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# ARTICLES

## A Guide to Monetary Sanctions for Environmental Violations by Federal Facilities

LIEUTENANT COLONEL CHARLES L. GREEN\*

### I. Introduction

Nearly all federal pollution statutes provide waivers of sovereign immunity to require compliance by federal agencies<sup>1</sup> and their facilities.<sup>2</sup> On each of three occasions that the Supreme Court has considered the scope of such a waiver, the Court has interpreted the waiver narrowly.<sup>3</sup> Congress has acted to override these decisions as to some, but not all, of the environmental statutes containing waivers that were called into doubt by the Supreme Court's decisions.

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1. The federal facilities provisions of these statutes typically require compliance not only by federal agencies, but also by "[e]ach department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government." *See, e.g.,* Clean Air Act (CAA) § 118(a), 42 U.S.C. § 7418(a) (1994).

2. *See* Clean Water Act (CWA) § 313, 33 U.S.C. § 1323 (1994); Clean Air Act (CAA) § 118(a), 42 U.S.C. § 7418(a) (1994); Resource Conservation and Recovery Act (RCRA) § 6001, 42 U.S.C. § 6961 (1994); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 120, 42 U.S.C. § 9620 (1994); Safe Drinking Water Act (SDWA) § 1447, 42 U.S.C. § 300j-6; RCRA Subtitle I (Regulation of Underground Storage Tanks) § 9007, 42 U.S.C. § 6991f (1994); Toxic Substances Control Act (TSCA) § 408, 15 U.S.C. § 2688 (control of lead-based paint hazards) (1994); Noise Control Act § 4, 42 U.S.C. § 4903 (1994).

3. *Hancock v. Train*, 426 U.S. 167, 178-80 (1976) (concluding waiver of sovereign immunity under CAA Section 118 did not require federal facilities to comply with state permitting requirements); *EPA v. California*, 426 U.S. 200 (1976) (same conclusion as to CWA § 313); *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (holding waiver of sovereign immunity under citizen suit provisions and federal facilities provisions of RCRA and CWA did not permit imposition of civil penalties against federal facilities).

This paper will first review the Court's holdings in these cases both to determine the current efficacy of the waiver of federal sovereign immunity in the specific environmental statutes concerned in each case and to develop a framework for analyzing the waivers under the remaining statutes. The main section of the paper examines the availability of civil penalties against the United States under these statutes and will focus particularly on the scope of federal sovereign immunity under the Clean Air Act. It will conclude that the Act's citizen suit provision provides a viable, but as yet unused, basis to impose civil penalties against federal facilities.

## II. The Supreme Court's Interpretation of Federal Sovereign Immunity for Environmental Violations

It is a fundamental precept of Anglo-American law that the sovereign may not be sued except when the sovereign consents to be sued. Consistent with this principle, the Supreme Court has long held that, to be valid, any waiver of the United States' sovereign immunity must be expressed clearly and unequivocally<sup>4</sup> and that such waivers must be "construed strictly in favor of the sovereign."<sup>5</sup>

Given the enormous scale and range of its activities, the federal government has been, through much of this century, one of the nation's largest sources of environmental pollution. But with the sudden expansion of federal pollution regulation that began in 1970, the United States charged itself with the responsibility of protecting the nation's environment. In erecting this legislative scheme, Congress simultaneously transformed the United States into both an environmental regulator and also a regulated entity. This transformation can be traced through the evolution of federal air pollution regulation.<sup>6</sup>

In 1959, Congress stated as its intent that federal facilities shall, "to the extent practicable and consistent with the interests of the United States and within any available appropriations,"<sup>7</sup> cooperate with federal, state, and local air pollution control agencies in preventing or controlling air pollution emitting from such

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

5. *McMahon v. United States*, 342 U.S. 25, 27 (1951).

6. See generally Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Environmental Law*, 15 ENVTL. L. REP. 10326 (1985).

7. Pub. L. No. 86-365, § 2, 73 Stat. 646 (1959).

facilities.<sup>8</sup> The Clean Air Act of 1963 (CAA), which incorporated this rather modest obligation from the 1959 law also required that federal agencies obtain federal permits for air emissions that might endanger human health or welfare.<sup>9</sup> But despite these laws, federal facilities remained largely unregulated by air pollution control standards until the enactment of the Clean Air Act Amendments of 1970.

The 1970 CAA Amendments were exceptional, not only in establishing a comprehensive system for national air pollution control, but also in waiving federal sovereign immunity so as to require federal facilities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."<sup>10</sup> In the 1972 Federal Water Pollution Control Act (FWPCA), Congress added language closely modeled on the CAA's federal facilities provision to also mandate federal compliance with water pollution requirements.<sup>11</sup> In 1976, the Supreme Court addressed the scope of these waivers in two companion cases, *Hancock v. Train*<sup>12</sup> and *EPA v. California*.<sup>13</sup>

In *Hancock*, the Court considered whether the provision of the CAA that required federal installations to comply with the Act's pollution abatement requirements, as discussed above, also required compliance with state permitting requirements. Citing the "fundamental importance of the principles shielding federal installations and activities from regulation by the States," the Court stated that the federal government may be subjected to state regulation only when, and to the extent that, congressional authorization is "clear and unambiguous."<sup>14</sup> The Court noted that, in this provision, Congress had only mandated compliance with "State . . . requirements," rather than with "[a]ll State . . . requirements."<sup>15</sup> Based on both the statutory text and its legislative history, the Court concluded that the CAA obligated federal

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8. *See id.*

9. Pub. L. No. 88-206, § 7, 77 Stat. 392, 399 (1959).

10. Pub. L. No. 91-604, § 5, 84 Stat. 1676, 1689 (1970).

11. *See* Pub. L. No. 92-500, § 2, 86 Stat. 875 (1972) (requiring federal facilities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements").

12. 426 U.S. 167 (1976).

13. 426 U.S. 200 (1976).

14. *Hancock v. Train*, 426 U.S. at 179.

15. *Id.* at 182.

installations to comply with state substantive requirements, but not with procedural requirements such as permitting.<sup>16</sup> In *EPA v. California*,<sup>17</sup> the Court reached the same conclusion as to the nearly identical waiver of sovereign immunity contained in the FWPCA.<sup>18</sup>

In 1977, Congress promptly responded to the *Hancock* and *EPA v. California* decisions by amending the federal facilities provisions of the CAA and FWPCA to explicitly subject the federal government to "all Federal, State, interstate, and local requirements," regardless of whether such requirements are "substantive or procedural," and specifically listing permitting requirements as among those requirements.<sup>19</sup> Congress included identical language in the federal facilities provisions it added to the Safe Drinking Water Act (SDWA) in 1977<sup>20</sup> and to the Resource Conservation and Recovery Act (RCRA) in 1978.<sup>21</sup> Moreover, the amendments to RCRA, the FWPCA, and the CAA also waived sovereign immunity as to any "sanction" imposed to enforce compliance, thereby setting the stage for the next conflict between the states and the federal government over the scope of the United States' liability for environmental violations.

#### A. Waiver of Immunity for Civil Penalties

The Supreme Court decided *United States Department of Energy v. Ohio*<sup>22</sup> in 1992 in order to resolve a split that had developed in the circuit courts as to whether the waiver for "sanctions" that Congress added to the federal facilities provisions contained in the CWA and RCRA permitted the imposition of punitive fines by states.<sup>23</sup> In *United States Department of Energy v. Ohio*, the

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16. *Id.* at 198.

17. *Supra* note 12.

18. 426 U.S. 200.

19. Clean Water Act, Pub. L. No. 95-217, § 61, 91 Stat. 1566 (1977); Clean Air Act, Pub. L. No. 95-95, § 116, 91 Stat. 685 (1977).

20. Pub. L. No. 95-190, 91 Stat. 1393 (1977).

21. Pub. L. No. 95-580, 92 Stat. 2475 (1978).

22. 503 U.S. 607 (1992).

23. The Sixth Circuit held in the case below, *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (1990), that the CWA's federal facility provision waived sovereign immunity from punitive fines, conflicting with the Ninth Circuit's finding of no such waiver in *California v. United States Dep't of Navy*, 845 F.2d 222, 225 (9th Cir. 1988). The Tenth Circuit had found that the CWA's citizen suit section permitted punitive sanctions. *Sierra Club v. Lujan*, 931 F.2d 1421, 1428 (10th Cir. 1991), *rev'd*, 504 U.S. 902 (1992). Two circuit courts had agreed with the Sixth Circuit below that RCRA's federal facilities provision did not permit the imposition of punitive fines. *Mitzelfelt*

State of Ohio had sued the U.S. Department of Energy (hereinafter "DOE") for civil penalties based on violations of state and federal pollution laws, including the CWA and RCRA, arising from DOE's operation of its uranium processing plant in Fernald, Ohio.<sup>24</sup> DOE conceded that the CWA and RCRA subject federal agencies to fines imposed to induce them to comply with injunctions or with other judicial orders designed to modify behavior prospectively.<sup>25</sup> The Court termed such forward-looking sanctions "coercive fines."<sup>26</sup> The Court distinguished these "coercive fines" from "punitive fines," which are monetary sanctions "imposed to punish past violations of those statutes or state laws supplanting them."<sup>27</sup> Since DOE did not dispute that the CWA and RCRA permitted "coercive" fines against federal agencies,<sup>28</sup> the only issue before the Court was whether the CWA and RCRA waive sovereign immunity for "punitive" fines.

Justice Souter began the Court's opinion by setting out the standard of review for a waiver of federal sovereign immunity. In order to be valid, the Court stated that such a waiver must be unequivocal, must be strictly construed in favor of the government, and must not be enlarged beyond what the statutory language requires.<sup>29</sup>

The Court first considered Ohio's contention that the citizen suit sections in the CWA and RCRA permit the imposition of civil penalties against federal agencies. Both citizen suit provisions specifically include the United States as a "person" against whom suit may be brought and incorporate the Acts' civil penalties section.<sup>30</sup> Moreover, the Court noted that it was undisputed that the

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v. Dep't of Air Force, 903 F.2d 1293, 1296 (10th Cir. 1990); *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989).

24. See *United States Dep't of Energy*, 503 U.S. at 612.

25. See *id.*

26. *Id.* at 613.

27. *Id.* at 613-14.

28. *Id.* at 619, n.15.

29. *Id.* at 615.

30. The CWA's citizen suit provision states:

[A]ny citizen may commence a civil action on his own behalf . . . against any person (including . . . the United States) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . . The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order . . . and to apply any appropriate civil penalties under [section 119(d) of the CWA].

CWA § 505, 33 U.S.C. § 1365 (1994).

RCRA's citizen suit provision, provides:

"civil penalties" referenced in those sections authorize punitive fines.<sup>31</sup> Therefore, Ohio argued,<sup>32</sup> it was apparent that Congress must have intended to subject the United States to punitive fines under the civil penalties provisions contained in the CWA<sup>33</sup> and in RCRA.<sup>34</sup>

The Court did not find the statutory scheme of the Acts to be so simple. It noted that the civil penalties provided for in the Acts' citizen suit provisions only applied to "persons" and that the United States was not a "person" as defined in the general definitions section of either the CWA or RCRA.<sup>35</sup> However, the Court found that the United States is specifically included in the citizen suit provisions of both the CWA and RCRA as a "person" against whom a citizen suit could be brought.<sup>36</sup> However, the citizen suit provisions' special definitions of "person" did not broaden the scope of the Acts' general definitions of the term, which omitted the United States.<sup>37</sup> Therefore, the United States was not among

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[A]ny person may commence a civil action on his own behalf . . . against any person (including . . . the United States) . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or other order which has become effective pursuant to this chapter . . . (B) against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . . The district court shall have jurisdiction . . . to enforce the permit, standard, regulation, condition, requirement, prohibition, or other order . . . and to apply any appropriate civil penalties under [section 3008(a) and (g) of RCRA].

RCRA § 7002, 42 U.S.C. § 6972 (1994).

31. 503 U.S. at 617.

32. *Id.* at 616-17.

33. The CWA's civil penalty provision, authorizes the imposition of civil penalties of not more than \$25,000 per day per violation through judicial enforcement and permits lesser amounts to be imposed administratively. *See* CWA § 309, 33 U.S.C. § 1319 (1994).

34. RCRA's civil penalties provision authorizes the imposition through either administrative or judicial enforcement of civil penalties of not more than \$25,000 per day per violation. *See* RCRA § 3008, 42 U.S.C. § 6928 (1994).

35. 503 U.S. at 617. CWA section 502(5) provides: "The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (1994). RCRA § 1004, at the time *United States Dep't of Energy v. Ohio* was decided, provided: "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body . . . ." 42 U.S.C. § 6903(15) (1994).

36. 503 U.S. at 619.

37. *Id.* at 619, n.14.

the class of "person(s)" subject to civil penalties under the citizen suit provisions of the CWA and RCRA.<sup>38</sup>

The Court next looked for a waiver for civil penalties in the federal facilities provision of the CWA, Section 313 which subjects the United States to "all . . . State . . . process and sanctions" for water pollution violations.<sup>39</sup> Ohio argued that the word "sanction," as used in this section, must encompass punitive fines.<sup>40</sup>

The Court disagreed based on dictionary definitions of the term and a review of federal case law. The Court concluded that "the meaning of 'sanction' is spacious enough to cover not only what we have called punitive fines, but coercive ones as well, and use of the term carries no necessary implication that a reference to punitive fines is intended."<sup>41</sup>

The Court also considered the meaning of "sanction" in the context of the phrase "process and sanction."<sup>42</sup> The Court found it significant that "sanction" was coupled, not with "requirements," but instead with "process."<sup>43</sup> The Court stated that "process" refers to the mechanics of enforcing a judicial order, typically through "coercive" sanctions.<sup>44</sup> In contrast, the term "requirements" encompasses the substantive provisions of the Act, violations of which would be sanctioned through either punitive or coercive measures.<sup>45</sup> Since "sanction" appears in connection with

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38. *Id.* at 617-18.

39. CWA Section 313 states:

[T]he Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity . . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. . . . [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State . . . to enforce an order or the process of such court.

33 U.S.C. § 1323 (1994).

40. *See* 503 U.S. at 620.

41. *Id.* at 621.

42. *Id.* at 622-23.

43. *Id.* at 623.

44. *See id.*

45. *See* 503 U.S. at 623.



“process” and not “requirements,” the Court concluded that Congress was using the term only in its coercive sense.<sup>46</sup>

The Court next considered the last sentence of Section 313(a) which states that “[t]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State . . . to enforce an order or the process of such court.”<sup>47</sup> The Court first observed that the use of the term “civil penalties” in this sentence did not provide an independent grant to impose punitive fines against the federal government.<sup>48</sup> Rather, it simply clarified that the “sanctions” authorized elsewhere in the section included civil penalties imposed to enforce the order of a court, *i.e.*, coercive sanctions.<sup>49</sup>

The Court, however, was unable to determine what Congress meant by its reference to civil penalties “arising under Federal law.” Ohio argued that this phrase should permit the imposition of a fine for the violation of an EPA-approved state law enacted to supplant the CWA.<sup>50</sup> The Court agreed that the term “civil penalties” in this context appeared to include both coercive and punitive sanctions.<sup>51</sup> The problem, the Court noted, was that there was no federal law that permitted the imposition of civil penalties against the United States since it had already determined that the CWA’s civil penalties section did not include the United States within its definition of “person(s)” against whom punitive sanctions could be applied.<sup>52</sup> Therefore, given the requirement that any waiver of sovereign immunity must be expressed unequivocally, the Court found that the waiver of sovereign immunity contained in the CWA’s federal facilities provision permits coercive, but not punitive fines.<sup>53</sup>

Finally, the Court considered whether RCRA’s federal facilities provision, Section 6001, authorized the imposition of civil penalties.<sup>54</sup> The Court concluded that this provision, which subjects

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46. *See id.*

47. CWA § 313(a), 33 U.S.C. § 1323(a).

48. 503 U.S. at 624.

49. *See id.*

50. *See id.* at 624-25.

51. *See id.* at 624.

52. *See id.*

53. *See id.* at 627.

54. At the time United States Dep’t of Energy v. Ohio was decided, RCRA Section 6001 provided that the federal government:

[S]hall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief

federal facilities to “all . . . requirements” applicable to the management and disposal of solid or hazardous waste, could reasonably be interpreted as including the Act’s substantive requirements and the means for implementing them, but excluding punitive fines.<sup>55</sup> The Court noted that it had already determined that substantive requirements can be enforced either punitively or coercively.<sup>56</sup> The Court also found it significant that the examples of such requirements listed in RCRA Section 6001 only included review for compliance (“permits or reporting”) or mechanisms for enforcing compliance in the future (“provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief”).<sup>57</sup> It observed that the absence of any example of punitive fines in this section “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.”<sup>58</sup> Accordingly, the Court held that neither the CWA nor RCRA contained a waiver of sovereign immunity that would permit the imposition of punitive sanctions against the United States.<sup>59</sup>

### III. Federal Immunity From Civil Penalties for Environmental Violation After *DOE v. Ohio*

Apart from its immediate effect on the CWA and RCRA, *DOE v. Ohio* also called into question the scope of the United States’ sovereign immunity under various other federal pollution control statutes containing waiver provisions that are (or were) very similar to the waivers the Court consider in *DOE v. Ohio*. Congress has acted to overturn the effect of *DOE v. Ohio* as to some, but not all of the environmental statutes affected by that decision. Consequently, civil penalties are now clearly precluded under some statutes, clearly permitted under others, and subject to dispute in the

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and such sanctions as may be imposed by a court to enforce such relief . . . in the same manner, and to the same extent, as any person is subject to such requirements . . . . Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

See 503 U.S. at 627.

55. See *id.* at 627-28.

56. See *id.* at 628.

57. *Id.*

58. *Id.*

59. See *id.* at 611.

remainder. The remainder of this article will examine the availability of punitive sanctions against the United States under each of these laws.

## B. Statutes Under Which Civil Penalties Clearly Are Not Available

### 1. The Clean Water Act

*DOE v. Ohio* held that civil penalties for violations of the CWA were not available against the United States under either the federal facilities or citizens suit provisions of the Act. Legislation to reverse *DOE v. Ohio*'s CWA holdings has repeatedly been introduced in Congress, but none has been successful.<sup>60</sup> Thus, states and citizens seeking to compel a federal facility's compliance with the CWA may seek injunctive relief,<sup>61</sup> but punitive fines remain unavailable.<sup>62</sup>

### 2. The Noise Control Act<sup>63</sup>

The waiver of sovereign immunity contained in the federal programs provision of the Noise Control Act, provides only that "the Federal Government . . . shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements."<sup>64</sup>

As the Noise Control Act contains no provision for either "sanctions" or "civil penalties," the Act plainly would not permit the imposition of fines against federal agencies, punitive or other-

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60. See, e.g., S. 1923, 105th Cong. (proposing the "Federal Facilities Clean Water Compliance Act of 1998" to allow fines against the federal government for Clean Water Act violations); H.R. 961, 104th Cong. § 303(a) (1995); H.R. 340, 103d Cong. (1993).

61. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 318 (1982) (stating court in a citizen suit brought against a federal agency under the CWA retains its traditional equitable discretion to order relief that will achieve compliance with the Act).

62. But see *Pennsylvania Dep't of Env'tl Resources v. United States Postal Serv.*, 13 F.3d 62, 69 (3d Cir. 1993) (holding that a limited waiver of sovereign immunity contained in federal facilities provision of Clean Water Act did not narrow the broader "sue-and-be-sued" provision in Postal Reorganization Act, permitting the imposition of civil penalties by state against U.S. Postal Service).

63. The Noise Control Act was enacted in 1972. Although EPA has been stripped of funding to enforce the Noise Control Act since 1981, the law has never been repealed. See generally Sidney A. Shapiro, *The Dormant Noise Control Act and Options to Abate Noise Pollution* (visited Nov. 1999) <<http://www.nonoise.org/library/shapiro/shapiro.htm>>.

64. Noise Control Act § 4, 42 U.S.C. § 4903 (1994).

wise. In fact, in light of the Supreme Court's conclusion in *Hancock v. Train*<sup>65</sup> that a nearly identical waiver in the CAA lacked adequate specificity to waive sovereign immunity for state permitting requirements under that Act, the Noise Control Act's mandate to federal agencies to "comply with Federal, State, interstate, and local requirements" would not even authorize the imposition of state permitting requirements.<sup>66</sup>

## B. Statutes Which Provide Clear Authority for Civil Penalties

### 1. RCRA

Congress overturned *DOE v. Ohio*, at least as to its RCRA holdings, through the Federal Facilities Compliance Act of 1992.<sup>67</sup> As amended, RCRA now provides clear authority for citizens, states, and EPA to seek punitive fines against federal agencies to enforce hazardous and solid waste violations.

#### a. Enforcement by Citizens and States

*DOE v. Ohio* held that, although the United States was specifically listed as a "person" against whom a citizen suit could be brought under Section 7002 of RCRA, and Section 7002 specifically authorized imposition of civil penalties, civil penalties were not available against the United States under RCRA's citizen suit provision.<sup>68</sup> The Court reasoned that the civil penalties referenced in RCRA's citizen suit provision only applied to "persons" and the United States was not a "person" as that term was defined in the general definitions section of RCRA.<sup>69</sup> To overcome this conclusion, the Federal Facilities Compliance Act amended the definition of "person" in RCRA's general definitions section to "include each department, agency and instrumentality of the United States."<sup>70</sup>

*DOE v. Ohio* also concluded that civil penalties against the national government were not available under Section 6001, RCRA's federal facilities provision, which subjects federal facili-

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65. 426 U.S. 167 (1976).

66. *But see* Exec. Order No. 12088, 43 Fed. Reg. 47,707 (1978) (requiring federal agencies to ensure "that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency," including pollution control standards established pursuant to the Noise Control Act). *Id.*

67. Pub. L. No. 102-386, § 102(a), (b), 106 Stat. 1505-06 (1992).

68. *See supra* notes 27-35 and accompanying text.

69. 503 U.S. at 617.

70. Pub. L. No. 102-386, § 103, 106 Stat. 1505 (1992).

ties to "all Federal, State, interstate, and local requirements" applicable to the management and disposal of solid or hazardous waste.<sup>71</sup> The Court found that this "all . . . requirements" phrase could reasonably be interpreted as not necessarily including punitive fines.<sup>72</sup> In response to this finding, the Federal Facilities Compliance Act also added the following clarification to Section 6001 of RCRA:

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).<sup>73</sup>

Although there have been a number of recent cases interpreting the waiver of sovereign immunity under RCRA Section 6001, as amended, none has involved a claim by the government that immunity for civil penalties had not been waived under this section.<sup>74</sup> It thus appears undisputed that RCRA now permits states and citizens to seek, through judicial and administrative enforcement, the imposition of punitive fines against the federal government.<sup>75</sup>

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71. See *supra* notes 51-56 and accompanying text.

72. *Id.*

73. Pub. L. No. 102-386, § 102(a)(3), 106 Stat. 1505. By authorizing civil penalties "imposed for isolated, intermittent, or continuing violations," this amendment also overruled *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) at least as to RCRA violations by federal facilities.

74. See, e.g., *Charter Int'l Oil Co. v. United States*, 925 F. Supp. 104 (D.R.I. 1996) (stating that RCRA waives federal sovereign immunity for past actions of federal government that violate state hazardous and solid waste laws, despite government's claim that statutory phrase, "engaged in activity," indicates that waiver applies only to agencies that are currently engaged in activity violating state laws); *Crowley Marine Services, Inc. v. Fednav Ltd.*, 915 F. Supp. 218 (E.D. Wash. 1995) (concluding that RCRA waived sovereign immunity of Army Corps of Engineers from liability for private cost recovery actions for damages under Washington's Hazardous Waste Management Act).

75. RCRA Section 6961(c) provides that a State that collects funds from the United States under this authority may use such funds "only for projects designed to

### b. Enforcement by EPA

The U.S. Department of Justice, Office of Legal Counsel, has long maintained that EPA lacks judicial enforcement authority over federal agencies and may not bring suit against them.<sup>76</sup> Under a doctrine known as the “unitary executive theory,” a dispute between two executive branch agencies is deemed to be non-justiciable because no Article III “case or controversy” would exist if the sovereign were to attempt to bring suit against itself.<sup>77</sup> Because the unitary executive theory is perceived to pose a constitutional limitation to judicial enforcement by EPA, Congress has not attempted to grant EPA judicial enforcement power over federal agencies.<sup>78</sup>

However, the Federal Facilities Compliance Act did add RCRA Section 6001(b), which granted EPA express authorization to bring administrative enforcement actions against federal agencies for violations of RCRA’s solid and hazardous waste provisions.<sup>79</sup> This provision authorizes EPA to initiate an administrative enforcement action, “pursuant to the enforcement authorities contained in this Act,” against a federal agency “in the same manner and under the same circumstances as an action would be initiated against another person.”<sup>80</sup> EPA’s general administrative enforcement authorities under RCRA, set out in Section 3008(a), permits EPA to issue an order assessing a civil penalty against a violator of up to \$25,000 per day per violation.<sup>81</sup> Section 6001(b) also provides that no such administrative order

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improve or protect the environment or to defray the costs of environmental protection or enforcement.” 42 U.S.C. § 6961(c).

76. See, e.g., *Ability of the Environmental Protection Agency to Sue Another Government Agency*, 9 U.S. Op. Off. Legal Counsel 99 (1985), available in 1985 WL 1855398.

77. See, e.g., Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to James Gilliland, General Counsel, Department of Agriculture, 6 (May 17, 1994). “We have reasoned that federal courts may adjudicate only actual cases and controversies, that a lawsuit involving the same person as both plaintiff and defendant does not constitute an actual controversy, and that this principle applies to suits between two agencies of the executive branch.” *Id.*

78. Whether this constitutional limitation in fact exists has been much disputed by commentators. See, e.g., Michael Herz, *United States v. United States: When Can The Federal Government Sue Itself?* WM. & MARY L. REV., Summer 1991, at 897; Michael W. Steinberg, *Can EPA Sue Other Federal Agencies?* 17 ECOLOGY L. Q. 317 (1990).

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

80. RCRA § 6001(b)(1), 42 U.S.C. § 6961(b)(1) (1994).

81. 42 U.S.C. § 6928(a)(3) (1994).

will become final until the agency against which it is imposed has had an opportunity to confer with EPA.<sup>82</sup>

## 2. The Safe Drinking Water Act

*DOE v. Ohio* also prompted amendment in 1996 of the Safe Drinking Water Act's (SDWA) waiver of sovereign immunity for federal facilities. Prior to these amendments, Section 1447 of the Safe Drinking Water Act contained the identical "all . . . requirements" and "process and sanctions" language the Court in *DOE v. Ohio* found to be an inadequate waiver for civil penalties imposed under the CWA.<sup>83</sup>

### a. Enforcement by Citizens and States

Using the same clarifying language the Federal Facilities Compliance Act added to RCRA's federal facilities provision, the Safe Drinking Water Act Amendments of 1996<sup>84</sup> modified Section 1447 of the Act to provide a clear and unequivocal waiver of the United States' immunity from punitive civil and administrative sanctions.<sup>85</sup> Like RCRA, SDWA Section 1447(c) now expressly

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82. RCRA § 6001(b)(1), 42 U.S.C. § 6961(b)(1) (1994).

83. Safe Drinking Water Act Amendments of 1977, Pub. L. No. 95-190, § 8(a), 91 Stat. 1393 (1977).

84. Pub. L. No. 104-182, § 129, 110 Stat. 1613 (1996).

85. SWDA § 1447(a), 42 U.S.C. § 300j-6(a) (1994) now provides:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) . . . in the same manner and to the same extent as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge) . . . Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. No agent, employee, or officer of the United States shall be personally liable for any civil penalty under any Federal, State, interstate, or local law . . .

provides for the imposition of civil penalties against the United States, including penalties for wholly past violations, and restricts the use of funds collected by States under this authority to "projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement."<sup>86</sup>

b. Enforcement by EPA

The 1996 SWDA Amendments also added Section 1447(b), which authorizes EPA to impose administrative penalty orders for violations of the Act by federal facilities.<sup>87</sup> Like the administrative enforcement authority granted to EPA under RCRA, SDWA Section 1447(b) permits EPA to impose civil penalties against federal agencies and affords agencies an opportunity to confer with EPA before any such penalty becomes final.<sup>88</sup> Section 1447(b), however, contains several additional features that are not present in the parallel provision of RCRA.

First, SDWA Section 1447(b) also affords agencies the right to notice and an opportunity for a hearing on the record before any penalty becomes final.<sup>89</sup> Second, this subsection provides any interested person the right to seek judicial review of a penalty order issued against a federal agency.<sup>90</sup> Finally, Section 1447(b) authorizes the imposition of maximum penalties against federal agencies that are greater than penalties that may be imposed against non-federal entities.<sup>91</sup> Under the SDWA's general administrative enforcement provision, EPA may issue an administrative order assessing a penalty of not more than \$10,000 per day, up to a maximum administrative penalty of \$125,000.<sup>92</sup> Under Section 1447(b)(2), in contrast, EPA may administratively assess a penalty against a federal agency of not more than \$25,000 per day, with no maximum fine specified.<sup>93</sup>

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with respect to any act or omission within the scope of the official duties of the agent, employee, or officer. . . .

*Id.*

86. 42 U.S.C. § 300j-6(c).

87. *Id.* at § 300j-6(b)(1).

88. *Id.* at § 300j-6(b).

89. *Id.* at § 300j-6(b)(3).

90. *Id.* at § 300j-6(b)(4).

91. *Id.* at § 300j-6(b)(2).

92. 42 U.S.C. § 300h-2(c)(1).

93. *Id.* at § 300j-6(b)(2).



### 3. Toxic Substances Control Act

Unlike every other major federal environmental pollution statute considered in this article, the Toxic Substances Control Act (TSCA) does not contain a general waiver of sovereign immunity for federal facilities. That may be because the extent to which TSCA applies to federal facilities at all is unclear.

Although TSCA Section 16 provides that civil penalties may be assessed for certain violations against any "person,"<sup>94</sup> the term "person" is nowhere defined in the Act. Lacking any other general waiver of federal sovereign immunity, TSCA thus fails to clearly and unambiguously subject the United States to not only any such penalties, but even to any requirement to comply with the Act at all.<sup>95</sup>

The closest any provision in TSCA comes to subjecting federal facilities to the Act's requirements is Section 22.<sup>96</sup> TSCA Section 22 provides that EPA may "waive compliance with any provision of this chapter upon a request and determination by the President that the requested waiver is necessary in the interest of national defense."<sup>97</sup> At best, Section 22 suggests by implication that national defense activities such as those performed by the Department of Defense and Department of Energy implicitly are covered by the TSCA. Otherwise, a provision authorizing a waiver for such activities would be entirely superfluous. The Supreme Court, however, has repeatedly stated that federal sovereign immunity may not be waived by implication.<sup>98</sup>

TSCA does provide one clear waiver of sovereign immunity in Section 408,<sup>99</sup> which applies to control of lead-based paint hazards at federal facilities. This provision, which was added in 1992<sup>100</sup> following *DOE v. Ohio*, contains the identical clarifying language

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94. Toxic Substances Control Act, § 16, 15 U.S.C. § 2615 (1994).

95. *But see* Exec. Order No. 12088, 43 Fed. Reg. 47,707 (1978) (requiring federal agencies to ensure "that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency," including pollution control standards established pursuant to TSCA). *Id.*

96. *See* 15 U.S.C. § 2621. This is the authority to which Executive Order 12088 refers to in directing that federal agencies comply with pollution control standards under TSCA.

97. 15 U.S.C. § 2621.

98. *See, e.g.,* Lane v. Pena, 518 U.S. 187, 192 (1996) (concluding that a waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied).

99. 15 U.S.C. § 2688.

100. *See* Pub. L. No. 102-550, § 1021(a), 106 Stat. 3672, 3921 (1992).

that now appears in RCRA and SDWA, permitting judicial and administrative imposition of civil penalties against the United States for lead-based paint violations at federal facilities.<sup>101</sup>

a. Enforcement by States and Citizens

TSCA's citizen suit provision, Section 20, provides that "any person may commence a civil action . . . against any person (including . . . the United States . . .) who is alleged to be in violation of (this Chapter). . . ." <sup>102</sup> In contrast to the CWA and RCRA citizen suit provisions the Supreme Court considered in *DOE v. Ohio*, TSCA Section 20 contains no reference to sanctions, penalties, or fines. This section therefore provides no independent basis for seeking civil penalties for violations of TSCA.

b. Enforcement by EPA

Unlike SDWA and RCRA, TSCA Section 408 does not expressly provide for administrative enforcement by EPA. Section 408's waiver subjecting the United States to "Federal . . . requirements . . . includ[ing] . . . all administrative orders and all . . . administrative penalties and fines regardless of whether such

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101. TSCA Section 408 provides:

Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for certification, licensing, recordkeeping, or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent as any nongovernmental entity is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines regardless of whether such penalties or fines are punitive or coercive in nature, or whether 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) . . .

15 U.S.C. § 2688 (1994).

102. 15 U.S.C. § 20.

penalties or fines are punitive or coercive in nature,"<sup>103</sup> however, does present an apparent basis for EPA to impose civil penalties against federal facilities under its enforcement authorities provided by TSCA Section 17.<sup>104</sup>

## C. Statutes With Uncertain Civil Penalties Provisions

### 1. CERCLA

The federal facilities provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>105</sup> is set forth in Section 120 of that Act.<sup>106</sup> Unlike the federal facilities provisions of other pollution statutes, CERCLA Section 120 does not subject the United States to penalties for violations of the statute.<sup>107</sup> Instead, Section 120 simply makes federal facilities liable for costs "in the same manner and to the same extent" as any potentially responsible party under the Act.<sup>108</sup> Although CERCLA remediation costs often may seem onerous, it is well settled

103. 15 U.S.C. § 2688 (1994).

104. 15 U.S.C. § 2616 (1994).

105. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA §§ 101-405), 42 U.S.C. §§ 9601-9675 (1994).

106. CERCLA Section 120(a), 42 U.S.C. § 9620(a) (1994), provides:

(1) In general

[T]he United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under § 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under §§ 9606 and 9607 of this title. . . .

(4) State laws

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by . . . the United States . . . when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

*Id.*

107. See *id.* The United States, however, may be liable for civil penalties for violation of an interagency agreement entered into pursuant to CERCLA Section 120. See 42 U.S.C. § 9622(l) (stating "[a] potentially responsible party which is a party to an . . . agreement . . . under Section 9620 of this title (relating to Federal facilities) . . . and which fails or refuses to comply with any term or condition of the order, decree or agreement shall be subject to a civil penalty in accordance with Section 9609 of this title") and 42 U.S.C. § 9609(a)(1)(e) (stating "[a] civil penalty of not more than \$25,000 per violation may be assessed by the President in the case of . . . (a)ny failure or refusal referred to in Section 9622(l) of this title (relating to violations of administrative orders, consent decrees, or agreements under Section 9620 of this title).")

108. 42 U.S.C. § 9620(a)(1).

that such costs are not punitive.<sup>109</sup> Thus, the distinction raised by *DOE v. Ohio* between punitive and coercive penalties is not directly relevant to the waiver of sovereign immunity under CERCLA Section 120.<sup>110</sup>

CERCLA Section 120(a)(4), however, does subject the United States to “[s]tate laws regarding enforcement” for clean-up activities at federal facilities that are not listed on the National Priorities List.<sup>111</sup> In *Maine v. United States Department of the Navy*,<sup>112</sup> the First Circuit held that CERCLA Section 120(a)(4) does not permit imposition of punitive fines under Maine’s hazardous waste laws because it does not contain a clear and unequivocal waiver of sovereign immunity.<sup>113</sup> The court likened the waiver of sovereign immunity in CERCLA Section 120(a)(4) to the RCRA waiver the Supreme Court considered in *DOE v. Ohio*, which provides that the federal government is subject to “all . . . State . . . requirements.” The Court found the phrase “[s]tate laws regarding enforcement” in Section 120(a)(4) to be ambiguous in the same way as RCRA’s federal facilities provision—the waiver could refer to prospective coercive fines, to retrospective civil penalties, or to

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109. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied.*, 490 U.S. 1106 (1989) (holding that “CERCLA does not exact punishment . . . . The restitution of cleanup costs was not intended to operate, nor does it operate in fact, as a criminal penalty or a punitive deterrent.”) *Id.*

110. CERCLA has generated substantial federal sovereign immunity litigation on issues other than civil penalties, however. See, e.g. *United States v. Pennsylvania Dep’t of Env’tl. Resources*, 778 F. Supp. 1328 (M.D.Pa. 1991) (rejecting United States’ claim that CERCLA Section 120(a)(4) only permits a state to order cleanup of a federal facility under provisions of a state law that is modeled on CERCLA); *In re Paoli R.R. Yard PCB Litig.*, 790 F. Supp. 94 (E.D. Pa.), *aff’d*, 908 F.2d 724 (3d Cir. 1992) (concluding that CERCLA Section 107(d)(1) does not waive sovereign immunity for private party contribution claims based on EPA regulatory activities); *United States v. Atlas Minerals and Chemicals, Inc.*, 797 F. Supp. 411 (E.D. Pa. 1992) (same conclusion); *United States v. Western Processing Co.*, 761 F. Supp. 725 (W.D. Wash. 1991) (same conclusion); *FMC Corp. v. United States Dept. of Commerce*, 29 F.3d 833, 838-42 (3d Cir. 1994) (determining that sovereign immunity did not bar imposition of liability against United States for cleanup costs as an owner, operator, or arranger under CERCLA Section 107 based on its close involvement in the operation of a war materials plant during World War II); *Redland Soccer Club Inv. v. Dep’t of Army*, 801 F. Supp. 1432 (M.D. Pa. 1992) (holding that waiver of sovereign immunity under CERCLA section 120(a)(4) only extends to facilities currently owned or operated by the United States; therefore, United States not liable for cleanup costs at site it no longer owns or operates); *Rospatch Jessco Corp. v. Chrysler Corp.*, 829 F. Supp. 224 (W.D.Mich. 1993) (same conclusion).

111. 42 U.S.C. § 9620(a)(4).

112. 973 F.2d 1007 (1st Cir. 1992).

113. See *id.*

both.<sup>114</sup> The court reached this conclusion even though CERCLA Section 120(a)(4) contains none of the modifying, equitable limitations contained in the CWA and RCRA federal facilities provisions the Court examined in *DOE v. Ohio*.

## 2. RCRA Subtitle I

In 1984, Congress added Subtitle I to RCRA to impose federal requirements on underground storage tanks.<sup>115</sup> Subtitle I contains a waiver of sovereign immunity for federal facilities, RCRA Section 9007, that operates independently from the general RCRA federal facilities provision, Section 6001, which the Court considered in *DOE v. Ohio*.

RCRA Section 9007(a) subjects federal facilities to “all Federal, State, interstate, and local requirements” applicable to underground storage tanks and provides that the United States shall not be immune “from any process or sanction of any state or Federal Court with respect to the enforcement of any such injunctive relief.”<sup>116</sup> This section was not amended by the Federal Facilities Compliance Act.

### a. Enforcement by Citizens and States

Although no published decision has addressed the issue, Section 9007 would not permit the imposition of civil penalties against the federal government in an enforcement action brought by citizens or a state for violations of RCRA Subtitle I. In *DOE v. Ohio*, the Court squarely considered and rejected the contention that the identical waiver for “all . . . State. . . requirements” that appears in Section 9007 permitted the imposition of civil penalties for RCRA violations by federal facilities.<sup>117</sup> *DOE v. Ohio* also compels the conclusion that Section 9007’s waiver for “any process or sanction of any state or Federal Court with respect to the enforce-

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114. *Id.* at 1010.

115. See Pub. L. 98-616, § 601(a), 98 Stat. 3286 (1984).

116. RCRA Section 9007(a), provides that the United States:

[S]hall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to [underground storage tanks], both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

42 U.S.C. § 6991f(a) (1994).

117. See 503 U.S. 607 (1992).

ment of any such injunctive relief” permits at best the imposition of coercive sanctions.<sup>118</sup>

b. Enforcement by EPA

While states and citizens may be precluded from seeking civil penalties for underground storage tank violations by federal facilities, EPA maintains that it does have such authority and has begun to administratively assess civil penalties for underground storage tank violations by federal facilities.<sup>119</sup>

Although RCRA Section 9007 plainly lacks the clear and unequivocal expression of congressional intent to waive sovereign immunity from punitive fines that the Supreme Court demanded in *DOE v. Ohio*, sovereign immunity generally is not implicated where one Executive branch agency attempts to impose administrative fines over another.<sup>120</sup> Where the exercise of such authority raises separation of powers concerns, the Department of Justice, Office of Legal Counsel has stated that the enabling statute need only provide a “clear statement” that Congress intended to grant this power to the enforcing agency.<sup>121</sup>

The Department of Defense, however, disputes EPA’s authority to impose administrative fines under RCRA Subtitle I and has refused to pay such fines.<sup>122</sup> The Department of Defense argues that because Congress failed to amend RCRA Section 9007 when it amended Section 6001 through the Federal Facilities Compliance Act, Congress has made no such “clear statement” that it intended to empower EPA to impose punitive fines on federal agencies for underground storage tank violations.<sup>123</sup>

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118. RCRA § 9007(2).

119. See Letter from Craig Hooks, Acting Director, Federal Facilities Enforcement Office, U.S. Environmental Protection Agency, to Raymond Fatz, Deputy Assistant Secretary for Environment, Safety & Occupational Health, Department of the Army, (August 26, 1997) (stating that RCRA provides the requisite “clear statement” of Congress intent to grant EPA authority to assess civil penalties against a federal agency for violations of RCRA Subtitle I).

120. See Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, (July 16, 1997).

121. *Id.*

122. See Letters from Robert S. Taylor, Deputy General Counsel (Environment & Installations), Department of Defense, to Craig Hooks, Acting Director, Federal Facilities Enforcement Office, U.S. Environmental Protection Agency (January 20, 1998 and March 18, 1998).

123. See *id.*

EPA, on the other hand, contends that RCRA does reflect the requisite congressional intent.<sup>124</sup> Under RCRA's statutory scheme: Federal agencies are subject to "all Federal . . . (underground storage tank) requirements;"<sup>125</sup> EPA is authorized to issue a compliance order to any "person" in violation of the requirements of Subtitle I and to include a penalty with any such order;<sup>126</sup> the definition of "person" for purposes of Subtitle I includes the United States;<sup>127</sup> and EPA is authorized to bring an administrative enforcement action against the United States "pursuant to the enforcement authorities contained in [RCRA]".<sup>128</sup>

In April 1999, the Department of Defense requested the Office of Legal Counsel to issue an opinion on the authority of EPA to assess administrative penalties against federal facilities under RCRA Subtitle I. The Office of Legal Counsel is currently preparing an opinion to resolve this issue.

## 2. The Clean Air Act

### a. Enforcement by States and Citizens

Before *DOE v. Ohio* was decided, every court to consider whether the CAA permitted the imposition of civil penalties for violations by federal facilities found that such penalties could be imposed.<sup>129</sup> Since then, only a handful of courts have considered the impact of *DOE v. Ohio* on the scope of the waiver of sovereign immunity under the CAA and their conclusions have differed widely.<sup>130</sup>

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124. See *supra* note 117.

125. RCRA § 9007(a), 42 U.S.C. § 6991f(a) (1994).

126. See *id.* at § 9006(a).

127. See *id.* at § 9001(6).

128. *Id.* § 6001(b).

129. See *Ohio ex rel. Celebrezze v. U.S. Dep't of the Air Force*, 1987 WL 110399 (S.D. Ohio 1987) (determining that CAA Section 118 waived federal sovereign immunity for fines and penalties); *Alabama ex rel. Graddick v. Veterans Admin.*, 648 F. Supp. 1208 (M.D. Fla. 1986) (CAA section 118(a) permits imposition of civil penalties by state); *In re Nat'l Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standard*, Op. Comptroller Gen. No. B-191747, 1978 WL 9814 (June 6, 1978) (holding that a federal agency may pay civil penalty imposed administratively by a state for air emission violation under CAA Sections 118 and 304(e)); See also *U.S. v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732 (C.D. Cal. 1990) (stating that CAA Section 18 waives federal sovereign immunity as to fees and taxes assessed by state agency).

130. See *People of the State of California ex rel. Sacramento Metro. Air Quality Management Dist. v. U.S.*, 29 F. Supp. 2d 652 (E.D. CA. 1998); *U.S. v. Tennessee Air Pollution Control Bd.*, 967 F. Supp. 975 (M.D. Tenn. 1997), *aff'd*, 1999 U.S. App.

## (1) Waiver Under CAA § 118

Most of the decisions finding a waiver of federal sovereign immunity for civil penalties under the CAA have relied on the Act's federal facilities provision, Section 118. CAA Section 118(a) states:

[T]he Federal Government. . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution . . . . The preceding sentence shall apply . . . to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.<sup>131</sup>

Nearly all pre-*DOE v. Ohio* cases to examine Section 118 concluded that the broad language contained in this Section, submitting the United States to "all. . . State. . . requirements," including "any process and sanctions," permitted the imposition of civil penalties.<sup>132</sup> In *DOE v. Ohio*, however, the Supreme Court concluded that the exact same waiver language in the federal facilities provisions of the CWA and RCRA was sufficient to waive sovereign immunity only for "coercive" penalties necessary to compel compliance with judicial process, and not for punitive fines calculated to punish past violations.<sup>133</sup>

Only one post-*DOE v. Ohio* case, the district court decision in *United States v. Tennessee Air Pollution Control Board*,<sup>134</sup> has held that CAA Section 118 permits the imposition of punitive sanctions against federal facilities.<sup>135</sup> The court in that case found the RCRA and CWA federal facilities provisions analyzed by

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LEXIS 16863 (6th Cir. 1999); *U.S. v. Georgia Dep't of Natural Resources*, 897 F. Supp.1464 (N.D. Ga. 1995).

131. Clean Air Act § 118, 42 U.S.C. § 7418 (1994).

132. *U.S. v. South Coast Air Quality Management Dist.*, 748 F. Supp. 732, 738 (C.D. Cal. 1990); *Graddick v. Veterans Admin.*, 648 F. Supp. 1208, 1211 (M.D. Fla. 1986); Nat'l Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standard, Op. Comptroller Gen. No. B-191747, 1978 WL 9814, 3 (June 6, 1978).

133. See *supra* notes 30-37 and 45-47 and accompanying text.

134. 967 F. Supp. 975 (M.D.Tenn.1997), *aff'd on other grounds*, 1999 U.S. App. LEXIS 16863 (6th Cir. 1999).

135. See *id.*



the Court in *DOE v. Ohio* to be distinguishable from CAA Section 118.<sup>136</sup>

Section 118 does differ in several important respects from the provisions Court considered in *DOE v. Ohio*. First, aside from the “all . . . requirements” and “process and sanctions” language it shares in common with the CAA, the federal facilities’ provision of the CWA contains additional qualifying language that does not appear in the CAA. This language 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 the process of such court.”<sup>137</sup>

Similarly, the federal facilities provision contained in RCRA at the time *DOE v. Ohio* was decided, stated that the United States was subject to all requirements respecting solid and hazardous waste, “including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief.”<sup>138</sup> The CAA, in contrast, lacks any such limitation as to the scope of relief available.

Despite the textual differences between the Acts, however, the author concludes in the following discussion that the Supreme Court’s interpretation in *DOE v. Ohio* of the phrases “process and sanctions” and “all. . . requirements” as used in the CWA and RCRA should still control the meaning of these same words as used in CAA Section 118.

(A) Section 118(a)’s Waiver for State “Process and Sanctions” Does Not Permit the Imposition of Civil Penalties

In its examination in *DOE v. Ohio* of the scope of the waiver for State “process and sanctions” contained in Section 313 of the CWA, the Court first interpreted the term “sanction” by itself.<sup>139</sup> As noted previously, the Court found that, while the meaning of “sanction” is broad enough to include both punitive and coercive fines, “the term carries no necessary implication that a reference to punitive fines is intended.”<sup>140</sup> Only after construing the meaning of “sanction” in isolation and then in the context of the phrase

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136. See *id.* at 980. See also *Celebrezze*, 1987 WL 110399, at 7 (distinguishing the CAA’s federal facilities section from the equivalent provisions in the CWA and RCRA).

137. CWA § 313(a), 33 U.S.C. § 1323(a) (1994).

138. See *United States Dep’t of Energy v. Ohio*, 503 U.S. at 627.

139. See *id.* at 620-21.

140. See *supra* note 38 and accompanying text.

“process and sanction,” did the Court then consider the effect of the section’s additional language limiting the scope of such sanctions.<sup>141</sup>

The Court did find that the language limiting the United States’ liability to only “civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court” served to “clarify or limit the waiver preceding it.”<sup>142</sup> But the Court’s conclusion that the meaning of “sanctions” included both punitive and coercive fines plainly did not turn on the clarifying effect of this limiting language.

In fact, because the Court determined that the phrase “civil penalties arising under Federal law” was an “expansive but uncertain waiver,” it ultimately gave this language no effect.<sup>143</sup> As one district court noted, if the Supreme Court was unable to give meaning to this passage of the CWA’s federal facilities provision, the fact that the equivalent provision in the CAA lacks such language could hardly serve to clarify the scope of the waiver under the CAA.<sup>144</sup>

(B) Section 118(a)’s Waiver for “All . . . Requirements”  
Does Not Permit the Imposition of Civil  
Penalties

The Supreme Court used a similar approach in its analysis of the language in RCRA’s federal facilities provision requiring the United States’ compliance with “all . . . requirements . . . (including . . . such sanctions imposed by a court to enforce such relief).” Before reaching the limiting language contained in parenthesis, the Court first considered the meaning of the phrase “all requirements” standing alone.<sup>145</sup> The Court stated that “all . . . requirements . . . can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures.”<sup>146</sup>

Only then did the Court consider the limiting effect of the modifying equitable language. Thus, the Court’s conclusion that

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141. See *supra* notes 38-43 and accompanying text.

142. *United States Dep’t of Energy v. Ohio*, 503 U.S. at 624.

143. See *supra* notes 47-49 and accompanying text.

144. See *United States v. Georgia Dep’t of Natural Resources*, 897 F. Supp. 1464, 1471 (N.D. Ga. 1995) (stating that no waiver under Section 118). See also *California v. United States*, 29 F. Supp. 2d 652, 656 (E.D. Ca. 1998).

145. See *supra* notes 51-55 and accompanying text.

146. 503 U.S. at 627-28, (quoting *Mitzelfelt v. Dep’t of Air Force*, 903 F.2d 1293, 1295 (1990)).

the phrase "all . . . requirements" does not necessarily include punitive sanctions was not dependent on the parenthetical phrase "including . . . such sanctions imposed by a court to enforce such relief." Instead, the Court found that the additional equitable language merely bolstered the conclusion it reached when it considered the phrase in isolation.<sup>147</sup> Accordingly, the absence of this language from CAA Section 118 does not prevent the Court's conclusion that the phrase "all . . . requirements" in RCRA does not include civil penalties from controlling the meaning of the identical phrase in the CAA.

(C) No Other Portion of Section 118(a) Provides a Waiver for Civil Penalties

The lower court opinion in *Tennessee Air Pollution Control Board* also found support for a waiver of civil penalties in the third and fourth sentences of CAA Section 118(a).<sup>148</sup> That portion of Section 118(a) states:

This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.<sup>149</sup>

The court noted that, while the first of these two sentences precludes any assertion of sovereign immunity by all governmental entities, the second exempts all of these entities, except agencies, from civil penalties.<sup>150</sup> The court reasoned that because agencies were not exempted from civil penalties, Congress must necessarily have intended to subject them to such sanctions.<sup>151</sup> Otherwise, the court stated, "there is no conceivable reason why Congress would have included language exempting certain individual governmental actors from those penalties, and the phrase would be superfluous."<sup>152</sup>

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147. See 503 U.S. at 628.

148. See *United States v. Tennessee Air Pollution Control Bd.*, 967 F. Supp. 975, 980-81 (M.D. Tenn. 1997), *aff'd on other grounds*, 1999 U.S. App. LEXIS 16863 (6th Cir. 1999).

149. CAA § 118(a), 42 U.S.C. § 7418(a) (1994).

150. 967 F. Supp. at 981.

151. *Id.*

152. *Id.*

There are two problems with this argument. First, this very same language from CAA Section 118(a) also appears in CWA Section 313(a),<sup>153</sup> yet the Supreme Court held in *DOE v. Ohio* that that section of the CWA does not waive sovereign immunity for civil penalties imposed by a state.<sup>154</sup> Moreover, it is doubtful that a negative inference drawn from the clarification that federal officers, agents, and employees are not personally liable for civil penalties as a result of the waiver of sovereign immunity in CAA Section 118(a) evinces the requisite unequivocal expression of congressional intent to waive federal sovereign that the Supreme Court has repeatedly demanded.<sup>155</sup>

(D) A Waiver for Civil Penalties Cannot Be Derived  
From the Legislative History of CAA Section  
118(a)

The legislative history of the 1977 CCA amendments that added Section 118 plainly reveals Congress' intent to waive sovereign immunity from civil penalties.<sup>156</sup> In finding a waiver for civil penalties in Section 118, several courts, including the district court in *Tennessee Air Pollution Control Board*, looked to the Act's legislative history to support their holdings.<sup>157</sup> Use of legislative history in this way was consistent with the Supreme Court's sov-

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153. CWA Section 313(a)(2)(C), provides: "This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law . . . No officer, agent, or employee of the United States shall be personally liable for any civil penalty . . . for which he is not otherwise liable . . ." 33 U.S.C. § 1323(a)(2)(c) (1994).

154. See *supra* notes 36-50 and accompanying text.

155. See, e.g., *Lane v. Pena*, 518 U.S. 187, 192 (1996) (determining that a waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied); *United States v. Williams*, 514 U.S. 527, 531 (1995) (stating that any ambiguity in such waiver must be strictly construed in favor of immunity); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (concluding that a waiver of sovereign immunity that affects the public fisc must extend unambiguously to such monetary claims).

156. See H.R. REP. NO. 294, at 200 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1279 stating:

The applicable sanctions are to be the same for Federal facilities and personnel as for privately owned pollution sources and for the owners or operators thereof. This means that Federal 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.*

157. See *Tennessee Air Pollution Control Bd*, 967 F. Supp. at 979; See also *Alabama ex rel Graddick v. Veterans Admin.*, 648 F. Supp. 1208, 1211 (M.D. Ala. 1996); *Ohio ex rel Celebrezze v. United States Dep't of the Air Force*, 1987 WL 110399 at 7.

ereign immunity jurisprudence,<sup>158</sup> at least until the Court decided *United States v. Nordic Village*.<sup>159</sup>

In *Nordic Village*, a 1992 case that preceded *DOE v. Ohio*, the Court stated that, in analyzing a waiver of sovereign immunity, legislative history cannot provide the requisite clarity of congressional intent that is otherwise lacking in the statutory text.<sup>160</sup> The Court stated: "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."<sup>161</sup>

Thus, if any waiver of sovereign immunity for punitive fines is to be found in the CAA, it must be found within the language of the statute itself and without reference to extrinsic sources.<sup>162</sup>

## (2) Waiver Under CAA Section 304

Apart from CAA Section 118, the Act's citizen suit provision, Section 304, also provides possible grounds for a waiver that would permit the imposition of civil penalties against the United States. In fact, in determining whether the CWA or RCRA provided such a waiver, the first sections the Court examined in *DOE v. Ohio* were the Acts' citizen suit provisions.<sup>163</sup> Although the Court found that such a waiver did not exist in those sections, the CAA's citizen suit provision is readily distinguishable from the CWA and RCRA citizen suit provisions the Court considered in *DOE v. Ohio*.

In *DOE v. Ohio*, the Court found that, although the citizen suit provisions of both the CWA and RCRA permit the imposition of civil penalties, such penalties could only be applied to "persons" as that term was generally defined in the statute.<sup>164</sup> Because the United States was omitted from the general definition of "person" in the CWA and in RCRA, the Court concluded the United States

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158. See, e.g., *supra* note 15 and accompanying text, discussing the Court's use of legislative history in *Hancock v. Train* to support its conclusion that CAA Section 118 only obligated federal installations to comply with state substantive requirements, but not with procedural requirements.

159. 503 U.S. 30 (1992).

160. *Id.* at 37. See also *Lane v. Pena*, 518 U.S. 187, 192 (1996).

161. 503 U.S. at 37.

162. This conclusion also necessarily precludes consideration of arguments, such as those discussed by the district court in *Tennessee Air Pollution Control Bd*, 967 F. Supp. at 983, regarding the desirability from a public policy standpoint of a waiver of federal sovereign immunity for civil penalties under the CAA.

163. See *supra* notes 27-35 and accompanying text.

164. See *supra* note 32 and accompanying text.

was not among the class of “person(s)” subject to civil penalties under the citizen suit provisions of either Act.<sup>165</sup>

Just as in the citizen suit provisions contained in the CWA and RCRA, CAA Section 304(a) allows “any person” to initiate a civil action “against any person (including . . . the United States)” and grants jurisdiction to the district courts “to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties.”<sup>166</sup> Unlike the general definitions of “person” in the CWA and RCRA provisions the Court considered in *DOE v. Ohio*, however, CAA Section 302(e) specifically lists the United States as being among the “persons” who can be sued under the Act.<sup>167</sup>

Subsection 304(e) of the CAA also distinguishes that provision from the citizen suit provisions in the CWA and RCRA. The first sentence of CAA Section 304(e)<sup>168</sup> contains a savings clause that is essentially identical to the savings clauses contained in the CWA<sup>169</sup> and RCRA.<sup>170</sup> However, Section 304(e), also contains two additional sentences, discussed more fully below, relating to federal sovereign immunity that are not present in either the CWA or RCRA. Because of these textual differences between the statutes, the Court’s finding in *DOE v. Ohio* that there is no waiver of civil penalties under the citizen suit provisions contained in the CWA and RCRA by no means precludes the possible existence of such a waiver under CAA Section 304.

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165. See *supra* notes 33-35 and accompanying text.

166. CAA § 304(a), 42 U.S.C. § 7604(a) (1994).

167. See 42 U.S.C. § 7602(e).

168. CAA § 304(e) provides “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).” 42 U.S.C. § 7604(e) (1994).

169. CWA § 505(e) provides “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).” 33 U.S.C. § 1365(e) (1994).

170. See RCRA § 7002(f), provides “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).” 42 U.S.C. § 6972(f) (1994).

(A) Waiver for Civil Penalties Imposed in a State  
Judicial or Administrative Proceeding

Of the pre-*DOE v. Ohio* decisions to consider whether the CAA waives sovereign immunity for civil penalties, only one reached the issue of whether Section 304 waives federal sovereign immunity from civil penalties administratively imposed by a state or locality and concluded without analysis that it did.<sup>171</sup>

In the first post-*DOE v. Ohio* case to decide the issue, the court in *United States v. Georgia Department of Natural Resources* found that CAA Section 304 does not permit the imposition of civil penalties against the United States in a state administrative enforcement proceeding.<sup>172</sup> The court began its analysis of Section 304 by noting that *DOE v. Ohio* found that the incomplete incorporation of the civil penalty portions of the CWA and RCRA into their respective citizen suit sections prevented the imposition of punitive civil fines against the United States.<sup>173</sup> But because Section 304 “does not reference a civil penalty section,” the court reasoned that the rationale of *DOE v. Ohio* is inapplicable.<sup>174</sup> Therefore, the court stated, the cross-reference to the CAA’s federal facilities provision in the last sentence of Section 304(e) (“For provisions requiring compliance by the United States. . . , see [CAA Section 118]”) indicated that the scope of the Act’s waiver must be defined by that section.<sup>175</sup>

The district court in *United States v. Tennessee Air Pollution Control Board*, which also involved a state administrative enforcement proceeding, reached essentially the same conclusion as the *Georgia Department of National Resources* court, at least with respect to Section 304.<sup>176</sup> Although the lower court in *Tennessee Air Pollution Control Board* found that Section 304 authorizes state suits against federal agencies for recovery of civil penalties assessed under state clean air statutes,<sup>177</sup> it stopped short of finding

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171. See Matter of Nat’l Oceanic and Atmospheric Agency Payment of Civil Penalty for Violation of Local Air Quality Standard, Op. Comptroller Gen. No. B-191747, 1978 WL 9814, at 2 (June 6, 1978).

172. See 897 F. Supp. 1464 (N.D. Ga. 1995).

173. *Id.* at 1470.

174. *Id.*

175. *Id.*

176. See *Tennessee APCB*, 967 F. Supp. at 975. However, *Tennessee APCB*, unlike *Georgia DNR*, found that CAA Section 118 waives federal sovereign immunity from civil penalties. See *supra* notes 118-119.

177. See 967 F. Supp. at 978. Because *Tennessee APCB* involved a state administrative enforcement proceeding, the court’s statement as to the possibility of a waiver

a waiver for civil penalties in Section 304 independent from the waiver provided under Section 118. Rather, the court concluded that the cross-reference in the last sentence of Section 304(e) to CAA Section 118 simply “connects [the state’s] right to sue under Section 304 with its authority to apply any sanction in Section 118.”<sup>178</sup>

Surprisingly, the district court opinions in *Georgia Air Pollution Control Board* and *Tennessee Air Pollution Control Board* did not examine in any detail the second and third sentences in Section 304(e) to determine whether that subsection provides a waiver of sovereign immunity that is separate from the waiver in section 118 for penalties imposed in state judicial and administrative enforcement proceedings. Although the state agency in *Tennessee Air Pollution Control Board* squarely asserted that Section 304(e) waives the United States’ immunity from state civil law penalties,<sup>179</sup> the district court in that case apparently concluded that that section provides only a waiver from suit, not a waiver from civil penalties.<sup>180</sup> The court in *Georgia Department of Natural Resources* simply did not find it necessary to reach the issue at all.<sup>181</sup> When the appeal from the district court’s opinion in *Tennessee Air Pollution Control Board* reached the Sixth Circuit, however, the Court of Appeals picked up where the district court left off.<sup>182</sup>

CAA Section 304(e) is titled “Nonrestriction of other rights.” The first sentence of Section 304(e) provides, “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the administrator or a State agency).”<sup>183</sup>

The Sixth Circuit in *Tennessee Air Pollution Control Board* concedes that this sentence clearly is, like its nearly identical provisions in the CWA and RCRA,<sup>184</sup> a savings clause.<sup>185</sup> The Court

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under § 304 for civil penalties imposed in a judicial enforcement proceeding is clearly dicta.

178. 967 F. Supp. at 981.

179. *See id.* at 977.

180. *See supra* notes 171-72 and accompanying text.

181. *See supra* notes 171-74 and accompanying text.

182. *See* *United States v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529 (6th Cir. 1999).

183. CAA § 304, 42 U.S.C. § 7604(e) (1994).

184. *See supra* notes 162-64 and accompanying text.

185. *See* *Tennessee APB*, 185 F.3d at 532.



of Appeals, however, concluded, contrary to the finding of every post-*DOE v. Ohio* court to consider the issue, including the district court in the case below that the second sentence of Section 304(e) provides a clear and unequivocal waiver of sovereign immunity that permits the imposition of civil penalties.<sup>186</sup>

The second sentence of Section 304(e), which was added as part of the CAA Amendments of 1977 that followed the Supreme Court's decision in *Hancock v. Train*,<sup>187</sup> states:

Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States . . . under State or local law respecting control and abatement of air pollution.<sup>188</sup>

Unlike the sentence that precedes it, this sentence does not relate to the preservation of any existing right. Instead, it apparently creates, or confirms the creation of a right that previously did not exist. Thus, the Court of Appeals concludes that the second sentence of Section 304(e), although framed in the negative (“[n]othing in . . . any other law of the United States”), provides an affirmative, independent waiver of federal sovereign immunity. Given Congress' declaration in Section 304(e) that neither 304(a) nor “any other law of the United States” restricts states from obtaining any judicial or administrative remedy or sanction, the court found that this must mean that there is no law (including the law of federal sovereign immunity) that precludes the State of Tennessee from obtaining any administrative remedy or sanction against a federal air polluter.<sup>189</sup> Although the Sixth Circuit's textual analysis of CAA Section 304(e) appears facially reasonable, it

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186. See *id.* at 533. The Sixth Circuit's conclusion that Section 304 is anything other than a savings clause is also inconsistent with the holding of the Fourth Circuit in *Virginia v. United States*, 74 F.3d 517, 524 (1996), in which that court found that the sole meaning of Section 304(e) is “that the citizen suit provision does not preempt any other available remedies.”

187. Pub. L. No. 95-95, § 303(c), 91 Stat. 685 (1977).

188. CAA § 304(e), 42 U.S.C. § 7604(e) (1994). No equivalent provision exists in either the CWA or RCRA.

189. See *Tennessee APCB*, 185 F.3d at 533.

is inconsistent with the sovereign immunity analysis the Supreme Court applied in *DOE v. Ohio*.

As previously discussed, the Court in *DOE v. Ohio* flatly rejected Ohio's contention that the word "sanction" as used in the CWA's federal facilities provision necessarily included civil penalties.<sup>190</sup> Nonetheless, the Sixth Circuit asserts that the state "administrative remedy or sanction," to which the United States is subjected by Section 304(e), must mean a civil penalty in the punitive sense, because virtually all state agencies lack the authority to impose coercive contempt penalties to compel compliance with their process or orders.<sup>191</sup>

The court's argument may, in other words, be expressed as follows: (1) The Supreme Court has stated that the meaning of "sanctions" is broad enough to encompass both coercive and punitive penalties; (2) "sanctions" may, but does not necessarily denote punitive fines; (3) if "sanctions," as used in Section 304(e) does not include punitive fines, then the only penalties permitted under that provision must be coercive ones; (4) nearly all state agencies, however, lack the authority to impose coercive penalties; and (5) therefore, if Section 304(e) does not authorize punitive sanctions, the provision is virtually meaningless, at least as to the authority it apparently provides for state administrative proceedings.<sup>192</sup>

If Section 304(e) does not provide authority to state agencies to impose punitive fines against the United States, the provision is not necessarily surplusage. More likely, Section 304(e) simply reaffirms the authority granted to states by Section 118 to subject the United States to "process and sanctions," which authority, as discussed previously, does not permit for the imposition of civil penalties.<sup>193</sup> This reading of Section 304(e) is reinforced by the subsection's last sentence, which states: "For provisions requiring compliance by the United States . . . see [CAA Section 118]."<sup>194</sup>

This construction may well, as the Court of Appeals notes, "render [Section 302(e)(2)] virtually meaningless" because the authority granted to state agencies by that section to impose "sanc-

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190. See *supra* note 32 and accompanying text.

191. See *Tennessee APCB*, 185 F.3d at 532, n.3, citing *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485 (1894) (determining that agency does not have "authority to compel obedience to its orders by judgment of fine").

192. In contrast, state judicial proceedings, which also are apparently authorized by Section 304(e) to impose any "remedy or sanction," unquestionably do have general authority to impose coercive sanctions.

193. See *supra* notes 126-147 and accompanying text.

194. CAA § 304(e), 42 U.S.C. § 7604(e) (1994).

tions" against the United States would then allow for the imposition of neither punitive nor coercive penalties.<sup>195</sup> Nevertheless, the Supreme Court has made abundantly clear that a waiver of sovereign immunity that opens the public fisc may not be found by implication.<sup>196</sup>

In *DOE v. Ohio*, the Court was unable to give meaning to the CWA's authorization for "civil penalties arising under Federal law."<sup>197</sup> The Court explained:

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.<sup>198</sup>

This explanation applies with equal force to the Sixth Circuit's construction of Section 304(e) and compels the same conclusion. Moreover, Congress' use of the term "civil penalties" in subsection (a) of Section 304, but not in subsection (e), makes clear that Congress knows how to designate such penalties when it intends to.<sup>199</sup>

#### (B) Waiver for Civil Penalties Imposed by a District Court

Remarkably, there are no published decisions examining the authority the CAA clearly grants the district courts to impose civil penalties against the United States.

Section 304(a) provides that "[t]he district courts shall have jurisdiction . . . to enforce [air pollution standards or limitations] . . . and to apply any appropriate civil penalties."<sup>200</sup> Civil penalties for air pollution violations in turn are specifically authorized

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195. See *Tennessee APCB*, 185 F.3d at 532, n.3.

196. See *supra* note 148 and accompanying text.

197. *Supra* notes 47-50 and accompanying text.

198. 503 U.S. at 626-27.

199. See *e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (stating that "where 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 purposefully in the disparate inclusion or exclusion").

200. CAA § 304(a), 42 U.S.C. § 7604(a) (1994).

by Section 113.<sup>201</sup> When read together with its other applicable provisions, the CAA thus authorizes a civil action to be brought “against any person (including . . . the United States) . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation;”<sup>202</sup> grants jurisdiction to the district courts “to enforce such an emission standard or limitation . . . and to apply any appropriate civil penalties;”<sup>203</sup> specifically provides for the imposition of “civil penalties” against any “person,” as that term is generally defined, for a violation of an emission standard or limitation;<sup>204</sup> and includes the United States within its general definition of “person.”<sup>205</sup>

The CAA’s statutory scheme thus provides a clear and unequivocal waiver of sovereign immunity that permits a federal district court to impose monetary sanctions to punish past CAA violations by a federal facility.<sup>206</sup>

#### b. Enforcement by EPA

CAA Section 113(d)(1) grants EPA authority to impose a civil administrative penalty against any “person” of up to \$25,000 per day of violation, up to a maximum penalty of \$200,000.<sup>207</sup> Similarly, under the field citation program authorized by Section 113, EPA may assess against any “person” civil penalties of up to

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201. CAA § 113(b). 42 U.S.C. § 7413(b) (1994) authorizes the imposition of a civil penalty against any person of up to \$25,000 per day for each violation of a permit emission standard or limitation. 42 U.S.C. § 7413(b) (1994).

202. CAA § 304(a)(1), 42 U.S.C. § 7604(a)(1) (1994).

203. CAA § 304(a), 42 U.S.C. § 7604(a) (1994).

204. CAA § 113(b), 42 U.S.C. § 7413(b) (1994).

205. CAA § 302(e), 42 U.S.C. § 7602(e) (1994). The general definition of “person” was expanded as part of the 1977 CAA Amendments to include “any agency, department, or instrumentality of the United States.” Pub. L. No. 95-95, § 301(b), 91 Stat. 685 (1977). The committee report that accompanied the House bill in which this amendment was introduced stated:

Finally, in defining the term “person” . . . to include Federal agencies, departments, and instrumentalities, officers, agents, or employees, the committee is expressing its unambiguous intent that the enforcement authorities of section 113 may be used to ensure compliance and/or to impose sanctions against any federal violator of the act.

H.R. REP. No. 95-294, at 200 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1279. The value of this legislative history would otherwise provide, however, has been significantly diminished by Nordic Village. *See supra* notes 122-23 and accompanying text.

206. The Court in *United States Dep’t of Energy v. Ohio* noted that it was undisputed that the “civil penalties” referenced in those sections authorize punitive fines. *See supra* note 22 and accompanying text.

207. CAA § 113(d)(1), 42 U.S.C. § 7413(d)(1) (1994).

\$5,000 per day of violation.<sup>208</sup> As noted previously, the United States is included within the Act's general definition of "person,"<sup>209</sup> and therefore is subject to civil penalties administratively assessed by EPA under the provisions of Section 113.<sup>210</sup>

#### IV. Conclusion

Civil penalties are one of the most powerful enforcement mechanisms that may be used to compel a federal facility's environmental compliance. The Supreme Court's holding in *DOE v. Ohio* significantly narrowed the availability of civil penalties as a sanction against federal agencies. Congress has acted to override *DOE v. Ohio*, at least as to violations of RCRA's hazardous and solid waste provisions, SWDA, and the lead-based paint regulations of TSCA. *DOE v. Ohio*, nonetheless still directly precludes the imposition of civil penalties under the CWA, and limits the scope of the waivers of sovereign immunity under the CAA and CERCLA.

In short, Congress' response to *DOE v. Ohio* has been slow and remains incomplete. In the meantime, the reaction of states seeking to compel the compliance of federal facilities within their borders has, in some respects, been puzzling.

For example, every published decision raising the question of whether the waiver of sovereign immunity under the CAA permits the imposition of civil penalties, both before *DOE v. Ohio* and after, has arisen out of a state administrative enforcement proceeding. Until the CAA is amended to overcome *DOE v. Ohio*, this paper concludes that no such authority exists, at least in the context of a state judicial or administrative enforcement proceeding, and that *Tennessee Air Pollution Control Board's* conclusion to the contrary is mistaken.

The author believes, however, the authority for states to obtain civil penalties against the United States for air pollution violations does exist, but only in enforcement proceedings brought in federal district court. It is unclear as to why states, given the Court's decision in *DOE v. Ohio*, continue to pursue punitive sanc-

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208. 42 U.S.C. § 7412(d).

209. See *supra* note 161 and accompanying text.

210. See Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, (July 16, 1997) (concluding that EPA may administratively assess civil penalties under CAA Section 113(d) against federal agencies).

tions for violations by federal facilities in state administrative proceedings, rather than in federal district court.

Similarly, while *DOE v. Ohio* may prevent states from seeking civil penalties under the CWA, the United States conceded in that case that the waiver for “process and sanctions” under the federal facilities provision subjects federal agencies to coercive fines—that is, fines imposed to induce them to comply with injunctions or other judicial orders designed to modify behavior prospectively.<sup>211</sup> Accordingly, coercive fines may be imposed against the United States in any state or federal judicial enforcement action under the CWA.<sup>212</sup> This same authority also exists under the CAA.<sup>213</sup>

The Court in *DOE v. Ohio* stated that a coercive sanction is one that is designed to modify behavior prospectively, rather than punish conduct that already has occurred.<sup>214</sup> Given this meaning, there is no apparent reason why a state seeking to sanction a federal facility for on-going CWA or CAA violations could not avoid the bar against punitive sanctions by seeking a compliance order or consent decree that provides for stipulated penalties for future violations. While a federal agency would likely object to such stipulated penalties, an objection based on *DOE v. Ohio* would not appear to be well founded.

Enforcement of air pollution violations in federal court and the use of stipulated penalties as coercive sanctions in CWA and CAA cases would fill a significant void as states and citizens seeking to compel environmental compliance by federal facilities continue to wait for Congress to finish its incomplete response to *DOE v. Ohio*.

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211. 503 U.S. at 613.

212. CWA Section 313(a)(2)(C) states the United States “shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions . . . respecting the control and abatement of water pollution” including “any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.” 33 U.S.C. § 1323(a)(2)(C) (1994).

213. CAA Section 118(a)(2)(D) states The United States “shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution,” including “any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner.” 42 U.S.C. § 7418(a)(2)(D) (1994).

214. See *supra* notes 23-24 and accompanying text.