1991

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Recommended Citation

Corinne B. Yates, *Limitations of Sovereign Immunity Under the Clean Water Act: Empowering States To Confront Federal Polluters*, 90 MICH. L. REV. 183 (1991).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss1/5>

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Limitations of Sovereign Immunity Under the Clean Water Act: Empowering States To Confront Federal Polluters

Corinne Beckwith Yates

When it comes to polluting the environment, "some of the worst offenders are our own Federal facilities," Vice President George Bush said in a 1988 presidential campaign speech.¹ Promoting himself as the "environmental president," Bush urged that "[t]he government should live within the laws it imposes on others."² Private chemical companies, steel manufacturers, and paper mills embody the stereotypical image of this country's worst polluters. Most often overlooked, however, are agencies within the federal government itself. In 1989, the General Accounting Office reported that federally owned facilities — such as shipyards, nuclear weapons plants, laboratories, and military bases — violated clean water regulations twice as often as private firms and that forty percent of federal violators were noncompliant for a year or longer.³ Congress has adopted stringent standards to combat the problems of solid waste,⁴ hazardous materials,⁵ and water⁶ and air pollution.⁷ Holding the federal government accountable to its own laws, however, has proved difficult. Federal agencies generally are subject to sanctions only to the extent Congress unambiguously waives sovereign immunity.⁸ Yet Congress did not express its intent uniformly in the waiver provisions of the major federal environmental laws. The result is a confused amalgam of statutes that address, but fail to clearly delimit, the government's sovereign immunity.

1. 135 CONG. REC. H3894 (daily ed. July 19, 1989). Bush was quoted in the comments of Rep. Thomas Luken on consideration of H.R. 1056, the Federal Facilities Compliance Act of 1989, which clarified the waiver of sovereign immunity in the Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1988).

2. 135 CONG. REC. at H3894.

3. *GAO Says Federal Facilities Are Major Water Polluters*, L.A. TIMES, Jan. 15, 1989, at I4, col. 1. The GAO study also noted that federal agencies place minimal emphasis on compliance with antipollution laws and that the Environmental Protection Agency and state regulators pursued "timely enforcement actions against federal facilities in only eight of the [forty-six] cases in which" action was required. *Id.*

4. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988).

5. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1991).

6. Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1991).

7. Clean Air Act, 42 U.S.C.A. §§ 7401-7671q (West 1983 & Supp. 1991).

8. *Block v. North Dakota ex rel. Board of Univ. & School Lands*, 461 U.S. 273, 280 (1983) (A waiver of sovereign immunity must be express.).

The Clean Water Act⁹ is one such statute. The original Act and, to a greater extent, its subsequent amendments, evince congressional intent to make federal agencies responsible for pollution. Section 1323(a), which defines agencies' obligations under the Act, subjects federal entities to the Act's requirements and sanctions to the same extent as private polluters.¹⁰ Yet a limitation to this broad sovereign immunity waiver obscures that aim: section 1323(a) waives sovereign immunity only for those civil penalties that arise under federal law.¹¹ Thus, environmental groups, states, and individuals suing as private attorneys general have been relatively effective under the Clean Water Act's citizen suit provision,¹² as that provision's penalties are part of the Act's own provisions and undoubtedly arise under federal law.¹³ States, however, face great impediments when they seek to impose civil penalties under state-operated programs that transfer enforcement of some of the Clean Water Act's provisions to the states.¹⁴

These programs, designed as part of the Clean Water Act's complex National Pollutant Discharge Elimination System (NPDES),¹⁵ al-

9. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1991).

10. Section 1323(a) reads, in part:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural . . . , (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

33 U.S.C. § 1323(a) (1988).

11. "[T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." 33 U.S.C. § 1323(a) (1988). See *Ohio v. United States Dept. of Energy*, 904 F.2d 1058 (6th Cir. 1990) (holding that the Department of Energy is subject to civil penalties arising under federal law), *cert. granted*, 111 S. Ct. 2256 (1991). But see *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601, 605 (E.D. Cal. 1986) (ruling that the Clean Water Act does not waive sovereign immunity for any civil penalties, including those arising under federal law). *MESS*, a case that has been widely criticized, is discussed in note 89 *infra*.

12. See, e.g., *Sierra Club v. Lujan*, 931 F.2d 1421, 1424-29 (10th Cir. 1991); *cf. Ohio v. United States Dept. of Energy*, 904 F.2d 1058 (6th Cir. 1990) (suit allowed under the Resource Conservation and Recovery Act's analogous citizen suit provision), *cert. granted*, 111 S. Ct. 2256 (1991); 33 U.S.C. § 1365 (1988). The Clean Water Act citizen suit provision allows citizens to file complaints against any person alleged to be in violation of an effluent standard or limitation or an order issued by the EPA or a state with regard to such a standard or limitation. 33 U.S.C. § 1365(a)(1) (1988). In authorizing citizen suits, Congress expressly provided for civil penalties — up to \$25,000 a day. 33 U.S.C. § 1319(d) (1988). See generally Michael D. Axline et al., *Stones for David's Sling: Civil Penalties in Citizen Suits Against Polluting Federal Facilities*, 2 J. ENVTL. L. & LITIG. 1 (1987).

13. See *Sierra Club*, 931 F.2d at 1427 ("Because this [citizen suit] is based on alleged violations of a . . . permit issued by the EPA, it arises under federal law.").

14. See *infra* Part II.

15. 33 U.S.C. § 1342 (1988); see *infra* Part II.

low and, in fact, require states to penalize polluters that exceed allowable pollutant discharge levels under the Act.¹⁶ Specifically, under the NPDES, either the federal Environmental Protection Agency (EPA) or the state (when it assumes administration of the NPDES program) issues permits to polluters, allowing the discharge of pollutants within strict permit conditions, and imposes penalties when permit holders violate the conditions of their permits. States prefer to penalize polluters using sanctions developed under the Act's state-operated programs, as opposed to those under the citizen suit provision, because the fines imposed in citizen suits are payable to the federal government rather than to the states.¹⁷

The penalties states seek under the NPDES state-operated programs, although integral to the federal Act, arise, in at least one court's view, under state instead of federal law.¹⁸ If this is the case, sovereign immunity deprives states of an effective weapon ordinarily available to enforce the Clean Water Act against federal agencies, because the sovereign immunity waiver is limited to penalties arising under federal law. Accordingly, this would restrict states' enforcement actions to citizen suits, thereby diminishing their incentive and their financial capacity to abate federal agencies' pollution, leaving no meaningful deterrent to federal agencies.

This Note considers whether civil penalties that states impose on federal agencies for violations of NPDES permits arise under federal law and thus are covered by the Clean Water Act's waiver of sovereign immunity — an issue the Supreme Court is scheduled to address during the 1991 term.¹⁹ Part I outlines the history of the Clean Water Act, discussing Supreme Court decisions and statutory amendments that affect the sovereign immunity provision. Part II explains the mechanics of the NPDES state permit process and examines, through analysis of statutory provisions, the degree of control retained by the EPA over individual states operating approved NPDES programs. Part III canvasses judicial treatment of the sovereign immunity question: the Ninth Circuit has ruled that states cannot impose civil penalties on federal agencies because those penalties arise under state law,²⁰ while the Sixth Circuit has held that states can impose such penalties

16. 33 U.S.C. § 1342(b) (1988).

17. See *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 14 n.25 (1981) (civil penalties assessed in Clean Water Act citizen suits payable to the federal government).

18. *California v. United States Dept. of Navy*, 845 F.2d 222, 225 (9th Cir. 1988). See section III.B for further discussion of this case.

19. See *Ohio v. United States Dept. of Energy*, 904 F.2d 1058 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991).

20. *California v. United States Dept. of Navy*, 845 F.2d 222 (9th Cir. 1988).

because they arise under federal law.²¹ Finally, Part IV argues that resolution of this question should turn primarily on the statutory language and framework of the Clean Water Act, as opposed to its convoluted legislative history. The Note concludes that, given the extent of federal oversight and the practical implications of the unusual hybrid arrangement, state-imposed civil penalties arise under federal law. Federal agencies, therefore, should be subject to state-imposed penalties for violations of NPDES permits.

I. HISTORY OF THE CLEAN WATER ACT

By the late 1970s, Congress had passed a series of stringent federal environmental standards in an attempt to arrest the massive environmental damage perpetrated in previous decades. The laws' aims were ambitious. The Clean Air Act, for example, sought to protect air quality and "initiate and accelerate a national research and development program to achieve the prevention and control of air pollution,"²² while the Clean Water Act enunciated a national goal "that the discharge of pollutants into the navigable waters be eliminated . . ."²³ Each of the major statutes — the Clean Air Act,²⁴ the Clean Water Act,²⁵ the Resource Conservation and Recovery Act (RCRA),²⁶ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)²⁷ — contains a provision waiving sovereign immunity to some extent.²⁸ The question remains: To what extent? Whether wittingly or otherwise, Congress has created a network of environmental statutes whose lack of uniformity defies comparative analysis and whose equivocality confounds those seeking evidence of a clear waiver.

21. *Ohio v. United States Dept. of Energy*, 904 F.2d 1058 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991).

22. Pub. L. No. 95-95, 91 Stat. 712 (1977) (codified as amended at 42 U.S.C.A. § 7401(b) (West Supp. 1991)).

23. Pub. L. No. 95-217, 91 Stat. 1567, 1575 (1977) (codified at 33 U.S.C. § 1251 (1988)).

24. 42 U.S.C.A. §§ 7401-7671q (West 1983 & Supp. 1991).

25. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1991).

26. 42 U.S.C. §§ 6901-6992k (1988).

27. 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1991).

28. The breadth of these waivers varies. For example, the Clean Air Act's waiver is the broadest, subjecting federal facilities and personnel to all state and local air pollution requirements, substantive and procedural, and to the same criminal, civil, and administrative sanctions that private polluters face. 42 U.S.C.A. § 7418 (West 1983 & Supp. 1991). The Clean Air Act provides for "as broad a waiver of sovereign immunity as is found in any of the environmental statutes." Michael Donnelly & James G. Van Ness, *The Warrior and the Druid — the DOD and Environmental Law*, 33 FED. BAR NEWS & J. 37, 38 (1986). RCRA, on the other hand, contains the most narrow waiver language, requiring federal facilities to comply only with "requirements." 42 U.S.C. § 6961 (1988); see *infra* section III.A.2.

A. Early Judicial Interpretations of Environmental Legislation

In 1976, two major Supreme Court cases resolved some questions, at least temporarily, by narrowly interpreting the breadth of the waiver in two environmental statutes. *Hancock v. Train*²⁹ and *EPA v. California ex rel. State Water Resources Control Board*,³⁰ companion cases addressing the Clean Air Act and Clean Water Act, respectively, restricted the sovereign immunity waivers in those acts to encompass only substantive standards, such as effluent limitations and compliance schedules, as opposed to procedural standards, such as the requirement that federal installations obtain discharge permits.³¹ In *Hancock*, the State of Kentucky sought an injunction impelling federal polluters in that state, namely the Army, the Tennessee Valley Authority, and the Atomic Energy Commission, to obtain operating permits under the Clean Air Act's analogue to the Clean Water Act's NPDES permit system.³² The EPA had approved Kentucky's implementation plan,³³ which essentially stated that no one could pollute the air "unless a permit therefor ha[d] been issued . . . and [was] currently in effect."³⁴ Despite the Clean Air Act's waiver provision, which, as of 1972, required federal facilities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution,"³⁵ the Court ruled that Congress did not unambiguously declare that federal facilities required a permit to operate.³⁶

Likewise, in *State Water Resources Control Board*, the Court reasoned that although the Clean Water Act obliged federal water polluters to comply with state "requirements respecting control and abatement of pollution," securing a permit from a state with an EPA-approved program was not one of those requirements.³⁷ In that case, the states of California and Washington challenged the EPA administrator's position that states lacked authority to require federal facilities to obtain permits. The Court ruled in favor of the EPA, narrowly interpreting the word "requirement" to exclude state NPDES permit

29. 426 U.S. 167 (1976).

30. 426 U.S. 200 (1976).

31. *Hancock*, 426 U.S. at 198-99; *State Water Resources Control Bd.*, 426 U.S. at 215, 227.

32. *Hancock*, 426 U.S. at 172-76; see *infra* Part II.

33. Similar to the Clean Water Act, the Clean Air Act allows states to assume enforcement of the Act. 42 U.S.C. § 7407(a) (1988). Thus, under § 7407(a), each state would submit to the EPA a plan detailing how the state would maintain and implement the Act's air quality standards. See also *Hancock*, 426 U.S. at 169-70.

34. 426 U.S. at 173 (quoting Kentucky's implementation plan submitted to the EPA, which included this language from the Kentucky Air Pollution Control Commission Regulation No. AP-1, § 5(1)).

35. 42 U.S.C. § 1857f (1970) (current version at 42 U.S.C.A. § 7418(a) (West Supp. 1991)).

36. 426 U.S. at 198.

37. 426 U.S. at 212-13 (quoting 33 U.S.C. § 1323 (Supp. IV 1970)).

standards.³⁸ "Should it be the intent of Congress to have the EPA approve a state NPDES program regulating federal . . . point sources,"³⁹ the Court said, "it may legislate to make that intention manifest."⁴⁰ So Congress did.

B. *The Initial Legislative Response*

Congress promptly repudiated the Supreme Court's narrow construction by amending the language in both the Clean Air Act and Clean Water Act to expand the extent to which the Acts' provisions included federal polluters.⁴¹ The revised Clean Water Act, instead of merely subjecting federal agencies to "requirements," exacted a broader federal obligation. The 1977 version, which remains in force today, reads:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, *and process and sanctions* respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity [This obligation applies] to any requirement *whether substantive or procedural* . . . , to the exercise of any Federal, State, or local administrative authority, and . . . to *any process and sanction*, whether enforced in Federal, State, or local courts⁴²

The amendment furnishes strong evidence of congressional intent to treat the federal government essentially like private polluters. According to the Senate report on the amendments, Congress amended the Act to "indicate unequivocally" that federal facilities were "subject to all of the provisions of state and local pollution laws."⁴³ This was Congress' intent in 1972, but "the Supreme Court, encouraged by Federal agencies, ha[d] misconstrued the original intent" in *Hancock and State Water Resources Control Board*.⁴⁴ In the face of judicial setbacks, then, the amendments provided states with a legislative solution to close one loophole that had allowed federal polluters to avoid envi-

38. 426 U.S. at 227.

39. Point sources under the Clean Water Act are "any discernible, confined and discrete conveyance[s] . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (1988).

40. 426 U.S. at 227-28.

41. 42 U.S.C.A. § 7418(a) (West Supp. 1991) (Clean Air Act); 33 U.S.C. § 1323(a) (1988) (Clean Water Act). The Clean Water Act's legislative history states that the amendment "clarifies [section 1323(a)] to provide that all Federal facilities must comply with all substantive and procedural requirements of Federal, State, or local water pollution control laws." S. REP. NO. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392.

42. 33 U.S.C. § 1323(a) (1988) (emphasis added). The Clean Air Act waiver language also was changed to require compliance with any "requirement[s] whether substantive or procedural" and to include "process and sanction[s]." 42 U.S.C.A. § 7418(a) (West Supp. 1991).

43. S. REP. NO. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392.

44. *Id.*

ronmental requirements under the Clean Water Act. A more stubborn barrier to the enforcement ability of the states, however, involved the sovereign immunity waiver's limitation to penalties arising under federal law — a problem inextricably bound up with the mechanics of the NPDES state permit process.

II. THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

The NPDES program is a complex statutory system through which pollutant dischargers obtain permits allowing them to release some pollutants under strict permit conditions. Because it is the violation of these permit conditions that leads to the sanctions that are the subject of this Note, an understanding of the NPDES scheme is crucial. Part II discusses in detail the NPDES permit program. Section II.A focuses on the origins and basic procedures of the NPDES. Section II.B analyzes the distribution of permit authority and the degree of control the EPA retains over state permit programs.

A. *Dynamics of the NPDES Permit Program*

In its formative stage, pollution control legislation proceeded from the assumption that the promulgation and enforcement of measurable quality standards would achieve satisfactory pollution abatement. The current Clean Water Act's precursor — which Congress expressly devised "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution"⁴⁵ — evinced this theory. This legislative approach to reduce pollution, however, merely demonstrated the ineffectiveness of water quality standards.⁴⁶ Thus, Congress shifted its objective away from the tolerance of acceptable pollution levels to the complete elimination of pollutant discharge into navigable waters.⁴⁷

In pursuit of this objective, Congress designed the Clean Water Act to eliminate all pollution of navigable waters by making the *act* of polluting the nation's waterways, rather than the *results* of the discharge, the actionable offense.⁴⁸ The cornerstone of this ambitious program is contained in 33 U.S.C. § 1311(a), which boldly states that

45. Federal Water Pollution Control Act, 33 U.S.C. § 1151(a) (1970).

46. Indeed, Congress ultimately concluded that "the Federal water pollution control program . . . has been inadequate in every vital aspect . . ." S. REP. NO. 414, 92d Cong., 1st Sess. 7, reprinted in 1972 U.S.C.A.N. 3668, 3674; see also *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202 (1976) ("The problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of water pollution . . .").

47. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1567 (1977) (codified as amended at 33 U.S.C. § 1251 (1988)).

48. 33 U.S.C. § 1251 (1988).

"the discharge of any pollutants . . . shall be unlawful."⁴⁹ After proclaiming this sweeping ban on pollutant discharge, Congress carved out an exception for instances where compliance with the otherwise impervious ban was not "technologically and economically achievable."⁵⁰ Specifically, Congress incorporated a provision outlining the NPDES.⁵¹

Under the NPDES regime, facilities exceptionally burdened by the complete proscription of pollutant discharges may obtain permits allowing them to release specified levels of pollutants. Those exempted still must employ the best practical control technology available in meeting permit requirements.⁵² To obtain a permit, such facilities also must meet requirements of the Act that mandate monitoring equipment, allow inspections, and, most significantly, impose effluent limitations⁵³ on the amounts of pollutants discharged as specified in section 1342(a)(1). That section provides that "the [EPA] Administrator may, after opportunity for public hearing[,] issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) . . . upon condition that such discharge will meet . . . all applicable requirements" set forth throughout the Clean Water Act.⁵⁴ An NPDES permit thus explicitly incorporates a discharger's

49. 33 U.S.C. § 1311(a) (1988). The current Act prohibits the "discharge of pollutants," while the former language focused on "pollution." The discharge of pollutants is "the addition of materials in any quantity to the nation's waters," while pollution is "a demonstrable effect on an aquatic environment." Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REF. 863, 874 (1986).

50. 33 U.S.C. § 1311(b)(2)(A) (1988).

51. See 33 U.S.C. § 1342 (1988). In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Supreme Court explained that "[e]very point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." 451 U.S. at 318 (footnote omitted); see also *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (stating that legislative history clearly shows Congress intended the NPDES permit to be the only means by which a discharger of pollutants may escape the total prohibition of discharges stated in § 1311(a)).

52. See *Pymatuning Water Shed Citizens for a Hygienic Env't. v. Eaton*, 506 F. Supp. 902, 908 (W.D. Penn. 1980), *aff'd*, 644 F.2d 995 (3d Cir. 1981) (holders of NPDES permit bound to employ best practical control technology currently available in meeting requirements of permit, and whether they complied with terms of their application or project specifications did not excuse them from fulfilling conditions of permit).

53. An effluent limitation is "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of a contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11) (1988).

54. 33 U.S.C. § 1342(a) (1988). Those requirements include provisions addressing effluent limitations generally, 33 U.S.C. § 1311 (1988); water-quality-related effluent limitations, 33 U.S.C. § 1312 (1988); national standards of performance, 33 U.S.C. § 1316 (1988); toxic and pretreatment effluent standards, 33 U.S.C. § 1317 (1988); records, reports, and inspections, 33 U.S.C. § 1318 (1988); and ocean discharge criteria, 33 U.S.C. § 1343 (1988). Under a 1987 amendment to the Act, Water Quality Act of 1987, Pub. L. No. 100-4, § 404(d), 101 Stat. 7, 69 (1987) (codified as amended in scattered sections of 33 U.S.C.), the Administrator may issue a permit if the discharge meets either the applicable requirements under the noted sections or "prior to the taking of necessary implementing actions relating to all such requirements, such

general responsibilities under the Clean Water Act.⁵⁵

Absent state participation,⁵⁶ dischargers obtain NPDES permits directly from the federal EPA. The EPA may undertake enforcement action — including levying administrative, civil, and criminal sanctions — against permit holders who fail to comply with permit conditions.⁵⁷ Private citizens also can pursue civil actions “against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation . . . or . . . an order issued . . . with respect to such a standard or limitation.”⁵⁸ In cases where citizens prevail, courts may order injunctive relief or “apply any appropriate civil penalties.”⁵⁹ Since these citizens act as private attorneys general, rather than conventional plaintiffs, such civil penalties are payable to the U.S. Treasury.⁶⁰

The maximum effluent limitations of the NPDES target “point sources” — which the Clean Water Act defines as “any discernible confined and discrete conveyance . . . from which pollutants are or may be discharged.”⁶¹ The Clean Water Act requires the EPA to adopt elaborate regulations that govern the issuance of permits.⁶² Further, detailed guidelines direct the course of the EPA’s promulga-

conditions as the Administrator determines are necessary to carry out the provisions of [the Act].” 33 U.S.C. § 1342(a)(1) (1988).

55. Section 1342(k) of the Clean Water Act provides:

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.

33 U.S.C. § 1342(k) (1988). See also *Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1061 (6th Cir. 1990) (“Once a state water pollution law is approved, compliance with the state law is compliance with the Clean Water Act.”), *cert. granted*, 111 S. Ct. 2256 (1991).

56. See *infra* section II.B for an explanation of state-operated NPDES permit programs.

57. 33 U.S.C. § 1319(b), (c), (g) (1988).

58. 33 U.S.C. § 1365(a)(1) (1988). Section 1251 of the Clean Water Act, stating congressional goals and policy, notes the importance of public participation “in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established . . . under this chapter . . .” Such participation “shall be provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e) (1988). Several successful citizen suits demonstrate the value of this enforcement mechanism in curbing pollution by private enterprises. See, e.g., *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991); *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990). Indeed, this avenue of redress is even available against the federal government. See, e.g., *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991); *supra* notes 12-13 and accompanying text.

59. 33 U.S.C. § 1365(a) (1988).

60. 33 U.S.C. § 1365(a) (1988); see also *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 14 n.25 (1981) (civil penalties assessed in Clean Water Act citizen suits are payable to the federal government); cf. *Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1069 n.4 (6th Cir. 1990) (Guy, J., dissenting) (penalties under RCRA citizen suit provision payable to the United States), *cert. granted*, 111 S. Ct. 2256 (1991).

61. 33 U.S.C. § 1362(14) (1988).

62. 40 C.F.R. §§ 122, 123 (1990).

tion of such regulations.⁶³ In sum, the Clean Water Act established a complex apparatus to enforce rigid maximum effluent limitations on point sources where an immediate ban on pollutant discharge is impossible. The NPDES permit process converted these effluent limitations and related standards into obligations enforceable against pollutant dischargers through both administrative and judicial action.

B. *The Apportionment of Permit Authority*

Administration of the NPDES permit process has never been delegated exclusively to the federal EPA. In its declaration of purpose for the Clean Water Act, Congress stated its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"⁶⁴ Accordingly, Congress incorporated several provisions in section 1342 empowering the EPA administrator to authorize states to operate their own individualized permit programs.⁶⁵ A state wishing to assume administration of the NPDES program within its borders must "submit to [the EPA] a full and complete description of the program it proposes to establish" and verify that state laws authorize the proposed program.⁶⁶ State control of the permit process is contingent upon EPA approval, but once such approval is secured, the EPA will suspend its issuance of permits and instead allow the state to oversee the operation of the permit program.⁶⁷

Although states certainly possess some autonomy in their operation of NPDES permit programs, the EPA retains control over the program in several important respects. First, a state's freedom to design a permit process that suits its needs is constricted from the outset: the EPA must approve the state's proposed program before the state can implement it. Moreover, the prospect of EPA disapproval extends beyond the initial transfer of the federal program to state operation. An EPA-approved state permit program must "at all times be in accordance" with Clean Water Act provisions,⁶⁸ and the EPA retains the power to withdraw approval of a state permit program upon a determination that the program fails to comply with the requirements of section 1342.⁶⁹

63. For example, these regulations originally were intended to "identify . . . the degree of effluent reduction attainable through the application of the best practicable control technology currently available," 33 U.S.C. § 1314(b)(1)(A) (1988), and "specify factors to be taken into account in determining the control measures," such as cost-benefit analyses, age of equipment and facilities, and nonwater quality environmental impact. 33 U.S.C. § 1314(b)(1)(B) (1988).

64. 33 U.S.C. § 1251(b) (1988).

65. 33 U.S.C. § 1342(b)-(d) (1988).

66. 33 U.S.C. § 1342(b) (1988).

67. 33 U.S.C. § 1342(c)(1) (1988).

68. 33 U.S.C. § 1342(c)(2) (1988).

69. Section 1342(c)(3) reads:

Besides retaining the power to review the operation of a state permit program and thereafter to potentially revoke state authority to issue permits,⁷⁰ the EPA also may veto a state's issuance of any individual permit.⁷¹ Under section 1342, each state must provide the EPA with a copy of each permit application it receives and notify the EPA of any action it intends to take on the application.⁷² No permit will be issued "if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of [the Clean Water Act]."⁷³ When the state's issuance of a given permit is arrested in this way, the EPA can issue the permit instead, imposing federally approved limits upon the discharger.⁷⁴ Clearly, then, while states do operate approved NPDES programs largely independently, the level of federal oversight and potential interference is considerable,⁷⁵ supporting the characterization of penalties for violation of NPDES permits as "arising under federal law."

III. THE CONTEMPORARY UNDERSTANDING OF SOVEREIGN IMMUNITY UNDER THE CLEAN WATER ACT

Interpreting the Clean Water Act's sovereign immunity waiver in the context of the NPDES scheme is the next step in ascertaining whether states may impose civil penalties on federal violators of NPDES permits. Current assessments of the waiver must address two separate issues. First, the law is now fairly well settled that the waiver includes civil penalties generally, as long as they arise under federal law. Section III.A.1 evaluates courts' reasoning in reaching that conclusion. Section III.A.2 then compares the Clean Water Act's waiver and RCRA's narrower waiver to clarify the breadth of the Clean

Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

33 U.S.C. § 1342(c)(3) (1988).

70. 33 U.S.C. § 1342(d)(2)(B) (1988). One case suggests that the EPA cannot revoke a state permit program based solely on the mishandling of one permit. Instead, revocation requires a pattern of noncompliance with federal requirements. *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1290 (5th Cir. 1977) (dictum).

71. 33 U.S.C. § 1342(d)(2)(B) (1988).

72. 33 U.S.C. § 1342(d)(1) (1988).

73. 33 U.S.C. § 1342(d)(2)(B) (1988). At least one court has specifically required the EPA to base its veto upon a statutory provision or published regulation or guideline. *Ford Motor Co. v. EPA*, 567 F.2d 661, 671 (6th Cir. 1977).

74. 33 U.S.C. § 1342(d)(4) (1988); see Van Putten & Jackson, *supra* note 49, at 876.

75. *Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1067-68 (6th Cir. 1990) (Guy, J., dissenting), *cert. granted*, 111 S. Ct. 2256 (1991).

Water Act's waiver and underscore the importance of the sovereign immunity question given the limited utility of RCRA in states' suits against federal agencies. Second, assuming that the Clean Water Act's waiver includes civil penalties, the question remains whether the civil penalties at issue — those imposed by states upon federal agencies for NPDES permit violations — arise under state or federal law. Section III.B.1 examines the courts' response to this question, including two federal court of appeals decisions reaching conflicting conclusions. Section III.B.2 reviews the Clean Water Act's legislative history for evidence of congressional intent bearing on this question.

A. *Delimiting the Clean Water Act's Waiver of Sovereign Immunity*

Although the early English conception of sovereign immunity was based on the belief that "the king could do no wrong,"⁷⁶ the modern justification holds that the government must be protected in its day-to-day functions from judicial interference.⁷⁷ The federal government is free to waive its immunity, and cannot be sued unless it does so.⁷⁸ Such a waiver must be "express"⁷⁹ and "unequivocal."⁸⁰ Nevertheless, in their endeavor to determine whether a statute contains a waiver, courts should not adopt a "crabbed construction"⁸¹ or require Congress to use a "ritualistic formula" to accomplish such a waiver.⁸² Thus, with regard to state-imposed civil penalties against federal agencies in violation of NPDES permits, the primary means for courts to determine whether Congress waived sovereign immunity is "by refer-

76. See, e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 238 (1765); Joseph D. Block, Note, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060 n.2 (1946); see also CLYDE E. JACOBS, ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 7, 151-55 (1972). See generally LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-27 (1988).

77. See *United States v. Shaw*, 309 U.S. 495, 501 (1940) (stating that sovereign immunity arises, in part, from "the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants"); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 397 (1970). The debate over the justifications of sovereign immunity, which has been addressed extensively in the legal literature, see, e.g., Block, *supra* note 76, is beyond the scope of this Note. Regardless of disagreement among scholars, however, the concept is well established in the case law. See *infra* notes 78-82.

78. *Block v. North Dakota ex rel. Board of Univ. & School Lands*, 461 U.S. 273, 287 (1983) ("[T]he United States cannot be sued at all without the consent of Congress."); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (articulating the federal supremacy doctrine).

79. 461 U.S. at 280.

80. *United States v. King*, 395 U.S. 1, 4 (1969).

81. *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984). In *Franchise Tax Board*, the Court used the term "crabbed construction" in rejecting the Postal Service's argument that the sovereign immunity waiver, which was limited to cases where the Postal Service had been "sued," does not then apply to cases before administrative agencies rather than courts. 467 U.S. at 521.

82. *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939).

ence to underlying Congressional policy”⁸³ and by selecting the “most natural reading” of the statutory terminology in light of that policy.⁸⁴

1. *Judicial Construction of the Waiver Provision*

By delegating regulatory authority to states yet imposing minimum federal standards and retaining supervisory power for the EPA,⁸⁵ the NPDES system has invited debate in the courts over whether the penalties imposed for violations of state-issued NPDES permits fall within the ambit of the Clean Water Act’s sovereign immunity waiver. At the threshold, courts have faced the fundamental task of defining the breadth of the Clean Water Act’s waiver itself.

Almost all courts compelled to delineate the parameters of the waiver have determined that civil penalties arising under federal, but not state, law are included within the Clean Water Act’s sovereign immunity waiver.⁸⁶ Although it was not clear that civil penalties were included within the waiver when the Supreme Court decided *Hancock*⁸⁷ and *State Water Resources Control Board*,⁸⁸ it became patently so after Congress amended the waiver provision in response to the Supreme Court’s restrictive interpretation of the Clean Water Act and Clean Air Act waivers.⁸⁹

83. *Franchise Tax Bd.*, 467 U.S. at 521 (“[The party’s proposed] construction of the statute overlooks our admonition that waiver of sovereign immunity is accomplished not by ‘a ritualistic formula’; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy.”) (citing *Keifer*, 306 U.S. at 389).

84. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987).

85. See *supra* section II.B.

86. See, e.g., *Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1061 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991); *Metropolitan Sanitary Dist. v. United States Dept. of Navy*, 722 F. Supp. 1565, 1572 (N.D. Ill. 1989), *on reconsideration*, 757 F. Supp. 51 (N.D. Ill. 1990).

87. 426 U.S. 167 (1976); see *supra* notes 29-40 and accompanying text.

88. 426 U.S. 200 (1976); see *supra* notes 29-40 and accompanying text.

89. See *supra* section I.B. In at least one case, however, a court refused to accept the seemingly ineluctable conclusion that Congress intended the sovereign immunity waiver to include civil penalties. See *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). In *MESS*, a citizens’ group requested that civil penalties be imposed against the Department of Defense because its McClellan Air Force Base allegedly violated provisions of the Clean Water Act and RCRA. Calling the Clean Water Act’s federal facilities provision “a compilation of ambiguity,” the court ruled that since the statute is not clear on its face and since the legislative history “is of no assistance,” Congress did not waive sovereign immunity for purposes other than injunctive relief. 655 F. Supp. at 604-05. The *MESS* court did find support for the plaintiff’s position in the Clean Air Act’s history, but concluded that “[t]here will not be a waiver brought about by implication or by bootstrapping or by borrowing.” 655 F. Supp. at 605.

The *MESS* court’s narrow interpretation of the Clean Water Act’s waiver has been universally rejected, and the decision itself is considered an aberration. Both the majority and the dissent in *Ohio v. United States Dept. of Energy*, 904 F.2d 1058 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991), agreed that Congress waived sovereign immunity for civil penalties in the Clean Water Act. 904 F.2d at 1060; 904 F.2d at 1067 (Guy, J., dissenting). The dissenter, Judge Guy, also rejected the *MESS* court’s contention that the waiver of immunity for civil penalties is an inadequate “vehicle to end the pollution which this country is facing.” *MESS*, 655 F. Supp. at 604; to that, Judge Guy rejoined, “[c]ourts need not debate Congress’s sagacity . . . when its

In *Sierra Club v. Lujan*,⁹⁰ for example, an environmental group sought civil penalties against the U.S. Department of Interior for failing to comply with the requirements of an EPA-issued NPDES permit.⁹¹ The federal government moved to dismiss, characterizing the Clean Water Act's waiver of sovereign immunity as insufficiently broad to permit suits seeking civil penalties against the United States.⁹² The district court denied the motion to dismiss and instead granted the plaintiffs' motion for partial summary judgment, concluding that "civil penalties clearly are 'sanctions' within the meaning of the [Clean Water Act]."⁹³

On appeal, the Tenth Circuit affirmed, soundly rejecting the sole district court case⁹⁴ upon which the government relied⁹⁵ and holding that section 1323(a) "expressly authorizes the courts to assess civil penalties against federal agencies for violations of the [Clean Water Act]."⁹⁶ While the court acknowledged some disagreement over whether the waiver's use of the term "requirements" includes civil penalties,⁹⁷ it agreed with the district court that the statute's waiver of sovereign immunity as to "sanctions" clearly includes civil penalties.⁹⁸ The court said its holding was supported by the plain language of the statute;⁹⁹ for example, section 1323's limitation of sovereign immunity to "civil penalties arising under federal law" implies that sovereign immunity for civil penalties already had been waived.¹⁰⁰ The arguments put forth in *Sierra Club* typify those that courts have employed to counter federal government assertions that civil penalties are neither "requirements" nor "sanctions" under the Clean Water Act.¹⁰¹

intent is so apparent from the face of the statute." *DOE*, 904 F.2d at 1067 n.3 (Guy, J., dissenting).

90. 728 F. Supp. 1513 (D. Colo. 1990), *aff'd.*, 931 F.2d 1421 (10th Cir. 1991).

91. Because the permit was issued by the EPA instead of through a state-operated permit program, the applicable penalties undoubtedly arose under federal law.

92. 728 F. Supp. at 1514.

93. 728 F. Supp. at 1515.

94. *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986).

95. The court noted that *MESS* "has not enjoyed enthusiastic acceptance" and "has spawned no progeny." *Sierra Club*, 931 F.2d at 1425; *see supra* note 89.

96. 931 F.2d at 1426-27.

97. 931 F.2d at 1426 (noting that some courts have found "requirements" in § 1323(a) to include penalties, citing as an example *Maine v. United States Dept. of Navy*, 702 F. Supp. 322, 328 (D. Me. 1988)).

98. 931 F.2d at 1427.

99. 931 F.2d at 1425.

100. The same argument can be made with regard to the qualification later in the waiver provision that "[n]o officer, agent, or employee of the United States shall be personally liable for any civil penalty . . ." 33 U.S.C. § 1323(a) (1988) (emphasis added).

101. *See, e.g., Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1060 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991).

2. *Legislative Distinctions Between Broad and Narrow Waivers: The Resource Conservation and Recovery Act*

The prevailing interpretation of the Clean Water Act's waiver to encompass civil penalties is fortified by contrasting the Act's language with the limiting text of the waiver contained in the Resource Conservation and Recovery Act,¹⁰² the solid waste counterpart to the Clean Water Act and Clean Air Act. Because the RCRA waiver refers only to "requirements,"¹⁰³ as compared to the Clean Water Act's reference to "all . . . requirements . . . and sanctions,"¹⁰⁴ courts have read the RCRA waiver more narrowly than the Clean Water Act waiver, consistently holding that civil penalties do not constitute "requirements" within the purview of the RCRA waiver in cases involving federal facilities.¹⁰⁵

A recent Tenth Circuit case, *Mitzelfelt v. United States Department of Air Force*,¹⁰⁶ is representative. New Mexico sought to collect a fine from the Air Force for violating hazardous waste laws. The *Mitzelfelt* court ruled, however, that civil penalties are not "requirements" of state law that federal agencies must meet under RCRA, and sovereign immunity therefore precludes imposition of penalties on federal agencies.¹⁰⁷ The court noted that while Congress expanded the Clean Air Act and Clean Water Act waivers in response to *Hancock* and *State Water Resources Control Board*¹⁰⁸ to include "sanctions," under RCRA, "Congress continued to waive immunity only to 'requirements,' rather than something broader."¹⁰⁹

As in *Mitzelfelt*, courts have sometimes explicitly distinguished between RCRA and the Clean Water Act's broader waiver language,

102. 42 U.S.C. §§ 6901-6987 (1988).

103. 42 U.S.C. § 6961 (1988).

104. 33 U.S.C. § 1323(a) (1988).

105. See, e.g., *United States v. Washington*, 872 F.2d 874 (9th Cir. 1989) (refusing to classify RCRA federal facilities provision as an unequivocal waiver of government's immunity to state-imposed civil penalties); *Florida Dept. of Env'tl. Regulation v. Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985) (same). But see *Maine v. United States Dept. of Navy*, 702 F. Supp. 322 (D. Me. 1988). This case held that 42 U.S.C. § 6961 (1988) "is intended to and is effective to impose liability, by way of an appropriately explicit waiver of sovereign immunity in respect thereto, upon the United States for civil penalties imposed by state law." 702 F. Supp. at 330. Though the Clean Water Act was not at issue in this case, the court, in analogizing RCRA to the Clean Water Act, said that "in drafting . . . the Clean Water Act, Congress understood that the 'all requirements' language . . . included all civil penalties." 702 F. Supp. at 329. See also Elizabeth Cheng, Comment, *Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA*, 57 U. CHI. L. REV. 845, 850-51, 854 (agreeing with *Maine*, 702 F. Supp. at 326-27, that "requirements" include civil penalties).

106. 903 F.2d 1293 (10th Cir. 1990).

107. 903 F.2d at 1295; see also *Donnelly & Van Ness*, *supra* note 28, at 39 ("While [§ 6961] clearly subjects federal facilities to state and local hazardous waste requirements, both substantive and procedural, it would seem to permit only those sanctions imposed to enforce injunctive relief.").

108. See *supra* section I.B.

109. *Mitzelfelt*, 903 F.2d at 1295.

asserting that the latter waiver, which encompasses "sanctions," clearly includes civil penalties.¹¹⁰ This widely accepted distinction portends a growing reliance among states on the Clean Water Act instead of RCRA in actions against federal agencies, making resolution of the Clean Water Act sovereign immunity question critical.¹¹¹

B. *Defining the Origin and Nature of Civil Penalties in Clean Water Act Litigation*

If the Clean Water Act's sovereign immunity waiver encompasses civil penalties arising under federal, but not state law, as most courts have held,¹¹² courts still must determine whether to characterize state-imposed sanctions under the NPDES permit regime as arising under state or federal law. The Clean Water Act fails to address specifically where penalties imposed for violations of state-issued NPDES permits fit into the waiver scheme. Section III.B.1 discusses the most recent cases: two U.S. courts of appeals have differed on the question.¹¹³ Section III.B.2 analyzes the legislative history of the Clean Water Act, which can be read to support both views.

1. *Contrasting Judicial Characterizations of Civil Penalties*

The Ninth Circuit was the first federal appeals court to reach the question of whether civil penalties imposed by states on federal agencies for violations of NPDES permits arise under federal or state law.

110. See, e.g., *Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1063 (6th Cir. 1990) ("Although Congress may have intended to waive sovereign immunity in [RCRA], the differences between [RCRA] and the Clean Water Act make any waiver less than clear."), *cert. granted*, 111 S. Ct. 2256 (1991). One exception is *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). In *MESS*, the court reasoned, much like the *Mitzelfelt* court, that RCRA did not unambiguously waive sovereign immunity with regard to civil penalties against federal facilities. 655 F. Supp. at 604. See *supra* note 89. In turning to the Clean Water Act waiver, the court concluded with little explanation that § 1323 "does not waive sovereign immunity for civil penalties for the same reasons discussed in relation to RCRA . . ." 655 F. Supp. at 604. At least one court has expressly criticized this logic. See *Sierra Club v. Lujan*, 728 F. Supp. 1513, 1516 (D. Colo. 1990) (Although "the *MESS* court relied largely upon its analysis of . . . the RCRA . . . [t]he wording of the RCRA differs from the [Clean Water Act] and a conclusion that the former does not permit civil penalties should not be applied automatically to the latter statute."), *affid.*, 931 F.2d 1421 (10th Cir. 1991). The Sixth Circuit likewise implied disapproval by reaching different results for RCRA and the Clean Water Act when violations of both were alleged in a single lawsuit. See, e.g., *DOE*, 904 F.2d at 1060, 1064.

111. In many cases, those suing for violations of environmental statutes may have a choice among the statutes, as when a governmental facility's practices involve both hazardous substances and water pollution. See, e.g., *DOE*, 904 F.2d at 1059 (where Ohio alleged the Department of Energy's uranium processing plant improperly disposed of hazardous wastes and released radioactive materials into the air, water, and soil).

112. See *supra* section III.A.1.

113. Compare *California v. United States Dept. of Navy*, 845 F.2d 222 (9th Cir. 1988) (finding no waiver of sovereign immunity with regard to civil penalties) with *Ohio v. United States Dept. of Energy*, 904 F.2d 1058 (6th Cir. 1990) (finding waiver), *cert. granted*, 111 S. Ct. 2256 (1991).

In *California v. United States Department of Navy*,¹¹⁴ California sought civil penalties against the Navy for violating its NPDES permit when it discharged improperly treated waste into the San Francisco Bay. California argued that the NPDES provision of the Clean Water Act mandates adequate state authority to abate permit violations and, to this end, specifically requires states to include provisions for civil and criminal penalties in their legislative schemes. Consequently, provisions approved by the EPA administrator necessarily fall within section 1323, which subjects federal dischargers to civil penalties "arising under" federal law.¹¹⁵

In a sketchy opinion, the Ninth Circuit rejected California's argument. First, citing two statutory references to "state" operation, the court stated that the structure of the Clean Water Act does not support the conclusion that the civil penalties at issue arise under federal law.¹¹⁶ Section 1342, for example, requires states to submit to the EPA a description of the program they intend to administer under state law.¹¹⁷ Moreover, the court said, the California water pollution statute that sets out some of the NPDES enforcement provisions authorizes the state attorney general to seek civil penalties in state superior court.¹¹⁸

The Ninth Circuit also found no explicit congressional intent to waive sovereign immunity in this situation, reasoning that "California's position would essentially nullify [section 1323(a)]'s express limitation of civil penalties against federal agencies to those arising under federal law."¹¹⁹ That is, the court assumed that if the waiver's limitation did not apply to civil penalties imposed by states against federal agencies under state-operated permit programs, then the limitation applied to no penalties at all.¹²⁰ "Congress clearly did not intend such a result," the court concluded.¹²¹

Finally, the court relied on a phrase from the Clean Water Act's legislative history indicating that state-operated permit programs "are 'not a delegation of Federal authority,' " but that they "function[] in lieu of the Federal program."¹²² The court failed to elaborate upon the meaning of these phrases in the context of the sovereign immunity question. As this Note concludes, however, the legislative history ar-

114. 845 F.2d 222 (9th Cir. 1988).

115. 845 F.2d at 225.

116. 845 F.2d at 225.

117. 845 F.2d at 225 (citing 33 U.S.C. § 1342(b) (1988)).

118. 845 F.2d at 225 (citing Cal. Water Code § 13386 (West Supp. 1991)).

119. 845 F.2d at 225.

120. See *infra* text accompanying notes 132-33.

121. 845 F.2d at 225.

122. 845 F.2d at 225 (citing H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104, reprinted in 1977 U.S.C.C.A.N. 4424, 4479); see *infra* notes 139-43 and accompanying text.

gument the Ninth Circuit put forth is unconvincing for several reasons, including the fact that the quoted language comes from the legislative history for an entirely different section than that setting out the NPDES.¹²³

In 1990, the sovereign immunity issue came before the Sixth Circuit. In *Ohio v. United States Department of Energy (DOE)*,¹²⁴ the State of Ohio alleged that the Department of Energy's Fernald, Ohio, uranium processing plant "improperly disposed of hazardous wastes, released radioactive materials into the environment, and polluted surface and ground water."¹²⁵ A divided Sixth Circuit panel implicitly rejected the Ninth Circuit's analysis and found that the civil penalties Ohio sought to impose upon the federal agency "arose under federal law" for purposes of the sovereign immunity waiver.¹²⁶ Like the Ninth Circuit, the Sixth Circuit in *DOE* looked to statutory language and congressional intent, but found each supported the inclusion of state-imposed civil penalties against federal agencies.¹²⁷ Specifically, the court observed that the legislative scheme that creates the NPDES system logically assumes that state civil penalties arise under federal law:

The Clean Water Act mandates that the states may create their own water pollution laws, which may qualify to *replace* the requirements of the Clean Water Act. Upon implementing a state permit program "in accordance with" [section] 1342, the state assumes responsibility for pollution permits on behalf of and instead of the [EPA]. The [EPA] is charged with promulgating the standards that state programs must meet to obtain approval. In order to be approved, a state law must provide for civil penalties. Once a state water pollution law is approved, compliance with the State law *is* compliance with the Clean Water Act.¹²⁸

Oddly, both courts used essentially similar sources to support opposite results. Where the *Department of Navy* court stressed that state permit programs function "in lieu of" the federal program¹²⁹ to indicate a lack of federal authority, the *DOE* majority argued that the states operate the program "on behalf of and instead of" the EPA¹³⁰ to indicate that state-imposed sanctions arise under federal law. Moreover, while the Ninth Circuit cited statutory references to "state" operation and "state" law to prove state-run NPDES permit programs operate within state law, the Sixth Circuit found copious examples of statutory language placing the state permit programs "under" federal

123. See *infra* note 141 and accompanying text.

124. 904 F.2d 1058 (6th Cir. 1990), *cert. granted*, 111 S. Ct. 2256 (1991).

125. 904 F.2d at 1059.

126. 904 F.2d at 1061. The *DOE* majority did not cite the Ninth Circuit case.

127. 904 F.2d at 1061-62.

128. 904 F.2d at 1061 (citations omitted).

129. See *supra* note 122 and accompanying text.

130. 904 F.2d at 1061.

law.¹³¹ For the most part, such semantic arguments on both sides are unconvincing. A more compelling argument the Ninth Circuit makes with regard to the statute's language, though developed in a mere sentence, is that the restriction of the waiver to civil penalties arising under federal law would have no meaning if it did not apply to the penalties states seek to impose on federal agencies.¹³² The *DOE* court ignored this reading and concluded, almost as matter-of-factly, that the waiver's limitation "to civil penalties arising under federal law is aimed at *state* water pollution laws that fail to meet approval under the Clean Water Act."¹³³

Determining which of these two perspectives is correct requires undertaking the difficult task of discerning what Congress was collectively thinking in enacting the Clean Water Act. Under the Sixth Circuit's view, Congress meant to clarify that the Clean Water Act's waiver does not extend to *state* water pollution laws, except, of course, those devised by states as part of the Act's NPDES system. Under the Ninth Circuit's view, on the other hand, Congress' exclusive purpose in including the limitation was to maintain federal immunity with regard to EPA-approved civil penalty provisions under state-operated NPDES programs, even though such immunity is undoubtedly waived when the EPA, not the state, issues the permit. The proposal in Part IV of this Note compares these views in more detail and argues against the Ninth Circuit's reading, finding an alternative reading to be both logically sound and supported by case law.

The narrow question of whether the civil penalties at issue arise under federal or state law also has been discussed in one lower court opinion. *Metropolitan Sanitary District v. United States Department of Navy*,¹³⁴ a case in the Northern District of Illinois, involved an allegation that the Navy failed to comply with the terms of a sewage discharge permit. The court initially refused to dismiss the suit because the plaintiff — a state agency — might possibly demonstrate at trial that the penalties it seeks in fact arise under federal law.¹³⁵ The court defined broadly what it means for a penalty to "arise under" federal law: the state agency, the court said, may be able to show that it is pursuing "federally-sanctioned penalties."¹³⁶ The phrase appears to

131. In *Department of Navy*, for example, the Ninth Circuit noted that § 1342 "itself requires a state to submit to the [EPA] a description of the program it intends to administer under *state* law." 845 F.2d at 225. Contrarily, the *DOE* court pointed to a statement in the introductory section of the Clean Water Act that "[i]t is the policy of Congress that the states . . . implement the policy programs *under* sections [1342] and [1344] of this Act," (*i.e.*, under federal law), and to the language Congress used repeatedly, such as "permit issued *under* Section [1342] of this Act . . . by a State." 904 F.2d at 1061.

132. See *supra* notes 119-21 and accompanying text.

133. 904 F.2d at 1062 (emphasis added).

134. 722 F. Supp. 1565 (N.D. Ill. 1989), *on reconsideration*, 737 F. Supp. 51 (N.D. Ill. 1990).

135. 722 F. Supp. at 1572.

136. 722 F. Supp. at 1572.

be far more inclusive than the Ninth Circuit's restrictive notion of what "arises under" federal law.¹³⁷

2. Legislative Intent

Because both the Sixth and Ninth Circuits looked to congressional intent, an examination of the Clean Water Act's legislative history is appropriate, despite the increasing acceptance of theories that reject its usefulness.¹³⁸ Like the divergent judicial interpretations of the Clean Water Act, the legislative history of the Act is inconclusive as to what Congress intended when it restricted federal agencies' exposure to sanctions arising under federal law. Rather, congressional reports

137. On reconsideration of the decision denying the government's motion to dismiss, however, the court concluded that the Metropolitan Sanitary District "still has not asserted that it seeks penalties for violations of standards formulated or permits issued under a state-operated EPA-approved program under [the NPDES] . . ." 737 F. Supp. at 52. The court's dismissal of this count, however, seems to be based on a technicality and does not explicitly hold that the civil penalties do not arise under federal law. See 737 F. Supp. at 52 ("[T]he plaintiff has not argued that it is required to [enforce the Clean Water Act provisions] by seeking civil penalties in addition to an injunction.").

138. Indeed, many have urged that in all types of litigation courts set aside legislative history and restrict statutory interpretation to an inspection of the statute alone. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376 ("In using legislative materials, the courts create winners and losers in the legislative process: elevating the views of some and denigrating or rejecting the views of others. . . . By using legislative history, the courts may be acting in an area that should be out of bounds to the unelected branch.".) But see *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454 n.9 (1989) (It does not "strike us in any way 'unhealthy' . . . or 'undemocratic' . . . to use all available materials in ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result") (Brennan, J.); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Constructing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301-09 (1990) (arguing in favor of the use of legislative history).

The leading proponent of this increasingly popular textualist view is U.S. Supreme Court Justice Antonin Scalia. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 656 (1990). For example, in the 1987 case *INS v. Cardoza-Fonseca*, Justice Scalia, in a concurring opinion, scolded the majority for looking to legislative history. "Judges interpret laws rather than reconstruct legislators' intentions," Scalia wrote, calling the majority's use of legislative history an "ill-advised deviation" from a "venerable principle" of statutory interpretation. 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

Textualists argue that attempts to determine what Congress intended by delving into abundant legislative materials beyond the statute itself are inherently futile. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting) (listing the many possible reasons a particular legislator may vote for an Act). Moreover, they stress that few legislators actually read the congressional reports courts often rely on and that committee staff members often insert language at the suggestion of lobbyists to influence judicial interpretation. See *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part) (commenting that few legislators actually read committee reports); *Hirschey v. FERC*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (same). Textualists also point to the great discretion judges have when seeking support for a given interpretation from a vast array of legislative history materials. Former D.C. Circuit Judge Harold Leventhal once observed that citing legislative history is like "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). Though the debate is far more complex than represented here, the textualist argument is one that favors giving no weight to the Clean Water Act's legislative history on which the Ninth Circuit relied.

provide some support for each argument. This support consists primarily of general statements — most unrelated to the precise language at issue — from which courts can extrapolate a more specific congressional intent.

The *Department of Navy* court and the *DOE* dissent both cited conference report language from the 1977 Clean Water Act amendments asserting that a state permit program “functions in lieu of the Federal program” and “is not a delegation of Federal authority.”¹³⁹ This language, while providing some insight, is not dispositive for several reasons. First, as subsequent legislative history commenting retrospectively on the original legislation of several years earlier, it is of minimal legal significance.¹⁴⁰ Further, the comment does not appear under the history for section 1342, where the NPDES program is outlined, but under a later section setting out the Act’s system for issuing permits for the discharge of dredged or fill material.¹⁴¹ Earlier commentary under the NPDES section says nothing of federal authority.¹⁴² Finally, even if deemed to be an accurate view of Congress’ intent regarding section 1342, the statements are general, made without a clear context, and do not unequivocally preclude the more specific finding that sovereign immunity is waived for state-imposed civil penalties against federal dischargers.¹⁴³

Commentary elsewhere that supports the broader waiver interpretation further undermines the view that legislative history proves Congress intended immunity to bar such suits against federal facilities. In the Senate Report for the original act in 1972, for example, the comments on section 1323, the federal facilities provision, acknowledge the “flagrant violations” by federal dischargers and the “[l]ack of Federal leadership” in controlling pollution, concluding that “[t]his section requires that Federal facilities meet all control requirements as if they were private citizens.”¹⁴⁴ Taken on its face, this statement supports a broad waiver that would seemingly encompass state-imposed civil penalties. For the most part, however, legislative history does not lend

139. H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104, *reprinted in* 1977 U.S.C.C.A.N. 4424, 4479; *see supra* notes 122-30 and accompanying text.

140. *See* *United States v. Price*, 361 U.S. 304, 313 (1960) (“[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”); *Jefferson County Pharmaceutical Assn. v. Abbott Lab*, 460 U.S. 150, 165 n.27 (1983); *Sullivan v. Finkelstein*, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part) (“Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.”).

141. 33 U.S.C. § 1344 (1988).

142. *See* H.R. CONF. REP. NO. 830, 95th Cong., 1st Sess. 104, *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471-75.

143. The report’s statement that the programs are not a delegation of federal authority may be an attempted preemptive strike to prevent any number of unforeseen state challenges to federal supremacy.

144. S. REP. NO. 414, 92d Cong., 2d Sess. 67, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3733-34.

itself to such clear readings and the Clean Water Act is one of many examples where the intent of Congress is better found elsewhere.

IV. SANCTIONS AS AN ELEMENT OF FEDERALLY APPROVED PROGRAMS

If the Clean Water Act's sovereign immunity waiver is broad enough to include civil penalties imposed upon federal agencies for violation of NPDES permits, the evidence of that must come from an examination of the statute and the enforcement scheme it creates. Because legislative history is of limited utility,¹⁴⁵ the "most natural reading" of the statute should dictate whether the United States waived sovereign immunity.¹⁴⁶ This requires close scrutiny of the statute in the context of the NPDES scheme.

Under the NPDES program, pollutant dischargers do not directly violate either federal or state law; they violate the conditions of their NPDES permit.¹⁴⁷ That permit, for the purposes of this Note, is issued by the state under a program approved by the federal government.¹⁴⁸ A state legislature passes the sanctions at issue to determine how to penalize those who violate the permit. Those penalties, then, are a matter of state law, but required by federal law, because the Clean Water Act mandates the penalty provision.¹⁴⁹ Unlike many laws, which take away rights and privileges, the Clean Water Act NPDES scheme grants rights to dischargers. The Act completely prohibits pollutant discharge;¹⁵⁰ its hybrid NPDES system, however, authorizes the issuance of permits to dischargers that allow them to pollute up to the permits' specified limitations. Clearly, if these dischargers did not have a permit and they polluted nonetheless, they would be in violation of federal law. Similarly, polluters who do have permits but discharge more than the authorized amount also are outside the scope of the permit. In this sense, both the penalties for those polluting without a permit and the sanctions for dischargers exceeding the conditions of their permits arise conceptually under federal law.

A second statutory analysis also explains why the civil penalties at issue are encompassed within the Clean Water Act's sovereign immunity waiver. While the congressional purpose behind limiting the waiver to penalties arising under federal law is obscure, the purpose behind the federal facilities provision overall is manifest from the language itself. Congress responded in strong terms to the deplorable

145. See *supra* notes 139-44 and accompanying text.

146. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56-57 (1987).

147. See 33 U.S.C. § 1342 (1988).

148. As opposed to a permit issued directly by the EPA.

149. 33 U.S.C. § 1342(b)(7) (1988).

150. 33 U.S.C. § 1311 (1988).

condition of federal facilities: "Each . . . agency . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements . . . and sanctions . . . to the same extent as any nongovernmental entity" ¹⁵¹ Congress was aware that it could not begin to ameliorate the nation's environmental predicament without implementing strong measures to hold the federal government accountable for its share of the problem. Thus, Congress spoke in absolute terms, applying the waiver to "any requirement . . . substantive or procedural," to the exercise of "any Federal, State, or local . . . authority," and to "any process and sanction . . . enforced in Federal, State, or local courts or in any other manner." ¹⁵² If sovereign immunity limited states' enforcement options against these agencies, that effort would be severely diminished and the congressional purpose largely undermined.

Finally, the Ninth Circuit's argument — that the waiver's limitation to penalties arising under federal law is meaningless if not meant solely to confine the waiver to federally imposed, not state-imposed, penalties — is unconvincing. Courts have suggested the waiver's limitation targets state pollution laws not approved under the Clean Water Act ¹⁵³ or not "federally-sanctioned." ¹⁵⁴ These related interpretations are consistent with the broad scope of Congress' waiver in the federal facilities provision as well as Congress' aim to completely eliminate pollutant discharge. Moreover, they give effect to a congressional interest in confining the scope of the Clean Water Act's sovereign immunity waiver to state penalties specifically mandated by the Act, as opposed to any pollution laws state legislatures might enact without federal approval.

CONCLUSION

Statutory interpretation is an imprecise undertaking. That is especially true in a case such as this, where the Clean Water Act's federal facilities provision, like so many products of congressional compromise, fails to explain explicitly the rationale behind the requirement that civil penalties covered by the sovereign immunity waiver arise under federal law. Traditional rules of statutory construction, though often in conflict with each other and inherently manipulable, may provide some help. According to the Ninth Circuit, one of those interpretive rules, which counsels against a construction that would render

151. 33 U.S.C. § 1323(a) (1988); *see supra* section I.B.

152. 33 U.S.C. § 1323(a) (1988).

153. *Ohio v. United States Dept. of Energy*, 904 F.2d 1058, 1062 (6th Cir. 1990) (arguing that the waiver's limitation to civil penalties arising under federal law "is aimed at state water pollution laws that fail to meet approval under the Clean Water Act"), *cert. granted*, 111 S. Ct. 2256 (1991).

154. *Metropolitan Sanitary Dist. v. United States Dept. of Navy*, 722 F. Supp. 1565, 1572 (N.D. Ill. 1989), *on reconsideration*, 757 F. Supp. 51 (N.D. Ill. 1990).

certain words or phrases meaningless,¹⁵⁵ weighs in favor of a finding that the civil penalties imposed by states upon federal agencies arise under state law. Unless one accepts the explanation that the limitation is aimed at state water pollution laws that the EPA has not approved,¹⁵⁶ then, it is unclear what penalties would not arise under federal law. The inclusion of the term in the provision would therefore be superfluous.

Yet another interpretive practice carries even greater weight. That approach looks at a statute's words within the context and structure of the Act, paying special attention to its object and purpose. Under this approach, a statute should be given no construction that would render meaningless the goals of the legislation as manifested in the statute as a whole.¹⁵⁷ The Clean Water Act's federal facilities provision, with its emphasis on treating federal agencies exactly like private polluters, would be debilitated if states could not impose civil penalties upon federal and private violators alike. Moreover, unless the Clean Water Act can hold the country's worst polluter, the federal government, to its own environmental standards by subjecting federal agencies to state-imposed civil penalties, the Act's more general goal to "eliminate the discharge of pollutants into the navigable waters"¹⁵⁸ becomes an impossibility. The statute's language, its structural framework, and the substantial federal control maintained over states under the NPDES scheme all support this Note's conclusion that such penalties do arise under federal law and thus are within the sovereign immunity waiver.

155. See *California v. United States Dept. of Navy*, 845 F.2d 222, 225 (9th Cir. 1988).

156. See *supra* note 153.

157. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

158. 33 U.S.C. § 1251 (1988).