June 1989

When Will the Federal Government Waive the Sovereign Immunity Defense and Dispose of Its Violations Properly

Mike Rothmel

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol65/iss2/13

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
WHEN WILL THE FEDERAL GOVERNMENT WAIVE THE SOVEREIGN IMMUNITY DEFENSE AND DISPOSE OF ITS VIOLATIONS PROPERLY?

MIKE ROTHMEL*

I. INTRODUCTION

Congress has always envisioned that the federal government would play a lead role in compliance with federal environmental regulations. 1 Unfortunately, federally owned facilities are part of the pollution problem and not part of the solution.2 The Department of Defense generates over 500,000 tons of hazardous waste per year at 333 installations while the Department of Energy generates 2.5 million tons of hazardous waste and 16 million tons of mixed hazardous and radioactive waste per year.3 In disposing of this waste federal facilities violate pollution laws with impunity.4 The Justice Department has continually worked to tie the hands of both the Environmental Protection Agency (EPA) and the states when they attempt to impose penalties on federal facilities for violating the nation’s pollution laws.5

At the federal level, EPA enforcement consists of little more than extended negotiations that can be delayed for over two years before resolution occurs because the Justice Department has refused to allow the

* I would like to thank Professor Richard Wright of IIT Chicago-Kent College of Law whose thoughts and comments have helped me greatly.


2. Id. The Rocky Mountain Arsenal, an Army disposal site in Colorado, is said to contain "the most toxic square mile on earth." Pollack and Shulman, The Environment: Toxic Responsibility, THE ATLANTIC, March 1989, at 26. The military admitted, in a 1988 report to the Pentagon, that common disposal practices included "discharge on the ground into unlined pits or local creeks," "pouring and spraying on the ground," "drainage to industrial sewers," and "storage in leaking underground tanks." Id. at 28. At a recent congressional hearing, the Attorney General of Colorado stated that "the federal government has been one of the nation's worst violators of [federal] and state hazardous-waste laws," and the Attorney General of Ohio testified to the "widespread and long-standing disregard by federal facilities of hazardous-waste requirements designed to protect the safety of our citizens." Id.


4. Id. at 30-31. See also Porter, EPA Dispute Resolution Schedule for Federal Facility Compliance Under RCRA, 18 Env't Rep. (BNA) 41:3401 (May 13, 1988). This memorandum set out criteria to shorten the negotiating time between the EPA and federal facilities violating RCRA. The memorandum noted that "many Regions have expressed frustration in their apparent inability to compel the conclusion of these negotiations." Id.

EPA to issue compliance orders to or to seek civil penalties against federal facilities that violate the law. At the state level, the Justice Department has hindered state enforcement by relying on the shield of sovereign immunity to avoid complying with the nation’s antipollution laws. The shield is effective because of the unique structure of the pollution laws. Under most of the environmental laws, the EPA sets minimum pollution standards for a pollution program and the states have the option of administering these programs in lieu of the EPA. If a state cites a federal facility for a violation, the facility can claim that it is immune from state regulation because the sovereign has not consented to being sued. Although these acts all contain sovereign immunity waivers, most courts have held that these waivers “require” federal compliance without giving up sovereign immunity with regard to state initiated enforcement actions (except under the Clean Air Act). Thus, when a federal facility violates an environmental statute, the states cannot impose a penalty on the facility and all the EPA can do is attempt to cajole the recalcitrant agency into compliance, an action which history has proved to have little impact on agency behavior.

6. House Staff Report Hits DOD [Department of Defense], DOE [Department of Energy] for Violations of Environmental Statute, 18 Env’t Rep. (BNA) 199 (June 10, 1988). The article quoted the report as stating that the EPA had to rely on “jawboning at elevated bureaucratic levels” to enforce RCRA at federal facilities. Id. at 199. The article noted that at one facility in Ohio, the DOE had rototilled 50,000 gallons of contaminated solvent into the ground “resulting in trichloroethylene contamination of 790,000 parts per billion in a well, 158,000 times EPA’s drinking water standard.” Id. The Justice Department has refused to represent the EPA against federal facilities because it adheres to the “unitary executive” theory. Suits Against Federal Agencies Possible, EPA Deputy Administrator Nominee Tells Senate, 19 Env’t Rep. (BNA) 142 (May 19, 1989). Under that theory one federal agency may not sue another. The Justice Department maintains that only the President can arbitrate disputes between administrative agencies. Id.

7. Chief Justice Marshall first expounded upon the doctrine of sovereign immunity in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Although sovereign immunity is an English doctrine, it found its way into the American system of government through the supremacy clause of the Constitution. The doctrine, derived from the Supremacy Clause (U.S. Const. art. 6, cl. 2), prevents a state from regulating an instrumentality of the federal government, (i.e. government agency, property, etc.) without the express consent of the federal government through an act of Congress. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186-88 (1988) (White, J., dissenting).


10. These waivers are included in the Clean Air Act § 118, 42 U.S.C. § 7418, see infra note 136; the Clean Water Act § 313, 33 U.S.C. § 1323, see infra note 151 and accompanying text; and the Resource Conservation and Recovery Act § 6001, 42 U.S.C. § 6961, see infra note 189 and accompanying text.

11. See infra section IV.

12. See infra notes 275-76 and accompanying text.
This Note will examine whether the sovereign immunity waivers in the Clean Air Act (CAA), Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) authorize state enforcement against federal facilities. After a brief overview of the three statutes, the Note will first analyze the Supreme Court’s reasoning in Hancock v. Train and United States EPA v. California ex rel. State Water Resources Control Board to glean the Supreme Court’s criteria for determining whether a statute waives sovereign immunity to a particular action. The Note will then analyze the current sovereign immunity waivers in the CAA, CWA, and RCRA to determine whether they meet the Supreme Court’s guidelines established in Hancock and United States EPA v. California ex rel. State Water Resources Control Board. Finally, the Note will explore future possibilities for bringing about federal government compliance with its own laws.

II. THE FEDERAL POLLUTION LAWS

To understand how sovereign immunity defeats the enforcement of pollution laws against the federal government one must first understand how those laws operate. All three laws encourage a federal-state partnership to administer and enforce them. First, Congress or the EPA promulgates standards for pollution control. Next, the states have the option to enact their own legislation to implement and enforce the federal standards or their own more stringent standards. If the state’s implementation and enforcement is inadequate, the EPA takes over implementation from the state. This section will be divided into two parts. First, it will explain the structure of each Act in more detail. Second, it will discuss enforcement under the Acts in general.

A. Structure

The CAA takes a two step approach to air pollution control. First, the EPA establishes nationally uniform concentration limits for pollutants that it deems harmful to public health, called National Ambient

19. Id.
20. Id.
Air Quality Standards (NAAQS). Once the EPA establishes NAAQS the states must submit a State Implementation Plan (SIP) which details how the state will achieve the NAAQS for each pollutant for which the EPA has established a standard. The SIP must contain emission limits for major stationary sources of pollution (i.e. large factories), time tables for achieving those limits, adequate enforcement provisions and other provisions which this section requires. If the SIP meets all statutory requirements, then the EPA must approve it. While the states set emission limits for existing major stationary sources, the EPA sets nationally uniform emission limits for mobile sources, new stationary sources and toxics. The states have primary enforcement authority under the Act and the EPA will step in if a state fails to enforce its SIP adequately.

The CWA relies primarily on nationally uniform effluent limits rather than ambient standards to control pollution. The EPA prescribes the effluent limitations. The Act requires any person discharging pollutants that will affect the navigable waters of the United States to obtain a permit before doing so. The Act allows either the EPA or the individual state to administer and enforce this permit system, referred to as the National Pollution Discharge Elimination System (NPDES). Although the EPA suspends its permit program when it approves a state program, the EPA still retains the power to review all

21. 42 U.S.C. § 7409. Ambient standards measure the concentration of a pollutant in a given quantity of air. The NAAQS set a maximum concentration limit (ambient standards) for all pollutants which the EPA finds dangerous to public health.
23. An emission limit is a limit on the amount of pollutants a source can expel during a given period of time. States use permit systems to control and enforce emission limits from major stationary sources.
24. Id.
25. 42 U.S.C. § 7521. For example, cars and trucks.
26. 42 U.S.C. § 7411. For example, a factory built after the promulgation of a regulation regarding new sources would have to comply with that regulation.
27. 42 U.S.C. § 7412. Toxics are those pollutants for which no NAAQS applies, but which cause or contribute to an increase in mortality or morbidity.
29. Effluents are the discharges from factory pipes into water and are comparable to the emissions of smokestacks into the air. Effluent limits are analogous to emission limits and refer to the amount of polluted water a source may discharge into a given body of water over a given period of time. 33 U.S.C. § 1314(b).
30. Id.
31. Id.
32. The CWA defines person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."
34. The CWA 33 U.S.C. § 1342(a) allows the EPA to administer the NPDES permit program. Section 402(b), 33 U.S.C. § 1342(b) allows the states to administer their own NPDES program for waters within their borders.
state permit decisions at the EPA's option. Like the CAA, the CWA requires the federal government to set standards for new sources and toxics.

RCRA controls solid waste disposal using both a cradle to grave manifest system to track solid waste and technology requirements on disposal sites where it is dumped. The Act uses a permit system to insure that disposal sites meet federal or more stringent state standards. RCRA divides waste into two categories, hazardous and nonhazardous. Hazardous wastes are defined as those wastes which pose a risk to human health because of their concentrations, quantity, or physical, chemical, or infectious characteristics. RCRA allows a state to enact its own permit program in lieu of the federal program if the state's program is equivalent and consistent with the federal program and if the state's program provides for adequate enforcement.

B. Enforcement

All three Acts have similar enforcement provisions for polluters who violate them. The Acts authorize progressively increasing enforcement mechanisms from compliance orders to criminal penalties. The EPA or state agency has several options upon uncovering a violation of the Acts. The agency can promulgate an administrative compliance order requiring a polluter to comply with the law by a specified date. The agency can then seek civil penalties for violations that occur after that date.

35. 33 U.S.C. § 1342(c).
38. See Skillern, Constitutional and Statutory Issues of Federalism in the Development of Energy Resources, 17 NAT. RESOURCES LAW. 533, 594 (1984). The cradle to grave manifest system requires that paperwork identify every entity who has had control of hazardous waste from the point of its generation to the point of its disposal. Id.
39. 42 U.S.C. § 6924(o). The technological requirements include such safeguards as double liners under the landfill, a ground water monitoring system to detect leaks, and a leachate collection system to collect any liquids that do escape from the landfill. Id.
41. 42 U.S.C. § 6903(5).
42. 42 U.S.C. § 6926(b).
43. The enforcement sections of the environmental statutes under discussion include 33 U.S.C. § 1319, 42 U.S.C. § 7413, and 42 U.S.C. § 6928. Of the enforcement options, civil penalties are most important because otherwise violators would have a free period of noncompliance without penalty between the time of the violation and the issuing of a court order. Only civil penalties act to discourage polluters' behavior without a government suit. Because of the record of federal noncompliance to date the only effective means to ensure federal compliance is to allow the states to impose civil penalties for violations of pollution laws. Brief for Plaintiffs, Ohio v. Department of Energy, 689 F. Supp. 760 (S.D. Ohio 1988).
44. See supra note 43.
The agency can also proceed in federal district court and ask for injunctive relief or civil penalties against a violator. Moreover, the EPA can seek sanctions from the court if the violator fails to comply with an injunction. The most effective tool of government enforcement is the civil penalty. The three statutes authorize penalties for each day of violation. Except for the CAA, the Acts provide for criminal penalties of fines and jail terms for those who knowingly violate them; the CWA also provides criminal penalties for negligent violators.

III. THE SUPREME COURT DECISIONS

In 1976 the Supreme Court granted certiorari in two cases, Hancock v. Train and United States EPA v. California ex rel. State Water Resources Control Board, to resolve a conflict among the circuits regarding whether the CAA and CWA required federal facilities to apply for state permits before discharging pollutants. Hancock involved the interpretation of the sovereign immunity waiver in the CAA. United States EPA v. California ex rel. State Water Resources Control Board involved the CWA. In both cases the Court had to decide whether the sovereign immunity waivers in each Act allowed states to enforce the Act against federally owned facilities. In both cases the Court held that the Acts did not waive sovereign immunity with regard to state enforcement against federal facilities.

46. Id.
47. Id.
48. Id. at 325.
50. 33 U.S.C. § 1319(c); 42 U.S.C. § 6928(d). The CAA has no provisions for criminal penalties.

51. 426 U.S. 167 (1976). At the time of the decision, the first sentence of the waiver read:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.


Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

A. Hancock v. Train

The issue in Hancock was whether Congress intended that the enforcement mechanisms of federally approved SIPs, such as permit systems, be available to the states to enforce federal compliance with state SIPs. As stated previously, a state may regulate pollution sources within its borders if it receives EPA approval of its SIP. Kentucky applied to the EPA for this permission in February, 1972. The EPA approved Kentucky's SIP the following May. The SIP required all air pollution sources to obtain a permit before emitting pollutants into the air. To obtain a permit, a source had to supply the state with information to ensure that the state could meet NAAQS if it granted the permit. The source also had to provide the state with information so it could impose necessary restrictions on the permit.

Consistent with its EPA approved SIP Kentucky requested that federal facilities within its borders apply for permits. Kentucky's position was that federal facilities had to comply with the permit requirements because of the sovereign immunity waiver in section 118 of the CAA. Section 118 of the act required federal facilities to comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." When Kentucky requested the federal facilities within its borders to apply for permits, the federal facilities refused to comply. However, the facilities offered or did supply the information that the permit applications sought to obtain. Not satisfied with this response, Hancock, Kentucky's Attorney General, sued the EPA and its Administrator, Train.

Kentucky had a twofold claim. First, it argued that federal facilities

53. Hancock, 426 U.S. at 183.
54. See supra notes 22-28 and accompanying text.
55. Hancock, 426 U.S. at 172.
56. Id.
57. Id. at 173.
58. Id.
59. Id. at 174. Federal facilities included army facilities, facilities owned by the Tennessee Valley Authority, and the Atomic Energy Commission. Id.
60. 42 U.S.C. § 1857(f); see supra note 51.
62. Hancock, 426 U.S. at 174.
63. Id.
64. Id. EPA sent letters to the federal facilities involved stating EPA policy. According to the Regional Administrator this policy interpreted § 118 to require "Federal facilities to meet state air quality standards and emissions limitations and to comply with deadlines established in the approved state air implementation plans." Id. at 175. However, the EPA stated that § 118 did not require federal facilities to apply for state operating permits although the EPA did encourage federal facilities to provide states with requested information. Id.
had to comply with the information reporting requirements of the state's permit program.\textsuperscript{65} Second, Kentucky claimed that the facilities could not operate without applying for and receiving a state permit.\textsuperscript{66} The EPA maintained that federal facilities did not have to apply for or receive permits to operate.\textsuperscript{67} The EPA argued that section 118 merely required federal facilities to comply with state emission standards, not state permit requirements.\textsuperscript{68} The facilities supplied the requested information as a matter of EPA policy, not as a matter of federal or state law.\textsuperscript{69}

The Supreme Court analyzed the facts in \textit{Hancock} using the federal supremacy model first discussed in \textit{McCulloch v. Maryland}.\textsuperscript{70} The Court based its analysis on the supremacy clause\textsuperscript{71} of the Constitution and the plenary powers clause,\textsuperscript{72} authorizing exclusive congressional regulation over all places purchased by Congress with the consent of the state legislature. The Court assumed that federal facilities had the right to operate in a state free of state regulation so long as Congress did not declare the facility subject to state regulation.\textsuperscript{73} Because of the fundamental importance of federal sovereign immunity from state regulation, the Court held that only a "clear and unambiguous" waiver of sovereign immunity by Congress would permit state regulation.\textsuperscript{74} Having decided the rule, the Court proceeded to determine whether Congress clearly and unambiguously waived sovereign immunity to state regulation in the CAA.

To determine whether the Act waived sovereign immunity with regard to state enforcement devices such as permits, the Court proposed a three step analysis. First, it examined section 118 on its face. Second, the Court looked at the CAA as a whole to determine whether the requirements to which Congress waived sovereign immunity included permit requirements. Finally, the Court reviewed the legislative history of the CAA to find whether Congress intended to waive sovereign immu-

\textsuperscript{65} \textit{Id.} at 172-73.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 174.
\textsuperscript{68} \textit{Id.} at 175.
\textsuperscript{69} \textit{Id.}

\textsuperscript{70} 17 U.S. (4 Wheat.) 316 (1819). This Court's reasoning relates directly back to the U.S. Supreme Court's reasoning in \textit{McCulloch}, in which the Supreme Court held that Maryland could not tax the National Bank because the tax interfered with the operation of the bank in violation of the supremacy clause. The Court in \textit{McCulloch} reasoned that by using oppressive taxation a state could prevent the operation of a federal entity and thus frustrate the will of the majority. \textit{See supra} note 7.

\textsuperscript{71} U.S. CONST. art. VI, cl. 2.
\textsuperscript{72} U.S. CONST. art. I, § 8, cl. 17.
\textsuperscript{73} \textit{Hancock}, 426 U.S. at 179.
\textsuperscript{74} \textit{Id.}
nity with regard to state enforcement requirements such as permits.\textsuperscript{75}

1. Facial Analysis of Section 118 of the CAA

In full the CAA's sovereign immunity waiver read:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.\textsuperscript{76}

The waiver also authorized the President to exempt a facility from compliance with a requirement if it were in the paramount interests of the United States to do so.\textsuperscript{77} Kentucky argued that Congress granted it the power to enforce permits because the permit system was a "state law requirement," implementing federal requirements in the CAA, "respecting control and abatement of air pollution."\textsuperscript{78} Further, Kentucky stressed that without authority to enforce CAA requirements at federal facilities, those facilities would not exercise their duty to comply with the substantive requirements of the CAA.\textsuperscript{79}

Although Kentucky's analysis sounded logical, the Court rejected it. Because section 118 merely required federal facilities to comply with "requirements" regarding pollution control, instead of "all requirements" regarding pollution control, the Court held that section 118 on its face did not clearly and unambiguously waive sovereign immunity with regard to enforcement requirements in Kentucky's SIP.\textsuperscript{80} The full language of the Court's reasoning bears repeating because of the strict standard of interpretation it sets out:

Although the language of this provision is notable for what it states in comparison with its predecessor, it is also notable for what it does not state. It does not provide that federal installations "shall comply with all federal, state, interstate, and local requirements to the same extent as any other person." Nor does it state that federal installations "shall comply with all requirements of the applicable state implementation plan." Section 118 states only to what extent—the same as any person—federal installations must comply with applicable state requirements; it does not identify the applicable requirements. . . . Given agreement that § 118 makes it the duty of federal facilities to comply

\textsuperscript{75} Id. at 180.
\textsuperscript{77} Hancock, 426 U.S. at 172.
\textsuperscript{78} Id. at 183.
\textsuperscript{79} Id. at 184.
\textsuperscript{80} Id. at 182.
with state-established air quality and emission standards, the question is . . . “whether Congress intended that the enforcement mechanisms of federally approved state implementation plans, in this case permit systems would be” available to the States to enforce that duty [emphasis in original].

This statement illustrates the great lengths that the Court will travel to limit a statute’s waiver of sovereign immunity. First, the Court decided that Congress meant to limit the state requirements to which federal facilities were subject because Congress did not explicitly subject federal facilities to “all” requirements. This reading strains the imagination because Congress did not include words of limitation in the waiver. Since Congress did not add words of limitation to the waiver, it is unnatural for the Court to conclude that Congress meant to imply them.

Almost anticipating this criticism, the Court added its own words of limitation to the language of the waiver to justify its reading. In the second part of the quote, the Court adds ambiguity to the waiver by noting that federal facilities must comply with “applicable” requirements. The Court uses this language to justify a review of the statute as a whole to determine what Congress meant by applicable requirements. Unfortunately, section 118 makes no mention of applicable requirements. One can only conclude that the Court went out of its way to avoid a natural reading of the waiver, first by requiring the explicit use of a word already implicit in the waiver’s language and then by reading words of limitation into the act.

Kentucky also argued that the language making federal facilities comply with state requirements to the same extent as any person implied that federal facilities must comply with any requirement with which a person would have to comply. If Kentucky required any other person in the state to apply for a permit then, a natural reading of section 118 indicates that federal facilities must also apply for permits. The Court rejected this argument also. The Court read this language to mean that federal facilities would have to achieve the same levels of performance as nonfederal sources, not that state enforcement mechanisms would apply to federal facilities. The Court looked to other sections of the CAA to

81. Id. at 182-83 (quoting Alabama v. Seeber, 502 F.2d 1238, 1247 (5th Cir. 1974)).
82. The Court may have gotten the word “applicable” from the House of Representatives’ draft of the sovereign immunity waiver. The House version would: “direct Federal agencies in the executive, legislative and judicial branches to comply with the applicable Federal, state, interstate, and local emission standards.” H.R. REP. NO. 1146, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 5370 (emphasis added). See infra notes 101-05 and accompanying text for a more detailed discussion of the legislative history.
83. Hancock, 426 U.S. at 183.
84. Id.
determine that the CAA did not clearly and unambiguously waive sovereign immunity with regard to state permit requirements.

2. Analysis of the Act as a Whole

Because the Court found that section 118 did not adequately define "requirements," the Court turned to the CAA as a whole to search for the meaning of the word. The Court found that Congress intended to waive sovereign immunity only with respect to emission standards and compliance schedules and not administrative and enforcement standards.85 First, the Court analyzed section 110(a)(2)86 which describes what the state needed to have in its SIP before obtaining EPA approval. This section included such items as compliance schedules and emission standards. The Court did not find an adequate enforcement program as one of those requirements.87 The Court reasoned that although Kentucky chose to enforce its SIP requirements with a permit program, section 110, describing SIPs, did not require states to implement a permit program to enforce those requirements.88 According to the Court, Congress' failure to mandate a permit program to enforce pollution laws implied that Congress did not intend to waive sovereign immunity with regard to enforcement requirements.89

The Court found added support for this rationale in other parts of section 110. Section 110(e) provided for deadline waivers for sources that could not meet emission limitation "requirements" of the SIP.90 Another section, 110(f), allowed for a one year postponement of the application of "requirements" to sources necessary for public health or national security.91 Based upon a plain reading of section 110 the Court noted that the only requirements these sections could refer to were emission limitation requirements.92 The Court introduced a dichotomy between requirements such as emission standards and compliance schedules which work to actually reduce air pollution and administrative and enforcement requirements, provisions which states use to establish and enforce those requirements.93 The requirements in this dichotomy

85. Id. at 187.
86. 42 U.S.C. § 7410(a)(2).
87. Hancock, 426 U.S. at 184.
88. Id.
89. Id. at 185.
90. 42 U.S.C. § 7410(e).
92. Hancock, 426 U.S. at 187.
93. Id. at 185-86.
are also referred to as substantive and procedural requirements respectively.

In using section 110 to distinguish substantive from procedural requirements, the Court made a category mistake by confusing the requirements on states and the requirements of states. Section 110 lists the minimum requirements that a state SIP must meet to obtain EPA approval. It does not refer to the requirements that states can impose on sources. Section 118 refers to requirements of states imposed on sources in the states. If Congress had meant to limit sovereign immunity to the requirements of section 110 it would not have included the waiver of "local" requirements in section 118. Nowhere does section 110 mention any requirements that localities may (or must) impose, yet section 118 waives sovereign immunity with regard to local requirements.

Moreover, the Court's analysis indicates that it suffers from myopia as well as category confusion. Had the Court reviewed section 110(a)(1) as carefully as it reviewed section 110(a)(2) it would have found that Congress did indeed require SIPs to contain adequate enforcement provisions. Congress realized that states could not attain and maintain NAAQS without an adequate enforcement program. Section 110(a)(1) requires, "[e]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance, and enforcement of [NAAQS]." Under Section 110(a)(1) a SIP without adequate enforcement provisions would be incomplete. Thus, the Court's analysis is flawed because Congress did explicitly require SIPs to have an adequate enforcement program.

Other sections of 110(a)(2) do not lend themselves to the Court's narrow reading. Section 110(a)(2)(B) requires the state SIP to include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard[s], including, but not limited to, land use and transportation controls. . . ." This section could be read to include enforcement requirements in a SIP. Section 110(a)(2)(F) requires the state to have "adequate . . . authority to carry out [its] implementation plan." Reading along with section 110(a)(1) one can see that Congress intended to make enforcement programs an integral part of the SIP. Since Congress meant enforcement programs to be part of the SIP, by the Court's own logic, section 118

95. Id. § 7410(a)(2)(B).
96. Id. § 7410(a)(2)(F).
should have waived sovereign immunity with regard to Kentucky's enforcement program.

Other sections of the CAA further illustrate the Court's limited and arbitrary review of the Act as a whole. Kentucky argued that section 116 of the CAA defined emission limits as only one type of requirement, enforcement being the other type of requirement. Section 116 stated, "nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . ." This section illustrates that Congress did not intend to make requirements synonymous with emission standards because it separates requirements from emission limits. This section also supports a broad reading of the sovereign immunity waiver because it states that nothing in the CAA shall preclude states from enforcing those requirements. The Court refused to apply the section 116 definition of requirements to section 118, the sovereign immunity waiver, despite the fact that part (2) contained the same language as the waiver. The Court claimed that section 116 meant that the federal government had not preempted state regulation, but held that section 116 did not have the "clear and unambiguous authorization necessary to subject federal installations and activities to state enforcement."

3. Legislative History

The legislative history of section 118 is brief. The House version of section 118 required federal facilities to comply with emission standards. Further, the committee report states, "[i]n order to control air pollution . . . the Secretary may establish classes of potential pollution sources for which any Federal [facility] shall, before discharging any matter into the air of the United States, obtain a permit from the Secretary for such discharge. . . ." It seems that at least the House intended to limit the states' ability to impose permit requirements on federal facilities. First, the House version limited the actual waiver to emission stan-

98. Hancock, 426 U.S. at 186 n.47.
99. 426 U.S. at 186. The Court noted that, "we are unable to draw from § 116 any support for the position that Congress affirmatively declared that federal installations must secure state permits." Id. This inability is striking since § 116 states that "nothing in this act shall preclude or deny the right of any State . . . to adopt or enforce . . . any requirement respecting control or abatement of air pollution. . . ." 42 U.S.C. § 7416.
100. Hancock, 426 U.S. at 186 n.47.
102. Id.
ards. Second, the intent section stated that the House intended federal facilities to obtain permits from the federal government, not the states. However, Congress did not adopt the House version of the waiver. The Senate version required federal facilities to comply with state requirements. The report stated that "[t]his section requires that Federal facilities meet the emission standards necessary to achieve ambient air quality standards. . . ." The conference report stated that "[t]he House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions." Although the Court placed much emphasis on the language limiting the waiver to applicable standards, it ignored the language declaring that federal facilities "should comply" with these standards. By declaring that federal facilities should comply with emissions standards, Congress did not preclude the waiver from including enforcement requirements from the waiver. In fact, section 118 contained the broad "requirements" language rather than the narrow "emission standards" language. The Court misused the rules of statutory interpretation by using legislative history to confuse language clear on its face rather than by using it to clarify language unclear on its face.

B. United States EPA v. California ex rel. State Water Resources Control Board

United States EPA v. California ex rel. State Water Resources Control Board involved the sovereign immunity waiver in the CWA. The CWA waiver had a similar history to the waiver in the CAA. When Congress enacted the 1972 amendments, it worded the sovereign immunity waiver to parallel the waiver in the CAA. Section 313 required federal facilities to "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements." State Water Resources Control Board involved the issue of whether the EPA had the authority to refuse to approve the portion of a state's NPDES program requiring permits from federal facilities. Although the facts in State Water Resources Control Board were different from Hancock, the

104. Id.
106. See infra notes 130 and 139 and accompanying text.
108. Id.
109. See supra note 52.
Supreme Court narrowed the case down to the same issue: whether Congress intended a permit to be among the requirements respecting the control and abatement of water pollution with which federal facilities must comply.\(^{110}\)

The Court followed the same analysis as it did in *Hancock* to find that the Act did not waive sovereign immunity with regard to permits. Facialy, the Court found no evidence that section 313 included state NPDES permits within "requirements respecting the control and abatement of pollution."\(^{111}\) Again the Court limited requirements to "applicable" requirements even though no such language appeared in the statute.\(^{112}\) The Court then decided that it had to look to the Act as a whole to determine whether permits were an "applicable requirement," with which federal facilities must comply to the same extent as any person.

In analyzing the Act as a whole, the Court should have had great difficulty finding that the waiver in the CWA did not apply to permits because unlike the CAA, the CWA explicitly required a permit program to enforce effluent limitations.\(^{113}\) However, the Court found the EPA's review role in the state's permit program, coupled with the fact that the Act did not even require states to develop NPDES programs, sufficient to determine that Congress did not intend to waive sovereign immunity with regard to state permit programs.\(^{114}\) The Court did not find the CWA's provision allowing states to operate an NPDES program in lieu

\(^{110}\) 426 U.S. at 200. The CAA primarily relies upon NAAQS to ensure clean air. At the time the Supreme Court decided *Hancock*, permits were an optional measure that a state could use to achieve compliance with NAAQS. *Hancock*, 426 U.S. at 184-85. The CWA relied upon a permit system to ensure clean water and thus every entity that discharged pollutants into the waters of the United States had to have a permit. Therefore federal facilities needed a permit under the CWA but not under the CAA. Thus, the issue of whether a federally issued permit adequately conformed with state law which required a state permit arose in United States EPA v. California ex rel. State Water Resources Control Bd. but not in *Hancock*.

California and Washington both sued the EPA. The EPA approved California's NPDES program in 1973 except with regard to the right to issue permits to federal facilities. United States EPA v. California ex rel. State Water Resources Control Bd. 426 U.S. at 209. The EPA refused to approve Washington's application to permit federal facilities, because the EPA did not believe that it had the authority to delegate the right to issue permits to federal facilities to any state. Id. California and Washington petitioned the court of appeals to review the EPA's decision arguing two points. First, they argued that the CWA authorized states with approved permit programs to issue permits to federal facilities. Id. at 210. Second, the states claimed that the Act did not give the EPA the right to suspend state permitting authority only for nonfederal facilities. Id. The court of appeals held that the CWA did require federal facilities to obtain state permits before discharging pollutants even if the CAA did not. The Supreme Court overruled the court of appeals because it could not find "clear and unambiguous" language waiving sovereign immunity in § 313. 426 U.S. at 202.

\(^{111}\) Id. at 213.

\(^{112}\) Id. at 212.

\(^{113}\) 33 U.S.C. § 1342.

\(^{114}\) 426 U.S. at 213.
of a federal enforcement program persuasive enough to find a waiver of sovereign immunity with regard to permits. Again the Court made a category mistake by failing to distinguish between what the CWA required of states and what the CWA required of facilities.

Further, the Court separated the state's right to impose stricter standards from its right to enforce those standards through a permit program. The Court reasoned that since Congress did not require the states to implement a permit program, it must have felt that the EPA could adequately enforce a state's stricter standards, thus obviating the need for state permitting authority.\(^\text{115}\) This analysis is not consistent with the Court's analysis in \textit{Hancock} because the CWA expressly required states that chose to operate their own NPDES program to use permits to enforce effluent limits.\(^\text{116}\) The Court mistakenly focused on the potential role of the EPA rather than on the reality of Congressional intent as illustrated by section 402 to have the states administer their own NPDES programs.

Finally, the Court looked at the legislative history to determine that requirements referred to effluent limitations, not permit requirements.\(^\text{117}\) The Court reviewed both the Senate and House reports to determine that requirements meant effluent limitations only. Further, the Court found no support in the legislative history to warrant the all or nothing approach to EPA permitting approval.\(^\text{118}\) As in \textit{Hancock}, the Court admonished Congress to amend the Acts if it wanted to waive sovereign immunity with regard to state permit programs.\(^\text{119}\)

In summary, the Court in these two decisions defined a strict rule to determine whether Congress waived sovereign immunity with regard to state regulation of federal facilities. Congress must first expressly waive sovereign immunity, and it must also precisely define the parameters of the waiver.\(^\text{120}\) \textit{Hancock} and \textit{State Water Resources Control Board} indicate that when Congress attempts to waive sovereign immunity in a statute the Supreme Court will jealously guard sovereign immunity using a three step analysis. First, the Court will look at the section waiving sovereign immunity. Second, it will analyze the act as a whole to see if the

\(^{115}\) United States EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. at 213. The CWA gives the state the option of developing its own enforcement program or merely developing standards and having the EPA enforce the state standards.

\(^{116}\) \textit{See infra} note 120 and accompanying text.


\(^{118}\) \textit{Id.} at 226.

\(^{119}\) \textit{Id.} at 227-28.

\(^{120}\) \textit{Id.}
act requires a waiver of sovereign immunity. Third, the Court will analyze the legislative history to determine congressional intent.

C. The Cases Taken Together

The Court used inconsistent reasoning in *Hancock* and *United States EPA v. California ex rel. State Water Resources Control Board* to support the result it desired in each case. The CAA required states to develop a plan (including enforcement provisions), but the Act did not require states to use a permit system to enforce the plan. The CWA required states to operate a permit system, but did not mandate a comprehensive plan, instead relying mostly on federally mandated requirements (according to the Court).\(^{121}\) Logically, then, the Court’s reasoning in each case cannot consistently result in a finding of no waiver with regard to permits in both cases. Either the Court must uphold the waiver in the CWA because it specifically requires states to administer permit programs, or it must uphold the waiver in the CAA because the standards in the CAA are state developed. Logically, the Court should not have been able to reason away the waivers in both the CAA and the CWA.

One must wonder why the Court applied such an impossible standard to the sovereign immunity waivers in the CAA and CWA, especially because subsequent history\(^ {122}\) indicates that Congress truly intended to waive sovereign immunity with regard to enforcement requirements. Clearly, the Court drew from the theory in *McCulloch v. Maryland*\(^ {123}\) that the power to tax is the power to destroy.\(^ {124}\) Applied to *Hancock* and *State Water Resources Control Board*, the power to destroy could be through the power to refuse to issue a permit to a federal facility. Thus, a state could thwart the will of the nation unilaterally by refusing to allow a facility to operate that people in the other forty-nine states wanted to operate.

The power to destroy theory does not warrant support for three reasons. First, the sovereign immunity waivers themselves allowed the President to exempt federal facilities from state and local requirements if it were in the paramount interests of the United States.\(^ {125}\) In protecting the paramount interest of the United States, the presidential exemption indicates that Congress did wish to waive sovereign immunity to state requirements including enforcement requirements for other federal

\(^{121}\) *Id.* at 214-15.
\(^{122}\) See infra note 130 and accompanying text.
\(^{123}\) 17 U.S. (4 Wheat.) 316 (1819).
\(^{124}\) *Id.* at 327.
\(^{125}\) 42 U.S.C. § 7418 (CAA) and 33 U.S.C. § 1323 (CWA).
facilities. Second, the historic noncompliance of federal facilities coupled with Congress' desire for federal facilities to set a national example in pollution control also supports a reading of the waiver to include enforcement requirements. 126

The third reason to disavow the Court's logic is that federal facilities had to comply with state emission/effluent standards regardless of whether they were stricter than federal standards. 127 Thus, the EPA could not issue an NPDES permit that violated state standards. Theoretically the place where enforcement power lies should not affect whether a federal facility could operate because the EPA could not legally issue a permit that violated state standards. The only plausible reason that the Court could have read the sovereign immunity waivers so strictly was to give Congress a chance to rethink the desirability of a broad sovereign immunity waiver.

Another reason the Court interpreted the waiver narrowly could be due to the traditional deference that a court will show to an agency's interpretation of the statute it administers. Courts defer because agencies develop expertise in the statutes they administer: In both Hancock and United States EPA v. California ex rel. State Water Resources Control Board the EPA maintained that the sovereign immunity waivers in the CAA and CWA did not waive sovereign immunity with regard to enforcement requirements. For example, in United States EPA v. California ex rel. State Water Resources Control Board, the EPA maintained that the waiver of sovereign immunity to service charges meant charges for sewage treatment, not charges for permits. 128 The Court accepted the EPA's interpretation because it was not an "unreasonable construction." 129 The EPA position provided the Court with a rational reason to interpret the waivers narrowly.

IV. ANALYSIS OF CURRENT SOVEREIGN IMMUNITY WAIVERS

Congress reacted strongly to the Court's decisions in Hancock and United States EPA v. California ex rel. State Water Resources Control Board because Congress considered the sovereign immunity waivers in the CAA and CWA broad enough to require federal facilities to comply with state permitting authority. 130 Immediately after the Court handed

126. See supra notes 1-5 and accompanying text.
129. Id.
down these decisions, Congress busied itself with amending the Solid Waste Disposal Act, which became RCRA. Congress later amended the CAA and CWA. These Acts clearly waive sovereign immunity with regard to permits. The issue today is whether these three Acts waive sovereign immunity with regard to enforcement requirements, especially civil penalties, against federal facilities that violate those permits. The scope of these waivers is still at issue because many courts defer to the "clear and unambiguous" standard of the Supreme Court rather than to the obvious intent of Congress (especially in light of the post-Hancock amendments) in interpreting the sovereign immunity waivers in the pollution statutes.

Cases subsequent to 1976 illustrate the conflict between the Court's reasoning in Hancock and United States EPA v. California ex rel. State Water Resources Control Board and Congress' reaction to those cases. For example, in McClellan Ecological Seepage Situation v. Weinberger (MESS) the district court held that if any doubt about the meaning of the statute exists, the court will not find a waiver. To emphasize its point the court stated that a waiver "cannot be implied, . . . assumed, . . . [or] based upon speculation, surmise or conjecture." Other courts have found that the waivers do meet Supreme Court standards. The next sections will analyze the CAA, CWA and RCRA and show that the sovereign immunity waivers in each act meet even the clear and unambiguous requirements of the Supreme Court.

A. CAA Waiver

No statute waives sovereign immunity to state enforcement procedures more clearly than the CAA. The waiver requires federal facilities to be subject to and comply with:

- all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abate-


132. 655 F. Supp. 601 (E.D. Cal. 1986). The facts preceding MESS illustrate the danger of allowing the military to police itself. In 1979 the Air Force found that drinking water wells on base were contaminated but failed to notify the California Department of Health. Pollack and Shulman, supra note 2, at 28. Then, the Air Force withheld a report detailing how the contaminants had spread to wells off base until the state threatened legal action. Id. "Even then, cleanup lagged until the base was sharply criticized by the General Accounting Office and pressure was applied by angry members of Congress, state and local politicians and neighbors." Id. Today McClellan is ranked among the hundred worst sites on the Superfund list. Id.
133. MESS, 655 F. Supp. at 602-03.
134. Id.
ment of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (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.136

The Hancock decision angered Congress because it thought that section 118 of the act had been written clearly enough to waive sovereign immunity with regard to all requirements, including permits.137 Congress felt that section 118 obviously waived sovereign immunity to procedural requirements because it saw procedural requirements and sanctions “incidental to implementation and enforcement of the substantive requirements.”138 Thus, Congress wrote a sovereign immunity waiver into the CAA which clearly and unambiguously waived sovereign immunity to everything.

A facial analysis reveals the clear and unambiguous intent of Congress. The first part of the waiver answered the Supreme Court’s first problem with reading the old section 118 by putting an “all” in front of requirements. Further, Congress explicitly stated that the waiver applied to all “requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution....”139 This sentence clearly extends the requirements involved beyond the limits of emission standards imposed by the Court in the old waiver. First, the application of the waiver to “all requirements” rebuffs the Supreme Court’s attempt to create a dichotomy between substantive and procedural requirements. Second, the addition of “administrative authority

136. 42 U.S.C. § 7418. The waiver reads:

[en]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, 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 air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (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.

Id.

137. See supra note 119.


139. 42 U.S.C. § 7418.
and process and sanctions” removes any doubt regarding what the waiver covers.

Congress also made federal facilities “subject to” state and local requirements “in the same manner” as well as to the same extent as any person.140 The old section 118 merely mandated federal compliance with state and local pollution requirements to the same extent as any person. These two additions were important because in both Hancock and United States EPA v. California ex rel. State Water Resources Control Board the Court interpreted the “same extent as any person” language merely to require federal facility compliance with state emission/effluent limits.141 The phrases making federal facilities subject to state requirements in the same manner as any person allows states to impose penalties on federal facilities in the same manner as private citizens who violate state limits.

As if the first sentence were not enough, Congress added subsections (A), (B), and (C), which essentially repeated and amplified the first part. Subsection (A) defined substantive and procedural requirements with a parenthetical specifically designed to overturn Hancock. The parenthetical included recordkeeping, reporting, and permit requirements within the waiver as well as “any other requirement whatsoever.”142 Subsection (C) stressed that the waiver applied to sanctions regardless of what body imposed them.143 Subsection (B) allowed for enforcement by any federal, state, or local authority. Subsections (A), (B), and (C) clearly enable any level of government to enforce any requirement against any federal facility.

An analysis of the Act as a whole reveals modifications made in response to Hancock. In response to the Supreme Court’s reasoning that permits were not a required part of a state’s SIP, Congress required a state SIP to contain a permit program before the EPA could approve it.144 Congress clearly stated that the purpose of the program was for enforcement.145 Congress also amended section 302146 to include the United States and all of its instrumentalities within the definition of a person. Obviously Congress wanted to make the waiver “air tight,” and it did.

140. See supra note 135.
141. See United States EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. at 212. “Taken alone, § 313 like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements.” Id.
145. Id.
In the legislative history, Congress declared immediately that it intended the new sovereign immunity waiver to overturn Hancock.\textsuperscript{147} Congress did distinguish between requirements and sanctions. It defined requirements as actions federal agencies must take to comply with federal, state and local law and sanctions as actions which states could take in response to a federal agency’s violation of state law.\textsuperscript{148} However, this distinction makes the waiver even stronger.

Two courts have interpreted the amended CAA sovereign immunity waiver, and both have found that it waives sovereign immunity with regard to state enforcement actions.\textsuperscript{149} These courts looked to the legislative history of the 1977 Amendments and determined that Congress amended the waiver in the CAA for the purpose of overturning Hancock.\textsuperscript{150} They also found that the sovereign immunity waiver itself and the Act as a whole, as discussed above, demonstrated a clear and unambiguous waiver with regard to state imposed civil penalties on federal facilities.

\textbf{B. CWA}

The amended sovereign immunity waiver (section 313) of the CWA begins with the same strong language as the CAA. The waiver reads in relevant part:

\textit{\[e\]ach department, agency, or instrumentality... [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 including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (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... the United States shall be liable only for those civil penalties arising under federal law or imposed by a State or local court to enforce an order or the process of such court.}\textsuperscript{151}

\textsuperscript{148} \textit{Id.}
\textsuperscript{150} 17 Envtl. L. Rep. (Envtl. L. Inst.) at 21211.
\textsuperscript{151} 33 U.S.C. § 1323(a) (1982).
The CWA sovereign immunity waiver broadens the liability of federal facilities to state enforcement actions in much the same manner as the CAA. In fact the waiver was amended in committee to parallel the waiver in the CAA.\textsuperscript{152} The CWA waives immunity for "all" requirements, federal, state, or local, judicial, or administrative, regardless of whether the body enforcing them is federal, state, or local.

However, the waiver contains an additional sentence not found in the CAA waiver which states that "the United States shall be liable only for those civil penalties arising under Federal law or imposed by a state or local court to enforce an order or process of such a court."\textsuperscript{153} This additional sentence has been read by some courts\textsuperscript{154} to limit the state's authority to impose civil penalties on federal facilities violating state issued NPDES permits. The conference report on section 313 undercuts any reading of the additional sentence that limits the state's power to impose civil penalties on federal facilities. The report notes that the enacted waiver was specifically "revised to conform with a comparable provision in the Clean Air Act . . . with the additional requirement that any action or other judicial proceeding to which this provision applies may be removed by any Federal . . . instrumentality . . . to the appropriate district court of the United States."\textsuperscript{155} The additional provision to which the report refers must be the provision requiring civil penalties to be levied under federal law because this is the only difference between the two waivers and because a penalty imposed under federal law allows the federal courts jurisdiction over the matter.\textsuperscript{156}

The CWA as a whole provides further evidence that violations of state issued permits violate federal law. Two sections of the CWA make the discharge of any pollutant in violation of a permit a violation of federal law regardless of whether the state or EPA has issued the permit. Section 301(a)\textsuperscript{157} makes the discharge of pollutants in violation of a per-

\textsuperscript{153} 33 U.S.C. § 1323(a).
\textsuperscript{154} See infra notes 164-77 and accompanying text.
\textsuperscript{155} H.R. CONF. REP. NO. 830 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4468. The Senate report destroys any doubt about the application of any requirement, including civil penalties, that states may impose on federal facilities. The report states:

The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent.


\textsuperscript{157} 33 U.S.C. § 1311(a) (1982).
mit issued under section 402\textsuperscript{158} unlawful. Section 402(k)\textsuperscript{159} deems compliance with permits issued under section 402 as "compliance, for purposes of sections 1319 and 1365 of this title, and with sections 1311, 1312, 1316, and 1343 of this title. . . ."\textsuperscript{160} Thus a violation of a permit indicates a violation of one or more of these sections which are all under federal law. Sections 301 and 402(k) read together especially support the argument that all permit violations arise under federal law because 301 makes violation of a 402 permit a violation of federal law and 402(k) makes a permit violation a violation of 301 regardless of whether the EPA or the state issued the permit.

The CWA as a whole also authorizes state imposed civil penalties for violations of state issued permit requirements. Section 402(b)(7)\textsuperscript{161} requires a state permit program to contain provisions for civil and criminal penalties to remedy permit or permit program violations. Section 309(a)(2) indicates that Congress preferred states to enforce their own programs by giving the Administrator power to enforce state issued permits whenever the Administrator "finds that violations of permit conditions or limitations . . . are so widespread that such violations appear to result from a failure of the State to enforce . . . permit conditions effectively."\textsuperscript{162} Section 309(d)\textsuperscript{163} authorizes civil penalties for permit violations whether the Administrator or the state issued the permit. Thus, when federal facilities violate state issued permits they violate federal law and the CWA authorizes states to impose civil penalties to remedy those violations.

The three cases interpreting the sovereign immunity section of the CWA have come out on both sides of the issue. Basically the act's sovereign immunity waiver involves a conflict between federal courts in the Ninth Circuit, \textit{McClellan Ecological Seepage Situation v. Weinberger}
WAIVER OF SOVEREIGN IMMUNITY DEFENSE

(MESS), and California v. United States Department of the Navy and a federal district court in Ohio, Ohio v. United States Department of Energy. One other court interpreted the waiver narrowly, Kelley v. United States, but did so on grounds not relevant here. The difference in the language between the CAA waiver and the CWA led the MESS court and the court in California v. United States Department of the Navy to a narrow interpretation of the waiver. The similarities led the Ohio v. United States Department of Energy court to a broad interpretation of the waiver.

The court in MESS focused on the language limiting the sovereign immunity waiver to "civil penalties arising under Federal law . . . or imposed by a state or local court to enforce an order or the process of such court." The court labeled this section a "compilation of ambiguity" because of its vague and contradictory wording. Although the conference report stated that Congress intended this provision to mirror the waiver in the CAA, the MESS court refused to do so. Because the statute was not clear on its face and because it had a limited legislative history, the court held that section 313 did not meet the clear and unambiguous standard that the Supreme Court requires to find a waiver of sovereign immunity.

In California v. United States Department of the Navy, the Ninth Circuit relied on section 402(b)'s language that state permit systems arise under state law. The relevant part of section 402(b) states:

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program . . . may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

165. 845 F.2d 222 (9th Cir. 1988).
168. Id. The district court also interpreted the sovereign immunity waiver of the CWA. However, that court decided the case on the basis of the definition of requirements in Hancock and United States EPA v. California ex rel. State Water Resources Control Bd. See supra notes 96-97 and accompanying text. Thus, the court limited requirements to objective standards. Unfortunately, the court failed to recognize that the 1977 Amendments added all procedural requirements as well as substantive requirements to the list of state laws to which the federal government waived sovereign immunity.
169. 655 F. Supp. at 604.
170. Id.
171. Id. at 604-05.
172. Id. at 605.
173. 845 F.2d at 225.
California attempted to justify its imposition of civil penalties for two reasons. First, the state tried to justify imposing the penalties because section 402(b)(7) mandates that state permit programs have adequate enforcement authority. The second reason that the state advanced was that the violations of the permit were violations of federal law because the EPA approved California's program. The court of appeals rejected these arguments because it found that Congress intended state permit programs to be operated in lieu of federal programs and not as delegations of federal authority. The court of appeals refused to find a violation of federal law under the state's permit program.

In *Ohio v. United States Department of Energy*, the court also focused on the section limiting civil penalties to those arising under federal law. The court held that the state-imposed civil penalties arose under federal law because the NPDES system resulted in the state enforcing federal law. The court rejected the *MESS* court's contention that even if the state law mirrored the federal law word for word a violation still would not arise under federal law. The court had two reasons for holding that the DOE's violation arose under federal law. First, the court noted that section 402 required states to have an adequate enforcement program in order to receive permitting authority from the EPA. Second, the court found that since compliance with a state NPDES permit demonstrated compliance with the CWA, a violation of the state's NPDES permit constituted a violation of the CWA, a federal law. Thus, the court found that the sovereign immunity waiver applied to federal facilities that violated state permits.

The Supreme Court's analysis in *United States EPA v. California ex rel. State Water Resources Control Board* indicates that the court in *Ohio v. United States Department of Energy* interpreted the waiver correctly. The *Ohio v. United States Department of Energy* court can find support in the changes that Congress made in the CWA after *United States EPA v. California ex rel. State Water Resources Control Board*. In *United States EPA v. California ex rel. State Water Resources Control Board*, the Supreme Court found that the sovereign immunity waiver in

175. 845 F.2d at 225.
176. Id.
177. Id.
178. 689 F. Supp. at 766.
179. Id. at 767.
180. Id.
181. Id.
182. Id.
the CWA did not encompass state permitting authority because the EPA had final enforcement authority. Sections 402(c)\textsuperscript{185} and 309(a)(2)\textsuperscript{186} indicate that Congress rewrote the CWA to respond to that fault. Section 402(c) requires the Administrator to suspend the federal permit program when he approves a state permit program. Section 309(a)(2) authorizes federal enforcement in lieu of state enforcement only when the state fails to enforce its permit program on a widespread basis. Thus, one can see a conscious congressional effort to overturn United States EPA v. California ex rel. State Water Resources Control Board and make state enforcement an integral part of the state operated NPDES program.

The text of the waiver and the CWA as a whole does not support the decisions of the courts in MESS and California v. United States Department of Navy. The waiver on its face is broad and despite the contention of the court in MESS the legislative history clearly indicates that the narrowing language in the waiver is for jurisdictional and not substantive purposes. Even though section 402(b) states that each state administers its permit program under state law, the Act as a whole clearly indicates that a violation of a state issued permit violates several sections of federal law. These courts have confused the government that administers the permit program and the government whose laws are violated by infractions. Since the CWA clearly makes the violation of a state permit program a violation of federal law, the reasoning of the courts in the Ninth Circuit does not hold water.

\section*{C. RCRA}

Congress enacted the RCRA sovereign immunity waiver\textsuperscript{187} in response to the Supreme Court decisions in Hancock and United States EPA v. California ex rel. State Water Resources Control Board, three months after the Court decided those cases.\textsuperscript{188} A facial reading of section 6001 reveals that Congress worded the waiver to parallel the waiver of the CAA of 1970 and added language to respond to the Supreme Court decision in Hancock. The waiver requires federal facilities to:

- 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 sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous

\textsuperscript{184} Id.
\textsuperscript{186} 33 U.S.C. § 1319(a)(2).
\textsuperscript{188} Ohio v. United States Dep't of Energy, 689 F. Supp. 760 (S.D. Ohio 1988).
waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.\textsuperscript{189}

Like the pre-\textit{Hancock} section 118 of the CAA, the waiver required federal facilities to comply with federal, state, interstate and local requirements regarding the control and abatement of pollution to the same extent as any person.\textsuperscript{190} However, the Act added modifiers to this language. First, Congress added that the United States shall "be subject to" as well as "comply with" the federal, state, and local requirements "in the same manner" and to the "same extent" as any person.\textsuperscript{191} Second, Congress expanded the definition of requirements to include "all requirements, both substantive and procedural, (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)."\textsuperscript{192}

These additions are a direct response to the Supreme Court's challenge to Congress to draft a waiver that truly waives the sovereign immunity of federal facilities.\textsuperscript{193} The addition of "all" to modify requirements answered the Supreme Court's concern in \textit{Hancock}\textsuperscript{194} regarding the requirements to which the waiver referred. By waiving sovereign immunity with regard to all requirements, the Court does not have to search through the Act as a whole to find the requirements to which the waiver refers. By further modifying requirements to include both substantive and procedural requirements, Congress responded to the Court's dichotomy between substantive and procedural requirements.\textsuperscript{195} The Court included emission limits and compliance schedules in its definition of substantive requirements, and enforcement requirements such as permits in its definition of procedural requirements.\textsuperscript{196} By waiving sovereign im-

\begin{thebibliography}{99}

\bibitem{189} 42 U.S.C. § 6961.

\bibitem{190} Ohio v. United States Dep't of Energy, 689 F. Supp. 760.

\bibitem{191} 42 U.S.C. § 6961.

\bibitem{192} Id.

\bibitem{193} \textit{See} United States EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. at 227-28. The Court stated, "[s]hould it be the intent of Congress to have the EPA approve a state NPDES program regulating federal as well as nonfederal point sources . . . it may legislate to make that intention manifest." \textit{Id}.

\bibitem{194} \textit{See supra} note 81 and accompanying text.

\bibitem{195} \textit{See supra} note 93 and accompanying text. In \textit{Hancock}, the Court saw permits as both procedural and enforcement requirements. In one part of the decision the Court framed the issue as "whether Congress intended that the enforcement mechanisms of federally approved state implementation plans, in this case permit systems, would be available to the states to enforce [federal compliance]. . . . In the case before us the Court of Appeals concluded that federal installations were obligated to comply with state substantive requirements as opposed to state procedural requirements." \textit{Id}.

\bibitem{196} \textit{Hancock}, 426 U.S. at 185-86.
\end{thebibliography}
munity to "procedural" requirements, Congress clearly manifested its intent to allow states to enforce the law against federal facilities.

The final modification answers the Supreme Court's criticism in *United States EPA v. California ex rel. State Water Resources Control Board*, that merely requiring federal facilities to comply with state requirements to the same extent as any person does not imply that the states can enforce those requirements. The answer came in the form of language requiring federal facilities to comply with state requirements in the same manner as any person. This language must subject federal facilities to state enforcement requirements because that is the manner by which states make private citizens comply with substantive requirements.

A recent Supreme Court case supports this interpretation of "the same manner" language. In *Goodyear Atomic Corp. v. Miller*, the Supreme Court interpreted language in the sovereign immunity waiver of Section 290 of the Workers' Compensation Act similar to the same manner and extent language in RCRA. The Court found that language that held the federal government liable "in the same way and to the same extent" as a private person applied to state imposed penalties for failure to comply with state law. A closer analysis of this case will help to interpret the waiver in RCRA.

In *Miller*, the Supreme Court had to decide whether an Ohio law, providing an additional penalty when a worker suffered injury as a result of the employer violating state safety provisions, applied to a federally owned facility. The plant was owned by the Department of Energy and operated under contract by Goodyear Corporation. Goodyear argued that the supremacy clause barred the application of the state workers' compensation safety requirements to a federally owned facility. The Supreme Court held that the rule in *Hancock* and *United States EPA v. California ex rel. State Water Resources Control Board*, requiring a sovereign immunity waiver be clear and unambiguous, controlled the case.

In relevant part the workers' compensation statute provides that:

States shall have the power and authority to apply such laws [workers'
compensation laws] to all lands and premises owned or held by the United States of America . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries the place may be.205

The Court interpreted this language to mean that section 290 requires the same workers' compensation award for an employee injured at a federally owned facility as the employee would receive if working for a wholly private facility.206 This interpretation squares exactly with the language of the RCRA waiver which applies to federal facilities "in the same manner, and to the same extent, as any person is subject to such requirements . . . ."207 In RCRA's legislative history, the Senate declared that it expected federal facilities to comply with all requirements respecting the control and abatement of hazardous waste disposal as if the agency were a private citizen.208 Thus, the intent behind the RCRA sovereign immunity waiver parallels the waiver in the Workers' Compensation Act.

It might be argued that despite the similarities between the sovereign immunity waiver in RCRA and the Workers' Compensation Act, the Court's reasoning in Miller does not apply because of the parenthetical found in the RCRA waiver which includes a list of four requirements: permits, reporting, injunctive relief, and sanctions to enforce injunctive relief.209 This interpretation does not square with a facial analysis of the waiver or the legislative history behind the waiver. If the word "including" were limiting, it would directly contradict the "all" modifying the requirements with which federal facilities must comply. Further, if the parenthetical were limiting, the only procedural requirements with which the federal facilities would have to comply would be those regarding permits or reporting. The court in Ohio v. United States Department of Energy noted several of the requirements not specifically mentioned in the parenthetical with which federal facilities must comply to show that Congress intended the parenthetical to be exemplary, not limiting.210

The addition of "all" in front of "requirements" and "substantive and procedural" behind requirements negates a reading of the parenthetical as limiting because the waiver was enacted after the Court's decision in Hancock. The addition is a direct response to the major objection that

205. Miller, 108 S. Ct. at 1710.
206. Id. at 1711.
207. 42 U.S.C. § 6961.
208. S. REP. No. 988, 94th Cong., 2d Sess. 23 (1976).
the Supreme Court had in applying the original sovereign immunity waiver to permit requirements. Because Congress failed to put "all" in front of requirements, the Court limited the definition of requirements to substantive requirements. The two modifiers around "requirements" are actually redundant as either would satisfy the Court's qualms in *Hancock*. The addition of "all" shows the intent of Congress to waive sovereign immunity with regard to enforcement requirements as well as substantive requirements. The addition of the words "substantive and procedural" broadens the waiver to include enforcement requirements because the Court included enforcement requirements within its definition of procedural requirements in *Hancock*.

The legislative history supports reading the parenthetical as exemplary. The Senate report on section 6001 twice stated that federal facilities must meet all substantive and procedural requirements, specifically permit requirements. If the Senate had wanted the language to be limiting it would have stated that the waiver applied only to permits, not "all requirements, specifically permits." Since the parenthetical is not limiting, the scope of the sovereign immunity waiver must be as broad as the waiver in the Workers' Compensation Act and include civil penalties imposed under state law.

A comparison of the House and Senate bills also shows that the waiver should be read broadly. When Congress adopted the RCRA waiver it adopted the strong Senate waiver as opposed to the House proposal, which would have continued to shield federal facilities from state regulations. The House report on RCRA recommended subjecting federal facilities to "all standards developed by EPA . . . in the treatment of hazardous wastes." When Congress adopted the waivers in the CAA and CWA the House had written stronger waivers than the Senate waivers modeled after the RCRA waiver. Congress adopted the House versions for those two Acts. In all three cases Congress adopted the stronger waiver regardless of from which house it came. Because Congress wrote the RCRA waiver first and because the Senate version had no House counterpart, the RCRA waiver should be compared

211. *See supra* notes 80-82 and accompanying text.
212. 426 U.S. at 183.
215. *Id.*
217. *Id.*
to the Supreme Court decisions in *Hancock* and *United States EPA v. California ex rel. State Water Resources Control Board* to determine its extent, and not to the subsequently written waivers in the CAA and CWA. Thus, procedural requirements includes enforcement requirements.

Congress also wrote other sections of the RCRA to respond to the Supreme Court’s reasoning in *Hancock*. The Supreme Court refused to extend the requirement waiver to permits because Congress did not require a permit program as part of a state’s SIP.\(^\text{218}\) Congress remedied this problem in section 3006 of RCRA, describing state permit programs. Section 3006(b)\(^\text{219}\) makes state enforcement of permits an integral part of its permitting program. Specifically, section 3006(b)(3)\(^\text{220}\) does not allow the Administrator to approve a state permit program unless it has an adequate enforcement component. Further, section 3006(d) states that “[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.”\(^\text{221}\)

The congressional intent behind section 3006 reveals Congress’ preference for state enforcement of Subtitle C of RCRA. In its report the Senate stated that “[t]he permit program should be carried out to the extent possible by the states following EPA established criteria.”\(^\text{222}\) The Senate also proclaimed that the Administrator could not object to a state issued permit if the state demonstrated that it “was issued under an adequate permit program with necessary enforcement authority.”\(^\text{223}\) The emphasis on enforcement in both section 3006 defining state permit requirements and in the Senate’s report indicate that RCRA made the issuance and enforcement of permits an integral part of state programs while the pre-1977 CAA did not.

The 1984 RCRA amendments add further evidence that RCRA waives sovereign immunity with regard to civil penalties. Section 3007(c),\(^\text{224}\) enacted in November of 1984, allows states with an authorized hazardous waste program to undertake annual inspections of each federal facility in the state “to enforce its compliance with this subchapter and the regulations promulgated thereunder.”\(^\text{225}\) If Congress did

\(^{218}\) *Hancock*, 426 U.S. at 184.
\(^{221}\) 42 U.S.C. § 6926(d) (in reference to 42 U.S.C. § 6921-34 (1982)).
\(^{223}\) Id.
\(^{225}\) Id.
not mean to waive sovereign immunity with regard to enforcement requirements, it would not have clearly given state agencies the right to enforce federal compliance with RCRA. The act as a whole supports no other reading.

Courts have had two difficulties determining whether RCRA waives sovereign immunity with regard to all enforcement requirements, the same two difficulties discussed above.\textsuperscript{226} First, some courts have had difficulty determining whether the "all requirements" language in the waiver applies to enforcement requirements as well as to substantive and procedural requirements.\textsuperscript{227} The second problem, related to the first, is whether Congress meant the parenthetical phrase after requirements to be exclusive or exemplary.\textsuperscript{228} The next section will review the lower court decisions regarding these problems and then analyze those decisions.

1. The Meaning of "Requirements"

Two cases, \textit{California v. Walters}\textsuperscript{229} and \textit{Florida Department of Environmental Regulation v. Silvex Corporation}\textsuperscript{230} support the restrictive definition of requirements which subsequent courts have adopted. In \textit{Walters} the City of Los Angeles argued that in light of \textit{Hancock}, the addition of the word "all" in front of the word "requirements" was a sufficient modification from the language of the CAA interpreted by the Court in \textit{Hancock} to include criminal sanctions as a requirement.\textsuperscript{231} In \textit{Silvex}, the Florida Department of Environmental Regulation (DER) claimed that in section 6961 Congress waived the Navy's sovereign immunity with regard to hazardous waste actions.\textsuperscript{232} Both courts rejected these arguments, deciding that the waivers applied to permits and not to criminal sanctions or civil penalties respectively.

In \textit{Walters}, the Court of Appeals for the Ninth Circuit rejected Los Angeles' argument because it did not believe that Congress meant to include criminal sanctions as requirements. The court distinguished crimi-
nal sanctions from procedural requirements by labeling criminal sanctions "enforcement requirements." Similarly, in Silvex, the court adopted the Navy’s argument that the Congress expressly limited the sovereign immunity waiver to substantive and procedural requirements, not civil penalties.

Claiming to use the legislative history of section 6001 and the Supreme Court decisions in Hancock and United States EPA v. California ex rel. State Water Resources Control Board to support its findings, the court in Silvex held that RCRA waived immunity to only limited objective requirements (i.e. disposal site construction standards). The court used the legislative history to show that the Senate intended the waiver in RCRA to apply to "all substantive and procedural requirements, and specifically any requirements to obtain permits" to limit the waiver to regulatory guidelines rather than enforcement requirements. Then the court applied the logic of Hancock and United States EPA v. California ex rel. State Water Resources Control Board to determine that the waivers in the CAA and CWA applied to state objective standards and regulatory requirements, not penalties.

The precedents set by Walters and Silvex influenced other courts that heard similar cases involving RCRA. However, recent cases are rejecting the Walters and Silvex line of reasoning in favor of a reading of the waiver more in line with its facial language. In Colorado v. United States Department of the Army, the court refused to apply the logic of Silvex to the case at bar because it found that Colorado’s RCRA regulations set forth "sufficiently specific and precise standards, subject to uniform application, to satisfy the term ‘requirements.’" The court held that the waiver is, "all-encompassing since it provides that federal facilities are subject to ‘all Federal, State, Interstate, and local requirements, both substantive and procedural. . . .’

The court in Ohio v. United States Department of Energy has also

233. 751 F.2d at 978.
234. 60 F. Supp. at 162-64.
235. Id.
236. Id. at 162.
237. Id. See supra notes 92-94.
238. See California v. United States Dep’t of the Navy, 845 F.2d 222 (9th Cir. 1988); Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D. N.C. 1986).
240. Id. at 1572. The court noted that the Colorado regulations tracked almost verbatim, the federal regulations promulgated by the EPA that already applied to federal facilities. This tracking exposed the Army’s argument that Colorado’s regulations were not precise and objective enough to withstand a sovereign immunity challenge as specious. Id.
241. Id.
concluded that the sovereign immunity waiver in RCRA encompasses enforcement requirements, including civil penalties. In that case Ohio sued the United States Department of Energy (DOE) for injunctive relief, damages, civil penalties, and declaratory relief for improperly disposing of hazardous wastes at a nuclear weapons processing facility, and for releasing radioactive wastes into the air, water, and soil. The DOE moved to dismiss civil penalties claiming sovereign immunity. Ohio claimed that civil penalties were included in the waived requirements.

The court rejected the defendant's arguments and analyzed the language in section 6001 as a response to the Supreme Court's decisions in *Hancock v. Train* and *United States EPA v. California ex rel. State Water Resources Control Board*. The court used a two step reasoning process to find that the language of the RCRA waiver, waiving sovereign immunity for "all requirements substantive and procedural" included enforcement requirements. First, the court considered Congress' use of the word "all" as a direct response to the Supreme Court's decision in *Hancock*. Second, the court adopted the Supreme Court's opinion that procedural requirements included enforcement requirements. The conclusion followed easily. If the language in section 6001 waives sovereign immunity with regard to permits and permits are enforcement tools, then the "all requirements" language must include all enforcement tools including civil penalties.

2. The Meaning of Sanctions

*California v. Walters* also set the precedential stage for a limited definition of the sanctions that RCRA waived. In *Walters* the court emphasized that section 6001 limited procedural requirements enforceable against federal facilities to those, "(including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to support such relief)." The court held that the mention of sanctions for injunctive relief highlighted

243. *Id.* at 761.
244. *Id.* at 761-62. The plaintiffs also argued that in looking at the statute as a whole, since the citizen suit provision of RCRA waives sovereign immunity with regard to civil penalties, Congress intended 6961 to waive immunity to civil penalties. *Id.* at 762-63. See infra notes 264-68 and accompanying text.
245. *Id.*
246. See supra notes 92-94 and accompanying text.
248. *Id.* See *Hancock*, 426 U.S. at 138.
the absence of any mention of criminal sanctions. The court concluded that RCRA waived sanctions only to enforce injunctive relief. Although this court of appeals decision related to criminal sanctions, it set precedent in the Ninth Circuit regarding civil sanctions as well.

In McClellen Ecological Seepage Situation v. Weinberger (MESS), a subsequent Ninth Circuit case, a citizens group filed a complaint against the Department of Defense alleging it violated certain provisions of RCRA and the CWA. The plaintiffs sought injunctive relief and civil penalties because McClellan Air Force Base improperly stored hazardous waste in violation of RCRA. The district court rebuffed the plaintiff's claims for civil penalties holding that the sovereign immunity waiver in RCRA did not waive federal immunity with regard to civil penalties. The court adopted the limiting definition of sanctions adopted in Walters. The court reasoned that the waiver only stretched to include sanctions to enforce injunctive relief. Since the imposition of sanctions for injunctive relief implies that a party has violated a prior court order and since no prior court order existed, the court held that it could not possibly place sanctions on the defendant. When the court turned to the legislative history of the waiver it could not find a clear and unambiguous waiver of sovereign immunity. Two courts outside the Ninth Circuit have also adopted the MESS reasoning to limit the availability of sanctions to the enforcement of injunctive relief.

The court in Ohio v. United States Department of Energy faced the same arguments as the court in MESS, that Congress intended the parenthetical list in the waiver to be an exclusive list of the sanctions to which the federal government waived sovereign immunity. The plaintiffs ar-

251. California v. Walters, 751 F.2d at 978.
252. Id.
253. See supra notes 248-51 and accompanying text.
254. 655 F. Supp. 601, 602 (E.D. Cal. 1986). Although the court in MESS analyzed whether the waiver in RCRA applied to civil sanctions (as opposed to Walters which considered the waiver's application to criminal sanctions) the court came up with the same result and same reasoning as the Walters court.
255. Id. One can only marvel at the irony that the same agencies responsible for protecting American soil from foreign invasion are consistently the worst polluters and hence pose the greatest danger to the very soil and people they are sworn to defend.
256. Id.
257. Id.
258. Id.
259. Id. at 604.
260. Meyer v. United States Coast Guard, 644 F. Supp. 221 (E.D. N.C. 1986), and Ohio v. United States Dep't of the Air Force, 17 Envt'l L. Rep. (Envt'l L. Inst.) 21210 (S.D. Ohio 1987). Although Ohio v. Air Force involved the court's interpretation of the CAA, the court used the MESS analysis to determine that RCRA did not waive sovereign immunity with regard to civil penalties while the CAA did.
gued that the list in the parenthetical was merely exemplary. From that argument the plaintiffs argued that the sanctions included in section 6001 included civil penalties. The court agreed with the plaintiffs and did not find the parenthetical list modifying substantive and procedural requirements a barrier to a broad definition of sanctions. The court cited examples of requirements not in the parenthetical list to show that the parenthetical was not limiting, including, "completion of manifests to identify hazardous waste being transported by truck, . . . writing contingency plans to prepare hazardous facilities for fires, explosions, and other hazardous waste emergencies, . . . planning for safe closure of hazardous waste after use, . . . and keeping an operating log to record locations of hazardous waste. . . ."

More recently, in Colorado v. United States Department of the Army, the district court for Colorado held that the RCRA sovereign immunity waiver waived sovereign immunity with regard to civil penalties. The court read RCRA's sovereign immunity waiver along with its citizen suit provision, section 7002, to find that a state could seek civil penalties against federal facilities. Section 7002 allows persons to "commence a civil action on his own behalf . . . against any person including (a) the United States . . ." Since RCRA includes a state within the definition of person, and section 6001 requires federal facilities to comply with state requirements, a state can sue a federal facility that violates state law.

The courts in Walters and Silvex misread history as well as the Supreme Court cases that they cite. The court in Silvex clearly misread the Senate report. The Senate amendment that the case quotes states that the waiver applies to all substantive and procedural requirements,
specifically permit requirements.269 The court read out the "all" and read the word "specifically" as "only." This selective reading does not do justice to the Senate's report.

Additionally, the courts misapply the precedents in Hancock and United States EPA v. California ex rel. State Water Resources Control Board. The Silvex and Colorado v. United States Department of the Army courts used the Supreme Court precedents to limit the definition of requirements to "objective state standards of control."270 These courts ignored that in defining requirements, the Supreme Court was limiting itself to defining substantive requirements.271 By waiving sovereign immunity to procedural requirements as well as substantive requirements, Congress legislatively reversed the Supreme Court's definition of requirements. The Supreme Court's own logic requires that the courts include enforcement requirements within the definition of procedural requirements. In Hancock, the Court virtually equated permit programs, enforcement requirements, and procedural requirements.272

The decision of the court in Ohio v. United States Department of Energy is more reasonable than the decisions of courts failing to find a waiver of sovereign immunity. Those courts that limit the definition of requirements to objective standards have failed to realize that that definition applied only to the pre-Hancock waivers. When Congress added the words "all," "substantive" and "procedural" to modify requirements it expanded the waiver to include enforcement requirements such as permits.

Those courts that limit sanctions only to those imposed to enforce injunctive relief also seem to interpret the waiver artificially. If the parenthetical were truly limiting, the Act would require federal facilities to comply with all substantive requirements, two procedural requirements (permit and reporting), and one sanction requirement (sanctions for injunctive relief). Congress intended federal facilities to comply with all requirements "respecting control and abatement of solid waste or hazardous waste disposal as if the agency were a private citizen."273 The Supreme Court's holding in Goodyear Atomic Corp. v. Miller274 indicates that Congress could not make a clearer waiver of sovereign immunity.

270. Id. at 163.
272. Hancock, 426 U.S. at 183.
V. CONCLUSION

Of all the waivers presented, the waiver in RCRA is the most important for two reasons. First, the CAA clearly and unambiguously waives sovereign immunity with regard to state imposed sanctions. Second, the cases do not indicate that water pollution from federal facilities is as big a problem as the solid waste disposal problem. Further, the Supreme Court's decision in United States EPA v. California ex rel. State Water Resources Control Board indicates that the EPA could enforce permits against federal facilities if they violate the CWA. Current Justice Department policy makes EPA enforcement of RCRA impossible. Thus, if the states cannot enforce RCRA, then federal facilities will be free to destroy the environment. Current news articles indicate that federal facilities are no more serious about complying with federal pollution laws today than they were in the 1950s.

Of the enforcement penalties available, civil penalties are the most important because they get results. In Colorado v. United States Department of the Army, the court noted that it was impossible to expect the Justice Department, representing the EPA, to enforce RCRA while also representing the federal facility being sued. Therefore, the most effec-

275. Recently, the Justice Department further undermined environmental enforcement at federal facilities with new restraints on EPA enforcement options. According to the Justice Department, the EPA cannot issue administrative orders at federal facilities under RCRA. EPA Memorandum on Enforcement Actions at Federal Facilities Under RCRA and CERCLA, 18 Envtl. Rep. (BNA) 41:3341 (March 11, 1988). The EPA must first inform the violating facility through a Notice of Noncompliance (NON). After the EPA issues a NON, the EPA regional office then negotiate with the facility until a settlement is reached and embodied in a federal Facility Compliance Agreement. These agreements are subject to numerous administrative appeals and some have taken over two years to negotiate. Because violations do not result in financial penalties, federal facilities have little incentive to comply with the law. If states cannot impose civil penalties, there is little hope of getting federal facilities to clean up their act.


277. In Colorado v. United States Dep't of the Army, the court admonished the Justice Department for claiming to be able to represent both the Army and the EPA regarding the clean up of one of the most polluted dump sites in the country. The court noted:

Were I to dismiss this action, the Army's cleanup efforts would go unchecked by any parties whose interest are in any real sense adverse to those of the Army. The same Justice Department attorneys have repeatedly claimed to represent both the Army and the EPA in this action, even though the Army is a defendant and the EPA acts for the United States as a plaintiff. . . .

Since it is the EPA's job to achieve a clean up as quickly and thoroughly as possible, and since the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and whollyheartedly advocate both positions.

Having the State actively involved as a party would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup.

tive way to enforce RCRA against federal facilities is to allow states to impose civil penalties on federal facilities violating RCRA. Recent trends indicate that more circuits are rejecting the analysis of the Ninth Circuit and finding that RCRA's sovereign immunity waiver allows states to impose civil penalties on federal facilities.278

Congress and the EPA are split on the issue of whether RCRA waives sovereign immunity to state imposed civil penalties. In recent testimony before the Senate, F. Henry Habicht, the nominee for EPA Deputy Administrator, did not endorse an interpretation of RCRA's sovereign immunity waiver that included state imposed civil penalties.279 Habicht stated that "the prospect that states would issue penalties against the federal government has to be weighed against the ability of the federal Treasury to handle such charges."280 Habicht interpreted the waiver incorrectly because he used cost-benefit analysis, not statutory analysis, to determine Congress' intent to waive sovereign immunity. During the same testimony, Senator Max Baucus (D. Me.) stated that he believed that the current waiver did waive sovereign immunity against state suits.281

In light of this controversy, Congress could pass a sovereign immunity waiver that clears up any ambiguity that the courts might imagine. A bill has recently passed the House which would strengthen the waiver.282 This bill would make two major changes in the current waiver. First, it would modify the requirements by including "all administrative orders, and civil, and administrative, penalties and fines."283 More importantly, the bill changes the language describing the requirements waived to remove confusion regarding the parenthetical. The current act waives sovereign immunity to "all . . . requirements (including any requirement for permits on reporting on any provisions for injunc-


279. 20 Envtl. Rep. (BNA) 142 (May 19, 1989). However, Habicht may be unaware that EPA's regulations undercut his interpretation of RCRA. In Maine v. United States Dep't of the Navy, 702 F. Supp. 322, the district court held that RCRA waived sovereign immunity with regard to civil penalties because the EPA included the United States and its instrumentalities within its definition of person. The court reasoned that in light of the controversy surrounding the statute it would look to the EPA's interpretation of the statute to determine whether it waived sovereign immunity with regard to civil penalties. It found the inclusion of the United States within the definition was evidence of the EPA's belief that the federal facilities were subject to the same penalties as private polluters.

280. Id. at 143.

281. Id.


283. Id. § 2(a)(3).
tive relief and such sanctions to enforce such relief). . . .” Some courts have interpreted the waiver to be limited only to the requirements included in the parenthetical. H.R. 1056 states “the . . . requirements referred to in this subsection include, but are not limited to, all administrative orders . . . .” The change of language clearly reflects the intent of Congress to have the waiver read broadly. Second, H.R. 1056 would legislate the Justice Department’s unitary government theory out of existence by prohibiting the EPA from treating federal facilities that violate RCRA any differently in any respect from private persons. These changes would make the RCRA’s sovereign immunity waiver as strong as the CAA’s.

Finally, H.R. 1056 amends section 6005 of RCRA to include “each department, agency, and instrumentality of the United States.” This makes the RCRA conform to the CAA, which includes the United States within the definition of person. This definition further clarifies the extent of the sovereign immunity waiver.

However, the current language of the RCRA sovereign immunity waiver is strong enough to waive sovereign immunity to state imposed civil penalties. The waiver answers all of the objections that the Supreme Court raised in its opinions in Hancock and United States EPA v. California ex rel. State Water Resources Control Board. First, the waiver modifies requirements with the word “all”. Second, the waiver waives sovereign immunity to both substantive and procedural requirements. Since in Hancock the Supreme Court considered enforcement and procedural requirements to be one and the same, the waiver should allow states to impose civil penalties. Finally, by requiring federal facilities to comply in the same manner as any other person, Congress consented and the Supreme Court has affirmed that the waiver allows states to impose civil penalties.

285. See supra notes 250-63 and accompanying text.
289. See supra note 144 and accompanying text.