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FEDERAL SUPREMACY AND SOVEREIGN IMMUNITY IN ENVIRONMENTAL LAW: WHAT'S LEFT AND HOW TO FIX IT

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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U.S. Army

36TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1988

FEDERAL SUPREMACY AND SOVEREIGN IMMUNITY IN ENVIRONMENTAL LAW: WHAT'S LEFT AND HOW TO FIX IT

by CAPTAIN JOHN M. FOMOUS

ABSTRACT: The thesis examines the general principles of federal supremacy and sovereign immunity and how they apply to environmental statutes, each of which has a different waiver of sovereign immunity. The waivers raise fundamental questions concerning the federal--state relationship. The thesis presents a recommendation to enact one consistent waiver for all agencies to follow.

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I. INTRODUCTION

Technology, owned and operated by individuals, corporations, cities, states, and the United States, creates nationwide pollution. The National Environmental Policy Act (NEPA) of 1969[1] signalled the beginning of a national environmental awareness, understanding that ever increasing pollution of air, water, and other natural resources had to be controlled. Congress designed the Act to, inter alia, "declare a national policy which will encourage ... harmony between man and his environment; to ... prevent or eliminate damage to the environment...."[2]

The birth of environmental law in the 1970's forced a new examination of the federal--state relationship. Besides creating national environmental laws to abate pollution by the states, the United States also faced the responsibility to abate pollution by its own facilities. The nation owns approximately 740 million acres of land in fee, about one-third of the nation's land area.[3] On this land and other properties, the "Federal government owns or operates over 20,000 facilities, ranging from ... military establishments ... to ... fish hatcheries...."[4]

Sovereignty, the federal government's "power to do anything within the state without accountability,"[5] came under scrutiny with regards to federal facility pollution. At the federal level, the concept separates into two subject areas, federal supremacy and sovereign immunity. American courts have long upheld notions of supremacy--"the power to do anything"--and sovereign immunity--"without accountability". Would environmental

issues force a fundamental change in the federal--state relationship?

This paper examines the general principles of federal supremacy and sovereign immunity and how they apply to environmental statutes. The many different environmental statutes, each with a somewhat different waiver of sovereign immunity, raise several fundamental questions concerning the federal--state relationship. The paper evaluates the waivers, examines caselaw involving the waivers, and presents recommendations for one consistent waiver for all to follow.

A. STRUCTURE OF ENVIRONMENTAL STATUTES

Many federal environmental statutes have a common structure. Generally, the statutes:

(1) set minimum national standards,

(2) encourage the states to set their own, more stringent standards, and

(3) authorize the states to enforce the standards, both state and federal.[6]

Lawmakers recognized national standards must be "keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control, and abate ... pollution."[7] Because of the relationship, environmental statutes have changed the federal--state balance with respect to federal supremacy

and sovereign immunity. Can states hold federal facilities accountable for federal pollution?

B. GENERAL PRINCIPLES

1. Federal Supremacy

The United States Constitution decrees that federal laws enacted pursuant to the Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[8] The landmark decision of M'Culloch v. Maryland upheld the notion of supremacy.[9]

In M'Culloch, Maryland tried to tax bank notes issued within the state by banks not chartered by the state, i.e., the Bank of the United States. When the national bank cashier, Mr. James William M'Culloch, failed to pay the tax, the state sued for the tax and for penalties.[10]

Chief Justice John Marshall, holding against Maryland, firmly established the federal government's power over the states. Justice Marshall wrote the federal government must be free from incompatible state power which opposes or tries to limit federal power. Whenever a conflict between the two occurs, the United States Constitution makes federal law supreme. A grant of power from the people, not from the states, created the federal government.[11]

2. Sovereign Immunity

The doctrine of sovereign immunity "has always been treated as an established doctrine."[12] It evolved from the English idea that the "King could do no wrong." This, however, misstates the reason for the rule. Immunity protects the king when he commits a wrong. If he commits no wrong, the doctrine is unnecessary.

As early as 1821, the United States Supreme Court in Cohens v. Virginia, casually observed "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States...."[13] In American jurisprudence, the rule of sovereign immunity allows suits against the United States only if the United States, through Congress, voluntarily and expressly waives its immunity.[14]

Most cases citing the doctrine of sovereign immunity explain neither the doctrine nor its existence. Courts usually state and accept the doctrine, then continue with their opinions. For example, a 1921 federal court decision found that the "principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision."[15]

The concept of federal supremacy remains strong. As long as federal laws reasonably relate to powers enumerated in the Constitution, inconsistent state laws will fall. The M'Culloch rule remains healthy.[16] However, the doctrine of sovereign immunity, criticized

as unjust and unfair, has lost some vigor as Congress waived immunity in ever increasing amounts.

The loss of sovereign immunity began as early as 1855 when Congress created the Court of Claims.[17] The statute created a court to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract ... with the government of the United States."[18] Prior to the legislation, a person with a cause of action against the United States could get relief only through a private bill sponsored by a member of Congress.[19]

Then, in 1882, the United States Supreme Court created a judicial exception to the sovereign immunity rule. In United States v. Lee[20], the heirs of General Robert E. Lee sued federal custodians for improperly seizing the Lee family's Arlington estate during the Civil War. The court criticized the concept of sovereign immunity: "As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see what foundation of principle the exemption from liability to suit rests."[21] While kings and queens might require immunity, the court felt a government of the people did not need such monarchial power.

However, the court did not strike down the deeply ingrained principle. It reaffirmed that the sovereign could not be sued, but found that sovereign immunity did not apply to the federal custodians. In a hotly contested 5-4 decision, the court ruled that the land

custodians took the Lee estate without the lawful authority of the United States, i.e., ultra vires.[22] The United States, faced with returning the then 20 year old Arlington National Cemetery to the Lee family, paid $150,000 for the land.[23]

Congress, aware of the Lee decision, passed the Tucker Act five years later, in 1887.[24] The Act replaced the 1855 statute which created the Court of Claims. It still provided the same waivers of immunity for contract cases, but specifically excepted tort cases from the court's jurisdiction. Additionally, courts did not receive "jurisdiction to hear and determine claims growing out of the late civil war ... and determine other claims, which have heretofore been rejected...."[25].

The sovereign immunity issue remained relatively stable until Congress added tort cases to the waiver list. The Federal Tort Claims Act (FTCA), passed in 1946, waived immunity for some tort claims against the United States which arise under state law.[26]

Just after passage of the FTCA, the Supreme Court delivered another key decision on the issue of sovereign immunity, Larson v. Domestic and Foreign Commerce Corporation.[27] In 1947, the plaintiff Domestic and Foreign Commerce Corporation purchased excess coal from the War Assets Administration, an agency of the United States. Sometime after the sale, the Administrator of the War Assets Administration refused to make delivery, and instead, sold the coal to another buyer. Plaintiff

sued to stop the Administrator from delivering the coal to the other buyer.[28]

The court, deciding the suit was actually against the United States, addressed whether or not sovereign immunity barred the suit. The court divided the sovereign immunity issue into two different areas--suits for money damages and suits for specific relief.[29]

The court clearly did not like using sovereign immunity to preclude damage suits against the United States. It criticized, but did not overrule, sovereign immunity as applied to suits for damages. The court called the use of immunity to bar suits for damages "an archaic hangover not consonant with modern morality and should therefore be limited whenever possible."[30]

Conversely, the decision strongly defended the doctrine of sovereign immunity in suits for specific relief. The Supreme Court, not concerned with the United States paying damages, did not want lower courts exerciseing "compulsive powers to restrain the Government from acting, or to compel it to act."[31] However, the court did find two exceptions waiving immunity in suits for specific relief.

First, the court upheld the ultra vires exception of Lee. If a government agent acted without authority, the "actions are ultra vires his authority and therefore may be made the object of specific relief."[32] Second, unconstitutional actions taken by a government agent could also be corrected by a suit for specific relief.[33]

While articulating these two exceptions, the court found that neither exception applied to the Administrator since he acted properly.

But the Larson court also shaped a possible exception to the two waiver exceptions it created. In a footnote, the court wrote that immunity may still exist when a government agent acts unconstitutionally or ultra vires "if the relief requested cannot be granted merely by ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."[34] Thus, the decision did leave room for government reliance on sovereign immunity.

While the two judicially created waivers of sovereign immunity applied to some cases for specific relief, congressional waivers involved only causes of action seeking damages against the United States. That is, the Tucker Act and the FTCA waived sovereign immunity to money damages in contract and tort cases.

In 1966, Congress enacted the far reaching Administrative Procedures Act (APA).[35] Recognizing the diminishing doctrine of sovereign immunity, Congress enacted Section 702 of the APA to handle suits for specific relief. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[36] Subsequent court decisions split on whether or not the section waived sovereign immunity.[37]

Ten years later, Congress tightened the language of Section 702 so it clearly waived immunity. Congress specifically directed that in a suit for specific relief and involving no monetary damages, an action "shall not be dismissed nor relief therein be denied on the grounds that it is against the United States...."[38] The APA withdrew sovereign immunity in most non-monetary cases. However, the amendment did not totally abrogate sovereign immunity. Specific statutes limiting immunity waivers can still overcome the Section 702 general waiver.[39]

While only Congress can waive sovereign immunity, courts actually decide the issue by interpreting Congress's statutory intent.[40] In situations like FTCA lawsuits, the issue has been settled for the most part.[41] Other situations, not as clear, rely on judicial construction of the waivers.

Courts construe waivers "with that conservatism which is appropriate in the case of a waiver of sovereign immunity."[42] Waivers "cannot be implied but must be unequivocally expressed."[43] Generally, courts:

(1) strictly interpret statutory waivers in favor of the United States,

(2) consider the explicit waiver language,

(3) do not construe a waiver by implication or ambiguity, and

(4) do not be enlarge the waiver beyond what the statutory language requires.[44]

II. ENVIRONMENTAL WAIVERS OF SOVEREIGN IMMUNITY PRIOR TO 1977

A. MCCARRAN AMENDMENT

One of the first congressional waivers of sovereign immunity dealing with environmental matters occurred well before the NEPA and the environmental awareness of the 1970's. In 1952, Nevada Senator Pat McCarran sponsored a bill which allowed some suits involving water rights against the United States.[45]

The statute, known as the McCarran Amendment, allows plaintiffs to join the "United States as a defendant in any suit (1) for the adjudication of rights to the use of water ..., or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights...." Also, "the United States ... shall be deemed to have waived any right to plead that ... the United States is not amenable [to suit] by reason of its sovereignty...." [46]

Senator McCarran urged passage of his amendment because of the complicated water rights situation in the West. Sovereign immunity could "materially interfere with the lawful and equitable use of water ... by other water users...."[47] The legislator wanted to correct "the evils growing out of such immunity."[48]

The United States Supreme Court, maintaining a conservative posture, strictly interpreted the waiver in a 1963 case, Dugan v. Rank.[49] Several plaintiffs, claiming water rights, sued to enjoin the United States, federal officials, and local irrigation districts from storing and diverting water for a reclamation project. But, the suit did not affect all water rights holders.[50]

The Dugan court conservatively applied the doctrine of sovereign immunity by strictly interpreting the waiver's statutory language. Relying on legislative history, the court limited the McCarran waiver to suits involving a "general adjudication of 'all of the rights of various owners on a given stream....'"[51] Without all claimants as parties to the suit, the suit would only determine the priority of rights between the plaintiffs and the United States. This was not the "general adjudication" contemplated by the waiver.

In the claim against federal officials, the court found that they acted with authority. Therefore, the ultra vires exception did not apply.[52] Citing Larson, the court implied that even if federal officials had acted ultra vires, immunity might still be appropriate if a suit could stop the government "in its tracks."[53]

B. CLEAN AIR ACT (CAA)

The original Clean Air Act (CAA), as enacted in 1955, contained no waiver of sovereign immunity.[54] The bill encouraged federal--state cooperation and authorized the Surgeon General to study air pollution.

Congress wanted to "preserve and protect the primary responsibilities and rights of the State and local governments in controlling air pollution."[55] The theme of primary state responsibility would play an important role in the development of sovereign immunity waivers.

A 1963 revision of the CAA required federal polluters to cooperate with state air pollution agencies, but did not waive any sovereign immunity.[56] The Act also required federal agencies to obtain federal permits which could be revoked if pollution endangered human health and welfare.[57] However, the statute somewhat diluted the goal of federal--state cooperation by requiring federal agency compliance only "to the extent practicable and consistent with the interests of the United States and within ... appropriations...."[58]

Still, states did not respond to their "responsibilities and rights ... in controlling air pollution" as created by the CAA.[59] Another federal statutory attempt, this time in 1967, also failed to persuade states to control air pollution.[60]

So, in 1970, Congress responded by adopting a new approach for the states and the nation.[61] A review of "achievements to date ... make it abundantly clear that the strategies ... have been inadequate...."[62] The legislators even blasted other federal agencies: "Instead of exercising leadership in controlling or eliminating air pollution, the Federal Government has tended to be slow in this respect. The ... [1970 amendments] ... are designed to reverse this tendency."[63]

The amendments, for the first time, required states to attain specific air quality standards. The CAA Amendments of 1970 required the Environmental Protection Agency (EPA) Administrator to establish national ambient air quality standards (NAAQS) for air pollutants "which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare...."[64] Once the EPA set the NAAQS, each state had nine months to submit to the EPA a plan "which provides for implementation, maintenance, and enforcement of such ... standard...."[65]

Besides mandating state air pollution abatement plans, Congress passed the first major environmental waiver of sovereign immunity. The CAA Amendments of 1970 required federal agencies 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."[66] After the waiver became law, "there is no longer any question whether federal installations must comply with ... air pollution control ... measures. The only question has become how their compliance is to be enforced."[67]

While the CAA Amendments of 1970 weakened sovereign immunity, they reinforced the doctrine of federal supremacy by setting strict federal requirements for state air pollution abatement schemes. If the EPA decided a state's plan did not meet the federal standard, the EPA could impose its own standard on the state.[68]

The CAA also allowed states to enact standards more stringent than federal law if the state desired.[69]

Congress also retained some federal control over federal facility pollution by allowing the President "to exempt any emission source of ... the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States."[70] The provision, in addition, allowed exemption of "weaponry, equipment, aircraft, vehicles, or other classes ... of property which are owned or operated ny the Armed Forces of the United States ... and which are uniquely military in nature."[71]

A federal agency running short of funds in its normal budgetary process could not be exempted from compliance due to lack of funds. The President must specifically request an appropriation and the Congress must reject it before an exemption can be granted for lack of funds. Additionally, the exemption cannot exceed one year unless the President makes a new determination the exemption is warranted.[72] The President has used the provision only once.[73]

C. FEDERAL WATER POLLUTION CONTROL ACT (FWPCA)

The Federal Water Pollution Control Act (FWPCA), enacted in 1948, used a pattern similar to the first Clean Air Act.[74] The initial act encouraged cooperation among the states and the federal government to control air pollution, but made no mandatory provisions for federal facilities.[75]

Two years after the landmark 1970 Clean Air waiver of sovereign immunity, Congress realized the "national effort to abate and control water pollution has been inadequate in every respect."[76] Moreover, the lawmakers' attitude toward other federal agencies had not improved. Congress found that "many incidents of flagrant violations of air and water pollution requirements by federal facilities and activities."[77]

Because of FWPCA deficiencies similar to those found earlier in the CAA scheme, legislators amended the FWPCA, including a new waiver of sovereign immunity virtually identical to the 1970 Clean Air waiver.[78] The waiver made federal facilities subject to federal, state, and local requirements. It required "federal facilities [to] meet all control requirements as if they were private citizens."[79] Additionally, federal facilities were liable to the states for payment of service charges.[80]

Again, Congress invoked the doctrine of federal supremacy. The amendments required states to submit water pollution abatement schemes to the EPA for approval. Upon approval, the EPA allowed a state to enforce its plan.[81] The amendments also contained a presidential exemption provision virtually identical to the CAA amendments of 1970.[82]

D. NOISE CONTROL ACT (NCA)

"[G]rowing public awareness over the quality of the environment, ... spotlighted another problem untouched by

Federal regulation. Noise--unwanted sound...."[83] In response, legislators passed the Noise Control Act (NCA) of 1972.[84] As with other environmental statutes, Congress realized that "while primary responsibility for control ... rests with the State and local governments, Federal action is essential to deal with ... sources ... which require national uniformity of treatment."[85]

To this end, the NCA waived sovereign immunity using language virtually identical to the 1970 CAA and the 1972 FWPCA.[86] The section required federal facilities to "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."[87] However, while requiring federal compliance with state standards, the act did not require states to enact their own plans.

Again, Congress allowed the President to exempt federal noisemakers from statutory requirements. An exemption must be based on the "paramount interest of the United States," and cannot be granted "due to a lack of appropriations."[88] The statute did not contain specific language for exemption of military equipment.[89]

E. SAFE DRINKING WATER ACT (SDWA)

Another congressional target, drinking water, received attention in 1974.[90] However, this time lawmakers slightly relaxed the waiver of sovereign immunity for federal facility compliance.[91]

The Safe Drinking Water Act (SDWA) waiver required each federal agency with jurisdiction over public water systems to "comply with all national primary drinking water regulations ... and ... any applicable underground injection control program."[92] Legislators wanted the waiver "to constitute express consent to be sued, which thus waives the traditional sovereign immunity principle and defense."[93]

On its face, the waiver language separated public water systems from underground injection programs. Yet, the legislative history does not make the distinction.[94] Legislators wanted public water systems and underground injection wells treated "the same as any other ... system or ... well ... and [subject to the] ... same procedures."[95]

The Act required federal agencies with jurisdiction over public water systems to follow only national drinking water regulations.[96] Yet, agencies involved in underground injection programs were required to comply with applicable state programs approved by the EPA.[97]

While waiving some immunity, Congress again reinforced the federal government's supremacy over the states. Consistent with other environmental statutes, the states remained the primary enforcer to protect public water systems. But, the EPA could enforce federal standards until it approved state control and enforcement plans, which had to be equal to or more stringent than federal rules.[98]

The EPA could exempt compliance from the federal waiver of sovereign immunity. It could be granted "upon request of the Secretary of Defense and upon a determination by the President that the requested [exemption] is necessary in the interest of national security."[99]

F. COASTAL ZONE MANAGEMENT ACT (CZMA)

Congress went beyond legislating individual sources of pollution and moved to preserve ecosystems with the Coastal Zone Management Act (CZMA) of 1972.[100] The Act, designed to preserve, protect, and develop the country's coastal zones, followed the now common scheme of using states to implement federal goals.

In order to qualify for federal money to plan and execute controlled coastal use programs, Congress requires the states to submit a coastal management plan to the federal government. As with most environmental statutes, the CZMA gave final program approval authority to the federal government. If the federal government disapproves the state plan, the state does not receive any federal funds.[101]

The Senate wanted to waive substantial sovereign immunity regarding the use of coastal resources by requiring "all Federal agencies ... to administer their programs consistent with approved State management programs except in cases of overriding national interest as determined by the President."[102] The final version of the CZMA, however, only requires federal agencies to make

a good effort at complying with federally approved state programs. "Each Federal agency ... shall conduct ... activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."[103]

While sovereign immunity to CZMA issues remained intact, lawmakers decided that "nothing in this chapter shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act ... or the Clean Air Act ... or (2) established by the Federal ... or any state or local government pursuant to such acts."[104] In essence, sovereign immunity remained so long as federal activity did not involve either the CAA or the FWPCA.

G. SOLID WASTE DISPOSAL ACT (SWDA)

One other early environmental statute, the Solid Waste Disposal Act (SWDA), merits comment. In 1965, Congress provided states with money to survey waste disposal practices and plans.[105] Crafted primarily for research and development, the Act urged cooperation among the states to manage solid waste disposal. It did not address federal agency requirements or any waiver of sovereign immunity.

A 1970 amendment refocused the Act toward recovery of energy and materials.[106] The statute tasked the federal government to issue waste management guidelines. The federal guidelines, advisory to the states, were

mandatory on federal agencies.[107] But, Congress did not waive immunity to the states.

III. CHANGES IN ENVIRONMENTAL WAIVERS OF SOVEREIGN IMMUNITY

The differences among the branches of the federal government and the states, seen through congressional intent, court decisions, and agency actions, led to an upheaval of the sovereign immunity doctrine. The United States Supreme Court, in two companion cases, suggested that Congress use more explicit waiver language if it desired to waive sovereign immunity. The two cases did result in more extensive statutory waivers of sovereign immunity.

A. HANCOCK v. TRAIN

Kentucky's clean air implementation plan, approved by the EPA, required all persons who "... use, operate, or maintain an air contaminant source ... resulting in the presence of air contaminants ..." to obtain a permit from the state.[108] Section 118 of the 1970 Clean Air Amendments mandated that federal facilities "shall comply with ... State ... requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."[109]

The court answered the following sovereign immunity question in Hancock v. Train[110]: Did the Clean Air Act waiver of sovereign immunity require federal agencies to obtain state permits?

Once the EPA approved Kentucky's clean air plan, the state wanted local federal facilities, including military installations, to comply with the state's permit requirements. The federal facilities refused to apply for state permits. Each facility, however, provided or offered to provide the information needed to apply for a permit.[111]

In discussions with Kentucky, the EPA admitted that federal facilities must meet state deadlines for air quality standards. But EPA adamantly disagreed that federal facilities must follow state permit requirements.[112] In response, Kentucky filed suit to force federal facilities to secure state permits.[113]

The district court reviewed the immunity waiver's legislative history and found that Congress "contemplated a self imposed policy of federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures."[114] Because of the court's concern about litigation that interfered "with basic functions of national defense and ... congressionally authorized activities," it granted the United States's motion for summary judgement and dismissed Kentucky's complaint.[115]

The Sixth Circuit Court of Appeals agreed.[116] Kentucky argued it could not meet CAA standards without using state permits even if federal facilities complied with state emissions standards. However, the court did not "believe the congressional scheme ... included

subjection of federal agencies to state or local permit requirements."[117]

The court distinguished between substantive and procedural requirements. It found that the legislative history discussing "emission standards" referred only to substantive requirements. The Sixth Circuit found an "absence of a clear congressional purpose", and hence, found no waiver of immunity regarding state procedures such as permits.[118]

Meanwhile, in Alabama v. Seeber[119], the Fifth Circuit Court of Appeals, on facts similar to those in Hancock, found that federal facilities must abide by state permit requirements. It examined the statutory phrase, "requirements respecting control and abatement of air pollution to the same extent as any person ...,"[120] within the overall scheme of the CAA. Chiding the Sixth Circuit for its "strained reading of the Act's legislative history in Hancock"[121], the Fifth Circuit held that "federal facilities are to be treated equally with private facilities ..." in all respects.[122]

The United States Supreme Court, substituting new EPA Administrator Russell Train as respondent, settled the conflict in Hancock v. Train.[123] The court's analysis combined a conservative approach to the doctrine of sovereign immunity with an exhaustive study of legislative history. The Supreme Court concluded that the Clean Air Act did not waive sovereign immunity with regards to state permits.

The analysis began with M'Culloch v. Maryland[124] and the Constitution's supremacy over state law. The court recognized that Congress, by waiving sovereign immunity, can allow a state to enforce its law against the federal government. But, because "of the fundamental importance of the principles shielding federal installations ... from regulation by the States, ... [waiver] ... is found only when and to the extent there is `a clear congressional mandate,' [and a] `specific congressional action' that makes ... [the waiver] ... `clear and unambiguous.'"[125]

To determine whether the CAA contained such a clear and unambiguous waiver, the court looked first to the statutory language. It found that Section 118 did not say that federal facilities "shall comply with all ... state ... requirements...,"[126] but neither did it clearly identify which requirements apply to federal agencies. Besides, the statute did not require states to implement a permit system.

Based on its reading of the legislative history, the court decided that Congress meant to divide state statutes into two parts.[127] The court termed emission standards and compliance schedules as "those requirements which ... work the actual reduction of air pollution discharge..."[128], i.e., substantive requirements. On the other hand, it characterized administrative and enforcement methods as "those provisions by which the States ... enforce ... standards..."[129], i.e., procedural matters.

The court concluded that Congress did not waive sovereign immunity to state procedural matters.[130] The court narrowly viewed "requirements", asserting "that Congress intended to treat emission standards and compliance schedules ... differently from administrative and enforcement methods...."[131] Therefore, the waiver of immunity required federal facilities to comply only with state requirements affecting "the actual reduction of air pollutant discharge." The court, unable to find the clear language to bind the United States, laid the matter at Congress's door. "Should ... [waiver] ... nevertheless be the desire of Congress, it need only amend the act to make its intention manifest."[132]

B. ENVIRONMENTAL PROTECTION AGENCY v. CALIFORNIA

The same issue as in Hancock, whether state permit requirements apply to federal facilities, arose in Environmental Protection Agency v. California[133]. The case applied the 1972 FWPCA Amendments' waiver of sovereign immunity. The FWPCA Amendments contained almost the exact language of the 1970 Clean Air waiver. It provided that federal facilities "shall comply with ... State ... requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges."[134]

Decided the same day as Hancock, the California case used "the same fundamental principles applied ... in Hancock...."[135] Maintaining a strict attitude toward waiver, the court held Congress waived sovereign immunity

with regard to substantive requirements but did not waive it for procedural requirements. Again, the court invited Congress to clarify its intent if it disagreed with the court's interpretation.[136]

IV. CONGRESSIONAL RESPONSE

Congress accepted the Supreme Court's invitation, and moved almost immediately to overrule the Supreme Court's decision. The Senate considered a Clean Air amendment which would have reversed Hancock even before the Supreme Court made its decision.[137] A major amendment to the Solid Waste Disposal Act, called the Resource Conservation and Recovery Act (RCRA), made the first legislative assault on Hancock within four months of the decision.[138]

A. AMENDMENTS TO PRE-HANCOCK STATUTES

After Hancock, four major environmental statutes--amendments to Solid Waste Disposal, Clean Air, Federal Water Protection, and Safe Drinking Water Acts--quickly incorporated a new, broader waiver of sovereign immunity. Legislative histories made clear Congress's dissatisfaction with the high court's rulings in Hancock and California. Each amendment waiving immunity now uses similar operative language. For example, federal facilities and activities:

> "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 ... [insert type of pollution involved] ... in the same manner, and to the same extent as any nongovernmental entity.... The preceding sentence shall apply (A) to any requirement whether substantive or procedural ... , (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction...."[139]

1. Resource Conservation and Recovery Act(RCRA)

As the magnitude of environmental problems increased, legislators realized the need to control and regulate waste. "[W]hile the collection and disposal of solid wastes should continue to be primarily a function of State ... agencies, the problems ... have become national ... and necessitate Federal action."[140] To meet the need, Congress amended the SWDA with the Resource Conservation and Recovery Act (RCRA).[141]

The statute assigned the EPA to set standards for generators and transporters of hazardous waste as well as for owners and operators of hazardous waste facilities.[142] Maintaining federal supremacy, the statute also required states to develop plans to implement the federal standards. The EPA has the authority to approve or disapprove each state's plan.[143]

RCRA's legislative history reflects the controversy involving federal compliance with state environmental

standards. Addressing the overall responsibilities of the federal government, the House report noted "[t]here still remained ambiguities as to what such responsibilities are and who should take action against federal facilities that are irresponsible."[144]

Congress, in the final version of the amendment, did not subject federal facilities to civil penalties enforced by the states.[145] The House wanted to retain sovereign immunity over federal facilities.[146] The Senate wanted to give up some immunity but did not want to waive immunity to penalties. The Senate prevailed.[147]

RCRA waived some sovereign immunity when it made federal facilities subject to "all Federal, State, inter-state, and local requirements, both substantive and procedural (including ... provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)...."[148] The statute also retained the presidential exemption provision "if he determines it to be in the paramount interest of the United States."[149]

2. Clean Air Act (CAA)

Still not satisfied with the pace of federal compliance with environmental standards, Congress significantly amended the CAA in 1977.[150] Among other significant amendments, the Senate wanted to "remove all legal barriers to full federal compliance."[151]

The Senate committee, disagreeing with Hancock, had intended the 1970 amendments to waive the "historic defense of sovereign immunity...."[152] Since the 1970 amendment did not work as planned, the Senate committee made clear it intended the 1977 amendment "to overturn the Hancock case and to express, with sufficient clarity, the committee's desire to subject federal facilities to all Federal, State, and local requirements--procedural, substantive, or otherwise--process, and sanctions."[153]

The Senate wanted the 1977 amendment to:

> "resolve any question about the sanctions to which noncomplying Federal agencies ... may be subject. The applicable sanctions are to be the same for Federal facilities ... as for privately owned pollution sources.... This means that Federal facilities and agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), to civil or criminal penalties, and to delayed compliance penalties."[154]

The House report, not as eloquent as the Senate's, reached the same conclusion. The new legislation would require federal facilities to "comply with `procedural' as well as `substantive' ..." state requirements and would "authorize enforcement against such facilities by the same means, process, sanction, and jurisdiction as for any non-Federal source."[155]

The final version of the 1977 CAA waiver applies "to any requirement whether substantive or procedural ... , and ... to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."[156] The statute retained the presidential exemption.[157] The CAA waiver language would prove to waive more immunity than other amended waivers.

3. Safe Drinking Water Act (SDWA)

Congress next expanded the sovereign immunity waiver of the Safe Drinking Water Act so it could "avoid the pitfall encountered" in the Hancock decision.[158]

The new amendment made clear that federal facilities must abide by all procedural and substantive requirements of state drinking water laws. The statute also removed the distinction between a public water system and underground injection wells.[159] The waiver made federal facilities "subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and ... any underground injection program in the same manner, and to the same extent, as any nongovernmental entity."[160]

The amendment manifested congressional intention "that federally owned or operated facilities comply with all Federal, State, and local requirements.... [T]he committee explicitly waives the applicability of the doctrine of sovereign immunity...."[161] In dicta, one

federal district court held the SDWA waiver is as extensive as the CAA waiver.[162]

4. Federal Water Pollution Control Act (FWPCA)

While the House of Representatives did not want to change the FWPCA waiver, the Senate wanted to force federal facility compliance with both procedural and substantive requirements of state water pollution laws. The Senate, taking a slap at its executive and judicial counterparts, indicated "unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of Congress in ... the 1972 ... amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent."[163]

The Senate's discussion of the immunity issue quoted above occurred before passage of the 1977 CAA amendments. The final FWPCA conference report, compiled after the Clean Air Amendments became law, did not explain the final version of the waiver amendment, except to say that it "is essentially the same as the Senate amendment revised to conform with a comparable provision in the Clean Air Act."[164] However, later court decisions would find differences between the two.[165]

5. Other Statutes

Environmental sovereign immunity waivers in two other statutes enacted before Hancock, the Noise Control Act[166] and the Coastal Zone Management Act[167], remained

unmodified. Congress did amend the NCA in 1978 with a new-image name, the Quiet Communities Act.[168] However, its original pre-Hancock waiver did not change. Nor has Congress amended the CZMA and its unique and less ambitious waiver scheme.[169]

B. NEW POST-HANCOCK STATUTES

Congress continued its concern about the impact of federal facilities on environmental problems. Several new environmental statutes enacted after Hancock took varying approaches to sovereign immunity questions.

1. Toxic Substances Control Act (TSCA)

Even before amending the Solid Waste Disposal Act with RCRA, Congress took aim at regulating chemical mixtures and substances which present unreasonable hazards.[170] The Toxic Substances Control Act (TSCA) mandated federally promulgated regulations which would govern commercial production and distribution of hazardous chemical productions.[171] The act does not require states to develop an implementation program, but allows state regulation if its program meets or exceeds federal requirements.[172]

The act did not provide any clear waiver of sovereign immunity like the amended waivers passed after Hancock. It does not include statutory language pertaining directly to federal facilities. The statute does provide a national defense waiver. The EPA can waive compliance with statutory standards for any entity "upon

request and determination by the President that the requested waiver is necessary in the interest of national defense."[173]

2. Uranium Mill Tailings Radiation Control Act

Congress designed the Uranium Mill Tailings Radiation Control Act to regulate and control radioactive residue resulting from uranium mined under United States Government contracts.[174] Congress realized that uranium residue created "a significant radiation hazard to the public...." The statute authorized surveys of abandoned uranium mill tailings and allowed cooperative clean-up agreements between federal and state governments.[175]

Using a purely national approach without state programs, the act did not waive sovereign immunity. Only the Secretary of Energy can enforce the statute. Defining persons as any "government entity"[176], the act requires federal agencies to follow federal statutory requirements. But the statute, the first environmental statute to do so, specifically provided that "No civil penalty may be assessed against the United States...."[177]

3. Powerplant and Industrial Fuel Use Act(PIFA)

To reduce United States dependence on foreign oil imports and to encourage use of domestic fuel sources such as coal, Congress passed the Powerplant and Industrial Fuel Use Act (PIFA) of 1978.[178] Citing public welfare and national defense concerns, the statute encourages powerplants to conserve oil and natural gas by

modernizing old plants and redesigning new ones.[179] Using a national scheme like the Uranium Tailings Act, the statute excluded state programs and enforcement.

Without state enforcement, sovereign immunity would not even be an issue. Yet, the Senate bill contained a provision "modeled after the comparable authorities" in the CAA and the FWPCA.[180] The conference agreement combined "the House and Senate versions to provide that all Federal agencies ... are subject to the prohibitions of the Act applicable to powerplants and major fuel-burning installations."[181] PIFA also contains a presidential exemption provision similar to other environmental statutes, but it limited the exemption to when there is a "paramount interest ... [in] ... property ... uniquely military in character...."[182]

The statute requires federal agencies to "comply with any prohibition, term, condition, or other substantial or procedural requirement under this chapter, to the same extent as ... a nongovernmental person."[183] While enacting a provision similar to the CAA and FWPCA waivers of immunity, PIFA followed the Uranium Tailings Act and precluded federal agencies from paying civil or criminal penalties.[184]

4. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Hazardous waste continues to be a major congressional concern. Several statutes deal with the handling, transportation, and disposal of toxic wastes

now being generated.[185] Until the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[186], however, no statute broadly addressed cleanup of abandoned and inactive hazardous waste disposal sites.[187] Congress designed CERCLA to "bring order to the array of ... federal hazardous substances cleanup and compensation laws."[188]

Since existing law is "clearly inadequate to deal with this massive problem"[189], CERCLA created legal authority for the EPA to respond to abandoned hazardous waste dumps without first determining liability for the damage. The EPA "responds" by using federal money to cleanup sites deemed "necessary to protect the public health or ... the environment...."[190] CERCLA established two types of response to cleanup abandoned waste sites: short-term emergency cleanup efforts, called "removal" actions, and long-term containment and disposal programs, called "remedial" actions.[191]

CERCLA established a National Contingency Plan (NCP) to define procedures and standards "for responding to releases of hazardous substances, pollutants, and contaminants...."[192] As part of the NCP, CERCLA required the EPA to create a National Priorities List (NPL) so the most serious hazards could be handles first. The EPA must consider, but is not bound by, state priority lists when determining the NPL.[193]

Enforceable only in federal courts, CERCLA requires federal agencies to comply with all procedural and substantive provisions of the statute. CERCLA declared

"Each department ... of the 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 this section."[194] Since CERCLA allows, but did not require, states to legislate additional cleanup requirements, the original 1980 waiver of sovereign immunity did not encompass such state laws.[195] Again, the statute did not waive federal agency immunity to civil penalties.[196]

By 1986, the problem of toxic waste dumps reached new proportions. Seeing the need for more federal intervention and more federal money, Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA).[197] SARA authorized the federal government to spend an additional $8.5 billion for cleanup efforts over the next five years.[198]

Besides authorizing more federal cleanup money, SARA also expanded CERCLA's sovereign immunity waiver. It made state laws "concerning removal and remedial action, including ... enforcement" applicable to federal facilities not on the NPL.[199] Congress provided the waiver would apply if the states did not impose a standard on such sites "which is more stringent than the standards applicable to facilities ... not owned or operated" by the federal government.[200]

C. COMPARISON OF WAIVERS

Environmental waivers of immunity fall into two categories, pre-Hancock and post-Hancock. After the Hancock[201] decision, Congress amended several pre-Hancock statutes to insure that federal facilities followed state environmental procedural requirements as well as substantive pollution control requirements. Laws passed before Hancock evolved from statutes encouraging federal cooperation and became statutes requiring federal compliance.[202] Amended waivers of sovereign immunity gave the states a large role in forcing federal agencies to comply with state environmental standards.

New statutes passed after Hancock have a slightly different tone.[203] They focused on more specific environmental matters, such as toxic wastes. The statutes shifted from EPA-approved state programs to national programs. But, in most instances, the states retained enforcement authority.

V. POST-HANCOCK SOVEREIGN IMMUNITY ISSUES

Before Hancock and California, the few cases concerning federal compliance dealt primarily with the permit issue addressed in Hancock.[204] In the post-Hancock era, expanding waivers of sovereign immunity have increased the number and scope of lawsuits against federal facilities. The increase, especially in the last few years, has given the courts an opportunity to interpret the newer waivers.

Two cases decided prior to enactment of post-Hancock waivers served as a precursor for current

litigation. In 1972, the Pennsylvania Department of Environmental Resources filed a complaint against the United States and a federal contractor for violating the state's clean water laws. A state hearing assessed civil penalties of $1,667,000.00 against the Army commander of the federal facility and the contractor.[205]

The appeals court, faced only with the issue of contractor liability, held the contractor liable for penalties because the contractor was not a federal agency.[206] Referring to the commander's liability, the court wrote "[p]resumably ... a federal agent is (at the least) immune from an environmental enforcement proceeding unless brought in federal court, and could not be fined in any forum."[207]

The second case, decided after Hancock but before the 1977 CAA waiver, involved civil penalties under the Clean Air Act.[208] The California State Air Resources Board claimed Navy jet engine testing violated state air standards enacted pursuant to the Clean Air Act. The court found that "civil penalties are not specifically authorized..." by the Clean Air Act's pre-Hancock waiver of sovereign immunity."[209]

A. PENALTIES

In the newer cases, courts have separated the statutes into two categories when looking at civil penalties: (1) the CAA, and (2) the others, i.e., FWPCA, RCRA, and CERCLA.[210] Courts have concluded that only the

CAA makes federal agencies liable for state imposed civil penalties.

In the first post-Hancock case involving civil penalties, Alabama alleged that the Veterans Administration (VA) violated federal and EPA-approved state air pollution laws by improperly removing asbestos from a hospital.[211] The suit, State of Alabama ex rel. Graddick v. Veterans Administration[212], sought civil penalties for past violations.

The CAA made federal facilities subject "to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."[213] It also gave the state authority to enforce EPA-approved state regulations by providing "[i]f the Administrator finds the State procedure is adequate, he shall delegate to such state any authority he has ... to implement and enforce such standards."[214]

The legislative history clarified "that Federal ... agencies may be subject to injunctive relief (and criminal or civil contempt citations to enforce any such injunction), [and] to civil or criminal penalties...."[215] The statute did not distinguish between administrative penalties and court ordered contempt sanctions. Using this legislative history quote, the court held that Congress "expressly granted the states the power to enforce state sanctions against federal facilities."[216] Finding the statute made the regulations federal as well as state, the court allowed the state to enforce its sanctions, including civil penalties.[217]

In a pending civil penalty case under the CAA[218], Ohio has claimed that the United States Air Force operated boiler plants without permits and violated state emission standards. The Ohio Attorney General sought state administrative penalties against the Air Force. In its interim decision, the court has defined the real issue as has the "United States clearly waived its sovereign immunity to permit Ohio ... to impose fines or penalties upon federal facilities?"[219] The language harkens back to the standard announced by the Supreme Court in Hancock.

The court, analyzing the legislative history, went on to find "a clear intent on the part of the House to subject federal facilities to civil penalties and noncompliance penalties."[220] The court compared the CAA waiver of sovereign immunity to waivers from other environmental statutes. It found the CAA and SDWA waivers more comprehensive than the RCRA and FWPCA waivers.[221]

The CAA waiver clearly waived sovereign immunity to sanctions to enforce injunctive relief. Therefore, the issue turned on the difference, if any, between the statutory treatment of administrative penalties imposed by a state agency and penalties imposed by a court for violating an injunction. The CAA history, as cited in Graddick[222], indicated no difference between the two.[223]

The court held that the CAA allows state agencies to impose administrative fines and penalties against federal

facilities.[224] In dicta, the court suggested that the same result would be reached under the SDWA waiver.[225] However, the court also noted that RCRA and the FWPCA seemed to limit "sanctions" to court-imposed injunctive relief.[226] This implied a different result probably would be reached using RCRA or the FWPCA.[227]

RCRA and FWPCA waivers make a distinction not found in the CAA or SDWA. RCRA waives sovereign immunity with respect to "injunctive relief and such sanctions as may be imposed by a court to enforce such relief...."[228] FWPCA uses the same language as the CAA, but adds a qualifier providing that, "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State ... court to enforce an order or the process of such court...."[229]

Two RCRA cases establish continuing federal immunity from state penalties. North Carolina, in Meyer v. U.S. Coast Guard[230], tried to recover a $10,000 administrative penalty because the Coast Guard failed to file a timely permit request for a hazardous waste facility.

The court, reading the waiver narrowly, "limit[ed] the waiver to those penalties specifically mentioned [in the statute]."[231] It ruled that RCRA "does not waive the Federal government's immunity from the imposition of civil penalties by state agencies."[232] Studying the legislative history, the court also found that the RCRA waiver "seemed to contemplate only obligations arising from injunctions."[233]

In McClellan Ecological Seepage Situation (MESS) v. Weinberger[234], MESS claimed the United States Air Force violated RCRA and FWPCA provisions and sought injunctive relief and administrative civil penalties. The Air Force moved to dismiss the civil penalty claim on the grounds that neither RCRA nor the FWPCA waived the federal government's immunity from imposition of civil penalties by state agencies.[235]

In addressing the RCRA issue, the court did not bother with the usual analysis of legislative history. Instead, it relied on a "plain face, common-sense reading of this provision ... [and found] ... there has not been a waiver of sovereign immunity regarding the imposition of civil penalties against federal facilities under RCRA."[236] The "plain face" reading limited the waiver to "process or sanctions ... only as required for the enforcement of injunctive relief.... [T]his language ... requires a preexisting order of the Court to be enforced--no more, no less."[237]

Moving to the FWPCA, the court could not make any sense of that sovereign immunity waiver. "The federal facilities provision ... is a compilation of ambiguity."[238] No matter how the court read it, the provision appeared "to be an absurdity."[239] Given this confusion, the court's application of Hancock's "clear and unambiguous" standard required a finding that the FWPCA did not waive immunity to civil penalties.[240]

The court refused to apply the standard of the CAA waiver[241] to RCRA and the FWPCA. It decided Congress

meant the CAA waiver only for the Clean Air Act. Any other approach would undermine the requirement for an unambiguous waiver.[242]

B. THE MEANING OF "REQUIREMENTS"

All federal waivers of sovereignty use the term "substantive and procedural requirements." Even though the broader post-Hancock waivers overruled the Hancock decision, lower courts still apply the Hancock definition of requirements: "provisions ... to establish and enforce emission standards, compliance schedule and the like."[243]

The first case to interpret "requirements", Romero-Barcelo v. Brown[244], did so in the context of the Noise Control Act (NCA). The suit involved several environmental statutes and issues concerning Navy training in Puerto Rico and surrounding waters. The plaintiffs claimed, inter alia, that Navy activity violated a local statute because it generated "`shock waves and excessive noise that unreasonably interfere with the health and welfare of residents....'"[245] The court had to decide if the plaintiff's claims stated a violation of substantive or procedural requirements embodied in Puerto Rican law, that is, did the NCA waive sovereign immunity regarding Puerto Rico's statutes?[246]

The NCA legislative history indicated the Act would be enforceable by "`technologically-based standards' rather than the more open ended standard of the `public health and welfare.'"[247] The NCA relied "on relatively

precise standards capable of uniform application to similar sources of sound."[248] The court held that "generating excessive noise" was not an objective standard, and therefore, the Navy did not have to comply with it.

In another judicial effort to determine the meaning of "requirements" in the environmental setting, Florida tried to hold the United States Navy strictly liable under state law for hazardous waste removal costs.[249] In State of Florida Department of Environmental Regulation v. Silvex Corporation, the Navy argued the state statute did not meet the meaning of substantive or procedural requirements included in the RCRA immunity waiver.[250]

The court looked at the legislative histories of the CAA, FWPCA, and RCRA to define "requirements".[251] The RCRA history used the term "in the nature of regulatory guidelines and ascertainable standards...."[252] The CAA history "demonstrates a similar intent to have requirements defined as objective standards of state control."[253] The FWPCA history "indicates requirements refers to `effluent limitations' and similar `control requirements.'"[254]

The state statute that created the cause of action in Silvex permitted emergency action when hazardous waste spillage posed "an imminent hazard to the public health, safety and welfare."[255] Citing the Romero-Barcelo standard[256], the court held that the Navy need not comply with the"imminent hazard" standard since it did not create an objective requirement.

In a case decided partially on the "requirements" issue, California tried to enforce state criminal sanctions against the Veterans Administration in People of the State of California v. Walters.[257] The state alleged that a VA employee violated state law by improper disposal of hazardous medical wastes. The court based its decision that Congress did not waive federal sovereign immunity in the case on two points.

First, the court found that Congress did not specifically waive federal officials' immunity to criminal penalties. RCRA's legislative history "does not show a clear intent to waive the immunity to criminal sanctions."[258] Second, it held that state criminal sanctions were not a "requirement" within the meaning of the RCRA waiver of sovereign immunity. The court wrote that state provisions for "waste disposal standards, permits, and reporting duties clearly are `requirements'.... Criminal sanctions, however, are not a `requirement' ... but rather the means by which the standards, permits, and reporting duties are enforced...."[259]

While most cases discussed so far involved just one statute, lawsuits can also arise in situations where plaintiffs allege violations of two or more environmental statutes. In very similar cases, Kelley v. U.S.[260] and State of New York v. U.S.[261], both plaintiffs alleged federal agencies contaminated groundwater at military installations in violation of FWPCA and CERCLA.

Both plaintiffs made the same claims involving the FWPCA. First, they argued that the contamination violated the FWPCA provision which prohibits "addition of any pollutant to navigable water from any source point" without a permit.[262] The court noted that the FWPCA does not expressly include groundwater in the term "navigable waters." The court proceeded to hold that the FWPCA did not control groundwater pollution.[263]

Second, both courts addressed the immunity issue's application to the alleged violation of state laws. Both state statutes involved generalities such as a provision that makes it "unlawful to `discharge into the waters of the state any substance which is or may become injurious to the public health....'"[264] Neither statute contained "objective and quantifiable standards subject to uniform application."[265] Since neither state law met the Hancock "requirement" standard, the court dismissed the FWPCA claims in both cases.[266]

However, the CERCLA claims led to a different result. CERCLA did not involve the issue of state law and "requirements" since it essentially has been a federal program.[267]

In New York, the state alleged that the United States Air Force contaminated groundwater with "spilled, leaked or discharged large quantities of military jet fuel ... as well as other chemicals ..." over a period of ten years, beginning in the late 1950's or early 1960's.[268] The Air Force used the installation from 1951 through 1971, and then transferred ownership to the

county. The federal government moved to dismiss the state's CERCLA claim to recover cleanup costs from the United States based upon lack of jurisdiction and failure to state a claim.[269]

Denying the United States' motion to dismiss, the court held that the "plaintiff has a raised a genuine factual dispute as to whether or not defendants disposed of hazardous substances within the meaning of CERCLA."[270]

This leaves open the question whether federal agencies violated an objective standard, a "requirement" of CERCLA. If the Air Force did dispose of substances prohibited by CERCLA, it would have violated and objective federal standard. As such, the United States would pay for cleanup costs since it waived immunity on the issue of hazardous waste cleanup costs.[271] In Kelley, the United States did not contest the plaintiff's CERCLA claim in its motion to dismiss.[272]

C. DECLARATORY RELIEF

Since CERCLA allowed the EPA to shoot first and ask questions later[273], some plaintiffs tried to avoid the brunt of the statute by suing the EPA before it sued them. Preemptive attacks arose when the EPA tried to enforce CERCLA, not when a federal facility acted as a polluter. For example, plaintiffs sought a judicial review of the EPA's declaration of their CERCLA liability in MacKAy and Sons v. U.S.[274] The court held that general jurisdiction statutes[275] did not provide jurisdiction over the United States unless an independent waiver of sovereign immunity exists.[276] The individual

statute, CERCLA in this case, must provide a waiver of immunity which creates a cause of action.

The court did not find any such provision in CERCLA. Indeed, the legislative intent of CERCLA made it "clear that EPA should not be hindered, delayed or thwarted prior to its bringing a cost recovery action...."[277] Thus, a potentially liable party must wait for the EPA to initiate an action to recover governmental cleanup expenses before asserting any defenses to liability.

In a similar case, property owners in Jefferson County, Missouri, sued the United States to enjoin removal of contaminated soil.[278] Local landowners wanted to stop an EPA cleanup program which involved temporary storage of dioxin contaminated soil on property adjacent to the plaintiffs. The court did not find a CERCLA waiver for the plaintiffs' cause of action. It held that CERCLA did not waive immunity to "private suits for injunctive relief against the EPA."[279]

A New Jersey court reached the same decision on the CERCLA waiver in a different situation. Defendants in a recovery action brought by a state agency attempted to join the EPA as a party in the hope that the EPA could act as an effective settlement negotiator.[280] The court held the CERCLA waiver allowed suits against the EPA only if it was liable, and here, no liability existed. Since EPA did not consent to participation as a plaintiff or a defendant, the defendants' efforts failed.[281]

In U.S. v. Nicolet, Inc.[282], the United States sued a private defendant to recover removal and response costs for asbestos cleanup. Nicolet counterclaimed, contending, inter alia, that it did not violate CERCLA and it should be entitled to restitution for all costs it expended as a result of earlier improper federal action. In the restitution claim, Nicolet asked for response and cleanup costs it already spent because of the action against the company.[283]

The court held that the United States "waived sovereign immunity under CERCLA only in the limited circumstances where it may be liable for removal and response costs.... Congress wanted to limit liability ... to narrowly defined costs and damages."[284] Since CERCLA limited the immunity waiver to removal and response costs, the court dismissed all counterclaims except the one for cleanup costs.[285]

D. CITIZEN ACCESS TO COURT

1. Citizen Suits

Waivers of sovereign immunity that allow private citizens to sue the United States are in most environmental statutes.[286] The idea first appeared in the 1970 Clean Air Act Amendments.[287] The provisions allow citizens to act as private attorneys general and to enforce the community's statutory rights.

The Clean Air Act provided the model for all

environmental citizen suit provisions. It allowed any person to:

> "commence a civil action on his own behalf ... against any person (including ... the United States ...) who is alleged to be in violation of ... an emission standard or ... against the [EPA] Administrator where there is an alleged failure of the Administrator to perform any act ... which is not discretionary.... The district courts shall have jurisdiction."[288]

Additionally, each provision has a clause which makes clear that the statute does not "restrict any right which any person ... may have under any statute...."[289]

Citizen suit provisions waive sovereign immunity by allowing private citizens to sue federal agencies. The waivers do not impose any additional requirements on federal agencies. However, a successful plaintiff can collect litigation costs, including attorney and expert witness fees.[290]

While the statute allows citizens to enforce environmental laws, "[n]o action may be commenced ... prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the state ..., and (iii) to any alleged violator."[291] A citizen may also intervene in a suit being prosecuted by a governmental agency.[292]

In National Resource Defense Counsel (NRDC) v. Train[293], the court analyzed the CAA citizen suit provision and found that Congress made a deliberate choice to widen citizen access to court in environmental matters.[294] Yet the court felt that Congress left enough restrictions on the process that citizen suit provisions would not "fling open the courts' doors wide open."[295] A plaintiff must allege a clear cut violation of a particular statute. The NRDC court held that "Congress restricted citizen suits to actions seeking to enforce specific requirements of the act."[296] Simply alleging a common law violation, e.g., "the water is polluted," will not suffice. This fits within the Romero-Barcelo definition of requirements, "relatively precise standards capable of uniform application...."[297]

Three major issues appear in citizen suit cases:

(1) the definition of "citizen,"

(2) the 60 day notice provision, and

(3) recovery of civil penalties for on-going and past violations.

A few lower courts have decided a state is not a citizen. They have limited citizen suits to individual citizens, calling the process an alternative to state and federal enforcement.[298] However, the Supreme Court and the EPA have concluded that the definition of "person" in the CAA allows a state to file a citizen suit against federal agencies.[299] Since the EPA agreed with the

Supreme Court, it is unlikely that the minority view will stop states from filing as citizens.

Courts are split on the application of the 60 day notice provision. Some courts have treated it as a jurisdictional requirement and will dismiss suits filed less than 60 days after notice to the EPA, the violator, and the state where the violation occurred.[300] If plaintiffs want to continue the case after dismissal, they would have to refile after giving 60 days notice.

Other courts will not dismiss a premature complaint. Rather, they will treat the complaint as notice and hold the suit for 60 days to see what enforcement action is taken.[301] If the EPA or the state do not act within the 60 days, the court will allow the suit to go forward.

If the federal government did waive sovereign immunity to civil penalties, the impact of citizen suits on such a situation has been limited by the Supreme Court in Gwaltney of Smithfield v. Chesapeake Bay Foundation.[302] Prior to the decision, a majority of courts allowed an action for past violations which had been rectified before suit.[303]

The Gwaltney court citizen suits to on-going and intermittent violations of environmental standards. It found the FWPCA citizen suit provision written in the present tense.[304] The court also found that the 60 day notice provision, designed to give enforcement agencies a chance to remedy a violation, presupposed that a violation is ongoing. The legislative history appears to

have envisioned the citizen suit as an abatement measure designed to affect current violations.[305] The citizen suit has no purpose once the polluter has complied with the statute.

The court compared a 1984 SWDA amendment, which allowed suits against "past or present" violators to the FWPCA provision.[306] The SDWA amendment, by being the only statute to specifically add past violations to its citizen suit provision, indicated that the other citizen suit provisions pertain only to continuing violations. When comparing the past and present tense language of the SWDA with the present tense language of the FWPCA, the court concluded that the FWPCA "does not permit citizen suit for wholly past violations."[307] It limited the scope of citizen suits to instances where the "plaintiffs make a good-faith allegation of continuous or intermittent violation."[308] Even if federal facilities were liable for penalties, citizen suit provisions make the penalties payable to the federal treasury, not the plaintiffs.[309]

2. Judicial Review

Distinct from citizen suits for violating statutory standards, environmental statutes allow judicial review of standards set by the EPA. Citizens, as well as states, can challenge regulatory standards set by the EPA, so long as plaintiffs file their petitions within 60 days of the standard's publication.[310]

In most cases, jurisdiction for such suits rests with the United States Court of Appeals for the District of Columbia.[311] In limited situations where the challenged regulation has local or regional applicability, suits can be filed in the local Circuit Court of Appeals.[312] Standards, once in place, "shall not be subject to judicial review in civil or criminal proceedings for enforcement."[313]

VI. FEDERALLY ENFORCED COMPLIANCE

A. EXECUTIVE ORDERS

On October 13, 1978, President Carter issued Executive Order No. 12088[314] which requires federal agencies to comply with pollution control standards of several statutes.[315] The President put responsibility on the leader of each agency to insure "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."[316]

The Order tasked each executive agency to cooperate with the EPA as well as state, interstate, and local agencies to control and abate pollution. Additionally, President Carter established a conflict resolution procedure for disputes about compliance issues between the EPA and other federal agencies.

The EPA is also cast in the role of mediator between federal agencies and state, regional and local agencies

alleging violations. An EPA compliance plan "shall include an implementation plan for coming into compliance as soon as practicable."[317] If the EPA cannot resolve the conflict, the Office of Management and Budget (OMB), upon request of one of the parties, can act as the final arbiter.[318]

Executive Order No. 12088 has generally been interpreted as not waiving sovereign immunity or creating a private right of action against polluting federal agencies.[319] A 1987 amendment to the Order clarified this point by specifically providing that "nothing in this order shall create any right ... enforceable at law by a party against the United States...."[320]

However, the Ninth Circuit, in Sierra Club v. Peterson, decided that a lack of an "express or implied private right of action under Executive Order No. 12088 does not prevent review of agency action under the APA."[321] The case has limited value. Peterson involved the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), one of the few environmental statutes without a citizen suit provision. The court held that the lack of a citizen suit provision did not preclude judicial review under the APA.[322] Any court addressing violations of statutes with citizen suit provisions would not face the issue. In essence, Executive Order No. 12088 has few, if any, judicial teeth to solve federal facility compliance problems.

The Order put the budget burden on the agency by stating that "[t]he head of each ... agency shall ensure

that sufficient funds for compliance ... are requested in the budget."[323] President Carter also closed the door on budgetary sleight of hand by ordering that all funds earmarked for environmental compliance shall not be "used for any other purpose unless permitted by law and specifically approved by [the OMB]".[324]

Executive orders can also be used to implement individual statutes. Executive Order No. 12580, signed on January 23, 1987, serves as the vehicle for the President to implement SARA.[325] Primarily, the Order assigned responsibilities to federal agencies tasked to implement the NCP.[326] It did discuss federal facilities and substantially restates the compliance and dispute resolution procedures established in Executive Order No. 12088.[327] Since CERCLA has a citizen suit provision, Executive Order No. 12580 will not likely be used as a basis for causes of action against federal agencies.

The two Orders already discussed dealt purely with inter-governmental relationships. Another order, Executive Order No. 12327[328], had a different angle. It invoked, for the first and only time, the presidential exemption provisions of several statutes which allowed President Reagan to exempt federal agencies from complying with environmental standards. In order to provide housing for Haitian refugees in Puerto Rico, the President waived federal compliance with portions of the CAA, FWPCA, NCA, and RCRA.[329]

Lengthy litigation transpired between the United States and Puerto Rico before the signing of Executive

Order No. 12327. A court enjoined the transfer of Haitian refugees to Fort Allen in Puerto Rico because of NEPA violations.[330] After negotiations, the parties reached an agreement on the NEPA issues and the court vacated the injunction.[331] Executive Order No. 12327, signed after the negotiated agreement, exempted federal compliance with environmental statutes not addressed in the suit. President Reagan effectively avoided additional court challenges to refugee settlement by signing the Order.

The Fort Allen situation suggests that a President would be reluctant to use his ability to exempt federal facilities from compliance with environmental statutes. This has been its only use, and then only after several protracted lawsuits.[332] State authority over federal facilities seems well entrenched.

B. EPA FEDERAL FACILITIES COMPLIANCE PROGRAM

To combat the continuing problem of federal facility compliance, the EPA promulgated the Federal Facilities Compliance Program in 1984.[333] Based on authority created by Executive Order No. 12088, the effort by the EPA "is an administrative program requiring full coordination and cooperation between the federal agencies, ... EPA, and ... OMB. Disputes ... are resolved within the Executive Branch...."[334]

The program still relies on the states to judicially enforce pollution abatement statutes against federal agencies when necessary. The EPA makes clear that, as

"part of the Executive Branch, EPA does not pursue judicial remedies" against non-complying federal facilities.[335] The EPA recognized that if the Executive Branch, through the program, does not "ensure compliance of its own facilities ..., non-federal entities are authorized to initiate legal actions against the violators."[336]

Although the EPA can seek enforcement action, fines, and penalties against non-federal polluters, it takes "an administrative approach ..." against federal violators.[337] This consists of a five step process to settle disputes.[338] Usually, the final arbiter in disputes is the OMB, but theoretically, the President could overrule the OMB and exempt a facility from compliance.[339]

If the EPA decided to order compliance, it would establish a solution and provide a compliance schedule for the agency.[340] If the agency did not respond to the EPA solution, the OMB would weigh competing national interests and resolve the issue.[341] Other than cooperation, the Program does not provide any means to enforce either an EPA or OMB decision requiring an agency must take corrective action.

VII. ANALYSIS

A gap remains between the congressional goal of full federal facility compliance and the reality that we have not yet attained that level of compliance.[342] Clearly, Congress has waived much sovereign immunity to the states

to help narrow the gap. The basic waiver language--"comply with state substantive and procedural requirements"--appears in just about every environmental statute. However, caselaw has consistently held that the various statutory formulations have not waived all facets of sovereign immunity in environmental matters.

To make sense of the immunity puzzle, one must mesh together all the different pieces. M'Culloch v. Maryland established the federal government's supremacy over the states. This issue has never really been in doubt. Nevertheless, Congress has elected to waive some of its supremacy to the states, and since the Tucker Act in 1855, there has been an inexorable march toward increasingly broad waivers of sovereign immunity.

In early waivers of sovereign immunity, Congress kept control of the purse strings. It waived immunity to judicial review in non-monetary cases through the APA. However, money damages were another matter. Congress waived immunity to money damages only in contract and tort cases through the Tucker Act and the FTCA.

Environmental statutes created a different approach to the federal--state relationship. Congress gave the states an increasing role in abating federal facility pollution by putting specific waivers of immunity in each statute. By allowing citizen suits, Congress provided yet another waiver of immunity. The states use these waivers in various ways to regulate federal facility operations.

Assessing civil penalties is one approach to control pollution by federal facilities. Courts have limited civil penalties against federal facilities to situations involving the CAA.[343] The legislative history of the CAA indicated the Act encompasses penalties levied by state administrative bodies as well as courts.[344] Other statutes preclude state agencies from levying penalties. Civil suit provisions do not permit federal facilities to pay civil penalties to plaintiffs.

States may also try to pass substantive laws which, by their design, apply only to federal facilities. For example, a state could limit emissions from vehicles with engine specifications applicable only to tank engines or jet planes. The CAA, as the only statute waiving immunity to civil penalties, could tempt a state to look for federal funds by using discriminatory standards.

Congress recognized such a possibility when it amended CERCLA in 1986. The CERCLA immunity waiver permits a state to apply state law against federal facilities not listed on the NPL. But, in the interest of fairness, the waiver does not apply to a state "standard or requirement ... which is more stringent than the standards and requirements applicable ..." to non-federal facilities.[345]

Additionally, some state procedural requirements can present problems for federal agencies. Since each state can set its own procedures, an agency can face as many as 50 different procedural requirements to do the same thing. For example, a Kansas statute requires state

license drillers to drill pilot wells to check for toxic chemicals.[346] A state could require other special licensing arrangements, e.g., federal construction projects must be designed by a state licensed firm.

Federal facilities must abide by such procedures since the requirement for a state licensed driller or architect are "objective and quantifiable standards subject to uniform application."[347] During the debate over passage of RCRA, the EPA Administrator objected to federal facilities complying with state procedures because "[s]uch requirements--more likely than not--will differ, even to the point of conflict, requiring excessive attention to the niceties of State law without any substantial benefits."[348]

In Graddick, the court linked EPA approval of the state program to the state's ability to enforce it against federal agencies. It found that an EPA-approved state program was the equivalent of a federal program. The court implied that a state can enforce only EPA-approved statutes against federal agencies, and conversely, a state cannot enforce an unapproved state statute against federal agencies.[349]

VIII. CONCLUSION

A. FEDERAL VIEW OF IMMUNITY

Early cases, such as Lee, criticized the doctrine of sovereign immunity, but left it intact. Courts have maintained a conservative view of the doctrine, requiring

a "clear and unambiguous waiver" of immunity before they rule against the United States. Combined, the Tucker Act, FTCA, and APA waive a good portion of sovereign immunity.

Each branch of the federal government seems to have its own view on sovereign immunity. The judicial branch guards the doctrine of sovereign immunity, maintaining a conservative view of the doctrine. Within the judiciary, two approaches exist. One, courts decide congressional intent using the plain language of the statute. They do not look beyond statutory language nor compare statutes.[350] Two, courts read legislative histories and compare statutes to each other in an attempt to understand congressional intent. The second approach seems to prevail.[351] Either way, the courts hold Congress's feet to the fire and continue to look for the elusive "clear and unambiguous" waiver.

The executive branch appears to be split three ways on the issue. The EPA wants to enforce environmental statutes in cooperation with the states. The agencies want to complete their mission with minimum participation of the states.[352] The Department of Justice is caught in the middle. As attorney for federal agencies in court, it could represent both sides of an issue within the federal government.

Congress continues to propose legislation which would waive more immunity. Pending legislation underscores the differences. House Bill No. 3785, to amend RCRA, would specifically waive federal immunity to

"all civil, criminal, and administrative penalties and other sanctions, including fines and imprisonment."[353] In addition, the bill also waives immunity which protected individual federal employees and agents.[354]

Another amendment to RCRA, House Bill No. 3782, proposed by the same 16 Congressmen would establish a Special Environmental Counsel.[355] The Counsel would be independent of any federal supervision, and would prosecute civil actions against federal agencies for non-compliance. Such action would include injunctions and/or civil penalties.

Besides the divergent federal views, the states want to regulate pollution from federal facilities. Since a state has the responsibility to protect the health and welfare of its citizens, a state should have a voice in controlling or abating pollution caused by federal facilities.

B. RECOMMENDATIONS

Environmental immunity waivers, while similar, lack consistency. The 1972 FWPCA amendments proposed an idea to gain some consistency. The Act called for investigating the "feasibility of establishing a separate court or court system, having jurisdiction over environmental matters...."[356] In a similar vein, the 1975 Administrative Conference of the United States recommended giving a single federal agency complete authority to insure compliance by federal facilities.[357]

Neither idea mushroomed into a concrete program. The doctrine of sovereign immunity does not need complicated solutions to become effective. Rather, some fine tuning will make it consistent, understandable, and effective. Congress designed CERCLA to fill gaps of inadequate legal authority[358], "to bring order to the array of ... federal hazardous cleanup and compensation laws."[359] A similar statute concerning sovereign immunity will help stop the disarray on the immunity issue.

The interested federal players--Congress and the executive federal agencies--should consider the many competing state and federal interests and then decide what authority should be relegated to the states and what should be retained by the federal government. They need to consider issues such as state procedural requirements, civil penalties, and injunctive relief.

Once reaching a consensus, Congress should enact one waiver provision reflecting that consensus and make it a part of each environmental statute. One consistent waiver would clear up the confusing picture of sovereign immunity. Using the same waiver in each environmental statute would save time, money, and effort for all parties. All immunity waivers currently in force should be repealed.

Implementation of the following recommendations would result in a consistent and equitable sovereign immunity policy. The waiver should:

(1) retain the idea that federal agencies must comply with state substantive requirements. This would allow a state to set the overall pollution abatement program within its borders.

(2) streamline state procedural requirements for federal facilities. Immunity to requirements dealing directly with pollution abatement would still be waived. This could include some state procedural requirements such as permits. Immunity to state requirements without a direct connection to pollution abatement, such as using state licensed operators, would not waived. This would allow federal facilities to create national standards and efficient solutions.

(3) not apply to any standard or requirement which is more stringent than the standards and requirements applicable to non-federal facilities.[360] This would prevent a state from aiming discriminatory statutes at federal facilities.

(4) retain the state as the primary enforcer of environmental laws. Citizen suits would be limited to situations where a state or federal agency did not attack a problem in a timely manner. This would allow a state to control its environment and would also allow citizen groups to keep the pressure on state and federal agencies.

(5) use the EPA to administer procedures formerly left to the states. This would allow the federal agencies to follow one procedure, instead of 50 different ones. The EPA can develop national standards which will enhance productivity and compliance.

(6) not allow a state to sue for civil penalties payable to the state. Injunctive relief would still be appropriate. Since only the CAA allows penalties, it appears that Congress does not want federal agencies to pay penalties. Alternatively, penalties could be assessed against federal agencies, put into a fund controlled by the EPA, and used to bring federal facilities into compliance. This would create an incentive to comply with environmental standards.

Supreme Court Justice Antonin Scalia once wrote: "No one can read the significant Supreme Court cases on sovereign immunity ... without concluding that the field is a mass of confusion."[361] He was right.

Some sovereign immunity in environmental law remains. Issues, such as "requirements", penalties, fees, and others, still cloud the picture. Proposals to fix and individual statute in response to one case or issue will not ease the confusion. The uncertainty can be ended if federal agencies decide on one immunity policy for the federal government. A joint effort, based on national policies, priorities, and needs, can ease the

confusion and contribute to federal facility compliance.

The recommendation for an overall environmental waiver of sovereign immunity, based on policy and need, can provide a consistent, understandable, and an effective means to achieve the goal.

ENDNOTES

1. Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321-4374 (1982)).

2. Id. at § 2, 42 U.S.C. § 4321.

3. G. Coggins & C. Wilkinson, Federal Public Land and Resources Law 2 (1981).

4. 1 C.F.R. § 305.75-4a (1987).

5. Black's Law Dictionary 1568 (4th Ed. 1968).

6. See, e.g., infra text accompanying notes 54-73.

7. S. Rep. No. 92-414, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3669.

8. U.S. Const., Art. VI, cl. 2.

9. M'Cullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)

10. Id. at 317-318.

11. Id. at 403-07.

12. U.S. v. Lee, 106 U.S. 196, 207 (1882).

13. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-412 (1821).

14. Library of Congress v. Shaw, 106 S.Ct 2957, 2960 (1986).

15. The Pesaro, 277 F. 473, 474 (S.D. N.Y. 1921).

16. M'Cullough, supra, at 316.

17. Act of Feb. 24, 1855, 10 Stat. 612.

18. Id. at § 1, 10 Stat. 612.

19. See, e.g., Act of Jul. 20, 1854, 10 Stat. 788, where Congress granted Charles Stacy a U.S. pension of $8 per month for life.

20. U.S. v. Lee, 106 U.S. 196 (1882).

21. Id. at 206.

22. Id. at 222.

23. 1 Britannica Micropaedia 521 (1975).

24. Tucker Act, Act of Mar. 3, 1887, Ch. 359, 24 Stat. 505 (codified at 28 U.S.C. §§ 1346(a), 1491 (1982)).

25. Id. at § 1, 28 U.S.C. § 1346(a).

26. Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified at 28 U.S.C. § 1346(b) (1982)).

27. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

28. Id. at 684.

29. Id. at 703.

30. Id.

31. Id. at 704.

32. Id. at 689.

33. Id. at 690.

34. Id. at 691, n. 11, citing North Carolina v. Temple, 134 U.S. 22 (1890).

35. Administrative Procedures Act (APA), Pub. L. No. 89-554, 80 Stat. 392 (1966) (codified at 5 U.S.C. §§ 701-706 (1982)).

36. Id. at § 1, 5 U.S.C. § 702.

37. Compare Short v. Murphy, 368 F. Supp. 591 (D.C. Mich. 1963), aff'd 512 F.2d 374 (6th Cir. 1975) (does not constitute waiver of immunity) with Kletschka v. Driver, 411 F.2d 436 (2d Cir. N.Y. 1969) (constitutes waiver of immunity).

38. APA, supra, at § 1, 5 U.S.C. § 702.

39. Id.

40. See, e.g., Hancock v. Train, 426 U.S. 167 (1975). See also infra text accompanying notes 285-288.

41. See U.S. v. Feres, 340 U.S. 135 (1950).

42. United States v. Sherwood, 312 U.S. 584, 591 (1940).

43. United States v. King, 395 U.S. 1, 4 (1968).

44. Library of Congress v. Shaw, supra, at 2963, citing McMahon v. United States, 342 U.S. 25, 27 (1951), Eastern Transportation Company v. United States, 272 U.S. 675, 686 (1927).

45. S. Rep. No. 82-755, 82d Cong., 1st Sess. (1951).

46. McCarran Amendment, Act of Jul. 10, 1952, 66 Stat. 560 (codified at 43 U.S.C. § 666 (1982)).

47. Id.

48. Id.

49. Dugan v. Rank, 372 U.S. 609 (1963).

50. Id. at 614-615.

51. Id. at 618, quoting S. Rep. No. 82-755, 82d Cong., 1st Sess. 9 (1951).

52. Id. at 620.

53. Id. at 621, quoting Larson v. Domestic and Foreign Corporation, supra, at 704.

54. Clean Air Act (CAA), Pub. L. No. 84-159, 69 Stat. 322 (1955).

55. Id. at § 1, 69 Stat. 322.

56. CAA Amendments of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963).

57. Id. at § 7, 77 Stat. 399.

58. Id.

59. CAA, supra, at § 1, 69 Stat. 522.

60. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485.

61. CAA Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

62. H. Rep. No. 91-1146, 91st Cong., 2d Sess. 4, reprinted in 1970 U.S. Code Cong. & Admin. News 5356, 5360.

63. Id.

64. CAA Amendments of 1970, supra, at § 108, 84 Stat. 1678.

65. Id. at § 110, 84 Stat. 1680.

66. CAA Amendments of 1970, supra, at § 118, 84 Stat. 1689.

67. Hancock v. Train, supra, at 172.

68. Id. at § 110, 84 Stat. 1680.

69. Id. at § 116, 84 Stat. 1689. See also, e.g., Cal. Veh. Code §§ 27150-27158.5 (West 1985 & Supp. 1988).

70. Id. at § 118, 84 Stat. 1689.

71. Id.

72. Id.

73. Exec. Order No. 12327, 46 Fed. Reg. 48893 (1981). See also infra text accompanying notes 294-296.

74. Act of Jun. 30, 1948, 62 Stat. 843.

75. Id. at § 2, 62 Stat. 843.

76. S. Rep. No. 92-414, 92d Cong., 2d Sess. ___, reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3674.

77. Id. at ___, U.S. Code Cong. & Admin. News 3733.

78. Federal Water Pollution Control Act (FWPCA) Amendments of 1972, Pub. L. No. 92-500, § 313, 86 Stat. 816.

79. S. Rep. No. 92-414, supra, at ___, U.S. Code Cong. & Admin. News 3734.

80. Id.

81. FWPCA Amendments of 1972, supra, at § 402, 86 Stat. 880.

82. Id. at § 313, 86 Stat. 875. See also supra text accompanying notes 70-73.

83. S. Rep. No. 92-1160, 92d Cong., 2d. Sess. 1, reprinted in 1972 U.S. Code Cong. & Admin. News 4655, 4655.

84. Noise Control Act (NCA), Pub. L. No. 92-574, 86 Stat. 1234 (1972) (codified at 42 U.S.C. §§ 4901-4918 (1982)).

85. Id. at § 2(a)(3), 42 U.S.C. § 4901(a)(3).

86. Id. at § 4, 42 U.S.C. § 4903. See also supra text accompanying notes 66-67 and 78-80.

87. Id. at 4(b), 42 U.S.C. § 4903(b).

88. Id.

89. Id. See also supra text accompanying notes 70-73 and 82.

90. Safe Drinking Water Act (SDWA), Pub. L. No. 93-523, 88 Stat. 1688 (codified at 42 U.S.C. §§ 300f-300j (1982), amended Act of Jul. 1, 1944, ch. 373).

91. Id. at § 1447, 88 Stat. 1688.

92. Id.

93. H. Rep. No. 93-1185, 93d Cong., 2d Sess. ___, reprinted in 1974 U.S. Code Cong. & Admin. News 6454, 6494.

94. Id.

95. Id.

96. SDWA, supra, at § 1447(a), 88 Stat. 1688.

97. Id. at § 1421, 88 Stat. 1674.

98. Id. at § 1413, 88 Stat. 1665.

99. Id. at § 1447(b), 42 U.S.C. § 300j-6(b).

100. Coastal Zone Management Act (CZMA), Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified at 16 U.S.C. §§ 1451-1464 (1982), amended Pub. L. No. 89-454, 80 Stat. 203 (1966)).

101. CZMA, supra, at § 305, 16 U.S.C. § 1454.

102. S. Rep. No. 92-573, 92d Cong., 2d Sess. ___, reprinted in 1972 U.S. Code Cong. & Admin. News 4776, 4792.

103. Id. at § 307(c), 16 U.S.C. § 1456(c).

104. Id. at § 307(f), 16 U.S.C. § 1456(f).

105. Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965).

106. The Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227 (1970).

107. Id. at §§ 209-211, 84 Stat. 1232-1233.

108. Ky Admin. Regs., Pollution Control Commission Reg. No. AP-1, § 5(1).

109. CAA Amendments of 1970, supra, at § 118, 84 Stat. 1689.

110. Hancock v. Train, 426 U.S. 167 (1975).

111. Id. at 174.

112. Id. at 175, n. 26.

113. Kentucky ex rel. Hancock v. Ruckelshaus, 362 F. Supp. 360 (W.D. Ky. 1973).

114. Id. at 365.

115. Id. at 367.

116. Hancock v. Ruckelshaus, 497 F.2d 1172 (6th Cir. 1974).

117. Id. at 1177.

118. Id. at 1176.

119. Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974). See also California v. Stastny, 382 F. Supp. 222 (C.D. Cal. 1972).

120. CAA Amendments of 1970, supra, at § 118, 84 Stat. 1689.

121. Seeber, supra, at 1246.

122. Id. at 1243.

123. Hancock, supra, at 167.

124. M'Cullough, supra, at 316.

125. Hancock, supra, at 179 (footnotes omitted).

126. Id. at 183.

127. Id. at 184-191.

128. Id. at 185.

129. Id. at 186.

130. Id. at 187-189.

131. Id. at 185-187.

132. Id. at 198.

133. EPA v. California, 426 U.S. 201 (1975).

134. FWPCA Amendments of 1972, supra, at § 313, 86 Stat 875.

135. EPA v. California, supra, at 211.

136. Id. at 227-228.

137. Hancock, supra, at 198, n. 64.

138. Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580, 90 Stat. 2821 (1976) (codified at 42 U.S.C. §§ 6901-6987 (1982)).

139. See, e.g., CAA Amendments of 1977, Pub. L. No. 95-95, § 118, 91 Stat. 711 (codified at 42 U.S.C. § 7418 (1982)).

140. RCRA, supra, § 1002(a), 42 U.S.C. § 6901(a).

141. RCRA, supra.

142. Id. at §§ 3002-3004, 42 U.S.C. §§ 6922-6924.

143. Id. at § 4007, 42 U.S.C. § 6947.

144. H. Rep. No. 94-1491--Part 1, 94th Cong., 2d Sess. 45, reprinted in U.S. Code Cong. & Admin. News, 6238, 6283.

145. See infra text accompanying notes 230-242.

146. H.Rep. No. 94-1491--Part 1, supra, at 51, U.S. Code Cong. & Admin. News 6289.

147. 122 Cong. Rec., 32,610, 32,613 (Sept. 27, 1976).

148. RCRA, supra, at § 6001, 42 U.S.C. § 6961.

149. Id.

150. CAA Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified at 42 U.S.C. §§ 7401-7642 (1982)).

151. S. Rep. No. 95-127, 95th Cong., 1st Sess. 198, reprinted in 1977 U.S. Code Cong. & Admin. News, 1077, 1276.

152. Id. at 198, U.S. Code Cong. & Admin. News 1276-1277.

153. Id. at 199, U.S. Code Cong. & Admin. News 1278.

154. Id. at 200, U.S. Code Cong. & Admin. News 1279.

155. H. Rep. No. 95-294, 95th Cong., 1st Sess. 12, reprinted in 1977 U.S. Code Cong. & Admin. News 1077, 1089.

156. CAA Amendments of 1977, supra, at § 118(a), 42 U.S.C. § 7418(a).

157. Id. at § 118(b), 42 U.S.C. § 7418(b).

158. H. Rep. No. 95-338, 95th Cong., 1st Sess. 11, reprinted in 1977 U.S. Code Cong. & Admin. News 3648, 3658.

159. See supra text accompanying notes 92-97.

160. SDWA, supra, at § 1447, 42 U.S.C. § 300j-6.

161. H. Rep. No. 95-338, supra, at 13, U.S. Code Cong. & Admin. News 3660.

162. State of Ohio ex rel. Celebrezze v. Department of the Air Force, No. 86-0179 (S.D. Ohio, Mar. 31, 1987).

163. S. Rep. No. 95-370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4392.

164. H. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 93, reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4468.

165. Compare McClellan Ecological Seepage Situation (MESS) v. Weinberger, 655 F. Supp. 601, 604-605 (E.D. Cal. 1986) (FWPCA does not waive sovereign immunity of federal facilities to state imposed civil penalties.) with Celebrezze, supra (CAA does waive such federal immunity).

166. See supra text accompanying notes 83-89.

167. See supra text accompanying notes 100-104.

168. Quiet Communities Act, Pub. L. No. 95-609, 92 Stat. 3079 (1978).

169. See supra text accompanying notes 102-103.

170. Toxic Substance Control Act (TSCA), Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2628 (1982)).

171. Id. at § 15, 15 U.S.C. § 2614.

172. Id. at § 18, 15 U.S.C. § 2617.

173. Id. at § 22, 15 U.S.C. § 2621.

174. Uranium Mill Tailings Radiation Control Act, Pub. L. No. 95-604, 92 Stat. 3021 (1978) (codified at 42 U.S.C. §§ 7901-7942 (1982)).

175. Id. at § 2, 42 U.S.C. § 7901.

176. Id. at § 101(5), 42 U.S.C. § 7911(5).

177. Id. at § 110(a), 42 U.S.C. § 7920(a).

178. Powerplant and Industrial Fuel Use Act (PIFA), Pub. L. No. 95-620, 92 Stat. 3291 (1978) (codified at 42 U.S.C. §§ 8301-8484 (1982)).

179. Id. at § 102(b), 42 U.S.C. § 8301(b).

180. S. Rep. No. 95-31, 95th Cong., 2d Sess. 66, reprinted in 1978 U.S. Code Cong. & Admin. News 8173, 8212.

181. H. Conf. Rep. No. 95-1749, 95th Cong., 2d Sess. 89, reprinted in 1978 U.S. Code Cong. & Admin. News 8173, 8782.

182. PIFA, supra, at § 403(a)(2), 42 U.S.C. § 8373(a)(2).

183. Id. at § 403 (a)(1), 42 U.S.C. § 8373(a)(1).

184. Id. at § 403(d), 42 U.S.C. § 8431(d). See also H. Conf. R. 95-1749, supra.

185. See supra text accompanying notes 140-149 and 171-173.

186. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (1982)). See also S. Rep. No. 96-848, supra, at 10-13.

187. S. Rep. No. 96-848, 96th Cong., 2d Sess. 12-13 (1980). (There is one other statute, the Uranium Mill Tailings Act, supra, which deals with abandoned hazardous wastes.)

188. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985), footnotes omitted.

189. H. Rep. No. 96-1016--Part I, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6120. In 1979, the EPA estimated as many as 30,000 to 50,000 hazardous waste sites existed. Of those, between 1,200 and 2,000 present a serious health risk. Id.

190. CERCLA, supra, at § 104(a), 42 U.S.C. § 9604(a).

191. Id. at § 104, 42 U.S.C. § 9604.

192. Id. at § 105(a), 52 U.S.C. § 9605(a). The CERCLA NCP built on and expanded a NCP established by the FWPCA Amendments of 1972, supra, at § 311, 42 U.S.C. § 1321.

193. Id., at § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B).

194. Id. at § 107(g), 42 U.S.C. § 9607(g), moved to 42 U.S.C. § 9620 (a)(1)).

195. Id. at § 114, 42 U.S.C. § 9614.

196. Id. at § 109, 42 U.S.C. § 9609.

197. Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1631 (1986) (codified at 42 U.S.C.A. §§ 9601-9675 (West Supp. 1987) (amends CERCLA, supra).

198. Id. at §§ 511-517, 100 Stat. 1760-1774.

199. Id. at § 120(a), 42 U.S.C. § 9620(a). Federal facilities are not eligible for Superfund money. Id. at § 111(f), 42 U.S.C. § 9611(f).

200. Id. at § 120 (a)(4), 42 U.S.C. § 9620(a)(4).

201. Hancock v. Train, 426 U.S. 167 (1976).

202. See supra text accompanying notes 139-165.

203. See supra text accompanying notes 170-200.

204. See, e.g., Minnesota v. Calloway, 401 F. Supp. 524 (D. Minn. 1975).

205. U.S. v. Pennsylvania Environmental Hearing Board, 377 F.Supp. 545 (M.D. Pa. 1974).

206. U.S. v. Pennsylvania Environmental Hearing Board, 584 F.2d 1273 (3d Cir. 1978).

207. Id. at 1278, n. 20.

208. People of the State of California v. Department of the Navy, 431 F. Supp. 1271 (N.D. Cal. 1977).

209. Id. at 1293. The same court reached a similar conclusion concerning the FWPCA in California v. Navy, 371 F. Supp. 82 (N.D. Cal. 1973).

210. These are the only statutes to discuss civil penalties.

211. State of Alabama ex rel. Graddick v. Veterans Administration, 648 F. Supp. 1208 (M.D. Ala. 1986). The basis for the suit, past permit violations, is now precluded. See also infra text accompanying notes 269-276.

212. Id.

213. CAA Amendments of 1977, supra, at § 118(a), 42 U.S.C. § 7418(a).

214. CAA Amendments of 1977, supra, at § 109(d)(2),42 U.S.C. § 7412(d)(1).

215. Graddick, supra, at 1212.

216. Id. at 1211-1212.

217. Graddick, supra, at 1211.

218. State of Ohio ex rel. Celebrezze v. Department of the Air Force, No. 86-0179 (S.D. Ohio, Mar. 31, 1987).

219. Id. slip op. at 2.

220. Id. slip op. at 13.

221. Id. slip op. at 5-12.

222. See infra text accompanying notes 215-216.

223. Celebrezze, supra, slip op. at 13.

224. Id. slip op. at 14.

225. Id. slip op. at 13.

226. Id.

227. Other courts have supported this conclusion. See also infra text accompanying notes 230-242.

228. Id. at § 6001, 42 U.S.C. § 6961.

229. FWPCA Amendments of 1977, supra, § 313(a), 33 U.S.C. § 1323(a).

230. Meyer v. U.S. Coast Guard, 644 F. Supp. 221 (E.D. N.C. 1986).

231. Id. at 222.

232. Id. at 223.

233. Id.

234. MESS v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986).

235. Id. at 602.

236. Id. at 603.

237. Id.

238. Id. at 604.

239. Id.

240. Id.

241. See supra text accompanying notes 218-226.

242. MESS, supra at 605.

243. Hancock, supra, at 186.

244. Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), rev'd on other grounds, sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

245. Id. at 852.

246. Id. at 852, n. 30. P.R. Laws Ann. tit. 33 § 1365, inter alia, provides that "Anything injurious to health, or is ... offensive to the senses ..., so as to interfere with the comfortable enjoyment of life or property by ... [a] neighborhood ... is a public nuisance."

247. Id. at 854, n. 37.

248. Id. at 855.

249. State of Florida Dep't. of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985).

250. Id. at 161.

251. Id. at 163. See also Hancock, supra, at 188-189.

252. Id.

253. Id.

254. Id.

255. Id. at 161.

256. Romero-Barcelo, supra, at 855.

257. People of the State of California v. Walters, 751 F.2d 977 (9th Cir. 1985).

258. Id. at 979.

259. Id. at 978.

260. Kelley v. U.S., 618 F. Supp. 1103 (W.D. Mich. 1986).

261. State of New York v. U.S., 620 F. Supp. 374 (E.D. N.Y. 1986).

262. Kelley, supra, at 1105; New York, supra, at 381.

263. Id. Critics contend the failure of the FWPCA to include groundwater is a major flaw of the statute.

264. Kelley, supra, at 1108; see also New York, supra, at 376.

265. Kelley, supra, at 1108; see also New York, supra, at 381.

266. Id.

267. But see SARA, supra, § 120, 42 U.S.C. § 9620.

268. New York, supra, at 375.

269. Id., at 377.

270. Id. at 386.

271. CERCLA, supra, § 107, 42 U.S.C. § 9620.

272. Kelley, supra, at 1104.

273. B.R. MacKay & Sons, Inc. v. U.S., 633 F. Supp. 1290 (D. Utah 1986).

274. Id.

275. E.g., 28 U.S.C. § 1331, general federal question statute; 28 U.S.C. §§ 2201-2202, Declaratory Judgment Act; 28 U.S.C. § 1361, mandamus; 5 U.S.C. § 702, Administrative Procedures Act.

276. MacKay, supra, at 1295.

277. Id. at 1297.

278. Jefferson County, Missouri v. United States, 644 F. Supp. 178 (E.D. Mo. 1986).

279. Id. at 181.

280. New Jersey Department of Environmental Protection v. Gloucester Environmental Management Services, Inc., 668 F. Supp. 404 (D. N.J. 1987).

281. Id. at 407.

282. U.S. v. Nicolet, Inc., No. 85-3060 (E.D. Pa., Mar. 16, 1987) (Westlaw No. 15017).

283. Id. at Westlaw 2-3.

284. Id. at Westlaw 10.

285. Id. at Westlaw 11.

286. For an indepth series on citizens suits, see 13 Envtl. L. Rep. (Envtl. L. Inst.) 10309 (1983),14 Envtl. L. Rep. (Envtl. L. Inst.) 10063 (1984), and 14 Envtl. L. Rep. (Envtl. L. Rep.) 10407 (1984).

287. CAA Amendments of 1970, supra, § 304, 42 U.S.C. § 7604. Other environmental citizen suit provisions include: FWPCA, supra, 33 U.S.C. § 1365; RCRA, supra, 42 U.S.C. § 6972; TSCA, supra, 15 U.S.C. § 2619; NCA, supra, 42 U.S.C. § 4911; SDWA, supra, 42 U.S.C. § 300j-8; and PIFA, supra, 42 U.S.C. 8435. Statutes not discussed in this paper with citizen suit provisions include the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g); Endangered Species Act, 16 U.S.C. § 1540(g); Deepwater Port Act, 33 U.S.C. § 1515; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270; and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a). At least three environmental statutes do not have citizen suit provisions; the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-136, CZMA, supra, and Uranium Mills Tailing Act, supra.

288. CAA Amendments of 1970, supra, § 304, 42 U.S.C. § 7604.

289. Id.

290. Environmental Defense Fund v. Thomas, 24 Env't. Rep. Cases 1853 (D. D.C. 1986) applied the RCRA citizen suit provision concerning litigation costs. The CAA provision, supra, has been copied by all other statutes.

291. 42 U.S.C. s 7604(b)(1).

292. Id.

293. NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975).

294. Id. at 700.

295. Id.

296. Id.

297. Romero-Barcelo, supra, at 855. See also supra text accompanying notes 244-248.

298. California v. Department of Navy, 631 F. Supp. 584 (N.D. Cal. 1986).

299. Hancock v. Train, 426 U.S. 167, 195-196 (1976); CAA Amendments of 1970, supra, § 304, 42 U.S.C. § 7604.

300. See, e.g., Love Ladies Property Owners Association v. Raab, 430 F. Supp. 276, 280-281 (D. N.J.), 547 F.2d 1162 (3d Cir. 1976), cert. denied, 432 U.S. 906 (1977).

301. See, e.g., National Sea Clammers Association v. City of New York, 616 F.2d 1222 (3d Cir. 1980).

302. Gwaltney of Smithfield v. Chesapeake Bay Foundation, 56 U.S.L.W. 4017 (U.S., Dec. 1, 1987) (No. 86-473).

303. Graddick, supra, at 1211.

304. FWPCA Amendments of 1972, supra, at § 505, 33 U.S.C. § 1365.

305. Gwaltney, supra, at 4020.

306. Id. at 4019, n. 2. See also Pub. L. No. 98-616, § 401, 98 Stat. 3268 (1984) (codified at 42 U.S.C. § 6972(a)(1)(B) (1982 ed., Supp. III).

307. Gwaltney, supra, at 4020.

308. Id. at 4021.

309. Pawtuxent Cove Marina v. Ciba Geigy Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20685 (D. R.I. May 17, 1984).

310. The Clean Air Act provided the model for judicial review. CAA Amendments of 1970, supra, at § 307(b)(1), 42 U.S.C. § 7607(b)(1).

311. Id.

312. Id.

313. Id. at § 307(b)(2), 42 U.S.C. § 7607(b)(2).

314. Exec. Order No. 12088, 43 Fed. Reg. 47,707 (1978).

315. Exec. Order No. 12088, supra, lists nine statutes. The statutes discussed in this paper are the TSCA, FWPCA, SDWA, CAA, NCA, RCRA, supra. The statutes in the executive order not discussed are the Atomic Energy Act, 42 U.S.C. § 2021(h); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1401 and 16 U.S.C. § 1431; and Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 107.

316. Id. at § 1-1.

317. Id. at § 1-601.

318. Id. at § 1-602.

319. Sierra Club v. Peterson, 705 F.2d 1475 (9th Cir. 1983). See also Rysavy v. Harris, 457 F. Supp. 796 (D. S.D. 1978) for the same result pertaining to Exec. Order No. 11752, predecessor to Exec. Order No. 12088.

320. Exec. Order No. 12580, 52 Fed. Reg. 2923, 2928 (1987).

321. Peterson, supra, at 1478, n. 2. See also Oregon Environmental Council v. Kunzman, 741 F.2d 901, 903 (1983).

322. Peterson, supra, at 1478.

323. Exec. Order No. 12088, supra, at § 1-501.

324. Id. at § 1-502.

325. Exec. Order No. 12580, supra.

326. Id. at §§ 1, 3.

327. Id. at § 10.

328. Exec. Order No. 12327, 46 Fed. Reg. 48893 (1981). The order was revoked by Exec. Order No. 12553, 51 Fed. Reg. 7237 (1986).

329. Id.

330. Colon v. Carter, 507 F. Supp. 1026 (D. P.R. 1980); Commonwealth of Puerto Rico v. Muskie, 507 F. Supp. 1035 (D. P.R. 1980).

331. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981). See also Colon v. Carter, 633 F.2d 964 (1st Cir. 1980).

332. See supra footnotes 330-331.

333. The Environmental Protection Agency Federal Facilities Compliance Program, U.S. EPA, Office of Federal Activities, 4 January 1984.

334. Id. at 1.

335. Id. at 2.

336. Id.

337. Id.

338. Id. at 9-18.

339. Id. at 7-8.

340. Id.

341. Id. at 7.

342. Compare, e.g., Dep't. of Army Reg. 200-1, Environmental Protection and Enhancement (15 June 1982) with The Army Times, Nov. 9, 1987, at 65, col. 1 (an article discussing environmental problems on U.S. Army installations).

343. Graddick, Celebrezze, supra.

344. See supra text accompanying notes 150-157.

345. SARA, supra, at § 120(a)(4), 42 U.S.C. § 9620(a)(4)).

346. Kan. Stat. Ann. § 82a-1209 (1987 Supp.).

347. Romero-Barcelo, supra, at 855.

348. H. Rep. No. 94-1491--Part 1, 94th Cong., 2d Sess. 83, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6320-6321.

349. Graddick, supra, at 1211-1212.

350. E.g., MESS, supra.

351. E.g., Hancock, Graddick, Celebrezze, supra.

352. S. Rep. No. 95-370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S. Code Cong. & Admin. News 4326, 4392.

353. H.R. 3785, 100th Cong., 1st Sess., Dec. 17, 1987.

354. Id.

355. H.R. 3782, 100th Cong., 1st Sess., Dec. 17, 1987.

356. FWPCA Amendments of 1972, supra, § 9, 86 Stat. 899.

357. 1 C.F.R. § 305.75-4

358. S. Rep. No. 96-848, 96th Cong., 2d Sess. 11.

359. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985), citing, F. Anderson, D. Mandelker, A. Tarlock, Environmental Protection: Law & Policy, 568 (1984).

360. SARA, supra, at § 120(a)(4), 42 U.S.C. § 9620(a)(4).

361. S. Rep. No. 94-996, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 6121, 6126.