



# Chapter 1

## RCRA's Statutory and Regulatory Framework

### 1.0 Introduction

Each year, significant amounts of hazardous and radioactive mixed waste must be managed or disposed of in the United States. The Environmental Protection Agency (EPA) estimated that in 2007, approximately 50 million tons of hazardous waste were managed at 1,395 facilities nationwide annually.<sup>1</sup> Although the precise amount is uncertain, the volume increases when radioactive mixed waste is included—it is estimated that defense-related facilities manage approximately 219,000 cubic meters of radioactive mixed waste annually.<sup>2</sup>

The management and cleanup of these wastes are regulated by EPA and authorized states under Subtitle C of the Resource Conservation and Recovery Act (RCRA). RCRA establishes a framework, described as unparalleled in scope and complexity, for the comprehensive “cradle-to-grave” management of hazardous waste.<sup>3</sup> Central to this framework is the RCRA permit, which imposes detailed requirements on persons that own and operate facilities for the safe treatment, storage, or disposal of hazardous waste, including radioactive mixed waste. The RCRA regime developed over decades, but is marked by three key laws discussed below:

- The Resource Conservation and Recovery Act of 1976 (RCRA)
- The Hazardous and Solid Waste Amendments of 1984 (HSWA)
- The Federal Facility Compliance Act of 1992 (FFCA).

This opening chapter discusses how RCRA evolved to close major loopholes in federal law and, along the way, become a complicated regulatory program of labyrinthine rules and exceptions. The chapter introduces the reader to the “big picture” from which RCRA permit requirements derive. It provides a historical overview of RCRA's statutory framework (Section 1.1 below), including its major amendments such as HSWA and the FFCA (Sections 1.2 and 1.3), and EPA's “cradle-to-grave” rules (Section 1.4). Finally, the chapter discusses the RCRA State authorization process, with an emphasis on state program revisions, new processes to expedite approval, and the tools to better understand the State and EPA roles in this dynamic process (Section 1.5).

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1. U.S. EPA, NATIONAL ANALYSIS: THE NATIONAL BIENNIAL RCRA HAZARDOUS WASTE REPORT (BASED ON 2007 DATA) (2008). EPA data excludes: (1) hazardous waste received from off-site for storage/bulking and subsequently transferred off site for treatment or disposal; and (2) hazardous waste stored, bulked, and/or transferred off site with no prior treatment/recovery, fuel blending, or disposal at the site. Note that of the 1395 facilities, 516 reported as TSDFs. The National Biennial report, and updates are available at [www.epa.gov/epawaste/inforesources/data/biennialreport/index.htm](http://www.epa.gov/epawaste/inforesources/data/biennialreport/index.htm).
  2. EPA data, extrapolated from a 1990 National Survey, estimates that commercial facilities generate approximately 108,100 cubic feet of radioactive mixed waste annually. U.S. EPA, Regulatory Impact Analysis, Storage, Treatment, Transportation and Disposal of Mixed Waste, Docket F-2001-MLZF-FFFFF No. 14 (Feb. 2001). The U.S. DOE, on the other hand, estimates that it will treat and dispose up to 219,000 cubic meters (or 7,665,000 cubic feet) of radioactive mixed waste from 1997 until 2017. U.S. DOE, Fact Sheet: Department of Energy Announces its Preferred Alternatives for Disposal of Low-Level and Mixed Low-Level Radioactive Waste (1999).
  3. See HOUSE COMM. ON ENERGY AND COMMERCE, HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984, H. R. REP. NO. 98-198(I), 98th Cong., 1st Sess. June 9, 1983 (hearings of U.S. House Energy Committee). See also U.S. v. White, 766 F. Supp. 873, 877 (E.D. Wash. 1991) (EPA regulations establish a detailed and complex comprehensive hazardous waste management system).



## 1.1 The Historical Driver: RCRA

*“We must eliminate the word ‘waste’ from our vocabulary and substitute the word conservation.”*

— Statement of Sen. Jennings Randolph, in introducing RCRA<sup>4</sup>

In 1976 the U.S. Congress passed the Subtitle C of RCRA to establish a national framework to regulate hazardous waste.<sup>5</sup> The Act defined *hazardous waste* as a “solid waste” that “may cause or significantly contribute to an increase in mortality or serious illness, or may pose a substantial threat to human health or the environment.”<sup>6</sup> Hazardous waste also includes radioactive mixed waste, which is regulated under Subtitle C of RCRA and the Atomic Energy Act of 1954, as amended (see Chapter 10, “Radioactive Mixed Wastes”). RCRA recognizes two other types of wastes: *municipal* and *industrial*. Municipal waste (e.g., household and commercial trash and garbage) is primarily regulated by states, Indian tribes, and local governments under the less rigorous standards of Subtitle D of RCRA.<sup>7</sup> Industrial solid waste, some of which may present significant risks to human health and environment, is also regulated by states, Indian tribes, and some local governments under Subtitle D of RCRA (see Box 1.1).<sup>8</sup>

Congress passed Subtitle C of RCRA to address two interrelated policy goals:

- to reduce the generation of hazardous waste by promoting incentives to conserve, recycle, and recover valuable materials; and
- to control land disposal (primarily of hazardous industrial waste) through a regulatory program that sets national and uniform standards for safe waste management.<sup>9</sup>

This policy evolved in response to a particular problem in the mid-1970s, when the nation faced serious environmental issues resulting from the improper management and disposal of solid and hazardous waste. Up to that time, Congress and the environmental movement had focused on air and water problems while neglecting the “stepchild”—solid and hazardous waste.<sup>10</sup> The “use and discard” attitude prevailed in collective public policy.<sup>11</sup> As a result, by 1975 landfills were reaching their design limits, while the volume of waste was projected to increase by 5–10% annually.<sup>12</sup> Moreover, land disposal of hazardous waste was “essentially unregulated,” and

### Box 1.1 RCRA Waste Programs

Subtitle C — Hazardous and Radioactive Mixed Wastes

Subtitle D — Municipal and Industrial Solid Wastes

Subtitle I — Underground and Above-ground Storage Tanks

4. 193 CONG. REC. 23849-50 (daily ed., July 21, 1975).

5. RCRA § 1002, 42 U.S.C. § 6901, Pub. L. No. 94-580, 90 Stat. 2795 (Oct. 21, 1976). RCRA amended the Solid Waste Disposal Act of 1965 (“SWDA”), 42 U.S.C. § 3251 (1965), Pub. L. No. 89-272. Prior to the SWDA, the federal program was conducted under the Public Health Service Act and consisted primarily of solid waste disposal research. Only 12 States had an identifiable solid waste program. S. Rep. No. 988, 94th Cong., 2d Sess. 5–6 (June 25, 1976).

6. RCRA § 1004(5), 42 U.S.C. § 6903 (5)(2000).

7. 42 U.S.C. §§ 6941-6949a (1994). In 2007, the United States generated approximately 254 million tons of municipal solid waste, of which 33.4% was recycled. See U.S. EPA, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURE FOR 2007, EPA530-R-09-010 (Nov. 2008). EPA regulated municipal waste through guidelines until 1993. See 40 C.F.R. Part 257 (1996) (guidelines). In 1993, EPA issued regulations for municipal solid waste and established national standards for municipal solid waste landfills that encouraged environmentally safe methods for solid waste disposal that maximizes resource recovery and conservation. EPA rules for municipal solid waste are found at 40 C.F.R. Parts 240 through 258.

8. EPA estimates that industrial facilities in the United States generate and dispose 7.6 billion tons of industrial solid waste each year. EPA has not adopted national standards to regulate industrial solid wastes, but instead issued voluntary national guidelines for industrial waste management. See U.S. EPA, EPA’s *Guide for Industrial Waste Management*, at 1 (available at [www.epa.gov/epaoswer/non-hw/industd/guide.htm](http://www.epa.gov/epaoswer/non-hw/industd/guide.htm)).

9. RCRA § 1002, 42 U.S.C. § 6901 (2000).

10. 122 CONG. REC. at S33,816 (daily ed., Sept. 30, 1976) (statement of Sen. Randolph).

11. *Id.*

12. 122 CONG. REC. H19,764 (daily ed., June 22, 1976) (statement of Rep. Rooney).

considered one of the “last remaining loopholes in environmental law.”<sup>13</sup> There was a clear understanding that hazardous waste, unless neutralized or managed, presented a danger to society.<sup>14</sup>

These facts, compounded by a severe recession and impending energy crisis, led to the passage of RCRA. To accomplish its policy goals, Subtitle C of RCRA established a national program containing seven major components with regulatory controls for hazardous waste treatment, storage and disposal (see Box 1.2). Subtitle C was designed primarily as a “prevention oriented” program geared to prevent releases from new and existing facilities that managed and disposed hazardous waste (e.g., to prevent the creation of new hazardous remediation sites later known as “Superfund sites”).<sup>15</sup> Under the Act, the mechanism for controlling hazardous waste disposal was a comprehensive “cradle-to-grave” federal permitting program. As directed by Congress, EPA developed and promulgated a set of uniform standards it considered very stringent, applicable to all hazardous waste treatment, storage, and disposal facilities (referred to as *hazardous waste management facilities* or *TSDFs*). EPA considered at the time those standards adequate to prevent or minimize releases of a wide range of hazardous waste types, protect environmental conditions, establish operational contingencies, and other factors.

<b>Box 1.2</b>
<b>RCRA Subtitle C Program</b>
Waste listing, identification ( <i>Section 3001</i> )
Generator/transporter standards ( <i>Sections 3002–3003</i> )
TSDF standards ( <i>Section 3004</i> )
Permitting program ( <i>Section 3005</i> )
State authorization ( <i>Section 3006</i> )
Inspection ( <i>Section 3007</i> )
Enforcement ( <i>Section 3008</i> )

Since 1976, RCRA has been amended numerous times (see Sidebar 1.1). Of particular importance are the congressional amendments under HSWA (1984) and the FFCA (1992), which transformed RCRA into a prevention *and* cleanup program. These amendments focused primarily on solving problems—particularly those associated with land disposal of hazardous waste, radioactive mixed waste, and federal facility compliance—that had not been identified at the time of passage of RCRA. While HSWA and the FFCA did not significantly alter the original goals set by Congress for RCRA, they did result in a fundamental change of approach in *how* to achieve those goals.

## 1.2 Major Reform: HSWA

*The “current RCRA program is riddled with loopholes,” inadequate EPA enforcement and agency delay.*<sup>16</sup>

— Statement of Sen. Chafee

By the late 1970s, EPA had accomplished very little toward meeting RCRA's goals. The environmental harm associated with hazardous waste dumping had gained national attention in the early 1980s with the story of Love Canal,<sup>17</sup> which revealed a serious new issue that had not been evident in 1976 or addressed by RCRA: the problem of abandoned hazardous waste dumps.

13. *Id.* (land disposal of hazardous waste unregulated); H. REP. NO. 1491, 94th Cong., 2d Sess. 1 (Sept. 9, 1976), reprinted in U.S.C.C.A.N. 6238, 6241 (1976).

14. H.R. REP. NO. 94-1491, 94th Cong., 2d Sess. at 3 (Sept. 9, 1976), reprinted in 5 U.S.C.C.A.N. 6238, 6241 (1976).

15. See U.S. EPA, Corrective Action Management Units and Temporary Units; Corrective Action Provisions under Subtitle C, 58 FED. REG. 8658 (1993). In December of 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) also known as Superfund. While RCRA focuses on proactive measures to ensure no future releases from new and existing facilities managing hazardous waste, CERCLA focuses on remediation of hazardous substances from facilities no longer in existence.

16. H.R. CONF. REP. NO. 98-1133, 98th Cong., 2d Sess. at 2459 (Oct. 3, 1984). See also 130 CONG. REC. S13,816 (daily ed., Oct. 5, 1984).

17. Love Canal, located in Niagara Falls, New York was the location of a neighborhood built on top of a former canal containing over 44,000,000 pounds of hazardous waste. In 2004, the site was removed from EPA's Superfund list after 21 years of clean-up activity at costs close to \$400 million dollars. New York Times (Mar. 18, 2004).

### Sidebar 1.1 RCRA Statutory History

- 1965**     **The Solid Waste Disposal Act (SWDA)**, Pub. L. No. 89-272, 79 Stat. 997, 42 U.S.C. § 3251 (1965). Authorized solid waste disposal research, with minimal appropriations.
- 1970**     **The Resource Recovery Act of 1970**, Pub. L. No. 91-512, 84 Stat. 1227, 42 U.S.C. §§ 3251–59 (1970). Amended the SWDA to direct federal policy away from land disposal and towards maximum recovery of reusable material and energy; transferred federal responsibility for administration of the SWDA to the newly created EPA.
- 1976**     **The Resource Conservation and Recovery Act of 1976 (RCRA)**, Pub. L. No. 94-580, 90 Stat. 2795, 42 U.S.C. §§ 6901–6981 (1976). Amended the SWDA to establish the primary national framework for the management, treatment, storage and disposal of hazardous waste, including permitting and enforcement.
- 1978**     **The Quiet Communities Act of 1978**, Pub. L. No. 95-609, 42 U.S.C. § 4901 (1978). EPA authorized to educate/assist local officials in noise control; enacted numerous technical changes to RCRA.
- 1980**     **The Solid Waste Disposal Act Amendments of 1980**, Pub. L. No. 96-482, 94 Stat. 2334, 42 U.S.C. §§ 6933, 6934, 6941a, 6955 and 6956 (1980). Enacted numerous changes to RCRA including: (1) “interim status” standards; (2) testing and monitoring requirements; (3) authority to use private contractors for inspections; (4) temporary exemption for certain wastes (e.g., mining); (5) manifest system; (6) inventory for hazardous waste; (7) state authority to impose more stringent standards; (8) public participation requirements; (9) changes in enforcement and penalties; (10) administrative authority to abate imminent hazards; and (11) judicial review.
- 1980**     **Used Oil Recycling Act of 1980**, Pub. L. No. 96-463, 94 Stat. 2055, 42 U.S.C. §§ 6901a, 6914a, 6932 (1980) (re-designated as Section 3014 by HSWA). Required EPA to issue regulations for recycled used oil and added requirements for used oil.
- 1984**     **Hazardous and Solid Waste Amendments of 1984 (HSWA)**, Pub. L. No. 98-616, 98 Stat. 3221, 42 U.S.C. §§ 6917, 6936 –6939a, 6949a, 6979a, 6979b, 6991–6991i (1984). Enacted extensive changes to RCRA including: (1) land disposal ban; (2) minimum technology requirements; (3) permit requirements; (4) generator requirements; (5) listing and delisting; (6) standards for burning hazardous waste; (7) exporter provisions; (8) groundwater monitoring, financial assurance requirements; (9) hazardous waste reduction; and (10) enforcement.
- 1988**     **The Medical Waste Tracking Act of 1988**, Pub. L. No. 100-582, 102 Stat. 2950, 42 U.S.C. §§ 6903 (40), 6992–6992k (1988). Required EPA to issue rules for listing and tracking of medical waste, and to report to Congress on the results of the demonstration program, including the threats to human health and the environment posed by medical waste.
- 1992**     **The Federal Facility Compliance Act of 1992 (FFCA)**, Pub. L. No. 102-386, 106 Stat. 1505, 42 U.S.C. §§ 6908, 6939c, 6939d, 6939e, and 6965 (1992). Expressly waived federal sovereign immunity from state enforcement, including imposition of civil penalties; DOE immune from RCRA § 3004(j) treatment and storage violations so long as it complies with an EPA or State issued order or agreement.
- 1996**     **The Land Disposal Flexibility Act of 1996**, Pub. L. No. 104-119, 110 Stat. 830, 42 U.S.C. §§ 6921, 6924, 6925, 6947 and 6949a (1996). Authorized land disposal of treated characteristic hazardous waste; exempted underground injection of treated hazardous wastes from land disposal restrictions; directed EPA to study risks associated with new requirements and impose additional requirements to address such risks.

The vehicle for RCRA reform was the congressional reauthorization process.<sup>18</sup> This process triggered congressional oversight hearings and investigations that revealed an assortment of problems with the 1976 statute and widespread dissatisfaction with EPA's RCRA program. Congress expressed concern with a large array of major problems that included: (1) *significant loopholes* leading to virtually unregulated small-quantity generators, burning of hazardous waste in boilers, disposal of hazardous waste into domestic sewer systems, and injection of hazardous waste into ground water; (2) *inadequate technological and regulatory controls of hazardous waste land disposal*; (3) EPA *delay* in implementing congressional mandates and issuing permits;<sup>19</sup> (4) *failure to list many types of hazardous wastes*; (5) *inadequate waste management changes* to encourage recycling and reuse; and (6) *inadequate enforcement*.<sup>20</sup>

In 1984, Congress enacted HSWA to address those major problems. HSWA was distinctly different from other environmental statutes. Typically, Congress sets broad policy goals and objectives in its legislation, and the implementing agency (e.g., EPA) is then given broad discretion to establish detailed regulations to accomplish those goals and objectives. HSWA, however, looks and operates more like a detailed regulatory scheme than a broad congressional mandate.<sup>21</sup> This deviation from the norm is a pointed testament to the serious congressional dissatisfaction with EPA's implementation of RCRA at that time. HSWA is a technology-forcing statute with draconian incentives that incorporates self-implementing "hammer" provisions. The "hammer" is a statutory requirement that takes effect immediately if EPA fails to meet a statutory deadline.<sup>22</sup> HSWA requirements take effect as soon as they are incorporated into the federal program, regardless of state authorization (see discussion at Section 1.5 below).

Principal changes under HSWA included the land disposal ban, minimum technology standards for land-disposal units,<sup>23</sup> storage limitations,<sup>24</sup> generator requirements, listing (and de-listing) standards, certifications of compliance, export requirements, standards for burning hazardous waste, corrective action, waste minimization, enhanced enforcement, and permit requirements.<sup>25</sup> HSWA requirements are core to the RCRA program and are discussed throughout this book. The land disposal ban represented an overall philosophical shift in how to safely manage hazardous waste, and is discussed below.

- *Land Disposal Ban*

HSWA's main objective was to ban land disposal of hazardous waste. This is known as RCRA's "land ban," which was accomplished by shifting the focus of hazardous waste management away from land disposal to treatment alternatives. Land disposal of hazardous waste was banned, unless a facility could meet one of two conditions:

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18. RCRA was authorized for 2 years to allow Congress the opportunity to scrutinize it to ensure implementation. 128 CONG. REC. H22,858–22,888 (daily ed., Sept. 8, 1982).
  19. EPA delay created an assortment of problems including litigation. *See* State of Illinois v. Gorsuch, 530 F. Supp. 340 (D.C. Cir. 1981) (EPA ordered to issue and abide by court-imposed deadlines to issue regulations). The agency had failed to issue permitting standards for land disposal facilities (it missed two court ordered deadlines). *See also* S. REP. NO. 284, 98th Cong., 1st Sess. 2-3 (Oct. 28, 1983). For a detailed discussion regarding these issues, refer to RICHARD C. FORTUNA & DAVID J. LINNET, HAZARDOUS WASTE REGULATION, THE NEW ERA (McGraw-Hill 1987).
  20. H.R. REP. NO. 98-198, 98th Cong., 1st Sess. 19-20 (May 17, 1983) (large amount of hazardous waste were estimated to escape regulation (40 million metric tons yearly) through loopholes).
  21. H.R. CONF. REP. NO. 98-1133, 98th Cong., 2d Sess. 2449 (Oct. 3, 1984) (HSWA attempts to write detailed regulations into law). *See also* RICHARD C. FORTUNA & DAVID J. LINNET, HAZARDOUS WASTE REGULATION, THE NEW ERA (McGraw-Hill 1987).
  22. HSWA's self-implementing statutory requirements are identified in Table 2 of 40 C.F.R. § 271.1(j).
  23. RCRA § 3004(o), 42 U.S.C. § 6925(o) (2000) (minimum technology standards included leachate collection and management systems, ground water monitoring and liners and are discussed in Chapter 8).
  24. RCRA § 3004(j), 42 U.S.C. § 6924(j) (2000) (prohibiting the storage of LDR waste, except for the sole purpose of accumulating sufficient quantities to facilitate proper recovery, treatment, or disposal of that waste).
  25. RCRA § 3001, 42 U.S.C. § 6921(d) (2000) (closing generator loopholes); RCRA § 3005(h), 42 U.S.C. § 6925(h) (2000) (large-quantity generator requirements); RCRA § 3004, 42 U.S.C. § 6924 (2000) (standards for burning hazardous waste); RCRA § 3017, 42 U.S.C. § 6938 (2000) (certifications of compliance that groundwater monitoring and financial assurance requirements were met); RCRA §§ 3004(u)(v), 42 U.S.C. §§ 6924(u)(v) (corrective action); RCRA § 7003, 2 U.S.C. § 6973, RCRA § 7002, 42 U.S.C. § 6972 (imminent and substantial endangerment); RCRA §§ 3007(c)(d)(e), 42 U.S.C. §§ 6927(c)(d)(e) (inspections); RCRA §§ 3008(d)–(f), 42 U.S.C. §§ 6928(d)–(f) (criminal) (2000); and RCRA § 3008(h), 42 U.S.C. § 6928(h) (enhanced enforcement mechanism). Additional RCRA permit requirements included, by example: (1) ten-year permit terms, and five-year review for land-disposal permits; (2) timetables for permit issuance; (3) corrective action; (4) requiring a permit for the construction of any new hazardous waste facility; (5) providing regulatory agencies with omnibus authority to impose additional permit conditions as necessary to protect human health and the environment; and (6) requiring waste minimization to be addressed in permits. RCRA §§ 3005(a)(c)(g)(h), 42 U.S.C. §§ 6925(a)(c)(g)(h) (2000).

- LDR treatment. A facility can land-dispose certain hazardous waste if the waste meets specific treatment standards (LDR) to reduce mobility and toxicity of hazardous constituents and minimize both short-term and long-term threats to human health and the environment.
- No Migration. A facility can petition the EPA Administrator to land-dispose specific hazardous wastes without meeting LDR treatment standards if it receives an Agency “no migration determination.” The facility must demonstrate, based on a reasonable degree of certainty, that hazardous constituents will not migrate from the disposal unit for as long as the waste remains hazardous.<sup>26</sup>

But there was a problem with this approach. The ban could not be implemented immediately because, at the time, EPA had not completed its list of hazardous wastes and had issued few treatment standards. To address this problem, Congress forged two solutions. First, Congress directed EPA to implement the ban in phases by preparing a schedule, to be met by November 6, 1986, for restricting the land disposal of all hazardous wastes identified or listed as hazardous at the time of HSWA’s 1984 amendments.<sup>27</sup> EPA was required to set treatment standards by rule for these wastes by specific dates in three phases, known later as the “First-Third,” “Second-Third,” and “Third-Third” scheduled wastes and rules.<sup>28</sup> Second, Congress included hammer provisions under HSWA to force EPA to promptly identify hazardous wastes and issue land disposal treatment regulations by statutorily set dates.<sup>29</sup> EPA could delay the hard hammer land disposal ban by granting either a no-migration variance or extending the hard hammer date by a national capacity variance or on a case-by-case basis.<sup>30</sup> In addition, EPA was authorized to grant a variance from treatment standards where adequate alternative treatment capacity is lacking or treatment technologies are inappropriate.<sup>31</sup>

By establishing a comprehensive LDR program, Congress intended to ensure that hazardous waste was managed properly up front, thereby reducing the need for costly cleanup, also called corrective action. The LDR program would compel EPA to focus on inherent waste characteristics and long-term uncertainties, in order to identify which wastes can be safely land disposed or, conversely, land-banned.<sup>32</sup> Later, EPA would find the LDR requirements difficult to implement for certain types of hazardous waste, including radioactive mixed waste, due to limited treatment capacity and standards (see discussion below at Section 1.3, and Chapter 10).

### 1.3 The Federal Facility Compliance Act

*“Most Americans would be shocked to learn that the federal government is not subject to the same enforcement of environmental laws which the federal government imposes on others, yet that is the case.”*

— Statement by Sen. George Mitchell, introducing the Federal Facility Compliance Act<sup>33</sup>

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26. RCRA § 3004(m), 42 U.S.C. § 6924(m) (2000) (LDR Treatment); RCRA §§ 3004(d)(1), (e)(1), (g)(5), 42 U.S.C. §§ 6924(d)(1), (e)(1), (g)(5) (2000) (No Migration).

27. California-list wastes, solvent and dioxin containing wastes were banned by statutorily imposed deadlines. See RCRA §§ 3004(e)(f), 42 U.S.C. §§ 6924(e)(f) (2000).

28. RCRA § 3004 (g)(4), 42 U.S.C. § 6924 (g)(4) (2000). EPA issued rules for these wastes during a two-year span. See 53 FED. REG. 31138 (Aug. 17, 1988) (First-Third rule); 54 FED. REG. 26594 (June 23, 1989) (Second-Third rule) and 55 FED. REG. 22520 (June 1, 1990) (Third-Third rule). For hazardous waste identified or listed after 1984, EPA was required to issue rules on treatment and prohibitions within six months after each waste is identified or listed. RCRA § 3004(g)(5), 42 U.S.C. § 6924(g)(5) (2000).

29. If EPA failed to set treatment standards by May 8, 1990, a “hard” hammer automatically prohibited disposal of such wastes. RCRA § 3004(g)(6), 42 U.S.C. § 6924(g)(6) (2000).

30. RCRA § 3004(h)(2), 42 U.S.C. § 6924(h)(2) (2000).

31. RCRA § 3004(h)(2), 42 U.S.C. § 6924(h)(2) (2000). See also 55 FED. REG. 22520, 22526.

32. H. REP. NO. 98-198, 98th Cong., 1st Sess. 32-33 (May 17, 1983).

33. 137 CONG. REC. NO. 149, S14855 (daily ed., Oct. 17, 1991).

### 1.3.1 Background: The Problem

In 1992, Congress passed the Federal Facility Compliance Act (FFCA) to require federal facilities to comply with RCRA requirements for hazardous and radioactive mixed waste.<sup>34</sup> After the passage of HSWA, congressional investigations and reports had revealed a startling oversight: the federal government (primarily the U.S. Department of Energy (DOE)) was the worst violator of RCRA. Without a major revision to RCRA, issues surrounding federal facility compliance would continue. The federal government considered its facilities to be self-regulated, and in authorized states, immune from the assessment of civil penalties for past violations. Further, Congress had not previously focused on federal facilities or radioactive mixed waste. Without legal reform, it was unlikely that federal facilities would achieve RCRA compliance and cleanup. But this time, criticism turned from EPA to DOE. These criticisms focused on the following four problems, discussed below, that pointed to the need for legislative action.

- Widespread environmental contamination at federal facilities
- Secrecy and the lack of meaningful oversight
- Sovereign immunity
- The “mixed waste” problem.

#### 1.3.1.1 Widespread environmental contamination

Congressional hearings revealed a complex and significant problem at federal facilities. It was estimated that the huge defense weapons complex generated some 20 million tons of hazardous and radioactive mixed waste annually.<sup>35</sup> The DOE, alone, had approximately 33 facilities located in 15 states, not including Hanford (Washington), Rocky Flats (Colorado) and Savannah River (South Carolina). DOE controlled the defense weapons complex and nuclear weapons production. Its facilities were responsible for the management, storage and disposal of millions of cubic yards of radioactive mixed waste. As early as 1986, the General Accounting Office (GAO) had issued a report from its investigations that revealed widespread contamination and compliance issues at federal facilities.<sup>36</sup> In 1989 the comptroller general of the United States testified before Congress that there is “widespread contamination” at DOE sites, some sites may be irreversibly contaminated, and DOE may have to place them in long-term institutional care.<sup>37</sup> Finally, in 1991 the OTA issued its report *Complex Cleanup: The Environmental Legacy of Nuclear Weapons Production*, which concluded that DOE facilities produced contamination so severe that many may be permanently off limits to society.<sup>38</sup> DOE was among the “very worst,” with compliance rates lagging behind private industry and decades of self-regulation resulting in severe environmental contamination.<sup>39</sup> Cleanup at the DOE sites was either slow or impossible due to lack of mixed waste treatment technology or capacity.

#### 1.3.1.2 Secrecy and lack of meaningful oversight

Congressional hearings revealed three factors that contributed to environmental compliance problems at federal facilities. First, considerations of national security and secrecy regarding weapons production contributed to keeping environmental neglect by federal facilities out of sight. Secretary of Energy James D. Watkins stated that “[t]hese problems have resulted from a 40-year culture cloaked in secrecy and imbued with a dedication to the production of nuclear weapons without a real sensitivity to the environment.”<sup>40</sup> As described by Deputy

34. The Federal Facility Compliance Act, Pub. L. 102-386, 106 Stat. 1505 (Oct. 6, 1992) (codified as amended at 42 U.S.C. §§ 6901, 6903, 6908, 6939c–6939e, 6961, 6965 (1994)).

35. H.R. REP. 102-111, 102d Cong., 1st Sess. 2 (June 13, 1991).

36. The GAO concluded that out of 17 federal agencies in 12 states, almost ½ were cited by EPA for RCRA violations. Over 1/4 were out of compliance for 6 months or more, and some for as long as three years. *Id.* at 3. See also 137 CONG. REC. No. 149, S14883, 14899 (daily ed., Oct. 17, 1991).

37. 137 CONG. REC. No. 149, S14898 (daily ed., Oct. 17, 1991).

38. *Id.*

39. H. R. REP. 102-111, 102d Cong., 1st Sess. 2-3 (June 13, 1991).

40. *Id.* (quoting statement of Watkins before the Senate Committee on Energy and Natural Resources, October 5, 1989)).

Secretary of Energy W. Henson Moore, national security was considered “a secret operation not subject to laws . . . no one was to know what was going on.”<sup>41</sup> A study conducted by the congressional Office of Technology Assessment (OTA) showed that DOE noncompliance with RCRA resulted from a “history of emphasizing the urgency of weapon production for national security, to the neglect of health and environmental considerations; ignorance of, and lack of attention to, the consequences of self-regulation, without independent oversights or meaningful public scrutiny.”<sup>42</sup>

The second factor that contributed to problems with federal facility compliance was an outgrowth of the first—DOE’s history of self-regulation and its inability to perform meaningful oversight of its own facilities. Policy and legal constraints amplified the problem. The U.S. Department of Justice (DOJ) had long taken the position that EPA cannot sue another federal agency in court, and at one point, questioned EPA’s statutory authority to issue administrative compliance orders to federal facilities under Section 3008(a) of RCRA.<sup>43</sup> This was due to the “unified executive theory,” a DOJ policy drafted during the Reagan administration that interpreted the U.S. Constitution to bar EPA from bringing a judicial enforcement action against another federal agency (i.e., DOE) on the ground that the “executive cannot sue itself.”<sup>44</sup> Moreover, at least one court questioned the effectiveness of EPA enforcement in an action where the agency had authority.<sup>45</sup> As a result, there was a general concern that EPA could not effectively enforce RCRA at federal facilities.

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*“Do as I say and not as I do,” is the old political adage. The federal government follows that in spades when it come to environmental regulation.”*

– Sen. Brown (Colorado), 137 Cong. Rec. No. 149, S14898 (daily ed., Oct. 17, 1991).

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### 1.3.1.3 Sovereign immunity

The third factor was sovereign immunity, which in turn, created federal resistance to state enforcement. Since the unified executive theory prevented EPA from suing DOE, environmental enforcement was left to the states and citizen activist groups. State enforcement officials, in turn, stumbled directly onto sovereign immunity as a new obstacle challenging state authority. Hubert Humphrey III, attorney general of Minnesota stated:

“[F]ederal facilities are among the most heavily contaminated sites, and the federal agencies have been reluctant to acknowledge state authority over hazardous waste compliance and management activities.”<sup>46</sup>

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41. quoted in the *Washington Post*, June 17, 1989.

42. H. R. REP. 102-111, 102d Cong., 1st Sess. 3 (June 13, 1991) (citing from U.S. Congress, OFFICE OF TECHNOLOGY ASSESSMENT, COMPLEX CLEANUP: THE ENVIRONMENTAL LEGACY OF NUCLEAR WEAPONS PRODUCTION, OTA-484 (Washington, D.C. U.S. Government Printing Office, Feb. 1991)).

43. U.S. EPA, Federal Facility Compliance Act; Enforcement Authorities Implementation, 58 FED. REG. 49044 (Sept. 21, 1993) (“According to the Department of Justice’s 1987 testimony before the House Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, EPA lacked the statutory authority necessary to issue administrative compliance orders pursuant to RCRA section 3008(a).”). See also Environmental Compliance by Federal Agencies: Hearings Before the Subcomm. On Oversight and Investigations of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. 182, 206 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division (“[DOJ]”) has consistently taken the position that under our constitutional scheme, disputes of a legal nature between two or more executive branch agencies whose heads serve at the pleasure of the President are properly resolved by the President or by someone with authority delegated from the President.”). Later, however, EPA set up procedures whereby the agency could issue administrative compliance orders to a federal facility. See Rebecca Heintz, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 282 (1994) (providing detailed analysis of the history of sovereign immunity under environmental laws).

44. Under the unitary executive theory, there is no justiciable “case or controversy” that can be resolved under Article III of the U.S. Constitution. The theory provides that the Constitution creates a unitary executive branch, headed by the President, as one legal entity. The President alone is responsible for the activities of the executive branch, and federal agencies as part of the executive branch cannot sue each other because the executive cannot sue itself. See U.S. EPA, 58 FED. REG. 49044-02 (Sept. 21, 1993); 137 CONG. REC. No. 149, S14898 (Oct. 19, 1991) (jawboning under unified executive theory is not enough). See also *In the Matter of United States Air Force Tinker Air Force Base*, UST-6-98-002-AO-1, 1999 WL 362884 (Adm’r 1999); Michael W. Steinburg, *Can EPA Sue Other Federal Agencies?* 17 ECOLOGY L.Q. 317 (1990).

45. *Colorado v. United States Dep’t of Army*, 707 F. Supp. 1562, 1570 (D. Colo. 1989) (EPA’s potential monitoring of the Army’s cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army’s efforts with no independent advocate for the public interest).

46. H.R. REP. 102-111, 102d Cong., 1st Sess. 2 at 8 (June 13, 1991).

Sovereign immunity is an ancient common law doctrine derived from the England fiction that “the King can do no wrong.”<sup>47</sup> In order to bring a lawsuit for punitive penalties against the federal government, including the DOE, Congress must express a “clear and unequivocal” intent to waive sovereign immunity in a manner construed “strictly in favor of the sovereign.”<sup>48</sup> RCRA § 6001 contained a waiver of sovereign immunity, but the scope of this waiver with regard to punitive penalties was contested. DOE initiated a flood of litigation challenging state authority to assess civil penalties for past environmental liability. On behalf of DOE, DOJ argued that RCRA § 6001 did not provide states authority to sue for those civil penalties because the federal government enjoyed sovereign immunity. Federal courts were divided on the issue, with several circuits (6<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup>) holding that states could not seek punitive civil penalties from federal facilities for past violations of RCRA.<sup>49</sup> The United States Supreme Court, only months before passage of the FFCA, agreed with those circuits in *United States Dep’t of Energy v. Ohio*.<sup>50</sup> This decision, as well as EPA’s policy constraint on enforcement, prodded states to urge Congress to address the glaring oversight through the FFCA. The FFCA, in turn, became a “state rights” banner issue.

### 1.3.1.4 The Mixed Waste Problem: Catch 22

A final issue that arose during the FFCA hearings in Congress was the so-called “mixed waste problem.” RCRA § 3004(j) prohibits the storage of hazardous and radioactive “mixed wastes” unless the waste has been treated to meet land disposal standards, and provides that untreated wastes can be stored only to allow sufficient quantities to accumulate for treatment. But radioactive mixed waste did not quite fit the regulatory picture. First, treatment technology and/or capacities did not exist for most types of mixed waste. Second, regulations for treatment of mixed waste did not exist. Third, there were few disposal options.<sup>51</sup> Numerous federal agencies presented testimony that radioactive mixed waste created a “Catch-22” situation because RCRA compliance would be impossible,<sup>52</sup> yet DOE facilities could be fined up to \$25,000 a day for storing untreated mixed waste. Because little or no technology existed to treat the waste, and disposal options were limited, DOE argued that the only realistic alternative was to store mixed waste onsite at great expense and in violation of then-existing law.<sup>53</sup>

EPA had addressed the mixed waste problem in 1991 by issuing a civil enforcement policy for RCRA § 3004(j) storage violations where there existed no available treatment technology or disposal capacity.<sup>54</sup> The policy, upheld by the D.C. Circuit Court of Appeals, reaffirmed that storage of mixed wastes in the absence of adequate treatment or disposal capacity was unlawful, and established a “lower civil enforcement priority” for violators of § 3004(j).<sup>55</sup> The fix was temporary and inadequate. Thus the mixed waste problem emerged at the center of the FFCA debate.

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*“It is idiotic. It is a nation wrapped in navel gazing that cannot lift its eyes from its technology . . . to the reality of a world where there are some things we do not know how to do yet. So we fine ourselves for not knowing how to do it. We prohibit ourselves from doing it.”*

– Sen. Wallop, in describing the “mixed waste problem,” 137 Cong. Rec. S14867 (daily ed., Oct. 17, 1991).

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47. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 95-96 (1996) (Souter, J. dissenting) (sovereign immunity derives from the ancient myth that the “[K]ing can do no wrong,” and discussing history of the doctrine).
48. *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992).
49. *See, e.g., United States v. Washington*, 872 F.2d 874 (9th Cir. 1989); *State of Maine v. Dep’t of Navy*, 973 F.2d. 1007 (1st Cir. 1992); *Mitzenfelt v. Dep’t of Air Force*, 903 F.2d. 1293 (10th Cir. 1990).
50. 503 U.S. 607 (1992).
51. 137 CONG. REC. No. 149, S14900 (daily ed., Oct. 17, 1991).
52. *See, id.*, at S14870, 14893 (describing RCRA storage prohibitions as creating a Catch-22 situation whereby it is illegal to store it, illegal to transport it, and subjects facilities to \$25,000 a day in fines for having it).
53. *Id.* at S14870.
54. U.S. EPA, EPA Policy on Enforcement of RCRA Section 3004(j) Storage Prohibition at Facilities Generating Mixed Radioactive and Hazardous Waste, 56 FED. REG. 42730 (1991).
55. *See Edison Electric Institute, et. al, v. EPA*, 996 F.2d 326 (D.C. Cir. 1993) (upholding EPA’s mixed waste storage civil enforcement policy as consistent with RCRA’s highly prescriptive, technology-forcing statute).

### 1.3.2 Congressional Response: Equal Footing

*“The federal government should be held to the same standards of accountability as everyone regarding hazardous waste. This legislation places private industry . . . on equal footing.”*

— Statement by Sen. George Mitchell, during the FFCRA debates<sup>56</sup>

On October 6, 1992, Congress passed the FFCRA in a strikingly nonpartisan manner. Everyone agreed that RCRA needed reform to address compliance issues at federal facilities. For the most part, Congress could easily make those reforms with one significant exception: how to address the mixed waste problem. This section describes how the mixed waste problem was addressed, and includes a description of key FFCRA amendments.

#### 1.3.2.1 The Waiver of Sovereign Immunity<sup>57</sup>

To ensure that federal facilities were placed on an “equal footing” with private industry, Congress adopted language that expressly waived federal sovereign immunity with respect to punitive civil fines and penalties. The amendment also effectively overruled *United States Dep’t of Energy v. Ohio*, issued only months prior to the passage of the FFCRA.<sup>58</sup> Significantly, Congress amended only RCRA, leaving the question of federal sovereign immunity under other major environmental statutes open for future litigation (see Sidebar 1.2).

Congress amended RCRA § 6001 to state:

[T]he 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 . . . with respect to any such substantive or procedural requirement . . . (including, but not limited to, any injunctive relief, administrative [order or civil or administrative] penalty or fine referred to in the preceding sentence, or reasonable service charge) . . .<sup>59</sup>

Congress also “reaffirmed” and “clarified” that RCRA § 6001 required federal agencies to pay “reasonable service charges,” which it defined to include fees and charges assessed in connection with the processing and issuance of permits, permit modifications, review of plans, studies and other documents, inspection and monitoring of facilities or other nondiscriminatory charges assessed in connection with a federal, state, interstate, or local solid waste hazardous waste regulatory program.<sup>60</sup> In a committee report, these fees and charges were described as “nondiscriminatory” to ensure that federal facilities are not singled out for payment on the basis of their status as federal entities.<sup>61</sup> Further, the Committee recognized that federal facilities and private entities differ, and that some federal facilities may generate unique or unusually toxic wastes that may require special oversight and warrant imposition of “differential fees” that, in turn, would not be considered discriminatory.<sup>62</sup>

#### 1.3.2.2 Definition of Person<sup>63</sup>

The citizen-suit provision of RCRA was amended by defining *person* to “include each department, agency, and instrumentality of the United States.” This amendment was in response to the decision in *United States Dep’t of Energy v. Ohio*, discussed above. The amendment intended to clarify existing law and prior “misunderstandings” that led some courts to the “erroneous conclusion” that federal agencies were not “persons” under existing

56. 137 CONG. REC. No. 149, S14897 (daily ed., Oct. 17, 1991).

57. RCRA § 6001, 42 U.S.C. § 6961(a) (2000).

58. 503 U.S. 607 (1992).

59. RCRA § 6001(a), 42 U.S.C. § 6961(a) (2000).

60. RCRA § 6001(a), 42 U.S.C. § 6961(a) (2000). See H. R. REP. 102-111, 102d Cong., 1st Sess. 6–7 (June 13, 1991).

61. H. R. REP. 102-111, 102d Cong., 1st Sess. 6 (June 13, 1991).

62. *Id.*

63. RCRA § 1004(15), 42 U.S.C. § 6903(15); RCRA § 7002(a), 42 U.S.C. § 6972(a) (2000).

### Sidebar 1.2

#### Federal Sovereign Immunity Under Other Environmental Statutes

##### Safe Drinking Water Act (42 U.S.C. §§ 300j-6(a))

In 1996, Congress amended the Safe Drinking Water Act (SDWA) in the wake of *United States Dep't of Energy v. Ohio*, 502 U.S. 607 (1992) as it did with RCRA, to provide a clear and unequivocal waiver of federal government immunity from punitive civil penalties. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 129, 110 Stat. 1613 (1996). Like RCRA, the SDWA now expressly subjects federal agencies to the imposition of "all 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." 42 U.S.C. § 300j-6(a).

##### Clean Water Act (33 U.S.C. § 1323(a))

After *Ohio*, there have been several failed legislative attempts to amend the Clean Water Act (like RCRA and the SDWA). See, e.g., Federal Facility Compliance Act of 1998, S.1923, 105th Cong. §§ 2,3 (1998); Clean Water Act Amendments of 1995, H.R. 961, 104th Cong. 1st Sess. (1995); Water Pollution Prevention and Control Act of 1994, S. Rep. 103-257, 103rd Cong., 2nd Sess. (1994) (S.2093 proposed to amend Section 313 to clarify the intent to waive the United States' sovereign immunity for violations of the Clean Water Act by Federal facilities). See *United States Dep't of Energy v. Ohio and Sierra Club v. Lujan*, 972 F.2d 312 (10th Cir. 1992) (based on the *Ohio* decision, Congress did not waive the United States' sovereign immunity against the assessment of punitive civil penalties for past violations).

##### Clean Air Act (42 U.S.C. § 7418(a))

Federal courts are split on whether Section 118(a) of the Clean Air Act waives sovereign immunity to allow punitive penalties to be assessed against the federal government for past violations following *Ohio*. See *United States v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529 (6th Cir. 1999) (holding that federal sovereign immunity is waived under the Clean Air Act, and declining to follow *Ohio* in view of the language differences between the Clean Water Act and the Clean Air Act). *Contra City of Jacksonville v. Dep't of the Navy*, 348 F.3d 1307, 1317 (11th Cir. 2003) (holding that federal sovereign immunity from punitive penalties for past violations is not waived based on *Ohio*); *Sierra Club v. Tennessee Valley Authority*, 430 F.3d 1337 (11th Cir. 2005) (holding that the Clean Air Act does not waive federal sovereign immunity against punitive fines for past conduct).

Note: The sovereign immunity issue addresses only whether Congress waived the United States' sovereign immunity for punitive penalties for past violations. Under each of these federal statutes (including RCRA), the federal government is nevertheless required to comply with federal, state and local requirements.

law and immune from certain sanctions and enforcement mechanisms.<sup>64</sup> The result was to thwart any attempt by attorneys to make an end-run around sovereign immunity.

#### 1.3.2.3 Federal Administrative Enforcement<sup>65</sup>

EPA may take administrative enforcement actions against other federal agencies. This amendment was in response to the "unified executive theory," a DOJ policy that prohibited EPA from enforcing RCRA against another federal agency through judicial or administrative action (see discussion above at Section 1.3.1).

64. H. R. REP. 102-111, 102d Cong., 1st Sess. 18 (June 13, 1991).

65. RCRA § 6001(b), 42 U.S.C. § 6961(b) (2000).

### 1.3.2.4 The Mixed Waste Problem: Storage & Treatment<sup>66</sup>

Congress resolved the mixed waste problem by creating a three-step process that effectively required the DOE to negotiate with authorized states or the EPA. First, DOE was directed to inventory its mixed waste at 40 facilities, and for each facility, develop a site treatment plan (STP) with a schedule to treat mixed wastes to LDR standards for safe land disposal. Second, DOE was required, with one exception, to submit each STP to an authorized state or EPA for review and approval, modification, or disapproval.<sup>67</sup> Third, the EPA or the authorized state would issue an FFCA order or agreement to implement the STP. DOE was given a three-year waiver from the assessment of fines and penalties for RCRA § 3004(j) storage prohibitions for radioactive mixed waste (until October 1995). At the end of the three-year time period (e.g., October 1995), DOE's sovereign immunity would extend so long as it remained in compliance with the EPA or state-issued FFCA order or agreement implementing an STP (see Sidebar 1.3). By October 1995, DOE entered into orders or agreements with authorized states for each of its facilities. For this reason, a DOE facility cannot be sued for § 3004(j) violations so long as it complies with the state-issued FFCA order or agreement. This remains true today. Although Congress addressed the "mixed waste problem" for DOE facilities, commercial facilities that stored mixed waste were faced with a substantially similar problem that was not resolved until 2001 (see Box 1.3).

**Box 1.3**  
**What About Commercial/Non-DOE Facilities That Manage Mixed Waste?**

The "mixed waste problem" also existed for commercial facilities that managed mixed waste. In 2001, EPA provided these groups "regulatory relief" through its Mixed Waste Rule 66 Fed. Reg. 27218 (May 16, 2001) (see Chapter 10.3.2). Prior to that rule, EPA provided relief from RCRA § 3004(j) violations through mixed waste enforcement policies.

### 1.3.2.5 Limitation on State Funds (environmental projects)<sup>68</sup>

Congress required that fines and penalties collected by states for violations of RCRA may only be used for environmental projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement, unless the state's constitution or statute requires that these funds be used in a different manner. The amendment was intended to alleviate concerns about potentially excessive fines and to comport with congressional intent that federal funds for fines be used for projects designed to improve the environment.<sup>69</sup>

### 1.3.2.6 Facility Environmental Inspections<sup>70</sup>

EPA or an authorized state must conduct an annual inspection and environmental assessment of each federal facility located in its state. The department, agency, or instrumentality owning the facility (e.g., DOE) must reimburse the agency for the costs of conducting the inspection. The first inspection was required to include a comprehensive evaluation of ground water monitoring.

### 1.3.2.7 Definition of Mixed Waste<sup>71</sup>

Congress defined *mixed waste* as a waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954, as amended. The definition "reflects the meaning of the term as used in current Nuclear Regulatory Commission and EPA guidance, practice and policy."<sup>72</sup>

66. RCRA § 6001, 42 U.S.C. § 6961 (2000).

67. The exception was for DOE facilities that had a permit establishing a schedule for the treatment of mixed wastes, or any existing agreement or administrative or judicial order governing the treatment of such wastes and to which the state was a party. 42 U.S.C. § 6939c (b)(A)(ii) (2000).

68. RCRA § 6001(c), 42 U.S.C. § 6961(c) (2000).

69. H.R. CONF. REP. NO. 102-886, 102 Cong., 2d Sess. 17-18 (Sept. 22, 1992).

70. RCRA § 6001(c), 42 U.S.C. § 6961(c) (2000).

71. RCRA § 1004(41), 42 U.S.C. § 6903(41) (2000).

72. H.R. CONF. REP. NO. 102-886, 102 Cong., 2d Sess. 27 (Sept. 22, 1992).