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

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

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

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

* The author would like to thank Assistant Professor David A. Wirth for his valuable comments on earlier drafts of this Note.
3. See infra notes 28-29 and accompanying text (discussing degree of environmental contamination at DOD and DOE facilities).
4. See infra notes 21-38 and accompanying text (discussing scope and extent of federal facility pollution).
governments respond swiftly to environmental pollution from private sources.  

Such action can include injunctive or declaratory relief and possibly civil and criminal penalties. Additionally, private polluters cannot discount a possible citizen's suit.

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


12. See infra notes 171-93 and accompanying text (introducing constitutional concerns regulators confront in federal facility enforcement). The central question is how far can one executive branch agency—the EPA for example—go to coerce another executive branch agency—
This Note will explore the current ability of both state and federal regulators to enforce environmental laws against federal polluters. Part I details the extent of the pollution problem at federal facilities. It goes on to introduce the legal framework that, for the last decade, controlled the manner in which regulators sought federal compliance. The discussion reveals the issues that set the stage for two recent developments in the law of federal facilities compliance.

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

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

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

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

I. THE FACTUAL AND LEGAL CONTEXT OF FEDERAL POLLUTION

A. The Scope of the Pollution Problem at Federal Facilities

The term "federal facility" can include anything from a Navy ship to buildings, installations, or land.\(^21\) Of 27,000 total federal installations, roughly 5,000 have requested funding for environmental pollution abatement projects or hold environmental permits.\(^22\) The number of federal facilities listed on the EPA's Federal Agency Hazardous Waste Compliance Docket is increasing. In just six months, from August 1992 to February 1993, the number of facilities on the list increased from 1709 to 1930.\(^23\)

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

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22. Id.; see infra notes 42-48 and accompanying text (explaining CWA and RCRA permit systems).
24. See Babich, supra note 6, at 28 (stating that DOD and DOE have been poor stewards of public resources).
nated land. Activities that have contributed to the contamination include mining, cattle grazing, timber cutting, and other licensed activities.

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

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

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

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

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


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


33. GOVERNOR'S REP., supra note 21, at 11.
The costs of cleanup are overwhelming. Estimates of the total cost of cleanup exceed $150 billion over the next twenty to thirty years. The DOD has estimated its cleanup costs at $24 billion over the next ten years. The DOD requested $3.7 billion for fiscal year 1993 to pay for environmental cleanups and compliance at its military facilities. The DOE, for its part, requested $5.5 billion for fiscal year 1993. The House of Representatives increased total funding allotted for environmental cleanup and waste management at the DOE to $4.6 billion for the same period.

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

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

State regulators worked primarily with two laws in attempting to address federal pollution: the CWA and the RCRA. The CWA authorizes the EPA to establish national standards for water quality. To enforce these standards, the CWA establishes the National Pollutant Discharge...
Elimination System (NPDES). The NPDES authorizes the EPA to issue permits allowing the discharge of specified levels of pollutants. Furthermore, states interested in enforcing the national standards may submit plans to the EPA for approval. Essentially, the aim of the CWA is to combat ongoing pollution.

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

The CWA’s and the RCRA’s enforcement mechanisms are similar. If the EPA or a relevant state enforcement body finds a person in violation of the statute, it can issue an administrative order requiring compliance by a certain date. Both statutes allow proceedings in federal district court to obtain compliance with statutory requirements or to seek civil penalties.

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

Courts had no trouble determining that substantive standards contained in federal environmental laws applied to federal facilities. Controversy arose, however, over how regulators would enforce those standards against government polluters. Courts consistently have applied a substance versus procedure distinction to the federal facility statutory provisions. Courts have held that the reference to "requirements" in the CWA and the RCRA included items such as waste disposal standards, permits, and reporting duties, but excluded any means of enforcement. This judicially developed distinction created a chasm between those mechanisms available for use private individual or organization to enforce statutory requirements. See William H. Timbers & David A. Wirth, Private Rights of Action and Judicial Review in Federal Environmental Law, 70 CORNELL L. REV. 403, 405-06 (1985) (discussing citizen's suits).

54. See infra notes 85-105 and accompanying text (discussing court of appeals decisions).
55. See Hancock v. Train, 426 U.S. 167, 181 (1976) (agreeing that substantive standards apply to federal facilities); United States v. Washington, 872 F.2d 874, 877 (9th Cir. 1989) (same); California v. Walters, 751 F.2d 977, 978 (9th Cir. 1984) (same); see also Colleen Kraft Shields, Casenote, The Federal Government: Finally Paying Its Environmental Dues: State of Ohio v. United States Department of Energy, 2 VM.L. ENVTL. L.J. 439, 449 (1991) (discussing Washington). But see Kenneth M. Murchison, Reforming Environmental Enforcement: Lessons from Twenty Years of Waiving Federal Immunity to State Regulation, 11 VA. ENVTL. L.J. 179, 192-95 (1991-1992) (discussing cases where courts held "requirements" to exclude certain state environmental laws). State laws passed independently of federal laws such as the RCRA, the CERCLA and the CWA and state laws that are implemented pursuant to the RCRA, the CERCLA and the CWA should be distinguished. Murchison addresses the former. This note addresses the latter. Congress designed federal environmental laws to establish minimum standards and to allow the states to then adopt those standards and enforce them on their own. See, e.g., 42 U.S.C. § 6926(b) (1988); Milsten, supra note 6, at 124 & 127; Charles W. Tucker, Compliance by Federal Facilities with State and Local Environmental Regulations, 35 NAVAL L. REV. 87, 97 (1986) (stating that "requirements" applies to regulations under CWA, RCRA, and CERCLA, but not to state liability laws).
57. Walters, 751 F.2d at 978.
against private polluters and those available for use against federal polluters.

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

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


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

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

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

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

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

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


\textsuperscript{66} See 42 U.S.C. § 6972(a) (RCRA); 33 U.S.C. § 1365(a) (CWA).

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


\textsuperscript{68} \textit{Ohio}, 112 S. Ct. at 1634-35.

\textsuperscript{69} See \textit{infra} notes 132-33 and accompanying text (discussing FFCA provisions).

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

Federal prosecutors have conducted the only successful prosecutions.\textsuperscript{22} Finally, the substance-procedure distinction affected the ability to assess civil penalties against federal polluters for past violations.\textsuperscript{73} \textit{Ohio} made a vital distinction between civil penalties that are coercive and those that are punitive.\textsuperscript{74} A court imposes a coercive penalty to induce compliance with previously issued orders or injunctions.\textsuperscript{75} On the other hand, a court imposes a punitive penalty to punish past violations of environmental laws.\textsuperscript{76}

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

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


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


75. \textit{Id.}

76. \textit{Id.}

77. \textit{Id.} at 1635 & n.15.

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

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

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

81. \textit{See infra} notes 85-105 and accompanying text (discussing appeals court cases preceding \textit{Ohio}).
II. RECENT DEVELOPMENTS IN FEDERAL FACILITY COMPLIANCE

A. Ohio v. United States Department of Energy

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

1. The Setting in the Circuits Prior to Ohio

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

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

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


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

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

87. \textit{Id.} at 1295.

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

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

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

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89. Id.
92. 872 F.2d 874 (9th Cir. 1989).
93. United States v. Washington, 872 F.2d 874, 875 (9th Cir. 1989). The Washington court addressed three arguments advanced by the state. First, the state argued that the plain language of 42 U.S.C. § 6961 contained a sweeping waiver of sovereign immunity. Washington, 872 F.2d at 876. The court, citing the rule of interpretation requiring waivers to be unequivocal, noted that the only unequivocal waiver in § 6961 was to substantive standards and court-ordered sanctions, not to civil penalties. Id. at 877. The state's second argument was that Congress's reaction to the Hancock decision in the CAA indicated an intent to waive sovereign immunity in the RCRA. Id. at 876. The court rejected this argument. The RCRA's legislative history and statutory language were both silent as to punitive civil penalties. Id. at 878-79. Finally, the state argued that the court should reverse a prior decision of the Ninth Circuit regarding the term "requirements" in § 6961. Id. at 876. The court refused to do so noting that the authority of one panel to reverse a prior panel decision is limited. Id. at 880.
94. See id. at 876-80 (listing and then rejecting Washington's legal arguments).
97. Id.
its claim to all forms of relief except the penalties for past violations.\(^9\)
In this posture, the case squarely presented the issue of whether Congress
had waived sovereign immunity for civil fines imposed for past failure to comply
with both the CWA and the RCRA.

The Sixth Circuit held in *Ohio* that the state could obtain civil penalties
from the federal agency.\(^9\) As to the RCRA, the Sixth Circuit agreed that
the federal facilities provision of section 6001 did not waive sovereign
immunity. Instead, the court looked to the citizen's suit provision of the
RCRA to discover a clear sovereign immunity waiver.\(^10\) The court noted
that Congress included the United States as a "person" in the citizen's
suit provision of the RCRA but not in the civil penalties provision of the
RCRA.\(^10\) Thus, the court held that the citizen's suit provision incorporated
the civil penalties provision, not vice versa, and consequently, the citizen
suit provision's definition of "person" applied.\(^10\) Additionally, the court
found that Congress intended to subject the United States to civil penalties
in the context of citizen's suit.\(^10\) The combination of these factors allowed
the Sixth Circuit to conclude that Ohio could seek civil penalties against
the United States under the citizen suit section of the RCRA.\(^10\) The Sixth
Circuit also concluded that the CWA federal facilities provision waived
immunity.\(^10\)

### 2. The Supreme Court's *Ohio* Decision

The Supreme Court granted certiorari in *Ohio*, analyzed the four
possible statutory provisions in which the government might have waived
its immunity, and firmly rejected them all. The four provisions advanced
and rejected included the citizen's suit provisions of the CWA and the
RCRA\(^10\) and the federal facilities provisions of the CWA and the RCRA.\(^10\)

Starting with the proposition that waivers of immunity must be con-
strained strictly in favor of the sovereign,\(^10\) the Court proceeded to examine
exclusively the statutory language of the provisions. Treating the CWA
and the RCRA citizen's suit provisions together, the Court rejected Ohio's

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98. *Id.*
100. *Id.* at 1064. The *Washington* court did not address the argument relating to the citizen
suit section. *Id.* at 1064 n.2.
6903(15) (excluding United States in general definition of person).
102. *Ohio*, 904 F.2d at 1065.
103. *Id.* at 1064.
104. *Id.* at 1065.
105. *See id.* at 1060-62 (arguing that use of term "sanction" coupled with "arising under
federal law" terminology expresses clear sovereign immunity waiver); *cf.* California v. *Department of Navy*, 845 F.2d 222, 225 (9th Cir. 1988) (determining no sovereign immunity waiver
exists in CWA).
argument, successful before the court of appeals, that the provisions support assessment of civil penalties against a federal agency. The Court reasoned that whenever one provision of a statute incorporates another provision of the same statute, it incorporates the restrictions inherent in the incorporated provision.\textsuperscript{109} The Court's holding is the exact opposite of the Sixth Circuit's reasoning.\textsuperscript{110} Here, the incorporated provision is the civil penalties section of the RCRA. That section does not apply to the United States because the United States is not a "person" in the general definitions section. Therefore, when a court incorporates the civil penalty section into the citizen suit provision, the citizen's suit provision is limited by the civil penalty section's lack of applicability to the United States.\textsuperscript{111}

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

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

\textsuperscript{109} Id. at 1634.  
\textsuperscript{110} See supra note 102 and accompanying text (discussing the Sixth Circuit holding on incorporation of civil penalties provision into citizen's suit provision).  
\textsuperscript{111} Ohio, 112 S. Ct. at 1634-35.  
\textsuperscript{114} Id. at 1636.  
\textsuperscript{115} Id. at 1637.  
\textsuperscript{117} Ohio, 112 S. Ct. at 1636.
While the sentence relied upon by Ohio did refer more specifically to "civil penalties" and not "sanctions," the Court noted that the sentence was phrased to limit or clarify the preceding waiver. Even though the language did pull towards Ohio's interpretation, the Court observed that adopting Ohio's interpretation would create a new problem of finding a source of authority for levying civil penalties against the federal government. The Court did not accept that the civil penalties provision of the CWA, authorizing civil penalties against "persons," could serve as the source of authority, because "persons" did not include the United States. The Court refused to find a new source of authority, reminding Ohio that any waiver must be clear and unequivocal.118

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

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

118. Id. at 1638-39.
119. See id. at 1631 (reporting unanimous opinion with respect to Part II.C interpreting RCRA federal facilities provision).
120. Id. at 1639.
121. Id. at 1639-40; Mitzelfelt v. United States Dep't of Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990).
122. See Ohio v. United States Dep't of Energy, 112 S. Ct. 1627, 1639 (1988) (expressing uncertainty over meaning of RCRA and CWA language). The Court in Ohio all but invited Congress to make the RCRA waiver more clear:
The question is still what Congress could have meant in using a seemingly expansive phrase like "civil penalties arising under federal law." Perhaps it used it just in case some later amendment might waive the government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps someone was careless. The question has no satisfactory answer.


While the legislation's primary purpose is to address the sovereign immunity issue, that is not its sole purpose. Some examples of additional provisions include provisions relating to: inspection of federal facilities by states at the facility's expense, FFCA, supra note 14, § 104, 106 Stat. at 1507, and additional requirements relating to mixed wastes at federal facilities.
Bush signed the legislation on October 6, 1992. The FFCA filled what legislators saw as an important need: correcting the allegedly improper reading of the RCRA's waiver section by courts of appeal and the Supreme Court.


Congress did not immediately enact the FFCA even though Congress believed that the reading courts had applied to the RCRA was incorrect. Congress held the first hearings on federal facility compliance in late 1987. When Congress finally passed the FFCA in 1992, it enacted a statute with provisions aimed at overturning the Ohio decision and providing the clear and unequivocal waiver that the Supreme Court required.

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


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

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

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


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

The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

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

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

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

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

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


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

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

134. FFCA, supra note 14, § 102(a)(4), 106 Stat. at 1505-06. The statute reads: “An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law . . . .” Id.

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

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

136. Compare United States v. Dee, 912 F.2d 741, 743 (4th Cir. 1990) (upholding conviction
cerns ranging from different immunity concerns to questions surrounding state prosecution of state environmental crimes committed on federal lands. The FFCA's language appears to subject a federal employee to criminal prosecution. However, the FFCA still might contain a loophole that would allow federal employees to escape prosecution.

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

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

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

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

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

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

What H.R. 3847 missed, according to Smith, and thus what the FFCA is missing, is the
Finally, the FFCA creates serious constitutional concerns when it addresses the inability of the EPA to effectively enforce federal laws against federal polluters. The concerns include both separation of powers problems and justiciability questions. The FFCA provides that the EPA may commence an "administrative enforcement action" against a federal agency or department for violations of the RCRA. The EPA must initiate such an action against a federal agency just as it would against any other polluter. If the EPA did issue an administrative order, it could collect civil penalties from the target agency. The FFCA, however, prevents an administrative order from becoming effective until after the agency that is the object of the order has had an opportunity to confer with the Administrator of the EPA about the order. The FFCA's provisions do not address directly the questions presented by a civil action instituted by the EPA against another agency.

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

III. ANALYSIS OF THE FFCA'S EFFECTIVENESS

A. The Civil Penalties Issue

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

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

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

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

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

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

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

144. *See infra* notes 209-30 and accompanying text (discussing civil action issue in context of FFCA).
The Ohio Court held that the CWA federal facilities section did not waive sovereign immunity for the assessment of civil penalties, yet the FFCA does not address the CWA provisions. Consequently, states and citizen groups are left with an ambiguous immunity waiver when it comes to the assessment of civil penalties for violations of the CWA.

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

Another oversight limits the FFCA civil penalties waiver. The Ohio decision will have, and in some cases already is beginning to have, a major effect on the interpretation of other federal facilities provisions. Ohio could affect both the CERCLA and the CAA. In Maine v. Department of Navy the United States Court of Appeals for the First Circuit used Ohio to hold that the federal facility provision in the CERCLA was not a clear and unambiguous waiver of sovereign immunity. The CERCLA waiver section purports to be clear and explicit. Federal facilities must comply with "[s]tate laws regarding enforcement." The reference to "enforcement" seems to include civil penalties. It runs counter to the substance-procedure distinction explained earlier because "enforcement" could include the procedural aspects of enforcement.

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147. See Pennsylvania v. United States Postal Serv., 810 F. Supp. 605, 612 (M.D. Penn. 1992) (preventing state from recovering civil penalties against Postal Service due to absence of CWA waiver). The result in Pennsylvania would have been different if the FFCA had included provisions applicable to the CWA because the district court decided Pennsylvania on December 30, 1992, after the FFCA's effective date. See FFCA, supra note 14, § 102(c), 106 Stat. at 1506 (making waiver provisions effective upon date of passage).
148. See Gleason & Goutzounis, supra note 6, at 289 & nn.5-6 (noting divergent purposes of CWA and RCRA); House Republican Seeks Waiver or Federal Clean Water Act Immunity, Inside EPA, Jan. 15, 1993, at 17 (describing DOE as generally more compliant with CWA but noting DOD maintenance of hundreds of wastewater treatment works around country); supra notes 42-48 and accompanying text (discussing general purpose of RCRA and CWA).
149. See 40 C.F.R. § 261.4 (1991) (excluding certain materials from RCRA definition of hazardous or solid waste).
150. 973 F.2d 1007 (1st Cir. 1992).
151. Maine v. Department of Navy, 973 F.2d 1007, 1011 (1st Cir. 1992). Maine arose when the state of Maine alleged violations of the state's federally approved hazardous waste laws. Id. The Navy agreed to comply substantively with the state laws but refused to pay a civil penalty of $887,200 the state had imposed. Id. at 1009. The case also involved a related immunity issue concerning state assessment of fees. See id. at 1011-15 (discussing ability of state to impose reasonable licensing and waste disposal fees upon federal facilities).
153. See supra notes 56-57 and accompanying text (explaining substance-procedure distinction).
ally, "enforcement" is much more likely to include punitive civil penalties than is the RCRA term "requirements," thus distinguishing the RCRA waiver provision from the CERCLA waiver provision.

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

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

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

154. Maine, 973 F.2d at 1010-11.
155. See id. at 1011 (discussing possible ambiguity). The Maine court observed that: Maine's argument [on CERCLA § 9620(a)(4)] is open to the Supreme Court's observation concerning RCRA section 6961 that "the statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future." Id. (quoting Ohio v. United States Dep't of Energy, 112 S. Ct. 1627, 1640 (1992)).
157. See 33 U.S.C. § 1323 (1988) (making applicable to federal facilities certain CWA requirements). The differences between the two provisions are purely cosmetic. See Rothmel, supra note 8, at 603 (observing that CWA was amended in committee to parallel language used in CAA).
158. But see Axline et al., supra note 6, at 23-25 (arguing that CAA waivers are clear); Rothmel, supra note 8, at 599 ("No statute waives sovereign immunity ... more clearly than the CAA"). Both of these articles were written before Ohio.

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

Id.
160. See S. REP. No. 370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S.C.C.A.N. 4326, 4392 (discussing federal facilities provision without specific reference to punitive civil penalties);
Recent Supreme Court precedent, however, diminishes the usefulness of the CAA's favorable legislative history. In *United States v. Nordic Village, Inc.*, the Court held that a sovereign immunity waiver must be clear and unambiguous without reference to the legislative history of the statutory provision containing the waiver.163 Similarly, the *Ohio* Court did
not refer to the legislative history of the CWA or the RCRA even though a potential argument existed. Thus, courts likely would ignore the CAA legislative history, which is tenuous authority in any case. Ignoring legislative history further suggests that the three district court cases referred to above, each of which relied to a varying degree on legislative history, would be decided differently today.

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

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

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

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

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

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

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

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

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

B. Constitutional Issues Raised by the FFCA

1. Overview of Primary Constitutional Concerns

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

169. See supra note 163 (revealing that Supreme Court relies upon statutory text to determine if Congress waived immunity).
170. See Strand & Samuels, supra note 84, at 309 (arguing that very fact ambiguity exists supports conclusion of inadequate waiver).
171. But cf. FFCA, supra note 14, sec. 102(b), § 6001(c), 106 Stat. at 1506 (earmarking fines awarded to states for environmental protection projects). This provision could raise federalism concerns. Indeed, Congress did not include a similar provision in the CAA, perhaps because of federalism concerns. See Federal Facilities Compliance, supra note 29, at 22 (statement of National Conference of State Legislators) (criticizing earmarking provisions as violating federalism). See New York v. United States, 112 S. Ct. 2408, 2427-29 (1992) (holding that statute requiring state to take title to hazardous waste was unconstitutional “commandeering” of state’s regulatory apparatus).
172. U.S. Const. art. III, § 2, cl. 1. The Constitution provides that:

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

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

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

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

175. See Massachusetts Bay Transp. Auth. v. United States, 21 Cl. Ct. 252, 257 (1990) (stating that case or controversy clause prohibits courts from issuing advisory opinions or deciding cases that are not concrete or adverse).
176. See United States v. Nixon, 418 U.S. 683, 692-97 (1974) (holding that no barrier to justiciability existed where both parties were officers of executive branch); United States v. ICC, 337 U.S. 426, 430 (1949) (holding that action by United States against Interstate Commerce Commission was traditionally justiciable); United States v. Federal Maritime Comm'n, 694 F.2d 793, 809-10 (D.C. Cir. 1982) (en banc) (adopting panel decision holding that case or controversy did exist between United States as sovereign and independent agency of United States).

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

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

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

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

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

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

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

182. See Steinberg, supra note 6, at 341-42 (discussing separation of powers). Separation of powers concerns are the heart of the entire debate. The clearly framed separation of powers question concerns the EPA’s ability to issue administrative orders and to sue other federal agencies. This conflict addresses whether the judiciary intrudes upon executive powers when it
takes the form of a legal theory called the unitary executive.183 This theory posits that the President is the one individual ultimately accountable for the actions of the executive branch.184 The executive branch is hierarchical and all executive branch agencies are subordinate to the President.185

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

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

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

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


186. U.S. Const. art. II, § 3.

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

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

188. See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (stating that one purpose of case or controversy clause is to assure that federal courts will not intrude into
Critics of the unitary executive theory argue that proponents of the unitary executive theory mistakenly apply the Take Care Clause. The founders did not intend the clause to create a hierarchical executive, nor to imply that the Executive has the power to forbid execution of laws and thus pervert congressional intent. Instead, the clause makes clear that the President has a duty to ensure that other executive branch agencies comply with Congress’s instructions. Similarly, opponents of the unitary executive theory cite cases establishing that the three branches of government are not “hermetically” sealed from one another. Any diminution of executive power is minimal and, to the extent diminution occurs, it is justified by Congress’s need to provide for effective environmental enforcement.

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

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

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

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

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


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

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

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

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

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

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


\(^{199}\) See id. at 210. Habicht stated that:

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

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

Legitimate arguments can be advanced for either interpretation. See Exec. Order No. 12,146, § 1-402, 3 C.F.R. 409 (1980), reprinted in 28 U.S.C. § 509 (1988) [hereinafter Exec. Order 12,146] (providing that “prior to proceeding in any court” agencies with legal disputes submit them to Attorney General). The wording of Executive Order 12,146 makes the unitary executive appear to be more of a quasi-exhaustion doctrine. Indeed, courts that have examined Executive Order 12,146 in this context so have concluded. Martin v. Great Lakes Indian Fish and Wildlife Comm’n, No. 92-C-409-C, 1992 WL 300841 at *4 (W.D. Wis. Oct. 7, 1992); TVA, 13 Cl. Ct. at 701. That the President signed the FFCA also indicates that the DOJ
The FFCA responded to the administrative order debate by giving the EPA the authority to commence an "administrative enforcement action" against other agencies that are violating federal environmental laws. While the meaning of "administrative enforcement action" is not immediately clear, it appears to include administrative orders and similar administrative remedies used by the EPA against private facilities. Pursuant to the statute, the EPA can exercise this power only after the target agency has had a chance to consult with the Administrator of the EPA. In theory, the EPA now has the option of forcing the issue when negotiations with other agencies on environmental compliance get bogged down.

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

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201. See FFCA, supra note 14, sec. 102(b), § 6001(b), 106 Stat. at 1506.
202. See 12 U.S.C. § 1441a(b)(12)(G) (Supp. II 1990) (using term "administrative enforcement action"); 42 U.S.C. § 7604(e)(2) (1988) (same). Congress has not used the "administrative enforcement action" terminology extensively. The two statutes above are the only statutes, other than the amended RCRA federal facilities provision, to use the term according to a Westlaw search completed on May 27, 1993.
203. See FFCA, supra note 14, sec. 102(b), § 6001(b)(1), 106 Stat. at 1506 (discussing requirement that EPA initiate "administrative enforcement action[s] ... in the same manner and under the same circumstances as an action would be initiated against another person"); id. § 6001(b)(2) (providing that no administrative order can be finalized until opportunity given to affected agency to consult with EPA administrator). See also H.R. CONF. REP. No. 886, supra note 131, at 19, reprinted in 1992 U.S.C.C.A.N. at 1319 (explaining congressional intent).
204. FFCA, supra note 14, sec. 102(b), § 6001(b)(2), 106 Stat. at 1506.
206. Exec. Order No. 12,146, supra note 200, § 1-402.
207. Id. The importance of Executive Order 12,146 is its acknowledgement of a role for congressional determination of who would adjudicate intrabranch disputes. The order suggests
The FFCA does this. It gives the EPA Administrator authority to resolve enforcement disagreements if existing negotiation mechanisms fail.\textsuperscript{208}

3. EPA Civil Action Authority

The FFCA has resolved the administrative order issue for now.\textsuperscript{209} However, the EPA statutory authority to initiate a civil enforcement action in federal district court under the RCRA is still unresolved.\textsuperscript{210} If statutory
authority does not exist, then the analysis does not reach the potential separation of powers concerns that civil actions present.

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

Examined more closely, however, this construction fails to establish congressional approval of the EPA civil action authority. The explanation relies on two statutory interpretation considerations. Initially, Congress, in the context of the federal facility provision, gave the EPA explicit authority for "administrative enforcement actions.1 At the same time, the FFCA contains no section explicitly granting the power to bring "judicial enforcement actions."212 Thus, the limitation in section 102(b) of the FFCA to administrative orders to the exclusion of judicial enforcement actions in federal court implies a congressional intent to not authorize the latter.213 The legislative history of the FFCA does not detract from this conclusion.215

211. See FFCA, supra note 14, § 103, 106 Stat. at 1507 (including United States in definition of "person"); 42 U.S.C. § 6928(a)(1) (1988) (making "person" subject to administrative orders or civil actions). Section 6928(a)(1) authorizes the EPA to "issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred . . . ." Id.

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

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

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

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

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

Executive Order 12,146, however, falls short of the goal of providing consultation. First, the Order is arguably applicable in only limited situations. Second, Executive Order 12,088, the other Presidential directive an "administrative enforcement action" section in the federal facility provision of the RCRA raises significant questions about the plain meaning of the statute with regard to civil actions. In such a case, resort to the legislative history and analysis of the statute as a whole is appropriate. Horner v. Merit Systems Protection Bd., 815 F.2d 668, 673 (Fed. Cir. 1987).

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

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


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

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

218. See Steinberg, supra note 6, at 330 (arguing that Executive Order 12,146 would be unhelpful in resolving enforcement problems). Executive Order 12,146 is ineffective because it applies only to jurisdictional, legal disputes, and most enforcement issues involve factual disputes.
addressing conflicts between federal agencies on environmental compliance issues, does not guarantee prior resolution.\textsuperscript{219} Third, even if both of these mechanisms did work, they would only delay potential court resolution.\textsuperscript{220} Therefore, the larger separation of powers issue that still remains is whether an Article III court could ever hear a suit between executive branch agencies.\textsuperscript{221} A court would essentially have to second guess the President’s decision that no separation of powers issue existed.\textsuperscript{222}

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


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


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

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


225. \textit{Public Citizen, 491 U.S. at 465-66; see Commodities Futures Trading Comm’n v. Schor, 478 U.S. 833, 841 (1986) (holding that courts should read statutes to avoid serious doubt of constitutionality).}

In \textit{Public Citizen}, the Court addressed whether the Federal Advisory Committee Act
issue should induce a court to interpret the vagaries created by the FFCA and the RCRA so as to deny the EPA the statutory authority to bring civil actions. Thus, a court will never reach the constitutional issue. Such an interpretation is possible without resorting to disingenuous evasion.226 Only two reasons could justify withholding authority from the EPA to sue federal agencies. First, interested parties thought that the EPA could sue. This is not the case. As early as 1978, the DOJ had taken the position that the EPA suing another agency raised separation of powers and justiciability concerns and was therefore unallowable.227 Witnesses raised the issue at hearings held on federal facility compliance.228 However, Congress chose to affirm administrative order authority and not civil action authority. Why Congress treated these two options differently, then, is the question.

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

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

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

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

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

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

IV. CONCLUSION AND RECOMMENDATIONS

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

The FFCA is only a qualified success for two reasons. First, certain inherent limitations to statutory response exist. For example, separation of powers considerations correctly informed Congress’s choice to withhold civil action enforcement authority from the EPA.\textsuperscript{231} Prosecutorial discretion, especially at the federal level, is another constraint limiting statutory response. Choosing when to enforce a law is inherently an executive power\textsuperscript{232} that the FFCA does not purport to limit in any significant manner.\textsuperscript{233} If the EPA chooses not to bring any enforcement actions, the constitutional issues those actions trigger might remain shielded from court

\textsuperscript{229} CRS REP., supra note 174, at 66. A political settlement could temper the “weak” unitary executive by providing for prior consultation, thus avoiding the question. The FFCA provides prior consultation.

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

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

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

\textsuperscript{233} See FFCA, supra note 14, sec. 102(b), § 6001(b)(1), 106 Stat. at 1506 (directing that if EPA pursues administrative order, it must do so like any order against private facility).
decision. These limitations, however, are part of the costs that this nation incurs for its system of separation of powers.234

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

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

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


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

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

239. See FFCA, supra note 14, § 102(a) (waiving immunity to state imposed fines). The policy assumption underlying the FFCA, that punitive civil penalties will encourage federal compliance as well as they do private, has not been extensively analyzed. See Steinberg, supra note 6, at 321-23 (arguing that concern over constitutional and sovereign immunity issues has prevented discussion of central issue of whether civil penalties are prudent mechanism to enforce law upon federal polluter). At the federal level, any penalties exacted by the EPA with its new administrative order authority, will simply be shifted from one account to another. Real deterrent effect will only be from penalties exacted by states but those penalties will most likely be a very tiny percentage of the agency’s overall budget. See H.R. Rep. No. 111, supra note 2, at 14, reprinted in 1992 U.S.C.C.A.N. at 1300 (reporting average RCRA penalty collected was
the need for expensive and time consuming litigation. Finally, experience demonstrates that criminal enforcement is an increasingly valid option.240

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

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

$4,750).

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


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

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

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

Executive action is also possible. The President could clarify both Executive Order 12,146 and Executive Order 12,088 to address the problems that arise in the context of EPA enforcement efforts against other federal agencies. Specifically, President Clinton could abandon the use of the Office of Management and Budget—in Executive Order 12,088—and the DOJ—in Executive Order 12,146—as the adjudicating authorities for intrabranch disputes. Instead, he could issue a new order that would give the EPA and its new enforcement-oriented Administrator\textsuperscript{248} the final say in agency disputes. This would give the EPA an effective enforcement mechanism and also resolve who is accountable in cases when disputes arise. The President's ability to remove the EPA Administrator assures that the executive branch bureaucracy respects the policy goals the President advocates.

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

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

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

\textsuperscript{244} 426 U.S. 167 (1976).

\textsuperscript{245} Wolverton, supra note 6, at 581-82.

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

\textsuperscript{247} Id. at 207.

\textsuperscript{248} See supra note 238 (discussing appointment of Carol Browner as EPA Administrator).

\textsuperscript{249} See DURANT, supra note 238, at 134 (citing use of executive orders, appointments,
higher priority on the use of federal criminal enforcement as well.\textsuperscript{250} 

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

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

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\begin{footnotes}
\item[250] See supra note 135 (discussing usefulness of criminal sanctions in seeking federal compliance).
\item[251] DuRant, supra note 238, at 134.
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