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A PRIMER ON FEDERAL FACILITY COMPLIANCE WITH ENVIRONMENTAL LAWS: WHERE DO WE GO FROM HERE?*

Look, Buster, don't bug me with your crap about permits. I'm building nuclear weapons.¹

Unfortunately, some of the worst [environmental] offenders are our own federal facilities. As President, I will insist that in the future federal agencies meet or exceed environmental standards: The government should live within the laws it imposes on others.²

Pollution caused by facilities owned or operated by various federal agencies³ is a major contributor to the environmental problems facing the United States today.⁴ While capable of causing harm identical to pollution from a private facility,⁵ federal facility pollution raises legal issues that never arise when a private entity pollutes.⁶ For instance, federal and state

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1. Dan W. Reicher & S. Jacob Scherr, *Laying Waste to the Environment*, BULL. OF THE ATOM. SCIENTISTS, Jan.-Feb. 1988, at 31, 31.

2. See H.R. REP. NO. 111, 102d Cong., 1st Sess. 2-3 (1991), reprinted in 1992 U.S.C.A.N. 1287, 1288 (attributing remarks to George Bush during 1988 presidential campaign).

3. See *infra* notes 28-29 and accompanying text (discussing degree of environmental contamination at DOD and DOE facilities).

4. See *infra* notes 21-38 and accompanying text (discussing scope and extent of federal facility pollution).

5. See H.R. REP. NO. 141, 100th Cong., 1st Sess. 4 (1990) (discussing release of 300,000 pounds of radioactive uranium particles into atmosphere from Fernald facility); 139 CONG. REC. E9 (daily ed. Jan. 5, 1993) (statement of Rep. Schaeffer) ("The environment knows no difference between contamination from federal and private sources . . .").

6. See generally Michael D. Axline et al., *Stones for David's Sling: Civil Penalties in Citizen's Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1 (1987) (examining CWA, CAA, RCRA and recent case law); Richard E. Lotz, *Federal Facilities Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties*, 31 A.F. L. REV. 7 (1989) (discussing meaning of "requirements," fines and penalties, and recent case law); Stan Millan, *Federal Facilities and Environmental Compliance: Toward a Solution*, 36 LOY. L. REV. 319 (1990) (discussing constitutional questions presented by EPA suing sister agencies); Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?*, 17 ECOLOGY L.Q. 317 (1990) (same); Louise M. Gleason & Marie I. Goutzounis, Comment, *Clearing the Air of Environmental Sovereign Immunity: Ohio v. United States Department of Energy*, 6 ST. JOHN'S J. LEGAL COMMENT. 287 (1991) (discussing facility compliance with environmental laws and sovereign immunity waivers); Nancy E. Milsten, Note, *How Well Can States Enforce Their Environmental Laws When the Polluter Is the United States Government?*, 18 RUTGERS L.J. 123 (1986) (same); J.B. Wolverton, Note, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565 (1991) (same); Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?*, NAT. RESOURCES & ENV'T, Summer 1991, at 28 (same).

governments respond swiftly to environmental pollution from private sources.⁷ Such action can include injunctive or declaratory relief and possibly civil and criminal penalties.⁸ Additionally, private polluters cannot discount a possible citizen's suit.⁹

When a federal agency is responsible for environmental contamination, however, statutory and constitutional concerns limit or preclude nearly all of the enforcement options named above.¹⁰ Vital enforcement tools such as state-imposed civil penalties and criminal sanctions on federal actors implicate sovereign immunity concerns.¹¹ Federal level enforcement, that is, enforcement by the Environmental Protection Agency (EPA) through administrative orders or civil actions filed in federal district court, against federal actors raises constitutional concerns such as separation of powers.¹²

7. See *United States v. Ashland Oil, Inc.*, [Litigation] 20 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,399 (W.D. Pa. June 19, 1989) (approving entry of consent decree). On January 2, 1988, an oil storage tank at one of Ashland's facilities collapsed, spilling about one million gallons of diesel fuel into the Monongahela River. *Id.* Six months later, the United States and Pennsylvania, pursuant to § 309(b) of the Clean Water Act (CWA) and § 13 of the Rivers and Harbors Act, filed a complaint against Ashland seeking recovery of costs incurred in cleaning up the spill. *Recent Developments in the Courts*, [News & Analysis] 18 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,491, 10,492 (Nov. 1988). Then, in September 1988, the United States filed a criminal indictment against Ashland for violation of the CWA. *Ashland Oil*, [Litigation] 20 *Env'tl. L. Rep.* at 20,399 n.1. Individuals filed civil damage actions, but not citizen's suits, against Ashland. See *Ashland Oil Would Pay up to \$30 Million in Proposed Settlement of Oil Spill Suits*, [Current Dev.] 20 *Env't Rep.* (BNA) 1295, 1295 (Nov. 17, 1989) (discussing settlement of class action law suits). The civil action filed by the United States resulted in a civil penalty of \$4.6 million. *Ashland Agrees to Pay \$4.6 Million in Penalties, Costs Related to Spill*, [Current Dev.] 20 *Env't Rep.* (BNA) 1384, 1384 (Dec. 8, 1989). The criminal action resulted in a fine of \$2.25 million. *Largest Oil Spill Fine in History Assessed Against Ashland Oil by Court*, [Current Dev.] 19 *Env't Rep.* (BNA) 2473, 2473 (Mar. 17, 1989).

8. See Mike Rothmel, Note, *When Will the Federal Government Waive the Sovereign Immunity Defense and Dispose of its Violations Properly?*, 65 *CHI.-KENT L. REV.* 581, 585-86 (1989) (describing enforcement actions that private polluters may face).

9. See, e.g., 33 U.S.C. § 1365(a)(1) (1988) (allowing citizen to sue any "person" who violates effluent standard or administrative order under CWA); 42 U.S.C. § 6972(a)(1) (1988) (allowing same under RCRA); *id.* § 7604(a)(1) (1988) (allowing same under CAA).

10. See Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 *U. CHI. L. REV.* 845, 846 (1990) (noting that federal agencies seek less stringent treatment under environmental laws); *infra* notes 53-80 and accompanying text (discussing enforcement options available to state and federal enforcers against federal polluters). The limitation on enforcement options exists despite Congress's desire that regulators treat federal facilities identically to private facilities. H.R. REP. NO. 111, *supra* note 2, at 2, reprinted in 1992 U.S.C.C.A.N. at 1288.

11. See David W. Goewey, Note, *Assuring Federal Facility Compliance with the RCRA and Other Environmental Statutes: An Administrative Proposal*, 28 *WM. & MARY L. REV.* 513, 522-25 (1987) (discussing sovereign immunity); Susan L. Smith, *Government Immunity Issues: Can the King Do No Wrong?*, *NAT. RESOURCES & ENV'T*, Summer 1991, at 16, 16 (discussing three potential immunity defenses). "The basic principal of sovereign immunity is that one cannot sue the government without its consent." Babich, *supra* note 6, at 29.

12. See *infra* notes 171-93 and accompanying text (introducing constitutional concerns regulators confront in federal facility enforcement). The central question is how far can one executive branch agency—the EPA for example—go to coerce another executive branch agency—

This Note will explore the current ability of both state and federal regulators to enforce environmental laws against federal polluters. Part I details the extent of the pollution problem at federal facilities. It goes on to introduce the legal framework that, for the last decade, controlled the manner in which regulators sought federal compliance. The discussion reveals the issues that set the stage for two recent developments in the law of federal facilities compliance.

Part II shifts the focus to those two recent developments, the United States Supreme Court decision in *Ohio v. United States Department of Energy*¹³ and the enactment of the Federal Facility Compliance Act of 1992 (FFCA).¹⁴ Both *Ohio* and the FFCA significantly have affected the availability of remedies against pollution from federal installations. The *Ohio* decision limited the remedies available to states in civil enforcement actions by forbidding states from collecting punitive civil penalties.¹⁵ The FFCA reversed *Ohio* on the penalties issue and addressed other problems that arose from the legal framework that governed federal facility compliance for the last decade.

Part III analyzes the effectiveness of the FFCA. First, Part III examines the civil penalties provision of the FFCA. Although the FFCA provides a clear waiver of sovereign immunity, it does not respond to parts of *Ohio's* reasoning that call into question other environmental statutes' sovereign immunity waiver provisions, specifically the Clean Water Act (CWA),¹⁶ the Clean Air Act (CAA),¹⁷ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁸ The *Ohio* rationale undercuts the effectiveness of those laws by questioning their ability to waive sovereign immunity and subject the federal government to certain enforcement tools.¹⁹ The FFCA, which amended the Resource Conservation and Recovery Act (RCRA),²⁰ does not address *Ohio's* possible effect on the CAA or the CERCLA.

The civil penalties issue, however, is only half the problem. Part III next examines the constitutional issues the FFCA raises. The constitutional

the Department of Energy for example—into complying with the requirements of federal environmental laws?

13. 112 S. Ct. 1627 (1992); see *infra* notes 106-21 (discussing and analyzing *Ohio* decision). The *Ohio* decision overturned an appeals court decision by the same name. Unless otherwise specifically noted, a reference to "*Ohio*" herein is to the United States Supreme Court decision.

14. Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) [hereinafter FFCA]; see *infra* notes 128-44 (discussing provisions of FFCA).

15. The *Ohio* decision was preceded by a split in the circuits over the issue of punitive civil penalties. See *infra* notes 74-76 and accompanying text (defining punitive civil penalties); *infra* notes 85-105 and accompanying text (discussing appeals court split over punitive civil penalties issue).

16. 33 U.S.C. §§ 1251-1376 (1988).

17. 42 U.S.C. §§ 7401-7661f (1988 & Supp. II 1990).

18. *Id.* §§ 9601-9662.

19. See *infra* notes 150-70 and accompanying text (discussing impact of *Ohio* on CAA and CERCLA waivers).

20. 42 U.S.C. §§ 6901-6992k (1988).

questions arise from the EPA's attempts to enforce the RCRA against federal facilities. Under the FFCA, the EPA could issue administrative orders to other agencies or, arguably, institute civil actions against other agencies. Part III will show that administrative orders are constitutional under the FFCA and that the FFCA does not authorize civil actions, thus avoiding constitutional problems.

Finally, this Note will conclude that both congressional and executive action is needed to repair the key flaw of the FFCA, namely, its limited scope. Congress should extend the clear and unambiguous immunity waiver in the FFCA to other environmental statutes. The President should use the power of the executive office to control EPA enforcement against other federal agencies. The justification for congressional and presidential action begins with an understanding of the extent of the pollution problem at federal facilities.

I. THE FACTUAL AND LEGAL CONTEXT OF FEDERAL POLLUTION

A. *The Scope of the Pollution Problem at Federal Facilities*

The term "federal facility" can include anything from a Navy ship to buildings, installations, or land.²¹ Of 27,000 total federal installations, roughly 5,000 have requested funding for environmental pollution abatement projects or hold environmental permits.²² The number of federal facilities listed on the EPA's Federal Agency Hazardous Waste Compliance Docket is increasing. In just six months, from August 1992 to February 1993, the number of facilities on the list increased from 1709 to 1930.²³

While federal pollution is concentrated at facilities owned or operated by the Department of Defense (DOD) and the Department of Energy (DOE),²⁴ it is by no means limited to those two agencies. The Departments of Interior and Agriculture own substantial acres of potentially contami-

21. See NATIONAL GOVERNORS ASS'N & NATIONAL ASS'N OF ATTORNEYS GENERAL, FROM CRISIS TO COMMITMENT: ENVIRONMENTAL CLEANUP AND COMPLIANCE AT FEDERAL FACILITIES 2 (1990) [hereinafter GOVERNOR'S REP.] (revealing that uses of "federal facility" varied).

22. *Id.*; see *infra* notes 42-48 and accompanying text (explaining CWA and RCRA permit systems).

23. Compare 58 Fed. Reg. 7298, 7300 (1993) (showing 1930 sites on docket in February 1993) with 57 Fed. Reg. 31,758, 31,760 (1992) (showing 1709 sites on docket in July 1992). Congress mandated the Federal Agency Hazardous Waste Compliance Docket (Docket) in the 1986 Superfund reauthorization legislation. It is codified at 42 U.S.C. § 9620(c) (1988). The Docket serves to "identify the universe of [f]ederal facilities that must be evaluated to determine whether they pose a risk to human health and the environment . . ." 57 Fed. Reg. at 31,758. Thus, a listing on the Docket does not signify actual contamination, but rather suspected contamination and reason for concern. The National Priorities List (NPL) identifies actually contaminated sites, and 116 federal facilities are on the NPL. H.R. REP. NO. 111, *supra* note 2, at 3, reprinted in 1992 U.S.C.C.A.N. at 1289.

24. See Babich, *supra* note 6, at 28 (stating that DOD and DOE have been poor stewards of public resources).

nated land.²⁵ Activities that have contributed to the contamination include mining,²⁶ cattle grazing, timber cutting, and other licensed activities.²⁷

The DOD and the DOE sites, however, present the most toxic, most dangerous, and most expensive threat to the environment. The responsible agency may never remedy many of the sites because they are so contaminated.²⁸ Nor has the waste stopped flowing. The DOD and the DOE together annually generate approximately twenty million tons of hazardous or mixed hazardous and radioactive waste.²⁹ While the DOD has improved its record by emphasizing waste reduction techniques,³⁰ the waste already fouling the environment remains unaddressed.

The waste is largely a legacy of the Cold War. Nuclear weapons production at the DOE plants created much of the waste.³¹ The pollution at the DOD facilities includes unexploded munitions, contamination from chemical weapons, and spilled fuel.³² At the Rocky Mountain Arsenal in Denver, Colorado, for instance, the disposal of wastes from the manufacture of chemical weapons has contributed to groundwater contamination.³³

25. See *id.* at 28 (stating that Departments of Interior and Agriculture "own vast amounts of potentially contaminated property (e.g., abandoned mining sites)").

26. *Id.* See generally Nancy Mangone, *The Other Federal PRPS: Liability for Mining Wastes Under CERCLA and RCRA*, 10 VA. ENVTL. L.J. 87 (1990) (discussing whether EPA can and should seek CERCLA response costs or corrective actions from other executive branch departments).

27. See Wolverton, *supra* note 6, at 567 (discussing pollution problems on federal lands and citing sources).

28. *Cleanup at Federal Facilities: Hearings on H.R. 765 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 34 (1989) (statement of Charles A. Bowsher, United States Comptroller General).

29. H.R. REP. NO. 111, *supra* note 2, at 2, reprinted in 1992 U.S.C.A.N. at 1288; see *Federal Facilities Compliance: Hearings on H.R. 2194 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 69 (1991) (statement of Christian R. Holmes, Deputy Assistant Administrator, EPA) [hereinafter *Federal Facilities Compliance*] (defining mixed waste as "wastes that contain hazardous wastes subject to RCRA regulations and radioactive wastes subject to the Atomic Energy Act").

30. See David Hanson, *Defense Pollution Reduction Efforts Paying Off*, CHEMICAL & ENGINEERING NEWS, Sept. 21, 1992, at 15 (revealing that total DOD hazardous waste output fell 57% from 1987 to 160 million pounds per year).

31. See OFFICE OF TECHNOLOGY ASSESSMENT, COMPLEX CLEANUP: THE ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION (SUMMARY) 3-4 (Feb. 1991) reprinted in *Department of Defense Authorization for Appropriations for FY 1992 and 1993: Hearings on S. 1507 Before the Senate Armed Services Comm.*, 102d Cong., 1st Sess., pt. 7, 285, 294-95 (1991) (identifying as one cause of current waste problems "a long history of emphasizing the urgency of weapons production in the interest of national security, to the neglect of environmental considerations"); Dan W. Reicher & S. Jacob Scherr, *The Bomb Factories: Out of Compliance and Out of Control*, in HIDDEN DANGERS: ENVIRONMENTAL CONSEQUENCES OF PREPARING FOR WAR 35, 35 (Anne H. Ehrlich & John W. Birks eds., 1990) (describing environmental problems caused by DOE's nuclear weapons production).

32. *Cleaning Up Closing Bases Will Cost More, Take Longer Than Estimated*, CBO Predicts, [Current Dev.] 23 Env't Rep. (BNA) 1385, 1385 (Sept. 11, 1992).

33. GOVERNOR'S REP., *supra* note 21, at 11.

The costs of cleanup are overwhelming. Estimates of the total cost of cleanup exceed \$150 billion over the next twenty to thirty years.³⁴ The DOD has estimated its cleanup costs at \$24 billion over the next ten years.³⁵ The DOD requested \$3.7 billion for fiscal year 1993 to pay for environmental cleanups and compliance at its military facilities.³⁶ The DOE, for its part, requested \$5.5 billion for fiscal year 1993.³⁷ The House of Representatives increased total funding allotted for environmental cleanup and waste management at the DOE to \$4.6 billion for the same period.³⁸

Federal facility pollution is a serious problem. The major actors on the issue—Congress, the EPA, and other federal agencies—are moving towards a resolution by increasing funding levels for environmental cleanup.³⁹ Congress's response, however, has been slow.⁴⁰ Faced with agency noncompliance in the interim, state regulators⁴¹ took appropriate enforcement action under then-existing environmental laws. The ensuing clash between the regulators and the regulated created a legal framework that stymied effective enforcement efforts.

B. *An Introduction to the Legal Framework for Enforcing Environmental Laws Against Federal Facilities*

State regulators worked primarily with two laws in attempting to address federal pollution: the CWA and the RCRA. The CWA authorizes the EPA to establish national standards for water quality.⁴² To enforce these standards, the CWA establishes the National Pollutant Discharge

34. See *id.* at 3 (suggesting clean-up cost range of \$95 billion to \$135 billion for DOE facilities and \$10 billion to \$15 billion for DOD facilities). More recent reports place the cleanup costs at DOE facilities at \$600 billion. *New Public Participation Planning Teams at Core of DOE Cleanup Efforts, Official Says*, [Current Dev.] 23 Env't Rep. (BNA) 3049, 3049 (Mar. 26, 1993).

35. U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE: DOD ESTIMATES FOR CLEANING UP CONTAMINATED SITES IMPROVED BUT STILL CONSTRAINED 3 (Oct. 1991) (GAO/NSIAD 92-37) [hereinafter HAZARDOUS WASTE]; *Senate Panel Urged to Support More Funding for Defense Department Environment Programs*, [Current Dev.] 23 Env't Rep. (BNA) 316, 316 (May 15, 1992).

36. *Senate Panel Urged to Support Funding*, *supra* note 35, at 316. President Bush signed, on September 23, 1992, a supplemental appropriations bill (H.R. 5620) that "contain[ed] \$1 billion in new money for environmental cleanup and compliance at military bases." *Bush Signs into Law Appropriations Bill with \$1 Billion for DOD Environmental Efforts*, [Current Dev.] 23 Env't Rep. (BNA) 1501, 1501 (Oct. 2, 1992).

37. *Interagency Report on DOE Cleanup Costs Rebutted, Questioned by Environmentalists*, [Current Dev.] 23 Env't Rep. (BNA) 279, 279 (May 8, 1992). Environmental groups dispute that the amount allotted for cleanup and waste management is enough to cover all of the DOE's compliance agreement obligations. *Id.*

38. *House Approves \$1 Billion Funding Increase for Weapons Plant Cleanups*, [Current Dev.] 23 Env't Rep. (BNA) 669, 669-70 (June 19, 1992).

39. See Hanson, *supra* note 30, at 15 (stating that fiscal 1993 funding request is four times that of 1987). See generally *Cleaning Up Federal Facilities: Controversy over an Environmental Peace Dividend*, [Current Dev.] 23 Env't Rep. (BNA) 2659, 2659 (Feb. 5, 1993) (providing general overview of problems facing cleanup efforts at DOE and DOD installations).

40. See *infra* note 123 (discussing FFCA's extensive legislative history).

41. See *infra* note 62 (discussing how EPA enforcement authority was limited).

42. 33 U.S.C. §§ 1311-1314, 1316-1317 (1988).

Elimination System (NPDES).⁴³ The NPDES authorizes the EPA to issue permits allowing the discharge of specified levels of pollutants.⁴⁴ Furthermore, states interested in enforcing the national standards may submit plans to the EPA for approval.⁴⁵ Essentially, the aim of the CWA is to combat ongoing pollution.

Conversely, Congress designed the RCRA to address problems associated with existing hazardous waste. Specifically, the RCRA deals with hazardous waste tracking and disposal problems.⁴⁶ Congress passed the legislation to establish a "cradle-to-grave"⁴⁷ monitoring system for hazardous waste. Like the CWA, the RCRA allows individual states that seek to administer and enforce a hazardous waste program pursuant to the RCRA standards to submit their programs to the EPA for approval.⁴⁸

The CWA's and the RCRA's enforcement mechanisms are similar. If the EPA or a relevant state enforcement body finds a person in violation of the statute, it can issue an administrative order requiring compliance by a certain date.⁴⁹ Both statutes allow proceedings in federal district court to obtain compliance with statutory requirements or to seek civil penalties.⁵⁰ The statutes allow courts to impose criminal penalties.⁵¹ Finally, individuals may bring citizen's suits against the EPA or polluting entities.⁵²

43. *Id.* § 1342. See generally 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW §§ 4.26-.32 (1986) (discussing NPDES).

44. 33 U.S.C. § 1342(a) (1988). See generally Corinne Beckwith Yates, Note, *Limitations of Sovereign Immunity Under the Clean Water Act: Empowering States to Confront Federal Polluters*, 90 MICH. L. REV. 183, 189-92 (1991) (providing analysis of NPDES).

45. 33 U.S.C. § 1342(b) (1988). Once the EPA approves a state program, active federal enforcement within that state ceases. *Id.* § 1342(c). However, should the EPA determine that the state is not administering its program properly, the EPA can resume responsibility for enforcement. *Id.* § 1342(c)(3). See Yates, *supra* note 44, at 192-93 (discussing state-operated NPDES permitting).

46. See 42 U.S.C. §§ 6923-6925 (1988) (establishing standards and permitting system for hazardous waste handling); 3 RODGERS, *supra* note 43, §§ 7.1-.5 (discussing RCRA in detail); Milsten, *supra* note 6, at 126-27 (discussing how RCRA functions).

47. JOHN QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTES: A GUIDE TO RCRA 5 (1982).

48. 42 U.S.C. § 6926(b) (1988). Like the CWA, the RCRA allows federal takeover should the EPA determine that the state is not properly administering the program approved by the EPA. *Id.* § 6926(e).

49. 33 U.S.C. § 1319(a) (1988); 42 U.S.C. § 6928(a) (1988). Generally, an administrative order is the whole or part of a final disposition by an agency in an adjudicatory or licensing matter. 5 U.S.C. § 551(6) (1988). The RCRA allows the target of an administrative order the opportunity for a public hearing prior to the order being finalized. 42 U.S.C. § 6928(b) (1988). An example of an administrative order under the RCRA is set out in *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 485-89 (1987) [hereinafter *Environmental Compliance*].

50. 33 U.S.C. § 1319(b) (1988); 42 U.S.C. § 6928(a)(1) (1988).

51. 33 U.S.C. § 1319(c) (1988); 42 U.S.C. § 6928(d) (1988); see Rothmel, *supra* note 8, at 585-86 (discussing enforcement mechanisms in CAA, CWA, and RCRA).

52. See 33 U.S.C. § 1365(a) (1988) (CWA); 42 U.S.C. § 6972(a) (1988) (RCRA). A citizen suit is a cause of action, authorized by an explicit statutory grant of authority, pursued by a

The CWA and the RCRA also contain sections that seek to waive sovereign immunity and to make federal facilities subject to their provisions. Both the CWA and the RCRA require federal facilities to comply with, *inter alia*, "all Federal, State, interstate, and local requirements."⁵³ Subsequent litigation, however, exposed uncertainties over the scope of these sovereign immunity waivers.⁵⁴ Slowly, court resolution or agency stipulation settled many issues. Several years of litigation ultimately led to the United States Supreme Court's decision in *Ohio* and to the FFCA. Therefore, examining how various issues developed will lead to a greater understanding of what exactly was at stake when Congress considered the FFCA.

Courts had no trouble determining that substantive standards contained in federal environmental laws applied to federal facilities.⁵⁵ Controversy arose, however, over how regulators would enforce those standards against government polluters. Courts consistently have applied a substance versus procedure distinction to the federal facility statutory provisions.⁵⁶ Courts have held that the reference to "requirements" in the CWA and the RCRA included items such as waste disposal standards, permits, and reporting duties, but excluded any means of enforcement.⁵⁷ This judicially developed distinction created a chasm between those mechanisms available for use

private individual or organization to enforce statutory requirements. See William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403, 405-06 (1985) (discussing citizen's suits).

53. 33 U.S.C. § 1323(a) (1988); 42 U.S.C. § 6961 (1988).

54. See *infra* notes 85-105 and accompanying text (discussing court of appeals decisions).

55. See *Hancock v. Train*, 426 U.S. 167, 181 (1976) (agreeing that substantive standards apply to federal facilities); *United States v. Washington*, 872 F.2d 874, 877 (9th Cir. 1989) (same); *California v. Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (same); see also Colleen Kraft Shields, Casenote, *The Federal Government: Finally Paying Its Environmental Dues: State of Ohio v. United States Department of Energy*, 2 VILL. ENVTL. L.J. 439, 449 (1991) (discussing *Washington*). But see Kenneth M. Murchison, *Reforming Environmental Enforcement: Lessons from Twenty Years of Waiving Federal Immunity to State Regulation*, 11 VA. ENVTL. L.J. 179, 192-95 (1991-1992) (discussing cases where courts held "requirements" to exclude certain state environmental laws). State laws passed independently of federal laws such as the RCRA, the CERCLA and the CWA and state laws that are implemented pursuant to the RCRA, the CERCLA and the CWA should be distinguished. Murchison addresses the former. This note addresses the latter. Congress designed federal environmental laws to establish minimum standards and to allow the states to then adopt those standards and enforce them on their own. See, e.g., 42 U.S.C. § 6926(b) (1988); Milsten, *supra* note 6, at 124 & 127; Charles W. Tucker, *Compliance by Federal Facilities with State and Local Environmental Regulations*, 35 NAVAL L. REV. 87, 97 (1986) (stating that "requirements" applies to regulations under CWA, RCRA, and CERCLA, but not to state liability laws).

56. See *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1636-37 (1992) (distinguishing coercive from punitive sanctions); *Hancock*, 426 U.S. at 183 (distinguishing standards from means to enforce standards); *Walters*, 751 F.2d at 978 (same); *Federal Facility Compliance Act of 1989: Hearings on S. 1140 Before Senate Comm. on Environment and Public Works*, 101st Cong., 2d Sess. 182 (1990) (statement of Jack Van Kley, Office of Ohio's Attorney General) (discussing *Hancock* decision).

57. *Walters*, 751 F.2d at 978.

against private polluters and those available for use against federal polluters.

The substance-procedure distinction limited state and federal enforcement efforts. Declaratory and injunctive relief, for example, did not lose effectiveness as a result. The federal government specifically conceded that such relief was available against a polluting facility.⁵⁸ However, the substance-procedure distinction did restrict state administrative order authority.⁵⁹ Consequently, states expended valuable resources on ineffective enforcement options⁶⁰ rather than using the more rapid and flexible mechanism of administrative orders.⁶¹ Furthermore, statutory and constitutional concerns prior to the FFCA also limited administrative order authority exercised by the federal government.⁶² The FFCA has bolstered a state's authority to use administrative orders.⁶³

The substance-procedure distinction also affected citizen's suits. The RCRA and the CWA clearly authorize citizen's suits against the United States.⁶⁴ The uncertainty concerned what enforcement mechanisms were

58. See *Ohio*, 112 S. Ct. at 1635 n.15 (conceding availability, via citizen's suit and direct state action, of coercive sanctions against United States for violation of court orders); see also *Legal Envtl. Assistance Found., Inc. v. Hodel*, 586 F. Supp. 1163, 1169 (E.D. Tenn. 1984) (applying substantive standards and ordering declaratory relief but refusing injunctive relief due to national security concerns); Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 COLUM. J. ENVTL. L. 1, 16 n.47 (1991) (discussing three stages of federal resistance to state laws); Cheng, *supra* note 10, at 846 (discussing DOE resistance to state laws). For a discussion of the constitutional issues surrounding the use of injunctive relief against the federal government, see Michael D. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. L. REV. 1 (1988).

59. See H.R. REP. NO. 111, *supra* note 2, at 11-12, reprinted in 1992 U.S.C.C.A.N. at 1297-98 (stating that states need administrative order authority to avoid unnecessary and wasteful litigation thus implying that lack of such authority existed); *Federal Facilities Compliance*, *supra* note 29, at 39 (same); 138 CONG. REC. S14,756 (daily ed. Sept. 25, 1992) (statement of Sen. Baucus) (stating that FFCA clarifies availability of administrative orders against federal facilities).

60. See *Federal Facilities Compliance*, *supra* note 29, at 58 (statement of Mary A. Gade, Director, Illinois EPA) (discussing inefficiencies and time delays in current system requiring extensive litigation of technical, legal issues).

61. See *Federal Facilities Compliance*, *supra* note 29, at 57-58 (statement of Christine O. Gregoire, Washington Department of Ecology) (implying administrative order authority better enforcement option). States use administrative order authority against private polluters. *Id.* at 58 (statement of Thomas P. Looby, Colorado Department of Health).

62. See *infra* notes 195-208 and accompanying text (discussing constitutional issues raised by administrative order authority). Department of Justice (DOJ) concerns over the constitutionality of the EPA's use of administrative orders against federal agencies prompted the development of an informal dispute resolution process. See *Environmental Compliance*, *supra* note 49, at 211-12 (statement of F. Henry Habicht II, DOJ) (arguing that resolution process avoids constitutional problems); *id.* at 201 (describing details of resolution process). Many saw the informal process weakening the EPA's authority. See H.R. REP. NO. 141, *supra* note 5, at 43 (characterizing informal dispute resolution process as involving ineffective "jawboning" at elevated bureaucratic levels).

63. See *infra* notes 128-44 and accompanying text (discussing provisions of FFCA).

64. See 42 U.S.C. § 6972(a)(1) (1988) (RCRA provision); 33 U.S.C. § 1365(a)(1) (1988) (CWA provision).

available in a citizen suit. Declaratory and injunctive relief always had been available to those bringing a citizen's suit against the United States.⁶⁵ Civil penalties were available via the citizen suit mechanism when the object of that suit was a private polluter.⁶⁶ However, authority was divided as to whether states could use citizen's suits to obtain civil penalties against the United States.⁶⁷ The Supreme Court in *Ohio* held that a state could not use a citizen's suit to obtain civil penalties against the United States.⁶⁸ The FFCA waiver of sovereign immunity decreased the significance of using a citizen's suit to seek civil penalties against the United States.⁶⁹

The substance-procedure distinction also affected the availability of criminal penalties against federal employees. The CWA and the RCRA make criminal sanctions available against private polluters, and the government uses them.⁷⁰ However, the availability of criminal penalties, that is, a prosecution of a federal employee by a state or federal authority for environmental crimes, was not entirely clear prior to the FFCA's passage.⁷¹

65. *Legal Envtl. Assistance Found., Inc. v. Hodel*, 586 F. Supp. 1163, 1165 (E.D. Tenn. 1984) (using citizen suit to seek declaratory and injunctive relief against United States).

66. *See* 42 U.S.C. § 6972(a) (RCRA); 33 U.S.C. § 1365(a) (CWA).

67. *Compare Ohio v. United States Dep't of Energy*, 689 F. Supp. 760, 765 (S.D. Ohio 1988) (holding that RCRA citizen suit provision allows recovery of civil penalties), *aff'd on other grounds*, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992) and Milsten, *supra* note 6, at 142 (same) and Smith, *supra* note 11, at 56 (same) with *McClellan Ecological Seepage Situation (MESS) v. Weinburger*, 655 F. Supp. 601, 603 (E.D. Cal. 1986) (holding that RCRA citizen suit provision does not allow recovery of civil penalties) and Gleason & Goutzounis, *supra* note 6, at 297-98, 304 (same). Civil penalties continue to be available against private polluters.

Commentators suggested using citizen suit provisions as an alternative to a direct suit of the federal government. *See* Milsten, *supra* note 6, at 142 (arguing that alternative approach is to use citizen suit provisions). The state would sue as a citizen, rather than as a sovereign. Michael Donnelly & James G. Van Ness, *The Warrior and the Druid—The DOD and Environmental Law*, 33 *FED. B. NEWS & J.* 37, 39 (1986). The drawback is that any penalties collected in a citizens suit do not necessarily go to the citizen that brought the suit. *See* Theodore L. Garret, *Citizen Suits*, in *ENVIRONMENTAL LITIGATION* 68, 80 (Janet S. Kole & Larry D. Espel eds., 1991) (discussing limitations on citizen suit recoveries in CWA and CAA). *But see* Elizabeth R. Thagard, Note, *The Rule that Clean Water Act Civil Penalties Must Go to the Treasury and How to Avoid It*, 16 *HARV. ENVTL. L. REV.* 507, 530-33 (1992) (discussing circumvention of rule).

68. *Ohio*, 112 S. Ct. at 1634-35.

69. *See infra* notes 132-33 and accompanying text (discussing FFCA provisions).

70. *See Civil and Criminal Enforcement Accomplishments*, [News & Analysis] 22 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,150, 10,150 (Feb. 1992) (revealing total of 550 months imprisonment and \$14.1 million in fines resulting from EPA criminal enforcement in FY 1991); *supra* note 7 (discussing *Ashland Oil* and imposition of criminal penalty).

71. *See infra* notes 135-38 and accompanying text (discussing effectiveness of FFCA in addressing preexisting concerns on criminal liability waivers). *See generally* James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 *MIL. L. REV.* 279 (1991) (discussing criminal liability of federal employees); H. Allen Irish, *Enforcement of State Environmental Crimes on the Federal Enclave*, 133 *MIL. L. REV.* 249 (1991) (same); Smith, *supra* note 58 (same); James B. Doyle, Note, "Who Will Watch the Watcher?": Using Independent Counsel to Compel Federal Facilities to Comply with Federal

Federal prosecutors have conducted the only successful prosecutions.⁷²

Finally, the substance-procedure distinction affected the ability to assess civil penalties against federal polluters for past violations.⁷³ *Ohio* made a vital distinction between civil penalties that are coercive and those that are punitive.⁷⁴ A court imposes a coercive penalty to induce compliance with previously issued orders or injunctions.⁷⁵ On the other hand, a court imposes a punitive penalty to punish past violations of environmental laws.⁷⁶

The federal government admitted liability for coercive civil penalties prior to the FFCA.⁷⁷ The issue confronting courts and commentators, therefore, was whether federal agencies were liable for punitive civil penalties under various environmental statutes. Courts continued to apply the substance-procedure distinction to punitive civil penalties and therefore did not allow imposition of such penalties.⁷⁸ Many commentators thought that those courts were incorrect and that the federal statutes involved—mainly the RCRA and the CWA—had waived sovereign immunity for punitive civil penalties.⁷⁹ The Supreme Court in *Ohio*, however, agreed with those courts applying the substance-procedure distinction.⁸⁰

Out of this background came the three issues that the FFCA had to address: state and federal administrative order authority, punitive civil penalties, and criminal sanctions. The *Ohio* decision, and the cases leading up to it, focused only on civil penalties.⁸¹ The *Ohio* decision, while not the primary impetus for adopting the FFCA, further defined the required congressional action.

Environmental Laws, 26 VAL. U. L. REV. 671 (1992) (same). The FFCA has addressed most of these problems. FFCA, *supra* note 14, § 102(a)(4), 106 Stat. at 1505-06.

72. See *United States v. Dee*, 912 F.2d 741, 743 (4th Cir. 1990) (upholding criminal conviction under RCRA), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Carr*, 880 F.2d 1550, 1551 (2d Cir. 1989) (upholding criminal conviction under CERCLA without addressing immunity); *California v. Walters*, 751 F.2d 977, 979 (9th Cir. 1985) (*per curiam*) (precluding state prosecution for RCRA violations).

73. See, e.g., Lotz, *supra* note 6, at 14-24 (discussing civil penalties issue); Milsten, *supra* note 6, at 131-37 (same); Wolverton, *supra* note 6, at 577-85 (same).

74. See *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1632 (1992) (distinguishing punitive from coercive fines).

75. *Id.*

76. *Id.*

77. *Id.* at 1635 & n.15.

78. See *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990) (applying substance-procedure distinction to civil penalties issue); *California v. Walters*, 751 F.2d 977, 978 (9th Cir. 1984) (same).

79. See, e.g., Milsten, *supra* note 6, at 143 (concluding that explicit waiver exists in RCRA); Rothmel, *supra* note 8, at 621 (same); Yates, *supra* note 44, at 206 (same for CWA).

80. *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1631 (1992); see *infra* notes 108-21 and accompanying text (summarizing *Ohio*).

81. See *infra* notes 85-105 and accompanying text (discussing appeals court cases preceding *Ohio*).

II. RECENT DEVELOPMENTS IN FEDERAL FACILITY COMPLIANCE

A. Ohio v. United States Department of Energy

The Supreme Court decided *Ohio* amidst a shrill debate over the scope of the immunity waiver in the RCRA and the CWA.⁸² As to the RCRA, all courts of appeal unanimously agreed that the RCRA federal facilities provision did not waive sovereign immunity.⁸³ Two district courts, prior to reversal, as well as numerous commentators, disagreed.⁸⁴ The appeals courts' unanimity, however, did not extend to their final holdings because the scope of their opinions differed. Some courts looked beyond the RCRA federal facility provision to a similar provision in the CWA and to the citizen suit provisions of both the RCRA and the CWA.

1. The Setting in the Circuits Prior to *Ohio*

The United States Court of Appeals for the Tenth Circuit in *Mitzelfelt v. Department of Air Force*⁸⁵ limited its inquiry to the federal facility provision. In *Mitzelfelt*, the Tenth Circuit held that the waiver section in the RCRA did not effect a clear waiver of sovereign immunity for New Mexico's penalty claim.⁸⁶ The court stressed that any sovereign immunity waiver must be construed strictly in favor of the sovereign.⁸⁷ In this case, the court reasoned that the language in section 6001 of the RCRA, subjecting federal agencies to "all federal, state, interstate, and local requirements, both substantive and procedural,"⁸⁸ did not unambiguously

82. See *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1294 (10th Cir. 1990) (citing courts and commentators that had split on immunity waiver's scope); *supra* note 79 (listing authors concluding that RCRA contained waiver). *But cf.* Gleason & Goutzounis, *supra* note 6, at 308 (concluding that "proper interpretation" of RCRA and CWA does not include waiver).

83. See *infra* notes 85-105 and accompanying text (discussing court of appeals holdings on RCRA immunity waiver provision).

84. See *Maine v. Department of Navy*, 702 F. Supp. 322, 330 (D. Me. 1988) (holding that RCRA waives sovereign immunity in federal facilities provision), *rev'd*, 973 F.2d 1007 (1st Cir. 1992); *Ohio v. United States Dep't of Energy*, 689 F. Supp. 760, 765 (S.D. Ohio 1988) (same), *aff'd on other grounds*, 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992); Milsten, *supra* note 6, at 143 (same). See generally Margaret N. Strand & Stephen L. Samuels, *Federal Facilities' Liability for Civil Penalties Under RCRA and the Clean Water Act*, 2 FED. FACILITIES ENVTL. J. 307 (1991) (giving general overview of status of case law prior to *Ohio* decision).

85. 903 F.2d 1293 (10th Cir. 1990).

86. *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293, 1296 (10th Cir. 1990). *Mitzelfelt* arose when New Mexico notified the Air Force that Cannon Air Force Base was violating state hazardous waste laws. *Id.* at 1294. The Air Force corrected all but one violation. *Id.* New Mexico then ordered the Air Force to correct the violation and to pay a \$5,000 civil penalty. *Id.* While the Air Force did correct the violation, it did not pay the penalty arguing that sovereign immunity protected it from such a penalty. *Id.*

87. *Id.* at 1295.

88. 42 U.S.C. § 6961 (1988) (emphasis added).

waive federal sovereign immunity from civil penalties.⁸⁹ The court rejected the argument that Congress intended to waive sovereign immunity because it enacted section 6001 in response to prior Supreme Court decisions. Those Supreme Court decisions held that the word "requirements" in the CAA and the CWA did not include state permit requirements.⁹⁰ According to the Tenth Circuit, the generality of the legislative history rendered it unhelpful in defining "requirements."⁹¹

The United States Court of Appeals for the Ninth Circuit reached the same conclusion in *United States v. Washington*.⁹² In *Washington*, the Ninth Circuit held that section 6001 of the RCRA was not an express waiver of sovereign immunity from a state's assessment of civil penalties.⁹³ This case arose out of Washington's attempt to administratively assess a \$49,000 penalty against the DOE's Hanford Reservation facility. The Ninth Circuit rejected arguments essentially similar to those made by the state in *Mitzelfelt* and used similar reasoning.⁹⁴

The United States Court of Appeals for the Sixth Circuit, prior to reversal by the Supreme Court in the same case, went beyond the RCRA federal facility provision. In *Ohio v. United States Department of Energy*,⁹⁵ Ohio sued the DOE in federal district court for violations of the CWA and the RCRA that arose from the operation of the DOE's Fernald, Ohio, uranium-processing plant.⁹⁶ In addition to seeking injunctive relief against the DOE, the state sought penalties under both state and federal law for past violations of the CWA and the RCRA.⁹⁷ Prior to the district court's resolution of the DOE's motion to dismiss, the DOE and Ohio entered a consent decree. The parties agreed to settle or stay all substantive claims addressing actual compliance or remediation in return for Ohio's dropping

89. *Id.*

90. See *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 227 (1976) (holding that language of CWA did not waive sovereign immunity); *Hancock v. Train*, 426 U.S. 167, 198 (1976) (same, with regard to CAA).

91. *Mitzelfelt v. Department of Air Force*, 903 F.2d 293, 1295 (10th Cir. 1990).

92. 872 F.2d 874 (9th Cir. 1989).

93. *United States v. Washington*, 872 F.2d 874, 875 (9th Cir. 1989). The *Washington* court addressed three arguments advanced by the state. First, the state argued that the plain language of 42 U.S.C. § 6961 contained a sweeping waiver of sovereign immunity. *Washington*, 872 F.2d at 876. The court, citing the rule of interpretation requiring waivers to be unequivocal, noted that the only unequivocal waiver in § 6961 was to substantive standards and court-ordered sanctions, not to civil penalties. *Id.* at 877. The state's second argument was that Congress's reaction to the *Hancock* decision in the CAA indicated an intent to waive sovereign immunity in the RCRA. *Id.* at 876. The court rejected this argument. The RCRA's legislative history and statutory language were both silent as to punitive civil penalties. *Id.* at 878-79. Finally, the state argued that the court should reverse a prior decision of the Ninth Circuit regarding the term "requirements" in § 6961. *Id.* at 876. The court refused to do so noting that the authority of one panel to reverse a prior panel decision is limited. *Id.* at 880.

94. See *id.* at 876-80 (listing and then rejecting Washington's legal arguments).

95. 904 F.2d 1058 (6th Cir. 1990), *rev'd*, 112 S. Ct. 1627 (1992).

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

97. *Id.*

its claim to all forms of relief except the penalties for past violations.⁹⁸ In this posture, the case squarely presented the issue of whether Congress had waived sovereign immunity for civil fines imposed for past failure to comply with both the CWA and the RCRA.

The Sixth Circuit held in *Ohio* that the state could obtain civil penalties from the federal agency.⁹⁹ As to the RCRA, the Sixth Circuit agreed that the federal facilities provision of section 6001 did not waive sovereign immunity. Instead, the court looked to the citizen's suit provision of the RCRA to discover a clear sovereign immunity waiver.¹⁰⁰ The court noted that Congress included the United States as a "person" in the citizen's suit provision of the RCRA but not in the civil penalties provision of the RCRA.¹⁰¹ Thus, the court held that the citizen's suit provision incorporated the civil penalties provision, not vice versa, and consequently, the citizen suit provision's definition of "person" applied.¹⁰² Additionally, the court found that Congress intended to subject the United States to civil penalties in the context of citizen's suit.¹⁰³ The combination of these factors allowed the Sixth Circuit to conclude that Ohio could seek civil penalties against the United States under the citizen suit section of the RCRA.¹⁰⁴ The Sixth Circuit also concluded that the CWA federal facilities provision waived immunity.¹⁰⁵

2. The Supreme Court's *Ohio* Decision

The Supreme Court granted certiorari in *Ohio*, analyzed the four possible statutory provisions in which the government might have waived its immunity, and firmly rejected them all. The four provisions advanced and rejected included the citizen's suit provisions of the CWA and the RCRA¹⁰⁶ and the federal facilities provisions of the CWA and the RCRA.¹⁰⁷

Starting with the proposition that waivers of immunity must be construed strictly in favor of the sovereign,¹⁰⁸ the Court proceeded to examine exclusively the statutory language of the provisions. Treating the CWA and the RCRA citizen's suit provisions together, the Court rejected Ohio's

98. *Id.*

99. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1065 (6th Cir. 1990).

100. *Id.* at 1064. The *Washington* court did not address the argument relating to the citizen suit section. *Id.* at 1064 n.2.

101. Compare 42 U.S.C. § 6972(a)(1) (1988) (including United States as person) with *id.* § 6903(15) (excluding United States in general definition of person).

102. *Ohio*, 904 F.2d at 1065.

103. *Id.* at 1064.

104. *Id.* at 1065.

105. See *id.* at 1060-62 (arguing that use of term "sanction" coupled with "arising under federal law" terminology expresses clear sovereign immunity waiver); cf. *California v. Department of Navy*, 845 F.2d 222, 225 (9th Cir. 1988) (determining no sovereign immunity waiver exists in CWA).

106. See 33 U.S.C. § 1365(a) (1988) (CWA); 42 U.S.C. § 6972(a) (1988) (RCRA).

107. See 33 U.S.C. § 1323(a) (1988) (CWA); 42 U.S.C. § 6961 (1988) (RCRA).

108. *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1633 (1992).

argument, successful before the court of appeals, that the provisions support assessment of civil penalties against a federal agency. The Court reasoned that whenever one provision of a statute incorporates another provision of the same statute, it incorporates the restrictions inherent in the incorporated provision.¹⁰⁹ The Court's holding is the exact opposite of the Sixth Circuit's reasoning.¹¹⁰ Here, the incorporated provision is the civil penalties section of the RCRA. That section does not apply to the United States because the United States is not a "person" in the general definitions section. Therefore, when a court incorporates the civil penalty section into the citizen suit provision, the citizen's suit provision is limited by the civil penalty section's lack of applicability to the United States.¹¹¹

The Court then turned to the CWA federal facilities provision. Two relevant portions of the CWA are in question. The first provides that "[e]ach department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all [f]ederal, [s]tate, interstate, and local . . . process and *sanctions* . . ."¹¹² As to this provision, Ohio argued that the term "sanctions" included punitive civil penalties. The Court rejected this argument. Because the definition of "sanction" was broad enough to include *both* coercive fines and punitive fines, the exact meaning was not clear as required for a sovereign immunity waiver.¹¹³ To determine the meaning intended by Congress the Court looked to the context of the term's use. The Court noted that Congress included "sanctions" in the phrase "process and sanctions" whenever "sanctions" was used in the statute. This usage created a fundamental distinction between substantive requirements and judicial process to enforce those requirements.¹¹⁴ The fact that the statute refers to "process and sanctions" being "enforced" in federal, state, or local court supports the key distinction.¹¹⁵ The Court employed the distinction to argue that it is logical to infer that Congress used "sanctions" in its coercive, and not punitive, sense.

The second provision, occurring after the first in the statute, provides that "the United States shall be liable only for those *civil penalties arising under federal law* or imposed by a state or local court to enforce an order or process of such court."¹¹⁶ As to this provision, Ohio contended that Congress included a waiver for punitive fines by using the "arising under federal law" language quoted above.¹¹⁷ Again, the Court looked to context.

109. *Id.* at 1634.

110. See *supra* note 102 and accompanying text (discussing the Sixth Circuit holding on incorporation of civil penalties provision into citizen's suit provision).

111. *Ohio*, 112 S. Ct. at 1634-35.

112. 33 U.S.C. § 1323(a) (1988) (emphasis added).

113. *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1636-37 (1992).

114. *Id.* at 1636.

115. *Id.* at 1637.

116. 33 U.S.C. § 1323(a) (1988) (emphasis added).

117. *Ohio*, 112 S. Ct. at 1636.

While the sentence relied upon by Ohio did refer more specifically to "civil penalties" and not "sanctions," the Court noted that the sentence was phrased to limit or clarify the preceding waiver. Even though the language did pull towards Ohio's interpretation, the Court observed that adopting Ohio's interpretation would create a new problem of finding a source of authority for levying civil penalties against the federal government. The Court did not accept that the civil penalties provision of the CWA, authorizing civil penalties against "persons," could serve as the source of authority, because "persons" did not include the United States. The Court refused to find a new source of authority, reminding Ohio that any waiver must be clear and unequivocal.¹¹⁸

Finally, the *Ohio* Court turned to the federal facilities provision of the RCRA. The Court agreed unanimously that the RCRA had not waived sovereign immunity for punitive civil penalties.¹¹⁹ Ohio had argued that the language "all . . . requirements" constituted an explicit and unambiguous waiver of sovereign immunity.¹²⁰ The Court adopted the Tenth Circuit's position in *Mitzelfelt* construing this language as "including substantive standards and the means for implementing those standards, but excluding punitive measures."¹²¹

The Supreme Court's decision in *Ohio* indicated that if Congress wanted the government held liable for civil penalties, it would have to act.¹²² On September 23, 1992, Congress passed the FFCA.¹²³ President

118. *Id.* at 1638-39.

119. *See id.* at 1631 (reporting unanimous opinion with respect to Part II.C interpreting RCRA federal facilities provision).

120. *Id.* at 1639.

121. *Id.* at 1639-40; *Mitzelfelt v. United States Dep't of Air Force*, 903 F.2d 1293, 1295 (10th Cir. 1990).

122. *See Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1639 (1988) (expressing uncertainty over meaning of RCRA and CWA language). The Court in *Ohio* all but invited Congress to make the RCRA waiver more clear:

The question is still what Congress could have meant in using a seemingly expansive phrase like "civil penalties arising under federal law." Perhaps it used it just in case some later amendment might waive the government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps someone was careless. The question has no satisfactory answer.

Id.

123. FFCA, *supra* note 14. The FFCA took a number of years to develop. *See* 138 CONG. REC. H9136 (daily ed. Sept. 23, 1992) (statement of Rep. Swift) (stating length of time needed to obtain final passage of FFCA). In the 100th Congress, supporters introduced the FFCA as H.R. 3785 and held two days of hearings in 1988. H.R. REP. NO. 111, *supra* note 2, at 18, reprinted in 1992 U.S.C.C.A.N. at 1304. The Energy and Commerce Committee reported H.R. 3785 favorably, but it went no further. 138 CONG. REC. at H9136. Supporters again introduced the FFCA as H.R. 1056 in the 102d Congress. H.R. REP. NO. 111, *supra* note 2, at 18, reprinted in 1992 U.S.C.C.A.N. at 1304. The legislation finally passed the full House. *Id.*

While the legislation's primary purpose is to address the sovereign immunity issue, that is not its sole purpose. Some examples of additional provisions include provisions relating to: inspection of federal facilities by states at the facility's expense, FFCA, *supra* note 14, § 104, 106 Stat. at 1507, and additional requirements relating to mixed wastes at federal facilities.

Bush signed the legislation on October 6, 1992.¹²⁴ The FFCA filled what legislators saw as an important need: correcting the allegedly improper reading of the RCRA's waiver section by courts of appeal and the Supreme Court.¹²⁵

B. *The Federal Facility Compliance Act of 1992*

Congress did not immediately enact the FFCA even though Congress believed that the reading courts had applied to the RCRA was incorrect. Congress held the first hearings on federal facility compliance in late 1987.¹²⁶ When Congress finally passed the FFCA in 1992, it enacted a statute with provisions aimed at overturning the *Ohio* decision and providing the clear and unequivocal waiver that the Supreme Court required.¹²⁷

First, the FFCA subjects federal agencies to civil penalties, both punitive and coercive.¹²⁸ The language Congress used meets the standard

124. Statement on Signing Legislation Waiving Federal Immunity Relating to Solid and Hazardous Waste, 28 WEEKLY COMP. PRES. DOC. 1868 (Oct. 12, 1992).

125. See H.R. REP. NO. 111, *supra* note 2, at 5, reprinted in 1992 U.S.C.C.A.N. at 1291 (disapproving of lower court decisions).

126. See generally *Environmental Compliance*, *supra* note 49 (dating hearings in 1987). The battle lines at the congressional hearings were well-drawn. On one side were state officials that were encountering difficulty in enforcing their laws on federal facilities. They were joined by environmentalists. See *Federal Facilities Compliance*, *supra* note 29, at iii (listing persons giving testimony). On the other side were the polluting federal agencies. *Id.* To the extent there was a middle ground, the DOJ attempted to occupy it. The DOJ took the position that it was possible to separate the issue of substantive compliance from the legal issue of sovereign immunity. See *Environmental Compliance*, *supra* note 49, at 188 (statement of F. Henry Habicht II, DOJ) (stating position of DOJ in state-initiated litigation against federal agencies). The DOJ explained this position by saying:

To prevent this purely legal issue [of sovereign immunity waivers] from interfering with expeditious compliance, [the DOJ has] proceeded directly to take steps to conform with the substantive requirements of the law, while at the same time testing in litigation the narrow issue of whether certain of the federal environmental statutes have waived sovereign immunity for the payment of civil penalties.

Id. at 188 n.1. Some did not accept this argument. See *id.* at 130-31 (statement of Kathleen D. Mix, State of Washington) (criticizing DOJ position). However, *Ohio* indicates that the position is sincere. The DOE settled the substantive claims against it before the district court ruled on the DOE's sovereign immunity motions. *Ohio*, 112 S. Ct. 1632.

127. *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1633 (1988) (requiring clear waiver).

128. See FFCA, *supra* note 14, § 102(a)(3) (subjecting federal agencies to all penalties and fines). The FFCA provides that:

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).

set out in *Ohio* and precludes the application of the logic the *Ohio* Court used.¹²⁹ Thus, federal facilities now will be liable for civil penalties imposed by state regulatory bodies when states find RCRA violations. Furthermore, states can subject the facilities to these penalties without resorting to expensive and time consuming litigation.¹³⁰ Rather, the FFCA allows states to choose from a number of different enforcement mechanisms that include administrative orders, civil penalties, and civil actions.¹³¹

Second, even if a state wanted to vindicate its interest in a citizen's suit, the FFCA clarifies the state's ability to do so. The statute does this simply by defining "person" to include the United States.¹³² This definition eliminates the crucial step in *Ohio's* reasoning that permitted the Court to find no waiver in the citizen suit provisions.¹³³

A third important provision of the FFCA waives a federal employee's immunity from criminal prosecution.¹³⁴ Criminal sanctions can play a significant role in achieving federal facility compliance.¹³⁵ Prior to the FFCA, courts took differing views on whether federal employees could be prosecuted for environmental crimes.¹³⁶ Commentators raised several con-

129. See *Ohio*, 112 S. Ct. at 1633 (requiring clear and unambiguous waiver). The FFCA satisfies the clear and unambiguous standard. It states that the United States is "expressly" waiving its immunity as to "any . . . substantive or procedural requirement (*including*, but not limited to, *any* injunctive relief, administrative order or *civil* or administrative *penalty* or fine . . .)." FFCA, *supra* note 14, § 102(a)(3) (emphasis added).

130. See *Federal Facilities Compliance*, *supra* note 29, at 40 (statement of Christine O. Gregoire, Director, Washington Dep't of Ecology) (stating that pre-FFCA litigation delays were significant, lead to little real action, and decreased enforcement flexibility).

131. H.R. CONF. REP. NO. 886, 102d Cong., 2d Sess. 17 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1317, 1317.

132. FFCA, *supra* note 14, § 103, 106 Stat. at 1507.

133. See *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1634 (1992) (noting that RCRA and CWA definition of "person" did not include United States).

134. FFCA, *supra* note 14, § 102(a)(4), 106 Stat. at 1505-06. The statute reads: "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 . . ." *Id.*

135. See Irish, *supra* note 71, at 284-85 (observing that "[c]riminal sanctions get the attention of the regulated community and persuade it to obey the law"); Smith, *supra* note 58, at 8 & n.23 (discussing efficacy of criminal penalties as indirect incentive to comply with environmental laws). Smith went so far as to argue that, based upon her experiences in the DOJ, federal officers responsible for environmental compliance efforts would be deterred *more* by the potential stigma associated with a criminal conviction than with a civil penalty. Smith, *supra* note 58, at 8 n.23. See generally Note, *Criminal Enforcement of Environmental Laws on Federal Facilities*, 59 GEO. WASH. L. REV. 938 (1991) (discussing problem and suggesting recklessness standard for federal employees).

The distinction between state and federal prosecutions is also important. See *infra* notes 136-37 (discussing distinction). State prosecutions are significant not only because multiple prosecutions produces more compliance, but also because states would not be constrained by internal executive branch politics that may prevent prosecutions of high level federal employees by the DOJ. Smith, *supra* note 58, at 14; see Doyle, *supra* note 71, at 692 (suggesting use of independent counsel due to "conflict of interest" when federal employee is accused of wrongdoing). The trend is towards the application of criminal liability. Irish, *supra* note 71, at 249.

136. Compare *United States v. Dee*, 912 F.2d 741, 743 (4th Cir. 1990) (upholding conviction

cerns ranging from different immunity concerns to questions surrounding state prosecution of state environmental crimes committed on federal lands.¹³⁷ The FFCA's language appears to subject a federal employee to criminal prosecution. However, the FFCA still might contain a loophole that would allow federal employees to escape prosecution.¹³⁸

of three federal employees for violations of RCRA), *cert. denied*, 111 S. Ct. 1307 (1991) and *United States v. Carr*, 880 F.2d 1550, 1551 (2d Cir. 1989) (upholding conviction of federal employee for violations of CERCLA but not addressing any immunity issue) with *California v. Walters*, 751 F.2d 977, 979 (9th Cir. 1984) (amended 1985) (per curiam) (preventing prosecution for RCRA violations of federal official in his official capacity).

In *Dee*, the three codefendants were civilian employees of the U.S. Army at the Aberdeen Proving Ground. *Dee*, 912 F.2d at 743. The Aberdeen facility was subject to an umbrella RCRA permit allowing storage of hazardous wastes at three separate locations. *Id.* Prosecutors charged the defendants on a four-count indictment alleging various violations of the above permit and the RCRA rules. *Id.* The employees claimed that they were not subject to prosecution because Congress did not define "person" in the RCRA to include the United States. *Id.* at 744. As employees of the United States, then, the defendants argued that they too were immune from prosecution. The court rejected this argument. Because the defendants were charged as individuals and not as federal employees, they were clearly "persons" within the meaning of 42 U.S.C. § 6903(15). *Dee*, 912 F.2d at 744. The *Dee* decision seems to make the immunity issue a question of proper pleading by the prosecuting authority.

The *Walters* court reached a conclusion inapposite to *Dee*. In *Walters*, a state prosecutor indicted the defendant, the administrator of the Veterans Administration, in his official capacity. *Walters*, 751 F.2d at 978. The defendant allegedly violated California law by improperly disposing of hazardous medical waste. *Id.* However, the parties agreed that the case was "in essence" against the United States. *Id.* Thus, the court turned to the RCRA immunity waiver section to determine if the suit was allowable. The court held that the RCRA barred the suit because the term "requirements" in 42 U.S.C. § 6961 did not include criminal prosecutions. Those prosecutions are not, therefore, included in the immunity waiver. *Walters*, 751 F.2d at 978.

137. See generally Irish, *supra* note 71 (discussing exclusive federal enclave status); Smith, *supra* note 58 (discussing sovereign immunity, intergovernmental immunity, official immunity and exclusive federal enclave status). Smith distinguishes various immunities that criminal prosecutions of federal employees raise. She defines each of four immunities federal employees could use as defenses. They include: sovereign immunity, official immunity, intergovernmental immunity, and exclusive federal enclave status. See Smith, *supra* note 58, at 18-24, 28-55 (defining each immunity and discussing each immunity's significance as defense to state initiated prosecution of federal employees); Irish, *supra* note 71, at 250-58 (discussing source of and case law regarding exclusive federal enclave doctrine).

The significance of each immunity varies depending upon whether the state or federal government brings the prosecution. Smith concludes that while the various immunities she identifies present problems for state prosecutions, they do not inhibit federal prosecutions. Smith, *supra* note 58, at 59-63.

138. See Smith, *supra* note 58, at 68-71 (discussing legislative solutions to immunity problems in criminal context). Smith examines H.R. 3847, a precursor to the FFCA. The language of H.R. 3847 regarding criminal sanctions is identical to the FFCA's. Compare H.R. 3847, 101st Cong., 2d Sess. § 602(a)(4) (1990) (waiving immunity of federal employees) with FFCA, *supra* note 14, § 102(a)(4), 106 Stat. at 1505-06 (same). H.R. 3847's language "washed away the common law doctrine of official immunity . . ." Smith, *supra* note 58, at 68. Similarly, the language of the FFCA, as found in the precursor H.R. 3847, has eliminated problems with sovereign immunity and expanded the waiver of intergovernmental immunity. *Id.* at 68-69.

What H.R. 3847 missed, according to Smith, and thus what the FFCA is missing, is the

Finally, the FFCA creates serious constitutional concerns when it addresses the inability of the EPA to effectively enforce federal laws against federal polluters. The concerns include both separation of powers problems and justiciability questions.¹³⁹ The FFCA provides that the EPA may commence an "administrative enforcement action" against a federal agency or department for violations of the RCRA.¹⁴⁰ The EPA must initiate such an action against a federal agency just as it would against any other polluter.¹⁴¹ If the EPA did issue an administrative order, it could collect civil penalties from the target agency.¹⁴² The FFCA, however, prevents an administrative order from becoming effective until after the agency that is the object of the order has had an opportunity to confer with the Administrator of the EPA about the order.¹⁴³ The FFCA's provisions do not address directly the questions presented by a civil action instituted by the EPA against another agency.¹⁴⁴

The FFCA is an important piece of legislation. However, close analysis reveals that Congress has failed to correct all of the effects of the *Ohio* decision. The FFCA is flawed because *Ohio* and subsequent cases have a much broader scope than does the FFCA. Thus, *Ohio* and its progeny will continue to undercut the effectiveness of other environmental laws by calling into question their ability to subject the federal government to certain enforcement tools. As the next section will show, the FFCA does not address the broad scope of *Ohio*.

III. ANALYSIS OF THE FFCA'S EFFECTIVENESS

A. *The Civil Penalties Issue*

The FFCA fails to address significant issues because its provisions do not apply broadly enough to all environmental statutes. Its most glaring omission is the failure to address the federal facilities section of the CWA.

necessary clarity with regard to the exclusive federal enclave doctrine. Specifically, the FFCA does not say explicitly that state authorities can prosecute federal employees in state courts for violating state laws. *See id.* at 69 (lodging same criticism against H.R. 3847). Granted, the FFCA does say "any criminal sanction." But, when considered in light of the tone set by *Ohio*, the language could mean federal sanctions or state sanctions. Thus, further strengthening is in order. *See id.* (suggesting possible statutory wording).

139. *See infra* notes 171-93 and accompanying text (discussing separation of powers and justiciability problems created by federal level enforcement).

140. FFCA, *supra* note 14, sec. 102(b), § 6001(b)(1), 106 Stat. at 1506. The meaning of "administrative enforcement action" is not readily apparent. *See infra* text accompanying notes 202-03 (suggesting probable meaning of "administrative enforcement action").

141. FFCA, *supra* note 14, sec. 102(b), § 6001(b)(1), 106 Stat. at 1506.

142. *Id.* (forcing EPA to pursue administrative order against federal polluter just as it would against private polluter); 42 U.S.C. § 6928(a)(3) (1988) (allowing imposition of penalty pursuant to EPA order not to exceed \$25,000 per day per violation).

143. FFCA, *supra* note 14, sec. 102(b), § 6001(b)(2), 106 Stat. at 1506.

144. *See infra* notes 209-30 and accompanying text (discussing civil action issue in context of FFCA).

The *Ohio* Court held that the CWA federal facilities section did not waive sovereign immunity for the assessment of civil penalties,¹⁴⁵ yet the FFCA does not address the CWA provisions.¹⁴⁶ Consequently, states and citizen groups are left with an ambiguous immunity waiver when it comes to the assessment of civil penalties for violations of the CWA.¹⁴⁷

The FFCA's omission of the CWA is not mitigated by arguing that the CWA and the RCRA are redundant. They are not.¹⁴⁸ In some instances a CWA violation will occur at a federal facility but a RCRA violation will not.¹⁴⁹ In such a case, the enforcer of the law will be unable to obtain civil penalties because Congress has yet to state clearly the immunity waiver.

Another oversight limits the FFCA civil penalties waiver. The *Ohio* decision will have, and in some cases already is beginning to have, a major effect on the interpretation of other federal facilities provisions. *Ohio* could affect both the CERCLA and the CAA. In *Maine v. Department of Navy*¹⁵⁰ the United States Court of Appeals for the First Circuit used *Ohio* to hold that the federal facility provision in the CERCLA was not a clear and unambiguous waiver of sovereign immunity.¹⁵¹

The CERCLA waiver section purports to be clear and explicit. Federal facilities must comply with "[s]tate laws regarding enforcement."¹⁵² The reference to "enforcement" seems to include civil penalties. It runs counter to the substance-procedure distinction explained earlier because "enforcement" could include the procedural aspects of enforcement.¹⁵³ Addition-

145. *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1631 (1992).

146. See H.R. 340, 103d Cong., 1st Sess. (1993) (amending CWA with provision identical to FFCA).

147. See *Pennsylvania v. United States Postal Serv.*, 810 F. Supp. 605, 612 (M.D. Penn. 1992) (preventing state from recovering civil penalties against Postal Service due to absence of CWA waiver). The result in *Pennsylvania* would have been different if the FFCA had included provisions applicable to the CWA because the district court decided *Pennsylvania* on December 30, 1992, after the FFCA's effective date. See FFCA, *supra* note 14, § 102(c), 106 Stat. at 1506 (making waiver provisions effective upon date of passage).

148. See Gleason & Goutzounis, *supra* note 6, at 289 & nn.5-6 (noting divergent purposes of CWA and RCRA); *House Republican Seeks Waiver or Federal Clean Water Act Immunity*, Inside EPA, Jan. 15, 1993, at 17 (describing DOE as generally more compliant with CWA but noting DOD maintenance of hundreds of wastewater treatment works around country); *supra* notes 42-48 and accompanying text (discussing general purpose of RCRA and CWA).

149. See 40 C.F.R. § 261.4 (1991) (excluding certain materials from RCRA definition of hazardous or solid waste).

150. 973 F.2d 1007 (1st Cir. 1992).

151. *Maine v. Department of Navy*, 973 F.2d 1007, 1011 (1st Cir. 1992). *Maine* arose when the state of Maine alleged violations of the state's federally approved hazardous waste laws. *Id.* The Navy agreed to comply substantively with the state laws but refused to pay a civil penalty of \$887,200 the state had imposed. *Id.* at 1009. The case also involved a related immunity issue concerning state assessment of fees. See *id.* at 1011-15 (discussing ability of state to impose reasonable licensing and waste disposal fees upon federal facilities).

152. 42 U.S.C. § 9620(a)(4) (1988).

153. See *supra* notes 56-57 and accompanying text (explaining substance-procedure distinction).

ally, "enforcement" is much more likely to include punitive civil penalties than is the RCRA term "requirements," thus distinguishing the RCRA waiver provision from the CERCLA waiver provision.

However, the *Maine* court, relying upon the *Ohio* analysis, found ambiguity in the term "enforcement."¹⁵⁴ The term could mean either coercive penalties assessed for violations of court orders or punitive civil penalties assessed for past violations of removal or remediation requirements.¹⁵⁵ Where statutory language is ambiguous, a waiver of sovereign immunity will fail.

The CAA is the second statute drawn into question by *Ohio*. The language of the CAA is nearly identical to the language of the CWA. The CAA provides that federal facilities "shall be subject to, and comply with, all . . . requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution" as would any other facility.¹⁵⁶ The CWA uses identical language in the relevant portion of the statute.¹⁵⁷

Ohio's holding that the CWA does not waive sovereign immunity creates significant doubt that courts will construe the CAA to include such a waiver.¹⁵⁸ Potentially, the CAA has a better chance of surviving scrutiny by the Court on this point because the CAA has a clear statement in its legislative history that the applicable sanctions include civil penalties.¹⁵⁹ The CWA does not have such a reference in its legislative history.¹⁶⁰ Three

154. *Maine*, 973 F.2d at 1010-11.

155. *See id.* at 1011 (discussing possible ambiguity). The *Maine* court observed that: Maine's argument [on CERCLA § 9620(a)(4)] is open to the Supreme Court's observation concerning RCRA section 6961 that "the statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future."

Id. (quoting *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1640 (1992)).

156. 42 U.S.C. § 7418(a) (1988).

157. *See* 33 U.S.C. § 1323 (1988) (making applicable to federal facilities certain CWA requirements). The differences between the two provisions are purely cosmetic. *See* Rothmel, *supra* note 8, at 603 (observing that CWA was amended in committee to parallel language used in CAA).

158. *But see* Axline et al., *supra* note 6, at 23-25 (arguing that CAA waivers are clear); Rothmel, *supra* note 8, at 599 ("No statute waives sovereign immunity . . . more clearly than the CAA"). Both of these articles were written before *Ohio*.

159. *See* H.R. REP. No. 294, 95th Cong., 1st Sess. 200, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1279 (giving Congressional intent). The House report stated:

The applicable sanctions are to be the same for [f]ederal facilities and personnel as for privately owned pollution sources and for the owners or operators thereof. This means that [f]ederal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunctions), to civil or criminal penalties, and to delayed compliance penalties

Id.

160. *See* S. REP. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392 (discussing federal facilities provision without specific reference to punitive civil penalties);

district courts have found a waiver of civil penalties in the CAA.¹⁶¹

Recent Supreme Court precedent, however, diminishes the usefulness of the CAA's favorable legislative history. In *United States v. Nordic Village, Inc.*,¹⁶² the Court held that a sovereign immunity waiver must be clear and unambiguous without reference to the legislative history of the statutory provision containing the waiver.¹⁶³ Similarly, the *Ohio* Court did

H.R. CONF. REP. No. 830, 95th Cong., 1st Sess. 93, reprinted in 1977 U.S.C.C.A.N. 4326, 4468 (same). In fact, the Senate Report devotes more discussion to dredging activities of the Army Corp of Engineers than to civil penalties. See S. REP. No. 370, *supra*, at 68, reprinted in 1977 U.S.C.C.A.N. at 4393 (discussing Corp of Engineers dredging operations).

161. See *United States v. Air Pollution Control Bd.*, No. 88-1030, order at 3 (M.D. Tenn. Mar. 2, 1990) (interpreting CAA federal facilities provision); *Ohio ex rel. Celebreeze v. United States Dep't of the Air Force*, [1987] 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 21,210, 21,213 (S.D. Ohio Mar. 31, 1987) (same); *Alabama ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208, 1211-12 (M.D. Ala. 1986) (same); see also Karen S. Cleveland & Jack A. Van Kley, *Compliance at Federal Facilities: A State Perspective*, 1 *FED. FACILITIES ENVTL. J.* 301, 302-03 (1990) (discussing cases cited above).

In *Ohio v. Department of the Air Force* the state claimed that the Air Force operated boilers at two installations without first obtaining permits under Ohio law adopted pursuant to the CAA. 17 *Envtl. L. Rep.* (Envtl. L. Inst.) at 21,211. The state sought an injunction and civil penalties. *Id.* The Air Force argued that the CAA, when compared to other statutes amended about the same time as the CAA, did not allow assessment of civil penalties. *Id.* The court responded by examining the language and legislative history of the RCRA, the Safe Drinking Water Act (SDWA), the CWA, and the CAA. *Id.* at 21,211-13. In analyzing these statutes, the court concluded that the order in which Congress enacted them was significant. *Id.* at 21,213. The order suggested that Congress intended the CAA's language to extend to civil penalties, even though the other acts may not have. *Id.* The court also rejected the Air Force's argument that the complaint failed to state a cause of action. *Id.* at 21,214. Consequently, the court held for the state. *Id.*

In *Alabama* the state sued the Veterans Administration (VA), a general contractor, and a subcontractor for violations of the CAA arising out of asbestos removal at a VA facility. 648 F. Supp. at 1209. All of the defendants filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim. *Id.* The VA also filed a motion to dismiss based upon sovereign immunity. *Id.* The court rejected the challenge to subject matter jurisdiction, noting that 42 U.S.C. §§ 7412(d)(1), 7418(a) and 7604 granted the plaintiffs both standing to bring the action and created liability for the defendants' violations. *Alabama*, 648 F. Supp. at 1209-11. The court also rejected the defendants' failure to state a claim motions. *Id.* at 1211. Finally, the court rejected the VA's sovereign immunity argument. The clear language of CAA § 7418 and the legislative history both indicate Congress's intention to waive sovereign immunity and overrule *Hancock v. Train*, 426 U.S. 167 (1976). *Alabama*, 648 F. Supp. at 1211. Thus, the court held against the defendants. *Id.* at 1212.

162. 112 S. Ct. 1011 (1992).

163. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1016 (1992). The Court stated: "As in the Eleventh Amendment context the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Id.* (citations omitted). *But see Hancock v. Train*, 426 U.S. 163, 183 (1972) (using legislative history to determine scope of waiver); Smith, *supra* note 11, at 56 (suggesting that courts may use legislative history).

In *Nordic Village*, the Court considered whether § 106(c) of the Bankruptcy Code waived the sovereign immunity of the United States from an action seeking a monetary recovery in bankruptcy. 112 S. Ct. at 1013. An officer of a corporation in bankruptcy used corporate funds to pay individual income tax liability. *Id.* The bankruptcy trustee sought to recover that

not refer to the legislative history of the CWA or the RCRA even though a potential argument existed.¹⁶⁴ Thus, courts likely would ignore the CAA legislative history, which is tenuous authority in any case.¹⁶⁵ Ignoring legislative history further suggests that the three district court cases referred to above, each of which relied to a varying degree on legislative history, would be decided differently today.¹⁶⁶

Furthermore, the CWA is *broader* textually than the CAA.¹⁶⁷ The CWA contains the provision, thoroughly analyzed by the Supreme Court, that the United States will be liable for "only those civil penalties arising under federal law."¹⁶⁸ Congress did not include this language in the CAA

payment. *Id.* The Court determined that § 106(c) was subject to two interpretations, neither of which authorized monetary relief against the IRS. *Id.* at 1015. First, the statute could allow declaratory and injunctive relief but not monetary relief. *Id.* at 1015-16. Second, the statute might be read to trigger a waiver in any other portion of the statute that used the terms contained in § 106(c)(1). *Id.* at 1016. Finally, the Court rejected several alternative arguments, including that the general jurisdiction statute in 28 U.S.C. § 1334(d) waives sovereign immunity and that a bankruptcy court's in rem jurisdiction over property overrides sovereign immunity. *Nordic Village*, 112 S. Ct. at 1016-17. Consequently, the Court reversed the courts below and held for the IRS. *Id.* at 1017.

164. See *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1060-61 (6th Cir. 1990) (advancing congressional intent argument), *rev'd*, 112 S. Ct. 1627 (1992). The congressional intent argument advanced by the State of Ohio was that to the extent that the CWA was amended at the same time as the CAA and in response to the Supreme Court's decision in *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976), and *Hancock v. Train*, 426 U.S. 167 (1976), the language clearly waives sovereign immunity for civil penalties. *Ohio*, 904 F.2d at 1060-61. The Supreme Court in *Hancock* held that the then-existing provisions of the CAA did not require that federal facilities obtain a permit to pollute from a state that was operating a federally approved pollution control plan. 426 U.S. at 198-99. The Court in *California* made the same holding with respect to the CWA. 426 U.S. at 227.

165. See H.R. REP. No. 294, *supra* note 159, at 200, *reprinted in* 1977 U.S.C.C.A.N. at 1279 (stating congressional intent). The problem with this statement of "intent" is that, in light of the *Ohio* distinction between coercive and punitive civil penalties, it does not itself distinguish between coercive and punitive civil penalties.

166. See *supra* note 161 (discussing district court cases holding that CAA waives sovereign immunity).

167. See 33 U.S.C. § 1323 (1988) (providing "arising under federal law" language). Most previous courts and commentators thought that the "arising under federal law" passage evidenced a congressional intent that the CWA contains a narrower waiver than the CAA. See *Ohio ex rel. Celebreeze v. United States Dep't of the Air Force*, [1987] 17 *Envl. L. Rep. (Envl. L. Inst.)* 21,210, 21,213 (S.D. Ohio Mar. 31, 1987) (interpreting CAA as broader than CWA waiver); Rothmel, *supra* note 8, at 599-602 (same). The plain language does seem to indicate a narrower waiver. But when considered in the context of how the Court has used the additional sentence, it is not necessarily true that the waiver in the CWA is narrower than the waiver in the CAA.

The primary issue being addressed here is whether the Court would decide the CAA differently simply because it lacks the "arising under federal law" language. The answer must be no. The Supreme Court based its analysis in *Ohio* upon the meaning of the word "sanction" and, secondarily, upon the "arising under" language. *Ohio v. United States Dep't of Energy*, 112 S. Ct. 1627, 1636-39 (1992). Thus, the "arising under" language provided the Court with an *additional* opportunity, not present in the CAA, to find a waiver of sovereign immunity. The words "textually broader" as used in the text, then, are meant to capture this concept.

168. 33 U.S.C. § 1323 (1988).

federal facility section. Because the text of the CAA offers fewer possibilities for finding a waiver, and the text of the statute is what a court will look to in determining the waiver,¹⁶⁹ future courts that address the issue should conclude that the CAA does not waive sovereign immunity for punitive civil penalties.

The FFCA does not amend the CERCLA or the CAA federal facility waiver provision. Consequently, the CERCLA remains without a clear waiver under *Maine* and the CAA is also open to question. The uncertainty that now exists under both the CERCLA and the CAA demonstrates the effect that *Ohio* might have on the interpretation of immunity waivers in the future.¹⁷⁰ Given these effects, the FFCA sovereign immunity waiver does not go far enough and, therefore, the provision is not as effective as it might have been. However, the immunity waiver is only half the problem. The FFCA also raises significant constitutional issues.

B. Constitutional Issues Raised by the FFCA

1. Overview of Primary Constitutional Concerns

The FFCA raises two constitutional concerns.¹⁷¹ The first is justiciability. The Constitution provides that the judicial branch may only adjudicate cases or controversies.¹⁷² Courts interpret Article III to require that

169. See *supra* note 163 (revealing that Supreme Court relies upon statutory text to determine if Congress waived immunity).

170. See Strand & Samuels, *supra* note 84, at 309 (arguing that very fact ambiguity exists supports conclusion of inadequate waiver).

171. *But cf.* FFCA, *supra* note 14, sec. 102(b), § 6001(c), 106 Stat. at 1506 (earmarking fines awarded to states for environmental protection projects). This provision could raise federalism concerns. Indeed, Congress did not include a similar provision in the CAA, perhaps because of federalism concerns. See *Federal Facilities Compliance*, *supra* note 29, at 22 (statement of National Conference of State Legislators) (criticizing earmarking provisions as violating federalism). See *New York v. United States*, 112 S. Ct. 2408, 2427-29 (1992) (holding that statute requiring state to take title to hazardous waste was unconstitutional "commandeering" of state's regulatory apparatus).

172. U.S. CONST. art. III, § 2, cl. 1. The Constitution provides that:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and Citizens of another State;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

parties to a lawsuit have a concrete or personal stake in the outcome to satisfy the justiciability requirement.¹⁷³ A suit between two agencies whose heads serve at the pleasure of the President might not be justiciable because the United States would appear on both sides of the lawsuit.¹⁷⁴ In essence, the lawsuit would ask the court to issue an advisory opinion.¹⁷⁵

Those on the other side of the justiciability argument, however, point to several courts that have not found justiciability problems with suits between two executive branch agencies.¹⁷⁶ These courts have fashioned essentially a three-part test. A court has jurisdiction to resolve an intra-branch controversy if (1) the dispute is concrete; (2) the dispute involves issues traditionally considered as justiciable; and (3) Congress has not barred the action by statute.¹⁷⁷

Justiciability presents significant concerns, but the resolution of the issue turns on the interpretation of the case law. That case law is distinct from the situation in which the EPA is suing another cabinet agency such as the DOD. The litigants, in cases cited by those who believe that intrabranh disputes are justiciable, were not agencies whose heads were removable at will by the President.¹⁷⁸ Thus, the cases do not necessarily

173. See *Buckley v. Valeo*, 424 U.S. 1, 11-12 & n.10 (1976) (noting that justiciability requires personal stake in outcome).

174. MORTON ROSENBERG, CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL CONTROL OF AGENCY DECISIONS AND DECISION MAKERS: THE UNITARY EXECUTIVE THEORY AND SEPARATION OF POWERS 43-44 (1987), reprinted in *Environmental Compliance*, *supra* note 49, at 10, 63-64 [hereinafter CRS REP.]. The potential nonjusticiable lawsuit in the instant context is between the EPA and another federal agency accused of environmental violations.

175. See *Massachusetts Bay Transp. Auth. v. United States*, 21 Cl. Ct. 252, 257 (1990) (stating that case or controversy clause prohibits courts from issuing advisory opinions or deciding cases that are not concrete or adverse).

176. See *United States v. Nixon*, 418 U.S. 683, 692-97 (1974) (holding that no barrier to justiciability existed where both parties were officers of executive branch); *United States v. ICC*, 337 U.S. 426, 430 (1949) (holding that action by United States against Interstate Commerce Commission was traditionally justiciable); *United States v. Federal Maritime Comm'n*, 694 F.2d 793, 809-10 (D.C. Cir. 1982) (en banc) (adopting panel decision holding that case or controversy did exist between United States as sovereign and independent agency of United States).

177. See CRS REP., *supra* note 174, at 51 (citing *United States v. ICC* and its progeny). See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991) (discussing justiciability topic).

178. See Letter from John R. Bolton, Ass't Att'y Gen., DOJ, to Rep. John D. Dingell 3 (Dec. 20, 1985), reprinted in *Environmental Compliance*, *supra* note 49, at 709, 711 [hereinafter Bolton Letter] (arguing that no case has decided justiciability of legal controversy between two agencies whose heads serve at pleasure of President); see also *Mail Order Assoc. of Am. v. United States Postal Serv.*, 986 F.2d 509, 527 n.9 (D.C. Cir. 1993) (declining to decide intrabranh dispute on justiciability grounds).

In *Mail Order Association*, the court addressed a dispute between the Postal Rate Commission (PRC) and the U.S. Postal Service Board of Governors (Board) over a postal rate set by the PRC. *Id.* at 510. At issue was whether the Postal Reorganization Act (PRA) permitted the U.S. Postal Service (USPS) to seek judicial review of such a rate after the DOJ specifically had refused to provide counsel for such review. *Id.* The court determined, based on statutory construction of the PRA, that Congress intended the Board to seek judicial review of certain PRC determinations. *Id.* at 522. To allow the DOJ unilaterally to determine when the judicial

establish that a concrete dispute would exist where the litigants are both removable at will.

Courts also might turn to the political question doctrine to resolve this issue. The political question doctrine is a special form of justiciability.¹⁷⁹ This doctrine attempts to limit a court's involvement in cases in which the court might have to resolve questions committed by the Constitution to a coordinate branch of government.¹⁸⁰ The inquiry is relevant because it combines both the separation of powers issue and the justiciability issue.¹⁸¹ In sum, the justiciability of an intrabranch dispute is an open issue, but one that courts can resolve by interpretation and application of precedent.

A second, more intractable, constitutional issue raised by federal facility enforcement is a separation of powers question.¹⁸² The concern

review could be exercised would veto the judicial review option in contravention of Congress's intent. *Id.* Whether the Board is removable at will by the President is not clear. *See Mackie v. Bush*, 809 F. Supp. 144, 148 (D.D.C. 1993) (granting preliminary injunction against President Bush preventing him from removing Board until appeals court decided case); *id.* at 147 n.3 (suggesting that USPS is independent agency and thus governors not subject to at-will removal). The appeals court did not decide the removal issue in *Mail Order Association*. *See* 986 F.2d at 812 (discussing background of case and noting removal attempt by President). Thus, it is possible that even this most recent case does not support the justiciability of a suit between two agencies whose heads were removable at will by the President.

179. *See Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that apportionment challenge did not present a nonjusticiable political question).

180. *See Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (listing as one of three factors in political question inquiry whether deciding case would involve resolution of questions committed by Constitution to coordinate government branches).

181. *See id.* (establishing three-part inquiry for political question doctrine). The political question doctrine poses three questions: (1) does the issue involve resolution of questions committed by the Constitution to a coordinate branch of government; (2) would resolving the issue take the court outside areas of judicial expertise; (3) do prudential considerations counsel against judicial intervention? *Id.*

As to the second inquiry, it would be within a court's competence to resolve factual or legal disputes over the applicability of environmental standards. Deciding cases is what courts do. The third inquiry is indeterminate in this situation. Some of the considerations may include the extent to which the court views the decision as a political one and whether multiple interpretations of the Constitution would result from intervening in the case. *See id.* at 1000 (discussing prudential concerns).

The first concern is most applicable. It turns upon "an examination of the constitutional provisions governing the exercise of the power in question." *Id.* at 998. Indeed, political questions are usually not justiciable because of separation of powers. *Powell v. McCormack*, 395 U.S. 486, 518 (1969). A court could decide that because enforcement issues are raised, and because enforcement is usually committed to the President, a suit by one agency against another is not justiciable. *See infra* notes 182-93 and accompanying text (discussing separation of powers problem); *infra* notes 232-33 and accompanying text (discussing President's enforcement discretion). The political question doctrine, then, further blurs the distinction between Article III and separation of powers issues. *See infra* note 188 (suggesting potential view of distinction).

182. *See Steinberg, supra* note 6, at 341-42 (discussing separation of powers). Separation of powers concerns are the heart of the entire debate. The clearly framed separation of powers question concerns the EPA's ability to issue administrative orders and to sue other federal agencies. This conflict addresses whether the judiciary intrudes upon executive powers when it

takes the form of a legal theory called the unitary executive.¹⁸³ This theory posits that the President is the one individual ultimately accountable for the actions of the executive branch.¹⁸⁴ The executive branch is hierarchical and all executive branch agencies are subordinate to the President.¹⁸⁵

The constitutional basis for the unitary executive theory is the Take Care Clause. Found in Article II of the Constitution, the clause provides that "[the President] shall take care that the laws be faithfully executed"¹⁸⁶ Therefore, the President alone is entitled to control the actions of the executive branch, to the exclusion of others. Unitary executive theorists buttress this conclusion by reference to Federalist No. 70 and *Myers v. United States*.¹⁸⁷ While the justiciability and separation of powers issues are closely related and hence confusing, they are distinguishable concepts in the federal facility context.¹⁸⁸

decides executive intrabranch disputes. The sovereign immunity issue is also a separation of powers debate. In that context, the clash is between the judiciary and the legislature on who will determine how U.S. funds will be spent. See *Environmental Compliance*, *supra* note 49, at 187-88 (statement of F. Henry Habicht II) (discussing reasons for asserting sovereign immunity defense).

183. See Babich, *supra* note 6, at 30 (introducing unitary executive concept). Uncertainty exists about what the unitary executive refers to—separation of powers or justiciability concerns. This Note's terminology operates on the assumption that the unitary executive is concerned with the former. When the DOJ formally broached the theory, it did not refer to justiciability or cite to any of the cases in *supra* note 176. Rather, it only spoke to the intrusion of the judiciary into executive decisionmaking power—a classic separation of powers problem. See *Environmental Compliance*, *supra* note 49, at 206-13 (statement of F. Henry Habicht II) (discussing constitutional basis of unitary executive).

184. See Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 *Hous. L. Rev.* 599, 659 (1990) (stating that key reason for unity in executive branch is its role in holding executive accountable to public).

185. See Lee S. Liberman, Morrison v. Olsen: *A Formalistic Perspective on Why the Court Was Wrong*, 38 *AM. U. L. REV.* 313, 316 (1989) (stating that President's power to execute laws includes authority to give directions to those who assist him); Letter from Robert A. McConnell, Ass't Att'y Gen., DOJ, to Rep. John D. Dingell 2 (Oct. 11, 1983), reprinted in *Environmental Compliance*, *supra* note 49, at 678, 679 [hereinafter McConnell Letter] (asserting power of President to exert "general administrative control" over subordinate executive officers). See generally Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 *YALE L.J.* 991 (1993) (using framers' intent arguments to support unitary executive theory).

186. U.S. CONST. art. II, § 3.

187. 272 U.S. 52 (1926). *Myers* supports the unitary executive theory to the extent it acknowledges the framers' intent that the government execute laws in a "unitary and uniform" way. *Id.* at 135. *Myers* also recognizes the importance of the Take Care Clause as the textual basis for the theory. *Id.* at 161-64; see also *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. Cir. 1981) (discussing need and authority for presidential control over executive policymaking); *Environmental Compliance*, *supra* note 49, at 206-10 (statement of F. Henry Habicht II, DOJ) (discussing constitutional basis for unitary executive); Steinberg, *supra* note 6, at 325-28 (same).

Federalist No. 70 establishes the foundation for an original intent argument to complement the Constitution's text. It discusses the desirability and importance of unity in the executive branch. THE FEDERALIST No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

188. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (stating that one purpose of case or controversy clause is to assure that federal courts will not intrude into

Critics of the unitary executive theory argue that proponents of the unitary executive theory mistakenly apply the Take Care Clause. The founders did not intend the clause to create a hierarchical executive, nor to imply that the Executive has the power to forbid execution of laws and thus pervert congressional intent.¹⁸⁹ Instead, the clause makes clear that the President has a duty to ensure that other executive branch agencies comply with Congress's instructions.¹⁹⁰ Similarly, opponents of the unitary executive theory cite cases establishing that the three branches of government are not "hermetically"¹⁹¹ sealed from one another.¹⁹² Any diminution of executive power is minimal and, to the extent diminution occurs, it is justified by Congress's need to provide for effective environmental enforcement.¹⁹³

Two situations in the context of federal facility compliance raise problems with separation of powers. The remainder of this section will focus upon these two situations.¹⁹⁴ The first occurs when the EPA attempts to issue administrative orders against other federal agencies. The second occurs when the EPA attempts to sue another agency in federal court.

areas committed to other branches). Under justiciability, the question is whether an Article III court can hear the case. This is a question that only the courts can decide and their decision is final. The separation of powers concerns, however, while of course subject to judicial review, can be understood more readily if viewed as a problem for executive branch resolution.

A simple factual scenario will clarify the distinction. Suppose the EPA discovers information showing that the DOD was violating environmental standards. The EPA proposes to file a civil lawsuit against the DOD to obtain enforcement. Because the President is sworn to uphold the Constitution, the President must decide whether the prosecution of the case would violate separation of powers before the case even gets to the courts. If a violation would result, then the President should order the EPA not to pursue the case. If, however, the suit does not pose a separation of powers concern, then it could proceed. It is presumably at this point that a DOD motion to dismiss would raise the justiciability issue. See Memorandum from John M. Harmon, Ass't Att'y Gen., Office of Legal Counsel, to Michael J. Egan, Assoc. Att'y Gen. 3 (June 23, 1978), reprinted in *Environmental Compliance*, *supra* note 49, at 668, 670 [hereinafter Egan Memorandum] (setting out similar hypothetical and discussing implications).

189. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir.) (arguing that duty to execute laws does not imply power to forbid their implementation), *reh'g en banc ordered sub nom.*, *Lear Siegler, Inc. v. Ball*, 863 F.2d 693 (9th Cir. 1988).

190. See Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decision-makers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 650-51 (1989) (arguing that Take Care Clause does not vest absolute power in President to control subordinate officials and that Congress retains ability to assign powers to heads of departments).

191. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

192. See CRS REP., *supra* note 174, at 41-59 (discussing and applying decisions on separation of powers); Steinberg, *supra* note 6, at 343-52 (same).

193. See CRS REP., *supra* note 174, at 53 (listing reasons why congressional intrusion upon executive powers is minimal); Steinberg, *supra* note 6, at 350-52 (same, but conceding possibility of finding more than de minimis intrusion); *infra* note 217 (describing separation of powers balancing test).

194. See *supra* notes 172-81 and accompanying text (discussing justiciability arguments and suggesting potential resolution).

2. EPA Administrative Order Authority

The Department of Justice's (DOJ) concern with the proposed FFCA was that the EPA ability to issue unilateral and contested administrative orders would violate the unitary executive theory by entangling the judicial and executive branches.¹⁹⁵ Entanglement would occur when the EPA issued a unilateral administrative order without prior opportunity for consultation between the affected agency and the EPA.¹⁹⁶ The RCRA makes the violation of an administrative order a basis for a citizen suit.¹⁹⁷ Therefore, when the target agency contested the subject matter of the EPA unilateral order, it would have no choice but to violate the order and risk exposure to a citizen suit. If a citizen group did sue, the suit would force a court into the role of arbiter for what was essentially an intrabranched dispute between the EPA and the target agency.¹⁹⁸

The unitary executive, however, can take two forms, and it is not clear which form the DOJ is advancing in the context of the EPA administrative order authority. A "strong" unitary executive would require that the President *must* resolve intrabranched disputes. A "weak" unitary executive would require that the President should have the *first opportunity* to resolve intrabranched disputes. The DOJ position with respect to administrative orders, as described in the preceding paragraph, seems to take the latter form.¹⁹⁹ However, the DOJ has argued the former in unrelated litigation.²⁰⁰

195. See Steinberg, *supra* note 6, at 342 (stating that concern is that judiciary, rather than executive, would be empowered to decide dispute between two executive agencies).

196. *Environmental Compliance*, *supra* note 49, at 211 (statement of F. Henry Habicht II, DOJ).

197. 42 U.S.C. § 6972(a)(1)(A) (1988).

198. *Environmental Compliance*, *supra* note 49, at 211 (statement of F. Henry Habicht II, DOJ).

199. See *id.* at 210. Habicht stated that:

Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order *without the prior opportunity to contest the order within the Executive Branch*. Thus, coercive unilateral order authority is inconsistent with the constitutional principles of unity and unitary responsibility within the Executive Branch.

Id.

200. See *TVA v. United States*, 13 Cl. Ct. 692, 701 n.9 (1987) (revealing that defendant (DOE represented by DOJ) argued that Executive Order 12,146 commits resolution of dispute to executive and suggesting that consequently, judiciary can *never* decide an intrabranched dispute).

Legitimate arguments can be advanced for either interpretation. See Exec. Order No. 12,146, § 1-402, 3 C.F.R. 409 (1980), *reprinted in* 28 U.S.C. § 509 (1988) [hereinafter Exec. Order 12,146] (providing that "prior to proceeding in any court" agencies with legal disputes submit them to Attorney General). The wording of Executive Order 12,146 makes the unitary executive appear to be more of a quasi-exhaustion doctrine. Indeed, courts that have examined Executive Order 12,146 in this context so have concluded. *Martin v. Great Lakes Indian Fish and Wildlife Comm'n*, No. 92-C-409-C, 1992 WL 300841 at *4 (W.D. Wis. Oct. 7, 1992); *TVA*, 13 Cl. Ct. at 701. That the President signed the FFCA also indicates that the DOJ

The FFCA responded to the administrative order debate by giving the EPA the authority to commence an "administrative enforcement action" against other agencies that are violating federal environmental laws.²⁰¹ While the meaning of "administrative enforcement action" is not immediately clear,²⁰² it appears to include administrative orders and similar administrative remedies used by the EPA against private facilities.²⁰³ Pursuant to the statute, the EPA can exercise this power only after the target agency has had a chance to consult with the Administrator of the EPA.²⁰⁴ In theory, the EPA now has the option of forcing the issue when negotiations with other agencies on environmental compliance get bogged down.

The FFCA provision concerning administrative orders renders moot the distinction between the two possible interpretations of the unitary executive. The opportunity for consultation addresses the weak form of the unitary executive. However, even if the stronger version applies, the President does have the power to designate the arbiter of the dispute. That power comes from the ability of the President to appoint and remove at will the Administrator of the EPA.²⁰⁵ Secondly, existing presidential directives acknowledge that Congress can enact statutes to govern executive branch disagreements. Executive Order 12,146 requires submission of intrabranched legal disputes to the Attorney General for resolution prior to litigation.²⁰⁶ However, that general requirement does not apply when a statute specifically has vested the responsibility for resolution elsewhere.²⁰⁷

ascribed to the weak form of the unitary executive.

Yet the unitary executive is grounded upon the theory of accountability in one person for the uniform execution of the laws. Cross, *supra* note 184, at 659. Carried to its logical conclusion, this argument would require that the President must resolve intra-executive disputes. If that were not the case, then the President routinely could abdicate responsibility for executive decisionmaking to the courts and usurp the balance of powers in the constitutional system.

201. See FFCA, *supra* note 14, sec. 102(b), § 6001(b), 106 Stat. at 1506.

202. See 12 U.S.C. § 1441a(b)(12)(G) (Supp. II 1990) (using term "administrative enforcement action"); 42 U.S.C. § 7604(e)(2) (1988) (same). Congress has not used the "administrative enforcement action" terminology extensively. The two statutes above are the only statutes, other than the amended RCRA federal facilities provision, to use the term according to a Westlaw search completed on May 27, 1993.

203. See FFCA, *supra* note 14, sec. 102(b), § 6001(b)(1), 106 Stat. at 1506 (discussing requirement that EPA initiate "administrative enforcement action[s] . . . in the same manner and under the same circumstances as an action would be initiated against another person"); *id.* § 6001(b)(2) (providing that no administrative order can be finalized until opportunity given to affected agency to consult with EPA administrator). See also H.R. CONF. REP. No. 886, *supra* note 131, at 19, reprinted in 1992 U.S.C.A.N. at 1319 (explaining congressional intent).

204. FFCA, *supra* note 14, sec. 102(b), § 6001(b)(2), 106 Stat. at 1506.

205. See Reorganization Plan No. 3 of 1970, § 1(b), 84 Stat. 2086, 2086 (1970), reprinted in 5 U.S.C. app. 1 at 1343 (1988) (providing for appointment of Administrator by President); *Myers v. United States*, 272 U.S. 52, 161 (1926) (placing constitutional power of removal with President); *Rosenberg*, *supra* note 190, at 689 (discussing President's powers in policymaking process).

206. Exec. Order No. 12,146, *supra* note 200, § 1-402.

207. *Id.* The importance of Executive Order 12,146 is its acknowledgement of a role for congressional determination of who would adjudicate intrabranched disputes. The order suggests

The FFCA does this. It gives the EPA Administrator authority to resolve enforcement disagreements if existing negotiation mechanisms fail.²⁰⁸

3. EPA Civil Action Authority

The FFCA has resolved the administrative order issue for now.²⁰⁹ However, the EPA statutory authority to initiate a civil enforcement action in federal district court under the RCRA is still unresolved.²¹⁰ If statutory

that Congress can play a part in this designation via a statutory enactment. However, as to the central function of the order, *viz.*, preventing intrabranch disputes from going to court, the mechanism is inadequate. *See infra* note 218 (discussing inadequacy of Executive Order 12,146 in context of EPA civil action authority).

Further support for the proposition that Congress can direct that a certain governmental actor can decide intrabranch disputes is inferable from *Mail Order Assoc. of Am. v. United States Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993). The court held there that Congress's intent in passing the Postal Reorganization Act was to give the Postal Service the ability to decide when to seek judicial review of postal rate determinations with which it does not agree. *Id.* at 522. The rate determinations are made by the Postal Rate Commission, another executive branch agency. The FFCA clearly contemplates that the EPA will be the final arbiter of disputes through its power to issue administrative orders. To the extent that Congress intended this structure, *Mail Order Association* would appear to validate it.

However, *Mail Order Association* did draw a distinction between an agency seeking judicial review of an adverse agency determination and an agency seeking judicial enforcement of an agency's own determination. Citing *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927), the court held that excluding the DOJ was more legitimate in the judicial review situation than in the enforcement situation. *Mail Order Association*, 986 F.2d at 525. Applying that distinction to the instant situation, it is clear that *Mail Order Association* would not support the EPA's taking independent enforcement action without an opportunity for intrabranch consultation.

208. *See* FFCA, *supra* note 14, sec. 102(b), § 6001(b)(2), 106 Stat. at 1506 (requiring Administrator to allow opportunity for consultation prior to issuance of order); H.R. REP. No. 111, *supra* note 2, at 17, reprinted in 1992 U.S.C.C.A.N. at 1303 ("However, where a federal agency fails to respond to an administrative complaint or it becomes apparent to the [EPA] Administrator that negotiations are unlikely to be successful, the committee intends that the Administrator expeditiously finalize an administrative order").

209. *See supra* note 200 (indicating signature by President and thus his adoption of "weak" unitary executive).

210. *See infra* notes 212-30 and accompanying text (questioning authority of EPA to initiate civil actions). Prior to the FFCA, civil action authority did not exist in the RCRA. Section 3008(a)(1) allowed civil actions against persons, but section 1003(15) did not define persons to include the United States. *See* 42 U.S.C. § 6903(15) (1988) (excluding United States from list of entities deemed "person" under RCRA). Furthermore, courts interpreted the term "requirements" in section 6001 as subject to the substance versus procedure distinction. *See supra* notes 56-57 and accompanying text (discussing substance-procedure distinction). Because a civil action is arguably a means to enforce substantive requirements and not a requirement itself, courts might have concluded that Congress did not authorize civil actions.

Nor could courts use the legislative history of the RCRA. In fact, the pre-FFCA legislative history of the RCRA indicates an intent not to allow civil actions against federal agencies. *See* H.R. 14496, 94th Cong., 2d Sess. § 601(a)(3)(A) (1976) (authorizing civil suits by EPA against other federal agencies); H.R. REP. No. 1491, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6305 (same). The federal facility provision ultimately enacted did not include the H.R. 14496 provision. Rather, the Senate bill was the progenitor of § 6001. S. 3622, 94th Cong., 2d Sess. § 223 (1976). This was latter incorporated into S. 2150 and survived

authority does not exist, then the analysis does not reach the potential separation of powers concerns that civil actions present.

The FFCA could be read to allow civil actions. Section 103 of the FFCA modified the definition of "person" in the RCRA to include the United States and its departments and agencies. Section 3008(a)(1) of the RCRA remained unchanged by the FFCA, thus continuing to allow civil suits against "persons." One could conclude from these two provisions that Congress has allowed the EPA to institute civil actions against federal polluters.²¹¹

Examined more closely, however, this construction fails to establish congressional approval of the EPA civil action authority. The explanation relies on two statutory interpretation considerations. Initially, Congress, in the context of the federal facility provision, gave the EPA explicit authority for "administrative enforcement actions."²¹² At the same time, the FFCA contains no section explicitly granting the power to bring "judicial enforcement actions."²¹³ Thus, the limitation in section 102(b) of the FFCA to administrative orders to the exclusion of judicial enforcement actions in federal court implies a congressional intent to not authorize the latter.²¹⁴ The legislative history of the FFCA does not detract from this conclusion.²¹⁵

the substitution of H.R. 14496 for the text of S. 2150. *See* 122 CONG. REC. 33,817 (1976) (statement of Sen. Randolph) (stating that "[f]ederal facilities will be subject to state law and regulation, as under the Senate-passed bill"). The evolution of the language of a statute is relevant to resolving ambiguity in its language. *See* *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (considering deletion of limiting provision prior to passage); *Magee-Womens Hosp. v. Heckler*, 562 F. Supp. 483, 485 (W.D. Pa. 1983) (holding deletion of prior provision evidence of intended meaning).

211. *See* FFCA, *supra* note 14, § 103, 106 Stat. at 1507 (including United States in definition of "person"); 42 U.S.C. § 6928(a)(1) (1988) (making "person" subject to administrative orders or civil actions). Section 6928(a)(1) authorizes the EPA to "issue an order assessing a civil penalty for any past or current violation, 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 . . ." *Id.*

212. FFCA, *supra* note 14, sec. 102(b), § 6001(b), 106 Stat. at 1506.

213. *Cf. supra* notes 201-04 and accompanying text (describing administrative order authority provisions of FFCA).

214. *See Russello*, 464 U.S. at 23 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991) (holding that Congress's consideration of an issue in one context, but not another, of same statute, implies that Congress intends inclusion only where indicated). In the instant case, the federal facility provision of the RCRA, as amended by the FFCA, expressly reaffirms the ability of the EPA to issue orders. The FFCA contains no similar affirmation of the ability to engage in judicial enforcement actions. Therefore, Congress intended to deny authority for the latter.

215. *See* H.R. REP. No. 111, *supra* note 2, at 18, *reprinted in* 1992 U.S.C.C.A.N. at 1304 (stating that reason for changing definition of "person" in § 6001 is to make federal facilities subject to all "enforcement mechanisms" applicable to nonfederal facilities). The inclusion of

A second reason to conclude that the FFCA does not give the EPA the power to sue another agency is the rule of statutory construction that a court will construe a statute, whenever possible, so as to avoid raising a constitutional question.²¹⁶ An enforcement action in federal court by the EPA against another agency would present constitutional concerns of both the Article III and unitary executive variety.²¹⁷ Currently, Executive Order 12,146 purports to resolve intrabran­ch disputes short of litigation by requiring submission of the disputes to the Attorney General. This Order could be construed as resolving the constitutional issue by providing the prior consultation that the "weak" unitary executive theory demands.

Executive Order 12,146, however, falls short of the goal of providing consultation. First, the Order is arguably applicable in only limited situations.²¹⁸ Second, Executive Order 12,088, the other Presidential directive

an "administrative enforcement action" section in the federal facility provision of the RCRA raises significant questions about the plain meaning of the statute with regard to civil actions. In such a case, resort to the legislative history and analysis of the statute as a whole is appropriate. *Horner v. Merit Systems Protection Bd.*, 815 F.2d 668, 673 (Fed. Cir. 1987).

The vague reference to "enforcement mechanisms" is unhelpful because it does not clearly include civil actions. The same portion of the House Report notes that the failure to include the United States as a person led courts to believe that certain "enforcement mechanisms" did not apply to the United States. H.R. REP. No. 111, *supra* note 2, at 18, *reprinted in* 1992 U.S.C.C.A.N. at 1304. The cases referred to must be those, like *Mitzelfelt*, holding that administrative order authority and citizen's suit for the collection of civil penalties did not apply to the United States. *See supra* notes 85-105 (summarizing cases prior to Supreme Court decision in *Ohio*).

When the legislative history is of no help in resolving the meaning of a statute, it is appropriate to turn to other statutory construction tools. *Gray v. Department of Labor*, 943 F.2d 513, 516 (4th Cir. 1991); *Adams v. Dole*, 927 F.2d 771, 775 (4th Cir.), *cert. denied*, 112 S. Ct. 122 (1991). One tool is the notion that if a particular remedy is provided in one part of the statute but not another, Congress intended the remedy to be excluded in the latter portion. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (stating principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another)).

216. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 445-46 (1989); *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (discussing basis for rule of construction).

217. *See CRS REP.*, *supra* note 174, at 51-59 (discussing potential constitutional problems with civil action by one federal agency against another); Steinberg, *supra* note 6, at 341-52 (same); *infra* notes 172-81 and accompanying text (discussing justiciability problems with civil action by one federal agency against another). *See generally* Rosenberg, *supra* note 190 (discussing unitary executive theory in nonfederal facility context).

These commentators apply the test in *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977). *Nixon* established a two part analysis for a separation of powers issue. The first inquiry examines the extent to which the executive branch is prevented from completing its constitutionally assigned functions. *Id.* at 443. Only if a potential exists for those functions to be disrupted does the court need to determine whether the disruption is justified by an overriding need to promote constitutionally permissible congressional objectives. *Id.* The balancing required by *Nixon* makes the resolution of the separation of powers question even more uncertain.

218. *See* Steinberg, *supra* note 6, at 330 (arguing that Executive Order 12,146 would be unhelpful in resolving enforcement problems). Executive Order 12,146 is ineffective because it applies only to jurisdictional, legal disputes, and most enforcement issues involve factual disputes.

addressing conflicts between federal agencies on environmental compliance issues, does not guarantee prior resolution.²¹⁹ Third, even if both of these mechanisms did work, they would only delay potential court resolution.²²⁰ Therefore, the larger separation of powers issue that still remains is whether an Article III court could ever hear a suit between executive branch agencies.²²¹ A court would essentially have to second guess the President's decision that no separation of powers issue existed.²²²

The rule that courts should avoid constitutional questions when possible is triggered when such a question possibly exists.²²³ In *Public Citizen v. United States Department of Justice*,²²⁴ the Supreme Court noted that the presumption against creating a potential constitutional issue is even stronger when separation of powers questions exist than when other constitutional questions exist.²²⁵ The threat of creating a constitutional

Id. at 329-30. Second, the Attorney General cannot bind the parties to any resolution because the Attorney General cannot issue orders, only opinions. *Id.* Third, agencies may disregard executive orders. See Raymond L. Chambers, *The Executive Power: A Preliminary Study of the Concept and of the Efficacy of Presidential Directives*, 7 PRESIDENTIAL STUD. Q. 21, 29-32 (1977) (reporting on author's study results during Nixon era).

219. See Exec. Order No. 12,088, 3 C.F.R. 243 (1979), reprinted as amended in 42 U.S.C. § 4321 (1988) [hereinafter Exec. Order 12,088]. Executive Order 12,088 is the only executive order dealing specifically with the issue of federal compliance with environmental laws. The Order establishes a system to resolve enforcement conflicts between agencies whereby conflicts regarding environmental violations are referred to the Director of the Office of Management and Budget (OMB) if the Administrator cannot resolve them. *Id.* § 1-602. The flaw with this mechanism is that another section states that this procedure is "in addition to, not in lieu of, other procedures" to enforce pollution standards. *Id.* § 1-604. Conceivably, the EPA, under the FFCA and Executive Order 12,088, could notify OMB of a dispute and at the same time initiate an action in district court.

220. See *Martin v. Great Lakes Indian Fish and Wildlife Comm'n*, No. 92-C-409-C, 1992 WL 300841, at *4 (W.D. Wis. Oct. 7, 1992) (agreeing with TVA interpretation of Executive Order 12,146); *TVA v. United States*, 13 Cl. Ct. 692, 701 (1987) (requiring that TVA submit contract dispute between TVA and DOE to Attorney General under Executive Order 12,146 prior to court litigation). Thus, Executive Order 12,146 operates more as an exhaustion requirement whereby opposing agencies must pursue all nonjudicial remedies prior to a court entertaining a civil action.

221. A court could also frame the separation of powers issue as whether the "strong" unitary executive is a correct interpretation of the Constitution.

222. See *supra* note 188 (suggesting one alternative for viewing separation of powers problem and discussing hypothetical). A court's job is to say what the law is. *Marbury v. Madison*, 5 U.S. 368, 389, 1 Cranch 137, 177 (1803). If no separation of powers issue exists, the constitutional question of justiciability would also have to be passed upon: in this instance, can the judiciary hear the case? Potentially, both the separation of powers and justiciability inquiry could be combined in the context of the political question doctrine. See *supra* note 181 (discussing application of political question doctrine to intra-agency suits).

223. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466-67 (1989) (noting but not resolving constitutional issue).

224. 491 U.S. 440 (1989).

225. *Public Citizen v. United States Dep't of Justice*, 491 U.S. at 465-66; see *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (holding that courts should read statutes to avoid serious doubt of constitutionality).

In *Public Citizen*, the Court addressed whether the Federal Advisory Committee Act

issue should induce a court to interpret the vagaries created by the FFCA and the RCRA so as to deny the EPA the statutory authority to bring civil actions. Thus, a court will never reach the constitutional issue. Such an interpretation is possible without resorting to disingenuous evasion.²²⁶

Only two reasons could justify withholding authority from the EPA to sue federal agencies. First, interested parties thought that the EPA *could* sue. This is not the case. As early as 1978, the DOJ had taken the position that the EPA suing another agency raised separation of powers and justiciability concerns and was therefore unallowable.²²⁷ Witnesses raised the issue at hearings held on federal facility compliance.²²⁸ However, Congress chose to affirm administrative order authority and not civil action authority. Why Congress treated these two options differently, then, is the question.

The only remaining explanation is that Congress withheld civil action authority as a compromise to gain support for the bill. One commentator, in a report written for a 1987 subcommittee hearing, concluded by indi-

(FACA) applied to consultations between the DOJ and the American Bar Association's (ABA) Standing Committee on Federal Judiciary regarding potential nominees for federal judgeships. 491 U.S. at 443. The ABA, when requested, submits confidential reports to the President on the qualifications of potential nominees to the federal bench. *Id.* at 444. These reports aid the President in choosing a nominee. *Id.* The FACA imposes a number of requirements on "advisory groups" including opening meetings to public and keeping detailed minutes, later subject to public inspection, of any meetings. *Id.* at 2562. Washington Legal Foundation (WLF), and later the intervenor Public Citizen, sought to have the ABA committee declared an "advisory committee" and thus subject to the FACA requirements. *Id.* at 447-48. The Court examined the FACA's definition of "advisory committee." *Id.* at 452-53. The plain language of the statute would compel an odd result and thus the Court utilized congressional intent in construing the statute. *Id.* at 454-64. This inquiry led the Court to believe that the FACA's adoption strongly suggested that Congress did not intend the definition to include the ABA committee. *Id.* at 464. That significant separation of powers concerns would arise should the Court interpret the FACA to include the ABA committee tipped the balance against the FACA's application. *Id.* at 465. Accordingly, the Court held against WLF and Public Citizen. *Id.* at 467. The concurrence would have held FACA applicable, but found the FACA as applied an unconstitutional violation of the Appointments Clause. *Id.* at 481-82.

226. See *United States v. Locke*, 471 U.S. 84, 96 (1985) (stating that "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question") (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)); *supra* notes 212-15 and accompanying text (discussing application of *expressio unius* doctrine). Section 3008(a) of the RCRA is not rendered meaningless because it still operates as against federal facilities in the administrative order context and against nonfederal facilities in all other respects. *Cf. Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2384 (1992) (stating that courts must construe statute so as to give terms effect wherever possible).

227. Egan Memorandum, *supra* note 188, at 1 (revealing date of memorandum as June 23, 1978).

228. See *Federal Facility Compliance With Hazardous Waste Laws: Hearings Before the Subcomm. on Superfund and Environmental Oversight of the Senate Comm. on Environment and Public Works*, 100th Cong., 2d Sess. 30 (1988) (statement of Dan Reicher, Natural Resources Defense Council) (telling subcommittee that civil action authority was in question); *Environmental Compliance*, *supra* note 49, at 281 (colloquy between Rep. Eckhart—a sponsor of FFCA—and Richard Mays, EPA, and Henry Habicht, DOJ).

cating that a political settlement could temper or moot the unitary executive issue.²²⁹ Leaving the authority for the EPA to sue other agencies out of the FFCA is consistent with an underlying political settlement.²³⁰ Withholding authority to sue also indicates that Congress deemed administrative orders to be the best policy option to obtain federal facility compliance.

The key point is that one can and should make a distinction between administrative orders and civil actions. The former are constitutional while the latter possibly are not. Furthermore, the FFCA arguably does not authorize civil actions. Making the distinction allows one to readily understand the FFCA's purpose. Acting within constitutional constraints, the FFCA allowed orders, disallowed civil actions, and thereby established an overall effective enforcement mechanism.

IV. CONCLUSION AND RECOMMENDATIONS

Federal facility pollution problems are complex and multifaceted. On the one hand is Congress's desire to treat federal polluters the same as private polluters. On the other hand is the realization that two considerations, sovereign immunity and the constitutionality of EPA enforcement, make identical treatment of federal polluters impossible. The FFCA addresses these two considerations and has largely succeeded in resolving federal facility pollution problems.

The FFCA is only a qualified success for two reasons. First, certain inherent limitations to statutory response exist. For example, separation of powers considerations correctly informed Congress's choice to withhold civil action enforcement authority from the EPA.²³¹ Prosecutorial discretion, especially at the federal level, is another constraint limiting statutory response. Choosing when to enforce a law is inherently an executive power²³² that the FFCA does not purport to limit in any significant manner.²³³ If the EPA chooses not to bring any enforcement actions, the constitutional issues those actions trigger might remain shielded from court

229. CRS REP., *supra* note 174, at 66. A political settlement could temper the "weak" unitary executive by providing for prior consultation, thus avoiding the question. The FFCA provides prior consultation.

230. *See In re Graven*, 936 F.2d 378, 385 (8th Cir. 1991) (stating that court must look to object and policy of whole statute).

231. *See supra* notes 210-30 and accompanying text (arguing that proper interpretation of FFCA denies EPA authority to initiate civil suits).

232. *Cf. Morrison v. Olsen*, 487 U.S. 654, 691 (1988) (noting executive power of independent counsel). An agency's enforcement decision in any particular case generally is committed to agency discretion and is thus unreviewable by courts. *See* 5 U.S.C. § 701(a)(2) (1988) (making agency action committed to agency discretion by law unreviewable); *Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (holding that agency decision to enforce generally unsuitable for review). A reason for *Heckler's* decision was the similarity of an agency's decision to enforce to a prosecutor's decision to indict—a decision within the President's control due to the Take Care Clause. 470 U.S. at 832.

233. *See FFCA, supra* note 14, sec. 102(b), § 6001(b)(1), 106 Stat. at 1506 (directing that if EPA pursues administrative order, it must do so like any order against private facility).

decision. These limitations, however, are part of the costs that this nation incurs for its system of separation of powers.²³⁴

Viewing the FFCA as a whole lessens the adverse effect of the limitations above.²³⁵ The EPA does have authority to issue administrative orders. Subsequent enforcement of those orders is possible by a citizen's suit or by states acting as a citizen under the citizen's suit provisions.²³⁶ This mechanism is constitutional because the necessary opportunity for intrabranched consultation exists.²³⁷ An enforcement-minded administration has the statutory framework in place to address federal pollution should it choose.²³⁸ The FFCA gives states the full opportunity to use administrative orders and seek punitive civil penalties.²³⁹ The FFCA thus obviates

234. See *Morrison*, 487 U.S. at 710-11 (Scalia, J., dissenting) (stating that "[w]hile the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty"). In addition to protecting liberty at a certain cost, Justice Scalia argued that the ability of the people to remove the President imposes the necessary check upon the President's enforcement discretion. See *id.* at 728-29 (arguing that President will pay price for selective or disproportionate prosecution). George Bush made federal facility compliance an issue in the 1988 presidential campaign. See *supra* note 2 and accompanying text (quoting George Bush during 1988 campaign). Future candidates for President could do the same.

235. See also *Agencies Agree to Overhaul Federal Facility Cleanups to Ensure Public Input*, INSIDE EPA WEEKLY REP., Dec. 25, 1992, at 1 (reporting recent agreement between EPA and state agencies and citizens and environmental groups requiring federal agencies to create "site specific advisory boards" at contaminated federal facilities). The new agreement provides a mechanism for prioritizing the cleanup projects and also that all sites will "share equally" in any future funding shortfalls. *Id.* at 6. Significantly, it encourages renegotiation of cleanup milestones when agencies miss prior milestones rather than initiating enforcement actions. *Id.*

236. See 42 U.S.C. § 6972(a)(1)(A) (1988) (authorizing citizen's suit against United States for violation of order).

237. See *supra* notes 205-08 and accompanying text (discussing constitutionality of EPA administrative order authority under FFCA).

238. See *Browner Portrayed as Hardworking, Results-Oriented*, [Current Dev.] 23 Env't Rep. (BNA) 2086, 2086 (Dec. 18, 1992) (describing new EPA Administrator Carol M. Browner as pushing agency towards aggressive enforcement); William Booth, *Everglades Accord Indicative of EPA Designee's Approach*, WASH. POST, Jan. 11, 1993, at A4 (describing Browner as supportive of "very rigorous" enforcement). Federal compliance is not solely a Republican problem. The DOJ, under the Carter Administration, took the position that civil actions against sister agencies were not consistent with the Constitution. Egan Memorandum, *supra* note 188, at 1; McConnell Letter, *supra* note 185, at 1. But see ROBERT F. DURANT, WHEN GOVERNMENT REGULATES ITSELF 134 (1985) (describing successful Carter Administration actions relative to TVA noncompliance and stating that enforcement was aided by President "positively disposed toward regulatory goals").

239. See FFCA, *supra* note 14, § 102(a) (waiving immunity to state imposed fines). The policy assumption underlying the FFCA, that punitive civil penalties will encourage federal compliance as well as they do private, has not been extensively analyzed. See Steinberg, *supra* note 6, at 321-23 (arguing that concern over constitutional and sovereign immunity issues has prevented discussion of central issue of whether civil penalties are prudent mechanism to enforce law upon federal polluter). At the federal level, any penalties exacted by the EPA with its new administrative order authority, will simply be shifted from one account to another. Real deterrent effect will only be from penalties exacted by states but those penalties will most likely be a very tiny percentage of the agency's overall budget. See H.R. REP. No. 111, *supra* note 2, at 14, reprinted in 1992 U.S.C.C.A.N. at 1300 (reporting average RCRA penalty collected was

the need for expensive and time consuming litigation. Finally, experience demonstrates that criminal enforcement is an increasingly valid option.²⁴⁰

Even though the FFCA viewed as a whole can overcome the inherent limits to statutory response, the second major flaw is not as easily counterbalanced. The second major flaw is one of omission. The FFCA does not go far enough in applying its overall effective system to statutes other than the RCRA. The FFCA ignores the CWA, even though *Ohio* indicated need for reform. The CAA and the CERCLA, while not directly implicated in *Ohio*, are open to question in light of *Ohio's* hostile treatment of immunity waivers.

The solution to this problem requires statutory reform. *Ohio* has raised serious doubts about the sovereign immunity waiver provisions of the CAA and the CERCLA. Republican Congressman Dan Schaeffer of Colorado recently introduced legislation to clarify the immunity waiver in the CWA.²⁴¹ But Congressman Schaeffer's proposal amends neither the CAA

\$4,750).

Advocates of penalties argue that penalties will bring violations to the attention of the Congress by causing agencies adverse publicity and forcing them to explain the expenditure of funds on fines. Axline et al., *supra* note 6, at 43-44. But mechanisms other than civil penalties can generate adverse publicity. An agency head might have just as much difficulty explaining why a large number of subordinates have been convicted of environmental crimes. Further, the FFCA legislative history is indicative of the watchdog role environmental groups and states will play when it comes to pointing out federal abuses of the environment.

President Bush corrected a potential problem with Congress's contemplated source of payment for the fines. Congress had noted the existence of 31 U.S.C. § 1304 which provides a permanent fund to pay judgments against the United States. H.R. REP. NO. 111, *supra* note 2, at 15-16, reprinted in 1992 U.S.C.C.A.N. at 1301-02. Under decisions of the Comptroller General, if an agency disputes liability for the penalty, the fine ultimately imposed, if any, will be paid from the judgment fund in 31 U.S.C. § 1304. 58 Op. Comp. Gen. 667 (1979). As the President realized in signing the FFCA, this creates an incentive for noncomplying agencies to litigate. Statement on Signing Legislation Waiving Sovereign Immunity Relating to Solid and Hazardous Waste, 28 WEEKLY COMP. OF PRES. DOC. 1868, 1869 (Oct. 12, 1992). Pursuant to presidential directive, the fines will now be paid from an agency's appropriation. *Id.*; see Goewey, *supra* note 11, at 542-44 (discussing budgeting process). See generally Rami S. Hanash, *Environmental Compliance Within the Confines of the Federal Budgetary Process*, 2 FED. FACILITIES ENVTL. J. 243 (1991) (discussing budgeting process and its impact on environmental compliance); Rami S. Hanash, *Effects of the Anti-Deficiency Act of Federal Facility Compliance with Hazardous Waste Laws*, [News & Analysis] 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,541 (Dec. 1988) (same).

240. See *supra* note 135 (discussing use of criminal sanctions against responsible federal employees and deterrent effect thereof). Although the pace of federal employee prosecutions is not as fast as those of private polluters, *United States v. Dee* does not appear to be the last case involving a federal employee. See *Dateline Justice*, DOJ ALERT, June 1992, at 15, 17 (reporting CWA conviction and sentencing to 10 months in prison of John Curtis, former director of Fuels Division at Adak Naval Air Station); see also *United States v. Curtis*, 988 F.2d 946 (9th Cir. 1993) (affirming conviction of John Curtis and rejecting argument that CWA does not apply to federal employees whose violations occurred during course of employment).

241. See H.R. 340, 103d Cong., 1st Sess. (1993) (extending waiver in FFCA to CWA). The prospects for passage this year are uncertain. See *House Republican Seeks Waiver of Federal Clean Water Act Immunity*, INSIDE EPA WEEKLY REP., Jan. 15, 1993, at 17, 17

nor the CERCLA. Congress should extend the clear language in the FFCA, using Congressman Schaeffer's proposal as a vehicle, to amend the federal facility sections in the CAA and the CERCLA.²⁴²

A second statutory response takes a broader approach. One commentator recently argued that the problem is Congress's ad hoc reaction to court decisions on sovereign immunity.²⁴³ This is certainly true. For example, *Hancock v. Train*²⁴⁴ prompted the amendment of the waiver sections in the CAA and CWA.²⁴⁵ Also, the increasing acceptance by district and appeals courts of the DOJ argument on civil penalties roughly coincides with the increased emphasis put upon the FFCA as it moved through committees and towards passage. The court imposed rule requiring strict construction of waivers contributed to Congress's reactive approach.²⁴⁶ By including a provision that overturns the strict construction rule, Congress can move courts toward consistent interpretation of immunity waivers.²⁴⁷

Executive action is also possible. The President could clarify both Executive Order 12,146 and Executive Order 12,088 to address the problems that arise in the context of EPA enforcement efforts against other federal agencies. Specifically, President Clinton could abandon the use of the Office of Management and Budget—in Executive Order 12,088—and the DOJ—in Executive Order 12,146—as the adjudicating authorities for intrabranched disputes. Instead, he could issue a new order that would give the EPA and its new enforcement-oriented Administrator²⁴⁸ the final say in agency disputes. This would give the EPA an effective enforcement mechanism and also resolve who is accountable in cases when disputes arise. The President's ability to remove the EPA Administrator assures that the executive branch bureaucracy respects the policy goals the President advocates.

Other executive action could take the form of more general executive orders exhorting the federal bureaucracy to comply with federal laws and strategic use of the appointment power to place compliance-minded individuals in important agency positions.²⁴⁹ The Executive should place a

(discussing introduction of legislation). As of May 27, 1993, Westlaw Billcast gave H.R. 340 a one percent chance of passing the House Committee on Education and Labor and a one percent chance of passing on the House floor.

242. See also 42 U.S.C.A. § 6992e(a) (West Supp. 1992) (providing example of clear waiver).

243. Murchison, *supra* note 55, at 201-02 (arguing that Congress has focused on solving last judicial interpretation and not future problems); see Donnelly & Van Ness, *supra* note 67, at 39 (noting that environmental laws contain unique waiver provisions that exacerbate interpretation difficulties).

244. 426 U.S. 167 (1976).

245. Wolverton, *supra* note 6, at 581-82.

246. See Murchison, *supra* note 55, at 206 (stating that one impediment to effective waivers is strict construction rule).

247. *Id.* at 207.

248. See *supra* note 238 (discussing appointment of Carol Browner as EPA Administrator).

249. See DURANT, *supra* note 238, at 134 (citing use of executive orders, appointments,

higher priority on the use of federal criminal enforcement as well.²⁵⁰

Ohio and the FFCA represent a crossroads for environmental compliance by federal agencies. The FFCA pulls in the positive direction of providing a range of enforcement options to federal and state regulators who must deal with federal pollution. *Ohio*, however, simultaneously pulls in the opposite direction due to its potential ill effects on other federal facility provisions.

Given these two forces, the path from here is clear. Congress should amend, in a uniform way, each environmental statute so that it expressly and unambiguously waives sovereign immunity. Concurrently, the President should use the power of the Executive to create a "climate of compliance expectations"²⁵¹ in the executive branch. Combined congressional and presidential action will bring federal facilities into compliance and will stop the flow of pollution.

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and speeches as tools used by Carter Administration to obtain TVA compliance with laws); *Executive Order on Pollution Prevention Sought by Bipartisan Group of 54 Senators*, [Current Dev.] 23 Env't Rep. (BNA) 3049, 3049-50 (Mar. 26, 1993) (reporting on Senators urging adoption of an executive order that would require federal facilities to publicly report amount of toxic waste generated at federal facilities and adopt other measures to decrease amount of waste generated).

250. See *supra* note 135 (discussing usefulness of criminal sanctions in seeking federal compliance).

251. DURANT, *supra* note 238, at 134.

