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THE INADEQUACIES OF CONGRESSIONAL ATTEMPTS TO LEGISLATE FEDERAL FACILITY COMPLIANCE WITH ENVIRONMENTAL REQUIREMENTS

MELINDA R. KASSEN

INTRODUCTION

The federal government is the nation's largest polluter. The vast majority of federal facilities that have released contamination into the environment are defense facilities, owned or operated by the Department of Defense (DOD) or by the Department of Energy (DOE), the agency responsible for manufacturing and maintaining nuclear weapons. The costs for both environmental “clean up” and compliance at federal facilities dwarf environmental spending in the private sector.

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2. The term “federal facilities,” as used in this Article, corresponds with the definition in the Comprehensive Environmental Response, Compensation and Liability Act of 1980 § 120(a)(2), 42 U.S.C. § 9620(a)(2) (1988 & Supp. V 1993) [hereinafter CERCLA], which defines federal facilities as “facilities which are owned or operated by a department, agency or instrumentality of the United States.”

3. Alice Rivlin, Director of the Office of Management and Budget, suggested naming a draft report on environmental restoration at federal facilities, “The Elephant, the Rabbit and the Mice,” as a way of describing the relative sizes of the tasks at DOE, DOD and all other federal agencies. Conversation with Thomas P. Grumbly, Assistant Secretary for Environmental Management, United States Department of Energy.

4. Given the magnitude and complexity of the contamination at these facilities, a complete “clean up” at these sites is not possible. However, because the use of this phrase has become endemic in this field, it appears throughout this Article.

5. In a 1993 report, Resources for the Future estimated that performing all of the restoration at the 1000 private sector sites on the National Priorities List under CERCLA could cost $44 million. KATHERINE PROBST & PAUL PORTNEY, RESOURCES FOR THE FUTURE, Assigning Liability for Superfund Cleanups (1992). “Environmental clean-up of the 24,000 sites on federal facilities in the United States may ultimately cost as much as $400 billion . . . .” FEDERAL FACILITIES ENVIRONMENTAL RESTORATION DIALOGUE COMMITTEE, INTERIM REPORT: RECOMMENDATIONS FOR IMPROVING THE FEDERAL FACILITY ENVIRONMENTAL
The special nature of federal facilities creates enforcement challenges for both federal and state regulatory agencies. For the United States Environmental Protection Agency (EPA), enforcing environmental laws at facilities owned or operated by sister agencies raises the specter of differential treatment or even the inability to enforce EPA regulations aggressively.\(^6\) It has proven largely immaterial that DOD and DOE budgets are proposed by the same executive branch and that their activities are overseen by the same Congress as are EPA's. States, attempting to enforce environmental regulations against federal facilities, have had to overcome hurdles ranging from claims of sovereign immunity to claims relating to the secrecy that surrounds many defense functions. The question whether states can impose fines and penalties against federal agencies that violate environmental laws has strained the cooperative federalism that prevails elsewhere in the environmental arena.

Part I of this Article discusses the reasons why EPA and states have had difficulty enforcing environmental regulations against federal facilities. Part I then traces the reasons for and the passage of enforceable penalty authorities in two hazardous waste statutes, the Resource Conservation and Recovery Act (RCRA)\(^7\) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\(^8\) This discussion also reviews briefly the important cases that have considered these penalty provisions.

Part II reviews the imposition of fines imposed on federal facilities under RCRA and CERCLA, and reviews DOE's and military departments' response to initial notices of violation. Part II also discusses where DOE and the military departments have found the money necessary to pay the fines\(^9\) and how the recipient state regulatory entities have used the money received.

Part III discusses three particularly important lessons learned from the enforcement experience. First, the imposition of environmental fines is unlikely to serve as an incentive to agency personnel to comply with its environmental responsibilities because of the manner...
in which agencies build their budgets and thus find the money to pay fines. Second, even though the imposition of fines may not serve as an incentive to comply with environmental regulations, and even though the fines themselves represent a trivial amount of program dollars, the formal process required by the statutes does at least give environmental regulatory agencies enhanced power to compel federal agencies to respond to legal mandates. Third, a federal agency's success in achieving compliance appears to be as much a function of the personalities of those running the environmental programs at the regulated agencies as it is a function of the legal mechanisms available.

In conclusion, I suggest that before Congress moves to repeal or fix the failure of penalty provisions in RCRA and CERCLA to provide meaningful incentives to federal agencies to comply with environmental requirements, members need to learn two things. First, Congress must find out what incentives would effectively motivate federal agency personnel to comply more completely with environmental laws. Second, Congress must explore how to draft legislation that will truly take advantage of such incentives. In addition, and most importantly, the key to federal facility compliance depends on the commitment of the executive and legislative branches to provide the resources necessary to accomplish the environmental restoration and waste management tasks that confront federal agencies.

I. THE BASIS FOR, AND PASSAGE OF, RCRA AND CERCLA ENFORCEMENT PROVISIONS AGAINST FEDERAL FACILITIES

A. Shields from Responsibility: Reasons Why Neither EPA nor States Could Enforce Environmental Requirements Against Federal Facilities

As Congress pulled federal facilities under EPA's regulatory net, defense agencies faced a series of hurdles in transforming themselves into entities capable of operating in compliance with environmental requirements. In particular, defense agencies had to confront, (1) a view within their own ranks that their operations were above regulatory law, (2) a lack of an effective bureaucracy to handle environmental compliance issues, and (3) a multitude of complex, unique

10. The beginning of this movement shows itself in legislation introduced by Senators Johnston and Murskowski for the Department of Energy's Hanford Reservation wherein they would override virtually all of the requirements of CERCLA and RCRA. 141 CONG. REC. S7620 (daily ed. May 25, 1995).
11. See infra note 54.
contamination scenarios, some of which presented situations where compliance would be effectively impossible.  

At the least, one must give federal polluters, as represented by the Department of Justice, credit for having come to the battle over environment enforcement with a dazzling array of arguments. As Senator Stafford characterized the federal agencies' stance during the floor debate on the amendments to Superfund: "No loophole, it seems, is too small to be found by the federal government." Federal defenses have included the need for national security, the inability of one federal agency to sue another, the traditional immunity of the sovereign from suit by the states, and the vagaries of federal budgeting that preclude the expenditure of money for activities that Congress has not authorized and for which Congress has not appropriated funds. For nuclear weapons complex facilities, defense agencies' arguments focused on the right to self-regulate and self-enforce under the Atomic Energy Act.

1. National Security.—For over two centuries, the armed services, most recently under the Department of Defense, have been entrusted with the defense of the country. For forty years, the primary mission of the Department of Energy and its predecessor agencies was to build nuclear weapons for the national defense. Historically, Congress has given the agencies responsible for the country's military protection far greater leeway for complying with applicable laws than other federal agencies.


14. See infra notes 28-31 and accompanying text.

15. See infra notes 51-57 and accompanying text.

16. See infra notes 62-79 and accompanying text.

17. See infra notes 85-91 and accompanying text.


20. For example, the military has its own legal code and system, its own standards for due process, Manual for Courts Martial, United States (1994 ed.), and its own rules protecting privacy, see, e.g., id., Part IV, para. 83 (criminalizing fraternization among service
In recognition of the unique conditions under which defense agencies operate, Congress has consistently recognized the potential need to exempt certain military activities from compliance with environmental laws. Thus, virtually every environmental statute contains a provision that authorizes the President to exempt an activity from compliance, if to do so is in the "paramount interest" of the United States. For example, RCRA provides:

The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with . . . [any RCRA] requirement if he determines it to be in the paramount interest of the United States to do so . . . . Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.21

Unfortunately for the defense agencies, the President has granted paramount interest exemptions in only a few instances.22 Moreover, when defense agencies have raised "national security" as a defense in the courts by arguing that forcing them to comply with environmental regulations would compromise national security, they have lost because judges have pointed to the presidential exemption provisions as the only legitimate way for an agency to avoid having to comply with environmental regulations.

For example, in the first environmental case in which it considered the paramount interest test, the Supreme Court found that the Clean Water Act23 permitted "the exercise of the court's equitable discretion . . . to order compliance with the Act."24 The Court noted that if the district court enjoined DOD from dropping ordnance into Puerto Rican waters without a Clean Water Act permit,25 a practice that

members); Mil. R. Evid. 315 (permitting military commanders to conduct searches); no other federal agency has such privileges.
22. Administration officials have asserted that the President has granted paramount interest exemptions less than 10 times, all as a result of natural disasters.
25. 33 U.S.C. §§ 1311(a), 1342(a) ("[T]he discharge of any pollutant by any person shall be unlawful . . . [except] the Administrator may . . . issue a permit for the discharge of any pollutant . . . . ").
DOD claimed was a necessary part of bomber training and thus critical for maintaining national security, then DOD could apply for a presidential exemption under that Act.26

A decade later, DOE contended that it could not comply with the Clean Water Act if it were to restart a nuclear reactor to produce tritium, an important element in the production of modern nuclear weapons.27 DOE argued that it should be allowed to proceed with tritium production even if doing so would violate the Clean Water Act because increasing the tritium stockpile was "a critical element of national security policy."28 The court rejected this contention outright because, based on the facts, it found that the nation had a sufficient tritium stockpile.29 In rejecting DOE's national security argument, the Fourth Circuit stated that, if DOE could show that "an injunction blocking the reopening of the . . . reactor would seriously compromise national security interests," then DOE should apply for a presidential exemption under the Clean Water Act30 because "the Executive Branch possesses ultimate unilateral authority to prevent any compromise to national security concerns."31

Because of the Court's position on the paramount interest exemption and because there are only a few instances where the President has granted the exemption, defense agencies have not been able to use it to shield routine national security activities from compliance with environmental requirements. Nevertheless, for many years after the inception of the modern environmental age,32 military agencies have operated without independent regulatory oversight of their activities that affect the environment. And, because the national security

28. Id. at 982.
29. Id. at 981-82.
30. 33 U.S.C. § 1323. The President's Executive Order 12,088 sets forth the process describing how an agency may qualify for a presidential exemption and requires the agency to submit its request and rationale to the Office of Management and Budget (OMB). The EPA Administrator is also required to submit EPA's position to OMB, after which OMB's Director makes a recommendation to the President. Exec. Order 12,088, § 1-7, Limitation on Exemptions, 3 C.F.R. 243 (1979), reprinted in 42 U.S.C. § 4321 (1988).
31. Watkins, 954 F.2d at 982.
hierarchy made few efforts to modify its operations in ways that might reduce environmental effects, neither DOD nor DOE developed the internal institutions to facilitate compliance when it finally became apparent that both would have to comply with environmental laws or face sanctions. Moreover, both found themselves with huge inventories of facilities that were either out of compliance with, or in need of, restoration under the relevant statutes. Therefore, defense agencies did not solely rely on the paramount interest exemption to shield their activities from external environmental regulation. Another example of how defense agencies tried to use their national security mission and their lack of internal environmental institutions to shield them from compliance with environmental laws can be found in the saga of RCRA permitting at DOE’s Rocky Flats Environmental Technology Site, formerly the Rocky Flats Plant.

Under RCRA, facilities that operate in whole or in part to treat, store or dispose of hazardous wastes (TSDs), including federal facilities, must obtain a RCRA permit. EPA’s regulations under RCRA required all TSDs to submit RCRA permit applications. Rocky Flats, where DOE machined and recycled plutonium pits, the core of a modern nuclear weapon, qualified as a TSD and in 1980 DOE submitted a RCRA application. However, on its first RCRA applica-

33. Sixteen of DOE’s facilities and over 100 defense (Army, Navy, Air Force, and Marine Corps) facilities are on the 1200-site National Priorities List of the most contaminated sites subject to the restoration requirements of CERCLA. H.R. REP. NO. 111, 102d Cong., 1st Sess. 3 (1991), reprinted in 1992 U.S.C.C.A.N. 1287, 1289. The federal government has over 24,000 hazardous waste sites. FEDERAL FACILITIES ENVIRONMENTAL RESTORATION DIALOGUE COMMITTEE, supra note 5, at v. For a description of DOE’s environmental restoration and waste management challenges, see RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE, B-256920, NUCLEAR WASTE: MUCH EFFORT NEEDED TO MEET FEDERAL FACILITY COMPLIANCE ACT’S REQUIREMENTS 1 (1994). For a perspective on the Department of Defense sites, see SETH SHULMAN, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF THE U.S. MILITARY (1992), in which the author describes the Army’s Rocky Mountain Arsenal as the most polluted square mile in the world. Id. at xi.

34. 42 U.S.C. § 6925.
35. 40 C.F.R. 270.1(b) (1994).
36. Rocky Flats is a 6.550 acre installation in northern Jefferson County, Colorado with 100 buildings and facilities. Affidavit of Special Agent Jon S. Lipsky, Federal Bureau of Investigation, attach. 3, at 4, In re Search of the Rocky Flats Plant (D. Colo. 1989) (No. 89-730M) [hereinafter FBI Affidavit]. In the past, Rocky Flats developed and fabricated “nuclear weapons components from radioactive and nonradioactive materials.” ROCKY FLATS ENVIRONMENTAL TECHNOLOGY SITE, SITE ENVIRONMENTAL REPORT 2 (1993). In 1992, the plant’s mission changed and today, the site focuses on “environmental restoration, waste management, [and] decontamination.” Id. Rocky Flats stores hazardous materials on site. Id. at 3.
tion,\textsuperscript{38} DOE claimed that the regulators should treat Rocky Flats as a "small generator" under RCRA,\textsuperscript{39} meaning a facility that generated less than one hundred kilograms of hazardous waste a month.\textsuperscript{40} A small quantity generator is generally exempt from RCRA requirements for each month in which it generates less than one hundred kilograms of hazardous waste.\textsuperscript{41} In fact, Rocky Flats was generating almost 50,000 pounds of halogenated solvent wastes and over 30 million pounds of all types of hazardous wastes annually.\textsuperscript{42}

Eventually, it became clear that the Rocky Flats' managers had submitted an application for a "small generator" because they determined that RCRA should not apply if hazardous wastes were mixed with the fissile radioactive materials used to make weapons components.\textsuperscript{43} DOE's theory was that, for the purpose of these nuclear materials, DOE was entitled to self-regulate under the terms of the Atomic Energy Act.\textsuperscript{44} Thus, DOE thought that it did not need to report or submit to regulation any hazardous materials that were mixed with the radioactive materials subject to DOE's exclusive Atomic Energy Act jurisdiction. Since over ninety percent of the waste at Rocky Flats was mixed hazardous-radioactive waste, DOE's theory meant that there would have been very little pure hazardous waste for EPA or Colorado to regulate under RCRA.

It was not until the State of Colorado threatened to sue DOE in 1984 that DOE began to take seriously its obligation to obtain a RCRA permit for more of the mixed hazardous-radioactive wastes at Rocky Flats. In 1989, DOE, EPA and Colorado signed an agreement that committed DOE to submit a complete permit application for Rocky

\begin{itemize}
  \item \textsuperscript{38} This application is on file at the Colorado Department of Public Health and Environment, Hazardous Materials Division. It is also described in FBI Affidavit, \textit{supra} note 36.
  \item \textsuperscript{39} \textit{Id.} attach. 3, at 31.
  \item \textsuperscript{40} 40 C.F.R. \textsection 261.5(a) (1994).
  \item \textsuperscript{41} \textit{Id.} \textsection 261.5(a)-(j).
  \item \textsuperscript{42} FBI Affidavit, \textit{supra} note 36, at 34-35.
  \item \textsuperscript{43} See RCRA, 42 U.S.C. \textsection 6903(27) (exempting from RCRA regulation "special nuclear, or byproduct material" as defined by the Development and Control of Atomic Energy Act, 42 U.S.C. 2014(e) (1988 & Supp. V 1993) [hereinafter Atomic Energy Act]).
  \item \textsuperscript{44} DOE did not propound this theory exclusively at Rocky Flats. In fact, DOE first lost in court on this theory in Legal Env't Assistance Fund, Inc., v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1983), in which the district court ruled that DOE had to comply with RCRA at its defense facilities, notwithstanding the authority vested in DOE under the Atomic Energy Act. \textit{Id.} at 1166. Eventually, EPA stepped in and issued a regulation proclaiming that RCRA jurisdiction extends to the hazardous portion of mixed hazardous-radioactive waste. 51 Fed. Reg. 24,504 (1986). The next year, DOE conceded and amended its own regulations to clarify that its facilities were subject to RCRA authority for the non-radioactive hazardous portion of mixed wastes. 10 C.F.R. \textsection 962.3 (1994).
\end{itemize}
Flats that would cover most of DOE's mixed waste streams.\textsuperscript{45} Even then, however, DOE balked at including certain high plutonium content waste streams—called "residues"—on the grounds that they were "in process." It took a Sierra Club lawsuit against DOE's contract operator to force DOE to allow Colorado to regulate all of its mixed wastes as hazardous.\textsuperscript{46}

Today, DOE has a voluminous state RCRA permit in hand, as well as a continual stream of applications to modify that permit to add additional units and activities at Rocky Flats.\textsuperscript{47} "RCRA regulates all activities at [Rocky Flats] . . . associated with hazardous waste and mixed waste."\textsuperscript{48} The State still does not regulate pure radioactive materials or waste.\textsuperscript{49} It is not yet the case, however, that DOE is in compliance with its RCRA obligations at Rocky Flats. In fact, the site has experienced continual problems meeting deadlines for finding adequate treatment, storage, and disposal of its mixed hazardous wastes. Notwithstanding this history, it was not until the day after the FBI raided the Plant in 1989 that Colorado first issued a Notice of Violation which also sought to impose a monetary penalty on DOE for its activities at Rocky Flats.\textsuperscript{50}

2. \textit{The Unitary Executive Theory}.—The unitary executive theory, advanced most vigorously in modern times by President Reagan's De-
partment of Justice (DOJ), contemplates that all federal agencies whose leaders serve at the pleasure of the President are part of a single branch of government which has a single view on any given public policy flowing from the President.\textsuperscript{51} Thus, under the unitary executive theory, one agency, in this case EPA, cannot logically bring a coercive action—through either a judicial or administrative enforcement proceeding—against another agency, such as DOD or DOE. Such an action necessarily requires the two agencies to take opposing positions with respect to factual or legal issues, something that cannot occur if both agency executives derive their marching orders from the same general.\textsuperscript{52} The solution, according to the proponents of the theory, is for disputant federal agencies to resolve their differences internally, usually with the Office of Management and Budget arbitrating.\textsuperscript{53}

While Congress has consistently rejected the legitimacy of the unitary executive theory by granting EPA the authority to enforce environmental laws against its sister agencies for noncompliance at federal facilities,\textsuperscript{54} EPA has exercised this authority sparingly.\textsuperscript{55} Moreover, at least one court\textsuperscript{56} and most states\textsuperscript{57} have expressed skeptical...
cism that EPA can regulate federal agencies as vigorously as it regulates private or local government polluters.

3. **Sovereign Immunity.**—Because of the factors constraining EPA's enforcement authority over federal facilities, states have asserted a more aggressive regulatory posture toward federal facilities. The federal government's response has been to claim sovereign immunity to resist such enforcement. DOE's resistance to Ohio's attempts to enforce RCRA and the Clean Water Act at its Fernald Plant is one of the best examples of this dynamic.  

Fernald, located at the edge of the Cincinnati metropolitan area, was the uranium processing center of the U.S. nuclear weapons complex. Substantial quantities of uranium and nonradioactive hazardous materials from the plant leaked into groundwater and contaminated soils outside of the plant's boundaries. Eventually, nearby residents won seventy-five million dollars for damages to health and property in a class action. The award also included significant health monitoring provisions. Operations ceased in the mid-1980s, so that the only ongoing activities at Fernald for the last decade have been waste management and remediation.

In 1986, the State of Ohio sued DOE for violations of RCRA and the Clean Water Act at Fernald; Ohio sought an injunction and sanctions in the form of civil penalties. DOE defended by arguing that, notwithstanding the statutory waivers of sovereign immunity, Ohio was still barred by sovereign immunity from seeking monetary sanctions. The district court considered the waivers of sovereign immunity in both RCRA and the Clean Water Act and, after finding the waivers to be sufficient, ruled in Ohio's favor. The district court based its

officials advocating the adoption of the Federal Facilities Compliance Act and arguing that the Act, which would give states enforcement power, is necessary because federal facilities have been and are "the very worst violators of environmental laws.").

58. The other outstanding example would be the Army's resistance to Colorado's enforcement of RCRA at the Rocky Mountain Arsenal. See infra notes 182-214 and accompanying text.


60. Id.


63. Id. at 761-62.

64. 42 U.S.C. § 6961(a).


holding both on the plain language of the statutory provisions and on
the statutes’ legislative history. On appeal, the Sixth Circuit af-
firmed the judgment of the district court. The Sixth Circuit based
its ruling on the waiver of sovereign immunity in the Clean Water
Act and on the citizen suit provision in RCRA. DOE appealed
again, and this time, the Supreme Court reversed. The Court held
that neither the citizen suit provisions nor the provisions that directly
appeared to waive sovereign immunity in RCRA and the Clean Water
Act did so successfully such that states or citizen groups could seek the
imposition of civil penalties as sanctions for a federal agency’s viola-
tions of these laws. With regard to RCRA’s waiver of sovereign im-
munity, the Court concluded that the language subjecting federal
facilities to “all” of RCRA’s “requirements” did not include a waiver of
immunity from punitive fines. As for the citizen suit provisions, the
Court concluded that there was no clear and unequivocal waiver
of sovereign immunity for the imposition of fines. While both stat-
utes stated: “any person may commence a civil action on his own be-
half against any person (including the United States),” the Court
noted that “neither statute defined ‘person’ to include the United
States.” The Court then concluded that, because the statutes’ defini-
tion of person did not include the United States, Congress had not
waived sovereign immunity with respect to the imposition of civil
penalties.

67. Id. at 764-67. The court found that both provisions were written in response to the
Supreme Court’s decisions in Hancock v. Train, 426 U.S. 167 (1976), and EPA v. Califor-
68. Ohio v. United States Dep’t of Energy, 904 F.2d 1058, 1058 (6th Cir. 1990).
69. Id. at 1062.
70. Id. at 1064-65. The citizens suit provision in RCRA provides:
   ... [A]ny person may commence a civil action on his own behalf—(1)(A) against
   any person [ ]cluding ... the United States ... who is alleged to be in violation
   of any permit, standard, regulation, condition, requirement, prohibition, or or-
   der which has become effective pursuant to this Chapter . . . . Any action under
   paragraph (a)(1) of this subsection shall be brought in the district court . . . .
   The district court shall have jurisdiction . . . . to enforce the permit, standard,
   regulation, condition, requirement, prohibition, or order . . . and to apply any
   appropriate civil penalties under section 6928(a) and (g) of this title.
72. Id. at 1640.
73. 42 U.S.C. § 6961(a).
76. United States Dep’t of Energy v. Ohio, 112 S. Ct. at 1638-36.
78. United States Dep’t of Energy v. Ohio, 112 S. Ct. at 1634.
79. See id. at 1635.
4. How Budgeting Affects Compliance Policy.—Compliance with environmental mandates was difficult for the defense agencies in part because they had never sought the funds necessary to sustain a serious program for environmental compliance and restoration activities. In 1984, eight years following RCRA’s adoption and over a decade after passage of the Clean Air and Clean Water Acts, both DOD and DOE had environmental budgets of less than one-half billion dollars annually. By 1994, their budgets for combined spending had grown to approximately $11.2 billion, a figure that represents the largest chunk of environmental spending in the federal budget, with each of the two defense agencies receiving approximately eighty-five percent of what Congress appropriated that year for EPA.

To comply with all laws, regulated entities must budget sufficient funds to perform the required activities. Executive Order 12,088 requires the head of each federal agency to request enough money in the agency’s budget to comply with all relevant legal requirements. But, because the President builds the Executive Branch budget by having OMB meld all of the agencies’ requests into a single Executive Branch proposal, the President’s request to Congress may include cuts in an agency’s original budget submission. Thus, even if the head of an agency complies with Executive Order 12,088, the President’s budget—as submitted to Congress—may not seek enough money for compliance. Moreover, Congress, in authorizing and appropriating funds, may cut an agency’s budget request even further.

States and federal agencies disagree about whether insufficient funds is a defense available to a federal agency for failing to comply with a legally enforceable requirement. Certainly, insufficient funds is not a defense for local governments and private sector polluters. States therefore object to the federal government using insufficient funds as a defense available to a federal agency for failing to comply with a legally enforceable requirement.
funds as a defense, particularly since Executive Order 12,088 seems to indicate an executive branch commitment to funding environmental compliance fully.\textsuperscript{88}

In response, federal agencies have argued that the Anti-Deficiency Act\textsuperscript{89} protects them from court orders that require the spending of money above what Congress authorized and appropriated. This law provides, in part:

\verb|No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.\textsuperscript{90}|

States have countered by pointing to the language in RCRA making reliance on the "paramount interest" exemption for environmental requirements contingent on the President's having "specifically requested such appropriation as a part of the budgetary process and the Congress [having] failed to make available such requested appropriation."\textsuperscript{91}

In addition to arguing that insufficient funds is a defense shielding federal facilities from the requirement of complying with environmental mandates, policy-makers at federal agencies have also used their understanding of the budgeting process to their advantage when negotiating with the states about environmental compliance. The attitude displayed by the Under Secretary of Energy, Admiral John Tuck, toward making commitments to perform expensive environmental requirements is an example of this tactic.\textsuperscript{92}

In an interview with DOE's historian, Tuck discussed his tenure during the Bush administration—1989 to 1992—when DOE's weapons production facilities were, for the most part, not in production due to safety and compliance related closures. To remove barriers for the resumption of production, DOE strategists signed enforceable agreements with the states and EPA to perform clean up and waste

\begin{itemize}
\item \textsuperscript{88} Exec. Order 12,088, \textit{supra} note 30.
\item \textsuperscript{89} Pub. L. No. 59-28, § 3679, 34 Stat. 27, 49 (1906).
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} 42 U.S.C. § 6961 (a).
\item \textsuperscript{92} Interview with John C. Tuck, Under Secretary of Energy, Reflections on Tenure as the Under Secretary (Jan. 17, 1993) [hereinafter Tuck Interview] (transcript available from the History Division of the Department of Energy).
\end{itemize}
management activities by specified milestones.\textsuperscript{93} However, the DOE signators knew that DOE would not be able to meet the time lines set in these agreements because the funds necessary for compliance would probably not be available in future fiscal years.\textsuperscript{94} As Tuck stated: "[W]hen we were compelled to produce, we would be lever-aged to be responsive to the environment . . . ."\textsuperscript{95} DOE officials' rationale was that, at the time, their most important task was getting the idled weapons production factories back into service: "We got into the compliance agreements, in my view, because we had to stay in production to produce the requirements for the military."\textsuperscript{96} Environmental hurdles stood in DOE's way, but regulatory agreements could remove the hurdles, and for at least an interim period, DOE adopted a policy of signing agreements. DOE officials were able to make such agreements because Executive Order 12,088 only requires that an agency head request sufficient funds for the instant fiscal year; it does not bar that same agency head from making future commitments that cannot be funded.\textsuperscript{97}

High-level DOE personnel knew that the money necessary to meet the legal obligations contained in these compliance agreements would most likely not be available in the future, but determined that ultimately it would fall to Congress to decide whether to fund the activities required by the agreements:

It seems to me that what is going to happen is . . . [that the lack of sufficient funds] will force somebody to actually sue from some jurisdiction. You promised in this compliance agreement that you would do this on this time line. You are not delivering. So now we are going to sue you. And then the judge issues a consent order, says thou shalt, etc. And then what does . . . [the DOE Assistant Secretary for Environmental Management] do? Does he take all the money away from everything else and apply it to that one decision . . . ? See, sooner or later the thing has to collapse, and it has to go back to the political process and they have to make the decision.\textsuperscript{98}

Unfortunately, at the time DOE was signing these agreements, agency spokespersons were also claiming that DOE had adopted a

\textsuperscript{93} Id. at 2.
\textsuperscript{94} Id. at 3-4.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Exec. Order 12,088, supra note 30.
\textsuperscript{98} Tuck Interview, supra note 92, at 4.
new understanding of the importance of environmental responsibility; the spokespersons pointed to DOE's willingness to engage in negotiation with states as evidence of change. Yet, the Tuck interview confirms the worst suspicions of the skeptical regulatory and environmental activist communities: DOE had not changed. The loss of trust that resulted from DOE's actions with respect to the agreements enhanced the frustration that today still inhibits cooperation between the states and DOE, cooperation necessary to effect this largest of cleanup programs.  

B. The Congressional Response: State Authority and Monetary Sanctions

Congress always intended federal facilities to comply with the nation's environmental laws; in every major, enforceable statute, starting with the Clean Air Act in 1970, Congress included a waiver of sovereign immunity. The courts' narrow interpretation of these waivers does not accurately reflect congressional intent. Nor do the courts appear to have considered the powerful equity argument that federal agencies should comply with environmental laws in the same manner and to the same extent as private entities.

Fundamentally, those who advocate authorizing states to impose financial penalties on noncomplying federal agencies are simply promoting the equitable notion that the federal government should comply with environmental laws in the same manner that the private sector complies. Beyond that, these advocates believe that only the

99. For an overview of the importance of trust in the relationship between DOD, DOE, and state regulators and a brief description of the lack thereof, see Federal Facilities Environmental Restoration Dialogue Committee, supra note 5, at v. EPA chartered this committee "to develop consensus policy recommendations aimed at improving the . . . decision-making process to ensure that clean-up decisions reflect the priorities and concerns of all stakeholders." Id.


101. See supra notes 71-79 and accompanying text; see also infra note 111 and accompanying text.


As several congressional members stated: Americans demand Federal leadership in environmental efforts, not recalcitrance from Federal agencies. Placing Federal facilities on an equal footing with private facilities with respect to administrative orders and civil penalties will leave no question of Congress' intent concerning Federal facilities compliance. This provision is necessary to restore the faith of the American people that protection of
threat of financial penalties, coupled with the Damoclean sword of criminal sanctions against individual federal employees, would create the incentives necessary to motivate federal agencies to comply with environmental requirements.\textsuperscript{104} Not surprisingly, the executive branch agencies alone opposed the notion that federal facilities should have to comply with environmental regulations to the same extent as nonfederal entities.\textsuperscript{105} In opposing compliance, executive branch agencies argued that the unitary executive theory logically prevented EPA from enforcing environmental laws against sister agencies.\textsuperscript{106} DOD, DOE, and DOJ also argued that allowing states to impose fines on federal facilities for violations of environmental laws would serve not as an incentive for federal agencies' compliance, but rather as a mere funds transfer from the federal to a state treasury, a transfer that emboldened and avaricious states would actively seek.\textsuperscript{107}

1. Resource Conservation and Recovery Act of 1976.—In order for a state to sue a federal agency for enforcement of an environmental statute, the federal government must waive its sovereign immunity from such a suit.\textsuperscript{108} In two 1976 Supreme Court decisions, the Court construed the waivers of sovereign immunity in both the Clean Air\textsuperscript{109} and Clean Water Acts\textsuperscript{110} narrowly.\textsuperscript{111} The Court issued these decisions while Congress was considering the hazardous waste amend-

human health and the environment will not give way either to bureaucratic recalcitrance, the lack of funding, or simple inactivity.


\textsuperscript{104.} See H.R. REP. No. 111, supra note 103, at 2-6 (discussing the need to subject federal facilities to the same environmental regulations and sanctions to which state and local governments and private entities are subject because the federal government has been slow to comply with environmental regulations).

\textsuperscript{105.} Id. at 31-32 (discussing amendments proposed by DOD and DOE seeking tailored regulations to address the potential conflict between some of RCRA's regulations and DOD's and DOE's safety concerns).

\textsuperscript{106.} See supra Part I.A.2.

\textsuperscript{107.} See H.R. REP. No. 111, supra note 103, at 19-20 (reprinting letter from the Congressional Budget Office to the House Committee on Energy and Commerce suggesting that the Federal Facilities Compliance Act may encourage states to seek the imposition of fines and penalties against the federal government).


\textsuperscript{109.} 42 U.S.C. § 7418.

\textsuperscript{110.} 33 U.S.C. § 1323.
ments package to the Solid Waste Disposal Act, which became the Resource Conservation and Recovery Act of 1976 (RCRA). Because of the two Supreme Court decisions, Congress included in RCRA the most explicit waiver of sovereign immunity that it could conceive at the time:

Each department, agency, and instrumentality of the executive . . . branch[ ] of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements.

Unfortunately for the states, during the next sixteen years, neither the courts nor the defense agencies uniformly read this language in RCRA to mean that the defense agencies were subject to monetary sanctions for noncompliance; nor did courts and defense agencies read the language to mean that states could enforce RCRA against federal facilities in a meaningful way. As more cases came

111. See Hanford, 426 U.S. at 198 (holding that, in view of the undoubted awareness of Congress that waivers of sovereign immunity must be clear and express, Congress, in enacting § 118 of the Clean Air Act, did not intend to subject federal installations to state permit requirements); EPA v. California, 426 U.S. 200, 227 (1976) (concluding that § 313 of the Clean Water Act did not subject federal facilities to state permit programs). In both cases, the Court found that Congress had not adequately expressed its waiver of sovereign immunity. Hanford, 426 U.S. at 198; EPA v. California, 426 U.S. at 227. For a general discussion of how narrowly the Supreme Court, in particular, and federal courts, in general, have read sovereign immunity waivers in environmental statutes, see Robert Percival, Overcoming Interpretive Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes, 43 WASH. U. J. URB. & CONTEMP. L. 221 (1993).


114. A number of courts have held that the RCRA waiver would not allow states to impose fines on federal agencies. See Ohio v. United States Dep’t of Energy, 112 S. Ct. 1627 (1992) (reversing court of appeals decision that held that Congress waived immunity from punitive fines under RCRA and Clean Water Act); Maine v. Department of Navy, 973 F.2d 1007, 1011, 1015 (1st Cir. 1992) (vacating a district court ruling that had found the Navy liable for punitive fines imposed under a state hazardous waste law); Mitzelfelt v. Department of the Air Force, 903 F.2d 1293, 1298 (10th Cir. 1990) (holding that the Air Force was not required to pay any fines under RCRA); United States v. Washington, 872 F.2d 874, 875 (9th Cir. 1989) (holding that RCRA did not contain an unequivocal waiver of sovereign immunity); McClellan Ecological Seepage Situation v. Weinberger, 665 F. Supp. 601, 605 (E.D. Cal.) (holding that “a waiver of sovereign immunity must be clear and concise and unequivocal”), dismissed in part, 707 F. Supp. 1182 (E.D. Cal. 1986) and dismissed in part
down finding the waiver of sovereign immunity inadequate, Congress began reconsidering the statutory waiver.\textsuperscript{115}

In 1987, shortly after the first such court decision, various congressional committees began holding hearings to consider legislation to clarify—or reaffirm—the broad scope of the RCRA waiver.\textsuperscript{116} Despite opposition from the Executive Branch, both houses of Congress passed federal facilities compliance bills by the end of the 101st Congress;\textsuperscript{117} however, members could not reconcile the two versions. Both houses of Congress reconsidered the bills in the 102nd Congress,\textsuperscript{118} but for most of that two year period, the bills languished because of seemingly irreconcilable differences, none of which involved the waiver of sovereign immunity. Then, only months after the Supreme Court’s ruling in \textit{United States Department of Energy v. Ohio},\textsuperscript{119} which narrowly construed RCRA’s waiver of sovereign immunity, Congress passed the Federal Facility Compliance Act of 1992 (FFCA).\textsuperscript{120}

The FFCA directly addressed the Supreme Court’s holdings about the citizens’ suits and waiver of sovereign immunity provisions.\textsuperscript{121} With regard to citizen suits, the Act amended the definition of person to “include each department, agency and instrumentality of the United States.”\textsuperscript{122} For the waiver section itself, the Act inserted the following two sentences:

The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to

\textit{sub nom.} McClellan Ecological Seepage Situation v. Cheney, 763 F. Supp. 431 (E.D. Cal. 1989); Meyer v. United States Coast Guard, 644 F. Supp. 221, 221 (E.D.N.C. 1986) (holding that RCRA did not waive Coast Guard’s immunity to state imposed fines); see also Percival, \textit{supra} note 111, at 240-44 (discussing the waiver of sovereign immunity in RCRA).

121. The FFCA only applies to RCRA. See 42 U.S.C. § 6961. Because Congress has yet to amend the Clean Water Act, both states and citizen groups remain subject to the holdings of United States Dep’t of Energy v. Ohio, 112 S. Ct. at 1627, and thus, there are still no effective sanctions for a federal agency’s noncompliance with the Clean Water Act.
122. 42 U.S.C. 6903(15).
any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).\textsuperscript{123}

In addition to amending the citizens' suit and waiver provisions, the FFCA also provides federal facilities four areas of relief, three of which specifically help defense agencies.\textsuperscript{124} First, the Act gives DOE relief from immediate enforcement of RCRA's provisions for treatment, storage, and disposal of mixed radioactive and hazardous materials by establishing a process that allows DOE an additional three years to comply or enter into a compliance order.\textsuperscript{125} Second, for the Navy, the Act exempts from RCRA's storage, inspection, labeling and recordkeeping requirements "hazardous waste generated on a public vessel," defined as "a vessel owned or bareboat chartered and operated by the United States."\textsuperscript{126} Third, the Act directed the Administrator of EPA to propose by May 1993 "regulations identifying when military munitions become hazardous waste" and to promulgate such regulation "[n]ot later than 24 months after such date."\textsuperscript{127}

2. The Comprehensive Environmental Response, Compensation and Liability Act of 1980.—In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA),\textsuperscript{128} which amended CERCLA.\textsuperscript{129} Among its many provisions, SARA included specific directions for remediating contamination at federal facilities.\textsuperscript{130} Through SARA, Congress granted EPA and state regulatory agencies

\textsuperscript{123} Id. § 6961(a).

\textsuperscript{124} Id. §§ 6924(4), 6939(c)-(d); see infra text accompanying notes 125-126. The fourth, providing that the discharges of pollutants from federally owned treatment works be treated the same under RCRA as the discharge of publicly owned, i.e., municipal treatment works, benefits DOE and DOD, but applies to all federal agencies. 42 U.S.C. § 6939(e).

\textsuperscript{125} 42 U.S.C. § 6939(c).

\textsuperscript{126} Id. § 6939(d).

\textsuperscript{127} Id. § 6924(4). EPA has not yet issued this rule. The University of Maryland Environmental Law Clinic filed a deadlines suit to compel its issuance in the D.C. District Court on December 8, 1994. In late May, the District Court for the District of Columbia issued a consent decree requiring EPA to begin notice and comment on proposed regulations by October 31, 1995. Consent Decree at 2, Tides Found. v. Browner (D.D.C. May 31, 1995) (No. 1:94CV02668).


\textsuperscript{130} Id. § 9620.
the authority to impose fines and penalties on federal agencies failing to comply with the terms of CERCLA.  

More than anything else, the 1986 amendments establish a process for how environmental restoration activities should proceed at federal sites. Although the 1980 Superfund law applied to federal facilities, the methodology set out for how EPA should proceed against federal agencies was inadequate. Moreover, the states' role in the original legislation was poorly conceived. The amendments clarify the respective jurisdictions of EPA and the states at federal sites. 

In particular, the amendments provide for the establishment of a Federal Agency Hazardous Waste Compliance Docket, the assessment, evaluation and inclusion of federal facilities on the Docket, and the time frame for the commencement of remedial investigation and action at sites on the National Priority List (NPL). The remedial investigation and action at sites on the NPL is now governed by an interagency—EPA and federal facility owner—agreement. The amendments also allow the President to issue orders regarding response actions at DOD and DOE facilities, including orders exempting sites from CERCLA requirements when such an order is necessary to protect national security interests.

In addressing the proper role of the states, SARA divides states' jurisdiction between NPL and non-NPL federal facilities, giving states lead responsibility at federal facilities that were not on the NPL. SARA also provided that the EPA Administrator shall allow "state and local officials the opportunity to participate in the planning and selection of the remedial action." Finally, the amendments attempted to increase the enforcement authority of states and others by referencing RCRA in the waiver of sovereign immunity; this waiver, while less

131. Id. But see Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992) (holding that Maine could not seek monetary civil penalties from the Navy under CERCLA).
133. 42 U.S.C. § 9620(a) (4), (f).
134. Id. § 9620(c).
135. Id. § 9620(d).
136. Id. § 9620(e) (2), (3).
137. Id. § 9620(e) (2), (4). The amendments articulated some of the particulars of such interagency agreements. Id. For example, § 9620(e) (4) provided that the EPA Administrator and federal facility owner/operator jointly select the final remedy, but also provided that the Administrator prevailed in the event of a disagreement. Id. The amendment also contained dispute resolution provisions. Id.
138. Id. § 9620(j).
139. Id. § 9620(a) (4).
140. Id. §§ 9620(f), 9621(f).
141. Id. § 9620(b).
specific than its RCRA counterpart, would allow a state to obtain monetary penalties for violations. As a practical matter, SARA's recognition of the state role in remediating contamination at federal facilities creates a system where the section 120 interagency agreements could, and have, become triparty agreements with state, EPA and federal agency signatories.

II. EXPERIENCE

DOD has estimated that remediation of all its contaminated sites will cost over $24.5 billion for fiscal years 1991-2012. For fiscal year 1995, Congress authorized DOD to spend roughly two billion dollars on environmental compliance other than clean up activities. For remediation work, Congress authorized $2.3 billion, of which $1.4 billion was for active bases, and the balance for bases being closed under the base closure laws.

142. The language of § 9620(a) closely follows RCRA's waiver of sovereign immunity in 42 U.S.C. § 6961. See supra note 119 and accompanying text.

143. 42 U.S.C. § 9620(a). But see Maine v. Department of Navy, 973 F.2d 1007 (1st Cir. 1992) (holding that in light of United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992), Maine could not seek penalties against the Navy under RCRA or CERCLA). In Maine v. Department of Navy, the First Circuit reasoned that, despite the different language in the two statutes, the CERCLA language was not a clear enough waiver of sovereign immunity to pass the Supreme Court's test. Maine v. Department of Navy, 973 F.2d at 1010-11. Moreover, the court found CERCLA's legislative history ambiguous. Id. at 1011. The court found the express linkage in the CERCLA waiver, 42 U.S.C. § 9620(a), to the flawed RCRA waiver, 42 U.S.C. § 6961, compelling. Maine v. Department of Navy, 973 F.2d at 1011. The court observed that because the statutory language and the legislative history of the SARA waiver of sovereign immunity referred to both RCRA and CERCLA and because the Supreme Court had found the RCRA waiver inadequate, the Superfund waiver must also be inadequate. Id. The package of Superfund amendments that passed both the House Committee on Energy and Commerce and the House Committee on Public Works and Transportation in 1994 would have amended the CERCLA waiver to track the new FFCA language. See H.R. 4916, 103d Cong., 2d Sess. (1994).

144. 42 U.S.C. § 9620(e), (f).

145. NATIONAL SECURITY AND INTERNATIONAL AFFAIRS DIVISION, GENERAL ACCOUNTING OFFICE, B213706, HAZARDOUS MATERIALS: UPGRADE OF UNDERGROUND STORAGE TANKS CAN BE IMPROVED TO AVOID COSTLY CLEANUPs 5 (1992). Outside experts have suggested that the costs could be double that estimate. Cf. supra note 5.


147. Id.

DOE has recently released its first systematic assessment of the costs of remediating its nuclear weapons facilities, which, while far fewer in number than DOD sites, are far more complicated to clean largely because of their extensive radioactive contamination. The DOE base case was $230 billion and the likely case $340 billion, both of which include all waste management costs as well as the costs of decontaminating and decommissioning the facilities, but each of these estimates assume less than complete remediation. DOE will spend roughly $5 billion on its defense environmental programs in fiscal year 1995, $1.5 billion of which will be spent on remediation and $2.8 billion on compliance.

A. The Federal Facilities Compliance Act and Section 120 Enforcement Statistics for the Department of Defense and the Department of Energy

1. Total Fines Are a Tiny Fraction of the Federal Agencies' Compliance Budgets.—In 1994, the second year that regulators operated with the additional powers given to them under the Federal Facilities Compliance Act (FFCA), EPA and the states proposed fines for military facilities under the FFCA of over $5.7 million. Because this figure represents the initial assessment of penalties in a process that usually results in the targeted facility paying a lesser fine, EPA and the states are unlikely to collect more than four million dollars. Since the total amount of spending for DOD and DOE on environmental compliance was over $4 billion, such fines are not likely, ultimately, to represent more than 0.10% of the two agencies' total compliance spending. However, because most of the fines paid came from a few large settlements, some military bases would dispute the de minimis

149. See BASELINE ENVIRONMENTAL MANAGEMENT REPORT, supra note 12.
150. Id. at ix-x. Unofficial estimates, done for an internal executive branch study of the costs of federal facilities clean up, put the figure as high as $1.6 trillion. MARK REISCH, CONGRESSIONAL RESEARCH SERVICE, SUPERFUND REAUTHORIZATION ISSUES IN THE 104TH CONGRESS 5 (1995).
152. Memorandum from Jim Edward, Director, Planning, Prevention, and Compliance Staff, FFEO, to Pete Rosenberg, Constituent Outreach & Communications Division, attach. 1 (Nov. 17, 1994) [hereinafter EPA 1994 Data] (information request for OECA's FY 1994 End of Year Press Conference).
153. Of the 24 penalties settled under 42 U.S.C. § 6928 in 1994, only nine were for 100% of the proposed amount. Taken together, EPA and the states collected just under 68% of the total amount assessed originally—$1,541,475 of $2,266,398. If one removes the $1,142,100 settlement of the Army's Fort Hood fine, the overall recovery percentage drops to 42.5%. See id.
154. See supra notes 145, 151 and accompanying text.
nature of the overall penalty picture. Nonetheless, the facts to date indicate that the concern for the federal fisc during the course of the debate over the FFCA was in fact, overwrought.

The CERCLA penalties assessed against the defense agencies are even more trivial when one compares the amount of penalties with the amount these agencies have budgeted for restoration. On a fiscal year 1995 budget of almost $4 billion for environmental restoration activities, Congress was asked to authorize and appropriate funds to pay three fines, one against the Army for $500,000 and two against DOE, each for $50,000. During the 1994 calendar year, EPA also assessed $1.27 million in stipulated penalties under ten separate Inter-agency Agreements.

These sums fail to account for Supplemental Environmental Projects (SEPs), assessments that the defense agencies agree to pay in addition to, or in lieu of, a fine. SEPs are an EPA creation, sought by that Agency under certain circumstances, always as a part of a broader settlement of environmental noncompliance. Typically, SEP activities take the form of environmentally beneficial projects that neither EPA nor the violator would otherwise fund, such as pollution prevention activities, waste management initiatives, and environmental education projects. EPA policy describes the types of projects that may qualify as SEPs and specifies that there be a "nexus" between the violation and the SEP. For example, in 1994, DOE agreed to pay Colorado and EPA a total of $2.8 million for violations of its inter-agency agreement at the Rocky Flats Site; of this sum, $1.63 million

155. One settlement reached in 1994 at the Army's Fort Hood, Texas was over one million dollars. Only two others were even in the six figure range: a $100,000 fine at the El Centro Naval Air Station in California, and a $138,922 payment at the Iowa Ammunition Plant. EPA 1994 Data, supra note 152, attach. 1.

156. H.R. Rep. No. 111, supra note 103, at 20 (reprinting letter from the Congressional Budget Office to the House Committee on Energy and Commerce suggesting that clarifying the waiver "may encourage states to seek and impose fines and penalties against the federal government").

157. See supra notes 147, 151.


159. See EPA 1994 Data, supra note 152, attach. 1.


161. See id. at 1 ("To further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or . . . [SEPs], may be included in the settlement.").

162. Id. at 5.

163. Rocky Flats InterAgency Agreement, supra note 87.
is for SEPs. Together, DOE and DOD agreed to pay $2.15 million for EPA-approved SEPs in fiscal year 1994. Thus, the grand total for all types of environmentally-based fines and payments in lieu of fines in fiscal year 1994 for both defense agencies was likely to total less than ten million dollars.

2. **Largest Fine Brings Congressional Scrutiny.**—It is not the trivial penalties assessed against federal agencies, but rather the occasional large assessments that bring federal facilities' fines to the attention of Congress. The Rocky Flats settlement was the largest sum that either DOE or DOD agreed to pay in 1994 for a Superfund agreement violation. The largest proposed fines under the FFCA resulted from three Notices of Violation issued to the Army. At Fort Hood, EPA and Texas released, to much press fanfare, a Notice of Violation on October 1, 1993 seeking $1.3 million in penalties, of which the Army agreed to pay over $1 million. EPA and Alaska also issued two Notices of Violation to the Army's Forts Richardson and Wainwright, for $1.2 million and $800,000 respectively. The agencies have not yet settled these cases.

During the spring of 1994, the House Armed Services Committee Subcommittee on Military Installations and Facilities held two hearings on the DOD's proposed fiscal year 1995 budget. During the hearings, members received testimony and discussed with federal and state officials the nature of DOD's environmental compliance responsibilities. Because the Fort Hood Notice of Violation raised the hackles of several members of Congress, these hearings provided a forum to address the issue of federal facilities paying fines for non-compliance with environmental laws.

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165. See *EPA 1994 Data, supra* note 152, attach. 1.
166. See *supra* notes 152-162 and accompanying text.
168. EPA 1994 Data, *supra* note 152, attach. 1. That the Army settled this case approximately one year later for such a large fraction of the initial amount sought by EPA and Texas is remarkable, particularly in light of the congressional attention paid to this particular fine. See *infra* notes 171-177 and accompanying text. The Army's willingness to pay can be seen as a vindication of the validity and gravity of the underlying violations.
At the first hearing, Congressman Chet Edwards, the representative from the district in which Fort Hood is located, characterized the FFCA as a "little-known law," and criticized EPA's authority to inspect DOD facilities and then take enforcement action including seeking fines.\textsuperscript{171} The Congressman stated: "I don't think [this] is a productive way to run our environmental business. I don't think there are more than ten members of Congress that knew what the implications were of that bill that we passed."\textsuperscript{172}

Congressman Edwards' comments focused on the relationship between EPA and the Army, as sister agencies within the same executive branch, and on the propriety of EPA's emphasis on enforcement over cooperation.\textsuperscript{173} Along with the subcommittee chair, Congressman Dave McCurdy, Edwards also questioned whether the violations charged at Fort Hood and other defense facilities were meaningful and substantive in nature, or simply technical.\textsuperscript{174} Congressman Edwards' latter line of inquiry may have had its genesis in the nature of the Army activities that resulted in the bulk of the problems at Fort Hood. They were activities—like setting and extinguishing fires—in which the Army has long engaged and that are critical to maintaining troop readiness. For example, EPA alleged that Fort Hood had stored waste oil contaminated with trace amounts of solvents without a permit at its fire training pit.\textsuperscript{175} EPA further alleged that some of this oil had spilled or leaked onto the ground and the Army had burned this oil without a permit.\textsuperscript{176}

3. EPA's Supplemental Environmental Projects Policy Raises Questions About Priorities.—Regardless of whether it is applied to private or fed-

\textsuperscript{171} Id. at 37-38.
\textsuperscript{172} Id.
\textsuperscript{173} Id. The Congressman described the Federal Facilities Compliance Act as requiring that there be "a purely adversarial relationship" between EPA and DOD. Id. at 37. For other examples of congressional scrutiny of EPA enforcement actions on military bases, see id. at 756-58, 856-62.
\textsuperscript{174} Id. at 712. The EPA responded to Congressman Edwards's queries in a May 13, 1994 letter which described the specific violations levied against Fort Hood. Id. at 714-20 (reprinting letter from Steven A. Herman, EPA Assistant Administrator for Enforcement, to Congressman Chet Edwards).
\textsuperscript{175} Id. at 714-15.
\textsuperscript{176} Id. The EPA contended that Army soldiers were exposed to toxic fumes from burning the hazardous oil. Id. at 714. In addition, the water and other liquids used to extinguish the fire mixed with the oil and overflowed at least once into surrounding soil and a stream used for swimming. Id. at 714-15. The overflow also may have contaminated the groundwater. Id. at 715. In a joint investigation, EPA and the Texas Natural Resources Commission discovered that several hundred gallons of hazardous waste had been spilled. Id.
eral facilities that violate environmental laws, EPA's SEP policy functions primarily as an expenditures-in-lieu-of-penalties mechanism. To the extent that the policy results in regulated entities funding pollution prevention programs that they would not otherwise pursue, the policy undoubtedly has a beneficial environmental impact. Moreover, the types of programs that receive SEP funds support are usually those that are most likely to reduce future dependence on toxic substances, and thus are most likely to decrease future environmental compliance and restoration costs.

Yet, in the federal facilities' arena, the use of public money to fund even worthy programs that Congress did not authorize, raises two issues. First, it raises the issue of the lack of congressional authorization. Second, the funneling of money away from environmental programs that Congress did authorize inherently raises the issue of the nation's environmental spending priorities. With regard to the lack of authorization, agencies have resolved this concern, at least in the CERCLA arena, by seeking specific line item authorizations for fines paid to the Superfund itself in the following year's budget. To date, RCRA fines appear to be paid from generally authorized compliance funds, perhaps on the theory that, while Congress did not expressly authorize the payment of such penalties, in authorizing an agency to comply with environmental regulations, Congress impliedly authorized the payment of all expenses associated with being regulated, including the payment of penalties. Whether this practice is consistent with regulations curtailing the discretionary use of funds, such as Executive Order 12,088 and the Anti-Deficiency Act is

177. See National Defense Authorization Act-Fiscal Year 1995, supra note 146, § 324 (authorizing the Secretary of Defense to pay $500,000 into the Superfund for payment of civil penalties assessed under CERCLA against the West Virginia ordnance works).  
178. Exec. Order No. 12,088, supra note 85. Executive Order 12,088 states in pertinent part: "The head of each Executive agency shall ensure that funds appropriated and apportioned for the prevention, control and abatement of environmental pollution are not used for any other purpose unless permitted by law and specifically approved by the Office of Management and Budget." Id. § 1-501.  
All appropriations made for contingent expenses or other general purposes . . . [shall be] apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment . . . and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment hav-
not a question that has been presented directly either to Congress or to a court.

Moreover, taking funds away from compliance to pay environmental penalties distorts congressional intent with regard to environmental spending. This distortion is particularly acute when agencies which may be subject to environmental penalties claim not to have sufficient funds available to meet all of their compliance obligations.¹⁸⁰

B. Following the Money: Sources, Authorization and Termini

The basic problem with trying to use fines against federal facilities as an incentive to encourage compliance with environmental obligations is that the money used to pay the fine ultimately comes from the budget of the office within the defense agency that is (1) responsible for environmental compliance, (2) most likely to advocate environmental compliance, and (3) least likely to be able to shift funds within its own budget so that the payment of the fine will not adversely affect other environmental compliance activities. Moreover, because of political changes within the executive branch, the agency office that must find the funds within its budget to pay environmental fines may no longer have on staff the personnel who made the environmental commitments that the agency ultimately is unable to meet.¹⁸¹ As a result, the office whose budget is adversely affected by the payment of environmental fines may be the very part of the agency that environmental regulatory agencies most want to protect and nurture.

For example, in 1994, DOE, EPA, and Colorado reached an agreement (the tolling agreement)¹⁸² in settlement of violations of their interagency agreement governing environmental restoration under CERCLA and RCRA at the Rocky Flats Environmental Technol-

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¹⁸⁰ Id.
¹⁸¹ See Tuck Interview, supra note 92, at 2-4 (discussing the environmental compliance agreements that DOE officials under the Bush administration entered into, agreements which the officials knew they could not fulfill).
¹⁸² Tolling Agreement, supra note 164.
ogy Site. The violations at issue in the tolling agreement resulted entirely from DOE's repeated inability to meet the enforceable interagency agreement schedule signed after two years of negotiations by the Bush administration early in 1991. In the tolling agreement, DOE agreed to pay a total of $2.8 million to EPA and Colorado, which was apportioned between penalties and Supplemental Environmental Projects. The parties also agreed that payment of the funds pursuant to the agreement was not to "affect implementation of required environmental work at Rocky Flats." Despite this agreement, the payment of the fines did diminish the money available for remediation at Rocky Flats in the following manner. To pay the first installation of the fines and SEPs required by the tolling agreement, Rocky Flats stopped field work at four hazardous waste sites being remediated pursuant to the interagency agreement. Since this transfer was insufficient, Rocky Flats scrambled to find "cost savings" to pay the rest. If cost savings were insufficient, then DOE-Rocky Flats determined that it would request the remainder of the money to pay the fine as part of DOE's 1996 budget request to Congress.

Because of the manner in which Congress advances money to DOE, the Department had little choice about where it could get money to pay the Rocky Flats settlement. The contamination of Rocky Flats may have initially been caused by production of weapons, an operation now conducted by DOE's Office of Defense Programs, but Congress specifies the amount of money that the Office of Defense Programs can spend on each of its activities; the line authorizations for defense missions do not allow for environmental spending. Furthermore, Congress funds environmental restoration through a separate authorization to the Office of Environmental Management. To transfer money between the two accounts, DOE must seek a "reprogramming" from Congress. Reprogramming is a long process that requires both a rigorous internal evaluation and a journey to the Hill for authorization to reprogram. At the end of the

183. Id. at 1; Rocky Flats InterAgency Agreement, supra note 87.
184. Tolling Agreement, supra note 164.
185. Id. para. h.
186. Id.
189. Id. § 3102.
190. Id. § 3121.
191. Id.
process, any of the four congressional committees involved can deny a request for reprogramming.

Congress authorizes and appropriates funds for environmental restoration as a single block grant to the agencies; for neither DOE nor DOD does Congress explicitly split the funds between the defense services, DOE field offices, or either agency's individual sites. However, the backup documentation that the President submits with each budget does break down the aggregate sum into amounts for each activity. After agency headquarters releases the money to the field office or service, it becomes exceedingly difficult to move funds between them. So, if an unanticipated need for money arises at one base or field office, for example, as a result of the imposition of a fine, then headquarters will force that base or field office to find the money necessary to respond to its need. For the Department of Defense, once environmental remediation funds have been allocated to the services, any chance of redistribution between services vanishes.

Moreover, the practicalities of budget building and the rough balance of power between the executive and legislative branches mean that, even if it does not appear that a particular program is taking money to pay a fine from other activities, the agency as a whole may be. Consider again the numbers involved. Congress received a request from the President for $1.4 billion for DOE environmental restoration. According to backup documents prepared by the administration, $161 million of that was earmarked for environmental restoration at Rocky Flats. The backup documentation includes less than three pages explaining the work to be done at Rocky Flats.

As just one item in a defense budget of over $260 billion, it is unlikely that any congressional member or aide will determine whether that $161 million has enough cushion to cover the $2.8 million fine imposed on Rocky Flats in the tolling agreement without

192. The four committees involved are the House National Security Committee, the Senate Armed Services Committees, and the House and Senate Appropriations Committees.
195. See Federal Facilities Environmental Restoration Dialogue Committee, supra note 5, at vii-viii (making recommendations encouraging federal agencies to consult each other on the funding for environmental regulation and to set priorities in the event of funding shortfalls).
196. 5 DEP'T OF ENERGY, supra note 194, at 198.
197. Id. at 231-33.
hurting the program described in the backup documents,\textsuperscript{198} (2) whether the cuts proposed to cover the fine and SEP payment are the least intrusive to the program,\textsuperscript{199} or (3) whether DOE headquarters adjusted the allocations of money for environmental compliance and restoration at the field offices to assist Rocky Flats in paying the fine without jeopardizing other environmental restoration requirements. While these questions are unanswered, it is clear that the money to pay the fine at Rocky Flats did not come from Defense Programs, since Defense Programs no longer conducts production activities at the site. Instead, the money to pay the fine came from Rocky Flats' environmental management account, because that is the source of the entire Rocky Flats budget.\textsuperscript{200} Because DOE had to pay the fine with money from the existing authorization for environmental restoration, Rocky Flats environmental restoration personnel had to curtail and postpone restoration activities.

In addition, there is no guarantee that any of the money paid to EPA and Colorado will be given back to benefit Rocky Flats environmental restoration. For example, the $700,000 fine assessed in the tolling agreement was split evenly between Colorado and EPA; DOE was to pay Colorado its half in 1994 and EPA its half in fiscal year 1996.\textsuperscript{201} None of this money will be used for environmental restoration at Rocky Flats.\textsuperscript{202} Of the remainder, DOE was to contract for $1,630,000 worth of work to be done on SEPs\textsuperscript{203} mutually agreed upon and beneficial to DOE, EPA and Colorado by the end of 1994.\textsuperscript{204} However, the settlement does not require that any of the money for SEPs be spent at Rocky Flats.\textsuperscript{205}

\textsuperscript{198} See supra note 164 and accompanying text.
\textsuperscript{199} See supra note 187 and accompanying text.
\textsuperscript{201} Tolling Agreement, supra note 164, paras. a, b.
\textsuperscript{202} The tolling agreement provides that the $350,000 for EPA would go into the Superfund, the fund that EPA uses for restoration of sites where there is no potentially responsible party to pick up the expenses. \textit{Id.} para. a. The Colorado Department of Health's portion would go into the state's general fund, \textit{id.} para. b., notwithstanding the provision of the Federal Facilities Compliance Act that fines received thereunder are to be spent for environmental enforcement, because Colorado law, COLO. REV. STAT. § 25-15-212(1) (1989), does not allow for such a procedure and thus is exempted by the terms of the FFCA. FFCA § 6001(c).
\textsuperscript{203} See supra notes 161-162 and accompanying text.
\textsuperscript{204} Tolling Agreement, supra note 164, para c.
\textsuperscript{205} The agreement does, however, state that the money be used to "find SEPs which relate to, and are at or in the vicinity of Rocky Flats." \textit{Id.} This provision satisfies EPA's SEP policy which requires that SEPs have a nexus to the original violation. \textit{See SEP Policy, supra note 160, at 5.}
In light of the recent testimony by DOE's Assistant Secretary for Environmental Management about the enormous problems in his program because of insufficient funds, it is not surprising that some members of Congress question the payment of any fines or the funding of SEPs because such payments channel money away from the enormous task of remediating DOE's weapons complex. Moreover, Colorado's agreement to take money away from cleanup at Rocky Flats and move that money to lower priority environmental activities undercuts states' repeated assertions that they enforce against federal agencies not merely to line their coffers but to achieve environmental ends. If state officials truly believe that federal facilities pose real risks to their citizens and that federal tax dollars going for site remediation is critical, then it would be against the state's interest to enter into an agreement that diverts funds from federal facility cleanup to other activities that, while perhaps environmentally beneficial, have not been previously funded because they are of lesser priority.

C. Unintended Consequences: When Federal and State Enforcement Agendas Collide

The 1986 amendments to CERCLA directly acknowledged that the states' potentially overlapping authority under RCRA's corrective action provisions set up both positive and negative possibilities. The positive is the possibility for collaboration between regulatory agencies. The negative is the potential of a battle for advantage between regulatory agencies with differing agendas.

The efforts to force two federal facilities in Colorado to comply with environmental regulations offer examples of both the advantages and the problems that can occur as a result of states' overlapping authority under RCRA's corrective action provisions. The experience at Rocky Flats demonstrates the advantage of such overlapping activity. At the Site, EPA and Colorado worked together closely in trying to force DOE to come into compliance with RCRA and to begin serious remediation efforts. While there has been litigation regarding Rocky Flats, the regulators have never been on opposite sides. In addition, while the agencies have not always agreed completely about tactics, starting in 1986, they have signed a series of combination CERCLA

206. House Grumbly Statement, supra note 180, at 143.
207. See supra note 107 and accompanying text.
section 120\textsuperscript{209} and RCRA\textsuperscript{210} corrective action agreements governing restoration at the site.\textsuperscript{211}

In contrast, at the Army’s Rocky Mountain Arsenal, EPA and Colorado, rather than joining to challenge the Army’s noncompliance at the site, spent over a decade fighting each other for regulatory advantage. Since 1983, the parties, in a prolonged series of court battles, have argued over the legal question: “Does CERCLA trump RCRA?”\textsuperscript{212} Most recently, the state has prevailed; federal courts have held that Colorado may impose RCRA corrective action requirements that are more stringent than restoration measures embodied in an EPA-Army consent decree reached under the CERCLA section 120\textsuperscript{213} process.\textsuperscript{214}

A comparison of the field results—in terms of remediation—at the Arsenal and Rocky Flats show that the Arsenal is further along. In fact, the parties at the Arsenal just signed a conceptual agreement prescribing an overall remedy that settles the various disputes.\textsuperscript{215} However, this comparison is somewhat misleading both because the Army began its efforts at the Arsenal first and because it did not have to deal with some of the complexities that DOE faces at Rocky Flats, such as an active work force in the thousands, ongoing waste generation, treatment and storage, and significant quantities of hazardous materials in on-site buildings. Additionally, because the Army only has to address ground water and soil contamination,\textsuperscript{216} its job is logistically easier than the clean up job at Rocky Flats where the bulk of radioactive materials contamination are in the buildings.\textsuperscript{217}

\textsuperscript{209} 42 U.S.C. § 9620.
\textsuperscript{210} 42 U.S.C. § 6961.
\textsuperscript{211} The three parties signed their first agreement in 1986. FBI Affidavit, \textit{supra} note 36, attach. 3, at 44. The second agreement was signed in 1991. \textit{See supra} note 163 and accompanying text.
\textsuperscript{213} 42 U.S.C. § 9620.
\textsuperscript{215} \textit{See} Conceptual Agreement Between the U.S. Army, Shell Oil Co., the State of Colorado, EPA, and the U.S. Fish and Wildlife Service for the Cleanup of the Rocky Mountain Arsenal (June 13, 1995) (on file with author); State of Colorado News Release Pertaining to Clean Up of Rocky Mountain Arsenal (June 13, 1995) (on file with author).
\textsuperscript{216} \textit{See} Peters et al., \textit{supra} note 212, at 10,419-20 (discussing the nature of the contamination at the Arsenal).
\textsuperscript{217} 1 U.S. DEP’T OF ENERGY, PLUTONIUM WORKING GROUP REPORT 25 (1994).
III. LESSONS LEARNED

A. Fines Do Not Necessarily Serve as an Incentive for Better Compliance Behavior

At DOD and DOE federal facilities, one confronts a situation where those responsible for remediation and compliance are not necessarily those responsible for the underlying violations that have resulted in contamination that now needs to be remediated. In addition, the monetary sanctions imposed for noncompliance and failure to meet remediation requirements are almost certain to come directly from funds available for compliance or remediation. Thus, those responsible for remediation and compliance bear the burden of paying a penalty for problems they often did not create. This is particularly true when the violation is of an agreement negotiated by another. Even if the state imposing the fine were to specify, or Congress were to direct, that the funds to pay a penalty come from an alternative source, the flexibility inherent in the budget building process and the relative lack of detail in agency budgets makes it difficult to assure that the payment of sanctions will not adversely affect a program's budgetary requirements. This situation makes it unlikely that fines and penalties will create an effective incentive for federal facility compliance.

B. The Enforcement Agencies Having a Formal, Public Process to Use Against Federal Facilities Is Critical to the Agencies' Success

While the amounts of the fines actually assessed and paid to date under RCRA and CERCLA may be small, one EPA official charged with enforcement against federal facilities suggests that there is a more important, if unquantifiable, benefit of the RCRA and CERCLA interagency agreement process. The benefit is that the existence of a formal, public process for regulatory agencies to notify a federal facility of an environmental violation, which could result in monetary sanctions, gives those agencies a tool far more effective than mere jawboning, which is the only enforcement tool currently available under the Clean Water Act as a result of United States Department of Energy v. Ohio. The effectiveness of the RCRA and CERCLA inter-

218. See supra Part II.B.
219. See supra notes 185-197 and accompanying text.
221. 112 S. Ct. 1627 (1992). In this case, the Supreme Court held that "Congress has not waived the National Government's sovereign immunity from liability for civil fines imposed by a State for past violations of the CWA." Id. at 1629. Since the waiver in § 118 of
agency agreement process lies in its formal requirements for notice, response and resolution. This process, in and of itself, demands more attention from the target facility than any informal contact or exhortatory letter could. Moreover, because the process is public, it leaves the target federal facility far more open to public pressure from neighbors and activists—who may use the media—and can even gain the attention of a local official or congressional member. Since most federal officials do not want bad press and do not want to find themselves the target of a congressional inquiry, the public nature of the process of informing a federal facility of a violation gives regulatory agencies an effective enforcement tool.

The threat of a fine, or even the actual imposition of a fine, is not as effective in achieving compliance as is the public exposure of non-compliance and the requirement to commit in writing the reasons for noncompliance. EPA personnel have publicly acknowledged that it is public exposure along with the imposition of a fine that provides motivation to federal violators. "[E]nforcement action[s] and penalt[ies] are a deterrent to noncompliance. They are an incentive for federal agencies to comply with the laws of the land. That incentive is not getting caught, not being exposed to the public and one's superiors as a violator, and not being fined and reprimanded."

The EPA advisory committee's experience with federal facilities environmental restoration illuminates the importance of establishing formal, public processes to respond to federal facilities environmental requirements. In early 1991, the Assistant Administrator for Enforcement at EPA brought together a group of individuals from DOD, DOE, states, tribes and environmental organizations, to discuss the setting of national priorities for clean up at federal facilities. At the time, prior to the passage of the FFCA, the Bush administration had taken the position that agencies had to prioritize their environmental

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the Clean Air Act, 42 U.S.C. § 7418(a), is identical to that in the Clean Water Act, 33 U.S.C. § 1923(a), the Court's decision in United States Department of Energy v. Ohio would also probably preclude states from obtaining fines and penalties from federal facilities that violate the Clean Air Act.


223. See CERCLA, 42 U.S.C. § 9620(c)-(e).

224. Hearings, supra note 103, at 736 (reprinting statement of Steven A. Herman, Assistant Administrator, EPA, to the American Defense Preparedness Association's 20th Environmental Symposium and Exhibit on "Department of Defense Environmental Security—Strategies for the 21st Century").


restoration obligations because there was not enough funding to do all of the restoration at once.\textsuperscript{227} Eventually, EPA turned this informal discussion group into the Federal Facilities Environmental Restoration Dialogue Committee, a formal federal advisory committee chartered to address environmental restoration at federal facilities.\textsuperscript{228} In 1993, the Committee issued a report that rejected the notion of establishing interagency and intra-agency prioritization models.\textsuperscript{229} Instead, the Committee made three recommendations designed to create an open public process and dialogue between federal agencies and other concerned stakeholders.\textsuperscript{230} The three recommendations focused on (1) the sharing of federal facility environmental restoration information, (2) the improvement of stakeholder involvement in environmental restoration through the use of site-specific advisory boards, and (3) the setting of priorities in the event of funding shortfalls through the creation of a "fair share" plan for allocating such shortfalls. These recommendations were intended to promote trust and collaboration among all stakeholders in the environmental restoration decision-making process.\textsuperscript{231}

C. The Importance of the Attitude and Message of Agency Leadership

It appears that the extent to which a federal agency attempts to comply with environmental requirements is as much dependent on the agendas of the key policy-makers within the agencies as it is on any legal obligations imposed on the agency. Thus, while the FFCA may have influenced defense agencies' attitudes towards meaningful state enforcement of RCRA and CERCLA, the nearly simultaneous election of President Clinton, and the resulting change in the federal executive branch's attitude may have influenced the relationship between the defense agencies and their state regulators more than did the FFCA.

The attitude of Reagan and Bush administration toward environmental regulations demonstrates that policies do matter. For example, throughout the congressional battle over the FFCA, Reagan and Bush administration officials objected to meaningful, enforceable, ex-

\textsuperscript{227} Federal Facilities Environmental Restoration Dialogue Committee, supra note 5, at 75-76. As a result, the Committee developed a Defense Prioritization Model for DOD and another model for DOE, albeit one that had been highly criticized by the states and others.
\textsuperscript{228} Id. at v.
\textsuperscript{229} Id. at v, 76.
\textsuperscript{230} Id. at v.
\textsuperscript{231} Id. at v-viii.
ternal regulation of environmental requirements. The message of those who opposed the Act was not simply that state enforcement would undeservedly enrich state coffers, but that state enforcement would unduly interfere with federal regulatory determinations. The Reagan and Bush administrations also spent years fighting Colorado's attempt to assert RCRA regulatory control at the Rocky Mountain Arsenal, an issue which was entirely separate from the question of Colorado's authority to assess fines and penalties for RCRA violations at an Army Superfund site.

The executive branch's attitude toward environmental regulation noticeably changed with the election of President Clinton. For example, in 1993, the Secretary of Energy announced an initiative that actually would have required the Department to submit to the safety regulations of the Occupational Safety and Health Administration (OSHA), even though the Atomic Energy Act allows DOE to self-regulate for health and safety protection. In demonstrating a willingness to go beyond the requirements of existing law, this policy suggests that the Clinton administration's commitment to external regulation in the health, safety, and environmental arenas is driven not only by minimum legal requirements, but also by an attitude that is different from that in previous administrations. Similarly, the Clinton administration's proposed Superfund reform bill would have given states direct and extensive regulatory authority in choosing clean up standards at NPL sites. This proposal represented a complete reversal of the position that the previous administrations had championed in the Arsenal litigation.

The Clinton administration also has a very different attitude toward the signing of compliance agreements than did the Bush admin-

233. Id. at 1308-1313 (reprinting the dissenting views of Rep. Norman Leno).
234. See supra notes 212-216 and accompanying text.
235. See Press Release, Secretary O'Leary Announces Safety Initiative, Office of the Press Secretary, Department of Energy (May 5, 1993).
236. House Bill 4916, as passed by the House Energy and Commerce Committee and Public Works and Transportation Committee was based on an administration proposal. One section that emerged intact after both committees' deliberations was § 207, State Role at Federal Facilities. This section would have given states the ability to apply to the EPA Administrator to

exercise the authorities vested in the Administrator under [section 120] at any or all facilities owned or operated by any department, agency or instrumentality of the United States ... including the authority—

(A) to publish a timetable and deadlines for completion of any remedial investigation and feasibility study;

(B) to review and approve all documents prepared in connection with any such investigation and study;
istration. For example, John Tuck, the Bush administration's Under Secretary of Energy, cynically acknowledged that DOE signed environmental compliance agreements even when they knew did not have the money to comply, because they needed the agreements to restart weapons production. In contrast, President Clinton's Assistant Secretary for Environmental Management has repeatedly acknowledged that, while he is committed to complying with legal obligations at the defense complex sites, he fears that the money necessary to ensure such compliance will not be available within the next five years. As a result of this forthcoming attitude, even if the Assistant Secretary's ultimate record of compliance is no better than that of the Bush administration, state officials may perceive him as being honest about the problems that his agency confronts. Such a perception will lend a more positive tenor to the ongoing enforcement discussions and compliance negotiations.

Because the relationship between states and defense agencies requires constant negotiations over the schedule, standards, and methodology of compliance and remediation, it is necessary that states and defense agencies have mutual trust and respect in order to minimize friction during negotiations and to prevent the breakdown of the cooperation that leads to enforcement. No act of Congress can legislate trust and respect. Thus, the personalities and attitudes of the

(C) to review and select remedies . . . ; and
(D) to enter into agreements with departments, agencies, and instrumentalities of the United States . . . and to enter into consent decrees with other potentially responsible parties in accordance [with this Act] . . . .

H.R. 4916, 103d Cong., 2d Sess. § 207 (1994).

237. Tuck Interview, supra note 92, at 2.
238. House Grumbly Statement, supra note 180, at 144. Ironically, it appears that both defense agencies' problems in this arena are getting worse. New administration budget proposals suggest additional deep cuts in environmental management at the same time that the administration and Congress are proposing increases in defense spending. See Mark Crawford, DOE's Defense Program Budget to Rise, ENERGY DAILY, Dec. 22, 1994, at 1; David E. Rosenbaum, Senate Approves Proposal to Balance Budget by 2002, N.Y. TIMES, May 26, 1995 (discussing Senate and Clinton administration agreement on a $25 billion increase in defense spending over a seven-year period).

239. For example, DOE has cited the 1994 renegotiated Tri-Party Agreement (TPA) for DOE's Hanford Reservation as an example of how the Department, in including stakeholders in the process, has improved the compliance and trust situation at that site. See Statement of Thomas P. Grumbly, Assistant Secretary for Environmental Management, United States Department of Energy, to Subcommittee on Energy and Water Development, House Appropriations Committee 15-17 (Mar. 8, 1995) (DOE Fiscal Year 1996 Budget Request for Environmental Management Program) (on file with author). For a less positive assessment, see STEVEN M. BLUSH & THOMAS H. HEITMAN, TRAIN WRECK ALONG THE RIVER OF MONEY: AN EVALUATION OF THE HANFORD CLEANUP 1-14 to 1-39 (1995).

240. FEDERAL FACILITIES ENVIRONMENTAL RESTORATION DIALOGUE COMMITTEE, supra note 5, at 6-8.
parties form a critical part of the regulatory landscape in the quest to bring federal facilities into environmental compliance.

**Conclusion: What Next?**

Ultimately, the key to whether federal facilities meet their compliance obligations turns on whether those in power want to comply. Thus, not only must agency decision-makers and congressional members want federal facilities to comply with the law, but they also must be willing to fund that compliance. Recent signals from the Clinton administration and the 104th Congress suggest that policy-makers faced with current fiscal realities, competing legislative priorities, and the possibility of civil and criminal sanctions, may be preparing to throw in the towel and abandon the concept of federally equivalent compliance altogether.241 In testimony before Congress in March 1995, Assistant Secretary Grumbly requested a repeal of the FFCA criminal penalty provisions.242

In a letter to OMB's Principal Assistant Deputy for Energy and Environment, Tom Grumbly suggested that his organization will not be able to meet its environmental obligations with the amount of money that OMB is proposing to request for environmental purposes in the President's fiscal years 1996-2000 budget submittal.243 To solve the problem, he proposed revisiting the possibility of changing Executive Order 12,088244 and seeking numerous statutory changes designed to reduce DOE's funding requirements. Prominent among the changes would be modifications of DOE's compliance agreements with the states requiring states to renegotiate DOE's milestones and requirements annually if DOE claims it has insufficient funds to comply with the agreements.245

Implementing Mr. Grumbly's recommendations for DOE, and for similarly situated federal agencies, however, could destroy the modern concept of the federal government's environmental duty. Moreover, it would likely create a firestorm of protest from the states because of the diminishment of state power over federal action which

242. See Senate Grumbly Statement, supra note 180, at 23.
244. Exec. Order 12,088, supra note 30.
would accompany these actions. In fact, states responded to Grumbly's suggestions by condemning the administration's plans to further reduce DOE's environmental management budget, and also by arguing that state/DOE renegotiations over the past few years demonstrate that current law provides sufficient flexibility for DOE.246

The Clinton administration is also considering a proposal requesting that congressional appropriators budget for environmental restoration and compliance activities on a site-by-site basis, rather than at the national program level as they have done previously.247 This would greatly enhance the current flexibility DOE has to move money between sites because DOE would first need to obtain congressional approval to reprogram the funds.248 Restructuring appropriations on a site-by-site basis could provide DOE with a partial shield protecting it from having to reallocate money to satisfy the demands of courts or state regulators. However, such a change would also open the allocation of environmental funds to substantially more political maneuvering; one would expect large and powerful delegations to be able to ensure more money for their sites.249

As suggested here, the passage of Superfund and the FFCA have not, in and of themselves, led the defense agencies to comply with environmental requirements notwithstanding the pressure created by the formal processes of these laws. Strong countervailing forces include the influence of administrative and congressional budgetary decisions and the power of individual agency decision-makers. The proponents of the FFCA, in particular, appear to have harbored an overly simplistic understanding of how the process of shaping the budget might interfere with the enforcement incentives built into that law.

A more meaningful package of incentives to encourage compliance must take into account the factors that motivate the behavior of the DOD and DOE personnel who run the systems that must comply with environmental requirements. Just as Congress has found that a threat to withhold federal highway funds can motivate states to pass all kinds of laws, including ones completely unrelated to highways, there may be things that federal agency managers want enough to motivate

249. This is the same fear that drove EPA's advisory committee members to warn against earmarking money for sites individually. Federal Facilities Environmental Restoration Dialogue Committee, supra note 5, at 50.
their compliance with environmental regulations. However, merely changing incentives will not be enough, because for any incentive package to work, Congress must be willing to fund the activities necessary for compliance. Since the congressional committees controlling the budget for the defense agencies\textsuperscript{250} are not the same committees that pass environmental laws,\textsuperscript{251} no incentive package can equal the commitment of the entire Congress to fund the environmental strategies it adopts.

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\textsuperscript{250} These committees are the House and Senate Appropriations Committees, the House National Security Committee and the Senate Armed Services Committee.

\textsuperscript{251} The Senate Environment and Public Works Committee and House Energy and Commerce Committees have jurisdiction over RCRA and CERCLA.