next part discusses two federal district court cases which exemplify successful attempts by the government to avoid liability for its destructive activities by placing the costs of cleanup on the private parties who presently own the sites.

41. *Id.* at 207.

II. CURRENT OWNERSHIP REQUIREMENT OF CERCLA

In contrast to the two decisions in *FMC* discussed in Part IV, the district courts in *Rospatch Jessco Corp. v. Chrysler Corp.*⁴² and *Redland Soccer Club v. Department of the Army*⁴³ have created a loophole through which the government may avoid liability for environmental damage caused at sites previously, but not currently, owned and controlled by the government. Interpreting the “owner”/“operator” language of section 107(a)(4) of CERCLA,⁴⁴ to include only current owners or operators, the courts participated in semantic gymnastics and completely ignored the underlying intent of Congress to effectuate a cleanup of hazardous waste sites by the responsible parties.

A. *Redland Soccer Club v. Department of the Army*

In concluding that the United States had not waived its sovereign immunity under CERCLA for sites it no longer owns or operates, the court ignored the language of the Act as well as the fact that the government was the owner or operator of the site at the time of contamination.⁴⁵

The court based its decision on the tense used in section 120(a)(4), which states “at facilities owned or operated” and “to facilities which are not owned or operated.”⁴⁶ The court read the two phrases in the present tense, thereby clearly and unambiguously expressing congressional intent to hold only current owners and operators liable.⁴⁷ The plaintiff argued that the court could read the first sentence in the past tense, placing liability on the culpable government entity based on its actions in damaging the environment rather than on the current ownership of the site. In reply to this argument the court stated “[c]ommon sense and the rules of grammar belie such an assertion.”⁴⁸

42. 829 F. Supp. 224 (W.D. Mich. 1993).

43. 801 F. Supp. 1432 (M.D. Pa. 1992).

44. 42 U.S.C. § 9620(a)(4).

45. *Redland Soccer Club*, 801 F. Supp. at 1436.

46. 42 U.S.C. § 9620(a)(4).

47. *Redland Soccer Club*, 801 F. Supp. at 1436.

48. *Id.*

When read in context, however, it is not at all clear that the first sentence of section 120(a)(4) indicates present tense,⁴⁹ and it is much less apparent that Congress intended to limit liability to current owners and operators. Furthermore, reading the second sentence in context clarifies that, as a sentence of restriction, the sentence has the one purpose of requiring states under their environmental laws to treat federal facilities and privately owned or operated facilities on an equal basis and not to apply more stringent requirements on the federal facilities.⁵⁰ It is a stretch to infer that either of the two sentences indicates a restrictive intent by Congress to limit the potential liability of the federal government for its own destructive behavior merely because the government has passed title to the property.

When examined in light of the overall purpose of CERCLA, the weakness of this argument becomes clearer. In a footnote, the court cited the language of section 127(a)(2) which generally defines "owner" and "operator" and places liability on "any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"⁵¹ The court pointed to this language to demonstrate that Congress knew how to apply liability to past owners or operators of sites but chose not to use the same language in the federal facilities compliance section. According to the court, this decision to use different language implied that Congress intended to allow the government to avoid cleanup liability for sites it had sold to private parties.⁵² The court appeared to ignore completely the congressional intent indirectly expressed in the language it quoted from section 127(a)(2) as well as the explicit language just prior to section 120(a)(4) in section 120(a)(1).

The language of section 127 (a)(2) clearly places liability for the cleanup of a site on any party who owned or operated a facility during the time in which hazardous materials were disposed at the site. This follows

49. 42 U.S.C. § 9620(a)(4), which reads in part, "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States"

50. *Id.* The conclusion of this subsection reads, "The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality."

51. *Id.* § 9607(a)(2).

52. *Redland Soccer Club*, 801 F. Supp. at 1436 n.4.

directly from the underlying intent of Congress to impose joint and several liability on any party involved with disposal at a site—the ultimate goal being the effective cleanup of the site regardless of the insolvency of one or more of the parties.⁵³

The court's position that if Congress had intended the government to be liable for cleanup at sites it had previously owned at the time of disposal, it would have worded section 120(a)(4) precisely like section 127(a)(2), becomes even less tenable when one reads the language of section 120(a)(4) in context. section 120(a)(1) provides in part that

[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) *shall* be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, *including liability under [CERCLA section 120] section 9607 of this Title.*⁵⁴

Read in light of section 120(a)(1), it seems difficult to conclude that Congress only meant section 120(a)(4) to apply to those facilities currently owned or operated by the government. Even though section 120(a)(4) provides for the special circumstance which arises when a party attempts to enforce state law on a federal facility not listed on the National Priorities List,⁵⁵ there is no language suggesting congressional intent not to hold the government liable. By strictly applying the rules of grammar rather than adhering to congressional intent, it seems clear that the court in *Redland Soccer Club* made a stretch to allow the government to avoid atoning for its environmental sins.

*B. Rospatch Jessco Corp. v. Chrysler Corp.*⁵⁶

Following closely on the heels of the *Redland Soccer Club* decision, the District Court for the Western District of Michigan heard a contribution action similar to that in *Redland Soccer Club* and applied many of the

53. See *supra* notes 25-32 and accompanying text (discussing the broad foundations of CERCLA).

54. 42 U.S.C. § 9620(a)(1) (emphasis added).

55. See *infra* note 100 and accompanying text (discussing the National Priorities List).

56. 829 F. Supp. 224 (W.D. Mich. 1993).

same arguments made in *Redland Soccer Club*. The plaintiff corporation brought an action seeking contribution for costs incurred during the cleanup of soil and groundwater pursuant to both state and federal environmental laws, primarily CERCLA. According to the plaintiff's complaint, the Air Force was an owner/operator of the site from 1951 to 1954 and "exercised substantial control over and participation in the Site, including direct involvement in directing, designing, and supervising operations, and the generation and disposal of waste materials."⁵⁷

Much like the arguments made in *Redland Soccer Club*, the government claimed that Congress did not waive its sovereign immunity to suit under state environmental laws in CERCLA section 120(a)(4)⁵⁸ for facilities owned and operated in the past, despite the broad waiver of sovereign immunity immediately preceding CERCLA section 120(a)(1).⁵⁹ The court agreed with the government and found that Congress only intended to waive the government's sovereign immunity for cleanup at sites currently owned.⁶⁰

The court reached its decision after first discussing and rejecting the lower court's finding of government liability under the same section of CERCLA.⁶¹ The court then discussed the reading given to section 120(a)(4) by the court in *Redland Soccer Club*.⁶²

57. *Id.* at 225 (quoting plaintiff's complaint ¶ 17).

58. 42 U.S.C. § 9620(a)(4).

59. *Id.* § 9620(a)(1).

60. *Rospatch Jessco*, 829 F. Supp. at 227-29.

61. *Id.* at 227 (quoting *Tenaya Assocs. Ltd. Partnership v. United States Forest Serv.*, No. CV-F-92-5375 REC at 5 (E.D. Cal. May 18, 1993)). The section cited by the court in *Rospatch Jessco* states that:

[d]espite the holding of the Middle District of Pennsylvania in *Redland*, this court finds that section 9620(a)(4) [CERCLA § 120(a)(4)] unambiguously and unequivocally waives immunity in the case at bar. It is quite clear from the language of section 9620(a)(4) that the waiver expressed therein is meant to include all actions brought against the United States for harms which occur during a time when the United States owns or operates a facility. This reading preserves the present tense wording of the section (i.e. facilities which ARE owned or operated by the United States when the harm occurs), and provides the government a very clear limit on the waiver of sovereign immunity. As worded, § 9620(a)(4) specifically maintains sovereign immunity for 'past' harms, i.e. those harms which occurred before the time when the government owned or operated the facility.

Id. at 227.

62. *Id.* at 227-28.

In coming to the same ultimate conclusion that Congress did not waive sovereign immunity under section 120(a)(4), the court in *Rospatch Jessco* accepted most of the arguments put forth in the *Redland Soccer Club* decision. The court did not accept the finding in *Redland Soccer Club*, however, that Congress expressly intended the tense of the language in section 120(a)(4) to limit governmental liability and admitted that the language in the first sentence is ambiguous regarding the requirement for current ownership.⁶³ In attempting to clear up the ambiguity, the court looked not to the intent as expressed in section 120(a)(1) but to the second sentence of section 120(a)(4).⁶⁴

The court conceded that the second sentence of section 120(a)(4) is a sentence of limitation intended only to prevent a state from applying stricter standards to federal rather than private facilities. The court then played the same semantic game with tense as the court in *Redland Soccer Club* to find "the comparison is casted in the present tense, suggesting that the reference to 'facilities owned or operated by the United States' in the first sentence should be construed in the present tense as well."⁶⁵ The court tried to support this creative interpretation with a non-discussion of the legislative history, discussing Congress' overall intent apparently without paying any heed to its meaning. The court interpreted the brief legislative history as indicating "that the waiver provision was enacted to further strengthen the entire clean up program for the *current* federal facilities under section 120 of CERCLA."⁶⁶

In viewing the arguments in *Redland Soccer Club* and *Rospatch Jessco*, it seems rather shocking that these courts would have a reader believe that Congress created section 120 as an additional provision to ensure governmental compliance with CERCLA in the same fashion as private corporations while at the same time allowing the government to escape from liability by the mere happenstance of having disposed of the property sometime subsequent to polluting it.

The simplistic and poorly constructed decisions in *Redland Soccer Club* and *Rospatch Jessco* reveal that the courts' true rationale in reaching their decisions was not to apply the sections of CERCLA as Congress

63. *Id.* at 228.

64. *Id.*

65. *Id.* See *Redland Soccer Club*, 801 F. Supp. at 1436.

66. *Rospatch Jessco*, 829 F. Supp. at 228 (citing 132 CONG. REC. H9561 (daily ed. Oct. 8, 1986) (statement of Rep. Fazio, primary author of section 120); 132 CONG. REC. S14,895 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford)).

designed them but instead to provide a loophole through which the government and its agencies could avoid the potentially unlimited liability for the cleanup of sites they polluted.

Clearly the courts have had a difficult time identifying Congress' true intent and possibly have taken advantage of the opportunity to interpret the law so as to reach their desired outcome. At this point, Congress needs to step in and clarify its intent to prevent a simple misreading from becoming a much greater miscarriage of justice. Part III of the paper will discuss a recent case in which Congress has successfully taken just such an action. Part IV discusses a case in which the court successfully dealt with a similar legislative interpretation problem, effectively preventing the need for congressional amendment.

III. CONGRESSIONAL RESPONSE TO COURT-IMPOSED LIMITATIONS OF FEDERAL LIABILITY

The recent and somewhat controversial Supreme Court case, *United States Department of Energy v. Ohio*,⁶⁷ presents an example of judicial inefficiency and requisite congressional reaction created by the overbroad application of the defense of sovereign immunity in the realm of environmental regulation. Perhaps the primary reason the *Ohio* decision has received so much attention is not the controversial outcome of the case but instead the quick and forceful congressional reaction to the outcome.

In response to the finding by the Supreme Court that neither the Clean Water Act ("CWA")⁶⁸ nor RCRA waived the federal government's sovereign immunity from punitive civil fines,⁶⁹ Congress enacted the FFCA to ensure that federal facilities would be liable for their hazardous waste and therefore more likely to comply with RCRA and any other acts or requirements included in its power.⁷⁰

67. 112 S. Ct. 1627 (1992).

68. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (codified at 33 U.S.C.A. §§ 1251-1387).

69. *Ohio*, 112 S. Ct. 1627, 1635 (1992).

70. See Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) (reiterating Congress' intent to subject federal agencies and facilities to environmental regulation). Section 102(a)(3) of the act states:

The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for

Ohio initiated the action by filing suit against the DOE and its subcontractors for cleanup costs arising from the improper disposal of both radioactive and non-radioactive hazardous wastes at the government's Feed Materials Production Center in Fernald, Ohio, a 1,050 acre uranium processing plant.⁷¹ DOE moved to dismiss, but the district court denied the motion and found that the CWA and RCRA waived sovereign immunity from punitive fines. This waiver allowed Ohio to levy punitive fines against DOE, and indirectly against the federal government, for its violation of state and federal environmental statutes.⁷²

The district court based its finding first on its interpretation of the language of RCRA section 6001,⁷³ specifically the section providing that government agencies are subject to "all Federal, State, interstate, and local requirements, both substantive and procedural."⁷⁴ The court supplemented its decision with the fact that Congress had already amended RCRA to include section 6001 to clarify further its intent to hold federal facilities liable.⁷⁵

In reviewing *Ohio*,⁷⁶ the Sixth Circuit affirmed the district court's holding that Congress waived the federal government's sovereign immunity for civil punitive fines in the CWA but found that there was no such express waiver in RCRA.⁷⁷ The court distinguished the language of the two acts based on the CWA's provision subjecting federal facilities to "all requirements" and "sanctions" of federal and state law.⁷⁸

The circuit court determined that the inclusion of the word "sanctions" in the CWA and the lack of that language in RCRA provided sufficient grounds to infer a congressional intent to exclude government

isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

Id. § 102(a)(3).

71. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1059 (6th. Cir. 1990).

72. *Id.* at 1065.

73. *See supra* note 23 and accompanying text.

74. *See supra* note 23 and accompanying text.

75. *See supra* note 23 and accompanying text.

76. *Ohio*, 904 F.2d at 1058.

77. *Id.* at 1061. The court held that, while there is no general waiver, the citizen suit provision does waive sovereign immunity. *Id.*

78. *Id.* at 1063.

agencies from liability.⁷⁹ The court then interpreted the parenthetical in RCRA section 6001, listing the requirements to which the United States may be subjected, as a "suggestive rather than exhaustive" list but nevertheless refused to include monetary and civil penalties as intended by Congress.⁸⁰

In so finding the circuit court seemed to have discounted the overall intent of the acts to regulate and hold liable responsible parties, both public and private, for the illegal disposal of hazardous substances. The court cut directly against the standard it established earlier by deciding that when "determining whether a waiver is clear, the controlling factor is the 'underlying congressional policy.'"⁸¹ The court also ignored its additional caution that, "[w]hen Congress enacts a clear waiver, that waiver should not be 'thwarted by an unduly restrictive interpretation' in the courts."⁸² In fact the appellate court did not heed its own advice in construing the language of RCRA when it prevented the imposition of punitive civil fines on the government for its acts at the installation.

In its review of *Ohio*,⁸³ the Supreme Court engaged in an even more pained and convoluted semantic exercise in attempting to avoid placing liability on the responsible party. The Court offered an extensive interpretation of how it would like the statutes to read but ignored the underlying congressional intent to effectuate a thorough and efficient cleanup of the environment.⁸⁴

The Court first focused on the citizen suit sections of the CWA and RCRA. These provisions effectively authorize the district court to enforce any statutory requirement against any violator. In addition, the court may "order such person to take such other action as may be necessary, or both, . . . and to *apply any appropriate civil penalties* under [section 3008(a) of RCRA]."⁸⁵ The Court accepted this section as enabling district courts to levy punitive fines on violators but interpreted the section to exclude the United States from liability.⁸⁶ The Court focused on the RCRA and CWA

79. *Id.*

80. *Id.*

81. *Id.* at 1059 (quoting *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984)).

82. *Id.* at 1060 (quoting *Canadian Aviator v. United States*, 324 U.S. 215, 265 (1945)).

83. *Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992).

84. See *supra* part I.A-B.

85. *Ohio*, 112 S. Ct. at 1634 (1992) (emphasis added).

86. *Id.*

civil suit sections' failure to provide definitions of "person" and found them not to include the United States.⁸⁷

The majority also focused on the definition of "sanction" in CWA section 1323(a) providing for federal facilities compliance.⁸⁸ Despite the fact that the majority acknowledged the distinct possibility that "sanctions" could by definition include civil penalties, it went on to write civil penalties out of the plain meaning of the word, limiting its meaning in the context of the CWA only to penalties associated with judicial or administrative judgments.⁸⁹ In his dissent Justice White described the exercise used by the majority in limiting the meaning of the word "sanction" as "analytic gymnastics."⁹⁰ Justice White continued by citing the "ancient and sound rule of construction that each word in a statute should, if possible, be given effect."⁹¹

Congress reacted quickly to the majority's decision not to hold the government liable for civil penalties by enacting the FFCA.⁹² The FFCA serves two primary purposes: first, it allows states to impose civil penalties on the government for RCRA violations at federal facilities⁹³ and second, it authorizes EPA to impose administrative fines on federal agencies for those violations.⁹⁴

The FFCA illustrates the quick and efficient action Congress can take when the judiciary does not effectuate its intent. The relative ease of passing RCRA amendments should reinforce congressional use of statutory change as a means of clarifying its intent, especially in light of the extraordinary confusion surrounding the purpose of RCRA.

The next part provides an example of a situation where judicial scrutiny of congressional intent spares Congress from acting to clarify its intent. In this example, the courts evaluated the overall purpose of the environmental legislation in deciding whether to apportion to the government a share of clean-up costs of sites the government used during World War II.

87. *Id.* at 1634-35.

88. *Id.* at 1636.

89. *Id.* at 1637.

90. *Id.* at 1641.

91. *Id.* (citing *Crandon v. United States*, 110 S. Ct. 997, 1002 (1990)).

92. See *supra* notes 13, 70; see generally Gross, *supra* note 15.

93. FFCA § 102(a).

94. *Id.* § 102(b).

IV. A JUDICIALLY CREATED EXPANSION OF GOVERNMENT
LIABILITY FOR CLEANUP OF WORLD WAR II MILITARY
INDUSTRIAL SITES—POSSIBLY ON THE WAY

Beginning with the World War II effort and continuing throughout all United States military confrontations to date, DOD has used its enhanced wartime powers to engage numerous private corporations to help in the buildup of the nation's defense system.⁹⁵ The government is now attempting to invoke its sovereign immunity to avoid contributing its portion of the CERCLA cleanup costs at these sites.

The government seeks protection through an exception to CERCLA's liability scheme by claiming that its actions were not similar to those of a private party. This exception holds the government not liable for pollution created by the government in its capacity as a "mere regulator."⁹⁶ In many instances, however, the government's involvement was pervasive and reached far beyond mere regulatory functions.

Although the wartime production system was crucial to our nation's success, the entire burden for remedying the environmental destruction at these sites should not be placed solely on the private companies. Instead the parties should share the costs in relation to the amount of each party's involvement.⁹⁷ Because the federal government has played such a large

95. See *supra* notes 1-3 and accompanying text (briefly discussing the background of government enlistment of private industry during war buildup).

96. See *In re Paoli R.R. Yard PCB Litig.*, 790 F. Supp. 94 (E.D. Pa. 1992). The court found EPA not liable for the further release of hazardous materials because the release occurred as a result of the cleanup effort and was therefore a result of its purely regulatory role. *Id.* at 95-97. See also *United States v. Atlas Minerals and Chems., Inc.*, 797 F. Supp. 411 (E.D. Pa. 1992), a similar case in which the court found that "the waiver [of sovereign immunity] contained in [CERCLA § 120(a)(1)] only applies to situations in which the government has acted as a business" and "does not extend to situations in which EPA has undertaken response or remedial actions at a hazardous waste site." *Id.* at 420. This is because "when the EPA undertakes such actions, it is not acting like a private party; it is acting to ameliorate a dangerous situation that, but for the prior actions of the generators and transporters of the hazardous waste, would not exist." *Id.* at 421. See also *Reading Co. v. City of Philadelphia*, 155 B.R. 890, 897 (E.D. Pa. 1993).

97. Although CERCLA § 107(a)(1)-(4) provide for liability that has been almost universally interpreted as joint and several, § 107 also provides EPA and private parties the ability to sue other potentially responsible parties for a contribution to the cleanup costs. Before EPA can initiate a cleanup action it must create a list naming the "potentially responsible parties" ("PRP"), which can then be used in subsequent cost recovery or contribution suits. See Robert T. Lee, *Comprehensive Environmental Response, Compensation, and Liability Act*, in ENVIRONMENTAL HANDBOOK 267, 310-11 (J. Gordon

role in coercing these companies to engage in war production activities and has also benefitted from the productivity of these companies, the federal government should not be able to elude Congress' intent to hold it liable.⁹⁸

An example of a site where the government conducted extensive wartime materials production is the Avtex site in Front Royal, Virginia. FMC Corporation, the current owner of the facility, is suing the federal government for indemnification for some portion of the present and future cleanup costs already assessed against FMC.⁹⁹ The Avtex site has been on the National Priorities List since 1986.¹⁰⁰

The *FMC* decision is one of the most important pending cases in the area of government liability for military contractor non-compliance. Not only is it necessary for an understanding of the eventual outcome of federal liability for wartime production facilities, but the decision also provides very plausible arguments for a more expansive reading of the intent of federal environmental statutes to hold the government liable to the same degree as private entities.

From 1942 to 1945 DOD exercised its enhanced wartime powers to join in a cooperative project with the former owner of the Avtex facility, American Viscose. The project was intended to increase greatly the facility's production of high tenacity rayon, used during the war as a substitute for tire rubber.¹⁰¹ The manufacturing process required the treatment and disposal of hazardous waste.¹⁰² At the time of the government's involvement, there was no control or regulation of the disposal which caused extensive environmental damage to the site.¹⁰³

Arbuckle et al. eds., 1993).

98. *But see* Katzman, *supra* note 2. The author argues in part that the financial benefits to the private corporations should be given significant consideration when determining federal/private liability. *Id.* The author also argues for severely limiting government liability by narrowly interpreting CERCLA's "owner or operator" language, which would exempt the government's involvement as mere regulation rather than active participation. *Id.*

99. *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. 471 (E.D. Pa. 1992).

100. *Id.* The National Priorities List ("NPL") is the list of sites created by EPA ranking in descending order those sites most needing cleanup attention. 42 U.S.C. § 9605(a)(8)(B). A site must be on the NPL to qualify for long-term remedial action financed by the Superfund. 40 C.F.R. § 300.425(b)(1) (1994). *See generally* Lee, *supra* note 95, at 273-74.

101. *FMC*, 786 F. Supp. at 472.

102. *Id.*

103. *Id.*

In its decision, the district court found that the United States was an "operator" of the Avtex facility for the purpose of determining CERCLA liability for the cleanup of the site. This finding would have effectively dismantled the government's sovereign immunity by treating the government as a private actor and leaving the government liable for the cleanup of the sites it polluted.¹⁰⁴

Although withdrawn from record for rehearing, the appellate court's affirmation of the district court's decision provides a significant amount of guidance in how courts should look at cases involving hazardous waste liability arising from a partnership between government and the private sector. The Court of Appeals for the Third Circuit affirmed the district court's holding and further found that the government's activities would also fulfill the definition of an "arranger" under the same CERCLA section.¹⁰⁵

The court based its decision on the nature and extent of the activities engaged in by the government, differentiating between regulatory and non-regulatory activities.¹⁰⁶ Applying an objective test, the court found that an expansive use of the "'regulatory' exception . . . would 'undermine Congress' intent to ensure that those who benefit financially from a commercial activity should internalize the health and environmental costs of that activity into the costs of doing business.' If the United States, even as a regulator, acts in a commercial capacity, it should be held responsible for cleanup costs as a private business would be."¹⁰⁷

The court employed two tests originally designed to determine a parent corporation's degree of control over a subsidiary, to find the government's actions to be those of a private commercial actor.¹⁰⁸ Several of the relevant factors include:

[w]hether the person or entity controlled the finances of the facility; managed the employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit

104. *Id.* at 487.

105. *FMC Corp. v. United States Dep't of Commerce*, 10 F.3d 987 (3d Cir. 1993), *withdrawn*, [1994] 24 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,207 (3d Cir. Nov. 26, 1993).

106. *FMC*, [1994] 24 *Envtl. L. Rep.* (Envtl. L. Inst.) at 20,209-20,211.

107. *Id.* at 20210 (quoting *United States v. Azrael*, 765 F. Supp. 1239, 1245 (D. Md. 1991)).

108. *Id.*

from the facility, other than the payment or receipt of taxes.¹⁰⁹

In applying the facts found by the district court¹¹⁰ to these factors, the appellate court looked at the daily control the government exerted, as well as the fact that American Viscose would not have been producing the high tenacity rayon if not ordered to do so by the federal government. The court then highlighted the presence of government inspectors in the plant and the constant threat hanging over the manufacturer to comply or face the possibility that the government would seize the facility entirely.¹¹¹

In finding the government's activities to also be those of an "arranger," the court focused first on the nature of the governmental activity, including: building plants to supply raw materials to the facility, arranging for an increased labor force and supervising employee conduct. The government also controlled product-marketing and price. Taking all of these factors into consideration, the appellate court found that the government's participation in the partnership with American Viscose greatly exceeded that required to find the government liable for a portion of the cleanup costs.¹¹²

This decision, although not binding, provides an informative and well reasoned determination of congressional intent with regard to CERCLA and demonstrates a conscious effort by a reviewing court to avoid an unnecessarily narrow reading of the language of an environmental statute.

V. CONCLUSION

The forefront of environmental law continues to advance at an incredible pace. Litigation will continue to provide new questions and answers, some correct and some incorrect. The solutions developed by the courts are only temporary, however. Unless the new Congress is up to the task of creating the next generation of environmental statutes, to successfully attain the true goals contemplated by Congress, the new Congress must remain constantly involved in the continuing development

109. *Id.* (citing *United States v. New Castle County*, 727 F. Supp. 854, 869 (D. Del. 1989)).

110. *FMC*, 786 F. Supp. at 472-85.

111. *FMC*, [1994] 24 *Envtl. L. Rep.* (Envtl. L. Inst.) at 20,211.

112. *Id.*

of existing laws by adding to, simplifying and, most importantly, clarifying these laws.

The FFCA is a prime example of the action that Congress must take to fulfill its desire to clean up our environment. The Act states in no uncertain terms that the government is to be responsible for its own actions. If Congress does not continue to answer clearly the crucial questions raised by the interpretations of federal law, the courts will continue to construe the legislation narrowly and the defense of sovereign immunity broadly.

Sovereign immunity plays an important historical as well as rational role in protecting the government from claims to which it should not be subjected. It is clear, however, from both the language of the environmental statutes as well as Congress' reaction to the courts' misconstruction of congressional intent to hold the government liable, that in the case of environmental laws, courts should apply the defense less mechanically.

One hopes that, in the near future, congressional clarification of unclear statutes and regulations will obviate most of the questions regarding congressional intent. In the interim, however, courts should interpret environmental statutes mindful of the broad congressional intent and commitment to clean up the environment and should hold the government liable for the environmental destruction it has wreaked.