Clearing the Air of Environmental Sovereign Immunity: Ohio v. United States Department of Energy

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COMMENTS

CLEARING THE AIR OF ENVIRONMENTAL SOVEREIGN IMMUNITY: OHIO v. UNITED STATES DEPARTMENT OF ENERGY

The hazardous release of pollutants has seriously jeopardized the integrity of the environment. In response to growing public


By land, sea, and air, the enemies of man's survival relentlessly press their attack. The most dangerous of all the enemies is man's own undirected technology. The radioactive poisons from nuclear tests, the runoff into rivers of nitrogen fertilizers, the smog from automobiles, and pesticides in food chains, ... are examples of the failure to foresee and control the untoward consequences of modern technology.

Id. (quoting N.Y. Times, May 3, 1969, at 34, col. 2 (city ed.)).


Id. at 417.

The concerns voiced at the Economic Summit were well founded considering that in 1987, 8.1 thousand metric tons of lead, 20.4 million metric tons of sulfur, 19.5 million metric tons of nitrogen oxide, and 61.4 million metric tons carbon monoxide were released into the atmosphere in the United States alone. Id. at 470-72. These emissions contributed to the depletion of the ozone layer and to the increase in the global surface temperature by 33 degrees celsius in 1987, relative to a 1957-79 reference period mean. Id. at 465.

Additionally, throughout 1985, over 267 million tons of pollutants were discharged into
concern, Congress has enacted legislation to curb environmental degradation. Two such enactments, the Water Pollution Preven-

the United States Coastal Waters. See Council on Environmental Quality, 1987-88 Annual Report 327 (1988). These discharges contributed to the resulting impairment of 350 miles of shoreline waters, 100 of which were categorized as severely impaired. Id. at 316. See also Christenson, Regulatory Jurisdiction Over Non-Indian Hazardous Waste in Indian Country, 72 IOWA L. REV. 1091, 1091 (1987) (hazardous waste threatens well-being of 700,000 persons dwelling on Indian reservations); Note, Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal, 28 WM. & MARY L. REV. 513, 513 (1987) [hereinafter Note, Assuring Federal Facility Compliance] (environmental pollution poses substantial threat to health of American public).

Ironically, the federal government is one of the biggest polluters. See Cheng, Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA, 57 U. CHI. L. REV. 845, 845 (1990) (federal government major violator of anti-pollution laws); Stever, Perspectives on the Problem of Federal Facility Liability for Environmental Contamination, 17 ENVTL. L. REP. 10114, 10114 (1987) (federal government responsible for substantial hazardous waste); Note, When Will the Federal Government Waive the Sovereign Immunity Defense and Dispose of Its Violations Properly?, 65 CHI.-KENT. L. REV. 581, 581 (1989) [hereinafter Note, When Will Federal Government Waive] (Department of Defense produces over 500,000 tons of hazardous waste; Energy Department produces 2.5 million tons of hazardous waste and 16 million tons of combined hazardous and radioactive waste); Note, Assuring Federal Facility Compliance, supra, at 515 (Department of Defense accountable for "eighty percent of the 1,000 to 1.400 federal facility hazardous waste... sites").

tion and Control Act ("Clean Water Act")\(^3\) and the Resource Conservation and Recovery Act ("RCRA"),\(^4\) impose regulation on the disposal of pollutants into navigable waters\(^5\) and the disposition of solid waste products, respectively.\(^6\) These statutes also au-


\(^5\) See 33 U.S.C. § 1251(a) (1988). "The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." \(Id.\) See also United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (Clean Water Act designed to regulate sources emitting pollution into rivers, streams and lakes); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1025 (D.C. Cir. 1978) (Act aimed at eliminating discharge of pollutants into waters); Quarles Petroleum Co. v. United States, 551 F.2d 1201, 1206 (10th Cir. 1977) (overall intention of Congress in enacting Clean Water Act was to eliminate or reduce water pollution throughout United States).

The Clean Water Act was originally enacted in 1948 and gave states the primary responsibility of enforcing water pollution control laws. See District of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980). See also Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1271 (5th Cir. 1980) (Clean Water Act "relieved primarily upon state-promulgated water quality standards as the means for reaching its goal of enhancing the quality of the nation's waters"). See generally J.B. Battle, 2 ENVIRONMENTAL LAW 7 (1986) (discussing state enforcement authority for control of water pollution under Clean Water Act). Unfortunately, over the years the Clean Water Act proved to be ineffective. See H.R. REP. No. 500, 92d Cong., 2d Sess. 95, reprinted in 1971 U.S. CODE CONG. & ADMIN. NEWS 3668, 3672 ("record show[ed] almost total lack of enforcement of [Act]"). The Act was amended five times between 1948 and 1972 with little or no change in the nation's water quality. See Battle, supra, at 7 (basic flaws in Act prevented effective enforcement). Finally in 1972, the Clean Water Act was reconstructed to provide a "comprehensive" method of abating chemical and biological water pollutants. See City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981) (purpose of 1972 amendments was to establish comprehensive long-range policy eliminating water pollution); Train v. City of New York, 420 U.S. 35, 37 (1975) (1972 amendments provide comprehensive program for controlling water pollution).

The 1972 Act contained a three-pronged system aimed at eliminating water pollution. See Battle, supra, at 8:

First, the Environmental Protection Agency was directed to conduct a research program and develop methods for waste treatment. Second, the Act authorized a massive construction program for municipal waste treatment works, with federal finance assistance. Third, the Act established a comprehensive system of standards, permits, and enforcement methods for control of the complete spectrum of polluting materials.

\(^6\) See 42 U.S.C. § 6902 (1988). The objectives of RCRA "are to promote the protection of health and the environment . . . by . . . assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment." \(Id.\) See also United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991) (RCRA requires management of hazardous waste "to prevent leakage, spillage, hazardous chemical reactions, and migration of toxins into the soil, water, or air"); Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1096 (8th Cir. 1989) (RCRA as relief for national difficulties caused by elimination of hazardous and solid wastes).

RCRA was designed for three purposes. See Note, Landowner Liability Under CERCLA, 4 ST. JOHN'S J. LEGAL COMMENT. 149, 151 n.11 (citing J. D. Stever, LAW OF CHEMICAL REGU-
thorize states to enact their own anti-pollution schemes which, upon approval from the Environmental Protection Agency ("EPA"), may operate in lieu of federal regulation. It is undisputed that federal facilities are required to comply, to a certain extent, with state laws enacted pursuant to the aforementioned Acts. However, whether the federal government has waived sovereign immunity from civil penalties under the Clean Water Act and RCRA remains unresolved. Recently, the United States

1) to provide a system for tracking and preserving a record of hazardous waste movement from its inception to disposal ("cradle to grave"); 2) to ensure disposal is accomplished so as to prevent escape of hazardous waste into the environment; and 3) to provide an enforcement mechanism to ensure compliance with the regulations.

Id. See also Cheng, supra note 1, at 846 ("RCRA . . . established a 'cradle-to-grave' scheme of measures . . . for regulating the generation, transport, treatment, and disposal of solid waste."); Note, Assuring Federal Facility Compliance, supra note 1, at 532 (purpose of RCRA was advancement of physical well-being of environment and preservation of resources). See generally 2 S. Cooke, THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION § 9.01 (1990) (overview of RCRA).


The 1972 amendments to the Clean Water Act instituted the National Pollutant Discharge Eliminations System (NPDES). See EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976). Under NPDES, a state may issue permits allowing for excretions into waters within state jurisdiction, after obtaining EPA endorsement of the state program. Id. at 208. Without a permit, any emission of pollutants into the waters is unlawful. Id. at 205. The governor of a state requesting a permit may submit to the EPA its proposed program accompanied by a statement from the state's Attorney General that the state is capable of carrying out the plan as proposed. Id. at 208. The EPA has the power to evaluate the administration of the program and may revoke its sanction upon determining that the program is not being operated according to the dictates of the Act. Id.


9 Compare Ohio v. United States Dep't of Energy, 904 F.2d 1058, 1065 (6th Cir. 1990) (held Clean Water Act and RCRA waived sovereign immunity from state civil penalties) and United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989) (held Congress had not waived federal sovereign immunity under RCRA from civil penalties imposed by state administrative agency) and Metropolitan Sanitary Dist. of Greater Chicago v. United States Dep't of Navy, 722 F. Supp. 1565, 1572 (N.D. Ill. 1989) (federal facilities subject to civil penalties under Clean Water Act) and Maine v. United States Dep't of Navy, 702 F. Supp. 322, 330 (D. Me. 1988) (federal facilities subject to civil penalties under Clean Water Act and RCRA permit recovery of civil penalties by state agency from federal government) with Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293, 1296 (10th Cir. 1990) (held RCRA did not waive sovereign immunity from state civil penalties) and McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 605 (E.D. Cal. 1986) (held sovereign immunity not waived under both Clean Water Act and RCRA) and Meyer v. United States Coast Guard, 644 F. Supp. 221, 223 (E.D.N.C. 1986) (held under RCRA, sovereign immunity of federal government not waived for civil
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Court of Appeals for the Sixth Circuit scrutinized the sovereign immunity doctrine and its relationship to both Acts in Ohio v. United States Department of Energy ("D.O.E.").

In D.O.E., a 1,050 acre uranium processing plant in Ohio, owned by the United States Department of Energy and managed under private contract, was allegedly responsible for the improper disposal of hazardous wastes, the release of radioactive materials into the environment, and the pollution of surface and ground water. The State of Ohio instituted an action against the Department of Energy and the private contractors who were involved in the disposal, alleging the illegal release of hazardous wastes and seeking relief, including civil penalties, under both the Clean Water Act and RCRA. The Department of Energy claimed that the sovereign immunity of the federal government barred the imposition of civil penalties. The Sixth Circuit, considering this issue on interlocutory appeal, affirmed the district court’s conclusion that sovereign immunity from civil penalties had been waived by Congress under both the Clean Water Act and RCRA.

In an opinion rendered by Judge Martin, the court initially examined section 1323 of the Clear Water Act, dealing with pollution control of federal facilities. The court asserted that the 1977 amendment to section 1323 was enacted in response to a Supreme Court decision which construed section 1323 as waiving sovereign immunity only for substantive mandates, but not for procedural requisites, including any enforcement devices. The court maintained that the plain language of the amendment explicitly subjecting federal facilities to "processes and sanctions" was solid evidence of congressional intent to waive sovereign im-

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12 Id.
13 Id.
14 Id. at 761-62.
15 D.O.E., 904 F.2d 1058, 1065 (6th Cir. 1990).
16 Id. at 1060-62.
munity from civil penalties under the Act. The court pointed out that section 1323's restriction on the waiver of sovereign immunity from civil penalties to those arising under federal law would be meaningless if that section were construed as not waiving sovereign immunity for civil penalties at all.

Additionally, the court stated that the Clean Water Act requirement that a state claim arise under federal law for a waiver to apply, had been satisfied under the circumstances. The court then explained that since the Clean Water Act empowered states to create their own anti-pollution laws which might, upon compliance with EPA standards, be substituted for the provisions of the Act, a state law thus generated should be considered to arise under federal law.

Next, the court considered whether RCRA provides sufficient evidence of a congressional intent to waive sovereign immunity from civil penalties. While failing to find a sufficient waiver under the “General Waiver” provision of the Act, the court

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18 D.O.E., 904 F.2d at 1060. The court found the 1977 amendment to be evidence of an intent to waive sovereign immunity for civil penalties. Id. The amendment changed the statutory language from the earlier version which subjected federal agencies to mere ″requisite ″[sic] ″... to the same extent as any person is subject to such requirements.″ ″Id. (quoting 33 U.S.C. § 1323 (1970)). The amendment provided language which subjected federal agencies to ″‘all’ requirements, including ″process and sanctions.″ ″Id. at 1061. The court found this to be clear evidence of an intent to subject federal facilities to civil penalties under the FWPCA. Id.

19 Id. The court declared that the § 1323 limitation on the waiver of sovereign immunity for civil penalties to those ″arising under federal law″ would become ″superfluous″ if § 1323 were interpreted as not waiving sovereign immunity for civil penalties at all. Id.

20 Id.

21 Id. The court further noted that the Clean Water Act authorized the EPA to enforce state permits as federal regulations. Id. The court viewed the EPA's suspension of its practice of dispensing permits in favor of the states themselves granting permits under state water pollution laws as additional evidence of a state-federal affiliation. Consequently, the court found a distinct waiver of sovereign immunity for civil penalties by federal entities guilty of offenses under the Clean Water Act. Id.

22 D.O.E., 904 F.2d at 1062. The court, citing the “General Waiver” provision of RCRA, pointed to two relevant sections. Id. The first states, in relevant part, that the federal government will be subjected to “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).” Id. (quoting 42 U.S.C. § 6961 (1988)). Secondly, the court pointed to another part of the provision which states: “[n]either 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.”
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held that there was an express waiver from civil penalties under the "Citizen Suit" provision codified in 42 U.S.C. § 6972. The court noted that this provision explicitly provides that "any person" is empowered to institute a civil suit against "any person," including the United States. Under section 6972, "persons" permitted to bring actions include states, as specified in section 6903 (15). Accordingly, the court asserted that Ohio was eligible to initiate this action. The court then reasoned that since section 6972 authorizes district courts to impose civil penalties pursuant to section 6928(a) and (g), the United States was subject to such penalties. Finally, relying on policy considerations, the court concluded that Congress intended civil penalties on federal facilities under section 6972 of RCRA.

In his dissent, Judge Guy asserted that the waivers under both the Clean Water Act and RCRA were too narrow to support the imposition of civil penalties on the United States. He argued

Id. (quoting 42 U.S.C. § 6961 (1988)). The court, disturbed by this general provision, held that despite outside indicators that Congress did want to waive sovereign immunity for civil penalties here, any such waiver was not clear enough to be recognized. Id. The court was also concerned with discrepancies between the waiver provisions of the Clean Water Act and RCRA. Id. After comparing the waiver provisions of both Acts, the court stated that while under the Clean Water Act federal entities were subject to "all . . . requirements includ[ing] sanctions," the RCRA provision merely caused the federal government to submit to "all requirements." D.O.E., 904 F.2d at 1062 (citing 42 U.S.C. § 6961 (1988)). Judge Martin reasoned that if "all requirements" encompassed sanctions, the mention of sanctions in the Clean Water Act would be meaningless. Id. Additionally, Judge Martin noted that the "General Waiver" provision of the RCRA expressly addressed injunctive remedies twice, but failed to mention civil penalties. Id. The court concluded that this evidence appeared "to omit civil penalties too neatly to be an accident" and that any evidence of intended monetary relief is far too ambiguous to be recognized. Id.
that the addition of the express language in section 1323(a) of the Clean Water Act restricting federal liability recognized an explicit waiver of sovereign immunity while limiting its breadth.\textsuperscript{33} Additionally, he reasoned that when Congress implemented a state permit system to operate in lieu of federal regulation, it intended to make the states the principal regulators under the Clean Water Act.\textsuperscript{33} Consequently, civil penalties administered by state agencies did not arise under federal law.\textsuperscript{34}

In contemplating the application of RCRA, the dissent agreed that section 6928(a) and (g) allow for civil penalties to be imposed against “any person” violating RCRA.\textsuperscript{35} However, it explained that since the appropriate section to be applied to the enforcement provision, section 6903 (15), did not expressly include the United States in its definition of “person,” Congress did not intend the United States to be subject to civil penalties.\textsuperscript{36}

It is submitted that the court was correct in determining that the tenets of sovereign immunity require a waiver to be unequivocal. However, it is proposed that the decision in \textit{D.O.E.}, in finding a waiver of sovereign immunity for civil penalties under the Clean Water Act, was not justified by either the language of the statute

dissent deduced that the United States would be subject to citizen suits soliciting declaratory or injunctive relief, but not civil penalties. \textit{Id.} at 1069.\textsuperscript{32} \textit{Id.} at 1067 (Guy, J., dissenting).\textsuperscript{33} \textit{Id.} at 1067 (Guy, J., dissenting).\textsuperscript{34} \textit{D.O.E.}, 904 F.2d at 1068 (Guy, J., dissenting).\textsuperscript{35} \textit{Id.} at 1069 (Guy, J., dissenting). Whether those penalties may be assessed against the Department of Energy, the dissent argued, depends wholly on whether the Department of Energy can be characterized as a “person.” \textit{Id.}\textsuperscript{36} \textit{Id.} (Guy, J., dissenting). Judge Guy explained that the congressional definition of “person” for the functions of the Act as specified by 42 U.S.C. § 6903(15) includes individuals, trusts, firms, joint stock companies, corporations (including government corporations), partnerships, associations, municipalities, commissions, states and their political subdivisions, and any interstate body. \textit{Id.} (quoting 42 U.S.C. § 6903(15) (1988)). He argued that if Congress had intended the United States to be subject to civil penalties, it would have expressly included the United States within its definition of “person.” \textit{Id.} He reasoned that the only reasonable inference that could be drawn from the conspicuous omission of the United States from the general definition of “person” is that Congress did not intend, nor specifically legislate, a waiver of sovereign immunity for civil penalties under the “Citizen Suit” provision. \textit{Id.} The fairest reading of § 6972 in conjunction with § 6928(a), (g), and § 6903(15), the dissent argued, is that the United States is subject to citizen suits by states seeking declaratory and injunctive relief, but not for civil penalties. \textit{Id.} (Guy, J., dissenting). Therefore, Judge Guy concluded that the majority opinion misread RCRA and wrongfully broadened the scope of the potential exposure to liability of the Department of Energy. \textit{Id.}\textsuperscript{37}
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or its legislative history. Further, it is suggested that the court's analysis regarding the existence of a waiver of sovereign immunity to civil penalties under RCRA was erroneous and resulted in an unacceptable broadening of the statute's scope. It is submitted that the court's result-oriented approach resulted in a usurpation of legislative duties by the judiciary.

This Comment will analyze the requirements necessary for finding a waiver of sovereign immunity. Additionally, it will examine the legislative histories and plain language of the Clean Water Act and RCRA. Finally, this Comment will discuss relevant policy ramifications of waiving sovereign immunity and propose considerations for future legislation.

I. SOVEREIGN IMMUNITY

In their relations with the federal government, states are restricted by the doctrines of federal supremacy and sovereign immunity. The federal supremacy precept is grounded in the supremacy clause of the United States Constitution, which mandates that federal law cannot be superseded by the law of any state. With respect to the Clean Water Act and RCRA, Congress has expressed its intention of allowing the states to implement leg-


88 U.S. Const. art. VI, cl. 2. "This Constitution, and the laws of the United States which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id.


"State law may run afoul of the Supremacy Clause in two distinct ways: the law may regulate the Government directly or discriminate against it . . . or it may conflict with an affirmative command of Congress." North Dakota v. United States, 110 S. Ct. 1986, 1994 (1990) (citation omitted).
islation, within federal guidelines, to regulate the disposal of hazardous substances.\textsuperscript{40}

The doctrine of sovereign immunity precludes any party from bringing suit against a sovereign absent the acquiescence of that sovereign.\textsuperscript{41} Waivers of the federal government's sovereign immunity may only be effected by congressional mandate,\textsuperscript{42} and any legislation intending to subject the United States to liability must clearly and unequivocally express this purpose.\textsuperscript{48} Absent the existence of an express waiver, a state may not subject the federal

\textsuperscript{40} See infra notes 51-86 and accompanying text (discussing legislative history and plain meaning of Clean Water Act and RCRA).

\textsuperscript{41} See Library of Congress v. Shaw, 478 U.S. 310, 315 (1986). "As sovereign, the United States, in the absence of its consent, is immune from suit." \textit{Id.}; United States v. Mitchell, 463 U.S. 206, 212 (1983). "It is axiomatic that the United States may not be sued without its consent . . . ." \textit{Id.}; Block v. North Dakota \textit{ex rel.} Bd. of Univ. & School Lands, 461 U.S. 273, 287 (1983). "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." \textit{Id.}; United States v. Sherwood, 312 U.S. 584, 586 (1941). "The United States, as sovereign, is immune from suit save as it consents to be sued . . . ." \textit{Id.} (citations omitted); Garrett v. United States, 640 F.2d 24, 26 (6th Cir. 1981). The United States is exempt from suit absent its consent. \textit{Id. See also} Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 67 (1982) "[T]he traditional principal of sovereign immunity . . . recognizes that the Government may attach conditions to its consent to be sued." \textit{Id.}

\textsuperscript{42} See United States v. Dalm, 110 S. Ct. 1361, 1368 (1990) (power to consent to suits against federal government reserved to Congress); Dalehite v. United States, 346 U.S. 15, 30 (1953) (no action may be brought against United States unless authorized by legislature); Brady v. Roosevelt Steamship Co., 317 U.S. 575, 580 (1943) (Congress delineates sovereign immunity); United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512 (1940) (waiver of federal sovereign immunity must be by congressional consent).

\textsuperscript{48} See United States v. King, 395 U.S. 1, 4 (1969) ("[A] waiver of [sovereign immunity] can not be implied but must be unequivocally expressed."); United States v. Shaw, 309 U.S. 495, 500-01 (1940) (specific statutory consent necessary to waive federal sovereign immunity); Mitzelfelt v. Dept. of Air Force, 903 F.2d 1295, 1294-95 (10th Cir. 1990) (waiver of sovereign immunity must be express).

"There can not be a waiver of sovereign immunity unless the waiver is clear, concise, and unequivocal." McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 602 (E.D. Cal. 1986). When any doubt exists, the conclusion must be that there is no waiver. \textit{Id.} Ambiguous language fails to amount to a waiver. \textit{Id.} "Any limitation on the United States' consent to be sued must be strictly construed in favor of the sovereign and may not be modified by implication." \textit{Id.} (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 683-85 (1983)).

In United States v. Sherwood, 312 U.S. 584, 590 (1941), the Court declared that since the statute being interpreted was one which would relinquish sovereign immunity it would have to be interpreted strictly. \textit{Id.} The Court further stated that statutory language must be conservatively construed when dealing with a waiver of sovereign immunity. \textit{Id. See generally} Kongable, \textit{Civil Penalties Under the Resource Conservation and Recovery Act: Must Federal Facilities Pay?,} 30 A.F. L. Rev. 21, 22-25 (1989) (cases which held government waivers of sovereign immunity must be unequivocally expressed).
government to civil penalties.  

It is submitted that the court in D.O.E. was correct in determining that the tenets of sovereign immunity require a waiver to be unequivocal. However, while initially advocating a strict construction of potential waivers of sovereign immunity, the court did not ultimately adhere to the standards it advanced. The arguments presented by the court fail to demonstrate how a waiver of sovereign immunity can rightfully be implied from the language of the statutes. Although the federal government’s sovereign immunity with respect to environmental protection acts has gradually diminished, Congress has not expressly indicated its desire to subject the federal government to civil penalties under either

44 See Block, 461 U.S. at 280. The Block Court stated that “[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress.” Id. (quoting California v. Arizona, 440 U.S. 59, 61 (1979)) (“It is settled that the United States must give its consent to be sued even when one of the States invokes [the Supreme Court’s original jurisdiction ...”). Minnesota v. United States, 305 U.S. 382, 387 (1939) “The exemption of the United States from being sued without its consent extends to a suit by a state.” Id.; Kansas v. United States, 204 U.S. 331, 342 (1907). Public policy forbids the United States from being sued by a state absent consent. Id.; see also Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990). “[E]ven when Congress clearly provides that federal facilities are to comply with state requirements, states may not impose sanctions for noncompliance—either civil or administrative—absent express Congressional authorization.” Id. (quoting Donnelly & Van Ness, The Warrior and the Druid — The DOD and Environmental Law, 33 Fed. Bar News 37, 38 (1986)).

46 See supra notes 16-30 and accompanying text (rationale of D.O.E. court).

the Clean Water Act or RCRA. Moreover, since Congress is aware that the language of a waiver must be unequivocal, courts are correct in only recognizing congressional waivers that are clearly and explicitly set forth in the history of the legislation.

II. THE CLEAN WATER ACT

A. Legislative History

The Clean Water Act was enacted to provide standards for the purpose of reparation and preservation of the country's waters. Originally passed by Congress in June of 1948, the Clean Water Act has been amended on numerous occasions in attempt to facilitate its goals. In 1972, an amendment to the Act established the National Pollutant Discharge Elimination System ("NPDES") as a method of gauging and implementing effluent limitations.

See Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990) (legislative history surrounding enactment of RCRA is general and does not indicate intent to waive sovereign immunity from civil penalties); McClellan, 655 F. Supp. at 605 (Congress waived sovereign immunity for injunctive relief but "[i]t has not jumped the magical line, however, and waived sovereign immunity [under Clean Water Act or RCRA] for purposes other than injunctive relief"); Meyer v. United States Coast Guard, 644 F. Supp. 221, 225 (E.D.N.C. 1986) (legislative history indicates no intent by Congress to waive sovereign immunity from civil penalties under RCRA).

See Albernaz v. United States, 450 U.S. 333, 341-42 (1981) (courts must assume Congress is aware of how to legislate waiver); Mitzelfelt, 903 F.2d at 1295-96 ("Congress knew how to indicate an intent to waive sovereign immunity to state civil penalties and did not do so . . . ."); McClellan, 655 F. Supp. at 604 (courts "must assume that the learned members of Congress, some of whom are learned members of various bars, can say waiver of sovereign immunity for civil penalties just as easily as any eighth grader writing the same type of legislation."); see also Kongable, supra note 43, at 25 (since Congress is aware waivers must be unequivocally expressed, courts presume that valid waivers will be legislated with sufficient clarity).

See 33 U.S.C. § 1251(a) (1988). "The objective of this Chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters." Id. See supra note 5 and accompanying text (expounding on objectives of Clean Water Act).


See 33 U.S.C. § 1362(11) (1988). "'[E]ffluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." Id; see also McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1191 (E.D. Cal. 1988). The court stated:

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except pursuant to a permit issued under section 402 of the Act, 33 U.S.C. § 1342. The EPA Administrator is
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Under NPDES, it is illegal for persons to discharge pollutants unless they acquire a permit and conform with NPDES specifications. The EPA is charged with both the creation of minimal NPDES standards and the issuance of permits pursuant to fulfillment of those standards. However, under NPDES, states are also authorized to promulgate their own standards and issue permits upon EPA approval. In June of 1976, the United States Supreme Court in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board* held that federal facilities were not subject to state permit requirements under the 1972


*See City of Milwaukee v. Illinois, 451 U.S. 304, 311 (1981) (EPA promulgated regulations establishing specific effluent limitations incorporated as conditions of permit); see also E.I. Du Pont de Nemours & Co. v. Train, 430 U.S. 112, 129 (1977). "In sum, the language of the statute supports the view that § 301 limitations are to be adopted by the Administrator, that they are to be based primarily on classes and categories, and that they are to take the form of regulations." Id.; McClellan, 707 F. Supp. at 1192. The Court stated that "through [NPDES], established pursuant to section 402 of the Clean Water Act, these standards and limitations, together with any applicable limitations based on state law, are incorporated into individual NPDES permits which regulate a particular person's discharges into waters of the United States."

*See Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1371 (1977) (Clean Water Act authorizes EPA to set standards and issue permits under NPDES); see also Van Putten & Jackson, supra note 53, at 874. "The Act authorizes EPA to issue NPDES permits that exempt dischargers from the blanket prohibition . . . provided the discharge meets several other requirements of the Act. In particular, NPDES permits must contain effluent limitations on the amounts of specific pollutants — especially priority toxic pollutants — discharged." Id. (citations omitted).*

*See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 52 (1987) (states empowered to issue permits authorizing discharge of pollutants provided program conforms to federal guidelines and is approved by EPA); EPA v. California, 426 U.S. 200, 203 n.4 (1976) (states authorized to promulgate water quality standards, as well as implementation plan, meeting certain criteria) (citing 33 U.S.C. § 1160(c)(1),(3)); McClellan, 707 F. Supp. at 1192 ("Under section 402(b) of the Clean Water Act, a state may administer the NPDES permit program upon EPA approval."). See also 33 U.S.C. § 1342(a)(1) (1988). The section states:

[The Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet either . . . all applicable requirements . . . or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.]

Id.

amendments to the Clean Water Act. As a result of this decision, Congress amended the Clean Water Act in 1977 to subject federal facilities to all of the requirements under the Act and to waive sovereign immunity "for those civil penalties arising under Federal law."

It is proposed that the decision in D.O.E., which found a waiver of sovereign immunity from civil penalties under the Clean Water Act, was not justified by the legislative history of the Act. Although the circumstances surrounding the 1977 amendments indicate that Congress intended to subject federal facilities to substantive and procedural requirements of state anti-pollution laws, the D.O.E. court overreached by expanding the definition of "requirements" and "sanctions" to include civil penalties.

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58 Id. at 227. The Court stated that if Congress intended to subject federal facilities to state NPDES permit programs "it may legislate to make that intention manifest." Id. at 228.

59 See 33 U.S.C. § 1323 (1988). Section 1323(a) states:

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

60 See supra note 56 and accompanying text (addressing intent of Congress).

61 See McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1198
Ohio v. U.S. Department of Energy

Similarly, it is proposed that by categorizing state laws — implemented in accordance with EPA guidelines and intended to function in lieu of federal regulation — as arising under federal law, the court ignored the fact that NPDES is initiated and administered under state law.

B. Plain Language

It is submitted that an examination of the plain language of the Clean Water Act indicates that the reasoning of the D.O.E. court is flawed. The contention advanced by the court — that any reader would construe the phrase in section 1323, which subjects the federal government to "all . . . requirements . . . and sanctions" imposed under the Act, to include civil penalties — is not supported by a reading of the section in its entirety. Had civil penalties been included within the meaning of "requirements" or "sanctions," the subsequent sentence specifically addressing civil penalties would be superfluous.

The express language of the disputed sentence in section 1323 subjects the United States only to those civil penalties arising under federal law. The D.O.E. court acknowledged that for the (1988). Defining "requirements to mean merely objective and administratively preestablished water pollution control standards." Id.; McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 605 (1986). "There will not be a waiver brought about by implication or by bootstrapping or by borrowing . . . . Congress could easily have stated that federal facilities would be liable not only to injunctive relief but also to civil or criminal penalties." Id.

See United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940). "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination." Id.; United States v. Washington, 872 F.2d 874, 879 (9th Cir. 1989). "In devising Congressional intent, 'we look first to the statutory language and then to the legislative history if the statutory language is unclear.'" Id. at 879. (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)). See generally 2A SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (1984) (guidelines of statutory interpretation).

See supra note 59 (limiting civil penalties to those which arise under federal law).
federal government to waive sovereign immunity, claims against federal agencies must arise under federal law.\textsuperscript{66} It is submitted that a review of the language of the statute as a whole refutes the court's assertion that Ohio's anti-pollution law is one "arising under Federal law." The statute, as drafted, consistently makes specific, independent reference to federal law and state permit programs promulgated pursuant to the Clean Water Act.\textsuperscript{67} It seems unlikely that, for this one sentence, Congress would change its method of phraseology to save space, when to do so would clearly cause confusion.\textsuperscript{68} Section 1342(b), which regulates NPDES permits, conspicuously provides that "each State desiring to administer its own permit program . . . may submit . . . a . . . description of the program it proposes to establish and administer \textit{under} state law."\textsuperscript{69}

III. The Resource Conservation and Recovery Act

A. Legislative History

RCRA was passed by Congress in 1976 to regulate hazardous waste from inception to elimination.\textsuperscript{70} Section 6926 of the Act


\textsuperscript{67} See, e.g., 33 U.S.C. § 1318(c). The statute provides:

\begin{quote}
(c) Application of State Law. Each state may develop and submit to the Administrator procedures \textit{under State law} for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).
\end{quote}

\textit{Id.} (emphasis added)

\textsuperscript{68} See \textit{supra} note 50 and accompanying text (addressing argument that courts must assume Congress knows how to effectively create waiver).

\textsuperscript{69} See 33 U.S.C. § 1342(b) (emphasis added).


\begin{quote}
The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove pollutants [sic] from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land
\end{quote}
empowers the states to implement and administer hazardous waste disposal programs, replacing federal regulations, subject to EPA approval.\textsuperscript{71} Prior to the passage of the Act, the House and the Senate contemplated distinct renditions of the bill,\textsuperscript{72} although neither body proffered a conference report.\textsuperscript{73} The version first considered by the House contained an explicit waiver of sovereign immunity.\textsuperscript{74} The House debated this version, and agreed to accept, with scant deliberation, the Senate’s phrasing for the federal facilities provision which did not mention waiving sovereign immunity for civil penalties.\textsuperscript{75}

It is suggested that the court’s assertion in \textit{D.O.E.} that the legislative history of the Act supports the imposition of civil penalties, is without merit, and results in an unacceptable broadening of the statute’s scope.\textsuperscript{76} The \textit{D.O.E.} court rationalized that since Congress was concerned with the pollution emitted by various federal facilities, it must have intended that the federal government be subject to civil penalties under RCRA.\textsuperscript{77} Congress has evidenced disposal often result in air pollution, subsurface leachate and surface run-off, which effect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

\textit{Id.}.

\textsuperscript{71} \textit{See} 42 U.S.C. § 6926(b) (1988). Section 6926(b) provides:

Any state which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. \ldots Such State is authorized to carry out such program in lieu of the Federal program under this subchapter \ldots in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste \ldots .

\textit{Id.}

\textsuperscript{72} \textit{See Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990) (House and Senate considered different versions of RCRA); Meyer v. United States Coast Guard, 644 F. Supp. 221, 223 (E.D.N.C. 1986) (same); Cheng, supra note 1, at 855 (same).}

\textsuperscript{73} \textit{See Cheng, supra note 1, at 856 (Senate and House failed to issue conference report).}

\textsuperscript{74} \textit{See Mitzelfelt, 903 F.2d at 1295 (House version “specifically subjected federal agencies to civil penalties”); Meyer, 644 F. Supp. at 223 (House bill authorized civil penalties).}

\textsuperscript{75} \textit{See Meyer, 644 F. Supp. at 223. In fact, the legislators did not specifically address the issue of civil penalties; Mitzelfelt, 903 F.2d at 1295 (legislative history makes no reference to intention by Congress to waive federal sovereign immunity to civil penalties); Cheng, supra note 1, at 856 (committee hearings and floor debates did not explicitly consider whether Congress intended to subject federal facilities to civil penalties).}

\textsuperscript{76} \textit{See Meyer, 644 F. Supp. at 223. “The legislative history of RCRA indicates that Congress did not intend for federal facilities to be subject to civil penalties.” Id.}

\textsuperscript{77} \textit{See Ohio v. Department of Energy, 904 F.2d 1058, 1065 (6th Cir. 1990); cert granted, 111 S. Ct. 2256 (1991).}
its concern by subjecting federal agencies to various anti-pollution laws and by allowing courts to use other enforcement mechanisms to compel compliance. As such, it is submitted that a desire to prevent federal entities from polluting, without more, does not justify judicial imposition of civil penalties on the federal government, absent the communication of an unequivocal intent to do so by Congress.

B. Plain Language

It is conceded that the D.O.E. court correctly decided that the General Waiver Provision of RCRA may not be construed to provide a waiver, given that the Act failed to expressly waive the sovereign immunity of the federal government from civil penalties. However, it is suggested that the court erred when it held that the Civil Suit Provision supports a waiver. The court attempted to justify its position by claiming that relevant provisions of section 6928(g), the "[f]ederal enforcement" section, derive the meaning of "person" from the Citizen Suit Provision instead of the general definition section which defines "person" for the purposes of RCRA.

Section 6928(g) mandates that civil penalties be paid to the United States. The practical result of the D.O.E. court's interpretation, is simply to have the Department of Energy pay the penalties into the federal treasury. Additionally, the relevant federal enforcement provisions were not drafted to be exclusively activated by citizen suits. There is no indication that Congress intended section 6928 to be read differently, so as to depend on

78 See supra note 2 (listing examples of acts restricting ability to pollute/damage environment).
79 See D.O.E. 904 F.2d at 1063 (Court found no clear-cut waiver of sovereign immunity).
80 See Meyer, 644 F. Supp. at 223. "[T]here is no language in this statute [RCRA] that suggests that the federal government was intending to waive its immunity against the imposition of civil penalties. On the contrary, it seems to contemplate only obligations arising from injunctions." Id.
81 See D.O.E., 904 F.2d at 1065.
83 See D.O.E., 904 F.2d at 1069 n.4 (Guy, J., dissenting).
84 See 42 U.S.C. § 6928 (a) (Administrator may take action on basis of any information indicating violation).
which provision authorized use of its sanctions. It is submitted that the court failed to explain why Congress would ignore the General Waiver Provision, which specifically addressed the issue of sovereign immunity, only to subsequently choose a convoluted path as its means for waiving the federal government's sovereign immunity. Such interpretation is at odds with the court's finding that a waiver of sovereign immunity must be clearly expressed.

IV. POLICY CONSIDERATIONS AND RAMIFICATIONS

Federal-state corroboration is a practical method of implementing effective anti-pollution legislation. The federal government, by virtue of its comprehensive jurisdiction, is in the best position to coordinate environmental protection efforts. In addition, requiring each state to observe minimum standards improves the quality of the environment as a whole. Additionally, consistency

86 Cf. 42 U.S.C. § 6928(a), (g) (1988). The statute provides in relevant part:

(a) Compliance orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter (42 USC § 6921 et seq.), the Administrator may issue an order... requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

Id. See supra note 45 and accompanying text (Congress must clearly express waiver).


88 See Breen, supra note 37, at 1 (federal government most important drafter of environmental legislation).

89 See Schnapf, supra note 87, at 697 (implementing minimum standards improves quality of environment).
in legislation avoids the flight of industry from those states vigorously pursuing environmental amelioration to states with substantially less stringent requirements. Further, proximity to the sources of pollution provides the states with a compelling motive to implement and enforce environmental programs.

Despite many advantages offered by a federal-state partnership, the present statutory scheme for federal compliance with environmental protection provisions fails to adequately protect the American public. Failure to impose on the federal government the same responsibilities that are imposed on both states and private entities, creates a deleterious effect on "federal-state cooperation that is . . . essential to a successful environmental protection effort." By permitting federal entities to avoid particular environ-

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90 See Note, Assuring Federal Facility Compliance, supra note 1, at 518. "[A] uniform national program . . . would eliminate the potential for location-based competitive advantages." Id. "A state could not set lower standards than neighboring states to attract firms interested in lower pollution control expenses." Id. at 519 n.19.

91 See Id. at 518. "An active pollution control role for state governments is desirable because local officials possess first-hand knowledge of pertinent economic, political, and environmental conditions and public sentiments." Id. "[S]tate residents and workers directly suffer the ill effects of inadequate pollution control and enjoy the benefits of adequate control." Id; see also Schnapf, supra note 87, at 737. "State agencies tend to be more responsive to their citizens, act faster, and are more flexible in fashioning pragmatic solutions to problems." Id.


93 Shaw, Sovereign Immunity: Federal Compliance with State Permit Requirements Under the Clean Air Act and the Federal Water Pollution Control Act Amendments, 6 SAN FERN. V.L. REV. 117, 121 (1978). The author suggested that since the federal facilities must comply with state standards anyway, the courts should not be reluctant to treat them as any other person would be treated in all aspects of the statutory scheme. Id. He found it difficult to understand why the federal government would be subject to some state regulations, but not all. Id. Having placed a large share of the burden of environmental protection on the states, policy considerations urge that the federal facilities be treated on the same level as private industry. Id. at 124-25. See Note supra note 92, at 143. Congress continues to realize that wide spread waste problems are being caused by federal facilities, yet refuses to explicitly waive sovereign immunity for civil penalties which would deter such irresponsi-
mental penalties, these otherwise influential environmental leaders, would be placed in the position of saying "do as I say, not as I do." This undesirable result would persist until Congress clearly waived sovereign immunity for environmental transgressions.

It is further submitted that merely levying civil penalties on a federal agency may not provide the necessary incentive to secure federal compliance with legislation demanding safe disposal of waste because the ultimate cost of these penalties will be borne by the taxpayers. Moreover, since the payment of civil penalties by the federal government is made directly into its own coffers, it is submitted that this sanction does little to further anti-pollution goals.

Additionally, even when a federal agency attempts to comply with the undoubtedly mandatory substantive requirements, often the necessary funds are unavailable.

As a result, the states are forced to clean up at their own expense. Id. As a result, the states are forced to clean up at their own expense. Id.
V. STATUTORY AND REGULATORY PROPOSALS

It is proposed that the proper interpretation of the Clean Water Act and RCRA does not presently subject federal agencies to civil penalties. It is further proposed that amendments be enacted by Congress, after careful evaluation of all relevant ramifications and policy considerations, focusing on the need to reserve adequate funds to meet the substantive requirements mandated under the Clean Water Act and RCRA.

It is submitted that the major federal agencies be individually addressed at both the congressional level and the departmental level. On the congressional level, it is proposed that when allocating budgets for each agency, Congress should evaluate the agency in respect to the relevant environmental statutes, and reserve adequate financing to implement the necessary pollution control devices. Additionally, Congress should review the adequacy of such reserve funds on a regular basis.

On the departmental level, it is proposed that a chain of responsibility for hazardous waste disposal be instituted on all employees, running from agency heads to those directly implementing waste disposal. It is further suggested that mandatory education of all employees involved in hazardous waste disposal be instituted, addressing limitations under applicable hazardous waste statutes, the legal responsibilities of the employees, and the potential civil and criminal penalties imposed for noncompliance.

CONCLUSION

Improper and unsafe disposal of hazardous waste by the federal government is a national problem. The potential consequences of environmental irresponsibility by the federal government are of enormous magnitude. It is therefore critical to impose upon the federal government the same environmental responsibility imposed upon other entities. The future safety of our environment demands that Congress provide explicit, intelligible, and consistent legislation. Further, productive environmental legislation will

when the agency responsible for a particular facility makes the fund request as a good faith response to state environmental regulators." Id.
be realized only after careful examination by Congress of all relevant ramifications and policy considerations in order to create a sufficient incentive to secure federal compliance and responsibility in this area.

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