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Waiver of Sovereign Immunity - Did Congress Intend to Exempt Federal Facilities from Civil Penalties under the Clean Water Act - United States Department of Energy v. Ohio

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WAIVER OF SOVEREIGN IMMUNITY—Did Congress Intend to Exempt Federal Facilities From Civil Penalties Under the Clean Water Act? *United States Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992).

Fernald, Ohio, is the site of a 1,050-acre Department of Energy (DOE) uranium processing plant, known as the Feed Materials Production Center. The Fernald plant processes uranium for the production of nuclear weapons¹ and has been operated by private contractors under management contracts with the DOE.² In March 1986, the State of Ohio filed suit³ against the DOE, the Secretary of Energy, and DOE's private contractors,⁴ alleging violations of federal⁵ and state pollution laws.⁶ More specifically, Ohio's claims included illegal dumping of hazardous waste, inadequate monitoring to detect groundwater contamination from hazardous waste, and failing to inspect regularly. Ohio further claimed the Fernald plant had discharged excessive contaminants into the Great Miami River⁷ and had released radioactive contaminants into the air, soil and water, including wells on adjacent property.⁸ Based on these and additional claims, the State of Ohio asked for injunctive relief, damages, civil penalties and declaratory relief.⁹

DOE filed a motion to dismiss and stay on November 7, 1986.¹⁰ The hearing on DOE's motion to dismiss was held on January 28,

1. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1059 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

2. *Id.* The private contractors at the plant were NLO, Inc. and NL Industries, Inc. *Ohio v. United States Dep't of Energy*, 689 F. Supp. 760, 761 (S.D. Ohio 1988), *aff'd*, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

3. Charges were filed in federal district court for the Southern District of Ohio.

4. Brief for the Petitioner at 11, *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992) (Nos. 90-1341, 90-1517) [hereinafter Brief of Petitioner].

5. Federal claims were brought under the Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251-1376 (1988 & Supp. II 1990), the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1988), *as amended* by Federal Facility Compliance Act of 1992, 42 U.S.C.S. § 6961 (Law. Co-op. Supp. 1993), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990).

6. State pollution claims were brought under the Ohio Solid & Hazardous Waste Control Act, OHIO REV. CODE ANN. § 3734 (Baldwin 1989 & Supp. 1990), and the Ohio Water Pollution Control Act, OHIO REV. CODE ANN. § 6111 (Baldwin 1991).

7. The Great Miami River flows into the Ohio River, which then makes its way into Kentucky.

8. Brief for Respondent State of Ohio at 8, *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992) (Nos. 90-1341, 90-1517) [hereinafter Brief of Respondent].

9. *Ohio*, 689 F. Supp. at 761.

10. *Id.* DOE sought to dismiss Count I, which stipulated the recovery of response (removal or remedial) costs under CERCLA, and to stay Count II, which sought natural resource damages under CERCLA. DOE asked that all other counts be dismissed: injunctive relief and civil penalties under RCRA and the Ohio Solid & Hazardous Waste Control Act and injunctive relief and civil penalties under the CWA and the Ohio Water Pollution Control Act. *Id.*

1988.¹¹ At that time, the parties had agreed that Count I, for recovery of response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was withdrawn and that Count II, for natural resource damages under CERCLA, was stayed pending completion of a remedial investigation/feasibility study (RI/FS).¹² On all other counts, claims for injunctive relief were withdrawn with only civil penalty claims remaining.¹³ The parties also agreed on the amount of civil penalties DOE would owe if found liable.¹⁴ At the hearing, DOE moved to dismiss under rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure based on the doctrine of federal sovereign immunity.¹⁵ DOE pressed for the clear statement rule, which requires that Congress state its intention to waive federal sovereign immunity in clear unmistakable terms.¹⁶

The federal district court found that both the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA) waived federal sovereign immunity for civil penalties under their respective federal-facilities and citizen-suit sections.¹⁷ The district court held that it had authority to impose civil penalties under both the CWA and RCRA.¹⁸ With respect to the claims under the Ohio Solid and Hazardous Waste Control Act¹⁹ and the Ohio Water Pollution Control Act,²⁰ the court ruled that the State of Ohio could recover civil penalties if it could prove facts supporting state law claims.²¹

The Sixth Circuit Court of Appeals affirmed in part, holding that Congress had waived sovereign immunity with respect to civil

11. *Ohio*, 689 F. Supp. at 761.

12. A remedial investigation (RI) "is a process undertaken by the lead agency to determine the nature and extent of the problem presented by the release." 40 C.F.R. § 300.5 (1992). A feasibility study (FS) "means a study undertaken by the lead agency to develop and evaluate options for remedial action." *Id.*

13. *Ohio*, 689 F. Supp. at 761.

14. *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627, 1632 (1992).

15. "A judicial doctrine which precludes bringing suit against the government without its consent." BLACK'S LAW DICTIONARY 1396 (6th ed. 1991). The Supreme Court has upheld this doctrine, "[w]e may lay the postulate that without specific statutory consent, no suit may be brought against the United States." *United States v. Shaw*, 309 U.S. 495, 500-01 (1940).

16. Brief of Petitioner, *supra* note 4, at 14-15.

17. *Ohio*, 689 F. Supp. at 767.

18. *Id.* at 765.

19. Section 3734.13(C) provides that the state attorney general may bring an action for any violation of the state hazardous waste statutes and that "[t]he court may impose . . . a civil penalty of not more than ten thousand dollars for each day of each violation." Section 3734.13(E) states that "[m]oneys resulting from civil penalties . . . shall be paid into the hazardous waste clean-up fund." OHIO REV. CODE ANN. § 3734.13 (Baldwin 1989 & Supp. 1990) (This is the amended version of the Act, but the changes are not significant to the issues in this case).

20. Section 6111.09 provides in part that "[a]ny person who violates [state water pollution regulations] shall pay a civil penalty of not more than ten thousand dollars per day of violation." OHIO REV. CODE ANN. § 6111.09 (Baldwin 1991) (This is the amended version of the Act, but the changes are not significant to the issues in this case).

21. *Ohio*, 689 F. Supp. at 765.

penalties under the CWA's federal-facilities section²² and RCRA's citizen-suit section,²³ but not with respect to RCRA's federal-facilities section.²⁴ The court did not consider the citizen-suit section of the CWA²⁵ since it found a clear waiver of sovereign immunity under the CWA federal-facilities section.²⁶ Judge Guy dissented, finding the waivers in each statute too narrow to allow the imposition of civil penalties against the United States.²⁷ Subsequently, DOE petitioned for review of the Sixth Circuit ruling that Congress intended to waive sovereign immunity for civil penalties in the CWA's civil-penalties section and RCRA's citizen-suit section. Ohio cross-petitioned on the court's ruling that RCRA's federal-facilities section failed to grant a clear waiver. The petitions were consolidated and the United States Supreme Court granted certiorari.²⁸

In *United States Department of Energy v. Ohio*, the United States Supreme Court reversed the Sixth Circuit Court of Appeals and held that Congress had not waived the federal government's sovereign immunity with regard to civil penalties under the CWA or RCRA.²⁹ This casenote discusses the Supreme Court's analysis of federal facilities' waiver of sovereign immunity for civil penalties under the CWA.³⁰ It addresses the Court's failure to consider the intent behind the statute and the language of the statutory sections at issue and further discusses the concept of federalism as applied to federal pollution law. It also looks at the legislative history of the 1977 Amendments to the CWA and the Clean Air Act (CAA)³¹ to discern whether Congress did intend to exempt federal facilities from civil penalties. Finally, this casenote discusses policy-based reasons for assessing civil penalties against federal polluters and state options for enforcement against federal facilities in light of *United States Department of Energy v. Ohio*.

22. 33 U.S.C. § 1323(a) (1982) (current version at 33 U.S.C. § 1323(a) (1988)). See *infra* text accompanying note 104.

23. 42 U.S.C. § 6972 (1982 & Supp. II 1984) (current version at 42 U.S.C. § 6972 (1988)). See *infra* text accompanying note 98.

24. 42 U.S.C.S. § 6961 (1982) (current version at 42 U.S.C.S. § 6961 (Law. Co-op 1982 & Supp. 1993)). See *infra* text accompanying note 117. The court did not find a clear waiver of sovereign immunity, agreeing with the Ninth Circuit in *United States v. Washington*, 872 F.2d 874 (9th Cir. 1989) that penalties were enforcement mechanisms as distinguished from requirements. *Ohio*, 904 F.2d at 1059-60.

25. 33 U.S.C. § 1365 (1982) (current version at 33 U.S.C. § 1365 (1988)). See *infra* text accompanying note 99.

26. *Ohio*, 904 F.2d at 1062.

27. *Id.* at 1067 (Guy, J., dissenting).

28. *Ohio v. United States Dep't of Energy*, 904 F.2d 1048 (6th Cir. 1990), cert. granted, 111 S. Ct. 2256 (1991).

29. *Id.* at 1631.

30. A discussion of the provisions of RCRA is beyond the scope of this note.

31. 33 U.S.C. §§ 7401-7642 (1988 & Supp. II 1990). See *infra* text accompanying notes 160-64.

BACKGROUND

In response to increasing environmental pollution problems in the United States, Congress has enacted federal pollution laws, many of which contain provisions for state and local enforcement.³² Ironically, federal facilities are among the worst environmental polluters.³³ Federal facility pollution creates a conflict when federal and state attempts to enforce environmental laws against federal facilities confront the doctrine of federal sovereign immunity.³⁴ The doctrine of sovereign immunity is a judicial doctrine founded on the ancient principle that the King can do no wrong.³⁵ The modern construction holds that the government cannot be sued without its consent.

The United States Supreme Court demands that a waiver of sovereign immunity be unequivocal³⁶ and that waivers be "construed strictly in favor of the sovereign."³⁷ Consequently, states may enforce pollution laws at federal facilities, but only to the extent that Congress has clearly and unequivocally waived federal sovereign immunity.³⁸

Clean Water Act

Congress enacted the Clean Water Act in 1948,³⁹ but substantially amended it in 1972⁴⁰ to more closely resemble today's CWA.⁴¹ The stated purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴²

The 1972 Amendments changed the enforcement mechanisms of the CWA to include compliance orders, civil actions for injunctive relief, and civil penalties.⁴³ The 1972 Amendments also established the National Pollutant Discharge Elimination System (NPDES),⁴⁴ which requires permits to limit the release of contaminants at point sources

32. Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 ENVTL. L. REP. (Envtl. L. Inst.) 10326 (Oct. 1985).

33. J.B. Wolverton, Note, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565 (1991).

34. *Id.* at 569-70.

35. BLACK'S LAW DICTIONARY 1396 (6th ed. 1991).

36. *United States Dep't of Energy*, 112 S. Ct. at 1633 (citing *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980)).

37. *Id.* (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

38. Brief of Respondent, *supra* note 8, at 18.

39. Act of June 30, 1948, ch. 758, 62 Stat. 1155. The act was called the Federal Water Pollution Control Act, or the Clean Water Act.

40. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

41. John P. Fogerty, *A Short History of Federal Water Pollution Control Laws*, in 1991 CLEAN WATER DESKBOOK 5-20 (1991).

42. 33 U.S.C. § 1251(a) (1988).

43. Fogerty, *supra* note 41, at 12.

44. 33 U.S.C. § 1342 (1988).

to control water pollution.⁴⁵ The NPDES is a complex statutory system designed to eliminate all pollutant discharges.⁴⁶ Under the NPDES, it is unlawful to discharge a pollutant without a permit, and all permit terms and conditions must be complied with.⁴⁷ Pollutant dischargers must obtain permits in order to release permitted levels of contaminants. Permits are issued either by the Environmental Protection Agency (EPA)⁴⁸ or by states that have EPA-approved state programs.⁴⁹ Once a state is authorized to administer its own EPA-approved program, the EPA has authority to review state-administered programs⁵⁰ and to withdraw approval for the program if the state is not adhering to the minimum requirements established by the EPA.⁵¹

The CWA requires the EPA to establish national standards of performance for new sources of water pollutants⁵² and for toxic pollutants.⁵³ The national standards of performance established by the EPA are the minimum standards that EPA-approved state programs must administer and enforce. Compliance with a state-issued permit constitutes compliance with the CWA.⁵⁴ If a state has failed to enforce the requirements of a state-issued permit, the EPA may directly enforce state permits as federal law requirements.⁵⁵ State administration and enforcement of their own programs are goals of NPDES.⁵⁶ Approximately two-thirds of the states have implemented programs which meet EPA requirements.⁵⁷

In 1976, two United States Supreme Court cases narrowly construed the waivers of federal sovereign immunity found in the federal-facilities sections of the Clean Air Act⁵⁸ and the CWA.⁵⁹ *Hancock v.*

45. Fogerty, *supra* note 41, at 12.

46. 33 U.S.C. § 1251(a)(1) (1988).

47. *Id.* § 1342(a).

48. *Id.*

49. *Id.* § 1342(b).

50. *Id.* § 1342(c).

51. *Id.*

52. *Id.* § 1316(b)(a)(B).

53. *Id.* § 1317(a)(1).

54. *Id.* § 1342(k).

55. 33 U.S.C. § 1319(a) (1988 & Supp. II 1990).

56. 33 U.S.C. § 1342(b)-(d) (1988).

57. Fogerty, *supra* note 41, at 12.

58. *Hancock v. Train*, 426 U.S. 167, 171-72 (1976). Section 118 of the CAA stated in part: "Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall comply with Federal, State, interstate and local requirements . . . to the same extent that any person is subject to such requirements." 42 U.S.C. § 1857(f) (1964 & Supp. V) (current version at 42 U.S.C. § 7418(a) (1988 & Supp. II 1990)).

59. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 211-12 (1976). The federal-facilities section of the CWA stated in part: "Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall comply with Federal, State, interstate and local requirements . . . to the same extent that any person is subject to such requirements." 33 U.S.C. § 1323 (1970 & Supp. IV 1974) (current version at 33 U.S.C. § 1323 (1988)).

*Train*⁶⁰ and *EPA v. California ex rel. State Water Resources Control Board*⁶¹ addressed the CAA and the CWA, respectively. In both cases, the Court found that "requirements" for federal facilities did not include obtaining state-issued permits, which would allow state enforcement of those permits. Partly in response to the narrow interpretations of the waivers of sovereign immunity in these cases, Congress amended both the CAA⁶² and the CWA⁶³ in 1977.⁶⁴

Civil Penalties

Since the 1977 amendments, some courts have concluded that civil penalties arising under federal, but not state, law fall within the CWA's waiver of sovereign immunity. For example, the federal district court in *Metropolitan Sanitary District v. United States Department of Navy*⁶⁵ considered a claim brought pursuant to the federal-facilities section⁶⁶ of the CWA and found a broad waiver of federal sovereign immunity in the first three sentences of the section.⁶⁷ The court specifically found that "all . . . requirements" and "any process and sanction" included state assessment of civil penalties at federal facilities.⁶⁸ It further noted that Congress's purpose in enacting the CWA and the legislative history further supported "a blanket waiver of sovereign immunity" that would include a state's entire scheme for enforcing water pollution regulations, including civil penalties.⁶⁹ The court next considered the section's limitation on the waiver, "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,"⁷⁰ and concluded that standards or permits issued under an EPA-approved state program could meet

60. 426 U.S. 167 (1976). The Court ruled that Congress did not unambiguously waive sovereign immunity in Section 118 of the CAA to require that federal facilities obtain state-issued permits under federally-approved plans.

61. 426 U.S. 200 (1976). The Court held that the word "requirement," in the federal-facilities section of the CWA, did not include state-issued, EPA-approved permits for federal facilities. *Id.* at 227. The Court further stated that if Congress intended a different outcome, "it may legislate to make that intention manifest." *Id.* at 227-28.

62. The CAA waiver was amended to require compliance with "all . . . requirements . . . and process and sanctions . . . to the same extent as any nongovernmental entity." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. § 7418(a)(2) (1988 & Supp. II 1990)) (emphasis added).

63. The CWA waiver was amended to require Federal compliance with "all . . . requirements . . . and process and sanctions . . . to the same extent as any nongovernmental entity." Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1597 (codified as 33 U.S.C. § 1323(a)(2) (1988)) (emphasis added).

64. See *infra* text accompanying notes 160-64.

65. 722 F. Supp. 1565 (N.D. Ill. 1989), *reh'g granted*, 737 F. Supp. 51 (N.D. Ill. 1990).

66. 33 U.S.C. § 1323(a) (1988).

67. *Metropolitan Sanitary Dist.*, 722 F. Supp. at 1571.

68. *Id.* at 1569-70.

69. *Id.* at 1570.

70. 33 U.S.C. § 1323(a) (1988).

that requirement.⁷¹ On rehearing, civil penalties were not awarded because Metropolitan Sanitary District did not show that it was pursuing penalties arising under federal law.⁷²

At least one court has found the waiver of sovereign immunity ambiguous. The federal district court in *McClellan Ecological Seepage Situation (MESS) v. Weinberger*⁷³ found that both the federal-facilities and citizen-suit⁷⁴ sections of the CWA were ambiguous and did not express a clear waiver of federal sovereign immunity. Thus, the court held that civil penalties could not be assessed against federal polluters.⁷⁵

More recently, in *Sierra Club v. Lujan*, the Tenth Circuit Court of Appeals affirmed the decision of the district court to authorize civil penalties against a federal facility for violations arising under an EPA-issued permit.⁷⁶ The appellate court found a clear waiver in the federal-facilities section of the CWA by interpreting "sanctions" to include civil penalties.⁷⁷ Discussing the citizen-suit section,⁷⁸ the court held that the definition of "person[s]" subject to civil penalties⁷⁹ should be provided by the citizen-suit section's definition, which includes the United States,⁸⁰ rather than the CWA's general definition section which does not include the United States in the definition of "person."⁸¹ Consequently, the United States would be a "person" subject to civil penalties.⁸²

On the issue of whether Congress had waived sovereign immunity with regard to state-issued permits, two courts of appeals have come to different conclusions. The Ninth Circuit, in *California v. United States Department of Navy*,⁸³ considered only the federal-facilities section of the CWA and found that EPA-approved, state-issued permits did not "arise under federal law," as required by that section. The

71. *Metropolitan Sanitary Dist.*, 722 F. Supp. at 1572.

72. *Metropolitan Sanitary Dist. v. United States*, 737 F. Supp. 51, 52 (N.D. Ill. 1990)

73. 655 F. Supp. 601 (E.D. Cal. 1986).

74. 33 U.S.C. § 1365 (1982) (current version at 33 U.S.C. § 1365 (1988)).

75. *Mess*, 655 F. Supp. at 604-05.

76. 931 F.2d 1421, 1427 (9th Cir. 1991), *vacated*, 112 S. Ct. 1927 (1992). The court went on to note that *MESS* (655 F. Supp. 601 (E.D. Cal. 1986)) "has not enjoyed enthusiastic acceptance." *Id.* at 1425.

77. *Id.* at 1427.

78. 33 U.S.C. § 1365 (1988).

79. Section 309(d) provides in part, "[a]ny person who violates [the permit provisions] of this Act . . . shall be subject to a civil penalty not to exceed \$10,000 per day of such violation." 33 U.S.C. § 1319(d) (1988).

80. The citizen-suit section allows suit to be brought against any person, including the United States. 33 U.S.C. § 1365 (1988).

81. Section 502(5) of the CWA defines "person" as "an individual, corporation, partnership, association, State, municipality, commission or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5) (1988).

82. *Sierra Club*, 931 F.2d at 1427.

83. 845 F.2d 222 (9th Cir. 1988).

court noted that "Congress has delineated the respective roles of the Administrator, the states, and private individuals under the CWA."⁸⁴ It determined that the civil-penalties section⁸⁵ authorized only the Administrator's enforcement powers under the CWA.⁸⁶ One district court, discussed earlier,⁸⁷ has also addressed the issue of whether state-issued permits under the CWA meet the requirement of "arising under federal law" in the federal-facilities section.⁸⁸ The court in *Metropolitan Sanitary District v. United States Department of Navy*⁸⁹ found that the plaintiff did not assert that the violations arose under a state-operated, EPA-approved program; therefore, the "arising under Federal law" requirement was not met.⁹⁰ In 1992, the United States Supreme Court had an opportunity to consider whether federal facilities are subject to civil penalties under the CWA, RCRA and state statutes enacted pursuant to those programs.

PRINCIPAL CASE

In *United States Department of Energy v. Ohio*, the United States Supreme Court considered the issue of whether Congress waived federal sovereign immunity for state-imposed civil penalties for past violations under CWA, RCRA or state law.⁹¹ The Court began by "presum[ing] congressional familiarity"⁹² with the doctrine that waivers of federal sovereign immunity "must be unequivocal"⁹³ and "must be 'construed strictly in favor of the sovereign.'"⁹⁴ The Court then discussed the citizen-suit sections of both the CWA⁹⁵ and RCRA⁹⁶ together, since they are so similar.⁹⁷ Each citizen-suit section refers to a civil-penalties section which provides remedies for citizen-suit actions.

RCRA's citizen-suit section reads in part:

84. *California*, 845 F.2d at 225-26.

85. 33 U.S.C. § 1319(d) (1988).

86. *California*, 845 F.2d at 225-26. *But see* *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1061 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992) (finding a clear waiver of sovereign immunity in the federal-facilities section of CWA [33 U.S.C. § 1323(a)] that extends to civil penalties under federal or EPA-approved state water pollution laws).

87. *Metropolitan Sanitary Dist.*, 722 F. Supp. 1565 (N.D. Ill. 1989). *See supra* text accompanying notes 65-72.

88. 33 U.S.C. § 1323(a) (1988).

89. 722 F. Supp. 1565 (N.D. Ill. 1989).

90. *Id.* at 1571-72. The Metropolitan Sanitary District was a local unit of government and it was not clear whether it was pursuing federally sanctioned penalties. *Id.* at 1572.

91. *United States Dep't of Energy*, 112 S. Ct. at 1631.

92. *Id.* at 1633.

93. *Id.* (citing *United States v. Mitchell*, 445 U.S. 535, 538-539 (1980)).

94. *Id.* (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)).

95. 33 U.S.C. § 1365 (1982) (current version at 33 U.S.C. § 1365 (1988)).

96. 42 U.S.C. § 6972(a) (1982 & Supp. II 1984) (current version at 42 U.S.C. § 6972(a) (1988)).

97. *United States Dep't of Energy*, 112 S. Ct. at 1631.

[A]ny person may commence a civil action on his own behalf — (1)(A) against any person (including . . . the United States, and (b) any other governmental instrumentality or agency . . .) who is alleged to be in violation of [this act]. . . . The district court shall have jurisdiction to . . . enforce [this act] . . . and to apply any appropriate civil penalties under section [42 U.S.C. § 6928 (a) and (g)].⁹⁸

The CWA's citizen-suit section states in part:

[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 [this act]. . . . The district courts 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)].⁹⁹

The Court focused on the definition of "person" as used in the relevant sections. The citizen-suit sections of both the CWA and RCRA provide that actions may be brought against any person, including the United States. However, the civil-penalties sections, referred to in the citizen-suit sections, do not include particular definitions of "person[s]" subject to civil penalties. The Court determined that the citizen-suit definitions of "person," which include the United States, do not apply to the civil-penalties provisions. Instead, it held that the general definitions of "person" in each act¹⁰⁰ apply to the civil-penalties sections.¹⁰¹

Consequently, although the United States is subject to citizen suits, civil penalties are not available as a remedy against the United States. Nonfederal polluters, who fall under the general definition of "person" in each act, however, are subject to civil penalties.¹⁰² The Court justified this conclusion by relying on particular statutory drafting techniques. It noted that a statutory definition of "person" can either encompass the entire section in which the term occurs, or apply

98. 42 U.S.C. § 6972(a) (1982 & Supp. II 1984) (current version at 42 U.S.C. § 6972(a) (1988)).

99. 33 U.S.C. § 1365 (1982) (current version at 33 U.S.C. § 1365 (1988)).

100. Section 1004 (15) of RCRA defines "person" as "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." 42 U.S.C. § 6903(15) (1982) (current version at 42 U.S.C. § 6903(15) (1988)).

Section 502(5) of the CWA defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state or any interstate body." 33 U.S.C. § 1362(5) (1982) (current version at 33 U.S.C. § 1362(5) (1988)).

101. *United States Dep't of Energy*, 112 S. Ct. at 1634.

102. *Id.* at 1635.

only to a particular clause or sentence of that section. The Court concluded that because the special definition of "person" in the citizen-suit sections is not specifically designated as applying to the entire section, the definition is limited to the sentence or clause in which it occurs.¹⁰³

The Court next addressed the CWA's federal-facilities section, which reads in part:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and *process and sanctions*. . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including . . . any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any *process and sanction*, whether enforced in Federal, State, or local courts or in any other manner. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law.¹⁰⁴

Focusing on the meaning of "process and sanctions," the Court recognized that "sanction[s]" can include coercive and punitive fines, but found no reason to infer that punitive fines were intended.¹⁰⁵ In its analysis of the statute's language regarding "process and sanctions," the Court noted that the section subjects the United States to three types of governmental powers: substantive and procedural requirements, administrative authority, and "process and sanctions."¹⁰⁶ The Court inferred that Congress had used "sanctions" in the coercive, but not punitive, sense for three reasons.¹⁰⁷ First, it noted that "process and sanctions" (enforcement) is separate from substantive requirements in the text of the section. Second, it noted that "process," which generally refers to the adjudicatory process, occurs twice with "sanctions" in that section. Finally, the Court explained that the section's reference to enforcement of "process and sanctions" in the courts generally means forward-looking orders which are traditionally coercive sanctions.¹⁰⁸

103. *Id.* Interestingly, the paragraph of the citizen-suit section which includes the United States as a "person" also refers to civil penalties. 33 U.S.C. § 1365 (1982) (current version at 33 U.S.C. § 1365 (1988)).

104. 33 U.S.C. § 1323(a) (1982) (current version at 33 U.S.C. § 1323(a) (1988)) (emphasis added).

105. *United States Dep't of Energy*, 112 S. Ct. at 1637.

106. *Id.*

107. *Id.* The Court later distinguished punitive fines ("backward-looking penalties") from coercive fines ("forward-looking orders enjoining future violators"). *Id.*

108. *Id.* at 1636-38.

The Court then addressed Ohio's argument that the federal-facilities section's language, "[t]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court,"¹⁰⁹ provides for assessing civil penalties against the United States under EPA-approved state programs.¹¹⁰ The Court concluded that the "civil penalties arising under Federal law" passage is not contrary to the Court's previous construction of "process and sanctions" as providing for coercive penalties only. It admitted that the section's subsequent reference to civil penalties suggests punitive fines, but decided that a punitive fine interpretation "would raise a new and troublesome question."¹¹¹ That question, according to the Court, is the source of legal authority to impose a punitive fine. Since the Court had already decided that the first part of the federal-facilities section¹¹² of the CWA did not authorize civil penalties against the United States, the Court noted that there remained "an unanswered question and an unresolved tension" between that construction and the section's subsequent language subjecting the United States to civil penalties arising under federal law.¹¹³ The Court further admitted that it did not know what Congress meant by the later civil penalty reference in that section, and resolved the tension by determining that the language with regard to civil penalties was too uncertain to be a valid waiver.¹¹⁴

The Court also decided that the federal-facilities section's language "arising under Federal law" could be equated to federal-question jurisdiction¹¹⁵ where that language has been held "to exclude cases in which the plaintiff relies on state law, even when the State's exercise of power in the particular circumstances is expressly permitted by federal law."¹¹⁶

Finally, the Court considered the federal-facilities section of RCRA, which states in part:

Each department, agency and instrumentality of the executive, legislative and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and pro-

109. 33 U.S.C. § 1323(a) (1982) (current version at 33 U.S.C. § 1323(a) (1988)).

110. *United States Dep't of Energy*, 112 S. Ct. at 1638.

111. *Id.*

112. 33 U.S.C. § 1323(a) (1982) (current version at 33 U.S.C. § 1323(a) (1988)).

113. *United States Dep't of Energy*, 112 S. Ct. at 1639.

114. *Id.* at 1638.

115. 28 U.S.C. § 1331 (1982) (current version at 28 U.S.C. § 1331 (1988)).

116. *United States Dep't of Energy*, 112 S. Ct. at 1638. The Court reasoned that its previous reading of 28 U.S.C. § 1331 indicated that Congress's use of the same language "indicates a likely adoption of" its prior determination. *Id.* at 1639.

cedural (including any requirements for permits or reporting or any provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief).¹¹⁷

The Court adopted the Tenth Circuit's¹¹⁸ definition of "all requirements" in that section.¹¹⁹ The Tenth Circuit interpreted "all requirements" as "including substantive standards and the means for implementing those standards, but excluding punitive measures."¹²⁰ The Court supported this interpretation by pointing to the statute's silence on punitive sanctions and its specific mention of injunctive relief as conclusive evidence of congressional intent.¹²¹

Justice White, joined by Justice Blackmun and Justice Stevens, wrote a concurring and dissenting opinion.¹²² Justice White concurred with the majority that the RCRA federal-facilities section¹²³ is too ambiguous to constitute a waiver.¹²⁴ However, Justice White pointed out that in the remainder of its decision the majority had ignored "the 'unequivocally expressed' intention of Congress."¹²⁵

Discussing the federal-facilities section of CWA,¹²⁶ Justice White stated that "a statute should be read as a whole."¹²⁷ Noting the majority's "tortured discussion" of "process and sanction," he suggested that the majority could have avoided that entire discussion by reading further in the federal-facilities section where the words "civil penalties" can be found: "[t]he United States shall be liable only for those civil penalties arising under Federal law."¹²⁸ He concluded that because the federal-facilities section specifically mentions the United States' liability for civil penalties, the reference to "sanctions" in the earlier text of the section must include civil penalties.¹²⁹

117. 42 U.S.C. § 6961 (1982) (current version at 42 U.S.C.S. § 6961 (Law. Co-op. 1982 & Supp. 1993)).

118. *Mitzelfelt v. Dep't of Air Force*, 903 F.2d 1293 (10th Cir. 1990).

119. *United States Dep't of Energy*, 112 S. Ct. at 1639-40.

120. *Id.* (quoting *Mitzelfelt v. Dep't of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990)).

121. *Id.* at 1640. The Court additionally pointed out that Ohio's argument that RCRA's language was enacted in response to *Hancock v. Train*, 426 U.S. 167 (1976), was without merit since Congress could have mentioned punitive fines if it wanted to. *Id.*

122. *United States Dep't of Energy*, 112 S. Ct. at 1640 (White, J., concurring in part and dissenting in part).

123. 42 U.S.C. § 6961 (1982) (current version at 42 U.S.C.S. § 6961 (Law. Co-op. 1982 & Supp. 1993)).

124. *United States Dep't of Energy*, 112 S. Ct. at 1644 (White, J., concurring in part and dissenting in part).

125. *Id.* at 1641 (quoting *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992)).

126. 33 U.S.C. § 1323(a) (1982) (current version at 33 U.S.C. § 1323(a) (1988)).

127. *United States Dep't of Energy*, 112 S. Ct. at 1640 (White, J., concurring in part and dissenting in part).

128. *Id.* at 1641 (quoting 33 U.S.C. § 1323(a)). The dissent pointed out that the majority's dismissal of civil penalties contravenes "the 'ancient and sound rule of construction that each word in a statute should, if possible, be given effect.'" *Id.* (quoting *Crandon v. U.S.*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring)).

129. *United States Dep't of Energy*, 112 S. Ct. at 1641 (White, J., concurring in part and dissenting in part).

Turning to the phrase "arising under federal law," Justice White declared that the CWA is an example of cooperative federalism and cited *Arkansas v. Oklahoma*, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government."¹³⁰ In *Arkansas*, the Court specifically allowed that state standards in interstate water controversies should be treated as federal law.¹³¹ Therefore, the dissent would have allowed penalties under state law, but only if the state programs were EPA-approved.¹³²

Finally, Justice White summarily dismissed the majority's statutory construction of "person" in the citizen-suit provisions of CWA¹³³ and RCRA.¹³⁴ He argued that the special definitions of "person" in those sections (which include the United States) surely apply to the civil-penalties provisions¹³⁵ that the citizen-suit provisions expressly incorporate.¹³⁶

ANALYSIS

In *United States Department of Energy v. Ohio*, the Supreme Court effectively ruled out the assessment of civil penalties against the federal government under the CWA. The Court's strict construction of congressional waivers of sovereign immunity subverts the overall purpose of the CWA, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹³⁷ Congress has enacted comprehensive plans to control water pollution, and exemptions for federal agencies do not promote that objective.¹³⁸

Federal facilities have generated tremendous amounts of pollution in recent years.¹³⁹ Their noncompliance with federal and state pollution laws suggests that they require the same kinds of deterrents that private polluters are subject to, in order to compel their compliance.

Nevertheless, the Court analyzed the plain language of the relevant statutory sections and concluded that Congress had not clearly

130. *Id.* at 1642 (citing *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1054 (1992)).

131. *Arkansas*, 112 S. Ct. at 1059.

132. *United States Dep't of Energy*, 112 S. Ct. at 1643.

133. 33 U.S.C. § 1365 (1982) (current version at 33 U.S.C. § 1365 (1988)).

134. 42 U.S.C. § 6972(a) (1982 & Supp. II 1984) (current version at 42 U.S.C. § 6972(a) (1988)).

135. The CWA civil-penalties provision is 33 U.S.C. § 1319(d) (1982) (current version at 33 U.S.C. § 1319(d) (1988)). RCRA's civil-penalties provision is 42 U.S.C. § 6928 (1982 & Supp. II 1984) (current version at 42 U.S.C. § 6928 (1988)).

136. *United States Dep't of Energy*, 112 S. Ct. at 1642 (White, J., concurring in part and dissenting in part).

137. 33 U.S.C. § 1251(a) (1988).

138. Brief of Respondent, *supra* note 8, at 19.

139. For example, EPA's list of sites with significant RCRA noncompliance contained thirty-two federal land disposal facilities. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1012 (1992).

waived federal immunity. The Court did not consider legislative history, nor did it consider Congress's intent in enacting the CWA. Even so, the Court should have found an unambiguous waiver of federal sovereign immunity for federal facilities in the plain language of the statute. As Justice White pointed out, the Court failed to look at the statute as a whole.¹⁴⁰

Statutory Language

The federal-facilities section of the CWA provides that "the Federal Government . . . shall be subject to, and comply with, *all* Federal, State, interstate and local requirements."¹⁴¹ The section further provides immunity from *civil penalties* for officers, agents, or employees of the United States. It also states that the United States is liable only for *civil penalties* arising under federal law. Finally, it authorizes the President to exempt effluent sources of any department, agency or instrumentality of the executive branch from any CWA federal facilities requirement if the exemption is deemed in the paramount interest of the United States.¹⁴² As the dissent noted, the majority engaged in a "tortured discussion" of "process and sanctions," while neglecting the rest of the federal-facilities section, which specifically refers to civil penalties.¹⁴³

The Court's interpretation of the later language in the federal-facilities section, "[t]he United States shall be liable only for those civil penalties arising under federal law," left the phrase utterly devoid of meaning. First, the Court found the waiver in that phrase too ambiguous to be effective, since it had already determined that the previous language, "[t]he Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions" was a waiver of sovereign immunity which excluded civil penalties for federal facilities.¹⁴⁴ Second, in analogizing the "arising under federal law" requirement to federal question jurisdiction, the Court failed to acknowledge that the section's language does not refer to jurisdiction but, instead, is a limit on the federal government's liability

140. *United States Dep't of Energy*, 112 S. Ct. at 1641 (White, J., concurring in part and dissenting in part).

141. 33 U.S.C. § 1323(a) (1988) (emphasis added).

142. *Id.* The presidential exemption reads in part: "The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so." *Id.*

143. *United States Dep't of Energy*, 112 S. Ct. at 1641 (White, J., concurring in part and dissenting in part).

144. *Id.* at 1636-37. See *supra* text accompanying notes 109-16.

for civil penalties under the Act.¹⁴⁵ It is more likely that the clause, which was added by the 1977 Amendments, was meant to ensure that the federal government would be subject only to civil penalties imposed pursuant to EPA-approved state programs.¹⁴⁶

The majority's interpretation of "person" as applied to the citizen-suit¹⁴⁷ and civil-penalties¹⁴⁸ sections of the CWA is equally strained. Subsection (a) of the citizen-suit section specifically states, "[e]xcept as provided by subsection (b) of this section, any citizen may commence a civil action . . . (1) against any person (including . . . the United States . . .) The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order, . . . and to apply any appropriate civil penalties."¹⁴⁹ The language indicates that subsection (b)¹⁵⁰ is the only limitation to a citizen bringing an action. Furthermore, "civil penalties" is preceded by "and," which indicates that this remedy is always available, if appropriate. There is no language in subsection (a) to indicate that the initial definition of "person" has changed within the subsection.

Federalism

As Justice White noted, the CWA is an example of cooperative federalism.¹⁵¹ Federalism is a cornerstone of national environmental pollution laws, e.g., CAA, CWA, RCRA. In enacting each of these laws, Congress has encouraged a state-federal partnership.¹⁵² Recently, the United States Supreme Court acknowledged the CWA state-federal partnership. In *Arkansas v. Oklahoma*, the Court recognized "that the system of federally approved state standards as applied in the interstate context constitutes federal law."¹⁵³

The CWA NPDES also supports the federalism concept.¹⁵⁴ The NPDES permit system authorizes the EPA or states, through EPA-

145. Brief of Respondent, *supra* note 8, at 26. The respondents point out that the purpose of the language is not to prevent the "destruction of federal statutes by state courts," but to shield "federal agencies from unauthorized penalties." *Id.* at 26-27.

146. Brief of Respondent, *supra* note 8, at 9. See also *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992).

147. 33 U.S.C. § 1365(a) (1982) (current version at 33 U.S.C. § 1365(a) (1988)) (the language is substantially the same).

148. 33 U.S.C. § 1319(d) (1982) (current version at 33 U.S.C. § 1319(d) (1988)) (the language is substantially the same).

149. 33 U.S.C. § 1365(a) (1982) (current version at 33 U.S.C. § 1365(a) (1988)) (emphasis added).

150. Subsection (b) requires notice before an action is commenced.

151. *United States Dep't of Energy*, 112 S. Ct. at 1642 (White, J., concurring in part and dissenting in part).

152. Mike Rothmel, Note, *When Will the Federal Government Waive the Sovereign Immunity Defense and Dispose of its Violations Properly?* 65 CHI.-KENT L. REV. 581, 583 (1989).

153. *Arkansas*, 112 S. Ct. at 1059. The Court noted that it has "long recognized that interstate water pollution is controlled by federal law" and that "treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation." *Id.*

154. See *supra* text accompanying notes 44-57.

approved programs, to issue permits under the CWA.¹⁵⁵ If a facility is in compliance with the requirements of its state-issued permit, it is also deemed in compliance with the CWA.¹⁵⁶ If a facility is not in compliance with a state-issued permit and the state fails to enforce the permit requirements, the EPA can enforce the state-issued permits as federal law requirements.¹⁵⁷ In addition, the EPA retains oversight of state programs and has the authority to withdraw approval of the state programs.¹⁵⁸ The interplay between state and federal duties and the overlap of federal and state requirements strongly suggest that the CWA was intended to be a working model of cooperative federalism and that violations of permits issued under EPA-approved state programs "arise under federal law."¹⁵⁹

Legislative History

The Court did not look to legislative history for evidence of Congress's intent, but instead chose to rely solely on the plain language of only a portion of the statute. The legislative history of the 1977 CWA amendments strongly suggests that Congress amended the CWA and the CAA in 1977 at least partly in response to previous United States Supreme Court decisions narrowly construing waivers of federal sovereign immunity in the acts.¹⁶⁰ Discussing the 1977 CWA amendments with regard to federal facility compliance, the Senate committee stated:

The act has been amended to indicate *unequivocally* that *all* Federal facilities and activities are subject to *all* of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.¹⁶¹

The 1977 Senate amendment for federal facility compliance is found in the House conference report, which provided:

This section clarifies section 313 of the Act to provide that *all* Federal facilities must comply with *all* substantive and pro-

155. 33 U.S.C. § 1342 (1988).

156. *Id.* § 1342(k).

157. 33 U.S.C. § 1319(a) (1988 & Supp. II 1990).

158. 33 U.S.C. § 1342(c) (1988).

159. Brief of Respondent, *supra* note 8, at 24. See also Rothmel, *supra* note 152, at 603-04.

160. See *supra* notes 58-64 and accompanying text.

161. S. REP. No. 370, 95th Cong., 1st Sess. 67 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4392 (emphasis added).

cedural requirements of Federal, State, or local water pollution control laws.¹⁶²

The conference substitute in the House report provided:

The conference substitute is essentially the same as the Senate amendment revised to conform with a comparable provision of the Clean Air Act.¹⁶³

Congress also amended the comparable provision in the CAA in 1977. Addressing federal facility compliance with the CAA, the House committee stated:

The amendment is also intended to resolve any questions about the sanctions to which noncomplying Federal agencies, facilities, officers, employees or agents may be subject. . . . This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to *civil or criminal penalties*, and to delayed compliance penalties.¹⁶⁴

The legislative history of the 1977 amendments to the CWA and the CAA clearly demonstrate that Congress did intend that federal facilities be subject to civil penalties. That history emphasizes that federal facilities must comply with *all* requirements of the CWA and CAA. In addition, the Senate Committee specifically mentioned the previous misconstruction of congressional intent by the United States Supreme Court. Finally, the House report referred to the comparable provision in the CAA which was also amended. Considering the CAA amendment, the House committee declared specifically that federal facilities would be subject to sanctions which include injunctive relief and both civil and criminal penalties.

Policy

Continued exemption of federal polluters under the doctrine of sovereign immunity undermines the objectives of federal environmental laws, especially in view of Congress's repeated attempts to waive sovereign immunity. A government that receives its power from the people maintains credibility by subjecting itself to the laws it

162. H.R. CONF. REP. No. 830, 95th Cong., 1st Sess. 93 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4468 (emphasis added).

163. *Id.*

164. H.R. REP. No. 294, 95th Cong., 1st Sess. 200 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1279 (emphasis added).

promulgates.¹⁶⁵ As Justice Frankfurter said, the “[sovereign immunity doctrine] undoubtedly runs counter to modern democratic notions of the moral responsibility of the State.”¹⁶⁶

Congress has set federal pollution standards that apply to federal facilities as well as to private parties. These standards have no teeth with respect to federal facilities if compliance cannot be effectively enforced. Available remedies at federal facilities include civil actions for injunctive relief or compliance orders issued by a state or federal administrator, but these remedies have not proven to be particularly effective. In particular, compliance orders contain no enforcement mechanism, so if a polluter chooses not to comply, the only alternative is to bring a civil suit for injunctive relief. Unfortunately, state officials have had difficulty obtaining and enforcing injunctions.¹⁶⁷ Civil penalties are an important enforcement mechanism because they encourage early compliance.¹⁶⁸ The threat of civil penalties, which can accrue from the beginning of the violation, provides a strong incentive to comply with environmental laws to avoid cumulative penalties.¹⁶⁹ Injunctive relief can be obtained only after court proceedings and is entirely prospective.¹⁷⁰ Consequently, a polluter might be inclined to take advantage of the “free period” before an injunction is obtained.¹⁷¹ Frequent use of civil penalties by the federal government against non-federal polluters is evidence that they work.¹⁷²

Additionally, one must consider the impact of federal pollution on United States citizens. The economic consequences of federal pollution are staggering. Estimates show that United States taxpayers will pay forty to seventy billion dollars over the next twenty years to clean up DOE sites.¹⁷³ If penalties were available as a remedy against federal polluters, federal agencies’ incentive to comply with

165. Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. CHI. L. REV. 845, 861 (1990).

166. Breen, *supra* note 32, at 10327 (quoting Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 59 (1943)) (Frankfurter, J., dissenting)).

167. Wolverton, *supra* note 33, at 575 (citing CONG. BUDGET OFFICE, FEDERAL LIABILITIES UNDER HAZARDOUS WASTE LAWS, S. DOC. NO. 95, 101st Cong. 2d Sess. 25 (1990)).

168. Cheng, *supra* note 165, at 864.

169. *Id.*

170. *Id.* (confirmed in Cheng’s telephone conversation with Dennis Harnish, Assistant Attorney General, Maine, and Jack Van Clay, Assistant Attorney General, Ohio (April 20, 1990)).

171. Rothmel, *supra* note 152, at 585 n.43 (citing Brief for Plaintiffs, Ohio v. Department of Energy, 689 F. Supp. 760 (S.D. Ohio 1988)).

172. Cheng, *supra* note 165, at 865.

173. *United States Dep’t of Energy*, 112 S. Ct. at 1640-41 (White, J., concurring in part and dissenting in part) (citing *Cleanup at Federal Facilities: Hearing on H.R. 765 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess., Ser. No. 101-04, p.44 (1989)).

the law could save taxpayers substantial clean-up costs.¹⁷⁴ In addition, all citizens would benefit from early compliance because federal polluters cause the same health and environmental problems as do private polluters.¹⁷⁵ These enormous problems would be decreased considerably if federal facilities complied with environmental laws.

CONCLUSION

The Supreme Court's decision in *United States Department of Energy v. Ohio* has completely ruled out the assessment of civil penalties against federal facilities under the CWA, RCRA, and state pollution laws promulgated under those statutes. In spite of Congress's declarations as to the spirit and intent of these statutes, the United States Supreme Court refused to find clear waivers of sovereign immunity for civil penalties as applied to federal facilities. Without this remedy, enforcers will have to resort to civil actions for injunctive relief to prevent federal environmental pollution. Pursuing injunctions will require administrative watchfulness and continued use of the court systems to curb violations before they become substantial.

United States citizens pay a very steep price for continued federal facility violation of federal pollution laws. Obviously, this result could not have been Congress's intent in formulating these nationwide pollution laws. The solution lies with Congress, which must, once again, amend these statutes to unequivocally waive sovereign immunity for federal facilities. Recently, Congress has begun to move in that direction. In October 1992, Congress passed the Federal Facility Compliance Act¹⁷⁶ to amend RCRA.¹⁷⁷ The act specifically subjects federal facilities to civil penalties under RCRA.¹⁷⁸ Now Congress must turn its attention to other federal pollution laws and do the same.

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174. Federal-law fines are paid to the federal treasury while state-law fines go to the state treasury. *United States Dep't of Energy*, 112 S. Ct. at 1632 n.1. Therefore fines would shift federal monies from agencies to the federal treasury or to state treasuries. Political pressure to comply, in order to avoid loss of agency funds, is a foreseeable consequence of federal facilities expending funds for civil penalties.

175. Brief of Respondent, *supra* note 8, at 9.

176. 42 U.S.C.S. § 6961 (Law. Co-op. Supp. 1993).

177. The Resource Conservation and Recovery Act, 42 U.S.C.S. §§ 6901-6987 (Law. Co-op. 1982 & Supp. 1993).

178. A portion of section 6001 has been amended to read: "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 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)". 42 U.S.C.S. § 6961 (Law. Co-op. Supp. 1993).