CRS Report for Congress

Enforcement of Environmental Laws at Federal Facilities: Legal Issues

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ENFORCEMENT OF ENVIRONMENTAL LAWS AT FEDERAL FACILITIES: LEGAL ISSUES

SUMMARY

In recent years, EPA and state enforcers have stepped up efforts to force compliance by federal facilities with environmental laws. Such efforts raise delicate issues in the case of EPA as to when one federal agency can coerce another, and in the case of states as to the balance of power between states and the United States.

Almost all the major federal environmental statutes contain "federal facilities provisions" stating unequivocally that federal facilities are subject to federal, state, and local environmental requirements just as nongovernmental entities. The issue, then, has not been *whether* federal sites must comply, but rather *what remedies are available, and to whom,* when such facilities do not comply.

EPA enforcement against federal agencies has been severely limited by the Department of Justice. The Department raises a variety of policy, constitutional, and statutory arguments why intrabranch enforcement may not occur by coercive means -- i.e., by administrative orders without the prior consent of the noncomplying agency, or by court actions. For example, the Department has articulated a "unitary executive theory," asserting that under the Constitution, only the President, not EPA unilaterally, may resolve disputes between executive branch agencies.

Justice Department opposition to intra-branch enforcement has put EPA on a very different footing when dealing with federal as opposed to non-federal sites. In enforcing at federal sites, EPA has been largely confined to jawboning -- and the hope that its inter-agency compliance agreements and administrative orders will be held enforceable by states and private individuals, through citizen suits, even if not by EPA itself. EPA also has the option of enforcing directly against the private contractors who operate certain federal facilities.

State and private enforcement against federal facilities runs up against the doctrine of sovereign immunity. Congress has waived this immunity in the federal facilities provisions, but often with qualifications. For example, the waiver in the Resource Conservation and Recovery Act extends only to "requirements," provoking endless litigation over whether this term includes state-imposed civil money penalties (most courts say no).

An agency's lack of appropriated funds for discharging environmental duties may also present problems. The solution, until funds are obtained, may lie in conditional agency and court orders, or tapping the Judgment Fund.

Enforcement against federal officials personally may also increase in coming years.

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ENFORCEMENT OF ENVIRONMENTAL LAWS AT FEDERAL FACILITIES: LEGAL ISSUES

It has long been reported that facilities owned or operated by the federal government are among the worst violators of federal and state environmental requirements.[1] In recent years, the U.S. Environmental Protection Agency (EPA) and state environmental agencies have stepped up pressure against such facilities, raising delicate legal issues of intrabranch enforcement (when EPA seeks to enforce against its sister agencies) and of federal supremacy and sovereign immunity (when state, local and private entities attempt enforcement against federal sites).[2] Congress as well has been closely eyeing the situation, particularly as to Resource Conservation and Recovery Act compliance at Department of Energy (DOE) facilities.[3]

This report in section 1 explores the legal issues raised by EPA enforcement against federal agencies, and against the contractors who operate certain federally owned facilities. Section 2 moves on to state, local, and private enforcement against those facilities and contractors. The next section considers the special legal issues raised when appropriated funds fall short of what is needed for agency- or court-ordered environmental compliance.

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[1] *See, e.g.*, Government Polluters, Nat'l Journal 762 (March 28, 1987); Finamore, Regulating Hazardous and Mixed Waste at Department of Energy Nuclear Weapons Facilities: Reversing Decades of Environmental Neglect, 9 Harv. Env'l L. Rev. 83 (1985); "Toxic Waste Laws: U.S. May Be Biggest Violator," Wash. Post., Aug. 17, 1983, at A1.

[2] *See generally* Stever, Perspectives on the Problem of Federal Facility Liability for Environmental Contamination, 17 Env'l Law Rptr. 10114 (1987); Note, How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government?, 18 Rutgers L. J. 123 (1986); Breen, Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law, 15 Env'l Law Rptr. 10326 (1985).

A periodical devoted exclusively to environmental compliance at federal facilities, the Federal Facilities Environmental Journal, began publication in spring, 1990.

[3] Recent hearings in the House include those of the Subcommittee on Transportation and Hazardous Materials, of House Energy and Commerce: "Accountability of DOE Contractors with Federal Environmental Laws," Serial No. 101-112 (1989); "Environmental Crimes at DOE's Nuclear Weapons Facilities," Serial No. 101-106 (1989); "Cleanup at Federal Facilities," Serial No. 101-4 (1989); "DOE: Pollution at Fernald, Ohio," Serial No. 100-236 (1988).

Recent Senate hearings include those before the Committee on Environment and Public Works: "Federal Facility Compliance Act of 1989" (not yet published) (May 2, 1990), and "Federal Facility Compliance with Hazardous Waste Laws," S. Hrg. 100-913 (1988). Also see those before the Committee on Governmental Affairs: "Environmental Issues at DOE Nuclear Facilities," S. Hrg. 100-311 (1987).

Finally, section 4 treats the prospect of personal liability (civil and criminal) for federal officials associated with noncomplying federal facilities.[4]

As a point of departure, federal facilities are generally subject to the same federal, state, and local environmental standards, both substantive and procedural, as any non-federal entity. Congress has made this amply clear in no fewer than six federal environmental laws:

> Resource Conservation and Recovery Act (RCRA) §§ 6001 (solid waste and hazardous waste), 9008 (leaking underground storage tanks), and 11006 (medical waste, in demonstration states);
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> Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) § 120;
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> Clean Air Act § 118;
>
> Clean Water Act § 313;
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> Safe Drinking Water Act § 1447; and
>
> Noise Control Act § 4.

With one exception, each of these so-called "federal facilities provisions" declares that facilities of all three federal branches are subject to federal, state, interstate, and local requirements related to the environmental threat addressed by the statute, to the same extent as a nongovernmental entity. The exception is CERCLA, subjecting federal agencies solely to requirements *under that statute* and a limited set of state requirements.[5] Another feature, shared by all the provisions but rarely invoked, authorizes the President to exempt executive-branch sites from pertinent environmental requirements when in the "paramount interest" (or, less commonly, the "national security interest") of the United States.[6]

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[4] Omitted from the report are prerequisites to the *sale* of federal property on which hazardous substances have been stored, released, or disposed of. *See* 42 U.S.C. § 9620(h), 55 Fed. Reg. 14208 (April 16, 1990).

[5] CERCLA § 120(a)(4) makes state laws governing hazardous-substance cleanups applicable to federal sites not on the NPL.

[6] Not noted in the text are two provisions of considerably narrower focus than the text-listed ones. Section 404(t) of the Clean Water Act, 33 U.S.C. § 404(t), states merely that each federal agency shall comply with state or interstate requirements to control the discharge of dredged or fill material into navigable waters of the state to the same extent as non-federal entities. Section 22 of the Toxic Substances Control Act, 15 U.S.C. § 2621, picks up the presidential exemption device used in the text-listed federal facility provisions, but nowhere states that federal facilities are subject to the statute.

Far more important in the current debate, though, is where the federal facilities provisions differ. Where they differ is in the *scope of permitted remedies* -- injunctive relief, civil penalties, criminal penalties, etc. -- made available for enforcing environmental duties. A related question, raised outside the federal facility provisions, is *who may enforce* these remedies. Nowadays it is these remedy-related questions, not the basic duty of environmental compliance, that generate all the sound and fury,[7] and are the common thread in this report.

1. EPA ENFORCEMENT

Against Federal Agencies

The Department of Justice, which represents EPA in most of its litigation,[8] has long been on record as refusing to represent one executive-branch agency in any coercive action against another executive-branch agency. Its stated reasons for this refusal fall into three categories.[9] First, it asserts, a variety of mechanisms are already in place to facilitate negotiation among federal agencies. Principal in this regard are established dispute resolution procedures, inter-agency memoranda of understanding, and ultimately, if necessary, Attorney General resolution of legal disputes under Executive Order 12146,[10] EPA/OMB resolution of other environmental conflicts between EPA and other agencies under Executive Order 12088[11] or referrals to the Council on Environmental Quality in the Executive Office of the President.[12] Where non-coercive means may be successful, reasons the Department, why

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[7] For example, DOE's position that it is not subject to RCRA, the federal statute governing hazardous waste, has long since been abandoned.

[8] Except as otherwise authorized, litigation in which the United States is a party "is reserved to ... the Department of Justice ...." 28 U.S.C. § 516. An executive order reaffirms this exclusive Justice Department authority as to judicial proceedings under the Superfund Act, adding that only the President (and hence not EPA) can require the Department to commence litigation. Exec. Order No. 12580 §§ 6(a)-(b), 52 Fed. Reg. 2923 (1987).

[9] Perhaps the most detailed statements of the Department's position are to be found in (1) a letter from Robert McConnell, Ass't Attorney General, to Hon. John Dingell, dated Oct. 11, 1983; (2) a letter from John Bolton, Ass't Attorney General, to Hon. John Dingell, dated Dec. 20, 1985, and (3) testimony of F. Henry Habicht II, Ass't Attorney General, during a hearing before the Subcomm. on Oversight and Investigations, House Comm. on Energy and Commerce, April 28, 1987, on "Environmental Compliance by Federal Agencies."

[10] Management of Federal Legal Resources (1979), 28 U.S.C. § 509 note.

[11] Federal Compliance with Pollution Control Standards (1978), 42 U.S.C. § 4321 note. The executive order sets up a two-step process. Conflicts over federal environmental compliance, either between federal agencies or between federal and non-federal entities, must first be put before the EPA Administrator and, if not resolved by him, transferred to the Office of Management and Budget.

[12] Clean Air Act § 309(b); 42 U.S.C. § 7609(b).

resort to the nastiness and considerable expense of litigation? (Nor could the Department represent both sides, given the conflict of interest.)

Secondly, the Department of Justice asserts two related constitutional concepts: the "unitary executive" theory and whether an intrabranch suit is "justiciable." The unitary executive doctrine, criticized by scholars but still pressed by the Department,[13] begins by noting the President's constitutional duty to "take Care that the Laws [are] faithfully executed."[14] It then reasons that this duty, vested as it is exclusively in the President, demands that all executive branch agencies be subject to the President's control and direction with regard to the "execution" of the laws -- in effect, a unitary executive. That being so, disputes between two or more executive branch agencies are properly resolved, at least in the first instance, solely by the President (or someone with authority delegated from the President).[15] Unilateral enforcement actions by EPA, whether administrative or in the courts, are unacceptable.

The Department's other constitutional argument asserts that intrabranch suits, particularly between agency heads removable at the will of the President, are not the kind of dispute that is appropriate for judicial resolution -- that is, are not "justiciable." The argument is grounded in the unitary executive view, above, that the President, not the courts, is charged with resolving disputes between his subordinates. In a similar vein, Justice has argued as well that EPA lacks standing to sue its sister agencies, owing to the Constitution's insistence on an actual "case or controversy" between parties litigating in federal court.[16] Right arm suing left arm, the Department suggests, is not what the Constitution contemplates. These categorical positions on justiciability and standing, just as the unitary executive doctrine,

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[13] *See, e.g.,* Rosenberg, Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627 (1989). Recent evidence that the Department of Justice continues to espouse the concept appears in Letter of Bruce Navarro, Acting Ass't Attorney General, to Hon. John Glenn, dated Feb. 20, 1990 (page 4).

[14] U.S. Const. art. II § 3.

[15] In some articulations of the unitary executive doctrine, the Department of Justice confines its application to executive agencies whose heads serve at the pleasure of the President. The Department has since clarified that even so-called "independent regulatory agencies" may fall under the doctrine. Such agencies, the heads of which do not serve at the President's pleasure but are removable only for cause, may nonetheless perform executive-type functions subject to broad presidential control. Accordingly, runs the argument, application of the unitary executive theory would, to the extent of such control, be appropriate. *See* testimony of Ass't Attorney Gen. Habicht, *supra* note 4, at 268-269.

In any case, the principal agencies of relevance here -- EPA, DOE, and DOD -- all clearly fall under even the narrower version of the doctrine.

[16] U.S. Const. art. III.

have been criticized and arguably do not reflect current case law on intrabranch litigation.[17]

Finally, the Justice Department argues that in certain cases, EPA lacks the *statutory* authority to take action against other federal agencies. An example is found in RCRA,[18] EPA's authority for regulating the generation, transport, treatment, storage, and disposal of hazardous waste. Differing with EPA, Justice argues that RCRA does *not* empower EPA to issue administrative orders against federal agencies demanding compliance with regulatory requirements, but only to demand corrective (cleanup) action.[19]

Justice Department opposition to intrabranch suits has put EPA on a very different footing when dealing with federal and non-federal sites. In enforcing at the former, the agency has been largely confined to jawboning -- and the hope that the compliance agreements EPA signs with noncomplying agencies and the consent orders EPA issues will be held enforceable by states

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[17] *See, e.g.*, United States v. ICC, 337 U.S. 426 (1949); United States v. Nixon, 418 U.S. 683 (1974); United States v. Federal Maritime Comm'n, 694 F.2d 793 (D.C. Cir. 1982). The Dep't of Justice attempts to distinguish these and similar cases on the ground that none involved agency heads subject to at-will removal on *both* sides of the dispute. (The EPA Administrator is such an agency head.) However, the Supreme Court has at least suggested that this factor makes little difference. In United States v. Nixon, *supra*, the Court cited with approval two cases in which it maintained jurisdiction over actions by the Justice Department in which the Comptroller of the Currency, removable at will by the President (12 U.S.C. § 2), participated on the side of defendants. A commentator notes that "[n]o case has hinted at a distinction between litigation involving independent regulatory commissions on the one hand and executive officers subject to at will removal on the other." Rosenberg, "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 Geo. Wash. L. Rev. 627, 684 (1989).

See also Federal Facility Compliance with Hazardous Waste Laws: Hearing Before the Subcomm. on Superfund and Environmental Oversight of the Sen. Comm. on Env't and Public Works, 100th Cong., 2d Sess. 148-149 (1988) (prepared statement of Natural Resources Defense Council).

[18] 42 U.S.C. §§ 6901-6992k.

[19] The Department of Justice's position, and EPA's acquiescence therein, is described in an EPA memorandum entitled "Enforcement Actions Under RCRA and CERCLA at Federal Facilities," dated Jan. 25, 1988. It is reprinted at 18 Env'l Law Rptr. 35141.

EPA authority to issue administrative orders addressing compliance violations is in RCRA § 3008(a); its authority to order corrective action is at RCRA § 3008(h).

and private individuals, even if not by EPA itself.[20] Let us examine how this works under RCRA, then under CERCLA.

RCRA. Under RCRA, EPA arm-twisting of federal facilities begins by issuing a Notice of Noncompliance, the analog of a RCRA section 3008(a) administrative complaint to a private facility. Negotiations with the offending agency ensue, leading to a Federal Facility Compliance Agreement (FFCA) specifying what measures the agency must take to come into compliance, and associated deadlines.

An important provision in these RCRA FFCAs is the enforceability clause, declaring that the mandated measures in the FFCA shall be deemed "requirements" for purposes of the RCRA citizen suit provision. EPA's strategy is plain enough. It is only "requirements" that are enforceable against noncomplying agencies through such citizen suits,[21] yet measures called for in FFCAs are vulnerable to the argument that they are not requirements at all since FFCAs are entered into *voluntarily* by the noncomplying agency. EPA's hope is that its preemptive strike of proclaiming FFCA provisions to be requirements will dispose courts to view them as such, and accordingly find them enforceable through citizen suits. We know of no judicial test of this strategy yet.

CERCLA.[22] Under CERCLA, EPA acts against federal agencies with a clearer mandate than under RCRA. CERCLA, in 1986 amendments, instructed EPA to establish a Federal Agency Hazardous Waste Compliance Docket,[23] building on a similar federal-facility inventory required earlier by RCRA.[24] Each facility in the docket is to be evaluated for possible listing on

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[20] As EPA put it in the agency's Federal Facility Compliance Strategy (Nov. 1988):

> EPA's enforcement response for Executive Branch agencies differs somewhat from its enforcement against non-Federal parties in that it is purely administrative, and neither provides for civil judicial action nor assessment of civil penalties.

Id. at VI-1. A footnote clarifies that this limitation does not apply to penalties for violations of Interagency Agreements under the Superfund Act, discussed in this report on the following page.

The Federal Facility Compliance Strategy finds partial justification for its no-civil-penalties policy in "Federal District court rulings which have issued conflicting decisions as to whether or not the United States Government has ... waived its sovereign immunity for penalties under various environmental statutes." *Id.* at VI-3. The issue of immunity addressed in those decisions, however, relates exclusively to whether entities *outside the federal government* (e.g., states) can obtain penalties against federal sites, not whether *EPA* may do so.

[21] RCRA § 7002(a)(1)(A); 42 U.S.C. § 6972(a)(1)(A).

[22] 42 U.S.C. §§ 9601-9675.

[23] CERCLA § 120; 42 U.S.C. § 9620.

[24] RCRA § 3016; 42 U.S.C. § 6937.

the National Priorities List of the country's worst toxic dumpsites.[25] Following listing, the agency that runs the facility must do a remedial investigation (describing the type and extent of contamination) and feasibility study (setting out possible remedies), then enter into an "interagency agreement" (IAG) with EPA "for the expeditious completion by such ... agency ... of all necessary remedial action ...." At a minimum, such agreements must list the alternative remedial actions and the one selected, a schedule for completing such action, and arrangements for long-term operation and maintenance of the facility. State and local officials, and the general public, must be afforded opportunity to participate.[26]

In contrast with FFCAs negotiated under RCRA (and, indeed, in contrast with several other EPA statutes), IAGs under CERCLA are clearly intended by Congress to be enforceable *by EPA* through civil penalties, either agency- or court-assessed,[27] and possibly through administrative orders and consent decrees as well. Given Justice Department doubts as to the constitutionality of intrabranch enforcement, however, IAGs and EPA-imposed penalties thereunder may still be enforceable only by states and individuals through citizen suits. Also in contrast with FFCAs, IAGs are statutorily stated to be within the reach of CERCLA-authorized citizen suits.[28]

EPA also can issue administrative orders to federal agencies to collect information and obtain access to federal agency sites,[29] or to command such agencies to clean up.[30] An executive order, however, asserts that EPA may issue such orders only with the concurrence of the Department of Justice.[31] Even should the Department approve EPA *issuance* of an order, however, we have seen that it is unlikely that the Department would allow EPA to *enforce* those agency orders in court. Once again, this puts the spotlight on the non-federal enforcer.

EPA encourages, but cannot require, federal agencies (and the private sector) to do environmental auditing -- that is, systematic, periodic, and

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[25] 40 C.F.R. part 300.

[26] CERCLA § 120(f) (state and local officials); CERCLA § 117 (general public).

[27] CERCLA §§ 122(l), 109.

[28] CERCLA § 310(a)(1).

[29] CERCLA § 104(e)(5)(A).

[30] CERCLA § 106(a).

[31] Exec. Order No. 12580 § 4(e) (1987), 42 U.S.C. § 9615 note. The previous executive order implementing CERCLA, No. 12136 of Aug. 14, 1981, did *not* condition EPA's use of the text authorities on concurrence by the Attorney General. Concern regarding this added condition and its apparent lack of support in the 1986 Superfund amendments was expressed in a letter from Hon. John Dingell, Chairman, House Subcomm. on Oversight and Investigations, to Hon. Lee Thomas, EPA Administrator, dated Feb. 10, 1987.

objective review of facility operations to detect environmental violations. At the same time, however, EPA warns agencies that disclosure of audit-generated information may be required by the Freedom of Information Act.[32]

Against Private Contractors

Certain government-owned facilities are contractor operated (GOCOs). Included in this category are some of the Department of Defense's operations and virtually all of the DOE nuclear weapons complex.

The Department of Justice has no objections, constitutional or statutory, to EPA enforcement of federal environmental statutes directly against such contractors. Plainly, such suits or agency orders involve parties that are not both within the executive branch, eliminating justiciability, standing, and unitary executive theory objections. Moreover, since the defendant is not part of the United States Government, coverage under all provisions of federal environmental statutes is clear. Nor does the executive order requiring Attorney General concurrence for EPA orders against federal agencies apply when EPA decides instead to proceed against the contractor running the facility.[33]

The key issue with GOCO facilities arises from DOE's practice of reimbursing its contractors for almost all liabilities, penalties, settlement payments, and related legal costs incurred in the performance of their contracts, excepting only those stemming from willful misconduct or lack of good faith.[34] The Department's full indemnification policy has been argued by many, and conceded by DOE, to lessen the disincentive represented by such penalties to environmental noncompliance at DOE GOCOs. Proposed DOE regulations reassess its longstanding practice, and would move the Department substantially in the direction of the Defense Department's more limited reimbursement policy.[35]

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[32] EPA, Environmental Auditing Policy Statement, 51 Fed. Reg. 25004, 25008 (1986).

[33] *Supra* note 31.

[34] *See generally* General Accounting Office, "Hazardous Waste: Contractors Should be Liable for Environmental Performance" (Oct. 1989), *reprinted in* Hearing on H.R. 2597 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 24-63 (1989).

[35] 55 Fed. Reg. 2796 (Jan. 26, 1990). The critical sentence of the proposed regulations asserts that:

> It is DOE policy *not* to reimburse profit making management and operating contractors for fines and penalties that are incurred in the performance of their contracts, unless such fines and penalties result from acts or omissions which were specifically directed or authorized by the contracting officer or occur after specific instances of noncompliance were reported by the contractor to the contracting officer and necessary authorizations or appropriations to correct the conditions were not received.

2. STATE AND PRIVATE ENFORCEMENT

Against Federal Agencies

With EPA confined largely to exhortation and negotiation, it has fallen to state and private enforcers to fill the gap. Such enforcers, however, confront two related legal barriers. The first is federal supremacy: the immunity of the United States from *being regulated* by subordinate units of government.[36] The second is sovereign immunity: the immunity of the United States from *being sued* by nonfederal entities. Together, these doctrines would effectively keep nonfederal watchdogs at bay, had Congress not waived application of both in the federal facility provisions listed at the outset. States also may use the citizen-suit provisions in these same statutes to compel federal facility compliance with *federal* environmental standards.

The federal supremacy waiver. In 1976, the Supreme Court construed the federal facility provision in the Clean Air Act (CAA).[37] Declaring the "fundamental importance of the principles shielding federal installations ... from regulation by the states," the Court concluded that any doubt as to the breadth of a federal statutory provision consenting to state regulation must be settled in the United States' favor. That being so, it held that the CAA provision demanded *substantive* compliance by federal facilities with state law, but did not require the obtaining of state *permits*. The distinction, in the Court's eye, lay in the greater degree of state control allowed by permits. Because Congress' intent to subject federal facilities to so much state control was not "clear and unambiguous" from the statute, the court disallowed it.[38]

The seminal pronouncement in the 1976 decision -- that federal consent to state regulation must be expressed in "*clear and unambiguous*" fashion -- had an immediate effect on congressional drafting. In the Resource Conservation and Recovery Act enacted three months after the decision, and in amendments to the Clean Air Act, Clean Water Act, and Safe Drinking Water Act enacted in 1977, Congress inserted language into federal facility provisions referring to "all" state requirements, both "substantive and

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(Emphasis added.) On the other hand, the proposed regulations would cap the contractor's liability -- at an amount equal to the award fee (or 6 months of fixed fee for cost-plus-fixed- fee contracts) available in the evaluation period when the noncompliance occurred.

[36] State efforts to subject federal agencies, facilities, instrumentalities, or employees to state controls or taxation go back to the earliest years of the Republic. McCulloch v. Maryland, that chestnut of constitutional law, first laid down the rule in 1819: states cannot regulate federal activities in any way that impedes the accomplishment of the federal government's constitutional powers. 17 U.S. 316. The supremacy clause of the Constitution, the Court felt, permitted no other result. U.S. Const. art. VI.

[37] Hancock v. Train, 426 U.S. 167 (1976).

[38] In a companion decision, the Court reached the same conclusion as to virtually identical language in the Clean Water Act. EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976).

procedural." In the judicial arena, the clear-and-unambiguous rule became the point of departure for all subsequent court decisions in the state-regulation-of-federal-facilities field.[39]

As noted, most of the federal facility provisions waive federal supremacy for the pertinent category of environmental requirements regardless whether imposed at the interstate, state, or even local level. Today, no federal agency challenges that it is subject to the full spectrum of state and local environmental regulation, both substantive and procedural. Rather, as said at the outset, the struggle has shifted to the separate realm of what remedies are available to the states (and EPA) in enforcing environmental requirements. As to states and other non-federal enforcers, this raises the matter of sovereign immunity: federal immunity from suit.

The sovereign immunity waiver. As with waivers of federal supremacy, a congressional desire to waive sovereign immunity must be plainly stated. The Supreme Court explained:

> It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued ... , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed. [40]

A corollary is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed.[41] Waivers affecting the public fisc are to be especially narrowly construed.[42]

Most of the sovereign immunity litigation in the environmental area has been based on RCRA, presumably due to the high profile of hazardous waste issues nowadays and the relative narrowness of the RCRA waiver of sovereign immunity. The RCRA federal facility provision reads:

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[39] The Supreme Court has recently reasserted the clear and unambiguous principle in a case involving application of a state worker's compensation formula to a DOE contractor employee. In contrast with Hancock v. Train, *supra* note 37, the Court this time found a clear and unambiguous waiver and hence applied the state rule. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988).

[40] United States v. Mitchell, 445 U.S. 535, 538 (1980). *See also* Library of Congress v. Shaw, 478 U.S. 310, 314-315 (1986).

[41] Block v. North Dakota, 461 U.S. 273, 287 (1983); Ruckelshaus v. Sierra Club, 463 U.S. 680, 683-685 (1983).

[42] Lehman v. Nakshian, 453 U.S. 156, 161 & n.8 (1981).

> Each department, agency, and 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, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanction as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements .... [43]

The pivotal word in this provision is "requirements." Only if the state's enforcement is by means of a "requirement," such as the expressly noted injunctive relief and attendant sanctions, does the provision's waiver of sovereign immunity allow it. Most heavily litigated has been the issue of whether "requirements" includes civil money penalties assessed against federal facilities by state agencies. The issue is a delicate one: huge fines could, by requiring a federal agency to expend funds budgeted for use elsewhere, threaten an agency's "worst first" cleanup priorities and even undermine congressionally mandated program priorities.[44]

Thus far, the majority of the decisions has held that states may *not* impose civil money penalties against federal agencies under the RCRA waiver.[45] Sanctions such as civil penalties, say these courts, are not requirements, but rather the *means* by which requirements (such as standards, permits, and reporting duties) are enforced. Should any doubt on this score remain, the rule of narrow construction of sovereign immunity waivers dictates excluding the remedy. Hence, state enforcement of solid and hazardous waste requirements against federal sites should be limited to the injunctive penalties expressly mentioned in RCRA. Reasoning along similar lines, other courts have found inapplicable to the United States under the RCRA waiver (1) a state's strict liability standard for hazardous waste cleanup costs and natural resource damages,[46] and (2) state criminal penalties.[47]

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[43] RCRA § 6001; 42 U.S.C. § 6961.

[44] The Comptroller General has approved use of appropriated funds to pay such money penalties. 58 Comp. Gen. 667 (1979); unpublished decision B-191747 (1978).

[45] Mitzelfelt v. Dep't of the Air Force, No. 89-02223 (10th Cir. May 21, 1990); United States v. State of Washington, 872 F.2d 874 (9th Cir. 1989); California v. U.S. Dep't of Defense, 18 Env'l Law Rptr. 21023 (E.D. Cal. 1988), *aff'd*, No. 88-2912 (9th Cir. June 26, 1989); MESS v. Weinberger, 655 F. Supp. 601 (E.D. Cal. 1986); and Meyer v. U.S. Coast Guard, 644 F. Supp. 221 (E.D. N. Car. 1986).

The minority view, that RCRA *does* authorize state-imposed penalties at federal sites, is set forth in State of Maine v. Dep't of the Navy, 702 F. Supp. 322 (D. Me. 1988), and State of Ohio v. U.S. Dep't of Energy, No. 89-3329 (6th Cir. June 11, 1990) (2-1 decision) (penalties authorized by RCRA citizen suit provision, but *not* by RCRA federal facility provision).

[46] Florida Dep't of Env'l Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985).

In sharp contrast with RCRA, both the Clean Air Act and Clean Water Act federal facility provisions waive sovereign immunity for "any process and sanction, whether enforced in Federal, State, or local courts or in any other manner."[48] Under this broader language, almost all courts have held that federal agencies are subject to state-imposed civil penalties.[49]

Against Private Contractors

A GOCO facility, when performing a federal function, is shielded from direct state regulation to the same extent as a federally owned and operated facility.[50] The upshot of this principle, under the federal supremacy doctrine discussed above, is that states cannot regulate such facilities unless Congress in "clear and unambiguous" fashion waives federal immunity. Of course, in the environmental realm Congress has done precisely that, in the form of the many federal facility provisions. Thus, in this area the principle that GOCO immunity is coextensive with that of federally operated facilities avails the GOCO facility operator little.[51]

3. INADEQUATE APPROPRIATIONS

Executive Order 12088 orders agency heads to "ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget." Yet obviously an agency cannot foresee all its

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[47] State of California v. Walters, 751 F.2d 977 (9th Cir. 1984).

[48] Clean Air Act § 118(a), Clean Water Act § 313(a).

[49] As to the Clean Air Act federal facility provision, see United States v. Tennessee Air Pollution Control Bd., 31 Env't Rptr. (Cases) 1500 (M.D. Tenn. 1990). As to the Clean Water Act provision, see State of Ohio v. U.S. Dep't of Energy, No. 89-3329 (6th Cir. June 11, 1990); Sierra Club v. Lujan, 728 F. Supp. 1513 (D. Colo. 1990); Metropolitan Sanitary Dist. v. Dep't of the Navy, 722 F. Supp. 1565 (N.D. Ill. 1989); State of Maine v. Dep't of the Navy, 702 F. Supp. 322, 329 (D. Me. 1988) (dictum). *Contra*, McClellan Ecological Seepage Situation v. Weinberger, 655 F. Supp. 601, 604 (E.D. Pa. 1986).

The Clean Water Act federal facility provision qualifies its waiver of sovereign immunity in a manner unique among federal environmental statutes:

> [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). Thus, in holding that the United States must pay state-imposed civil penalties, the Clean Water Act decisions above explicitly limit themselves to penalties "arising under Federal law."

[50] Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988).

[51] Though beyond our scope here, we note a suit to affix *tort liability* on the United States under the Federal Tort Claims Act, based on actions of a contractor at a GOCO plant. McKay v. United States, 703 F.2d 464 (10th Cir. 1983) (remanded for determination whether employees of the United States were negligent).

environmental costs in the upcoming year, and Congress may not provide all that an agency requests.

As a result, states seeking to compel environmental remedies or impose penalties at federal facilities often run up against the federal claim that appropriated funds are inadequate.[52] To be sure, the legal duty to comply with federal environmental requirements is not altered by an agency's lack of funding. *But* lack of funding is obviously crucial to just how much the agency can do to satisfy such requirements and penalty assessments. If the low-funds claim is valid, the state enforcement effort will reap little, since the Constitution bans withdrawals from the U.S. Treasury in the absence of appropriated funds,[53] and the Anti-Deficiency Act[54] makes it a criminal offense for a federal manager to even *obligate* (let alone spend) federal money that has not been appropriated.

The first task, then, is to see whether an agency's appropriated funds would, in fact, be available if an agency or court order were to require federal expenditures. In many instances, as with DOE, appropriations are only broadly allocated in the statute, allowing the agency much flexibility in moving funds from one project to another. Language in accompanying committee reports may purport to earmark such funds in greater detail, but such language would appear to impose only a political, rather than a legal, duty on the agency. Presumably, a routine discovery request by plaintiff would enable him to determine whether funds may be transferred.[55]

In recent years, DOE has included in its negotiated cleanup agreements provisions dealing specifically with a possible appropriation shortfall. The Hanford Federal Facility Agreement and Consent Order, negotiated between EPA, DOE, and the Washington Department of Ecology under both RCRA and CERCLA, may be taken as illustrative. Note the DOE-state willingness to put aside the status of a lack-of-appropriations defense until such time, if any, that it is necessary to resolve it:

> 138. It is the expectation of the Parties that all obligations of DOE arising under this Agreement will be fully funded. DOE shall take all necessary steps and make efforts to

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[52] For general background on this section of the report, see Stever, Perspectives on the Problem of Federal Facility Liability for Environmental Contamination, 17 Env'l Law Rptr. 10114, 10115-10116 (1987).

[53] U.S. Const. art. I, § 9.

[54] 31 U.S.C. § 655. *See* Hanash, Effects of the Anti-Deficiency Act on Federal Facilities Compliance With Hazardous Waste Laws, 18 Env'l Law Rptr. 10541 (1988).

[55] An interesting issue is whether an agency legally could resist transfer of funds for environmental purposes on the ground that while authorized, such transfer would seriously debilitate the agency's implementation of some other, equally urgent statutory priority of the agency.

> obtain timely funding to meet its obligations under this Agreement.
>
> ....
>
> 143. If appropriated funds are not available to fulfill DOE's obligations under this Agreement the Parties shall attempt to agree upon appropriate adjustments to the dates which require the payment or obligation of such funds. If no agreement can be reached then Ecology and DOE agree that in any action by Ecology to enforce any provision of this Agreement, DOE may raise as a defense that its failure or delay was caused by the unavailability of appropriated funds. Ecology disagrees that lack of appropriations or funding is a valid defense. However, DOE and Ecology agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense.[56]

Judgment Fund

Where no agreement provision such as the foregoing exists and agency appropriated funds are found to fall short, several scenarios might unfold. (Lacking any precedent there is some speculation here.) One possibility is that plaintiffs would seek access to the Judgment Fund, a permanent *open-ended* appropriation, separate from any routine agency appropriation, that is available to pay "final judgments, awards, compromise settlements, and interests and costs" against the United States.[57] The main prerequisite for access to the Judgment Fund is that any such judgments, awards, etc., be "not otherwise provided for" -- that is, not legally payable out of any appropriation or fund controlled by the defendant agency.

The Judgment Fund extends only to judgments directing the United States to *pay money*, not those directing the United States to perform some action.[58] States presumably could satisfy this requirement through enforcement actions seeking not injunctive relief, but rather court-imposed civil money penalties against the United States (where the relevant waiver of sovereign immunity is sufficiently broad). Nor do matters have to proceed as far as a court judgment: money penalties agreed to in litigation settlements, and even in settlements entered into due to *imminent* litigation, are eligible for the Judgment Fund.[59]

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[56] In addition, the Hanford agreement defines as a *force majeure* any "insufficient availability of appropriated funds, if DOE shall have made timely request for such funds ...." Par. 135(G). It is unclear how this provision relates to the quoted provision in the text.

[57] 31 U.S.C. § 1304(a). The judgment appropriation originally applied only to judgments not in excess of $100,000, but this limitation was removed in 1977. Pub. Law 95-26.

[58] *See generally* General Accounting Office, Principles of Federal Appropriations Law ch. 12 (1982).

[59] 28 U.S.C. § 2414.

A General Accounting Office opinion confirms the above. There, the Judgment Fund was determined the proper source of funds for civil penalties under the Clean Air Act imposed by a court, including consent decrees and compromise settlements.[60] To be sure, penalties imposed by state or local *agencies* were deemed payable solely from agency appropriations if the federal agency agrees to pay; here, the Judgment Fund prerequisite of imminent litigation is not met.[61] Yet this is a small exception from the general rule of Judgment Fund availability: should the administrative penalty be reduced to court order, the Fund becomes available.

Conditional mandates / contempt

What if a state seeks a court order demanding that a federal agency perform remedial action or pay an administrative fine, but *neither* the federal agency's budgeted funds nor the Judgment Fund is available? Generally, courts are quite sensitive to the limits on what court orders can achieve. Quite sensibly, orders that have no chance of being complied with are avoided. As happened at DOE's Fernald facility, therefore, the court might offer the parties time and guidance in order to coax an acceptable accommodation.[62] The federal agency might seek a conditional order or consent decree -- one requiring the agency to make good faith efforts to secure the needed appropriation, and making compliance with the order contingent on Congress' actually granting it.[63] (Of course, Congress cannot be compelled to appropriate.)

In most circumstances, the civil contempt remedy would be unavailable where the federal defendant can demonstrate fiscal impossibility. Impossibility of performance, and in particular fiscal impossibility, has been accepted by virtually all courts as a defense to contempt -- at least where the party did

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[60] 58 Comptroller General Ops. 667 (1979).

[61] 58 Comptroller General Ops. 667 (1979); unpublished GAO opinion B-191747 (1978).

[62] Ohio v. Dep't of Energy, No. C-1-86-0217 (S.D. Ohio). The court's desire for accommodation was actually articulated here in the context of the state's seeking contempt of court for alleged violations of a state-DOE consent decree.

[63] One commentator writes:

> The federal budget is developed in one-year cycles. However, special appropriations, effective immediately, are reasonably frequent, and it would not be unreasonable to ask an agency, particularly one with a serious environmental problem to be remedied, to agree to seek a special appropriation.

Stever, Perspectives on the Problem of Federal Facility Liability for Environmental Contamination, 17 Env'l Law Rptr. 10114 (1987). Whether this is sound advise in the context of a DOE request for billions of dollars is another question.

not itself contribute to the impossibility.[64] The purpose of civil contempt is solely to compel performance required of a defendant, so where performance is impossible contempt penalties make little sense. Neither would a contempt *fine* be availing: GAO has concluded that the Judgment Fund is not available to pay contempt fines, even though they may technically involve a judgment of the court.[65] One commentator has suggested, however, that a state court, using its contempt power, could authorize the *state* to do the cleanup, thereby converting the federal agency's obligation to a sum certain recoverable from the Judgment Fund.[66]

Presidential exemptions

As noted, all the federal facility provisions allow the President to exempt particular sites administered by executive branch agencies (or certain agencies) from environmental requirements otherwise applicable under the statute in question. Usually, the condition precedent is a presidential finding that the exemption is "in the paramount interest of the United States."[67] Expressly precluded, however, as a basis for such finding is lack of appropriations, unless such appropriations have been requested from Congress as part of the budgetary process and refused.

To date, presidential exemptions have been granted only rarely.[68]

4. LIABILITY OF FEDERAL EMPLOYEES

With numerous obstacles strewn before EPA and state enforcers at federal facilities, it is little wonder that some eyes have turned to the possibility of

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[64] Stated the court in Pennsylvania DER v. Pennsylvania Power Co., 337 A.2d 823, 829 (Pa. 1975):

> If it is demonstrated that an alleged contemnor is unable to perform (in contrast to willfully disobeying) and has in good faith attempted to comply with a court order ... the purposes for punishing noncompliance are eliminated.

Federal court decisions specifically recognizing *fiscal* inability as a defense to contempt include Securities Investor Protection Corp. v. Executive Securities Corp., 433 F. Supp. 470, 473 (S.D.N.Y. 1977), and O'Leary v. Moyer's Landfill, Inc. 536 F. Supp. 218, 219 (E.D. Pa. 1982).

[65] 44 Comptroller General Ops. 312 (1964).

[66] Stever, *supra* note 2, at 10116. Recovery would presumably be sought under the Tucker Act, 28 U.S.C. § 1491(a), vesting jurisdiction in the U.S. Claims Court to render money judgments against the United States in specified circumstances.

[67] In the case of the Safe Drinking Water Act and CERCLA, an exemption may be granted only for "national security" reasons.

[68] Research reveals only one instance: Exec. Order No. 12244, 45 Fed. Reg. 66443 (1980), exempting a refugee processing center in Puerto Rico from four federal environmental statutes.

enforcing against federal employees personally.[69] And with the recent upsurge in criminal enforcement of environmental laws, both federal and state, one may expect that some actions against federal officials will fall on the criminal side.[70] Witness in 1989 the raid by EPA and FBI agents on DOE's nuclear weapons facility at Rocky Flats, Colorado, and the RCRA convictions of three civilian federal managers at a U.S. Army facility in Aberdeen, Maryland.

This is a confusing area, however, with little relevant case law under the federal environmental statutes. Hence, caution is advised.

Federal enforcement against federal employees, as against federal agencies, plainly may proceed with no federal supremacy and sovereign immunity obstacles. The federal employee, therefore, would appear to be fully liable under the standard set out in the federal law allegedly violated, just as if he or she were not a federal employee.[71] The one exception appears to be in the Safe Drinking Water Act, stating that no U.S. employee shall be personally liable for any civil penalty under that statute.[72]

Keep in mind, too, that environmental crimes may be prosecuted as well under the general criminal provisions of U.S. Code title 18. For example, an understanding among federal employees to jointly violate an environmental law is also a "criminal conspiracy" under title 18.[73]

State enforcement of state environmental laws against federal employees initially confronts a daunting barrier. Courts have long insisted that exposing federal employees to state enforcement for the mere performance of their duties would subject to state whims the very functioning of the central government itself. This, of course, is an unacceptable result given the supremacy clause of the Constitution.[74] As a result, courts have cloaked

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[69] Bartus, Federal Employee Personal Liability Under Environmental Law: New Ways for the Federal Employee to Get Into Trouble, 31 Air Force L. Rev. 45 (1989).

[70] *See generally* Hanash, The Legal Grounds for Prosecuting Federal Employees for Environmental Law Violations, 1 Fed. Facil. Env'l J. 17 (1990); Brown, The Liability of the Employee of a Federal Agency Charged With Criminal Environmental Violations, 35 Fed. Bar News & J. 442 (1988).

[71] EPA policy affirms this equating of federal and non-federal individual liability:

> In situations where employees of Federal agencies have committed criminal violations of environmental statutes applicable criminal sanctions may be sought against such individuals, in the same manner as is done with respect to employees of other types of regulated entities.

EPA, Federal Facility Compliance Strategy VI-16 (1988).

[72] Safe Drinking Water Act § 1447(a); 42 U.S.C. § 300j-6(a). The Clean Air Act federal-facility provision contains a similar statement that no federal employee shall be personally liable for civil penalties, but adds: "for which he is not otherwise liable."

[73] 18 U.S.C. § 371.

[74] U.S. Const. art. VI.

federal employees with the same supremacy doctrine and sovereign immunity protections as the United States. The Supreme Court first announced these protections against state enforcement in 1890, in the landmark case of *In re Neagle:*

> [I]f the prisoner is held in the state court to answer [under state law] for an act which he was authorized to do by the law of the United States, ... and if in doing that act he did no more than what was necessary and proper ... , he *cannot* be guilty of a crime under [state law].[75]

The two-part defense of *In re Neagle* -- federal authorization and necessary and proper actions -- has been loosened by later court decisions taking the position that "necessary and proper" has a subjective component. That is, it is only necessary that the federal defendant have held an "honest and reasonable" belief that his behavior was necessary and proper; he is not required to show that his action was in fact so.[76]

As noted, however, the two-part test is only a barrier to state enforcement at first blush. The federal employee's qualified immunity under the test appears to have been substantially modified in federal environmental statutes. For example, RCRA eliminates federal-employee immunity, seemingly whether the two-part test is satisfied or not, as to court-imposed sanctions to enforce court injunctions -- but not as to other agency or court process.[77] Under the Clean Air Act and Clean Water Act, federal-employee immunity is waived for criminal enforcement, though not, it may be argued, for civil penalties.[78] State imposition of the latter apparently must still circumvent the two-part defense.

Waiver of immunity or not, of course, a state effort to enforce state environmental laws that are proscribed by or inconsistent with a federal statute would fail on preemption grounds.

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[75] 135 U.S. 1, 75 (emphasis in original).

[76] *See generally* Commonwealth of Kentucky v. Long, 837 F.2d 727, 742-749 (6th Cir. 1988).

[77] RCRA § 6001.

[78] Clean Air Act § 118(a); Clean Water Act § 313(a).