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Sovereign Immunity and the National Nuclear Security Administration: A King That Can Do No Wrong?

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The 1999 National Nuclear Security Administration Act (NNSA Act)² threatens to reverse 20 years of reforms and court decisions intended to bring the U.S. Department of Energy (DOE) into compliance with environmental laws and regulations. The NNSA Act, enacted in the wake of allegations of spying at Los Alamos nuclear weapons laboratory in New Mexico,³ established a semi-autonomous agency within DOE—the National Nuclear Security Administration (NNSA).⁴ The NNSA operates nine laboratories and facilities within the U.S. nuclear weapons complex.⁵ The National Association of Attorneys General (NAAG), former DOE officials, members of Congress, and the public have all raised concerns regarding language in the

NNSA Act, which, they argue, erodes existing waivers of sovereign immunity in environmental laws.⁶ If correct, such an interpretation could effectively shield the NNSA from environmental law enforcement; thus, the Act takes a step backward toward a structure that many argue produced the significant environmental problems found at DOE facilities today.⁷

For over 40 years, DOE and its predecessors—the Atomic Energy Commission (AEC) and the Energy Research and Development Administration (ERDA)—operated the U.S. nuclear weapons complex in secrecy and essentially devoid of environmental oversight and regulation.⁸ Largely as a result, DOE is now faced with an enormous en-

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2. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, 113 Stat. 512 (1999) (codified as National Nuclear Security Administration Act, 50 U.S.C. ch. 24).

3. The allegation of spying against Wen Ho Lee, a naturalized U.S. citizen arose in March 1999. It is not clear how the NNSA Act addresses any clearly diagnosed problem. This lack of connection between problem and solution could be the subject of another article. Clearly, Congress was ready to provide the nuclear weapons establishment autonomy from the rest of DOE—a goal the nuclear weapons labs have long sought. See David Kramer, *Lab Heads Say Meddling Is Adversely Affecting Research Mission*, INSIDE ENERGY & PUBLIC LANDS Jan. 14, 1991, at 9.

4. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, §3211, 113 Stat. 512, 957 (1999).

5. The NNSA Act transfers control of nine facilities to the NNSA: Los Alamos National Laboratory in New Mexico, Sandia National Laboratory in New Mexico, Sandia Livermore in California, Lawrence Livermore National Laboratory in California, the Kansas City Plant in Missouri, the Pantex Plant in Texas, the Oak Ridge Y-12 Plant in Tennessee, the tritium operations at the Savannah River Site in South Carolina, and the Nevada Test Site. *Id.* §§3281(1),(2), 3291(a), 113 Stat. at 968-69. In addition, NNSA Act §3291 also grants the Secretary of Energy the authority to transfer "any other facility, mission, or function, in consultation with the Administrator and Congress, [that is determined] to be consistent with the mission of the Administration." *Id.* §3291(b), 113 Stat. at 969. Thus, the potential implications discussed herein could affect additional facilities.

6. See, e.g., Letter from National Association of Attorneys General to Sen. Trent Lott, Majority Leader, U.S. Senate; Sen. Thomas Daschle, Minority Leader U.S. Senate; Rep. J. Dennis Hastert, Speaker, U.S. House of Representatives; and Rep. Richard Gephardt, Minority Leader, U.S.

House of Representatives (Sept. 3, 1999), reprinted in 145 CONG. REC. S1107-08 (daily ed. Sept. 21, 1999) [hereinafter NAAG Letter] (this letter was signed by attorneys general from 46 states); Letter from Leo P. Duffy, former Assistant Secretary of Energy for Environmental Restoration and Waste Management; Thomas Grumbly, former Assistant Secretary of Energy for Environmental Management; and Tara O'Toole, former Assistant Secretary of Energy for Environment, Safety, and Health to Sen. John Warner (July 20, 1999) (on file with authors); Letter from Maureen Eldredge, Alliance for Nuclear Accountability, and David Adelman, Natural Resources Defense Council to William J. Clinton, President of the United States (July 21, 1999) (urging a veto) (on file with authors).

7. See generally Barbara A. Finamore, *Regulating Hazardous and Mixed Waste at Department of Energy Nuclear Weapons Facilities: Reversing Decades of Environmental Neglect*, 9 HARV. ENVTL. L. REV. 83 (1985); Terrence R. Fehner & F.G. Gosling, *Coming in From the Cold: Regulating U.S. Department of Energy Nuclear Facilities, 1942-1996*, 1 ENVTL. HIST. 5 (1996); Mark C. Schroeder et al., *Regulation of Nuclear Materials: Should National Defense and Other National Policies Override State Standards?*, 22 ELR 10014 (Jan. 1992); Michael W. Grainey & Dirk A. Dunning, *Federal Sovereign Immunity: How Self-Regulation Became No Regulation at Hanford and Other Nuclear Weapons Facilities*, 31 GONZ. L. REV. 83 (1996).

8. In 1946, the Atomic Energy Act (AEA) was passed, and in 1954 amended, to create the AEC and bring the production of nuclear weapons under governmental control. AEA of 1946, ch.724, 60 Stat. 755, as amended by the AEA of 1954, ch. 1073, 68 Stat. 919 (codified at 42 U.S.C. §§2011-2297g-3 (1994)). While the AEA recognized the need "to protect [public health] and safety," it did not require the development of specific regulatory standards for nuclear weapons facilities and failed to mention protection of the environment as a goal. *Id.* §2012(d). The AEC was dissolved under the Energy Reorganization Act (ERA) of 1974. The ERA transferred the AEC's oversight of nuclear weapons facilities to the ERDA and created the Nuclear Regulatory Commission to license and regulate commercial nuclear facilities. 42 U.S.C. §§5801-5891, 5814. The ERA granted ERDA internal regulatory authority over the management of radioactive waste. *Id.* §5812(d). ERDA was superceded by DOE in 1977 under the Department of Energy Organization Act of 1977, which continued the internal regulatory structure. 42 U.S.C. §§7101-7382f. DOE currently derives its core nuclear program regulatory functions from all three acts. See generally Finamore, *supra* note 7; David P. O'Very, *The Regulation of Radioactive Pollution*, in CONTROLLING THE ATOM IN THE 21ST CENTURY 281 (O'Very et al. eds., 1994).



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environmental cleanup problem—1.7 trillion gallons of contaminated groundwater and 40 million cubic meters of soil and debris; 18 metric tons of weapons-usable plutonium; more than 2,000 tons of intensely radioactive spent nuclear fuel; and about 4,000 facilities to decontaminate and decommission.⁹ From the beginning of the Manhattan Project in 1942 through 1995, the U.S. government spent more than \$300 billion researching, producing, and testing nuclear weapons.¹⁰ In comparison, DOE estimates that cleanup through 2070 will cost over \$200 billion, and has already spent nearly \$60 billion on its environmental management program.¹¹

During the 1970s, Congress ushered in a wave of environmental legislation that often contained provisions specifically applicable to federal facilities, including DOE.¹² From the beginning, DOE and its predecessor agencies resisted the application of these laws to nuclear weapons facilities.¹³ However, not until the 1980s, as the public gained awareness of the extent of contamination within the weapons complex did DOE face strong opposition to its position.¹⁴ DOE, with the backing of the Reagan and Bush Administrations asserted, and generally lost, a variety of arguments.¹⁵ DOE made these arguments at a time when DOE was closing nuclear weapons production facilities, not be-

cause of the end of the Cold War, but because environmental, health, and safety problems made it virtually impossible to continue operations.¹⁶

In 1988, the state of Ohio sued DOE for violations of the Resource Conservation and Recovery Act (RCRA)¹⁷ and the Clean Water Act (CWA)¹⁸ at the Fernald Uranium Plant. DOE, after failing to gain exemptions from environmental regulation, turned to an alternative argument based on the U.S. Supreme Court's requirement that Congress' intent to waive the federal government's sovereign immunity must be clear and unambiguous.¹⁹ In 1991, the Supreme Court agreed with DOE that neither the federal facilities provisions nor the citizen suit provisions of the CWA and RCRA waived sovereign immunity in respect to the imposition of "punitive" civil penalties for past violations at federal facilities.²⁰ Thus, the Court stripped the states of an important tool of enforcement.

Following *United States Department of Energy v. Ohio (DOE v. Ohio)*,²¹ and after years of debate regarding the need to clarify existing waivers, Congress responded by enacting the Federal Facility Compliance Act of 1992

9. OFFICE OF ENVTL. MGMT., U.S. DOE, STATUS REPORT ON PATHS TO CLOSURE 1 (2000) [hereinafter PATHS TO CLOSURE]. To put some of these numbers in perspective, 1.7 trillion gallons of water is 4 times the daily U.S. water consumption; 40 million cubic meters of soil and debris is enough to fill approximately 17 professional sports stadiums; and 18 metric tons of weapons-usable plutonium is enough for thousands of nuclear weapons. *Id.*

10. OFFICE OF ENVTL. MGMT., U.S. DOE, CLOSING THE CIRCLE ON SPLITTING THE ATOM: THE ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION IN THE UNITED STATES AND WHAT THE DEPARTMENT OF ENERGY IS DOING ABOUT IT 2 (1995).

11. PATHS TO CLOSURE, *supra* note 9, at 11; *see also* 1 OFFICE OF ENVTL. MGMT., U.S. DOE, THE 1996 BASELINE ENVIRONMENTAL MANAGEMENT REPORT 4-2 (1996). Even after DOE completes cleanup, it will need to conduct long-stewardship activities at a majority of sites an activity that will require an undetermined amount of additional funding. *See* OFFICE OF ENVTL. MGMT., U.S. DOE, FROM CLEANUP TO STEWARDSHIP 44 (1999).

12. Starting in 1969 with the National Environmental Policy Act (NEPA), Congress proceeded throughout the 1970s to enact environmental legislation applicable to the federal government. *See* 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §2-209 (enacted in 1970); the Clean Air Act Amendments of 1970 (CAA), Pub. L. No. 91-604, 84 Stat. 1676; the Clean Water Act (CWA), 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607; the Endangered Species Act of 1973, 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18; Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§6901-6992k, ELR STAT. 1001-11011; Safe Drinking Water Act of 1976, 42 U.S.C. §§300f-300j-26, ELR STAT. SDWA §§1401-1465.

13. The first landmark case addressing the question was fought and lost by the AEC, in 1971, when the agency could not escape the reach of NEPA. *Atomic Energy Comm'n v. Calvert Cliffs Coordinating Comm.*, 449 F.2d 1109 (D.C. Cir. 1971).

14. *See* F.G. GOSLING & TERRENCE R. FEHNER, HISTORY DIVISION, EXECUTIVE SECRETARIAT, DEPARTMENT OF ENERGY, CLOSING THE CIRCLE: THE DEPARTMENT OF ENERGY AND ENVIRONMENTAL MANAGEMENT, 1942-1994, 34 (Draft 1994) [hereinafter CLOSING THE CIRCLE]. A number of events during the 1980s attracted intense public scrutiny to DOE. In 1983, DOE admitted to releasing two million pounds of mercury from the Y-12 plant at Oak Ridge between 1950-1977. In 1984, a DOE contractor at the Fernald facility in Ohio announced that it

had released 275 pounds of radioactive uranium dust during the previous month. *Id.* at 42-43. The Chernobyl accident in the Soviet Union brought attention to DOE's aging nuclear weapons facilities. *Id.* at 46. In 1988, a power surge occurred during attempts made to restart the P production reactor at Savannah River. *Id.* at 51. These events attracted increased congressional oversight, and when Reagan left office, attitudes within the executive changed, culminating in the well-known Federal Bureau of Investigation (FBI) raid of Rocky Flats in 1989 as part of a U.S. Department of Justice (DOJ) investigation into violations of environmental laws. *Id.* at 63.

15. Because DOE generated, stored, and disposed of vast amounts of waste, it focused its resistance on RCRA. *See* Legal Envtl. Assistance Found. v. Hodel, 586 F. Supp. 1163, 14 ELR 20425 (E.D. Tenn. 1984) (arguing unsuccessfully that regulation under RCRA would be inconsistent with the AEA because the AEA precludes state regulation, places authority to set standards for waste disposal with DOE, and prevents dissemination of restricted data); *Sierra Club v. Department of Energy*, 734 F. Supp. 946, 20 ELR 21044 (D. Colo. 1990) (arguing unsuccessfully that RCRA's exclusion of "source, special nuclear, and by-product material" applies to mixed wastes). DOE and the DOJ have also asserted, out of court, that DOE is not subject to unilateral administrative orders under any environmental law based on the constitutionally grounded "unitary theory" of the executive, and is not subject to suit by the U.S. Environmental Protection Agency because it would not present a justiciable conflict. *See* ADVISORY COMMITTEE ON EXTERNAL REGULATION OF DOE NUCLEAR SAFETY, DRAFT STAFF PAPER—ENFORCEMENT AGAINST FEDERAL AGENCIES 1-2 (1995).

16. *See* CLOSING THE CIRCLE, *supra* note 14, at 51-52.

17. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

18. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

19. *Hancock v. Train*, 426 U.S. 167, 179, 6 ELR 20555, 20558 (1976) ("an authorization of state regulation is found only when and to the extent there is a 'clear congressional mandate,' 'specific congressional action' that makes this authorization . . . 'clear and unambiguous'") (citations omitted); *see infra* notes 27-67 and the accompanying texts' discussion on sovereign immunity.

20. *Department of Energy v. Ohio*, 503 U.S. 607, 628, 22 ELR 20804, 20809 (1992).

21. 503 U.S. 607, 22 ELR 20804 (1992) (*DOE v. Ohio*).

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(FFCA),²² which amended RCRA and partially overturned the Supreme Court's decision.²³ Only seven years later, however, the NNSA Act may have provided the nuclear weapons enterprise even greater sovereign immunity protections than those addressed in *DOE v. Ohio*, with the following section: "(a) COMPLIANCE REQUIRED—The Administrator shall ensure that the Administration complies with all applicable environmental, safety, and health statutes and substantive requirements."²⁴ This language is much more vague and narrow than that analyzed by the Court in several cases involving waivers in environmental laws.²⁵ The NAAG has repeatedly voiced its argument that because the language is so ambiguous, Supreme Court precedent requiring unequivocal waivers demands a narrow reading that would relieve the NNSA from compliance with environmental regulations, permits, orders, agreements, court decrees, or nonsubstantive requirements.²⁶ The U.S. General Accounting Office (GAO) and some members of Congress have asserted in response that NNSA Act §3261 does not constitute a waiver at all, but rather, acts as a directive to ensure NNSA compliance with existing environmental laws, including any waivers of sovereign immunity.²⁷

This Dialogue will analyze the language of the NNSA Act and the arguments pertaining to the question of sovereign immunity, explore the potential implications, and assess the possibilities for clarifying NNSA's responsibilities toward the environment. First, this Dialogue will outline the law of sovereign immunity and how it applies under environmental laws. Second, the Dialogue will address the language of the NNSA Act, set forth both the GAO's and the

NAAG's position, and then offer an alternative analysis assessing the Act's affect on current waivers of sovereign immunity. Finally, the Dialogue will conclude by offering possible solutions to clarify NNSA's mandate to comply with all environmental laws and regulations.

Sovereign Immunity

The Test

The doctrine of sovereign immunity has its origins in English common law.²⁸ Although the U.S. Constitution did not specifically incorporate the doctrine of sovereign immunity,²⁹ the doctrine emerged in U.S. courts beginning in the early 1800s.³⁰ With the adoption of the English doctrine, the courts also, rather blindly, adopted English justifications. As noted in one early case:

it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.³¹

However, even at this early stage some questioned the applicability of the doctrine to the U.S. political structure.³² Today, critics continue to argue that the doctrine is outdated, unnecessary, and, potentially dangerous, as evidenced by the current state of the environment at DOE facilities.³³ Yet some consider maintenance of the separation of powers and

22. Federal Facility Compliance Act of 1992, 102-386, 106 Stat. 1505 (amending scattered sections in 42 U.S.C. §§6901-6961).

23. Congress did not similarly amend the CWA and therefore federal facilities are not subject to punitive penalties for past violations of the CWA.

24. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, §3261(a), 113 Stat. 512, 967 (1999).

25. See *infra* notes 44-53, 59-66 and accompanying text.

26. See NAAG Letter, *supra* note 6, at 2; Letter from Ken Salazar, Attorney General of Colorado, Co-Chair, Environmental Committee, National Association of Attorneys General and Bill Lockyear, Attorney General of California to Rep. Joe Barton, Chairman, Subcommittee on Energy and Power, U.S. House of Representatives and Rep. Rick Boucher, Member, Subcommittee on Energy and Power, U.S. House of Representatives (Apr. 21, 2000) [hereinafter NAAG Analysis] (on file with authors).

27. See Letter from Robert P. Murphy, General Counsel, General Accounting Office to Rep. Mac Thornberry, Chairman, Special Oversight Panel on Department of Energy Reorganization, Committee on Armed Services, U.S. House of Representatives 4 (May 8, 2000) (on file with authors) [hereinafter GAO Letter]. It is important to note that Representative Thornberry was one of the chief congressional proponents of the NNSA Act. His request for a GAO review was widely perceived as seeking cover for the consequences of his legislation. See also Letter from Sen. Floyd D. Spence, Chairman, House Armed Services Committee and Sen. John Warner, Chairman, Senate Armed Services Committee to Michael O. Leavitt, Chairman, National Governors Association and Attorney General, Christine O. Gregoire, President, National Association of Attorneys General 2 (Sept. 14, 1999) reprinted in 145 CONG. REC. H8302 (daily ed. Sept. 15, 1999).

28. For an exposition on the doctrine's common-law roots see generally, *Briggs v. A. Light Boat*, 93 Mass. 157 (1865); see also generally Louis L.

Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

29. Courts looking for a constitutional basis generally cite to the Supremacy Clause, U.S. CONST. art. VI, cl. 2., or the Plenary Powers Clause, U.S. CONST. art. I, §8, cl. 17. See, e.g., *Hancock v. Train*, 426 U.S. 167, 178, 6 ELR 20555, 20558 (1976).

30. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821); *United States v. Clarke*, 33 U.S. 436, 443 (1834) (holding the "United States are not suable of common right, a party . . . must bring his case within the authority of some act of Congress"); *United States v. McInemore*, 45 U.S. 286, 288 (1846) ("government is not liable to be sued, except with its own consent, given by law"); *The Siren*, 74 U.S. 152, 154 (1868) (the United States "cannot be subject to legal proceedings at law or in equity without their consent").

31. *A. Light Boat*, 93 Mass. at 176. This justification echoes the legal fiction attached to the English doctrine that the "King can do no wrong." See *United States v. Nordic Village*, 503 U.S. 30, 43 n.9 (1992) (J. Stevens dissenting) citing 1 WILLIAM BLACKSTONE, COMMENTARIES *246.

32. See *United States v. Lee*, 106 U.S. 196, 206 (1882) ("As we have no person in this government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests.")

33. See, e.g., John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U. L. REV. 1121 (1993); Randall S. Abate & Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L.J. 1 (1995); Elizabeth Kunding Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203 (1991); Stan Millan, *Federal Facilities and Environmental Compliance: Toward a Solution*, 36 LOY. L. REV. 319 (1990); Michael W. Granein & Dirk A. Dunning, *Federal Sovereign Immunity: How Self-Regulation Became No Regulation at Hanford and Other Nuclear Weapons Facilities*, 21 GONZ. L. REV. 83 (1995-1996).

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the protection of the government from legal actions seeking damages sound reasoning for maintaining federal sovereign immunity.³⁴

Over the past century, the Supreme Court has repeatedly returned to the doctrine establishing a progressively narrower test for when and to what extent Congress has waived the government's immunity.³⁵ Finding the doctrine's basis in the Supremacy Clause and Plenary Powers Clause of the Constitution,³⁶ the Court's test rests on the principle that "the activities of the Federal Government are free from regulation by any state."³⁷ A state may regulate federal facilities "only when and to the extent that congressional authorization is clear and unambiguous."³⁸ Therefore, congressional waivers of sovereign immunity must be "unequivocally expressed."³⁹ Courts will construe all waivers "strictly in favor of the sovereign" and cannot "enlarge [waivers] . . . beyond what the language requires."⁴⁰ Most recently, the Supreme Court has taken the traditional rule one step further by insisting that an unequivocal expression be found in the statutory text and "[i]f clarity does not exist there, it cannot be supplied by a committee report."⁴¹

Waivers of Sovereign Immunity in Environmental Legislation

Many of the environmental laws passed in the 1970s envisioned a significant role for the states in implementing and enforcing regulatory mandates.⁴² This model provided ample opportunity for the Supreme Court to assess congressional attempts to relinquish federal supremacy and waive sovereign immunity. The Court did so in three primary cases the outcomes of which fueled criticism of the Court's test⁴³ and forced Congress to repeatedly clarify its intent.⁴⁴

The Court decided the first two cases—*Hancock v. Train* and *Environmental Protection Agency v. California (EPA v. California)*—consecutively in 1976.⁴⁵ Both cases addressed the question of whether federal facilities were required to obtain permits issued by a state under a federally delegated program.⁴⁶ The language the Court addressed was virtually identical in each act. Both the Clean Air Act (CAA)⁴⁷ and the CWA directed all branches of the federal government engaged in activities regulated under the legislation "to comply with Federal, State, interstate, and local requirements . . . to the same extent that any person is subject to such requirements."⁴⁸ The Court reached the same conclusion in both cases—no reading of the statutes reached the "requisite degree of clarity" to subject federal installations to state permit programs.⁴⁹ Simply stated, neither section demands that federal installations comply with "all" state requirements.⁵⁰ Thus, the Court's conclusion meant that while federal facilities must comply with state standards, the states have no control over the implementation or enforcement of those standards.

In both opinions, the Court noted that if Congress disagreed with the Court's opinion, "it need only amend the Act to make its intention manifest."⁵¹ In response, Congress wasted little time in doing so. First, in 1976, Congress passed RCRA, which explicitly addressed the Supreme Court's opinion by mandating federal agency compliance with "all . . . requirements . . . substantive or procedural (including . . . any requirement respecting permits and any other requirement whatsoever)."⁵² Congress then amended the CAA, the CWA, and the Safe Drinking Water Act,⁵³ which contained a similar provision, incorporating identical language into the statutes' federal facility provisions.⁵⁴ Con-

34. See Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992). For assessments of these justifications see generally, John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771 (1995); Hocking, *supra* note 33, at 207-12.

35. In particular, commentators have asserted that three cases in the 1990s have transformed a rule of strict construction into a clear statement rule that requires an unequivocal expression of congressional intent on the face of the statute. See Nagle, *supra* note 34; see also William N Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules and Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992). According to an accurate reading by Nagle, the cases establish that statutory purpose, legislative history, and a reasonable interpretation of ambiguous language are irrelevant factors in construing waivers of sovereign immunity. *Ardestani v. Immigration & Naturalization Serv.* 502 U.S. 129 141-50 (1991) (statutory purpose); *United States v. Nordic Village*, 503 U.S. 30, 37 (1992) (legislative history); *DOE v. Ohio*, 503 U.S. 607, 625-26, 22 ELR 20804, 20808 (ambiguity).

36. U.S. CONST. art. VI, cl. 2 (Supremacy Clause); *Id.* art. I, §8, cl. 17 (Plenary Powers Clause).

37. *Hancock v. Train*, 426 U.S. 167, 178, 6 ELR 20555, 20558 (1976) (quoting *Mayo v. United States*, 319 U.S. 441, 445 (1943)); see also *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

38. *EPA v. California ex. rel. State Water Res. Control Bd.*, 426 U.S. 200, 211, 6 ELR 20563 (1976) (*EPA v. California*).

39. *DOE v. Ohio*, 503 U.S. at 615, 22 ELR at 20805; *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980).

40. *DOE v. Ohio*, 503 U.S. at 615; 22 ELR at 20805 (citations omitted).

41. *United States v. Nordic Village*, 503 U.S. 30, 37 (1992).

42. For a general discussion and specific examples see ROBERT PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 118-25 (2d ed. 1996).

43. See Nagle, *supra* note 34, at n.132 (collecting sources).

44. See *infra* notes 54 and 67 and accompanying text.

45. 426 U.S. 167, 178, 6 ELR 20555, 20558 (1976) (decided June 7, 1976); 426 U.S. 200, 6 ELR 20563 (1976) (decided June 7, 1976).

46. *Hancock* involved the CAA and *EPA v. California* the CWA.

47. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

48. *Id.* §7418(a), ELR STAT. CAA §118(a); 33 U.S.C. §1323(a), ELR STAT. FWPCA §313(a).

49. *EPA v. California*, 426 U.S. at 227, 6 ELR at 20570; see also *Hancock v. Train*, 426 U.S. at 198, 6 ELR at 20562 (holding that "the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity").

50. *Hancock v. Train*, 426 U.S. at 182, 6 ELR at 20559.

51. *Id.* at 198, 6 ELR at 20562; see also *EPA v. California*, 426 U.S. at 227, 6 ELR at 20570 (suggesting that if Congress disagreed with the Court's opinion it should "legislate to make that intention manifest").

52. See 42 U.S.C. §6961, ELR STAT. RCRA §6001.

53. *Id.* §§300f-300j-26, ELR STAT. SDWA §§1401-1465.

54. See *id.* §7418(a)(2)(A), ELR STAT. CAA §118; 33 U.S.C. §1323(a)(2)(A), ELR STAT. FWPCA §313(a)(2)(A); 42 U.S.C. §300j-6(a), ELR STAT. SDWA §1447.

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gress also pronounced that the amendments clarified Congress' original intent, they did not expand the existing waivers.⁵⁵

During the 1980s, after Congress settled the issue of substantive and procedural requirements, a new argument arose regarding whether current waivers in environmental laws allowed for the imposition of "punitive" civil penalties against federal facilities.⁵⁶ Applying the Court's test requiring an unequivocal waiver, several courts reached opposing conclusions.⁵⁷ This split prompted attention first from Congress and eventually the Supreme Court.

As the issue made its way through the courts, states voiced increasing concerns regarding environmental problems at nuclear weapon facilities while DOE faced concerns over national security.⁵⁸ It was in this climate that a multiyear debate ensued in Congress about the FFCAct, which sought to "clarify"⁵⁹ the waiver of sovereign immunity many contended already existed in RCRA. State officials sought to secure their authority for imposing fines and penalties and unilateral administrative orders against DOE and other federal agencies.⁶⁰ The Bush Administration con-

tended that it would open a blank checkbook for states to make a raid on the federal treasury, and could further undermine their efforts to get the nuclear weapons factories up and running again, which until 1990 it was still trying to do.⁶¹ In 1991, the Supreme Court, rather than Congress, provided an initial resolution to the debate.

The Supreme Court resolved the circuit split by holding in favor of DOE.⁶² The decision relied on the settled jurisprudence of interpreting waivers of sovereign immunity narrowly. First, the Court addressed the citizen suit provisions that allowed for the imposition of civil penalties against "any person" for violating the statutes' requirements.⁶³ The Court noted that both RCRA and CWA citizen suit provisions include the United States as a "person" subject to suit. However, both sections incorporate through reference the civil penalty provisions that utilize the generic statutory definition of the term "person," which does not include the United States.⁶⁴

The Court next turned to the federal facility provisions of each act.⁶⁵ Despite Congress' inclusion of the term "all requirements" in response to *Hancock*, the Court held

55. See S. REP. NO. 95-370 (1977), reprinted in 1977 U.S.C.C.A.N. 4326 addressing the CWA and stating that:

The act has been amended to indicate 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 the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.

H.R. REP. NO. 95-294 (1977), reprinted in 1977 U.S.C.C.A.N. 1077 (addressing the CAA and stating that the purpose of this provision is to "clarify that the Federal facilities must comply with 'procedural' as well as 'substantive' requirements").

56. "Punitive" civil penalties are those meant to pollute for past violations as opposed to "coercive" fines that a court may impose to force compliance with injunctions or other court orders. *DOE v. Ohio*, 503 U.S. 607, 613-14, 22 ELR 20804, 20805 (1992). In *DOE v. Ohio*, DOE conceded that RCRA and the CWA waived sovereign immunity for coercive fines. *Id.* at 614, 22 ELR at 20805.

57. See *Meyer v. U.S. Coast Guard*, 644 F. Supp. 221, 223, 17 ELR 20128, 20129 (E.D.N.C. 1986) (holding RCRA's waiver of sovereign immunity did not allow for the imposition of civil penalties); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601, 603-05, 17 ELR 20344, 20245-46 (E.D. Cal. 1986) (holding that under the citizen suit provision of RCRA, penalties could only be assessed against "persons" that did not include the United States); *United States v. Washington*, 872 F.2d 874, 877, 19 ELR 20755, 20756-57 (9th Cir. 1989) (holding Congress did not expressly waive sovereign immunity from civil penalties assessed by state agencies); *Mitzelfelt v. Department of the Air Force*, 903 F.2d 1293, 1295-96, 20 ELR 21138, 21139-40 (10th Cir. 1990) ("Congress knew how to indicate an intent to waive federal sovereign immunity to state civil penalties and it did not do so when it enacted RCRA"); *but see*, *Maine v. Department of the Navy*, 702 F. Supp. 322, 330, 19 ELR 20614, 20617-18 (D. Me. 1988) (holding RCRA subjects federal government to civil penalties imposed by state law); *Ohio v. Department of Energy*, 904 F.2d 1058, 20 ELR 20953 (6th Cir. 1990) (holding that both the CWA and RCRA subject federal agencies to state imposed civil penalties), *cert. granted*, 500 U.S. 951 (1991).

58. It was during this time that increasing attention focused on DOE's nuclear weapons operations. From 1988-1989, a team of reporters from the *New York Times* published almost daily articles about the environmental and safety problems with the nation's aging nuclear weapons facilities. William Lanouette, *Tritium and the Times: How the Nuclear Weapons-Production Scandal Became a National Story*, JFK School of Government, Harvard University, Research Paper R-1 (May 1990). DOE's woes reached a crisis stage when the inability to operate the

facilities in compliance with environmental and safety requirements brought the weapons factories to a halt for the first time since the Manhattan Project. The last reactor producing nuclear weapons material was shut down in August 1988. The FBI raided the Rocky Flats site in June 1989 with a search warrant seeking evidence of environmental crimes. The last plutonium pit was produced there in December 1989. For the first time in history the Secretary of Energy reported to the White House that he was unable to meet the requirements set forth in the secret Nuclear Weapons Stockpile memorandum, which details the nation's annual nuclear weapons requirements. See *CLOSING THE CIRCLE*, *supra* note 14. Nuclear weapons production requirements had collided head on with environmental protection requirements and after decades of losses, the environment won.

59. States did not want to make any admission that could undermine their contention that the waiver already existed, which could affect ongoing enforcement litigation.

60. See, e.g., *Oversight Hearing Footnote—Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong. 86 (1987) (statement of Anthony J. Celebrezze Jr., Ohio Attorney General).

61. Because of its desire to restart the nuclear weapons production facilities, DOE entered into several compliance agreements with states. A senior DOE official later acknowledged that production demands drove the increasing number of compliance agreements:

We got into the compliance agreements, in my view, because we had to stay in production to produce the requirements for the military. And we had to give them their due in the jurisdictions where we left messes, and we should do that; we should do more, better, sooner, quicker. I mean we really mucked up Tennessee. I mean that is a dirty, dirty place. It is not as dirty as Hanford.

Reflections on Tenure as the Under Secretary, John C. Tuck (conversation conducted with Dr. Benjamin Franklin Cooling and Dr. F.G. Gosling of the History Division, Office of the Executive Secretariat, U.S. DOE, on January 17, 1993).

62. *DOE v. Ohio*, 503 U.S. 607, 629, 22 ELR 20804, 20809 (1992).

63. See 33 U.S.C. §1365, ELR STAT. FWPCA §505; 42 U.S.C. §6972, ELR STAT. RCRA §7002.

64. *DOE v. Ohio*, 503 U.S. at 618-20, 22 ELR at 20806.

65. See 33 U.S.C. §1323, ELR STAT. FWPCA §313; 42 U.S.C. §6961, ELR STAT. RCRA §6001.

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that RCRA did not waive sovereign immunity in respect to “punitive” civil penalties.⁶⁶ In respect to the CWA’s federal facilities provision, the Court held that the term “sanctions” meant “coercive” but not “punitive” civil penalties,⁶⁷ and the phrase allowing for the imposition of “civil penalties arising under federal law” did not include penalties for violations of state statutes implementing a federally delegated CWA regulatory program.⁶⁸

Congress passed the FFCAct in 1992 and thereby clarified the waiver of sovereign immunity in RCRA by making the federal government subject to “all civil and administrative penalties and fines, whether such penalties or fines are punitive or coercive in nature”⁶⁹ When the FFCAct passed, there was some suspense about whether President Bush would sign it or veto it. DOE advised him to veto it. Fortunately, President Bush listened to his better angels, and signed the bill into law aboard Air Force One on October 6, 1992.

DOE’s parade of horrors about the FFCAct never materialized. DOE’s contractors identified and used new technologies, finding new profits in environmental protection. The U.S. Environmental Protection Agency worked to approve new treatment technologies for mixed waste. DOE’s programmatic environmental impact statement was refocused to support the decisionmaking necessary for siting new treatment facilities; and states cooperated with DOE in an extensive dialogue process facilitated by the National Governor’s Association (NGA). No “raid” on the federal treasury ensued, as DOE had claimed. By 1999, a whole network of mixed waste treatment and disposal facilities was operating relatively smoothly.

The NNSA Act

In 1999, amidst a governmental investigation into China’s acquisition of top secret nuclear weapons data, President Clinton’s Foreign Intelligence Advisory Board (FIAB) issued a report condemning DOE’s security operations.⁷⁰ The board’s report included some scathing assessments of

DOE’s general management capability and performance, including: “[DOE] is a large organization saturated with cynicism, an arrogant disregard for authority, and a staggering pattern of denial.”⁷¹ “[DOE is a] dysfunctional organization that has proven incapable of reforming itself.”⁷²

The report seemed to give voice to a rising tide of discontent with DOE, although there was no clear consensus about the problem, much less a solution. Nonetheless, Congress moved forward on a legislative fix, without benefit of hearings or deliberate airing of views—an object lesson in the congressional proverb: “legislate in haste, repent at leisure.” The FIAB report recommended that Congress reorganize DOE by transferring the management functions of the nuclear weapons research and stockpile programs to either a semi-autonomous agency within DOE or an agency independent of DOE.⁷³ Congress used this recommendation as a catalyst for the creation of the NNSA.⁷⁴

Neither the House nor the Senate versions of the National Defense Authorization Act for fiscal year 2000 contained the wholesale restructuring envisioned by the NNSA Act. The NNSA Act was created in conference and therefore opponents had little time to assess the language before the measure reached the floor. Despite these constraints, opposition flooded congressional offices from a wide variety of sources.⁷⁵ However, because the bill had already gone through conference it was not open to amendment.

Once on the floor of the House, Rep. John Dingell (D-Mich.), former chair and now ranking member of the House Commerce Committee, attempted to have the bill recommitted to conference to clarify the language and address the concerns raised regarding the bill’s potential effect on waivers of sovereign immunity in environmental laws.⁷⁶ The motion to recommit failed, but Representative Dingell’s persistence coupled with the NAAG’s and the public’s response prompted debate and clarification in the legislative history.

Rep. Floyd Spence (R-S.C.) and Sen. John Warner (R-Va.), Chairmen of the House and Senate Armed Services Committee respectively, responded to the NAAG’s and the

66. *DOE v. Ohio*, 503 U.S. at 627-28, 22 ELR at 20808-09.

67. *Id.* at 621, 22 ELR at 20807.

68. *Id.* at 625, 22 ELR at 20808. Of course this language seems to necessarily imply that civil penalties are recoverable for violation of a federally issued permit. To circumvent this problem the Court reasoned that maybe Congress used the expansive phrase “in case some later amendment might waive the Government’s immunity from punitive sanctions” or “[p]erhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already” or “[p]erhaps someone was careless. The question has no satisfactory answer.” *Id.* at 626-27, 22 ELR at 20808. Justice White responded by noting, “[i]t is one thing to insist on an unequivocal waiver of sovereign immunity. It is quite another to ‘impute to Congress a desire for incoherence’ as a basis for rejecting an explicit waiver.” *Id.* at 636, 22 ELR at 20811 (J. White, concurring in part, dissenting in part) (quoting *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 394 (1939)).

69. 42 U.S.C. §6961, ELR STAT. RCRA §6001.

70. PRESIDENT’S FOREIGN INTELLIGENCE ADVISORY BOARD, SCIENCE AT ITS BEST, SECURITY AT ITS WORST: A REPORT ON SECURITY PROBLEMS AT THE U.S. DEPARTMENT OF ENERGY I (1999) (“Our bottom line: DOE represents the best of America’s scientific talent and

achievement, but it has also been responsible for the worst security record on secrecy that the members of this panel have ever encountered.”).

71. *Id.* at 4.

72. *Id.* at 4.

73. *Id.* at IV.

74. See H.R. CONF. REP. NO. 106-301, at 927 (1999).

75. See, e.g., NAAG Letter, *supra* note 6; Letter from Leo P. Duffy, former Assistant Secretary of Energy for Environmental Restoration and Waste Management; Thomas Grumbly, former Assistant Secretary of Energy for Environmental Management; and Tara O’Toole, former Assistant Secretary of Energy for Environment, Safety, and Health to Sen. John Warner (July 20, 1999) (on file with authors); Letter from Maureen Eldredge, Alliance for Nuclear Accountability, and David Adelman, Natural Resources Defense Council to William J. Clinton, President of the United States (July 21, 1999) (urging a veto) (on file with authors).

76. 145 CONG. REC. H8298 (daily ed. Sept. 15, 1999). Rep. John Dingell (D-Mich.) not only argued that the legislation would have unintended effects on existing laws, but also was extremely upset at the process by which the Conference inserted the NNSA provisions. Representative Dingell asserted that the NNSA provisions were not germane to the legislation and their inclusion exceeded the scope of the conference. *Id.*

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NGA's concerns in a letter, which they later placed in the *Congressional Record*.⁷⁷ The congressmen explained that the NNSA Act "does not amend any existing provision of law granting sovereign immunity or modify established legal precedent interpreting the applicability or breadth of such waivers of sovereign immunity."⁷⁸ Reps. Ike Skelton (D-Mo.) and Floyd Spence echoed these sentiments in a colloquy, and various members of both the House and Senate supported the conclusion.⁷⁹

The Administration expressed some last minute concerns regarding NNSA Act §3261.⁸⁰ The statement of Administration position included a veto threat about the NNSA Act, specifically citing the loss of authority by the Secretary of Energy and the concerns about environmental enforcement. However, vetoing the whole Defense Authorization Act, extraordinary in normal times, was impossible in late 1999 for a number of reasons. First, given the rising tide of concern about nuclear spies, the White House did not want to appear to be opposing Congress' attempt to respond to espionage in the nuclear weapons labs, reasonable or not. Second, the bill also included a pay raise for military personnel, and the White House did not want to appear to oppose such a raise—a judgment that has since proved prescient during the 2000 campaign. Third, the White House did not appear to have the votes, given the tally on the Dingell Amendment. The concerns DOE communicated to the White House had simply been too little too late. Therefore, President Clinton signed the NNSA Act into law as part of the overall fiscal year 2000 National Defense Authorization Act.

Debate continued after passage of the NNSA Act and prompted Reps. Joe Barton (R-Tex.), John Dingell, Tom Sawyer (D-Ohio), and Ted Strickland (D-Ohio) to draft an amendment intended to clarify the language.⁸¹ In response to the amendment, Rep. Mac Thornberry (R-Tex.) requested that the GAO analyze the effect of the original bill on existing waivers of sovereign immunity and the efficacy of the amendment intended to clarify the language.⁸² The GAO in a

brief analysis, with minimal supporting authority, concluded that the NNSA Act will have no effect on existing law and that the proposed amendment would actually expand existing waivers.⁸³ Once again, the NAAG weighed in by offering an assessment of the GAO's argument and expanding on its original conclusion that the NNSA Act supersedes existing waivers.⁸⁴

The GAO's Position

The GAO's letter to Representative Thornberry, concluded that the NNSA Act does not affect existing environmental laws, including waivers of sovereign immunity.⁸⁵ The analysis focused on two sections of the NNSA Act. First, the GAO points to NNSA Act §3296, which provides:

[u]nless otherwise provided in this title, all provisions of law and regulations in effect immediately before the effective date of this title that are applicable to functions of the Department of Energy [that have been transferred to the NNSA] . . . shall continue to apply to the corresponding functions of the Administration.⁸⁶

The GAO asserts that current environmental statutes "contain broad waivers of sovereign immunity, which [based on NNSA Act §3296] 'continue to apply' to the NNSA as they do to DOE."⁸⁷

The GAO letter also addressed the effect of NNSA Act §3261.⁸⁸ The GAO concluded that Congress did not intend NNSA Act §3261 to constitute a waiver of sovereign immunity; rather, Congress included the section to clarify NNSA's responsibility to comply with all existing environmental laws.⁸⁹ Therefore, the GAO asserts, NNSA Act §3261 is not a provision that falls under the qualifying language of the savings clause, which states "unless otherwise provided in this title."⁹⁰ Moreover, since existing waivers of sovereign immunity require compliance with both substantive and procedural provisions, the language "and substantive requirements" in NNSA Act §3261 was included to en-

77. *Id.* at H8302.

78. *Id.*

79. *Id.* at H8305 ("it was the clear intent and action of the conferees to not in any way supersede, diminish, or set aside existing waivers of sovereign immunity agreements between DOE and the States") (statement of Representative Spence); *id.* at H8305 ("no one intends this legislation to serve as a vehicle or an attempt in any way to relitigate or reopen the Federal Facility Compliance Act") (statement of Rep. Skelton); *id.* at H8297 ("there is nothing in this bill that would amend existing environmental, safety, and health laws or regulations, nor is there any intent to limit the States' established regulatory roles pertaining to Department of Energy operations or ongoing cleanup activities") (statement of Rep. Norman Sisisky (D-Va.)); *id.* at H8299 ("this bill does not change any of the waivers of sovereign immunity that the attorneys general have been concerned about"); *see also* 145 CONG. REC. S11194 (daily ed. Sept. 22, 1999) ("Section 3261 does not affect or abrogate existing waivers of sovereign immunity in environmental laws"); *id.* at S11104 ("Never was it intended that the semi-autonomous agency would be immune from any environmental law.") (statement of Sen. Pete Domenici (R-N.M.)).

80. DOE did not express any concerns about these provisions until it was too late. Ironically, some of the same individuals who had fought against the FFC Act in Congress and in DOE were then in a position to dampen and delay the Administration's concerns. The principle argument used by DOE was that nothing should be included that could weaken the authority

of the Secretary, which was exactly the intent of Congress in passing the NNSA Act.

81. H.R. 4288, 106th Cong. (2000). An identical amendment has since been offered in the Senate. S. 2597, 106th Cong. (2000).

82. *See* GAO Letter, *supra* note 27.

83. *Id.* Following a 25% cut in funding, the GAO has suffered severe staffing problems and has exhibited an eagerness to please congressional patrons. Representative Thornberry was a chief advocate of the NNSA and has now become its chief defender in Congress.

84. NAAG Analysis, *supra* note 26.

85. GAO Letter, *supra* note 27, at 2.

86. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, §3296, 113 Stat. 512, 970-71 (1999).

87. GAO Letter, *supra* note 27, at 2.

88. *Id.* at 4. To reiterate, NNSA Act §3261 directs the Administrator of the NNSA to ensure the Administration "complies with all applicable environmental, safety, and health statutes and substantive requirements." National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, §3261, 113 Stat. 512, 967 (1999).

89. GAO Letter, *supra* note 27, at 4.

90. *Id.*

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 sure NNSA compliance with DOE orders.⁹¹

The NAAG's Response

The NAAG has remained the most vocal opponent of NNSA Act §3261 and has offered the most thorough analysis to date of the section's possible legal implications. Based on the Supreme Court's strict interpretation of sovereign immunity waivers, the NAAG's analysis deserves considerable consideration. If a court deemed NNSA Act §3261 to constitute a waiver of sovereign immunity, the ambiguity of the section combined with the requirement that waivers be narrowly construed would virtually eliminate state regulation of NNSA activities because NNSA Act §3261 makes no explicit reference to regulations, orders, permits, penalties, etc.

The similarity of NNSA Act §3261 to CAA §118 addressed in *Hancock*, prompted the NAAG's concern.⁹² As explained above, the Supreme Court held that the term "requirements" in the CAA did not include procedural requirements such as permits or enforcement mechanisms because the language did not specify "all" requirements.⁹³ Thus, based on the Court's reasoning, Congress must explicitly define the scope of a state's regulatory authority over federal facilities.

NNSA Act §3261 remains completely ambiguous as to what extent the NNSA must comply with state regulation and enforcement. NNSA Act §3261 directs compliance with all applicable "environmental statutes and substantive requirements."⁹⁴ The GAO read this section to direct the NNSA to comply with all requirements of environmental statutes, substantive or procedural, including waivers of sovereign immunity.⁹⁵ The NAAG responded that the GAO's reading, while possible, would leave the "phrase 'substantive requirements' as mere surplusage, unless one accepts the GAO's strained interpretation of that phrase to mean 'DOE orders.'"⁹⁶ According to the Supreme Court,

two conflicting readings that prove plausible means that the waiver is ambiguous and the narrower reading controls.⁹⁷

The NAAG next addressed the GAO's argument that the savings clause in NNSA Act §3296 provides for the continued application of existing sovereign immunity waivers in environmental laws.⁹⁸ The NAAG expressed its concern that because the section contains the phrase "unless otherwise provided in this title," a court will read the section in conjunction with NNSA Act §3261 to actually limit existing waivers.⁹⁹ The section clearly contemplates that the NNSA Act does have some effect on existing law. However, "section 3296 itself provides no guidance as to which interpretation is correct."¹⁰⁰ Furthermore, like NNSA Act §3261, NNSA Act §3296 only makes reference to existing statutes "not permits, administrative orders, and the like."¹⁰¹ Thus, NNSA Act §3296 only adds to the ambiguity and, therefore, favors a narrow construction.

The Court in the past has turned to legislative history when addressing waivers of sovereign immunity¹⁰²; however, in *United States v. Nordic Village*,¹⁰³ Justice Scalia disavowed this approach. Upon finding that the section in question was subject to two conflicting interpretations and therefore ambiguous, Justice Scalia concluded that "legislative history has no bearing on the ambiguity point."¹⁰⁴ However, lower courts subsequent to *Nordic Village* have looked to legislative history to clarify Congress' intent,¹⁰⁵ and it remains to be seen whether the Supreme Court will adhere to this rule.¹⁰⁶ Given NNSA Act §3261's unquestionable ambiguity and coupled with a clear statement of intent not to change existing law in the legislative history it may prove difficult for a court to ignore.¹⁰⁷

No analysis can entirely resolve the question of whether the NNSA Act §3261 supersedes existing waivers of sovereign immunity. Only the courts could resolve the issue. Nonetheless, the possibility that a court may interpret the NNSA Act to weaken existing waivers of sovereign im-

91. *Id.* DOE issues "orders" to self-regulate activities such as the storage and handling of radioactive waste. Orders guide internal conduct and are not externally enforceable or subject to the Administrative Procedure Act. The GAO asserts that "substantive requirements" was included because NNSA employees are not subject to the control or direction of DOE employees other than the Secretary, which may call into question the effect of DOE orders. *Id.*

92. *Id.* at 2.

93. *Hancock v. Train*, 426 U.S. 167, 182, 6 ELR 20555, 20559 (1976).

94. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, §3261(a), 113 Stat. 512, 967 (1999).

95. GAO Letter, *supra* note 27, at 3.

96. NAAG Analysis, *supra* note 26, at 4. Although not cited by the NAAG, a common rule of statutory construction requires that "each word in a statute, if possible, be given effect." *Crandon v. United States*, 494 U.S. 152, 171 (1990).

97. *United States v. Nordic Village*, 503 U.S. 30, 37 (1992); *DOE v. Ohio*, 503 U.S. 607, 626 n.16, 22 ELR 20804, 20808 n.16 ("Even assuming an equal likelihood for each intent, our rule requiring a narrow construction of waiver language tips the balance in favor of the narrow reading.")

98. GAO Letter, *supra* note 27, at 3.

99. NAAG Analysis, *supra* note 26, at 5.

100. *Id.*

101. *Id.*

102. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 212-216 (1983); *Hancock v. Train*, 426 U.S. 167, 188-90, 6 ELR 20555, 20560-61 (1976); *Block v. North Dakota*, 461 U.S. 273, 288-99 (1983).

103. 503 U.S. 30 (1992).

104. *Id.* at 37.

105. *See Maine v. Department of the Navy*, 973 F.2d 1007, 1010-11, 23 ELR 20211, 20112-13 (1st Cir. 1992); *Sierra Club v. Lujan*, 972 F.2d 312, 314, 23 ELR 20079, 20080 (10th Cir. 1992); *FMC Corp. v. Department of Commerce*, 29 F.3d 833, 24 ELR 21097 (3d Cir. 1994).

106. Despite Justice Scalia's strong declaration in *Nordic Village* against the use of extrinsic evidence, he concurred with a subsequent opinion written by Justice O'Connor that discussed equitable factors as support for construing a waiver of sovereign immunity in favor of the plaintiff. *United States v. Williams*, 514 U.S. 527, 540 (1995). *See Nagle, supra* note 34, at 799.

107. *See, e.g.*, *Ardestani v. Immigration & Naturalization Serv.* 502 U.S. 129 (1991) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.") (citation omitted).

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 munity warrants considerable attention and congressional clarification.

An Alternative Analysis

The NAAG's analysis simply assumes that NNSA Act §3261 constitutes a waiver of sovereign immunity that under the Supreme Court's rule must be interpreted narrowly; however, such an analysis ignores existing waivers and another well-grounded rule. The Supreme Court has established as a "cardinal rule . . . that repeals by implication are not favored."¹⁰⁸ The NNSA Act naturally implicates this rule since Congress has already enacted broad waivers that apply to all arms of the federal government in statutes such as RCRA, the CWA, and the CAA.¹⁰⁹ Therefore, in order for the NNSA Act to constitute a more limited waiver of sovereign immunity, it would have to partially repeal the applicability of these statutes to all arms of the federal government.¹¹⁰

The Supreme Court under a long line of cases has developed a clear rule that strongly suggests the NNSA Act does not evince the requisite congressional intent to affect existing waivers. The rule disfavoring repeals by implication sets forth a strict test and has similar underpinnings to the narrow rule for interpreting waivers of sovereign immunity. However, a series of decisions emanating from the U.S. Court of Federal Claims has concluded that the narrow rule of construction for waivers of sovereign immunity trumps the strict rule disfavoring repeals by implication.¹¹¹ However, this conclusion rests on questionable legal grounds and will be discussed only because it exists and should be dismissed.

1. The Traditional Rule

Under the traditional rule, for a new law to repeal or amend an existing law, Congress' intent must be "clear and manifest."¹¹² If Congress has failed to affirmatively demonstrate its intent to repeal or amend an existing law, "the only per-

missible justification for a repeal by implication is when the earlier and later statutes are irreconcilable," or "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute."¹¹³ Yet, "in either case, the intention of the legislature to repeal must be clear and manifest."¹¹⁴ Where two statutes are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."¹¹⁵

The strict rules requiring clear congressional intent to waive sovereign immunity or supersede existing law function in a similar manner. The courts and commentators have characterized both as clear statement rules, demanding unequivocal expressions of congressional intent.¹¹⁶ Clear statement rules seek to maintain the status quo for the purpose of protecting "weighty and constant values, be they constitutional or otherwise," unless Congress clearly expresses a contrary intent.¹¹⁷ In the case of sovereign immunity, the Court has not specifically pronounced what values it seeks to protect; however, the most valid justifications include separation of powers and protection of the state treasury.¹¹⁸ The rule regarding repeals by implication acts to constrain "judicial discretion in the interpretation of laws,"¹¹⁹ to facilitate the task of legislating by providing a "fundamental rule by which laws are framed."¹²⁰ The rule allows members of Congress to legislate without having to constantly determine and consider potential unintended affects on existing law.¹²¹

Statutes such as RCRA, the CWA, and the CAA all contain explicit waivers of sovereign immunity that apply, by their terms, to all arms of the federal government. By enacting these waivers, Congress has altered the status quo—the federal government is immune from suit. Therefore, under the traditional rule, a court when analyzing the NNSA Act must determine whether Congress clearly intended to affect these existing laws not whether, and to what extent, they intended to affect sovereign immunity.

The importance of the rule against repeal by implication can be seen through an examination of *United States v.*

108. *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)).

109. The waivers of sovereign immunity in each statute apply to "[e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government." 42 U.S.C. §6001(a), ELR STAT. RCRA §1001(a); 33 U.S.C. §1323(a), ELR STAT. FWPCA §313; 42 U.S.C. §7418(a), ELR STAT. CAA §118.

110. The rule disfavoring repeals by implication applies to partial repeals not just to repeals that make an existing statutory provision completely inoperable. *See, e.g., Rodriguez v. United States*, 490 U.S. 522, 525 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017, 14 ELR 20539, 20545 (1984); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976).

111. *See John Muir Mem'l Hosp. v. United States*, 221 Ct. Cl. 843 (1979); *Harris v. United States*, 841 F.2d 1097, 1101 (Fed. Cir. 1988); *St. Luke's Med. Ctr. v. United States*, 22 Cl. Ct. 322, 329 (1991); *Puget Sound Power & Light Co. v. United States*, 23 Cl. Ct. 46, 57 (1991); *St. Vincent's Med. Ctr. v. United States*, 29 Fed. Cl. 165, 170 (1993).

112. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

113. *Posadas*, 296 U.S. at 503; *see also Mancari*, 417 U.S. at 550; *Borden*, 308 U.S. at 188 ("There must 'be a positive repugnancy between the provisions of the new law and those of the old'").

114. *Posadas*, 296 U.S. at 503.

115. *Mancari*, 417 U.S. at 551; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974); *Monsanto Co.*, 467 U.S. at 1017, 14 ELR at 20545.

116. *See United States v. Nordic Village*, 503 U.S. 30, 45 (1992) (J. Stevens, dissenting) (describing majority's rule as requiring a "clear statement"); *United States v. Williams*, 514 U.S. 527, 540 (1995) (J. Scalia, concurring) ("I acknowledge the rule requiring clear statement of waivers of sovereign immunity"); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citing *Mancari* as evidence of a clear statement rule for repeals by implication); *see also Nagle, supra* note 34, at 771; *Eskridge & Frickey, supra* note 35, at 595 n.4.

117. *Astoria Fed. Sav. & Loan*, 501 U.S. at 108.

118. *See generally Krent, supra* note 34.

119. *Astoria Fed. Sav. & Loan*, 501 U.S. at 109.

120. *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985).

121. *See id.* ("Without [the rule], determining the effect of a bill upon the body of preexisting law would be inordinately difficult").

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Hansen.¹²² Justice Scalia authored the opinion in *Hansen* while on the D.C. Circuit Court of Appeals and was joined by Justice Ginsburg (then Judge Ginsburg). Judge Scalia noted that because of the fundamental importance to law-making of the rule against repeal by implication, “[i]t will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important”¹²³ Thus, the opinion offers a thorough example of the process by which a court can determine if Congress intended to repeal or amend by implication an existing law.

In *Hansen*, the existing statute allowed for criminal punishment for anyone within the jurisdiction of a federal agency or department who knowingly provides to that entity false written statements.¹²⁴ The defendant, then Rep. George Hansen (R-Idaho), submitted false statements in financial disclosure documents required under the Ethics in Government Act (EIGA), a law enacted subsequent to the more broad criminal penalty provision.¹²⁵ The EIGA provided only for civil penalties and not criminal punishment.¹²⁶ The court after examining the statutory language and legislative history concluded that Congress did not intend when it enacted the EIGA to preclude the applicability of the more general statute that allows for the imposition of criminal sanctions.¹²⁷

The court in *Hansen* first dismissed an argument made by the defendant that the court described as “a resourceful characterization of the issue” and that the NNSA could similarly assert.¹²⁸ The defendant argued that because prior to the enactment of EIGA he was under no obligation to submit the statements there was no preexisting criminal liability to repeal. Similarly, since there was no NNSA prior to the NNSA Act, there existed no applicable waivers of sovereign immunity that Congress needed to repeal. The court countered that there exists no rule requiring Congress to demonstrate an affirmative intent to apply existing statutes to new obligations. Rather, the rule disfavoring repeals by implication dictates a presumption that “Congress ‘legislates with the knowledge of former related statutes’ . . . and will expressly designate the provisions whose application it wishes to suspend rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction.”¹²⁹ Therefore, since existing waivers in environmental laws apply to any federal agency, without express intent to the contrary, they apply to the newly created NNSA.

The court in *Hansen* turned to the statute and found

no explicit repeal of the existing law. However, the opinion notes that Congress did “take pains” to exclude the application of state or local law.¹³⁰ Similarly, although Congress demonstrated elsewhere in the NNSA Act that it knows how to convey a clear intent to affect existing laws, NNSA Act §3261 does not explicitly repeal or amend existing waivers. NNSA Act §3294 entitled “Conforming Amendments” sets forth specific amendments to other laws necessary to harmonize existing law with the NNSA Act.¹³¹ NNSA Act §3403 contains similar explicit amendments to existing law.¹³² However, neither NNSA Act §3294 nor NNSA Act §3261 explicitly amends, for example, the waiver of sovereign immunity in RCRA to exclude the NNSA.

As noted by the court in *Hansen*, the absence of an explicit exclusion is even more indicative of a lack of congressional intent when the application of existing law is explicitly brought to the attention of the committee reporting the bill.¹³³ As set forth previously, several parties brought to the attention of both the House and Senate Armed Services Committees the potential ambiguity of NNSA Act §3261. If Congress had intended to exclude the application of waivers, it could have done so explicitly; however, instead, as discussed below, this attention prompted the chairmen of those committees, and several other members of Congress, to clarify that NNSA Act §3261 was not intended to preclude application of existing waivers.¹³⁴

The defendant in *Hansen* asserted that Congress’ specification of only civil penalties in the EIGA manifests an intent that criminal sanctions are not applicable. The court countered that a combination of the EIGA’s civil provisions and 18 U.S.C. §1001’s criminal provisions provided a natural progression in penalties. The court noted that even if this reading does not produce perfect “harmony,” “it at least does not begin to approach the ‘irreconcilable conflict’ that the Supreme Court has instructed us to require as textual evidence of an implicit repeal.”¹³⁵

A similar textual harmonization is possible with NNSA Act §3261 and existing waivers. The NAAG asserted in its analysis that a waiver of sovereign immunity does not need to contain the words “waiver of sovereign immunity.”¹³⁶ Although the NAAG’s interpretation that NNSA Act §3261 constitutes a limited waiver of sovereign immunity remains plausible, without explicit language the statute does not foreclose other reasonable interpretations. For example, the GAO asserts that NNSA Act §3261 is not a waiver of sovereign immunity but rather a directive to the Administrator of Nuclear Safety to ensure the NNSA com-

122. 772 F.2d 940 (D.C. Cir. 1985).

123. *Id.* at 944.

124. *Id.* at 943 (citing 18 U.S.C. §1001).

125. Pub. L. No. 95-251, 92 Stat. 1824 (1982) (codified as amended in scattered sections of Titles 2, 5, 18, 26, 28 U.S.C.).

126. *Hansen*, 772 F.2d at 943.

127. *Id.* at 949.

128. *Id.* at 944.

129. *Id.*

130. *Id.* at 945.

131. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, tit. XXXII, §3294, 113 Stat. 512, 970 (1999).

132. *Id.* at 973.

133. *Hansen*, 772 F.2d at 945.

134. See *infra* notes 142-43 and accompanying text.

135. *Hansen*, 772 F.2d at 945.

136. NAAG Analysis, *supra* note 26, at 2.

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plies with existing environmental statutes and DOE orders.¹³⁷ The GAO's interpretation comports with the rule directing that "when there are two acts upon the same subject, the rule is to give effect to both if possible."¹³⁸ Furthermore, conflicting interpretations by the NAAG and the GAO also support the conclusion that Congress if it intended to affect existing waivers has failed to make that intent "clear and manifest."¹³⁹

Although ambiguity in the text alone warrants a finding that the NNSA Act does not affect existing waivers, the conclusion also finds support in the legislative history. Despite similar tests for waivers and repeals by implication, unlike the test for waivers of sovereign immunity, the Supreme Court has never disavowed the use of legislative history.¹⁴⁰ The Supreme Court and lower courts, as evidenced by Justice Scalia's opinion in *Hansen*,¹⁴¹ have utilized legislative history to determine whether Congress intended to affect existing law.¹⁴²

The legislative history for the NNSA Act clearly supports the conclusion that Congress in no way intended to affect existing waivers of sovereign immunity. Since NNSA Act §3261 attracted so much negative attention, the legislative history is particularly replete with statements regarding the Act's effect on existing waivers.¹⁴³ The statements of Congress' intent not to affect existing waivers, contained within the letter from Representative Skelton and Senator Warner to the NAAG and the NGA, echo the statements made throughout the post-conference.¹⁴⁴ The letter specifically states that the committees' intent was "that all existing regulations, orders, agreements, permits, court orders, or non-substantive requirements that presently apply to the programs in question, continue to apply subsequent to the enactment and effective date of [the NNSA Act]"¹⁴⁵ No members of Congress made explicit or implicit statements to the contrary. Moreover, a court should afford the legislative history of the NNSA Act additional weight because the

provisions in question were developed during conference and therefore not open to amendment before passage.¹⁴⁶

NNSA Act §3261 certainly does not manifest Congress' intent to limit existing waivers. In fact, the legislative history indicates the exact opposite intent. NNSA Act §3261 should be read as a directive to the Administrator to ensure compliance with all provisions of environmental statutes, including waivers of sovereign immunity, and the Act should not impair any law unless done so expressly. Such a reading would comport with well-established jurisprudence requiring that repeals by implication be clear and manifest and that two statutes on the same subject, if possible, should both be given effect. If Congress intended a contrary result, then as announced by the Supreme Court in *Hancock*, Congress "should amend the [NNSA] Act to make its intention manifest."¹⁴⁷

2. Cases From the U.S. Court of Federal Claims

The Tucker Act¹⁴⁸ grants jurisdiction to the U.S. Court of Federal Claims (hereinafter federal claims court)¹⁴⁹ to hear "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive Department . . ." ¹⁵⁰ The Tucker Act waives the federal government's sovereign immunity.¹⁵¹ The court has faced situations where Congress has enacted statutes directing claims previously heard in the federal claims court to another forum. Thus, the question arises whether such a modification precludes a claimant from seeking relief in the federal claims court under the Tucker Act. The court has repeatedly held that it does and in so doing has pronounced the rule that "the legal doctrine that consent to suit against the sovereign must be strictly construed overrides the doctrine that repeals by implication are not favored."¹⁵²

The rule would appear to dictate that a court should strictly construe the ambiguity of NNSA Act §3261 in favor

137. GAO Letter, *supra* note 27, at 5. This statement finds support in the legislative history. 145 CONG. REC. S11194 (daily ed. Sept. 22, 1999) ("Section 3261 was included to make clear NNSA's obligation to continue to comply with environmental laws and DOE environmental orders.") (statement of Senator Warner).

138. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *see also* *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

139. *See* *Watt v. Alaska*, 451 U.S. 259, 273, 11 ELR 20378, 20381-82 (1981) (holding that Congress failed to clearly express its intent to repeal existing revenue distribution under the Mineral Leasing Act of 1920 after considering reasonable alternative interpretations for Congress' inclusion of the term "minerals" in the Wildlife Refuge Revenue Sharing Act of 1935).

140. The Court has never clearly defined the role of extrinsic aids to statutory interpretation in the "clear statement" context. This has led Eskridge and Frickey to create categories of clear statement rules based on what the Court will look to in determining congressional intent. They have characterized the test for waiving sovereign immunity as a "super strong" clear statement rule because the Court appears unwilling to look beyond the statutory text. *See* Eskridge & Frickey, *supra* note 35, at 593.

141. Justice Scalia of course announced the opinion that legislative history plays no role in determining the extent of a waiver of sovereign immunity. *United States v. Nordic Village*, 503 U.S. 30, 37 (1992).

142. *See, e.g.,* *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193, 8 ELR 20513, 20522 (1978); *Watt*, 451 U.S. at 282-83, 11 ELR at 20384;

Rodriguez v. United States, 490 U.S. 522, 524-25 (1987); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 172-78 (1976).

143. *See* sources cited *supra* note 78 and accompanying text.

144. *Id.*

145. 145 CONG. REC. H8302 (daily ed. Sept. 15, 1999).

146. It's possible that the Conference Committee knew exactly what type of problems NNSA Act §3261 could pose. However, since the NNSA Act was a small piece of a much larger Defense Authorization this inference should not suggest that Congress intended to partially repeal existing waivers. This sort of "blind gamesmanship" is exactly what the rule is intended to avoid. *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985).

147. *Hancock v. Train*, 426 U.S. 167, 198, 6 ELR 20555, 20563 (1976).

148. 28 U.S.C. §1491.

149. The U.S. Court of Federal Claims was created in 1992. It was formerly the U.S. Claims Court, and it succeeded to the original jurisdiction of the Court of Claims.

150. 28 U.S.C. §1491.

151. *United States v. Testan*, 426 U.S. 392, 397 (1976).

152. *Puget Sound Power & Light Co. v. United States*, 23 Cl. Ct. 46, 57 (1991).

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of the sovereign and find that it does limit existing waivers. However, there exists several reasons why the applicability of the rule is questionable. First, the court fails to cite any direct authority for the rule, the indirect authority the court cites does not support the rule, and no court outside the federal claims court and the Federal Circuit Court has ever adopted it. Second, in correlation with the first, the rule appears unnecessary because the court could have reached the same result by engaging in some analysis rather than simply relying on the rule. Finally, looking beyond the language of the federal claims court rule, the NNSA Act simply does not fit within the category of cases addressed by the federal claims court.

When the federal claims court first announced the rule in 1979, the court cited no direct authority and the Supreme Court decisions the court did cite provide little support.¹⁵³ As a judge on the federal claims court later noted, in neither of these Supreme Court cases “did there appear to have been a pedigreed Tucker Act remedy for the relief sought. In short, there was nothing to repeal.”¹⁵⁴ In *Brown v. General Services Administration*,¹⁵⁵ the Court assumed the petitioner may have had remedies prior to the later enactment of a comprehensive jurisdictional statute.¹⁵⁶ The Court still engaged in a thorough analysis of the statute and its legislative history before concluding that Congress intended the statute to provide the exclusive means of relief.¹⁵⁷ The Court’s thorough analysis certainly does not suggest a more lenient standard for repeals by implication applied because of the narrow rule for waivers of sovereign immunity.

The federal claims court rule seems to operate as an expedient way to dismiss cases that can or should have been

brought elsewhere without engaging in any statutory analysis.¹⁵⁸ In all of the cases in which the court utilized the rule, the statute affecting the repeal directed the claimants to a different forum.¹⁵⁹ The statutes in question provided comprehensive administrative and judicial review procedures with exhaustion and time requirements. The plaintiffs in all but one of these cases had sought relief in the federal claims court because they had failed to comply with the procedures set out in these statutes.¹⁶⁰ If the federal claims court had engaged in the analysis set forth in *Brown* rather than simply inferring an unsupported rule it could have reached the same result. As noted in *Brown*, if immediate access to the courts was available under less demanding statutes it would render the administrative exhaustion and time limitations in the statutes meaningless.¹⁶¹

When Congress enacts a statute that provides for comprehensive administrative and judicial review procedures a natural conclusion is that the statute repeals a broad jurisdictional grant like the Tucker Act.¹⁶² A rule favoring repeals by implication proves unnecessary. Under the traditional rule, a court can find an implied repeal of an earlier statute if the two statutes present an “irreconcilable conflict” or if the later act encompasses the entire field and is intended as a substitute.¹⁶³ Certainly where a later jurisdictional statute provides exhaustion requirements and time limitations for review the statute cannot be interpreted as simply an alternative to a statute allowing a plaintiff to proceed immediately to court.¹⁶⁴ The federal claims court has recognized this but failed to see that this makes its rule favoring repeals by

153. *John Muir Mem’l Hosp. v. United States*, 221 Ct. Cl. 843 (1979) (citing as reference *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932) and *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976); see also *Fiorentino v. United States*, 607 F.2d 963, 969-70 (1979) (citing the same cases for the same proposition). The Court’s continued adherence to the doctrine also seems to be in contravention of Supreme Court precedent. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017, 14 ELR 20539, 20545 (1984) (applying rule disfavoring repeals by implication in holding that Federal Insecticide, Fungicide, and Rodenticide Act does not repeal Tucker Act jurisdiction over takings claim).

154. *St. Vincent’s Med. Ctr. v. United States*, 29 Fed. Cl. 165, 170 n.5 (1993).

155. 425 U.S. 820 (1976).

156. *Id.* at 828.

157. *Id.* at 828-34.

158. This conclusion finds support from Judge Nichols of the federal claims court who writes:

There is . . . a big difference between an implied partial repeal of the Tucker Act in course of providing a seemingly adequate remedy elsewhere than in this court (actuated, perhaps, by a commendable desire to guarantee us an easy life with long vacations) and such an implied partial repeal in course of expressly denying relief elsewhere.

Erika Co. v. United States, 634 F.2d 580, 592 (Ct. Cl. 1980) (J. Nichols, concurring).

159. *John Muir Mem’l Hosp.*, 221 Ct. Cl. at 843; *Fiorentino*, 607 F.2d at 963; *Harris v. United States*, 841 F.2d 1097 (Fed. Cir. 1988); *St. Luke’s Med. Ctr. v. United States*, 22 Cl. Ct. 322 (1991); *St. Vincent’s Med. Ctr.*, 29 Fed. Cl. at 165; *Puget Sound Power & Light Co. v. United States*, 23 Cl. Ct. 46, 57 (1991). In fact, this is the actual basis for the test. In two cases in which the plaintiff had no available remedy under the subsequent

enactment the court failed to invoke the rule. *Erika Co.*, 634 F.2d at 580 (relying on presumption of judicial review); *Fausto v. United States*, 783 F.2d 1020 (Fed. Cir. 1986) (relying on traditional rule against repeals by implication). Both cases reached the Supreme Court and were reversed applying different standards. *United States v. Erika Co.*, 456 U.S. 201 (1982) (examining statutory language and history to find express intent to foreclose review of statutes substantive standards); *United States v. Fausto*, 484 U.S. 439 (1988) (finding rule disfavoring repeals by implication inapplicable because subsequent statute merely repealed judicial interpretation of prior statute not the statute itself).

160. In the one case, the plaintiff was seeking preemptive declaratory relief against the Bonneville Power Administration under a contract in an attempt to preempt the issuance of a rule that could have been challenged after it was promulgated. *Puget Sound Power & Light Co.*, 23 Cl. Ct. at 46.

161. *Brown*, 425 U.S. at 832-33. Of course this is also the best justification for the federal claims court rule. See *St. Luke’s Med. Ctr.*, 22 Cl. Ct. at 329 (“To suppose that, in addition, consent survives as to any year where the provider has failed to exhaust its administrative remedy . . . is to do violence to the whole doctrine of strict construction of the consent to be sued.”). However, the rule is still unnecessary.

162. The conclusion finds support in other contexts. See *Argentine Republic v. Aremeda Hess Shipping Corp.*, 488 U.S. 428, 437 (1989) (holding Congress’ decision to deal comprehensively with foreign sovereign immunity in the Foreign Sovereign Immunities Act precludes suit against foreign government under the Alien Tort Statute).

163. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

164. See *Brown*, 425 U.S. at 832 (“[t]he balance, completeness, and structural integrity of the jurisdictional provision] are inconsistent [with an interpretation] that the judicial remedy afforded . . . was designed merely to supplement other putative judicial relief”).

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implication unnecessary.¹⁶⁵

The federal claims court rule should remain limited to cases in which Congress has directed Tucker Act claims to a different forum. The federal claims court has even acknowledged that the application seems limited to its context.¹⁶⁶ Because the rule has become ingrained, Congress can anticipate its application. However, the rule has never extended beyond the federal claims court and the U.S. Federal Circuit. The rule certainly has no place in respect to the NNSA Act. In NNSA Act §3261, Congress did not create a comprehensive provision that suggests the repeal of an earlier general provision. Therefore, a court interpreting any ambiguity in the language of NNSA Act §3261 should do so in light of the traditional rule disfavoring repeals by implication.

A Congressional Solution

Because Congress has ignored the NAAG's requests for clarification, perhaps the most telling statement in the NAAG's analysis is that "a lengthy history of litigation between states and the federal government makes it clear that federal agencies will resist application of state law at every turn."¹⁶⁷ This statement certainly applies to DOE, which even after Congress' repeated attempts to clarify its intent to make environmental laws fully applicable to federal agencies, has continued to argue for limited waivers of sovereign immunity.¹⁶⁸ Therefore, to avoid litigation, Congress should provide the most immediate resolution to the issue of sovereign immunity by amending and clarifying the NNSA Act.¹⁶⁹

H.R. 4288 provides that the Administrator has the duty to ensure that:

operations and activities of the Administration are executed in full compliance with . . . (e) requirements, whether procedural or substantive, of—

- (1) Federal environmental, safety, and health laws, regulations, and rules including any waivers of Federal sovereign immunity in any such laws;
- (2) State, interstate, or local environmental safety, and health laws, regulations, and rules for which the Federal Government has waived its sovereign immunity;
- (3) orders, permits, licenses, and other directives issued pursuant to the laws, regulations, and rules

and requirements referred to in paragraphs (1) and (2), including—

- (A) civil and administrative fines and penalties, whether coercive or punitive, and whether imposed for isolated, intermittent, or continuing violations;
- (B) fees charges; and
- (C) civil and administrative processes, authorities, and sanctions, including injunctive relief; and
- (4) agreements entered into pursuant to those laws, regulations, and rules.¹⁷⁰

The language reflects much of what Congress has included in current waivers of sovereign immunity and would ensure that a court could not interpret the section as a narrow waiver of sovereign immunity.¹⁷¹ The U.S. Department of Justice (DOJ) recently produced an alternative amendment, which is officially supported by DOE¹⁷²; however, the DOJ's proposed language does little to clarify the ambiguity of §3261 and, therefore, suffers the same potential for a narrow judicial construction.¹⁷³

The GAO asserts in its analysis that the language of H.R. 4288 may expand existing law, for example, by enlarging the waiver in the CWA despite congressional refusals to do so following *DOE v. Ohio*.¹⁷⁴ This reading fails to take note of the qualifying language in H.R. 4288 §2(e)(3) that limits the application of the subsequent requirements to those "for which the Federal Government has already waived its sovereign immunity."¹⁷⁵ Furthermore, subsection (d) provides that "nothing in this title shall be construed to limit, impair, *enlarge*, or *otherwise alter* the matters described in subsection (e)."¹⁷⁶ Therefore, H.R. 4288 will not "enlarge" existing waivers of sovereign immunity.¹⁷⁷

Unfortunately, H.R. 4288 and S. 2597 stalled in committee and never reached the congressional floor. Representative Thornberry helped kill the bill with his request that the GAO provide an analysis of the proposed amendment, a delay barely disguising his efforts to protect his original handiwork in the NNSA Act.

Conclusion

The uncertainty about sovereign immunity is only part of the muddle that is the NNSA Act. It is not yet clear how in-

165. See *St. Luke's Med. Ctr.*, 22 Cl. Ct. at 329.

166. See *Harris v. United States*, 841 F.2d 1097, 1101 (Fed. Cir. 1988) ("when it is a question of impliedly repealing a preexisting Tucker Act remedy against the government by something more specific, and different . . . in that context, repeal by implication is highly respectable and not a novelty").

167. NAAG Analysis, *supra* note 26, at 6.

168. See *United States v. New Mexico*, 32 F.3d 1221, 24 ELR 21354 (1994) (arguing unsuccessfully that RCRA permit conditions are not "requirements" for which the United States has waived its sovereign immunity because they are not preexisting state standards capable of uniform application).

169. H.R. 4288, 106th Cong. (2000); an identical amendment was proposed May 18, 2000, in the Senate. S. 2597, 106th Cong. (2000). Both measures have as a stated purpose "[t]o clarify that environmental protection, safety, and health provisions continue to apply to the functions of the National Nuclear Security Administration to the same extent as those provisions applied to those functions before transfer to the

Administration." Since, the GAO and the NAAG provided comments on H.R. 4288 this section will make reference to only this bill although all statements apply to the identical Senate measure.

170. H.R. 4288, 106th Cong. §2 (2000).

171. The section most clearly mirrors the most comprehensive waiver of sovereign immunity contained in RCRA. 42 U.S.C. §6001, ELR STAT. RCRA §1001.

172. See Letter from Mary Anne Sullivan, General Counsel, DOE, to Lynne Ross, Deputy Director and Legislative Director, NAAG 2 (June 16, 2000) (on file with authors).

173. See Letter from NAAG, to William Richardson, Secretary of Energy, DOE 2 (Oct. 17, 2000) (on file with authors).

174. GAO Letter, *supra* note 27, at 6-7.

175. H.R. 4288, 106th Cong. §2(e)(3) (2000).

176. *Id.* §2(d) (emphasis added).

177. See NAAG Analysis, *supra* note 26, at 8.

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dependently the NNSA will operate from DOE, or what initial tack the NNSA will take on environment, safety, and health matters. The direction will be set in part by its first administrator, Gen. John A. Gordon, who has experience in the nuclear weapons labs and the Central Intelligence Agency. Although General Gordon is relatively unknown in this field, his deputy for Defense Programs is the widely respected Madelyn R. Creedon, who served on the Senate Armed Services Committee staff as well as in DOE, and the Defense Base Realignment and Closure Commission.

Whether the NNSA Act was a retreat or a holding action on the issue of sovereign immunity as applied to environment laws will only be determined ultimately on the battlefield of the courts. States will likely be reluctant to test the new law for fear they could get an answer they do not want and establish bad law. DOE will not likely test the new law soon either because it could vindicate those who expressed distrust from DOE history of seeking to elude regulation. The resulting lull in the battle lines will eventually be bro-

ken. The scale of DOE's environmental problems are so vast, and its environmental capabilities so frail, that violations will occur and states will need to resort to unilateral administrative orders or enforcement action to compel compliance. At that time, the questions will be resolved, in part based on the facts of the particular case, the venue, and the relevant case law at that time.

Instead of waiting and taking chances, Congress could act directly to resolve the issue. If its intent was, as the belated legislative history would suggest, to maintain waivers of sovereign immunity, then it could be cleared up in the law, not in letters through the mail, or in speeches. Deliberate hearings could help provide advice on precise drafting.

A larger lesson should be the perils of legislating in haste, and the need for an open and honest legislative process, and careful consideration of the implications of bills. Let's hope we learn this lesson before the costs mount higher. The costs to the taxpayer and for the environment have already been too high.