

# WAIVERS OF IMMUNITY IN FEDERAL ENVIRONMENTAL STATUTES OF THE TWENTY-FIRST CENTURY: CORRECTING A CONFUSING MESS

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## INTRODUCTION

Since 1970, Congress has directed agencies of the United States government to comply with the requirements of a variety of state environmental statutes. Not surprisingly, the directives have spawned controversies as regulators and environmental activists have tried to force federal agencies to comply with statutory mandates. Although federal agencies have prevailed twice in Supreme Court litigation regarding the scope of the directives in major environmental statutes,<sup>1</sup> Congress partially abrogated both of those judicial victories in subsequent legislation. The most recent legislative change occurred in 1992 when Congress amended the Resource Conservation and Recovery Act<sup>2</sup> to subject federal agencies to civil penalties for past violations.<sup>3</sup> The 1992 legislative revision has not, however, eliminated the confusion over the environmental waivers. Federal agencies have continued to contest their obligations to pay civil penalties under the Clean Air Act<sup>4</sup> and to reduce their contributions to water pollution from nonpoint sources.<sup>5</sup>

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<sup>1</sup> U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992) (Resource Conservation and Recovery Act and Clean Water Act); U.S. Env'tl. Prot. Agency v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200 (1976) (Clean Water Act); Hancock v. Train, 426 U.S. 167 (1976) (Clean Air Act).

<sup>2</sup> 42 U.S.C. §§ 6901-6992k (2000).

<sup>3</sup> Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505, 1506 (codified at 42 U.S.C. § 6961 (2000)).

<sup>4</sup> See *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1357 (11th Cir. 2005); *City of Jacksonville v. U.S. Dep't of the Navy*, 348 F.3d 1307, 1320 (11th Cir. 2003); *Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1015 (9th Cir. 2000); *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 534 (6th Cir. 1999).

<sup>5</sup> See *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1154 (9th Cir. 1998).

This Article describes and critiques the interaction of legislation and judicial decisions summarized in the preceding paragraph. It begins with a review of the doctrines regarding federal immunity. Next, it discusses the waivers that have appeared in federal environmental statutes since 1970 and the litigation those waivers have produced. After describing the confusing state of the current law regarding environmental waivers, the Article offers proposals for legislative and judicial responses to reduce the confusion.

#### I. FEDERAL IMMUNITY FROM STATE REGULATION: A FUNDAMENTAL PRINCIPLE OF FEDERALISM

The Supreme Court has consistently ruled that federal agencies are immune from state taxes and regulations that impede the accomplishment of the functions entrusted to the agencies.<sup>6</sup> The seminal case

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<sup>6</sup> Since the 1970s, Congress has also required agencies in the executive branch to comply with the requirements of federal environmental statutes. Even though federal agencies have no immunity from federal law comparable to the immunity they enjoy from state regulations, these congressional mandates to comply with federal environmental law have produced two types of disputes.

First, federal agencies have claimed exemption from some of the normal mechanisms for enforcing environmental regulations. Although some litigation between federal litigants has occurred, such lawsuits are rare because the Department of Justice normally represents federal litigants. See Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 895-97 (1991) (citing cases). In the environmental arena, the Department of Justice has generally declined to file suit on behalf of the EPA against other federal agencies. See *Maine v. U.S. Dep't of the Navy*, 702 F. Supp. 322, 338 n.8 (D. Me. 1988), *vacated*, 973 F.2d 1007 (1st Cir. 1992); Michael W. Steinberg, *Can EPA Sue Other Agencies?*, 17 ECO. L. Q. 317, 325 (1990). Additionally, the President has given the Office of Management and Budget the power to resolve disputes between the EPA and other agencies concerning enforcement of federal environmental laws. Exec. Order No. 12,088, 43 Fed. Reg. 47,707, 47,708-09 (Oct. 13, 1978), *as amended by* Exec. Order No. 12,580, 52 Fed. Reg. 2923, 2928 (Jan. 23, 1987), *and* Exec. Order No. 13,148, 65 Fed. Reg. 24,595 (Apr. 21, 2000), *reprinted in* 42 U.S.C. § 4321 (2000); *see also* Exec. Order No. 12,146, §§ 1-401 to -402, 44 Fed. Reg. 42,657, 42,658 (July 18, 1979), *as amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (Sept. 9, 1987), *and* Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003), *reprinted in* 28 U.S.C. § 509 (2000) (resolution of interagency legal disputes by the Attorney General).

Second, federal agencies have claimed immunity from enforcement actions filed by private parties. Environmental statutes frequently allow private parties to enforce their provisions. See, e.g., 33 U.S.C. § 1364 (2000). By including the United States among the potential defendants, such "citizen suits" waive the federal government's sovereign immunity from being sued. Unlike waiver of federal immunity to state regulation, waiver of the federal government's sovereign immunity from being sued involves no fundamental constitutional principle. Nonetheless, the Court has consistently applied a rule of strict

is *McCulloch v. Maryland*,<sup>7</sup> where the Court ruled that the Bank of the United States did not have to pay taxes imposed by the state.

In *McCulloch*, Chief Justice Marshall grounded federal immunity doctrine in the Supremacy Clause.<sup>8</sup> Implicit in the supremacy of federal law was, he argued, freedom from state power that could destroy the instrumentalities Congress had established to carry out its functions. Because “the power to tax involves the power to destroy,” he concluded that Maryland could not tax the Bank of the United States.<sup>9</sup>

Subsequent decisions have adhered to, and extended, the *McCulloch* principle. They have reaffirmed the immunity doctrine in cases involving state taxes<sup>10</sup> and have also applied it to state regulations.<sup>11</sup> The Supreme

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construction to these waivers as well. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538-42 (1980); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); *United States v. King*, 395 U.S. 1, 4-5 (1969); *United States v. Sherwood*, 312 U.S. 584, 590 (1941); John H. Kongable, *Civil Penalties Under the Resource Conservation and Recovery Act: Must Federal Facilities Pay?*, 30 A.F. L. REV. 21, 22-24 (1989).

Attempts to grant one federal agency administrative enforcement authority over other agencies can raise constitutional concerns as well as problems of statutory construction. The “unitary executive” theory, *see* Steinberg, *supra*, at 325-31; *criticized in* Morton Rosenberg, *Congress’s Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628-34 (1989), interprets the President’s power to see that the laws are faithfully executed, U.S. CONST. art. II, § 3, as a constitutional grant of authority to resolve conflicts within the executive branch of government. Relying on this theory, the Department of Justice initially opposed congressional attempts to expand the EPA’s authority to enforce environmental regulations against other federal agencies. *See, e.g.*, *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 100th Cong. 182-206 (1987) (statement of F. Henry Habicht II, Assistant Att’y Gen., Land and Natural Resources Division).

Since 2000, federal agencies have continued to resist both state and federal sanctions for violations of the Clean Air Act. *See infra notes* 154-86 and accompanying text. In a recent federal case, the Eleventh Circuit ruled that the administrative compliance order issued against the Tennessee Valley Authority (“TVA”) was not a final agency action, although the court declared that the statutory scheme was unconstitutional to the extent that it tried to make administrative compliance orders binding without providing any opportunity for a hearing and judicial review. *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1260 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004).

<sup>7</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>8</sup> U.S. CONST. art. VI, cl. 2.

<sup>9</sup> *McCulloch*, 17 U.S.(4 Wheat.) at 431.

<sup>10</sup> *See, e.g.*, *United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. Boyd*, 378 U.S. 39 (1964); *Eso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

<sup>11</sup> *See, e.g.*, *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963); *Paul v. United*

Court has, however, recognized at least two limits to the doctrine. First, federal immunity is normally available only when the state tax or regulation is imposed directly on the federal government.<sup>12</sup> Second, agencies must comply with state regulations that do not significantly impede the agency's ability to perform its duties.<sup>13</sup>

Inasmuch as federal immunity from state taxes and regulations protects congressional power rather than the rights of individuals, the Supreme Court has allowed Congress to waive the immunity. The Court has, however, qualified this waiver authority by adopting a rule of strict construction.<sup>14</sup> Because federal immunity is a fundamental principle of federalism, waiver of the immunity requires a clear statement of congressional intent. Courts are not to extend waivers beyond the express language that Congress chooses, a principle of statutory construction that the Supreme Court has reemphasized in recent cases.<sup>15</sup>

## II. WAIVERS OF IMMUNITY IN ENVIRONMENTAL STATUTES: A CONTINUING CONTROVERSY

Congress has exercised its waiver authority in a variety of statutes.<sup>16</sup> In federal environmental statutes, waivers of federal immunity to state regulations have been commonplace, and the waivers in pollution control laws have become increasingly broad and inclusive.<sup>17</sup> Congress has never

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States, 371 U.S. 245 (1963); *Mayo v. United States*, 319 U.S. 441 (1943); *Arizona v. California*, 283 U.S. 423 (1931); *Ohio v. Thomas*, 173 U.S. 276 (1899).

<sup>12</sup> See, e.g., *United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. State Tax Comm'n*, 421 U.S. 599 (1975); *United States v. Boyd*, 378 U.S. 39 (1964); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *United States v. Hawkins County*, 859 F.2d 20 (6th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989). The Court has also applied the immunity when state taxes discriminated against private parties because of their relationship with the federal government. See, e.g., *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989).

<sup>13</sup> See, e.g., *Johnson v. Maryland*, 254 U.S. 51 (1920); *Virginia v. Stiff*, 144 F. Supp. 169 (W.D. Va. 1956); *Ex parte Willman*, 277 F. 819 (S.D. Ohio 1921).

<sup>14</sup> E.g., *Paul v. United States*, 371 U.S. 245, 263 (1963); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *Mayo v. United States*, 319 U.S. 441, 447-48 (1943).

<sup>15</sup> See, e.g., *United States v. Idaho*, 508 U.S. 1 (1993). This rule of strict construction also extends to waivers of immunity from the requirements of federal law. See *Lane v. Pena*, 518 U.S. 187 (1996); see also *supra* note 6. See generally John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771 (1995).

<sup>16</sup> For examples outside the environmental context, see, e.g., 4 U.S.C. §§ 104, 106 (2000) (taxes on federal installations); 12 U.S.C. § 1714 (2000) (taxes on certain properties acquired by the Department of Housing and Urban Development); 42 U.S.C. § 659 (2000) (enforcement of support obligations of individuals serving in the United States military).

<sup>17</sup> See Kenneth M. Murchison, *Reforming Environmental Enforcement: Lessons From*

enacted a general provision waiving immunity to state environmental regulations,<sup>18</sup> but it has included a waiver in most environmental statutes passed since 1970. Moreover, the waivers in more recent statutes are considerably broader than those enacted in the first half of the 1970s.<sup>19</sup>

The waivers to state environmental regulations have produced frequent litigation over their scope. In resolving these controversies, the Supreme Court has twice applied the rule of strict construction and read the waivers narrowly.<sup>20</sup> Following each of the Supreme Court decisions, Congress reversed the Court's specific holdings in subsequent amendments to the statutes that produced the litigation. Congress has, however, never made its broadest waiver language uniformly applicable to all environmental statutes, and litigation has continued in the lower federal courts in the fifteen years since the most recent Supreme Court decision.

A. *1970s: The Duty to Comply With Federal and State Requirements*

During the 1970s, Congress substituted a duty to comply with federal, state, and local environmental laws for the previous policy of cooperation insofar as practicable and consistent with other federal policies and available appropriations.<sup>21</sup> A qualified duty to comply "consistent with the paramount interest of the United States as determined by the President" originated with the Water Quality and Environmental Improvement Act of 1970.<sup>22</sup> In the same year, the Clean

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*Twenty Years of Waiving Federal Immunity to State Regulations*, 11 VA. ENVTL. L.J. 179, 185-91 (1992).

<sup>18</sup> *But see id.* at 207-08 (arguing that such a provision would be desirable).

<sup>19</sup> *Id.* at 185-88.

<sup>20</sup> *See supra* note 1 and accompanying text.

<sup>21</sup> *See, e.g.*, Act of Sept. 22, 1959, Pub. L. No. 86-365, § 2, 73 Stat. 646 (Air Pollution); Water Pollution Act Amendments of 1956, Pub. L. No. 84-660, § 9, 70 Stat. 498, 506 (Water Pollution). *See generally* Murchison, *supra* note 17, at 181-82; Kenneth M. Murchison, *Waivers of Intergovernmental Immunity in Federal Environmental Statutes*, 62 VA. L. REV. 1177, 1182-85 (1976) [hereinafter Murchison, *Waivers of Intergovernmental Immunity*].

<sup>22</sup> Pub. L. No. 91-224, 84 Stat. 91. The statute requires that all agencies having jurisdiction over any real property or facility, or engaged in any Federal public works activity of any kind, shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this Act in the administration of such property, facility, or activity.

*Id.* § 103, 84 Stat. at 107-08. Even before the passage of this legislation, the President had issued an Executive Order that required federal agencies to comply with air and water quality "standards and related plans of implementation." Exec. Order No. 11,507, 35 Fed. Reg. 2573 (Feb. 5, 1970). *See generally* Murchison, *Waivers of Intergovernmental*

Air Act Amendments of 1970 extended the compliance duty without qualification.

Section 118 of the 1970 Amendments to the Clean Air Act, mandated that federal agencies "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution."<sup>23</sup> Although the waiver in the air law was unqualified, it did allow the President to exempt federal agencies from its provisions when required by the "paramount interest" of the United States.<sup>24</sup>

The Clean Air Act Amendments also added a new method for enforcing its provisions. The citizen suit provision authorized any person to bring a civil action against any person (including the United States) alleged to be in violation of the emissions standards of the Clean Air Act or an order issued by the EPA Administrator or a state. It specifically granted the federal district courts jurisdiction to grant injunctive relief or to apply appropriate civil penalties.<sup>25</sup> In addition, the general statutory definition of the term "person" specifically included "the United States, and . . . any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution."<sup>26</sup>

Other federal environmental statutes enacted in the first half of the 1970s included waivers generally modeled on the one found in the Clean Air Act. Specifically, Congress included waiver provisions in the Clean Water Act, the Noise Control Act, and the Safe Drinking Water Act.

When section 313 was added to the Clean Water Act<sup>27</sup> in 1972, it instructed federal agencies to comply with "Federal, State, interstate, and local requirements respecting control and abatement of pollution."<sup>28</sup> The waiver in the water law went beyond the Clean Air Act in one respect by also requiring federal agencies to pay any "reasonable service charges" associated with water pollution control.<sup>29</sup>

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*Immunity*, *supra* note 21, at 1182.

<sup>23</sup> Pub. L. No. 91-604, § 5, 84 Stat. 1676, 1689.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* § 12(a), 84 Stat. at 1706.

<sup>26</sup> *Id.*

<sup>27</sup> The official name of the statute is the Federal Water Pollution Control Act, but Congress noted in the 1977 Amendments that it was "commonly referred to as the Clean Water Act." See Clean Water Act of 1977, Pub. L. No. 95-217, § 2, 91 Stat. 1566. This article consistently uses the Clean Water Act designation to avoid confusion.

<sup>28</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 875.

<sup>29</sup> *Id.*

Like the Clean Air Act, the Clean Water Act included a citizen suit provision.<sup>30</sup> It allowed any “citizen” to bring an enforcement action “against any person (including. . .the United States). . .alleged to be in violation of. . .an effluent standard or . . . an order issued by the [EPA] Administrator or a State.”<sup>31</sup> The Clean Water Act provision authorized “appropriate civil penalties” under the enforcement section of the Act,<sup>32</sup> and the enforcement section authorized civil penalties against “any person” violating the requirements of the Act.<sup>33</sup> However, the Clean Water Act definition of “person”—unlike the Clean Air Act definition—did not include the United States.<sup>34</sup>

The Noise Control Act of 1972 contained a substantive waiver virtually identical to the one originally found in section 118 of the Clean Air Act.<sup>35</sup> However, its citizen suit provision only allowed injunctive relief,<sup>36</sup> and the enforcement provisions excluded the United States from the definition of “person.”<sup>37</sup>

The Safe Drinking Water Act of 1974 also included a substantive waiver modeled on the air and water statutes, except that it expanded the waiver to include permits, reports, and other procedural requirements,<sup>38</sup> probably in response to the litigation then underway in the lower federal courts.<sup>39</sup> Like the Clean Water Act, the Safe Drinking Water Act expressly made the United States liable for reasonable service fees. However, unlike

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<sup>30</sup> *Id.* § 2, 86 Stat. at 888-89 (codified as amended at 33 U.S.C. § 1365 (2000)).

<sup>31</sup> *Id.* § 2, 86 Stat. at 888 (codified at 33 U.S.C. § 1365(g) (2000)). The provision defines citizen as “a person or persons having an interest which is or may be adversely affected.” *Id.* § 2, 86 Stat. at 889. Congress settled on this language after the Supreme Court broadly construed similar language in the Administrative Procedure Act. *See Sierra Club v. Morton*, 405 U.S. 727, 740-41 (1972).

<sup>32</sup> *See* Clean Water Act § 2, 86 Stat. at 888 (codified as amended at 33 U.S.C. § 1365(a) (2000)).

<sup>33</sup> *Id.* § 2, 86 Stat. at 860 (codified at 33 U.S.C. §§ 1319(b), (d) (2000)).

<sup>34</sup> *Id.* § 2, 86 Stat. at 886 (codified at 33 U.S.C. § 1362(5) (2000)).

<sup>35</sup> Noise Control Act of 1972, Pub. L. No. 92-574, § 4, 86 Stat. 1234, 1235 (codified at 42 U.S.C. § 4903(b) (2000)); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 5, 84 Stat. 1676, 1689-90 (codified as amended at 42 U.S.C. § 7418(b) (2000)).

<sup>36</sup> Noise Control Act § 12, 86 Stat. at 1243 (codified at 42 U.S.C. § 4911(a) (2000)).

<sup>37</sup> *Id.* § 11(e), 86 Stat. at 1243 (codified at 42 U.S.C. § 4910(e) (2000)). The exclusion in section 11(e) is an exception to the general inclusion of federal agencies within the statutory definition of “person.” *Id.* § 3, 86 Stat. at 1234 (codified at 42 U.S.C. § 4902(2) (2000)).

<sup>38</sup> Pub. L. No. 93-523, § 1447, 88 Stat. 1660, 1688-89 (codified as amended at 42 U.S.C. § 300j-6(a) (2000)).

<sup>39</sup> For a summary of that litigation, see Murchison, *Waivers of Intergovernmental Immunity*, *supra* note 21, at 1190-97.

the air and water statutes, it limited the President's ability to waive compliance to matters in the "paramount interest of the United States."<sup>40</sup> Like the air statute, the drinking water law defined "person" to include federal agencies,<sup>41</sup> but its citizen suit provision did not specifically authorize the imposition of civil penalties.<sup>42</sup>

The initial litigation over environmental waivers concerned whether the waivers in the air and water statutes required the federal government to obtain permits and to comply with other "procedural" provisions found in state environmental laws.<sup>43</sup> The courts of appeals split over the issue, and so the question reached the Supreme Court in 1976. Relying on the rule of strict construction, the Supreme Court interpreted both statutes to limit the federal government's compliance obligations to the substantive standards established by state law.<sup>44</sup>

Less than five months after the Supreme Court decisions, Congress enacted the Resource Conservation and Recovery Act.<sup>45</sup> The waiver language of the new statute responded to the Supreme Court decision by clarifying congressional intent with respect to the matters then being litigated under the Clean Air Act and the Federal Water Pollution Control Act.<sup>46</sup> Like the Safe Drinking Water Act, the Resource Conservation and Recovery Act waiver expressly covered "all" requirements whether designated substantive or procedural, and specifically included permits and reports within the definition of requirements. It also added a provision subjecting federal agencies and employees to sanctions imposed by courts to enforce injunctions.<sup>47</sup>

The Resource Conservation and Recovery Act also included a citizen suit provision allowing any person to file an enforcement against any violator of the statute.<sup>48</sup> Like the Clean Water Act, the Resource

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<sup>40</sup> 42 U.S.C. § 300j(6)(a).

<sup>41</sup> Safe Drinking Water Act § 1411, 88 Stat. at 1662 (codified at 42 U.S.C. § 300f(12) (2000)).

<sup>42</sup> *Id.* § 1449, 88 Stat. at 1690 (codified as amended at 42 U.S.C. § 300j-8(a) (2000)).

<sup>43</sup> For a summary of the litigation in the lower federal courts, see Murchison, *Waivers of Intergovernmental Immunity*, *supra* note 21, at 1187-97.

<sup>44</sup> See *Env'tl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976) (Clean Water Act); *Hancock v. Train*, 426 U.S. 167 (1976) (Clean Air Act). For detailed descriptions and a critical evaluation of the Supreme Court decisions, see Murchison, *Waivers of Intergovernmental Immunity*, *supra* note 21, at 1197-1209.

<sup>45</sup> Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (2000)).

<sup>46</sup> *Id.* §6001, 90 Stat. at 2821 (codified as amended at 42 U.S.C. § 6961(a) (2000)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 7002, 90 Stat. at 2825 (codified as amended at 42 U.S.C. § 6972(a) (2000)).

Conservation and Recovery Act allowed imposition of civil penalties, but the statutory definition of “person” omitted the United States and its agencies from the definition.<sup>49</sup>

In 1977—the year following the Supreme Court decisions construing the waivers in the Clean Air Act and the Clean Water Act—Congress passed a trio of environmental laws. Separate amendments to the air and water statutes reversed the outcomes produced by the Supreme Court decisions by expanding the existing waivers in both statutes. In addition, Congress also expanded the waiver provision of the Safe Drinking Water Act.<sup>50</sup>

The 1977 amendments to both the Clean Air Act and the Clean Water Act subjected the federal government to “all” requirements respecting the control of air and water pollution, including recordkeeping, permit, and reporting provisions. Both statutes also subjected the federal government to any state or local “administrative authority” and “to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.”<sup>51</sup>

The new waivers for air and water pollution were not identical, however, and all of the differences suggested a somewhat broader waiver under the Clean Air Act. Most significantly, the 1977 Amendments to the Clean Water Act still did not include agencies of the federal government within the definition of “person,”<sup>52</sup> and the water law lacked the new sentence added to subsection (e) of the Clean Air Act citizen suit provision. The additional sentence in the air law declared that nothing in the citizen suit section or “any other law of the United States” is to be construed to “restrict any State, local, or interstate authority from . . . obtaining any judicial” or “administrative” sanction against the United States or any of its agencies or instrumentalities.<sup>53</sup>

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<sup>49</sup> *Id.* § 1004(15), 90 Stat. at 2800 (codified as amended at 42 U.S.C. § 6903(15) (2000)).

<sup>50</sup> Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1393, 1397 (codified as amended at 42 U.S.C. § 300j(6)(a) (2000)).

<sup>51</sup> Clean Water Act of 1977, Pub. L. No. 95-217, § 61(a), 91 Stat. 1566, 1598 (codified at 33 U.S.C. § 1323(a) (2000)); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116(a), 91 Stat. 685, 711 (codified as amended at 42 U.S.C. § 7418(a) (2000)). For a more detailed discussion of the amendments to the waivers, see Murchison, *supra* note 17, at 188-90. For a general description of the 1977 Amendments to the Clean Water Act, see Kenneth M. Murchison, *Learning From More Than Five-and-a-Half Decades of Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. Envtl. Aff. L. Rev. 527, 557-64 (2005).

<sup>52</sup> Compare 33 U.S.C. § 1362(5) (2000), with 42 U.S.C. § 7602(e) (2000).

<sup>53</sup> Clean Air Act Amendments of 1977, § 303(c), 91 Stat. at 772 (codified at 42 U.S.C. § 7604(e) (2000)).

The Clean Water Act also contained several unique features that further limited the reach of the statute's waiver of federal immunity. The revised waiver in the water law slightly expanded the President's exemption authority with respect to property of the armed forces, limited the imposition of penalties to those "arising under Federal law or imposed by a State or local court to enforce an order or the process of such court," and disavowed any intent to preclude removal of actions against the United States to federal court.<sup>54</sup>

The revised waiver provision in the Safe Drinking Water Act generally tracked the new language in the 1977 Amendments to the Clean Water Act, but it also included some provisions that arguably made its waiver broader than the one in the water law. For one thing, the drinking water act continued to impose stricter limits on the President's authority to grant exemptions from the waiver provision.<sup>55</sup> For another, the Safe Drinking Water Act provision—like the Clean Air Act amendment—defined "person" to include agencies and instrumentalities of the United States.<sup>56</sup>

*B. 1980s: New Disputes*

The 1977 amendments did not eliminate the controversy over waivers of immunity in federal environmental statutes; they simply shifted the focus of the disputes. New disputes arose in four areas: the ability of the United States to litigate immunity issues in federal court, the determination of what state laws imposed requirements to which the statutes had waived immunity, the duty of federal agencies to pay service fees and charges, and the imposition of sanctions against federal agencies that violated pollution control regulations. Although the federal government did not win every case, it prevailed in most of the reported decisions.

The First Circuit recognized a broad authority for federal agencies to challenge state enforcement actions in federal court. It ruled that the statute granting federal courts jurisdiction in civil actions filed by the

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<sup>54</sup> Clean Water Act of 1977 § 61(a), 91 Stat. at 1598 (codified at 33 U.S.C. § 1323(a) (2000)).

<sup>55</sup> Safe Drinking Water Amendments of 1977 § 8(a), 91 Stat. at 1396-97, (codified prior to amendments at 42 U.S.C. § 300j-6 (1988)).

<sup>56</sup> *Id.* § 8(b), 91 Stat. at 1397 (codified at 42 U.S.C. § 300f(12) (2000)).

United States<sup>57</sup> allowed the federal government to challenge the state's denial of a water pollution permit in federal district court.<sup>58</sup>

The principal issues in the "requirements" cases involved the extent to which the federal government was subject to state standards that had not been translated into specific numerical standards or to state regulations that went beyond the scope of the federal statute in which the waiver was found. Until the late 1980s, the courts uniformly applied the rule of strict construction with respect to the waivers in the Clean Water Act, the Noise Control Act, and the Resource Conservation and Recovery Act.<sup>59</sup> In the last two years of the decade, however, the Ninth Circuit and one district court in Colorado adopted a less restrictive interpretation of the waiver in the Resources Conservation and Recovery Act. The Ninth Circuit held that the waiver was applicable to local regulations regarding the collection of solid waste,<sup>60</sup> and the district court held that the waiver encompassed nonnumerical state standards that were virtually identical to federal standards that had been adopted by the EPA.<sup>61</sup>

The waivers in most federal environmental statutes obligate the federal government to pay some fees associated with state environmental laws. Beginning with the Federal Water Pollution Control Act Amendments of 1972, the waivers in most federal environmental statutes have mandated federal agencies to pay reasonable service charges. Even without a special provision regarding federal payment of regulatory charges and fees, the Comptroller General concluded that the waiver in the 1977 Amendments to the Clean Air Act required federal agencies to pay permit fees<sup>62</sup> but not charges that are properly classified as taxes rather than fees.<sup>63</sup>

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<sup>57</sup> 28 U.S.C. § 1345 (2000) ("Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.")

<sup>58</sup> *United States v. Puerto Rico*, 721 F.2d 832, 839-40 (1st Cir. 1983).

<sup>59</sup> See *United States ex rel. Tenn. Valley Auth. v. Tenn. Water Quality Control Bd.*, 717 F.2d 992 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Mo. ex rel. Ashcroft v. U.S. Dep't of the Army*, 672 F.2d 1297 (8th Cir. 1982); *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds*, 456 U.S. 305 (1982); *New York v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985); *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985); *Florida Dep't of Env'tl. Reg. v. Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985). For descriptions of the holdings in these cases, see Murchison, *supra* note 17, at 192-94.

<sup>60</sup> *Parola v. Weinberger*, 848 F.2d 956, 962 (9th Cir. 1988).

<sup>61</sup> *Colorado v. U.S. Dep't of the Army*, 707 F. Supp. 1562, 1572 (D. Colo. 1989), *rev'd on other grounds*, 990 F.2d 1565 (10th Cir. 1993).

<sup>62</sup> Comptroller General Opinion No. B-193379, 58 U.S. Comp. Gen. 244, 247-48 (1979).

<sup>63</sup> See Comptroller General Opinion No. B-207695, 1983 U.S. Comp. Gen. LEXIS 1006

Relying on a Supreme Court decision in a case involving a federal fee levied on states,<sup>64</sup> federal agencies have occasionally challenged state charges as impermissible taxes. The federal challenges have generally been reserved for two types of fees: those that impact the federal government more severely than they impact private parties or state or local entities; and those that set aside a portion of the regulatory charge for a contingency fund or some other nonregulatory purpose.<sup>65</sup>

Although some states have acquiesced in the federal position regarding fees, others have argued that the waivers for service charges apply more broadly. At least two district courts that faced the issue favored the states. Rather than embrace the fee-tax distinction, the courts found that the fees were payable because they were part of the state "requirements" to which Congress has waived immunity.<sup>66</sup>

The most intensely litigated waiver issue during the 1980s was the question of what sanctions were available against federal agencies that violated pollution control regulations.<sup>67</sup> The primary controversy regarding sanctions was whether federal agencies had to pay civil penalties, especially those imposed under state law.<sup>68</sup> Despite an early district court decision finding the Clean Air Act waiver sufficient to cover civil penalties,<sup>69</sup> most of the reported decisions reached the opposite result with respect to the waivers of the Clean Water Act and the Resource Conservation and

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(June 13, 1983).

<sup>64</sup> *Massachusetts v. United States*, 435 U.S. 444 (1978); see Murchison, *supra* note 17, at 196.

<sup>65</sup> See generally William D. Benton & Byron D. Baur, *Applicability of Environmental "Fees" and "Taxes" to Federal Facilities*, 31 A.F. L. REV. 253 (1989).

<sup>66</sup> *United States v. S. Coast Air Quality Mgmt. Dist.*, 748 F. Supp. 732, 733 (C.D. Cal. 1990); *Maine v. U.S. Dep't of the Navy*, 702 F. Supp. 322, 323 (D. Me. 1988), *vacated*, 973 F.2d 1007 (1st Cir. 1992). *But cf.* *N.Y. Dep't of Env'tl. Conservation v. U.S. Dep't of Energy*, 772 F. Supp. 91, 91 (N.D.N.Y. 1991) (stating that Congress did not make a blanket waiver of immunity from state taxation in the Clean Air Act, the Clean Water Act, or the Resource Conservation and Recovery Act, but the Department of Energy failed to show that the challenged fees were impermissible taxes). For a summary of the holdings in *South Coast Air Quality Management District* and *Department of the Navy* cases, see Murchison, *supra* note 17, at 196-97.

<sup>67</sup> Because the Department of Justice would not allow the EPA to file suits against federal agencies, the litigation principally occurred in cases brought by state agencies responsible for pollution control. See *supra* note 6.

<sup>68</sup> The Ninth Circuit also rejected an attempt to impose criminal liability on the Veterans Administration and its Administrator for alleged violations of state law governing the disposal of hazardous waste. *California v. Walters*, 751 F.2d 977, 979 (9th Cir. 1984).

<sup>69</sup> *Ala. ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208, 1211-12 (M.D. Ala. 1986); see also *S. Coast Air Quality Mgmt. Dist.*, 748 F. Supp. at 732.

Recovery Act.<sup>70</sup> By 1990, however, the Sixth Circuit and one district court had issued decisions holding that federal agencies were subject to civil penalties imposed under those two statutes as well.<sup>71</sup> The Supreme Court granted certiorari to resolve the conflict in the lower courts.<sup>72</sup>

As the civil penalties cases were working their way to the Supreme Court, Congress continued to include waivers in new environmental statutes. The waivers in the air, water, and hazardous waste laws remained unchanged in the 1980s,<sup>73</sup> but Congress did pass several new environmental statutes. All but one of them included waivers of federal immunity.

When a program for regulating underground storage tanks was added to the Resource Conservation and Recovery Act in 1984,<sup>74</sup> Congress added a special waiver provision for the new program. It generally followed the waiver applicable to other portions of the Resource Conservation and Recovery Act, with one notable exception. The provision pertaining to underground storage tanks omitted the language specifically including “any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief” within the “requirements” covered by the waiver. At the same time, it—like the Resource Conservation and Recovery Act—still abrogated the immunity of federal agencies and employees with respect to “any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.”<sup>75</sup>

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<sup>70</sup> *Mitzelfelt v. U.S. Dep’t of Air Force*, 903 F.2d 1293, 1296 (10th Cir. 1990); *United States v. Washington*, 872 F.2d 874, 881 (9th Cir. 1989) (construing the waiver provision of the Resource Conservation and Recovery Act); *California v. U.S. Dep’t of the Navy*, 845 F.2d 222, 225-26 (9th Cir. 1988) (construing the waiver of the Clean Water Act); see Murchison, *supra* note 17, at 199-200.

<sup>71</sup> *Ohio v. U.S. Dep’t of Energy*, 904 F.2d 1058, 1059 (6th Cir. 1990); *Maine v. Dep’t of the Navy*, 702 F. Supp. at 329; see Murchison, *supra* note 17, at 200-01.

<sup>72</sup> See *Ohio v. U.S. Dep’t of Energy*, 500 U.S. 951 (1991).

<sup>73</sup> Congress also enacted and amended the Comprehensive Environmental Response, Compensation, and Liability Act during the 1980s. 42 U.S.C. §§ 9601-9675 (1988). Because that Act focuses on remediation rather than regulations, its waiver is excluded from the discussion in the text. As amended in 1986, the remediation statute generally subjects federal facilities to “[s]tate laws concerning removal and remedial action, *including state laws regarding enforcement*,” for releases of hazardous substances. *Id.* § 9620(a)(4) (emphasis added). The First Circuit ruled that the waiver does not waive the federal government’s sovereign immunity with respect to civil penalties. *Maine v. U.S. Dep’t of the Navy*, 973 F.2d 1007, 1007 (1st Cir. 1992).

<sup>74</sup> The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, 3277 (codified as amended at 42 U.S.C. §§ 6991 *et seq.* (2000)).

<sup>75</sup> Compare *id.* § 601(a), 98 Stat. at 3286 (codified as amended at 42 U.S.C. § 6991(f) (2000)),

The Medical Waste Tracking Act of 1988<sup>76</sup> contained the broadest waiver of the statutes enacted during the 1980s. It combined a waiver similar to other regulatory statutes with an expanded definition of "requirements." The new definition declared that the requirements included, but were not limited to, "all administrative orders, civil, criminal, and administrative penalties, and other sanctions, including injunctive relief, fines, and imprisonment."<sup>77</sup>

Two other statutes enacted during the 1980s took more cautious approaches to the waiver issue. The Emergency Planning and Community Right to Know Act,<sup>78</sup> which was part of the Superfund Amendments and Reauthorization Act of 1986, established a reporting system for releases of hazardous substances. It lacked an express waiver provision, and its definition of "person" did not include the United States or its agencies.<sup>79</sup> Finally, Congress also enacted the Low-Level Radioactive Waste Policy Amendments Act<sup>80</sup> in 1986. It waived federal immunity when the federal government uses a non-federal facility for the disposal of low level radioactive wastes.<sup>81</sup>

### C. 1990s: Partial Resolution of Some Disputed Issues

The 1990s produced both legislative and judicial attempts to resolve some of the controversies that had emerged during the preceding decade. In the Clean Air Act Amendments of 1990,<sup>82</sup> Congress again expanded the waiver in that statute. Two years later, the Supreme Court held that the only civil penalties that could be imposed on federal agencies under the Resource Conservation and Recovery Act or the Clean Water Act were penalties imposed by judges to force compliance with injunctions.<sup>83</sup> A few months after the Supreme Court decision, Congress enacted the

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with Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 6001, 90 Stat. 2795, 2821 (codified as amended at 42 U.S.C. § 6961 (2000)).

<sup>76</sup> Pub. L. No. 100-582, 102 Stat. 2950 (codified as amended at 42 U.S.C. §§ 6992-6992k (2000)).

<sup>77</sup> *Id.* § 2, 102 Stat. at 2955.

<sup>78</sup> Pub. L. No. 99-499, 100 Stat. 1728 (codified at 42 U.S.C. §§ 11001-11050 (2000)).

<sup>79</sup> *Id.* §§ 327, 329, 100 Stat. at 1757-58 (codified at 42 U.S.C. 11049(7) (2000)).

<sup>80</sup> Low-Level Radioactive Waste Policy Amendments Act of 1985 Pub. L. No. 99-240, § 102, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C.A. §§ 2021b-2021j (West 2006)).

<sup>81</sup> *Id.* § 102, 99 Stat. at 1845 (codified at 22 U.S.C. § 2021d(b)(1)(B) (2000)).

<sup>82</sup> Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7407-7601 (2000)).

<sup>83</sup> *Ohio v. U.S. Dep't of Energy*, 503 U.S. 607, 628 (1992).

Federal Facility Compliance Act; it reversed the Supreme Court decision with respect to the Resource Conservation and Recovery Act.<sup>84</sup>

Various circuit courts also addressed several issues not directly covered by the Supreme Court decision. Early in the decade, the Third Circuit gave federal agencies even broader authority to challenge state enforcement decisions in federal court.<sup>85</sup> Near the end of the decade, the Ninth Circuit ruled that federal agencies had to comply with state restrictions governing water pollution from nonpoint sources,<sup>86</sup> and the Sixth Circuit held that federal agencies were subject to civil penalties for past violations of the Clean Air Act.<sup>87</sup>

The Third Circuit decision expanding the ability of federal agencies to challenge state enforcement actions in federal court came early in the decade. The court of appeals broadly construed the Declaratory Judgment Act<sup>88</sup> to permit a federal agency to file a declaratory judgment action challenging its duty to comply with a state administrative order.<sup>89</sup> The decision gave federal agencies a venue normally denied to private parties. The courts of appeals have generally ruled that compliance orders issued under federal environmental laws are not subject to judicial review because they are not final agency actions.<sup>90</sup>

While Congress was considering the Clean Air Act Amendments of 1990, the Department of Defense was litigating the scope of federal liability to pay state fees under the Clean Air Act;<sup>91</sup> Congress addressed the issue in the 1990 Amendments. The revised waiver provision obligated federal agencies to pay any “fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program.”<sup>92</sup>

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<sup>84</sup> Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (codified at 42 U.S.C. § 6961 (2000)).

<sup>85</sup> *United States v. Pa. Dep’t of Env’tl. Res.*, 923 F.2d 1071, 1072 (3d Cir. 1991).

<sup>86</sup> *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1153 (9th Cir. 1998).

<sup>87</sup> *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 534-35 (6th Cir. 1999).

<sup>88</sup> 28 U.S.C. §§ 2201-2202 (2000).

<sup>89</sup> *See Pa. Dep’t of Env’tl. Res.*, 923 F.2d at 1074-75.

<sup>90</sup> *See, e.g., Acker v. U.S. Env’tl. Prot. Agency*, 290 F.3d 892, 894 (7th Cir. 2002); *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1079 (3d Cir. 1989); *Asbestec Constr. Serv. Inc. v. U.S. Env’tl. Prot. Agency*, 849 F.2d 765, 769 (2d Cir. 1988). *But see Allsteel Inc. v. U.S. Env’tl. Prot. Agency*, 25 F.3d 312, 315 (6th Cir. 1994) (order to stop construction was a final agency action because it imposed legal obligations beyond those of the statute). *Contra Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1239 (11th Cir. 2003), *cert. denied*, 541 U.S. 1020 (2004) (TVA not bound by EPA order because it was not a final agency action).

<sup>91</sup> For a description of the litigation and its outcome, see Murchison, *supra* note 17, at 189 n.65.

<sup>92</sup> Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 101(e), 104 Stat. 2399, 2409

Congress also expanded the Clean Air Act waiver by adding inspection and maintenance provisions for government vehicles and for vehicles operated on federal installations,<sup>93</sup> but it did not change the language of the 1977 Amendments regarding the sanctions covered by the waiver of immunity.

As described above, the lower federal courts had split on the question of the extent to which waivers in the Clean Air Act, the Clean Water Act, and the Resource Conservation Act subjected federal agencies to civil penalties imposed by federal agencies. In *Department of Energy v. Ohio*,<sup>94</sup> the United States Supreme Court definitively resolved the issue for the waivers of the Clean Water Act and the Resource Conservation and Recovery Act: each statute permitted penalties only when imposed by judges to enforce prior orders of the court; neither waived federal immunity with respect to administrative or judicial penalties imposed for past violations.<sup>95</sup>

The most notable aspect of Justice Souter's majority opinion in *Department of Energy* is its emphatic reaffirmation of the rule of strict construction for all waivers of federal immunity. According to Justice Souter, the principle of strict construction was "a common rule, with which we presume congressional familiarity."<sup>96</sup>

The premise for the Court's narrow construction of the waivers in the Clean Water Act and the Resource Conservation and Recovery Act was a distinction between "coercive" and "punitive" penalties, a distinction not previously drawn in environmental enforcement. "Coercive" penalties, in Justice Souter's lexicon, are sanctions imposed to "induce" compliance "with injunctions or other *judicial* orders designed to modify behavior prospectively."<sup>97</sup> In contrast, "punitive" sanctions are "imposed to punish past violations of those statutes or state laws supplanting them."<sup>98</sup> In the Court's view, neither statute contained a "clear and unequivocal waiver" of immunity to punitive civil penalties, and the Court was unwilling to infer "a broader waiver."<sup>99</sup>

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(codified at 42 U.S.C. § 7418(a)(2)(B) (2000)).

<sup>93</sup> *Id.* §§ 235, 302(d), 104 Stat. at 2530, 2574 (codified at 42 U.S.C. §§ 7418(c), (d) (2000)).

<sup>94</sup> 503 U.S. 607 (1992).

<sup>95</sup> *Id.* at 615, 632.

<sup>96</sup> *Id.* at 615.

<sup>97</sup> *Id.* at 613 (emphasis added).

<sup>98</sup> *Id.* at 614.

<sup>99</sup> *Id.* at 619.

The citizen suit provision of each statute before the Court allowed states and private parties to enforce the federal law against federal agencies and also allowed the district court to apply any appropriate civil penalties under the relevant statute.<sup>100</sup> That language was not, however, sufficiently clear to subject the federal government to punitive civil penalties. Each statute provided that civil penalties could only be assessed against “persons,” and neither included the United States or its agencies within its definition of person.<sup>101</sup>

The Court had the most difficulty with the waiver found in section 313 of the Clean Water Act. That section subjects the federal government to “all Federal, State, interstate, and local . . . process and sanctions respecting the control and abatement of water pollution,” but it limits federal liability for civil penalties to those “arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.”<sup>102</sup>

Conceding that the term “sanctions” might be used to include both coercive and punitive penalties, Justice Souter found three reasons in the statutory context for limiting the text to coercive penalties. First, the statutory provision distinguished “substantive requirements . . . from judicial process, even though each might require the same conduct.”<sup>103</sup> Second, the statute joined sanctions with “process” rather than with “requirements.” Third, the statute referred to the “enforcement” of sanctions, which would presumably occur in the future.<sup>104</sup>

Nor was the provision limiting federal liability to civil penalties “arising under Federal law or imposed by a State or local court to enforce an order or process of such courts” adequate to constitute a clear and unequivocal waiver with respect to punitive penalties arising under federal law.<sup>105</sup> The federal statute authorized civil penalties to be imposed against “any person” but the statute’s definition of person did not include the United States. Dismissing the state’s assertion that punitive sanctions were needed to deter federal violations as “not . . . self-evident,” Justice Souter relied on cases interpreting the federal question jurisdiction of the federal courts to conclude that penalties imposed under an approved

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<sup>100</sup> 33 U.S.C. § 1323(a) (2000) (Clean Water Act); 42 U.S.C. § 6972(a) (1988) (Resource Conservation and Recovery Act prior to 1992 amendment).

<sup>101</sup> 33 U.S.C. §§ 309(d), 502(15) (2000) (Clean Water Act); 42 U.S.C. § 6903(15), 6928(a) (1988) (Resource Conservation and Recovery Act).

<sup>102</sup> 33 U.S.C. § 1323(a) (2000).

<sup>103</sup> *Dep’t of Energy*, 503 U.S. at 623.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 631.

state permit program did not “arise” under federal law merely because the Environmental Protection Agency had approved the permit program under the Clean Water Act. Recognizing that this interpretation of the statute gave no “satisfactory” meaning to the phrase “arising under federal law,” Justice Souter nonetheless concluded the “rule of narrow construction . . . takes the waiver no further than . . . coercive [penalties].”<sup>106</sup>

Interpretation of the waiver of immunity in the Resource Conservation and Recovery Act was much less problematic. The only language referring to sanctions in the statutory text included an express reference to state and federal courts.<sup>107</sup> This reference was sufficient to bar “any inference that a waiver of immunity from ‘requirements’ somehow unquestionably extends to punitive fines that are never so much as mentioned.”<sup>108</sup>

When the Supreme Court opinion in *Department of Energy* was announced, Congress was debating the reauthorization of the Resource Conservation and Recovery Act. Although Congress failed to pass a reauthorization bill, it did enact the Federal Facility Compliance Act.<sup>109</sup> The new law partially reversed *Department of Energy* by allowing civil penalties to be imposed under the Resource Conservation and Recovery Act.<sup>110</sup>

The Federal Facilities Compliance Act significantly expanded the waiver of federal immunity in the Resource Conservation and Recovery Act.<sup>111</sup> The congressional intent to reverse the Supreme Court’s holding

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<sup>106</sup> *Id.* at 627.

<sup>107</sup> 42 U.S.C. § 6961 (1988).

<sup>108</sup> *Dep’t of Energy*, 503 U.S. at 628. For a similar conclusion about the Resource Conservation and Recovery Act waiver even pursuant to an analytic framework that rejected the rule of strict construction, see Murchison, *Reforming Environmental Enforcement*, *supra* note 17, at 221.

<sup>109</sup> Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (codified at 42 U.S.C. § 6961 (2000)).

<sup>110</sup> *Id.* § 102, 106 Stat. at 1505.

<sup>111</sup> In addition to listing punitive civil penalties among the sanctions to which federal agencies are subject, the 1992 legislation also covered a variety of other matters. The revised waiver substantially enhanced the enforcement authority of the EPA Administrator over federal agencies. Specifically, it authorizes the Administrator to institute “an administrative enforcement action” against any federal agency “pursuant to the enforcement authorities contained in this Act.” *Id.* § 102, 106 Stat. at 1506. Moreover, the new law requires that enforcement actions be initiated against federal agencies “in the same manner and under the same circumstances as an action would be initiated against another person” and that “any voluntary resolution or settlement . . . be set forth in a consent order.” *Id.* Federal agencies did, however, get one special procedural concession: before any administrative order becomes “final,” the Administrator must give the agency “the opportunity to confer with the administrator.” *Id.* The 1992 legislation also increased the number of inspections to which federal facilities are subject. It mandates that the EPA

in *Department of Energy* is obvious on the face of the Federal Facility Compliance Act. The statute extended the definition of the requirements to which immunity is waived to encompass “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.”<sup>112</sup> It also amended the definition of “person” in the Resource Conservation and Recovery Act to “include each department, agency, and instrumentality of the United States.”<sup>113</sup> According to the House Committee Report, even the Assistant Attorney General for the Land and Natural Resources division agreed that “the language of this legislation evidences a clear and effective waiver of the sovereign immunity of the United States from civil and administrative penalties for violations of . . . hazardous waste laws.”<sup>114</sup>

The new law did not give states unfettered discretion with respect to the use of civil penalties collected from federal agencies. Unless a pre-existing law or a provision of a “State constitution requires the funds to be used in a different manner,” the Federal Facilities Compliance Act provides that a state can only use penalties paid by the federal government

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inspect each federal facility annually and obligates the agencies to reimburse the EPA for the costs of the inspections; it also allows any state with a federally approved hazardous waste program to inspect federal facilities. *Id.* § 104, 106 Stat. at 1507-08.

In enacting the Federal Facility Compliance Act, Congress showed some sensitivity to special problems faced by certain agencies, including the Department of Defense. The Act provided special rules for “mixed wastes,” hazardous wastes generated on public vessels, military munitions, and federally owned treatment works. *Id.* § 105, 106 Stat. at 1508-10.

<sup>112</sup> *Id.* § 102(a)(3), 106 Stat. 1505 (codified at 42 U.S.C. § 6961(a)(2000)). Appendix A contains the full text of the waiver of federal immunity in the Federal Facilities Compliance Act.

The legislative history reflects some disagreement over the appropriate source of funds to pay civil penalties. The House Committee suggested that payment should come from the “judgment fund” appropriation when an agency disputed its liability and referred the matter to the Justice Department for defense. H.R. REP. NO. 111, 102d Cong., 2d Sess. 15 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1287, 1301. When President Bush signed the Federal Facility Compliance Act, however, he issued a statement declaring that “fines or penalties imposed as a result of this legislation will be paid from agency funds, unless otherwise required by law.” Presidential Statement Upon Signing H.R. 2194, 28 WEEKLY COMP. PRES. DOC. 1868 (Oct. 12, 1992), *reprinted in* 1992 U.S.C.C.A.N. 1337-1, 1337-1, 1337-2 (1992).

<sup>113</sup> Federal Facility Compliance Act § 103, 106 Stat. at 1507 (codified at 42 U.S.C. § 6903(15) (2000)).

<sup>114</sup> H.R. REP. NO. 111, 102d Cong., 2d Sess. 15 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1287, 1301.

“for projects designed to improve or [to] protect the environment or to defray the costs of environmental protection or enforcement.”<sup>115</sup>

Another liability question that the Federal Facility Compliance Act attempted to resolve was what are the “reasonable service charges” that can be assessed against federal agencies.<sup>116</sup> The 1992 Act contains a non-exclusive list of permissible charges that includes fees “assessed in connection with the” issuance, renewal, or amendment of permits; the “review of plans, studies, and other documents;” or the “inspection or monitoring of facilities.”<sup>117</sup> In addition, regulators can impose “any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program.”<sup>118</sup>

An amendment to the first sentence of the Resource Conservation and Recovery Act waiver further expanded regulatory control over federal agencies. Now, the statute expressly waives federal immunity to requirements respecting the “management” of hazardous waste as well as those concerning the disposal of such waste.<sup>119</sup>

The new law also clarified the extent to which federal employees are subject to the sanctions of the Resource Conservation and Recovery Act. It prohibits holding an individual agent, officer, or employee “personally liable for any civil penalty” that arises from “any act or omission within the scope of . . . official duties.”<sup>120</sup> It does, however, subject agents, officers, and employees (but not any federal agency or instrumentality) to “any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law.”<sup>121</sup> According to the Senate Report, this section did not “alter the standard for, impose, or otherwise affect any criminal liability of any Federal employee.”<sup>122</sup> With respect to federal prosecutions, the report appears accurate; several courts of appeal have affirmed convictions of federal employees for violating fed-

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<sup>115</sup> Federal Facility Compliance Act § 103, 106 Stat. at 1506 (codified at 42 U.S.C. § 6961(c)).

<sup>116</sup> *Id.* § 102(a)(3), 106 Stat. at 1505 (amending 42 U.S.C. § 6961(a)).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* § 102(a)(2), 106 Stat. at 1505 (amended 42 U.S.C. § 6961(a)). In a decision that preceded the Supreme Court's opinion in *Department of Energy*, the Ninth Circuit had ruled that the waiver in the Resource Conservation and Recovery Act was broad enough to encompass state regulation of the “collection” of solid waste even prior to the amendment described in the text. *Parola v. Weinberger*, 848 F.2d 956, 962 (9th Cir. 1988).

<sup>120</sup> Federal Facility Compliance Act § 102(a)(4), 106 Stat. at 1505 (amending 42 U.S.C. § 6961(a)).

<sup>121</sup> *Id.* § 102(a)(3), 106 Stat. at 1505-06 (amending 42 U.S.C. § 6961(a)).

<sup>122</sup> S. REP. NO. 102-67 (1991).

eral environmental laws.<sup>123</sup> However, the language is arguably inconsistent with a Ninth Circuit decision in which the court refused to allow a state prosecution of the Administrator of the Veterans Administration when the parties agreed that the prosecution was “essentially one against the United States.”<sup>124</sup>

The Federal Facility Compliance Act was an important step in the evolution of the waivers of immunity found in federal environmental statutes. Equally important to note, however, are two changes that the Act did not make. It did not alter any waiver except the one found in the Resource Conservation and Recovery Act, and it did not abrogate the rule of strict construction that the Supreme Court reaffirmed in the *Department of Energy* case.

Congress has not addressed the waiver problem in a comprehensive way since the enactment of the Federal Facility Compliance Act in 1992. It has neither enacted a general waiver applicable to all environmental statutes nor reconsidered the waivers in each environmental statute. Congress did, however, revisit the waiver in the Safe Drinking Water Act when it amended that statute in 1996.<sup>125</sup> The Safe Drinking Water Act Amendment follows the Federal Facility Compliance Act in two respects. It subjects federal agencies 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.”<sup>126</sup> It also provides that unless a pre-existing state law or a state constitutional provision “requires the funds to be used in a different manner,” states must use “all funds” they collect “only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.”<sup>127</sup>

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<sup>123</sup> See, e.g., *United States v. Curtis*, 988 F.2d 946, 949 (9th Cir. 1993), *cert. denied*, 510 U.S. 862 (1993); *United States v. Dee*, 912 F.2d 741, 748-49 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

<sup>124</sup> *California v. Walters*, 751 F.2d 977, 979 (9th Cir. 1985).

<sup>125</sup> Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (amending 42 U.S.C. § 300 (2000)).

<sup>126</sup> *Id.* § 129, 110 Stat. at 1660 (codified at 42 U.S.C. § 300j-6(a) (2000)).

<sup>127</sup> *Id.* § 129 (c), 110 Stat. at 1662 (codified at 42 U.S.C. § 300j-7(a) (2000)). The Safe Drinking Water Act Amendment also establishes a scheme to assess federal administrative penalties against federal facilities. It authorizes the EPA Administrator to assess a penalty against federal agencies of not more than \$25,000 per day when the administrator “finds that a Federal agency has violated an applicable requirement” of the Act. *Id.* § 129 (b)(1), 110 Stat. at 1661 (codified at 42 U.S.C. § 300j-6(b) (2000)).

Although *Department of Energy* is the Supreme Court's last decision regarding an environmental waiver, the 1992 decision has not eliminated litigation regarding the waivers that Congress has left un-amended. Cases raising two issues, liability for civil penalties under the Clean Air Act and the duty to prevent violations of water quality standards by nonpoint sources, produced new appellate decisions by the Sixth Circuit and the Ninth Circuit during 1998 to 1999.<sup>128</sup>

Before and after the Supreme Court's *Department of Energy* decision, federal agencies have resisted paying civil penalties under the Clean Air Act. The House Report on the 1977 amendment to section 118 declared that the amendment would subject the federal government to civil penalties,<sup>129</sup> and administrative and judicial decisions prior to 1992 generally held the federal government liable for the penalties. During the 1970s to 1980s, at least one federal district court and the Comptroller General rejected claims that federal agencies were immune from state penalties for violating air pollution laws.<sup>130</sup>

Justice Souter's reaffirmation of the canon of strict construction in *Department of Energy* prompted renewed resistance to payment of civil penalties under the Clean Air Act. The Clean Air Act was similar, the federal agencies argued, to the waivers involved in *Department of Energy*, particularly the Clean Water Act waiver. Thus, the United States claimed, the Supreme Court rationale should also preclude liability for "punitive" civil penalties under the air law.

The federal government prevailed in two of the three district courts in which the issue was initially litigated. District judges in the Northern District of Georgia and the Eastern District of California held that the air waiver was similar enough to the Clean Water Act provision to make the *Department of Energy* rationale controlling.<sup>131</sup>

The United States District Court for the Middle District of Tennessee reached the opposite conclusion regarding the air waiver, ruling that the "plain language" of section 118 of the Clean Air Act combined with the "repeated use of inclusive language, such as 'any' and 'all'"

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<sup>128</sup> *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529 (6th Cir. 1999); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146 (9th Cir. 1998).

<sup>129</sup> H.R. REP. NO. 95-294, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1089-90.

<sup>130</sup> *Ala. ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208 (M.D. Ala. 1986); Comptroller General Opinion No. B-194508, 58 U.S. Comp. Gen. 667, 667-68 (1979).

<sup>131</sup> *Cal. ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 29 F. Supp. 2d 652 (E.D. Cal. 1998), *rev'd on other grounds*, 215 F.3d 1005 (9th Cir. 2000); *United States v. Ga. Dep't of Natural Res.*, 897 F. Supp. 1464 (N.D. Ga. 1995).

showed a congressional intent to subject federal agencies to punitive penalties under the Clean Air Act.<sup>132</sup> The Tennessee Court listed several reasons why the *Department of Energy* opinion did not control the interpretation of the air waiver. First, the text supported a different result. The Supreme Court opinion had emphasized the language of the Resource Conservation and Recovery Act and the Clean Water Act connecting the waivers to sanctions to enforce court orders; by contrast, Congress had omitted that phrase when it amended the Clean Air Act waiver in 1977.<sup>133</sup> Moreover, Congress had added a provision to the Clean Air Act exempting “particular individuals, but not agencies” from civil penalties.<sup>134</sup> Second, the Court’s decision was consistent with prior administrative and judicial interpretations of the Act.<sup>135</sup> Third, the citizen suit provision of the Clean Air Act included a separate provision subjecting the United States to administrative and judicial sanctions in state agencies and courts.<sup>136</sup> Fourth, the legislative history of the Clean Air Act and sound public policy supported the Court’s interpretation.<sup>137</sup>

The Sixth Circuit was the first appellate court to address the issue, and it affirmed the District Court for the Middle District of Tennessee without deciding whether the waiver of federal immunity section of the Clean Air Act was sufficiently different from the waivers in the Resource Conservation and Recovery Act and the Clean Water Act to distinguish *Department of Energy*.<sup>138</sup> Instead, the court of appeals focused on subsection (e) of the citizen suit provision of the Clean Air Act, a provision that had no parallel in the Resource Conservation and Recovery Act or the Clean Water Act. Acknowledging that any waiver “must be ‘unequivocally expressed in statutory text’ . . . [and] strictly

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<sup>132</sup> *United States v. Tenn. Air Pollution Control Bd.*, 967 F. Supp. 975, 978-79 (M.D. Tenn. 1997).

<sup>133</sup> *Id.* at 980.

<sup>134</sup> *Id.* at 980-81.

<sup>135</sup> *Id.* at 981 (citing Comptroller General Opinion No. B-191747, 1978 WL 9814 (1978)); *Ala. ex rel. Graddick*, 648 F. Supp. at 1209; *United States v. S. Coast Air Quality Mgmt. Dist.*, 748 F. Supp. 732, 733 (C.D. Cal. 1990).

<sup>136</sup> *Tenn. Air Pollution Control Bd.*, 967 F. Supp. at 981-82.

<sup>137</sup> *Id.* at 982-84.

<sup>138</sup> *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 530-31 (6th Cir. 1999). See generally Stephan J. Schlegelmich, *The Clean Air Act, Sovereign Immunity, and Sleight of Hand in the Sixth Circuit: United States v. Tennessee Air Pollution Control Board*, 50 CASE W. RES. L. REV. 933 (2000).

construed in favor of the United States,” the Sixth Circuit found that the Clean Air Act met those “stringent rules.”<sup>139</sup>

Subsection (e) of the Clean Air Act declares that courts are not to construe anything in the citizen suit provision “or in any other law of the United States” to preclude “any State, local, or interstate authority from . . . obtaining any judicial remedy or sanction in any State or local court, or . . . obtaining any administrative remedy or sanction.”<sup>140</sup> According to the Sixth Circuit, the words “any administrative remedy or sanction” were sufficient to cover the civil penalties imposed by Tennessee because no qualification suggested that the remedies or sanctions had to be “prospective, coercive” sanctions.<sup>141</sup> Similarly, the declaration that nothing in “any other law” was to restrict the government’s liability included “the law relating to sovereign immunity.”<sup>142</sup> Nor was the court persuaded by the government’s argument that subsection (e) could not “effect a waiver . . . because it is merely a savings clause.”<sup>143</sup> To the contrary, the court of appeals concluded that “[i]f words have meaning,” subsection (e) “says that no law shall restrict the State of Tennessee from obtaining any administrative remedy or sanction against a federal air polluter.”<sup>144</sup>

In light of the clarity of subsection (e), the Sixth Circuit found “it unnecessary to decide” if the district court had correctly ruled that the waiver in section 118 of the Clean Air Act was sufficiently different from the waivers in the Resource Conservation and Recovery Act and the Clean Air Act to distinguish *Department of Energy*.<sup>145</sup> Nor did the court accept the argument that the reference to section 118 in the last sentence of subsection (e) made the new subsection solely dependent on section 118. To the contrary, the cross reference “simply reminds the reader that [section 118] defines the United States’ burden to comply with state laws;” subsection (e) of the citizen suit “expansively and unambiguously removes any impediment to enforcement in the event of noncompliance.”<sup>146</sup>

Near the end of the decade, the Ninth Circuit turned to a waiver issue involving the Clean Water Act, the question of whether a federal

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<sup>139</sup> *Tenn. Air Pollution Control Bd.*, 185 F.3d at 531.

<sup>140</sup> 42 U.S.C. § 7604(e) (2000).

<sup>141</sup> *Tenn. Air Pollution Control Bd.*, 185 F.3d at 532.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 533.

<sup>145</sup> *Id.* The court of appeals did indicate that it was “sympathetic to the [district] court’s conclusion.” *Id.*

<sup>146</sup> *Id.*

agency could be required to comply with state controls on nonpoint sources of water pollution when violations of those controls were causing violations of state water quality standards.<sup>147</sup> A 1987 decision had ruled that the Clean Water Act waiver extended to state “water quality standards enforceable under”<sup>148</sup> the federal statute and that review of federal compliance with the water quality standards was available under the Administrative Procedure Act.<sup>149</sup> In 1998, *Idaho Sporting Congress v. Thomas* extended the review under the Administrative Procedure Act to include pollution from nonpoint sources when that pollution contributed to the violation of water quality standards.<sup>150</sup>

*Idaho Sporting Congress* involved a challenge to timber sales by the Forest Service. The principal challenge concerned the failure to prepare an environmental impact system for the sales, and the court of appeals remanded the case for preparation of a statement.<sup>151</sup> Nonetheless, after determining that an impact statement was required, the court briefly considered the Clean Water Act claims raised by the plaintiffs. The court unequivocally ruled that “all federal agencies must comply with state water quality standards, including a state’s antidegradation policy” and that “[j]udicial review of the requirement is available under the Administrative Procedure Act” for nonpoint sources.<sup>152</sup> However, the court of appeals deferred determining whether a violation had occurred in the case before it. “[U]ntil further studies are completed” in connection with the environmental impact statement, the court concluded, it lacked “sufficient facts” to determine whether the state’s water quality standards had been violated.<sup>153</sup>

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<sup>147</sup> *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146 (9th Cir. 1998).

<sup>148</sup> *Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 844 (9th Cir. 1987).

<sup>149</sup> 5 U.S.C. § 704 (2000).

<sup>150</sup> *Idaho Sporting Cong.*, 137 F.3d at 1153. For an article criticizing the *Idaho Sporting Congress* court for assuming that all nonpoint source provisions in state water quality regulation created judicially enforceable standards, see Robin Kundis Craig, *Idaho Sporting Congress v. Thomas and Sovereign Immunity: Federal Facility Nonpoint Sources, the APA, and the Meaning of “In the Same Manner and to the Same Extent as Any Non-governmental Entity,”* 30 ENVTL. L. 527 (2000).

<sup>151</sup> *Idaho Sporting Cong.*, 137 F.3d at 1154.

<sup>152</sup> *Id.* at 1153.

<sup>153</sup> *Id.*

*D. Developments Since 2000: Continued Conflict Over Clean Air Act Enforcement*

Since 2000, the litigation involving waivers of immunity has focused on whether federal agencies have to pay civil penalties to the states under the Clean Air Act. The reported decisions conflict. The Ninth Circuit avoided the substantive issue by holding that the federal government could not remove an enforcement action filed in state court to federal district court.<sup>154</sup> The Eleventh Circuit rejected that holding as well as the Sixth Circuit's 1999 decision,<sup>155</sup> ruling that the federal government was liable for civil penalties under the Clean Air Act.<sup>156</sup>

Although the Ninth Circuit decided its case on jurisdictional grounds, its decision produced the same result—federal liability for punitive penalties imposed by the state—as the earlier Sixth Circuit decision that reached the merits of the waiver issue. In 1999, the Sacramento Area Metropolitan Air Quality Management District commenced an enforcement action in state court against the United States for \$13,050 in civil penalties. The United States removed the action to federal district court, and the district court ruled that the Clean Air Act did not waive the federal government's immunity for civil penalties for past violations.<sup>157</sup> On appeal, the Ninth Circuit decided removal was improper, so it reversed the district court and remanded the case to the state court.<sup>158</sup> The state court subsequently ruled in favor of the air quality management district, and the United States elected to pay the penalty rather than to appeal.<sup>159</sup>

Even though the Sacramento Metropolitan Air Quality Management District had not challenged the removal to federal court, the court of appeals concluded that it was obligated to resolve the jurisdictional issue: "If the district court lacked jurisdiction, we have jurisdiction on appeal to correct the jurisdictional error, but not to entertain the merits

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<sup>154</sup> Cal. *ex rel* Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 215 F.3d 1005, 1014 (9th Cir. 2000).

<sup>155</sup> United States v. Tenn. Air Pollution Control Bd., 185 F.3d 529 (6th Cir. 1999).

<sup>156</sup> Sierra Club v. Tenn. Valley Auth., 430 F.3d 1337, 1356-57 (11th Cir. 2005); City of Jacksonville v. U.S. Dep't of the Navy, 348 F.3d 1307, 1309 (11th Cir. 2003).

<sup>157</sup> Cal. *ex rel*. Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 29 F. Supp. 2d 652, 656-57 (E.D. Cal. 1998), *rev'd* 215 F.3d 1005 (9th Cir. 2000).

<sup>158</sup> *Sacramento Metro. Air Quality Mgmt. Dist.*, 215 F.3d at 1015.

<sup>159</sup> Email from Kathy Pittard, District Counsel, Sacramento Metropolitan Air Quality Management District, to the author (March 23, 2007).

of the dispute.”<sup>160</sup> In deciding that removal was improper, the Ninth Circuit focused on the language of subsection (e) of the Clean Air Act citizen suit section, a provision that was added to the statute in 1977. That language “specifically protect[ed] the right of state and local governments to obtain remedies or sanctions against the federal government in a nonfederal forum pursuant to state and local air quality laws.”<sup>161</sup> Conceding that the 1977 Amendment did “not expressly prevent the federal government from removing actions from state and local courts,” the Ninth Circuit nonetheless concluded that its “plain text unequivocally demonstrates that Congress intended to prevent the removal of a covered action to federal court.”<sup>162</sup> In the view of the appellate court, “guaranteeing the right of state and local governments to *obtain* judicial remedies and sanctions in state and local courts . . . necessarily prohibits the removal of actions that are brought by state and local governments pursuant to their own air quality laws.”<sup>163</sup>

More recently, the dispute over the federal government’s liability for civil penalties under the Clean Air Act has taken another new turn. The Eleventh Circuit has rejected the approaches of both the Sixth Circuit and the Ninth Circuit. It has allowed the federal government to remove state enforcement actions to federal court, and it has construed the Clean Air Act waiver as limited to “coercive” civil penalties.

Like the Ninth Circuit case, *City of Jacksonville v. Department of the Navy* originated as a state court action.<sup>164</sup> The city sought civil penalties

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<sup>160</sup> *Sacramento Metro. Air Quality Mgmt. Dist.*, 215 F.3d at 1009.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1011. Even though the final version of the Clean Air Act Amendments of 1977 deleted a provision expressly prohibiting removal “without explanation,” the Ninth Circuit concluded that the legislative history supported its decision that Congress intended subsection (e) of the citizen suit provision to preclude removal. *Id.* at 1012. That history, the court of appeals noted, shows “Congress’s manifest frustration with the federal government’s laggard and obstinate approach towards complying with state and local air quality laws.” *Id.* at 1011. In addition, the silence of the air waiver contrasted sharply with the contemporaneous denial of any intent to preclude removal in the 1977 amendment to the Clean Water Act waiver. *Id.* citing H.R. REP. NO. 95-294 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1277-78.

Finally, the Ninth Circuit rejected the argument that it might have independent jurisdiction of the case under the general federal question statute. That statute was inapplicable, the court ruled, because the federal issue was presented when the United States raised its sovereign immunity defense, not as part of the plaintiff’s claim. *Id.* at 1014-15.

<sup>163</sup> *Id.* at 1011.

<sup>164</sup> *City of Jacksonville v. U.S. Dep’t of the Navy*, 348 F.3d 1307, 1309 (11th Cir. 2003).

for more than 250 alleged violations of state and local air pollution control laws. The Navy removed the case to federal district court, and the district court denied a motion to remand the case to state court.<sup>165</sup> The district court also denied the Navy's motion for summary judgment on the ground that federal immunity barred the suit, but the trial court certified that ruling for interlocutory review by the Eleventh Circuit.<sup>166</sup>

The court of appeals decided both claims in favor of the United States. It held that removal to federal court was proper and that neither section 118 nor subsection (e) of the Clean Air Act citizen suit provision waived federal immunity from punitive penalties.<sup>167</sup>

The Eleventh Circuit began its analysis of the removal issue by noting that the authority for federal agencies to remove cases to federal court was a recent addition to federal jurisdictional statutes.<sup>168</sup> Prior to 1996, 42 U.S.C. § 1442(a)(1) only authorized removal by federal officers who were sued for acts taken under color of their offices. The 1996 amendment also allowed removal by the United States and its agencies.<sup>169</sup> The committee reports on the 1996 amendment indicated that one reason Congress changed the removal statute was to allow immunity claims to be adjudicated in federal court.<sup>170</sup>

In light of the text and legislative history of the 1996 amendment, the Eleventh Circuit held that subsection (e) of the Clean Air Act citizen suit provision did not preclude removal. Congress added subsection (e), the appellate court noted, nearly twenty years before it amended the removal statute to permit federal agencies to remove cases to federal court. This chronology caused the court to "doubt that Congress in 1977 intended to preclude removal by the United States" when Congress did not "even contemplat[e] the authorization of removal by the federal government" until 1996.<sup>171</sup> In any event, the language of subsection (e) did not show "a 'clear and manifest' intent . . . to preclude removal in this action."<sup>172</sup> Indeed, the appellate court concluded the provisions did not even conflict because it was possible to give them both full effect: "state and local

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<sup>165</sup> *City of Jacksonville v. U.S. Dep't of the Navy*, 187 F. Supp. 2d 1352, 1356 (M.D. Fla. 2002).

<sup>166</sup> *Id.* at 1358-59.

<sup>167</sup> *City of Jacksonville*, 348 F.3d at 1313, 1319.

<sup>168</sup> *Id.* at 1311.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1310 (quoting H. REP. NO. 104-798, at 20 (1996); S. REP. NO. 104-366, at 30-31 (1996)).

<sup>171</sup> *Id.* at 1311.

<sup>172</sup> *Id.* at 1311-12.

governments may bring enforcement actions in state courts pursuant to [subsection (e)] and the United States may then remove these actions so long as the federal government complies with the requirements of” the removal statute.<sup>173</sup> As a final argument for finding no prohibition of removal, the Eleventh Circuit noted that an early version of the 1977 Amendments to the Clean Air Act expressly prohibited removal of actions to federal court. Congress, however, deleted that provision before enacting the legislation; in the Eleventh Circuit’s view, that deletion contradicted any inference that Congress meant to forbid removal.<sup>174</sup>

After upholding federal jurisdiction, the court of appeals reversed the district court’s denial of the motion for summary judgment filed by the Navy. In the view of the appellate court, neither the waiver of immunity in section 118 nor subsection (e) of the citizen suit provision met the Supreme Court’s requirement that “a waiver of sovereign immunity with regard to punitive penalties . . . be unequivocally expressed in the statutory text.”<sup>175</sup>

With respect to the waiver in section 118, the Eleventh Circuit regarded the Supreme Court decision in *Department of Energy* as dispositive. In that case, the court of appeals declared, the Court had ruled that “similar, if not identical, language” in the federal facilities provision of the Clean Water Act waived immunity only with respect to coercive, not punitive, civil penalties.<sup>176</sup> As is true in the Clean Water Act provision, “each time the word ‘sanction’ appears in [section 118] of the [Clean Air Act], it is within the phrase ‘process and sanction[s].’”<sup>177</sup> The Eleventh Circuit acknowledged that the *Department of Energy* opinion “did discuss” a phrase not found in the Clean Air Act, the phrase in the Clean Water Act limiting federal liability to civil penalties imposed by a court “to enforce an order or the process of such court.”<sup>178</sup> According to the appellate court, that language “serves a clarifying function,” but was not “the basis for the Supreme Court’s decision.”<sup>179</sup> Thus, the linguistic distinction between the two provisions was insufficient to make the Clean Air Act waiver applicable to punitive penalties.

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<sup>173</sup> *Id.* at 1312.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1314.

<sup>176</sup> *Id.* at 1315.

<sup>177</sup> *Id.* at 1316.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1316-17.

The Eleventh Circuit also rejected the claim that subsection (e) of the citizen suit provision extended the Clean Air Act waiver to punitive penalties. Disagreeing with the Sixth Circuit this time, the Eleventh Circuit concluded that the omission of the word "process" from subsection (e)'s waiver of immunity to "any judicial remedy or sanction" was not sufficient to broaden the waiver.<sup>180</sup> Construing "the phrase 'remedy or sanction' in context," the court concluded that "the lack of any clarifying language" within subsection (e) did not create a presumption that Congress intended the phrase to have "the broadest conceivable definition."<sup>181</sup> Lacking "express intent from Congress," the court declined, therefore, to "interpret the broad language of the citizen suit provision to provide a larger scope of waiver of immunity" than section 118.<sup>182</sup>

Just over a year after the *City of Jacksonville* decision was issued, the Eleventh Circuit rejected one final argument that the Clean Air Act waived immunity to punitive penalties.<sup>183</sup> The court held that the authorization in the second sentence of subsection (a) of the Clean Air Act citizen suit provision for federal district courts to impose "appropriate civil penalties" did not broaden the waiver of federal immunity because the authorization did not expressly apply to the federal government.<sup>184</sup> The "inclusion of the United States" in the first sentence of subsection (a) did "not necessarily carry over to the grant of power to . . . impose civil penalties."<sup>185</sup> Unlike the text of the Federal Facilities Compliance Act, subsection (a) of the Clean Air Act citizen suit provision was not a "clear and unambiguous" waiver of immunity for punitive penalties. The Eleventh Circuit, therefore, affirmed the district court judgment granting the United States summary judgment on the issue of liability for civil penalties for past violations.<sup>186</sup>

### III. A SUMMARY OF CURRENT RULES

The current rules relating to waivers of federal immunity in environmental statutes form a confusing mess that implements no consistent and coherent policy. They are explainable only by reference to the compli-

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<sup>180</sup> *Id.* at 1318.

<sup>181</sup> *Id.* at 1319.

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

<sup>183</sup> *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1357 (11th Cir. 2005).

<sup>184</sup> *Id.* at 1355.

<sup>185</sup> *Id.* at 1356.

<sup>186</sup> *Id.* at 1357.

cated history of specific statutory provisions, narrow judicial interpretations, and limited legislative revisions described in the preceding section.

A. *A Few Exceptions*

Although waivers of immunity are extremely common in federal environmental statutes, Congress has never enacted a general waiver for environmental regulations, and the trend toward waivers in particular statutes is not yet universal. For example, the Federal Insecticide, Fungicide, and Rodenticide Act,<sup>187</sup> the Occupational Safety and Health Act,<sup>188</sup> the Surface Mining Control and Reclamation Act,<sup>189</sup> the Coastal Zone Management Act,<sup>190</sup> and the Environmental Planning and Community Right to Know Act<sup>191</sup> all lack waiver provisions, although presidential directives do sometimes direct compliance even without a waiver.<sup>192</sup> Thus, the starting point for any immunity issue must be to identify what provision, if any, purports to waive the federal government's immunity. Moreover, *Department of Energy* confirms that the rule of strict construction still governs interpretation of the waivers Congress has enacted.

B. *Waivers From the 1970s and the 1980s*

Several environmental statutes contain waivers that were enacted during the 1970s or 1980s. The text of the waivers in these statutes varies significantly, but the language in all of them is narrower than the wording that Congress chose in the Federal Facility Compliance Act.

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<sup>187</sup> 7 U.S.C. §§ 136-136y (2000).

<sup>188</sup> 29 U.S.C. §§ 651-678 (2000). *But see id.* § 668(a) (requiring each federal agency “to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with [federal] standards” for private employees).

<sup>189</sup> 30 U.S.C. §§ 1201-1328 (2000). *But see id.* § 1273(a) (stating that the Secretary of Interior “shall promulgate and implement a Federal lands program which shall be applicable to all surface coal mining and reclamation operations taking place pursuant to any Federal law on any Federal lands”); *id.* § 1292(c) (“To the greatest extent practicable each Federal agency shall cooperate with the Secretary and the States in carrying out the provisions of this chapter.”).

<sup>190</sup> 16 U.S.C. §§ 1451-1465 (2000). *But see id.* § 1456(c)(1) (mandating federal agencies to conduct their activities “to the maximum extent practicable [consistent] with the enforceable policies of approved State management programs.”).

<sup>191</sup> 42 U.S.C. §§ 11001-11050 (2000).

<sup>192</sup> *See, e.g.*, Exec. Order No. 12,088, §§ 1-601 to 1-605, 43 Fed. Reg. 47,707 (Oct. 13, 1978), *amended by* Exec. Order No. 13,148, 65 Fed. Reg. 24,604 (April 25, 2000), *reprinted in* 42 U.S.C. § 4321 (2000).

The Noise Control Act of 1972 contains the most restrictive waiver of modern environmental statutes.<sup>193</sup> The noise law still uses the “requirements” language that the 1976 decisions of the Supreme Court found insufficient to require compliance with state procedural requirements.<sup>194</sup> Because neither the federal government nor the states have adopted significant noise control regulations, Congress has felt little pressure to update the waiver as it has done with the waivers in other pollution control statutes.

In both 1976 and 1992, the Supreme Court decisions involved claims brought under the Clean Water Act. The 1977 Amendments to the Clean Water Act broadened the statute’s waiver to cover procedural as well as substantive matters,<sup>195</sup> but the Federal Facility Compliance Act enacted in 1992 only amended the waiver of the Resource Conservation and Recovery Act. As a result, federal agencies are presently not subject to civil punitive penalties for violations of the water law.

Despite the Supreme Court’s decisions in 1976 and 1992, a few issues regarding the Clean Water Act waiver remain unresolved. Several lower court decisions have allowed federal agencies access to federal court to challenge their obligations under state water pollution control laws.<sup>196</sup> Others have limited the federal obligation under the water law to compliance with numerical standards.<sup>197</sup> On the other hand, the Ninth Circuit has applied the waiver to state standards applicable to nonpoint sources.<sup>198</sup>

The chapter of the Resource Conservation and Recovery Act regulating underground storage tanks, which was added to the statute in 1984, is also probably insufficient to permit imposition of civil penalties for past violations.<sup>199</sup> The waiver for underground tanks is based on the general waiver in the Resource Conservation and Recovery Act prior to its amendment by the Federal Facilities Compliance Act.<sup>200</sup> However, the underground storage tank law differs from the statutes before the Supreme Court in *Department of Energy* in one significant respect: it defines the term “person” to include federal agencies.<sup>201</sup>

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<sup>193</sup> See 42 U.S.C. § 4911 (2000).

<sup>194</sup> See *supra* notes 43-44 and accompanying text.

<sup>195</sup> See *supra* notes 62-63 and accompanying text.

<sup>196</sup> See *supra* notes 66, 91 and accompanying text.

<sup>197</sup> See *supra* notes 59-60 and accompanying text.

<sup>198</sup> See *supra* notes 152-53 and accompanying text.

<sup>199</sup> See 42 U.S.C. §§ 6991-6991m (2000).

<sup>200</sup> Compare 42 U.S.C. § 6961 (1988), with 42 U.S.C.A. § 6991f(a) (West 2007).

<sup>201</sup> 42 U.S.C.A. § 6991(6) (West 2007) (underground storage tanks chapter of the Resource Conservation and Recovery Act).

The inclusion of the federal government within the definition of “person” is unlikely to subject federal agencies to punitive civil penalties for violations relating to underground storage tanks. As in the waiver of the Resource Conservation and Recovery Act prior to its 1992 amendment by the Federal Facilities Compliance Act, the only reference to sanctions in the waiver of federal immunity for underground storage tanks comes in a sentence regarding the enforcement of injunctive relief.<sup>202</sup>

The waiver in the Low-Level Radioactive Waste Policy Act is a curious one. It only applies when the federal government uses a non-federal disposal facility, and it contains no reference to sanctions. At the same time, it contains the broadest waivers with respect to monetary charges. Federal agencies are liable for all “fees, taxes, and surcharges imposed by the compact commission, and by the State in which such facility is located.”<sup>203</sup>

Of the statutes enacted in the 1980s, the Medical Waste Tracking Act is the one whose provisions are most likely to allow imposition of punitive civil penalties against federal agencies. Its waiver provision expressly extends, but is not limited, to “civil, criminal, and administrative penalties,” and it also includes federal agencies within the definition of “person.”<sup>204</sup> However, enforcement of civil penalties will probably require an action under state law. Only the EPA Administrator can impose penalties under the federal statute, which contains no provision authorizing citizen suits.<sup>205</sup>

### C. *Broader Waivers From the 1990s*

In the 1990s, Congress amended the waivers of both the Clean Air Act and the Resource Conservation and Recovery Act. Both amendments expanded the waivers previously found in the statutes.

The change in the Clean Air Act waiver concerned federal liability for charges imposed by state regulators. After the 1990 amendment, the Clean Air Act waiver obligates the federal government “to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program.”<sup>206</sup> Although the amendment omits any requirement that the fees or charges be nondiscriminatory, that requirement is implicit in the general wording of the waiver, which only applies “to

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<sup>202</sup> *Id.* § 6991f(a).

<sup>203</sup> 42 U.S.C. § 2021d(b)(1)(B) (2000).

<sup>204</sup> *Id.* § 6992e.

<sup>205</sup> *See id.* § 6992d.

<sup>206</sup> *Id.* § 7418(a).

the same extent” as requirements apply to “any nongovernmental entity.”<sup>207</sup> The revised waiver does not expressly encompass taxes, but the addition of the word “charge” is probably sufficient to require the federal government to contribute to the overhead costs of the state regulatory program.

The 1990 Amendments to the Clean Air Act did not expressly address the sanctions issue, presumably because the amendments preceded the Supreme Court decision in the *Department of Energy* case. Unfortunately, the failure to address the issue leaves considerable uncertainty with respect to the sanctions to which federal agencies are subject when they violate air pollution control laws. The main sentence of the Clean Air Act waiver is similar to the language of the Clean Water Act except that the Clean Air Act omits the troublesome reference to “civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.”<sup>208</sup> One can also distinguish the *Department of Energy* holding on at least four additional grounds. First, the Clean Air Act includes federal agencies within its definition of “person,”<sup>209</sup> and the omission of the United States from the definition of person in the Clean Water Act and the Resource Conservation and Recovery Act was an important link in the Supreme Court’s reasoning in *Department of Energy*.<sup>210</sup> Second, the citizen suit provision in the air law contains an express disavowal of any intent to restrict any “State, local, or interstate authority from . . . obtaining any administrative remedy or sanction in any State or local administrative agency.”<sup>211</sup> Third, the House committee report for the 1977 amendment to the Clean Air Act waiver expressly declared that the amendment subjects federal agencies to “civil penalties.”<sup>212</sup> Fourth, prior to the Supreme Court opinion in *Department of Energy*, both judicial and administrative interpretations of the air waiver had found it sufficient to allow imposition of civil penalties for past violations.<sup>213</sup> As described above, the circuits have split on the issue of whether these distinctions amount to a sufficiently clear and unequivocal waiver for the imposition of punitive civil penalties against federal agencies.

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<sup>207</sup> *Id.*

<sup>208</sup> Compare 33 U.S.C. § 1323(a) (2000), with 42 U.S.C. § 7418(a) (2000).

<sup>209</sup> 42 U.S.C. § 7602(e) (2000).

<sup>210</sup> U.S. Dep’t of Energy v. Ohio, 503 U.S. 607, 617-18 (1992).

<sup>211</sup> 42 U.S.C. § 7604(e) (2000).

<sup>212</sup> H.R. REP. NO. 95-294, 5, 12 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1082, 1089-90.

<sup>213</sup> United States v. S. Coast Air Quality Mgmt. Dist., 748 F. Supp. 732, 734 (C.D. Cal. 1990); Ala. *ex rel.* Graddick v. Veterans Admin., 648 F. Supp. 1208, 1212 (M.D. Ala. 1986); Comptroller General Opinion No. B-194508, 58 U.S. Comp. Gen. 667(1979).

The question of whether state enforcement actions against federal agencies for violations of air pollution laws can be removed to federal court is also a difficult one. Congress did not expressly preclude removal in the 1977 Amendments, probably because at that time the removal statute did not authorize removal of actions against federal agencies. When Congress amended the removal statute in 1996, it did not directly address the Clean Air Act issue, although the legislative history indicated that one reason for the amendment was to permit review of sovereign immunity issues in federal court.<sup>214</sup>

As described in the preceding section, the Federal Facility Compliance Act greatly expands the sanctions to which federal agencies are subject under the Resource Conservation and Recovery Act. In the committee hearing that preceded the adoption of the Act, even the representatives of the Department of Justice conceded that the amended waiver covers punitive civil penalties,<sup>215</sup> and all recent decisions have assumed the Federal Facility Compliance Act waiver is sufficient for civil penalties.<sup>216</sup>

The text of the Safe Drinking Water Act also seems adequate to subject the federal government to civil penalties for past violations. It mirrors the Federal Facility Compliance Act by expressly covering “punitive” civil penalties<sup>217</sup> and including federal agencies within the definition of “person.”<sup>218</sup>

#### IV. LEGISLATIVE AND JUDICIAL RESPONSES TO THE CURRENT MESS

A complete solution to the current confusion regarding federal immunity from state environmental regulations will require legislative action. In the Clean Air Act Amendments of 1970, Congress embraced a simple principle: the federal government should be subject to the same requirements of state environmental law as any other person. That principle was a dramatic change from prior law, and Congress has frequently repeated it in federal environmental statutes. Unfortunately, the Supreme Court’s narrow interpretations of that language have bred a host of inconsistencies among various statutes. When Congress has amended environ-

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<sup>214</sup> See *supra* notes 171-74 and accompanying text.

<sup>215</sup> See *supra* note 112 and accompanying text.

<sup>216</sup> See, e.g., *City of Jacksonville v. U.S. Dep’t of the Navy*, 348 F.3d 1307, 1319 (11th Cir. 2003).

<sup>217</sup> 42 U.S.C. § 300j-6(a) (2000).

<sup>218</sup> *Id.* § 300f(12).

mental statutes after a Supreme Court interpretation, it has generally overruled the Court's most recent interpretation, but it has not tried to incorporate the revisions into other statutes that have not been the subject of general revisions. The result is the differing language in the federal statutes summarized in the preceding sections.

The policy initiated in the Clean Air Act Amendments of 1970 is a sound one. If achieving environmental goals are worth forcing individuals and companies to bear the cost of complying with environmental standards, government agencies should also bear those costs in carrying out their activities. Moreover, they should comply with permit and other procedural requirements so that regulators can determine if the agencies are meeting their environmental compliance obligation. Likewise, sanctions—including monetary penalties—are necessary to give agencies adequate incentive to comply.

One can identify two valid federal interests that justify limiting the waivers: the federal government should not face discriminatory enforcement, and a safety outlet should exist when compliance would threaten other vital national interests. The waivers in current environmental statutes satisfy both of those concerns. By subjecting federal agencies to the same requirements as other "persons" or "nongovernmental entities," the environmental waivers protect the government from bearing a disproportionate share of the cost of environmental compliance. Likewise, the provision for presidential exemption from the waivers when required by the "paramount interest" of the United States ensures that environmental concerns will not frustrate other national interests.<sup>219</sup> Requiring presidential approval means that individual agencies will not routinely sacrifice environmental concerns whenever they conflict with other agency objectives.

The best legislative approach to implement the waiver principle would be a broader Federal Facilities Compliance Act identifying all of the state environmental requirements to which Congress wanted to make the federal government subject. Unfortunately, that solution is unlikely to occur. The Conservation Foundation proposed a general federal environmental protection code more than two decades ago,<sup>220</sup> but the proposal never gained any traction. The reasons are undoubtedly institutional and

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<sup>219</sup> See Murchison, *Reforming Environmental Enforcement*, *supra* note 17; Pub. L. No. 91-224, 84 Stat. 91 (1970).

<sup>220</sup> See Robert F. Blomquist, *The Conservation Foundation's Proposed "Environmental Protection Act": Prospects and Problems For an Integrated Pollution Control Code for the United States*, 40 DEPAUL L. REV. 937 (1991).

political. Different congressional committees are responsible for the various environmental statutes, and so any general environmental statute would have to be approved by multiple committees. Second, convincing Congress to pass a new statute is a daunting prospect that is likely to discourage states and environmental organizations from investing limited political capital on a relatively narrow project.

An alternate approach is to develop an expanded model for waiving federal immunity and to insert the same language in federal environmental statutes as they are revised. Although this method is slower and is likely to result in some continued differences between waivers, it has the potential to reduce the current fragmentation significantly if Congress updates the major environmental statutes over the next decade. This approach also has the virtue of political viability. All of the various congressional committees with control over environmental statutes have been willing to adopt broad federal waivers when they have enacted general statutory broad revisions.

Whichever legislative approach is adopted, the Federal Facilities Compliance Act offers a good starting point for reform. When the Act was being considered by Congress, the Justice Department agreed that the language was sufficient to subject federal agencies to liability for civil penalties imposed for past violations, and all recent decisions assume that it is. It also broadly defines the environmental fees that federal agencies must pay.

Although the Federal Facilities Compliance Act provides a good beginning, at least three additions to its provisions seem desirable. First, Congress should explicitly overrule those cases limiting requirements to numerical standards. Second, Congress should abrogate the rule of strict construction; in its place, it should explicitly embrace a rule of liberal construction that subjects the federal government to the same environmental standards, procedures, processes, and sanctions as any nongovernmental violator. Third, Congress should expressly decide whether state enforcement actions against federal agencies can be removed to federal court. If the other changes are made, removal to federal court probably should be allowed. Once federal agencies are expressly subject to civil penalties for past violations and non-numerical standards and Congress prescribes a rule of liberal construction for the waivers, preservation of a federal forum to resolve disputed issues seems to be a reasonable way to insure that federal agencies are not subject to discriminatory state enforcement.

Given the Supreme Court's continued embrace of the rule of strict construction, judicial decisions are unlikely to produce a complete solution

to the current confusion. The Court can, however, mitigate some of the uncertainty created by recent cases.

The current controversy over sanctions is whether federal agencies are liable for civil penalties for past violations under the Clean Air Act. As noted above,<sup>221</sup> the text of section 118 of the Clean Air Act waiver is similar to the language of the Clean Water Act, but one can distinguish the air waiver on a number of grounds: the omission of the language limiting the waiver to “civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court;”<sup>222</sup> the inclusion of federal agencies within the definition of “person;”<sup>223</sup> the sentence in subsection (e) of the citizen suit provision disavowing any intent to “restrict any State . . . authority from . . . obtaining any judicial remedy or sanction in any State . . . court;”<sup>224</sup> the House committee report declaring that the 1977 amendment to the Clean Air Act waiver subjected federal agencies to “civil penalties;”<sup>225</sup> and the judicial and administrative interpretations finding the air waiver sufficient to allow imposition of civil penalties for past violations. Collectively, these differences between the air and water waivers support the Sixth Circuit’s conclusion that the waiver extends to past violations.<sup>226</sup> The Eleventh Circuit’s contrary opinion rests on the misleading description of the Clean Air Act waiver as “similar, if not identical” to the Clean Water Act waiver.<sup>227</sup> Moreover, its comment that the Clean Air Act language is not as broad as the text of the Federal Facility Compliance Act ignores the obvious reason for the difference: Congress expanded the Clean Air Act waiver long before it had the specific language of the *Department of Energy* opinion to overrule.

The related question of whether state enforcement actions for air violations can be removed to federal court is even more difficult.<sup>228</sup> Congress did not expressly preclude waiver in the 1977 amendment to the Clean Air Act waiver for the obvious reason that Congress did not amend the federal removal statute to allow removal of all actions against federal

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<sup>221</sup> See *supra* notes 167-75 and accompanying text.

<sup>222</sup> 33 U.S.C. § 1323 (a) (2000).

<sup>223</sup> 42 U.S.C. § 7602(e) (2000).

<sup>224</sup> *Id.* § 7604(e).

<sup>225</sup> H.R. REP. NO. 95-294, 4 & 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1082, 1089-90.

<sup>226</sup> *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529, 531 (6th Cir. 1999); see *supra* notes 140-46 and accompanying text.

<sup>227</sup> *City of Jacksonville v. U.S. Dep't of the Navy*, 348 F.3d 1307, 1315 (11th Cir. 2003); see *supra* note 176 and accompanying text.

<sup>228</sup> See *supra* note 171-72 and accompanying text.

agencies until 1996. The language of the amended removal statute contains no exception for the Clean Air Act, and the legislative history indicates that one reason for the change was a desire to allow immunity claims to be litigated in federal court. Nonetheless, allowing removal of state enforcement actions for air violations seems to contradict the decision Congress made in subsection (e) of the Clean Air Act citizen suit section. That sentence declares that “[n]othing . . . in any . . . law of the United States shall be construed to . . . restrict any State . . . from . . . obtaining any judicial remedy or sanction in any State . . . court.”<sup>229</sup> The Eleventh Circuit’s assertion that allowing removal does not conflict with section 7604(e)<sup>230</sup> simply ignores the statutory text quoted in the preceding sentence.

The lower federal courts have generally reached a sound consensus on the liability of federal agencies for fees.<sup>231</sup> So long as the fees imposed on the agencies are the same as those imposed on other regulated entities and are not used to support general state revenues, the principle underlying waiver—that the federal government should be treated like any other polluter—suggests that the federal agencies should also pay the fees.<sup>232</sup>

Despite the Supreme Court’s emphatic endorsement of the rule of strict construction for section 313 of the Clean Water Act in the *Department of Energy* opinion, a few issues continue to be litigated. Some lower courts have ruled that the water waiver does not extend to state standards that are not expressed in numerical terms, while the Ninth Circuit has held the waiver applicable to standards applicable to nonpoint sources of water pollution.<sup>233</sup> Proper resolution of these issues requires one to return to the basic principle behind the waiver: if a standard is enforceable against other persons, it should also be enforceable against the United States.<sup>234</sup> In addition, the decisions limiting the reach of the Clean Water Act to numerical standards conflict with the Supreme Court’s interpretation of the same “requirements” in other contexts. Decisions construing the law regulating labeling for both cigarettes and pesticides

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<sup>229</sup> 42 U.S.C. § 7604(e) (2000).

<sup>230</sup> *City of Jacksonville v. U.S. Dep’t of the Navy*, 348 F.3d 1307, 1312 (11th Cir. 2003).

<sup>231</sup> See *supra* notes 94-95 and accompanying text.

<sup>232</sup> For a more extended analysis of the fee issue, see Murchison, *Reforming Environmental Enforcement*, *supra* note 17, at 195-97, 214-18.

<sup>233</sup> See *supra* notes 59-61, 151-53 and accompanying text.

<sup>234</sup> For criticism of the *Idaho Sporting Congress* decision because it did not require that state water quality regulations of nonpoint sources of water be judicially enforceable before imposing them on the federal government, see Craig, *supra* note 150.

have held that common law tort duties, the paradigm of non-numerical standards, can constitute "requirements."<sup>235</sup>

## CONCLUSION

In 1970, Congress tried to establish a new standard regarding federal compliance with pollution control laws: federal agencies were to be treated like "any other person." The Supreme Court's rigid reliance on the rule of strict construction for waivers of federal immunity has frustrated that congressional goal. Other persons have always had to comply with the permit requirements of federal environmental laws, but the Supreme Court's 1976 decisions held that the federal government was immune from such "procedural" requirements of the Clean Air Act and the Clean Water Act. Other persons are also subject to substantial civil penalties when they violate environmental statutes, but in 1992 the Supreme Court held that no civil penalties could be imposed on federal agencies under the Clean Water Act and the Resource Conservation and Recovery Act until an agency had violated an injunction entered after a court determined that the agencies were violating the law.

Congress has only partially corrected the erroneous Supreme Court rulings. In the decade following the 1976 decisions, Congress gradually added permits and procedures to the text of the waiver in most important federal statutes. Following the 1992 decision, Congress enacted the Federal Facilities Compliance Act, but that statute only overruled the Supreme Court decision with respect to Resource Conservation and Recovery Act.

The result is a confusing group of statutes that waive different amounts of federal immunity for no apparent purpose. Congress should correct this unfortunate situation by broadening slightly the waiver language of the Federal Facilities Compliance Act, and making the broader language applicable to all federal environmental statutes either by a

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<sup>235</sup> See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 436 (2005) (stating that prohibition against state "requirements for labeling or packaging in addition to or different from those required under" federal pesticide law covered common-law duties as well as regulations); *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 515 (1992) (noting that a statute forbidding any "requirement or prohibition . . . with respect to the advertising . . . of any cigarettes the packages of which are labeled in conformity with" federal law regulating labeling of cigarettes preempted state tort claims, not just state regulations). Cf. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 259 (2004) (prohibition against a stricter local "standard relating to the control of emissions from new motor vehicles" covered mandate to purchase low-emission vehicles as well as emission control standards for engines).

general waiver applicable to all environmental statutes or by a specific amendment to each environmental statute. When expanding the existing waivers, Congress should use the Federal Facilities Compliance Act as a guide. In addition, Congress should clarify that federal agencies are subject to any type of standard that is also enforceable against other persons. Furthermore, Congress should direct the courts to construe the waiver liberally to achieve its purpose of treating the United States like any other person subject to environmental regulations. If these changes are made, Congress might well choose to grant agencies authority to remove state enforcement actions to federal court.

Until Congress acts, the courts should apply the existing waivers with more attention to congressional purpose and less to an overly technical application of the rule of strict construction. This approach would subject agencies to civil penalties for past violations under the Clean Air Act, preclude removal of air violations to federal court, allow states to collect nondiscriminatory fees from federal agencies, and subject federal agencies to any standard that can be enforced against other persons.

## APPENDIX A

RESOURCE CONSERVATION AND RECOVERY ACT WAIVER AS AMENDED BY  
THE FEDERAL FACILITIES COMPLIANCE ACT

## (a) In general

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. 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). The reasonable service charges referred to in this subsection include, but are not limited to, fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed in connection with a Federal, State, interstate, or local solid waste or hazardous waste regulatory program. 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. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local solid

or hazardous waste law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason or granting each such exemption.