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Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis

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SOVEREIGN IMMUNITY AND CITIZEN ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS: A PROPOSAL FOR A NEW SYNTHESIS

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I. INTRODUCTION

The common law doctrine of sovereign immunity is frequently used by courts to deny a right of action or remedy against the "sovereign" United States, unless such immunity is specifically waived. Judicial interpretation of waiver has fluctuated throughout the doctrine's history. The current trend favors a narrow interpretation, thereby precluding causes of action or remedies against the sovereign. Such restrictive interpretations, however, ultimately undermine the intent of some legislation by denying actions or remedies that are expressly authorized in the plain language of the statutes' waiver provisions. These interpretations have been criticized as "tortured discussion[s]"[1] that use "ingenuity to create ambiguity."[2]

This article proposes that where a cause of action is available against the sovereign through an explicit waiver, the full range of remedies provided within the statutory scheme should be available for all suits against the sovereign, regardless of whether the government or private citizens initiate action. This position is particularly

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[1] United States Dep't of Energy v. Ohio, 503 U.S. 607, 631 (1992) (White, J., concurring in part and dissenting in part).

[2] *Id.* at 633 (quoting Rothchild v. United States, 179 U.S. 463, 465 (1900)).

relevant to pollution control statutes insofar as the statutory language and legislative history of several federal environmental statutes reflect congressional intent to target the polluting activities of federal facilities, as well as private entities. To provide a framework for discussion, this article focuses primarily on case law that reads undue limitations into the citizen suit provisions of the Clean Water Act (CWA),[3] the Resource Conservation and Recovery Act (RCRA),[4] the Clean Air Act (CAA),[5] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[6] These narrow interpretations have precluded citizens from suing federal facilities for civil penalties, ignoring the explicit congressional intent to provide for such penalties.[7]

The doctrine of sovereign immunity should, however, continue to limit the causes of action available against the sovereign to those explicitly enumerated within a given statutory scheme. This limitation ensures that the congressional intent embodied in the statutory scheme is fulfilled. Implied causes of action that are "piggybacked" onto express congressional waivers can undermine statutory objectives. To uphold congressional intent, courts must not imply a waiver unless Congress has explicitly provided one.

For example, the Columbia River Gorge National Scenic Area Act[8] (Gorge Act or Act), a federal initiative aimed at protecting resources within the Columbia River Gorge in Oregon and Washington, presents a strong argument for a narrow interpretation of waiver. The District of Columbia Circuit and the Ninth Circuit Courts of Appeals have interpreted the citizen suit provision of the Gorge Act to exclude causes of action brought by landowners alleging a "taking" of their land.[9] By enacting the Gorge Act, Congress explicitly intended to protect the scenic, natural, recreational, and cultural resources within the Gorge.[10] To attain this objective, the Act's citizen suit provision prohibits takings claims against the implementing agency (the Columbia River Gorge Commission).[11]

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[3] Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993).

[4] Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

[5] Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).

[6] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

[7] *See infra* parts III.B.1, III.D.

[8] Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1994).

[9] *See infra* part IV.B.2.

[10] 16 U.S.C. § 544a(1).

[11] 16 U.S.C. § 544c.

A narrow construction of the sovereign immunity waiver in the Gorge Act's citizen suit provision avoids undermining the Act's objectives. When applied properly, the doctrine of sovereign immunity is a valuable mechanism that can secure this important and narrow construction.

Part II of this article discusses the origins of the sovereign immunity doctrine, its evolution in the American judicial system, and the varying rationales supporting its application. This section also details increased criticism of the doctrine as its application has moved progressively further from its original moorings.

Part III illustrates why this criticism is justified in the context of citizen suits seeking civil penalties from federal facilities under the CWA, RCRA, the CAA, and CERCLA. Part III argues that, once citizens have obtained standing against the federal government, injunctive relief and civil penalties should be available to citizens in order to further the goals of the statutes. This issue created a split in the circuits that was recently resolved in the controversial *United States Department of Energy v. Ohio* decision.[12] Unfortunately, through a narrow construction of waiver, the Court held that civil penalties are not available under the citizen suit provisions of the CWA and RCRA.[13] Part III also examines legislative history and policy arguments demonstrating that *Ohio* thwarted congressional intent.

Part IV analyzes how the doctrine of sovereign immunity has been appropriately applied to limit private causes of action under environmental statutes that provide other explicit means of enforcement. Allowing implied causes of action against an administrative body under such statutes is redundant and can undermine agency enforcement efforts. Instead, citizens should frame their suits within the boundaries of citizen suit provisions authorized by Congress. By recognizing only those causes of action against the sovereign that fall explicitly within a statute's provisions, citizen actions serve to enforce the specific purposes of the statute rather than to harass the agency or undermine the environmental protection goals of the legislation. Part IV first explores the foundations of this limitation on implied private causes of action and then analyzes the limitation in the context of the Gorge Act and recent judicial interpretations of its citizen suit provision. Part IV also illustrates the value of the sovereign immunity doctrine in this con-

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[12] 503 U.S. 607 (1992).

[13] *Id.* at 617-18.

text, revealing that proposals for abolition of the doctrine are unjustified.

II. Legal and Conceptual Foundations of Sovereign Immunity

Sovereign immunity traces to English common law and has evolved in the United States for nearly two centuries as a federal common law doctrine. In its purest form, the doctrine immunizes the federal government from suit. The government may, however, consent to suit by waiving its immunity. In turn, the courts determine the limits of such waivers through statutory interpretation. Recently, narrow constructions of seemingly clear congressional waivers of sovereign immunity have undermined citizen enforcement of environmental statutes.[14]

A. The Doctrine's Origin and Evolution

Sovereign immunity originated in English common law. The traditional basis for the doctrine assumed that "the king could do no wrong," and therefore could not be sued without his consent.[15] In the United States, the doctrine developed through constitutional interpretation, beginning with *McCulloch v. Maryland*.[16]

The king's sovereignty was imputed to the United States government because it is the institutional descendant of the Crown and thus enjoys its immunity.[17] Accordingly, the traditional immunity of the English sovereign survived the Constitution's grant of judicial power over controversies in which the United States is a party.[18] Beyond these origins, the holding in *McCulloch* has evolved into the modern doctrine of sovereign immunity, which precludes courts from enforcing judgments against the federal government without its consent.

Three principal rationales support the application of sovereign immunity in the United States: (1) sustaining separation of powers; (2) protecting the government from the "undue interference"

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[14] *See infra* part II.B.

[15] Michael D. Axline et al., *Stones for David's Sling: Civil Penalties In Citizen Suits Against Polluting Federal Facilities*, 2 J. Envtl. L. & Litig. 1, 17 & n.81 (1987).

[16] 17 U.S. 316 (1819) (concluding generally that the states do not have the power to interfere with the operation of federal law; holding specifically that the Bank of the United States is immune from state taxation).

[17] Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 396-97 & n.38 (1970).

[18] *Id.*

of legal actions seeking damages; and (3) protecting the public fisc.[19] Although grounded in sound public policy, each of these rationales has developed a wide array of exceptions,[20] the most important of which is the doctrine of waiver.

A specific congressional statutory waiver allows the government to abrogate its immunity and consent to suit.[21] Several judicial standards have developed that govern interpretation of provisions "waiving" the protection of sovereign immunity. Courts have generally relied upon rules of statutory construction that narrowly construe waivers of sovereign immunity, thus holding in favor of the United States and its agencies in citizen suits for damages or specific performance.[22] More specifically, courts must interpret statutory provisions that appear to relinquish sovereign immunity strictly,[23] in favor of the sovereign, and they may not enlarge the waiver "beyond what the language requires."[24] Waiver "cannot be implied but must be unequivocally expressed."[25]

Conversely, a less frequently applied standard recognizes that when Congress enacts clear waivers of sovereign immunity, courts should not thwart congressional intent by applying an "unduly restrictive interpretation" to the waivers.[26] To determine whether a waiver is clear, the controlling factor for the court is the "under-

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[19] Elizabeth Hocking, *Survey, Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203, 207-12 (1991).

[20] *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1988) (waiving the federal government's sovereign immunity for certain torts committed by federal officers).

[21] *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983); United States v. Sherwood, 312 U.S. 584 (1941).

[22] *See, e.g.*, Library of Congress v. Shaw, 478 U.S. 310, 314 (1986) (requiring a waiver of immunity from an interest award separate from a waiver of immunity from an award of attorney's fees); McMahon v. United States, 342 U.S. 25, 27 (1951) (explaining that statutes waiving sovereign immunity are to be strictly construed).

[23] *McMahon*, 342 U.S. at 27.

[24] *Ruckelshaus*, 463 U.S. at 685 (quoting Eastern Transp. Co. v. United States, 272 U.S. 675, 686 (1927)).

[25] United States v. King, 395 U.S. 1, 4 (1969) (holding that Congress did not intend to expand the Court of Claims jurisdiction in passing the Declaratory Judgment Act); *accord* United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992) (holding that section 106(c) of the Bankruptcy Code does not waive immunity from an action seeking monetary recovery in a bankruptcy proceeding); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)) (holding that the rule of equitable tolling applies in suits against the United States once Congress has unequivocally waived sovereign immunity); United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. King, 395 U.S. 1, 4 (1969)) (explaining that the Tucker Act is only a jurisdictional statute and does not waive sovereign immunity).

[26] Ohio v. Dep't of Energy, 904 F.2d 1058, 1060 (6th Cir. 1990) (citing Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 222 (1945)), *rev'd*, 503 U.S. 607 (1992).

lying congressional policy."[27] However, this minority rule rarely controls the interpretation, even when such underlying policy is readily apparent (as in the context of pollution control legislation).

Depending upon the era and the dominant political agenda, courts have applied these varying standards in construing waivers. However, varying standards are not the sole cause of fluctuations in the breadth of waiver; the use of the sovereign immunity doctrine in a manner that represents a departure from its jurisprudential origin has also influenced the breadth of waiver.[28] For instance, the rationale that the government must be able to perform its functions without "undue interference" does not justify restrictive readings of waiver, although such rationales impliedly invoke the sovereign immunity doctrine and its accompanying theory. In addition, civil suits against federal facilities do not threaten federal funds — funds are merely taken from the offending agency and returned to the federal treasury.[29] This severance of sovereign immunity from its doctrinal underpinnings has produced an unpredictable range of outcomes, some of which recognize and further legislative intent, while others ignore and, thus, undermine it.[30]

By allowing citizen suits against federal facilities, Congress has attempted to relieve the restrictive effect of the doctrine. More than half a century ago, the Supreme Court observed, a "sense of justice has brought a progressive relaxation by legislative enactment of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen."[31] While this observation embodies a strong argument in favor of liberal construction of sovereign immunity waivers, the Supreme

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[27] *Id.* at 1059-60 (citing Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512, 521 (1984)).

[28] *See supra* notes 21-26; *Irwin*, 498 U.S. at 95 (making available equitable tolling in suits against the government "in the same way that it is available to private suits"); Block v. Neal, 460 U.S. 289, 298 (1983) (refusing to recognize sovereign immunity in spite of the fact that the stated cause of action overlapped actions from which sovereign immunity had not been waived); Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) (refusing to act a guardian of the Treasury when construing waivers of sovereign immunity).

[29] Axline, *supra* note 15, at 19.

[30] *See supra* notes 21-26 (cases invoking the same common law doctrine of sovereign immunity, yet arriving at different outcomes). *See generally Ohio*, 503 U.S. 607 (1992); Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616 (9th Cir. 1992) (holding that waiver of sovereign immunity in state court does not waive sovereign immunity in federal court), *cert. denied*, 114 S. Ct. 60 (1993); Broughton Lumber Co. v. Yeutter, 939 F.2d 1547 (D.C. Cir. 1991) (holding that waiver must authorize suit in a particular court).

[31] United States v. Shaw, 309 U.S. 495, 501 (1940).

Court has nevertheless enlarged the scope of sovereign immunity in the modern era, most probably due to its misapprehension of the doctrine's historical foundations.[32]

B. Sovereign Immunity and Citizen Enforcement Actions

The Supreme Court's strict construction of waiver in *Ohio*[33] prompted renewed criticism that sovereign immunity is nothing more than a judge-made rule that is sometimes favored and sometimes disfavored.[34] As a theoretical matter, the doctrine's original reliance on the notion that a divinely ordained monarch "can do no wrong" has long been thoroughly discredited.[35] Moreover, as a practical matter, the persistent threat that the doctrine poses "to the impartial administration of justice has been repeatedly acknowledged and recognized."[36]

Within the environmental statutes, Congress has incorporated limitations on citizen suits and remedies against polluting federal facilities. Thus, application of sovereign immunity in this context seems unnecessary and unintended and naturally draws criticism. The doctrine of sovereign immunity has generally been criticized for: (1) causing serious substantive injustice; (2) removing controversies from the courts and placing them in ill-equipped forums, thereby producing final determinations without the necessary procedural safeguards; and (3) inefficiently allocating controversies to other forums when well-suited for court resolution.[37] Moreover, now that citizen suit provisions are routinely adopted as a viable means of environmental enforcement,[38] the use of sovereign immunity to limit the scope of available enforcement mechanisms has become particularly problematic.

Ironically, while the availability of judicial review has expanded,[39] reviewing courts have used sovereign immunity to

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[32] *See, e.g., supra* note 28 and accompanying text; *Nordic Village, Inc.*, 503 U.S. at 33-34; Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983); *Mitchell*, 445 U.S. at 538.

[33] 503 U.S. at 628.

[34] *Nordic Village, Inc.*, 503 U.S. at 42 (Stevens, J., dissenting).

[35] *Id. See also* Nevada v. Hall, 440 U.S. 410, 415 (1979) ("We must of course reject the fiction [that the king does no wrong]."); Langford v. United States, 101 U.S. 341, 343 (1880) ("[t]he English maxim . . . has [no] existence in this country").

[36] *Nordic Village, Inc.*, 503 U.S. at 42-43 (Stevens, J., dissenting).

[37] Kenneth C. Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383 (1970).

[38] *See* CWA, 33 U.S.C. § 1365; RCRA, 42 U.S.C. § 6972; CAA, *id.* at § 7604; CERCLA, *id.* at § 9659.

[39] *See* Barlow v. Collins, 397 U.S. 159, 166 (1970) (explaining that judicial review of administrative action is the rule and nonreviewability the exception); Association of Data

restrict the categories of relief available to plaintiffs.[40] As part III discusses, citizens can obtain injunctive relief to prevent future pollution from federal facilities; however, they are precluded from obtaining civil penalties, which provide significant and perhaps the greatest deterrent against future violations.[41] Essentially, what the courts have given with one hand by liberalizing the availability of judicial review, they have taken away with the other by diluting the effectiveness of citizen suits.

III. Sovereign Immunity: An Inappropriate Shield for Federal Facilities

A significant number of federal facilities in the United States and abroad fail to comply with environmental statutes.[42] Paradoxically, the EPA did not attempt to coerce compliance through court action until recently,[43] and only a few courts held that citizen suit provisions allowed for civil penalties against such federal facilities.[44] More surprisingly still, the Court in *Ohio* held that RCRA and the CWA did not waive sovereign immunity from civil penalties.[45] *Ohio* appears wrong on its face and as a matter of policy.[46] Fortunately, some courts have distinguished *Ohio* and have interpreted sovereign immunity waivers broadly in other contexts, thereby preserving the powerful deterrent of civil penalties against federal facilities in the oversight schemes implied by citizen suit provisions.[47]

Processing Serv. Org. v. Camp, 397 U.S. 150, 157 (1970) (stating "[t]here is no presumption against judicial review and in favor of administrative absolutism"); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) (noting petitioner's heavy burden of overcoming "the strong presumption that Congress did not mean to prohibit all judicial review"). *But see* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that respondents failed to demonstrate an injury in fact, and therefore lacked standing to seek judicial review); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) (holding that respondents failed to show that their interests were actually affected by petitioners' actions, and therefore did not meet an Administrative Procedure Act prerequisite to judicial review).

[40] Axline, *supra* note 15, at 19.

[41] *See infra* part III.D.

[42] *See infra* part III.A.

[43] *See infra* notes 53 (discussing "unitary executive" theory), 104-109 (discussing Federal Facilities Compliance Act of 1992), 114-116 (discussing Federal Facilities Clean Water Compliance Act) and accompanying text.

[44] *See infra* part III.B.

[45] *See infra* part III.C.

[46] *See infra* parts III.C.1-3, III.D. (arguing for non-restrictive interpretations of sovereign immunity waivers).

[47] *See infra* part III.E.

A. *Enforcement of Pollution Control Laws Against Federal Facilities*

The violation of pollution control laws by federal facilities poses an enormous problem. Over 25,000 federal facilities in the United States and abroad pose potential pollution problems.[48] "Federal facilities fail to comply with the CWA twice as frequently as private industry," and sixty-three percent of federal facilities have committed serious RCRA violations.[49] Furthermore, 1,000 to 4,000 federal facilities nationwide are either on or eligible for the CERCLA National Priorities List. The Department of Energy (DOE) and the Department of Defense (DOD) operate most of these facilities.[50]

The federal government recognizes the deterrent effect of monetary fines and frequently seeks to assess civil penalties or criminal fines against private polluters. Even the DOE acknowledges the value of "'stipulated penalties' to 'avoid stalling the cleanup process' at dangerously polluted federal facilities."[51] Despite this acknowledgement, the federal government vigorously resists any attempt to apply civil penalties to polluting federal facilities.[52]

Some courts acquiesced immediately to this governmental resistance and precluded citizens from obtaining civil penalties against federal facility violators, consistent with the EPA's refusal to bring suit against these facilities because of its internal policy against suing other federal agencies for violations of environmental laws. This policy arose out of the Department of Justice's (DOJ's) position that one federal agency cannot sue another. Such a suit would not present a justiciable controversy under Article III of the Constitution because it involves only one party according to the "Unitary Executive" theory.[53] Therefore, by refusing to allow citizens

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[48] Axline, *supra* note 15, at 4.

[49] Daniel Horne, Case Note, *Federal Facility Environmental Compliance After United States Department of Energy v. Ohio*, 65 U. COLO. L. REV. 632, 638 (1994).

[50] Axline, *supra* note 15, at 5. *See generally* Nancy E. Milsten, Note, *How Well Can States Enforce Their Environmental Laws When the Polluter Is the U.S. Government?*, 18 RUTGERS L.J. 123 (1986).

[51] Horne, *supra* note 49, at 632 (quoting *DOE, EPA Reach Settlement in Dispute Over Fines for Delays in Cleanup of Fernaln*, Env't Rep. (BNA) No. 3, at 125 (May 17, 1991).

[52] Axline, *supra* note 15, at 2.

[53] *Id.* at 3; *see also* Nelson D. Cary, Note, *A Primer on Federal Facility Compliance with Environmental Laws: Where Do We Go From Here?*, 50 WASH. & LEE L. REV. 801, 828 (1993) (explaining generally the unitary executive theory). The Federal Facilities Compliance Act of 1992 under RCRA, 42 U.S.C. § 6961 (Supp. V. 1993), may nullify some of the effects of the EPA's policy, at least with respect to RCRA. Although the results are not yet clear, it expressly targets federal facilities and thereby strengthens the argument that

to sue for civil penalties, the courts removed the teeth from pollution control laws and created a "Catch-22" situation where the most effective deterrent provided for by Congress is not used against some of the most egregious polluters.

This anomalous situation created a split in the lower courts. Some courts held that civil penalties are available under the citizen suit provisions of the CWA[54] and RCRA[55] in order to effectuate congressional intent. Others used sovereign immunity to force strained interpretations of these same provisions and precluded citizens from obtaining civil penalties against federal facilities.[56] In 1992, the United States Supreme Court's decision in *Ohio* resolved this split.[57]

B. The Split in the Circuits

1. Holdings Against Civil Penalty Awards in RCRA and CWA Citizen Suits

Prior to *Ohio*, several federal courts had refused to find a waiver of sovereign immunity from civil penalties under the CWA and RCRA. For example, in *McClellan Ecological Seepage Situation v. Weinberger* (*MESS*),[58] the United States District Court for the Eastern District of California concluded that federal facilities are not subject to civil penalties in citizen suit actions brought under the CWA and RCRA.[59] The court held that, even though RCRA's

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citizens should also be able to sue for civil penalties against federal polluters. *See infra* notes 97-109 and accompanying text.

54 CWA § 505 authorizes citizens to sue any person, including the United States, for violations of the Act and to seek specified remedies, including civil penalties. 33 U.S.C. § 1365. It provides that "any citizen may commence a civil action on his own behalf (1) against any person (including (i) the United States . . .) who is alleged to be in violation of (A) an effluent standard or limitation." *Id.* Furthermore, the section provides that "[t]he district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under section 1319(d) of this title." *Id.*

55 Under RCRA § 7002, the citizen suit provision, citizens are allowed to commence a civil action "against any person, including . . . the United States" for past or present violations of RCRA's provisions. 42 U.S.C. § 6972(a)(1)(A). The last sentence of section 7002(a) vests the district court with jurisdiction "to order such person to take such other action as may be necessary . . . and to apply any appropriate civil penalties under [§ 3008] (a) and (g) of this title." *Id.* at § 6972(a).

56 *See infra* part III.B.

57 *See infra* part III.C.

58 655 F. Supp. 601 (E.D. Cal. 1986), *vacated sub nom.* MESS v. Perry, 47 F.3d 325 (9th Cir. 1995), *and cert. denied*, 116 S. Ct. 51 (1995).

59 655 F.2d at 603-05. *See also* Mitzenfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990) (RCRA's federal facilities provision does not waive sovereign immunity); California v. Department of Navy, 845 F.2d 222 (9th Cir. 1988) (CWA's federal facilities provision does not waive sovereign immunity); California v. Department of Defense, 18

citizen suit provision referred to the United States as a "person" and authorized the imposition of civil penalties against any such "person,"[60] Congress failed to include the United States under RCRA's definition of "person."[61] Therefore, Congress had not unambiguously waived federal immunity from civil penalties.[62] The court also reasoned that it would be inconsistent to authorize citizens to sue for civil penalties under the citizen suit provision when the EPA itself cannot do so under its general enforcement authority.[63]

Similarly, the court in *MESS* held that there is no waiver of sovereign immunity in the CWA,[64] notwithstanding section 505's explicit language authorizing citizens to seek relief against any person including the United States. The court determined that because section 505's language authorizing civil penalties refers to the civil penalties provision (section 309), and because the general definition section (section 502) does not include "United States" in its definition of "person" for the purposes of civil penalties, section 505 does not allow civil penalties in a citizen suit against the United States.[65]

2. *Holdings Allowing Civil Penalty Awards in RCRA, CWA, and CAA Citizen Suits*

Prior to the *Ohio* decision, one circuit court had held that Congress did waive sovereign immunity from civil penalties under the CWA.[66] In *Sierra Club v. Lujan*,[67] the court held that the federal facilities provisions and the citizen suit provisions evinced clear congressional intent to authorize civil penalties under the CWA. The court construed the citizen suit provision to authorize civil penalties, stating that "a specific statutory provision will govern notwithstanding the fact that a general provision, standing alone,

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Envtl. L. Rep. (Envtl. L. Inst.) 21023 (E.D. Cal. 1988) (RCRA's federal facilities provision does not waive sovereign immunity).

60 42 U.S.C. § 6972.

61 *Id.* at § 6903 (15).

62 *MESS*, 655 F. Supp. at 603-604.

63 *Id.* at 604. The court's conclusion stems from the self-imposed EPA policy that it cannot pursue any form of judicial enforcement against federal agencies, not from an independent statutory interpretation.

64 655 F. Supp. at 605.

65 *Id.* at 605. The court summarized its rationale as, "again there is an all-encompassing introductory definition . . . which defines 'person' as everybody under the sun save for the United States."

66 *See* Sierra Club v. Lujan, 931 F.2d 1421 (10th Cir. 1991), *vacated*, 504 U.S. 902 (1992).

67 *Id.* at 1427.

may include the same subject matter."[68] The Tenth Circuit held that the general definition in section 502(5) does not trump the definition of "person" contained in the citizen suit provision.[69]

Some federal district courts followed a similar line of reasoning, holding that the federal facilities provisions contained in the CWA and RCRA allow citizens to sue federal facilities for civil penalties.[70] Courts have also found that the CAA[71] waives sovereign immunity from the imposition of civil penalties under the federal facilities provision.[72] However, the Tenth Circuit in *Sierra Club* is the only federal appellate court to find a waiver of federal sovereign immunity within the CWA's citizen suit provision. No other federal appellate court has considered this question under RCRA or the CAA.

C. *Resolving the Split in the Circuits: United States Department of Energy v. Ohio*

In *United States Department of Energy v. Ohio*, the state of Ohio sued the DOE for alleged environmental violations stemming from the DOE's operation of a uranium-processing plant in Ohio.[73] Among other relief, the state sought federal civil penalties for past violations of RCRA and the CWA.[74] The DOE conceded that these two statutes rendered "federal agencies liable for fines imposed to induce them to comply with injunctions or other judicial orders designed to modify behavior prospectively" ("coercive fines").[75] The issue was whether the federal facilities or citizen suit sections of RCRA and the CWA[76] waived federal sovereign immu-

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68 *Id.* (quoting United States v. Prescon, 695 F.2d 1236, 1243 (10th Cir. 1982)).

69 *Id.*

70 *See, e.g.*, Maine v. Department of Navy, 702 F. Supp. 322 (D. Me. 1988), *vacated*, 973 F.2d 1007 (1st Cir. 1992); Metropolitan Sanitary Dist. v. Department of Navy, 722 F. Supp. 1565 (N.D. Ill. 1989).

71 42 U.S.C. § 7418.

72 *See, e.g.*, Alabama v. Veterans Admin., 648 F. Supp. 1208 (M.D. Ala. 1986); United States v. South Coast Air Quality Management Dist., 748 F. Supp. 732 (C.D. Cal. 1990).

73 503 U.S. 607 (1992).

74 *Id.* at 612.

75 *Id.* at 613.

76 States may sue the United States under the citizen suit provisions of the CWA and RCRA. *Id.* at 613 n.5. Section 1365(a) provides that any "citizen" may bring a citizen suit under the CWA. 33 U.S.C. § 1365(a) (1988). For purposes of the CWA citizen suit provision, citizen is defined as a "person . . . having an interest which is or may be adversely affected," and "person" is defined to include a state. *Id.* at § 1365(g)-(h)(1988). *See also* 42 U.S.C. § 6972 ("any person" may bring a citizen suit under RCRA); *id.* at § 6903(15) ("person" under RCRA includes a state).

nity from liability for "punitive" fines for past violations of those statutes.[77]

The United States District Court for the Southern District of Ohio held that both statutes waived federal sovereign immunity from punitive fines.[78] The Sixth Circuit affirmed in part and held that Congress had waived immunity for punitive fines in the CWA's federal facilities section and in RCRA's citizen suit provision, but not in RCRA's federal facilities section.[79] On appeal, a majority of the Supreme Court determined that Congress had not waived the federal government's sovereign immunity from liability for civil penalties imposed by a state for past violations of the CWA or RCRA.[80]

In analyzing the statutes' respective citizen suit provisions, the majority adopted the court's reasoning in *MESS*, disregarding the state of Ohio's argument that "'Congress could not avoid noticing that its literal language subject[ed] federal entities to penalties.'"[81] In doing so, the Court ignored the relevant legislative history and instead relied exclusively on rules of statutory construction. Applying a rule of construction whereby a particular section of a statute referring to another section must be read as encompassing all the terms and limitations of that section, the Court concluded that significant limitations result from restricting the applicability of the civil penalties sections to "persons."[82] As in *MESS*, the Court relied on the fact that neither statute included the United States in its general definition of "person." "Its omission has to be seen as a pointed one when so many other governmental entities are specified, a fact that renders the civil-penalties sections inapplicable to the United States."[83]

In reaching this conclusion, the Court distinguished between sections merely redefining "person" within a particular clause from

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77 503 U.S. at 612-13.

78 *Id.* at 614.

79 *Id.* Because the court held that the CWA's federal facilities section waived immunity, it never reached the issue under the CWA's citizen suit provision.

80 *Id.* at 628. Justice Souter delivered the majority opinion in which Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas joined. Justice White joined by Justices Blackmun and Stevens, concurred with the decision regarding RCRA's federal facilities section, but dissented on the other issues, stating that the majority had adopted "an unduly restrictive interpretation" of the federal facilities and citizen suit provisions of the CWA and of the citizen suit provision of RCRA. *Id.* at 630, quoting Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 222 (1945).

81 *Id.* at 617 (quoting Respondent's Brief at 36).

82 *Id.*

83 *Id.* at 617-18 (citations omitted).

redefinition for the entire section in which the special definition occurred. "[T]he inference can only be that a special definition not described as being for purposes of the 'section' or 'subchapter' in which it occurs was intended to have the more limited application to its own clause or sentence alone."[84] Thus, the Court held that while the United States could be sued under the citizen suit provisions, it was not subject to civil penalties under the incorporated sections.

The Court's reasoning in *Ohio* is faulty in at least two respects. First, the rules of statutory interpretation suggest that specific definitions of "person" in RCRA and the CWA trump the statutes' general definitions of the same.[85] Second, the legislative history of RCRA and the CWA clearly indicates congressional intent to authorize civil penalties in citizen suits against federal facilities.[86] Moreover, by eliminating the specter of civil penalties, the Court undermined citizen efforts to oversee federal agency conduct .[87]

1. Statutory Interpretation

The rules of statutory interpretation that should have governed the Court's analysis in *Ohio* would have allowed citizens to sue for civil penalties against federal polluters under these statutes. Generally, specific definitions govern more general ones.[88] Therefore, the meaning and coverage in a general definition of "person" need not apply everywhere throughout the CWA, especially in subsections governed by their own set of definitions.[89]

Although courts should not isolate one section of an act from the rest, as this ultimately undermines the integrity and intent of the Act as a whole, Congress would not have impliedly excluded federal polluters from only some civil remedies. In other words, once Congress had waived sovereign immunity for citizen suits generally, if it had sought to exempt federal facilities from one remedy provided for under citizen suits, but not from others, it would have made that distinction explicit in the language of the citizen suit provision itself.

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[84] *Id.* at 619.

[85] *See infra* part III.C.1.

[86] *See infra* parts III.C.2-3.

[87] *See infra* part III.D.

[88] NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION 2B § 51.05 (5th ed. 1992).

[89] *See, e.g., supra* note 68 and accompanying text.

In addition, applying the Supreme Court's reasoning to every section containing the term "person" will yield absurd and incongruous results. For example, section 301(a) states that "the discharge of any pollutant by any person shall be unlawful."[90] Section 404(n)(4)(A) applies to "[a]ny person who willfully or negligently violates any condition or limitation in a permit."[91] If a federal polluter cannot be sued for civil penalties in a citizen suit because the section 1319(d) civil penalty section uses the word "person," then federal polluters cannot be sued for any violation of key CWA provisions, such as section 303 and section 404, because they impose liability on all entities included under the definition of "persons." Such a result would mean that federal facilities are not subject to citizen suits at all (or perhaps to the CWA at all), a conclusion that contravenes the statutory language and legislative history of the Act.[92]

The same analysis applies under RCRA. Congress refers to section 3008 within section 7002 in order to identify the penalties available against federal facilities under the citizen suit provision.[93] However, if Congress intended to limit the available remedies, it could have included an explicit statement to that effect.

As under the CWA, the general definition of "person" in RCRA section 1004(15) should not control every section of the statute when some sections have broader applicability on their face. Moreover, if the Court's logic in *Ohio* were extended to other areas of the Act referring to "persons" as subject to particular provisions, the government would be exempt from all citizen enforcement actions of the substantive provisions of RCRA. For example, section 3005(a) requires "each person" who owns or operates a facility for the treatment, storage, or disposal of hazardous wastes to obtain a permit for such activity.[94] Section 3010(a) of RCRA provides that "any person" who generates hazardous wastes must notify the EPA of the location and nature of the activity and identify the specific hazardous wastes involved.[95] Congress intended to apply this section to federal facilities through section 6001, the federal facilities section. However, if the United States is not a "per-

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90 33 U.S.C. § 1311(a).

91 *Id.* at § 1344(s)(4)(A).

92 Axline, *supra* note 15, at 32.

93 *Id.* at 33.

94 42 U.S.C. § 6925(a).

95 *Id.* at § 6930(a).

son" for purposes of RCRA, federal facilities would not have to comply with this or any other provision of the statute.[96]

2. *RCRA Legislative History*

RCRA's legislative history contains ample evidence that Congress intended to make civil penalties available in citizen suits against federal facilities. In drafting the 1984 Amendments to RCRA, the House Committee on Energy and Commerce criticized and attempted to remedy the EPA's inadequate civil and criminal enforcement efforts.[97] The Committee also chastised the DOJ's lackluster hazardous waste enforcement record.[98] Noting that "litigation expertise is not the sole province of the Justice Department,"[99] the Committee stated that citizen involvement was explicitly contemplated to attain a higher number of enforcement actions.[100]

Furthermore, the Senate expressed its reliance on citizen enforcement by adding the civil penalty relief provision to the RCRA citizen suit provision:

> A non-complying agency . . . [is] subject to the citizen suit and penalty provision of section 7002. To assure that there is no confusion as to this approach, the amendments to section 7002 continue to use the current statutory language to authorize specifically a suite [sic] against any person, including the United States.[101]

RCRA's citizen suit provision authorizes citizens to seek appropriate civil penalties under sections 6928(a) and (g).[102] The Senate Committee explicitly stated that this reference authorizes civil penalties against agencies disobeying court orders, as well as any federal "noncomplying agency."[103] These amendments and comments were ignored by the Supreme Court in *Ohio*.

Following the *Ohio* decision, Congress passed the Federal Facilities Compliance Act of 1992 (FFCA)[104] in an effort to make its sovereign immunity waiver "as clear and unambiguous as humanly

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96 Axline, *supra* note 15, at 34.

97 H.R. REP. No. 198, 98th Cong., 1st Sess., pt. 1, at 20 (1984), *reprinted in* 1984 U.S.C.C.A.N 5576, 5579.

98 *Id.* at 5609-10.

99 *Id.* at 5610.

100 *Id.* at 5612.

101 S. REP. No. 284, 98th Cong., 1st Sess. 44 (1983).

102 42 U.S.C. § 6972.

103 S. REP., *supra* note 101, at 44.

104 Federal Facilities Compliance Act of 1992, 42 U.S.C. § 6961 (Supp. V. 1993).

possible."[105] The FFCA amends RCRA's federal facilities section, explicitly overruling the RCRA component of the Supreme Court's *Ohio* decision[106] by stating that:

> 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 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).[107]

Moreover, the citizen suit and civil penalties sections have been similarly amended through incorporation — the general definition of "person" in section 6903(15) of RCRA now includes all departments, agencies, and instrumentalities of the United States.[108] Finally, the FFCA grants the EPA power to enforce administrative compliance orders against federal facilities.[109] Thus, the FFCA dispels any doubt as to whether Congress intended to make civil penalties available in actions brought against federal facilities under RCRA's citizen suit provision.

3. *CWA Legislative History*

The CWA's legislative history, like that of RCRA, demonstrates that Congress intended to authorize citizen suits for civil penalties against federal facilities. There is no support in either Senate or House reports that "person," as defined in section 309, did not include "person" as defined in section 505 (including the United States).[110] Rather, faced with the misinterpretation by some federal circuit courts denying civil penalties under the CWA's citizen suit provision prior to *Ohio*, Congress attempted to use clear statutory language authorizing citizens to recover for pollution violations by federal facilities. The Senate Report stated that some federal agencies had failed to abate pollution and request appropri-

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105 Horne, *supra* note 49, at 635.
106 *Id.* at 650-51.
107 42 U.S.C. § 6961(a).
108 *Id.* at § 6903(15).
109 *Id.* at § 6961(b)(1).
110 Axline, *supra* note 15, at 31.

ations to develop control measures, thus authorizing citizens to sue would expedite government performance under section 313 (the federal facilities section).[111] Thus, Congress sought to encourage citizen participation in enforcement proceedings, especially against federal facilities.

Moreover, in its reports on the CWA Amendments of 1977, the Senate Environment and Public Works Committee stated the purpose of the amendments:

> This act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by the Federal agencies, has misconstrued the original intent.[112]

Therefore, Congress granted the courts "specific jurisdiction . . . to apply any appropriate civil penalties under § 1319(d)."[113]

An amendment similar to FFCA, the Federal Facilities Clean Water Compliance Act (FFCWCA) was introduced on July 1, 1993 in the House of Representatives as an amendment to the CWA.[114] "Federal violations of the CWA are no less serious than federal RCRA violations, [and] this understanding was reflected in the proposed legislation."[115] The bill would: (1) allow states to assess civil penalties against federal agencies and (2) authorize the EPA to issue unilateral administrative orders and assess penalties against other federal agencies for CWA violations.[116] As of the writing of this article, the FFCWCA has not been enacted.

D. Policy Arguments for Non-Restrictive Interpretations of Sovereign Immunity Waivers

As a practical matter, citizen suit provisions explicitly recognize that certain types of agency conduct require a system of state and citizen oversight. Restrictive interpretations of corollary sovereign

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111 S. REP. No. 414, 92d Cong., 1st Sess. 80 (1971). This 1971 Senate Report was submitted in support of S. 2770, 92d Cong., 1st Sess. (1971), which ultimately became the Clean Water Act. The wording of section 505 remained unchanged with the 1977 Amendments to the Act.

112 Sierra Club, 931 F.2d at 1428 (citing S. REP. No. 370, 95th Cong., 1st Sess. 67 (1972), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4392).

113 33 U.S.C. § 1365(a).

114 139 CONG. REC. E1720 (daily ed. July 1, 1993).

115 Horne, *supra* note 49, at 651-52.

116 *Id.* at 652.

immunity waivers preclude effective citizen oversight. Thus, as a theoretical matter, citizen suit provisions should inhibit interpretations of specific subsections of the statute as hostile to relief. In other words, the doctrine of sovereign immunity should not be relied upon to limit the scope of a statute's plain language. Justice Stevens' dissent in *Nordic Village* bemoaned the drawbacks of applying the doctrine of sovereign immunity in an overly restrictive manner:

> The Court's stubborn insistence on 'clear statements' burdens the Congress with unnecessary reenactment of provisions that were already plain enough when read literally. The cost to litigants, to the legislature, and to the public at large, of this sort of judicial lawmaking is substantial and unfortunate. Its impact on individual citizens engaged in litigation against the sovereign is tragic.[117]

Although the legislative histories of RCRA and the CWA reveal congressional intent to permit civil penalties against federal facilities, the Court in *Ohio* denied this remedy.[118] Therefore, as Justice Stevens predicted, Congress was required to amend these statutes to meet the Court's overly restrictive test, thereby perpetuating a wasteful pattern.

In this context, the primary purpose of a civil penalty is to deter noncompliance identified through citizen oversight. The appellate courts that upheld civil penalties under the citizen suit provisions of RCRA and the CWA recognized the importance of monetary damages in effectively deterring future violations by federal polluters.[119] Without the threat of civil penalties, the possibility of a citizen suit provides little, if any, additional incentive for federal polluters to comply with discharge limitations. Even the EPA's civil penalty policy, which states "[t]he first goal of penalty assessment is to deter people from violating the law," suggests that for deterrence purposes alone, citizens should be able to sue federal violators for civil penalties.[120] It is undisputed that pollution is equally harmful whether it comes from a private or federal source. Therefore, considering the recognized deterrent effect of the threat of civil penalty assessment, allowing citizens to obtain civil penalties against federal polluters promotes environmental protection.

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[117] *Nordic Village, Inc.*, 503 U.S. at 45-46 (Stevens, J., dissenting).

[118] *See supra* parts III.C.2-3.

[119] *See supra* part III.B.2.

[120] Axline, *supra* note 15, at 30.

Citizen suits seeking recovery of civil penalties would provide federal facilities with at least three powerful incentives to resolve pollution problems quickly. First, penalized federal polluters must explain to congressional oversight and budget committees why they subjected the federal government to penalties for environmental violations.[121] In turn, Congress would more closely scrutinize requested appropriations, thereby increasing a federal polluter's incentive to comply with pollution standards.[122] Second, the penalized federal agency loses funds that it secured from Congress. Such funds are paid to another federal account from which the agency may not draw.[123] Third, public stigma attaches to the penalized agency.[124] In contrast, the existing policy of no civil penalties against federal facilities removes a substantial deterrent from remedial mechanisms, and even if injunctive relief is awarded against a violator, Congress and the public are rarely made aware of the violations.[125]

Civil penalties assessed against one federal polluter should also deter other federal polluters. Currently, suits under the FFCA are the only incentive for federal polluters to stop polluting. Even if they are sued under other pollution control statutes, federal polluters do not incur monetary sanctions. However, with civil penalties, the potential liability often outweighs the benefits of continuing to pollute and practices may change without the expense of actual litigation.[126] Also, allowing citizens to bring suit against federal polluters effectively increases citizens' bargaining power by encouraging federal polluters to settle rather than engage in protracted litigation, ultimately conserving judicial resources.[127] Despite obvious congressional and administrative intent to rely on such civil penalties to achieve these desired effects, the Supreme Court in *Ohio* ignored and undermined this intent by improperly applying the doctrine of sovereign immunity and precluding civil penalties under the citizen suit provisions of the CWA and RCRA.[128]

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121 *Id.* at 41.

122 *Id.* More specifically, agencies are forced to inform Congress of actual statutory violations and to then justify civil penalty expenditures. *Id.* at 43.

123 Horne, *supra* note 49, at 654.

124 *Id.* at 655.

125 Axline, *supra* note 15, at 43.

126 *Id.* at 44.

127 *Id.* at 43.

128 *See Ohio*, 503 U.S. at 626-28.

E. Post-Ohio Interpretations of Sovereign Immunity and Citizen Enforcement

The *Ohio* decision not only restricted the scope of remedies available under the CWA and RCRA, it also prompted subsequent judicial interpretation that weakened the federal facilities section of CERCLA.[129] For example, in *Maine v. Department of Navy*, the First Circuit held that CERCLA's federal facilities section does not waive sovereign immunity with respect to civil penalties.[130]

Fortunately, some courts have refused to extend the *Ohio* rationale to CERCLA. In *FMC Corp. v. United States*,[131] an industrial facility owner sued the United States, seeking indemnification under CERCLA for a portion of response costs based on the government's role in the operating the facility during World War II. The Third Circuit held that CERCLA's waiver of sovereign immunity could extend to regulatory activities (as opposed to noncompliance) of the United States.[132] In so holding, the court refused to "read undesignated conduct [into] the plain waiver of sovereign immunity."[133] Instead of following the unduly restrictive approach to statutory interpretation endorsed by the majority in *Ohio*, the court maintained that "CERCLA is a remedial statute which should be construed liberally to effectuate its goals."[134]

Other courts have also disregarded the "unduly restrictive" and "tortured" analysis in *Ohio* and applied this sensible approach when interpreting RCRA and CWA provisions not at issue in *Ohio*.[135] For example, in *United States v. New Mexico*,[136] the Tenth Circuit held that RCRA waives sovereign immunity from certain state-imposed permit conditions that address the presence of radionuclides in hazardous waste incinerated at Los Alamos

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129 CERCLA § 120 (a)(1) provides that "[e]ach department, agency and instrumentality of the United States . . . shall be subject to, and comply with, this Chapter in the same manner and to the same extent . . . as any non governmental entity including liability under section 107" of CERCLA. 42 U.S.C. § 9620(a)(1) (1989). This language of CERCLA § 120 is "unclear" as "it could refer to (1) prospective coercive fines, (2) retrospective civil penalties, or (3) both." *See also* Horne, supra note 49, at 652 n.132.

130 973 F.2d 1007, 1010-11 (1st Cir. 1992).

131 29 F.3d 833 (3d Cir. 1994).

132 *Id.* at 840. *See also* Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 826 F. Supp. 961, 965 (E.D. Va. 1993) (CERCLA's waiver of sovereign immunity permits the recovery of attorneys' fees and litigation costs against the United States).

133 *FMC Corp.*, 29 F.3d at 841.

134 *Id.* (quoting United States v. Alcan Aluminum, 964 F.2d 252, 258 (3d Cir. 1992)).

135 *Ohio*, 503 U.S. at 630-31 (White, J., concurring in part and dissenting in part).

136 32 F.3d 494 (10th Cir. 1994).

National Laboratory by the federal government.[137] These decisions demonstrate that some courts do not necessarily feel bound by *Ohio* when addressing other environmental contexts. The results in these cases reflect the courts' willingness and ability to distinguish *Ohio*, even when applying the CWA and RCRA. Such liberal interpretations of waiver ensure greater protection of health and the environment by elevating the environmental requirements and objectives of the statutes above a dogmatic application of the sovereign immunity doctrine.[138]

IV. Sovereign Immunity as an Appropriate Limitation on Implied Private Rights of Action

In contrast to the above examples in which a strict application of sovereign immunity serves only to undermine congressional intent in federal environmental legislation, application of the doctrine in another context sets important limits on citizen suits, thereby serving the objectives embodied in environmental protection legislation. The Gorge Act[139] is one such environmental statute. Without application of the sovereign immunity doctrine, the administering agency would be incapable of implementing this legislation. In dismissing suits against the sovereign premised on an implied private right of action, courts have upheld the Act's environmental objectives.

Although a wealth of legislative history demonstrates congressional intent to permit civil penalties under the citizen suit provisions of the CWA and RCRA, the preclusion or inclusion of private remedies is rarely addressed in the legislative history of federal environmental statutes.[140] For example, the Gorge Act was passed in the waning hours of the 1986 congressional session against entrenched political opposition, and lacks even the typical committee notes as a guide to statutory interpretation.[141] The leg-

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137 *Id.*; *see also* New York State Dep't of Envtl. Conservation v. Department of Energy, 850 F. Supp. 132 (N.D.N.Y. 1994) (The DOE waived its sovereign immunity under RCRA and the CWA from the imposition of state environmental regulatory charges that reasonably approximated the benefits provided to DOE facilities by state services).

138 *See New Mexico*, 32 F.3d at 498 (citing Sierra Club v. Department of Energy, 770 F. Supp. 578, 580 (D. Colo. 1991)).

139 Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1994).

140 *Cf.* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 418 (1982) ("It has only been in unusual circumstances that Congress has explicitly precluded private remedies in designating a regulatory regime. It has also been rare that the issue has been addressed in the legislative history.").

141 Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 Envtl. L. 863, 932 (1987).

islative history explaining the Gorge Act consists only of statutory language and several days of general discussion in the Senate and the House. From this scant legislative history, courts must discern congressional intent regarding the intricate details of the Act.

In this context, the doctrine of sovereign immunity provides a reliable analytical framework that precludes additional private rights of action through a narrow construction of waiver. By requiring express waivers, courts can ensure that the goals of statutory enforcement and environmental protection are carried out consistently with the Act's plain meaning.

A. Background on Implied Private Rights of Action

The modern approach to implied private rights of action began with the Supreme Court's four-part test in *Cort v. Ash*,[142] which determines whether a private right of action should be created in a statute that does not explicitly provide for one. In applying the test, courts consider: (1) whether the plaintiff is a special beneficiary of the statute; (2) the legislative intent to deny or create a remedy; (3) the consistency of private remedies with the purposes of the statute; and (4) the extent to which the right and remedy are traditionally left to state law.[143] However, the introduction of citizen suit provisions into comprehensive legislation has prompted a strong presumption against implied private rights of action. Thus, courts are unlikely to recognize private rights of action unless the text or history of the statute reveal a congressional intent to allow them.[144] Underlying this trend are notions that judicial creation of private rights of action equals judicial lawmaking and that judicially created remedies may conflict with the remedial scheme created by Congress.[145]

The court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*[146] articulated this rule in the environmental law context. In *Middlesex*, the plaintiffs alleged that discharges and ocean dumping of sewage had unlawfully damaged fishing grounds. They claimed a private right of action under the CWA and the

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142 422 U.S. 66 (1975).

143 *Id.* at 78.

144 Sunstein, *supra* note 140, at 413.

145 Sunstein, *supra* note 140, at 413-14. Note that the federal courts' general lawmaking powers ended with Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

146 453 U.S. 1 (1981). *See generally* William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403 (1985) (arguing that the denial of a private right of action under Middlesex should not be expanded to deny judicial review of agency action).

Marine Protection, Research, and Sanctuaries Act of 1972.[147] The actions were not brought pursuant to the citizen suit provisions of these acts because the plaintiffs had failed to satisfy the statutory notice requirements.[148] Because these statutes provided "elaborate enforcement provisions," the Court concluded that Congress did not intend to authorize additional judicial remedies for private citizens by implication.[149] Where congressional intent opposes additional implied remedies, "the courts are not authorized to ignore this legislative judgment."[150]

B. Sovereign Immunity as Applied to the Gorge Act

Consistent with the rule in *Middlesex*, both the D.C. Circuit and the Ninth Circuit Courts of Appeals have applied the doctrine of sovereign immunity to the Gorge Act. In these cases, the doctrine was used to construe narrowly the waiver of sovereign immunity within the citizen suit provision, thereby precluding a "takings" claim brought under the Gorge Act.[151] As applied to legislation for the protection of natural resources, the doctrine of sovereign immunity is an appropriate and valuable means of adhering to congressional intent, precluding private causes of action not explicitly provided for under a citizen suit provision.

1. The Gorge Act

The Columbia River Gorge is a "distinct geographic region with a spectacular constellation of natural resources" that straddles the states of Oregon and Washington.[152] The Gorge Act aims to "protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge."[153] Simultaneously, it allows for economic growth in the area consistent with the protective nature of the Act.[154]

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147 453 U.S. at 4-5.

148 *Id.* at 6-7.

149 *Id.* at 14.

150 *Id.* at 18.

151 *See infra* notes 152-179 and accompanying text.

152 Lawrence Watters, *The Columbia River Gorge National Scenic Area Act*, 23 ENVTL. L. 1127, 1128 (1993).

153 16 U.S.C. § 544a(1).

154 *Id.* at § 544a(2).

Oregon and Washington adopted the Gorge Act through an interstate compact.[155] It provides for the creation of a regional Commission responsible for the implementation and enforcement of the Act.[156] The Act ensures the application of uniform legal standards to an area determined by Congress to have "critical national significance."[157] Pending formation of the Commission, the statute directed the Secretary of Agriculture to promulgate interim guidelines for administration of the Gorge Act.[158]

To assist in securing compliance with the administrative provisions of the Act, Congress included a provision authorizing citizen suits against the Secretary in federal district court and suits against the Commission in the Oregon and Washington state courts.[159] The provision grants citizens broad authority to enforce non-discretionary duties under the Gorge Act,[160] and it was fashioned after citizen suit provisions found in other federal environmental statutes.[161] The Act requires written notification sixty days prior to commencing a citizen suit[162] and precludes suit if the state or the United States Attorney General is diligently prosecuting a lawsuit on the same matter.[163]

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155 *Id.* at § 544c (a)(1)(A). The resulting agreement between the states is the Columbia River Gorge Compact, codified at Or. Rev. Stat. § 196.150 (Butterworth 1991) and Wash. Rev. Code. § 43.97.015 (West Supp. 1995).

156 16 U.S.C. § 544c(a)(1)(A). The Act specifies the voting composition of the Gorge Commission as consisting of three members appointed by the Governor of each state, and one member appointed by each of the six Gorge counties. *Id.* at § 544c(a)(1)(C)(i-iii). Further, the Secretary of Agriculture appoints one Forest Service employee as a non-voting member of the Commission. *Id.* at § 544c(a)(1)(C)(iv).

157 *See* Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 184 (1992).

158 16 U.S.C. § 544h(a).

159 *Id.* at §§ 544m(b)(5), (6), (2).

160 16 U.S.C. § 544m(b)(2) provides:

> Any person or entity adversely affected may commence an action to compel compliance with . . . [this Act]:
>
> (A) against the Secretary, the Commission, or any county where there is alleged a violation of the provisions . . . [of this Act], the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or . . . [under this Act]; or
>
> (B) against the Secretary, the Commission, or any county where there is alleged a failure of the Secretary, the Commission, or any county to perform any act or duty under . . . [this Act] which is not discretionary with the Secretary, the Commission, or any county.

161 *See, e.g.*, CWA, 33 U.S.C. § 1365(a); CAA, 42 U.S.C. § 7604(a)(1)-(2).

162 16 U.S.C. § 544m(b)(3)(A)(i).

163 *Id.* at § 544m(b)(3)(A)(ii).

2. *Recent Treatment of the Scope of Waiver in the Gorge Act's Citizen Suit Provision*

Parties have brought suit under the Gorge Act's citizen suit provision alleging that actions of the Commission and the Secretary of Agriculture constitute inverse condemnation. For example, *Broughton Lumber Co. v. Yeutter*[164] addressed whether the sovereign immunity waiver in section 544m(b)(2)(B) of the Gorge Act extends to a suit for an award of just compensation for an alleged "taking" of property.[165]

Prior to the enactment of the Gorge Act, plaintiff Broughton acquired ownership rights to water flow and planned to produce hydroelectric power from a river covered by the legislation. Although Broughton had obtained a preliminary permit from the Federal Energy Regulatory Commission in early 1987, later that year the Forest Service informed Broughton that its proposed hydroelectric project constituted a "new industrial development" and was thus inconsistent with the provisions of the Gorge Act. This decision prevented Broughton from fulfilling its plans to produce hydroelectric power with its water rights.[166]

Broughton subsequently filed suit, alleging that the decision deprived it of all economic use of its water rights, amounting to a taking of property without just compensation under the Fifth Amendment to the Constitution. In its complaint, Broughton sought $2.5 million in damages, plus interest.[167] After a protracted procedural history,[168] the District of Columbia Circuit ultimately decided whether the district court had jurisdiction to entertain Broughton's claim for compensation either under the Gorge Act or under its federal question jurisdiction.

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164 939 F.2d 1547 (D.C. Cir. 1991) (Broughton I).

165 *Id.* at 1550-51, 1551 n.2.

166 *Id.* at 1549.

167 *Id.*

168 After plaintiffs filed in the District Court, the government moved to transfer the case to the Court of Claims on the basis that under the Tucker Act the Claims Court has exclusive jurisdiction to adjudicate Broughton's inverse condemnation "takings" claim. The motion was granted, and the District Court transferred the case to the Claims Court. At that time, such orders were not appealable, and the Ninth Circuit denied a Writ of Mandamus. Broughton then voluntarily dismissed its complaint before it was answered, and subsequently refiled the same claim in the same district court. The claim again was transferred to the Claims Court, and because such transfer orders had been made appealable in the interim, the second transfer was appealed to the D.C. Circuit. *Id.*

After determining that the Claims Court did not have exclusive jurisdiction over Broughton's suit,[169] the court considered whether the waiver of sovereign immunity in section 544m(b)(2) of the Gorge Act extends to a suit alleging a taking of property.[170] Broughton claimed that its "civil action" was intended to compel compliance with both subsections of the citizen suit provision.[171] Broughton contended that its taking claim addressed a violation of Gorge Act provisions, and it sought to compel performance of a non-discretionary duty imposed on the Secretary under the Act. The court noted that a minority of jurisdictions interpret waivers of sovereign immunity broadly, but nonetheless endorsed the "well-established" rule that waivers of sovereign immunity should be strictly construed.[172] The court then addressed Broughton's first claim under the citizen suit provision.

Section 544m(b)(2)(A) authorizes civil actions against the Secretary to compel compliance with the provisions of the Gorge Act. Broughton asserted that the Secretary had violated section 544h(b)(1) of the Act, which gives the Secretary authority to condemn property until certain local ordinances take effect.[173] Thus, Broughton alleged, "the Secretary failed to comply with the Gorge Act by not paying just compensation to Broughton for the water rights rendered valueless" by the Secretary's decision.[174]

The court rejected this argument, noting that "[o]nly limited funds were made available to the Secretary for such acquisitions"[175] and recognizing that section 544h lacks a provision for adjudicating an inverse condemnation claim.[176] From these observations, the court concluded that "[i]t clearly was not contemplated by Congress that such claims would be paid by the Secretary from the limited funds made available to him."[177] The court stated that

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169 The assumption that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000 is not based on any language in the Tucker Act. Because section 702 of the Administrative Procedure Act can be construed to authorize a district court to grant monetary relief other than traditional "money damages," there was no reason to bar that aspect of the relief available in the district court. *Id.* at 1550-51 (quoting Bowen v. Massachusetts, 487 U.S. 879 (1988)).

170 *Id.* at 1551 n.2, 1552.

171 *Id.* at 1552.

172 *Id.*

173 *Id.* at 1553. Section 544h(b)(1) provides that the Secretary may acquire by condemnation any land or interest that is being used or threatened to be used in a manner inconsistent with the purposes for which the scenic area was established.

174 *Id.*

175 16 U.S.C. § 544n; Broughton I, 939 F.2d at 1553.

176 Broughton I, 939 F.2d at 1553.

177 *Id.*

section 544m contemplates only injunctive or mandamus relief, not damage awards.[178] The court also noted that Broughton was not actually attempting to "compel compliance" with section 544h since it had failed to request that the Secretary file a condemnation complaint. Instead, Broughton sought a judicial determination that a taking had occurred and an award of damages for that amount.[179]

The court summarily dismissed Broughton's additional argument that section 544m(b)(2)(A) waives sovereign immunity for any action taken by the Secretary under the Gorge Act, regardless of whether a violation is alleged.[180] Although the court noted that, "while the language of the Gorge Act is not clear, and, indeed, appears defective in several respects," the application of sovereign immunity mandated a conclusion that only a single waiver was intended where a violation of the Act is alleged.[181]

Broughton's alternative statutory ground for jurisdiction under the Gorge Act asserted that the Secretary had a non-discretionary duty to pay compensation for any taking and, therefore, the citizen suit provision authorized citizen compulsion of the Secretary.[182] Since this argument also rested on section 544h's grant of authority to acquire land through condemnation, the court determined that this claim suffered from the same infirmities as the first claim[183] — the Secretary had no mandatory duty to acquire land through a condemnation action.

Broughton's corollary argument under section 544m(b)(2)(B) asserted that "the Secretary had a non-discretionary duty to promulgate regulations governing procedures and payment on inverse condemnation claims."[184] The court also rejected this theory, stating that a statutory scheme providing the Secretary with only limited power to acquire property cannot rationally encompass inverse condemnation.[185] Moreover, the court faulted Broughton for failing to explain how an order to compel compliance required an award of just compensation.[186] The court concluded that "Broughton's claim for just compensation for an alleged 'taking' of

178 *Id.*
179 *Id.*
180 *Id.* at 1554 n.4.
181 *Id.*
182 *Id.* at 1554.
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*

its water rights is therefore not a citizen suit to compel compliance with a non-discretionary duty assigned to the Secretary by the Gorge Act."[187]

A strict interpretation of the two sections of the Gorge Act's citizen suit provision led the court to conclude that the District Court of Oregon lacked jurisdiction to adjudicate Broughton's claim and that transfer to the Claims Court was therefore proper. Had the court implied a private right of action in order to uphold the constitutionality of the Gorge Act or under a theory of broad waiver,[188] it would have undermined the entire statutory scheme of the Gorge Act.

In subsequent litigation, Broughton turned against the Gorge Commission itself, and brought another takings claim on a different set of facts.[189] As this case dealt only with the jurisdictional provisions of the Gorge Act, rather than the citizen suit provision, it merits only a cursory discussion. However, the role of the sovereign immunity doctrine deserves recognition, as this decision also demonstrates that the doctrine serves a valuable purpose when applied to limit federal environmental causes of action to those provided expressly by the statute.

Like the D.C. Circuit, the Ninth Circuit Court of Appeals applied the doctrine of sovereign immunity in order to obtain a restrictive interpretation of the Gorge Act's jurisdictional provisions. The court concluded that a takings claim against the Commission was improper in a federal forum and must be brought in

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187 *Id.* at 1555. The remaining issue that Broughton raised to obtain jurisdiction for the taking claim involved neither interpretation of the Gorge Act, nor the application of sovereign immunity, and thus is beyond the scope of this article. However, regarding whether a constitutional question conferred federal jurisdiction upon the district court, the court held that since the Tucker Act had conferred jurisdiction upon the Claims Courts prior to the enactment of 28 U.S.C. § 1331 (1988), giving effect to Broughton's argument would implicitly repeal the Tucker Act. As repeals by implication are strongly disfavored and as specific jurisdictional provisions are to govern statutes conferring general jurisdiction, the court rejected Broughton's § 1331 argument.

188 *See generally* Lomarch Corp. v. Englewood, 237 A.2d 881 (N.J. 1968) (reading into a statute the requirement of compensation to uphold its constitutionality). "In construing a statute the presumption is that the legislature acted with existing constitutional law in mind and intended the act to function in a constitutional manner. . . . Thus, it follows . . . that the legislature understood that any attempt to deprive a landowner of the use of his property for one year would be unconstitutional absent an intent to compensate the landowner." *Id.* at 884 (citation omitted).

189 Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 60 (1993) (Broughton II).

state court according to section 544m(b)(6) of the Act.[190] This restrictive reading upholds the protective purposes of the Act.[191]

In this case, Broughton contended that the Gorge Act and the interstate compact waived sovereign immunity for actions brought against the Gorge Commission in federal court. Dismissing the argument that Congress' approval of the compact provided the necessary federal waiver of sovereign immunity, the court stated that this "terse enactment provision [did not] constitute an 'unmistakably clear' statement of Congress' intent to abrogate [the Commission's] immunity to suit in federal court."[192] In addition, the court strictly construed the jurisdictional provisions of the Gorge Act (despite a provision in the Compact empowering the Commission to "sue and be sued") and found that the Commission had not explicitly waived its sovereign immunity to suits brought in federal court. "Pursuant to 16 U.S.C. § 544m(b)(6), actions involving the Commission's waiver shall be brought in the state courts of Oregon and Washington. The Commission's waiver of sovereign immunity in the state courts does not act as a waiver of Eleventh Amendment immunity in the federal courts."[193] Therefore, the court again interpreted the Gorge Act strictly, precluding implied private rights of action aimed at undermining, rather than enforcing, the environmental protection objectives of the Gorge Act.[194]

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190 16 U.S.C. § 544m(b)(6) provides:

> The State courts of the States of Oregon and Washington shall have jurisdiction —
>
> (A) to review any appeals taken to the Commission pursuant to subsection 9(a)(2) of this section;
>
> (B) over any civil action brought by the Commission pursuant to subsection (b)(1) of this section or against the Commission, a State, or a county pursuant to subsection (b)(2) of this section.

191 All other takings claims against the Gorge Commission have been brought in state court. *See, e.g.*, Murray v. Columbia River Gorge Comm'n, 865 P.2d 1319 (Or. App. 1993); Tucker v. Columbia River Gorge Comm'n, 867 P.2d 686 (Wash. App. 1994).

192 Broughton II, 975 F.2d at 619.

193 *Id.* at 619-20.

194 The takings issue reached the state courts in an action for declaratory and injunctive relief brought against Washington and the Gorge Commission. The action was dismissed as "beyond the scope of the limited waiver of sovereign immunity" contained in the citizen suit provision. The Washington Court of Appeals' reasoning echoed that of the Broughton I court. Klickitat County v. State, 862 P.2d 629 (Wash. App. 1993).

Similarly, in *Friends of the Columbia Gorge v. Espy*, a magistrate for the United States District Court for the District of Oregon dismissed an action brought under the citizen suit provision of the Gorge Act against the Oregon and Washington Forest Practice Boards, the Washington Department of Natural Resources, and the Gorge Commission. No. 94-1228-AS (D. Or. Apr. 14, 1995). Citing the Gorge Act's legislative history, the magistrate followed *Broughton II* and held that "neither the states nor the Commission waived their Eleventh Amendment immunity with regard to actions in federal court under the Act." *Id.*

C. *Policy Arguments for Restricting Implied Rights of Action Under Federal Environmental Laws*

"[J]udicially created private rights of action may frustrate statutory purposes [of enforcement] by allowing private litigants to bypass the administrative process entirely and permitting the nature and extent of enforcement to be dictated by the judiciary."[195] Such circumvention may disrupt the agency's authority to make law and policy, a critical element of regulation.[196] Several policy rationales support limiting private rights of action arising under federal environmental laws to those explicitly authorized within the citizen suit provision. These rationales include:

- Statutory Integrity. The substantive and remedial provisions of a statute may represent a legislative compromise that would be undermined if courts were to create private remedies on their own.[197]
- Agency Specialization. Private rights of action will often require courts to make determinations for which they lack the specialized fact-finding and policy-making competence of the relevant agency.[198]
- Agency Centralization and Autonomy. Decentralized courts may not be able to produce a consistent and coordinated enforcement process. Resolution of issues on an *ad hoc* basis produces varied results and unpredictability for the regulator and the regulated. The result could weaken a carefully balanced regulatory scheme by invalidating practices that the federal agency decided to permit, or by imposing sanctions that are different from those preferred by the agency.[199]
- Collective Interests. Collective benefits are typically better protected through public enforcement mechanisms than through private remedies.[200] When a benefit is jointly shared, Congress may disfavor private remedies because enforcement at the request of one beneficiary necessarily affects others, possibly in undesir-

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at 6. Therefore, the court granted the states' motion to dismiss for lack of subject matter jurisdiction and dismissed, *sua sponte*, the action against the Commission on the same ground. *Id.* at 6-7.

195 Sunstein, *supra* note 140, at 414.

196 *Id.*

197 *Id.* at 414, 416.

198 *Id.* at 416.

199 *Id.* at 417.

200 *Id.* at 435.

able ways. Thus, a public enforcement mechanism is preferable and might be undermined by additional private enforcement.[201]

If these principles are true in the context of private enforcement actions beyond the scope of citizen suit provisions, then actions aimed at collecting damages from an agency would certainly undermine the effectiveness and integrity of environmental protection regulations. For example, in the Columbia River Gorge, damages awarded against the Commission would result in fewer regulations and would weaken the enforcement of existing ones. If a private cause of action is substantially similar to a cause of action provided for in the citizen suit provision, the citizen suit provision should presumptively supplant the private cause of action; otherwise, the statutory remedy would be redundant. If, on the other hand, the two are materially different from one another, the statutory remedy should still preclude the private remedy since the private cause of action would effectively nullify the conditions imposed on the intended remedy.[202]

V. The Proposed Synthesis

Courts applying the doctrine of sovereign immunity in the context of citizen enforcement of federal environmental laws are faced with a dilemma — whether, and under what circumstances, the doctrine should be applied to restrict private rights of action. One resolution limits the private rights of action available under environmental legislation to those intended for enforcement purposes and explicitly provided for within citizen suit provisions. Once this threshold is met, all remedies under the statute, including civil penalties, should be available to citizens who have standing to bring actions under these provisions. Congressional objectives are best upheld by subjecting the injuring party to the greatest possible deterrent against future violations, thereby also deterring other violators.

This proposal is consistent with the evolution of the general theory of citizen enforcement under federal environmental laws. Provided that citizen enforcement efforts supplement (rather than supplant) government enforcement objectives, federal courts have generally welcomed citizen suits under environmental laws. Once the troublesome threshold of standing is crossed, the enforcement authority inherent in citizen suits is expansive and has expanded

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201 *Id.* at 436.

202 *Id.* at 427.

dramatically in the past decade, particularly with respect to citizen suits for civil penalties.[203]

Citizen suits under federal environmental statutes are subject to abuse; however, abuse is the exception rather than the rule. Moreover, various safeguards such as rigid standing requirements and the requirement that such actions be consistent with the overall enforcement goals of the statute exist to keep such abuse to a minimum. Nevertheless, concern that plaintiffs should not derive personal gain through their enforcement actions is common to citizen enforcement of federal environmental laws. Courts have addressed this "altruism" concern and have reached conclusions that are consistent with the holdings in *Broughton I* and *Broughton II*. These courts have considered and properly rejected citizen actions in other environmental contexts that were held to be inconsistent with the goals of the statutes' enforcement schemes.[204]

In the context of sovereign immunity, the *Ohio* Court's restrictive reading of the citizen enforcement schemes under RCRA and the CWA is symptomatic of the Court's restrictive approach to citizen enforcement of environmental laws in general.[205] In other words, the *Ohio* decision is more a case concerning citizen enforcement of environmental laws than it is a case about sovereign immunity. The case reflects the unfortunate paranoia embraced by many courts in the area of citizen enforcement of federal environmental laws. Such courts assume that citizen suits pose a threat, rather

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[203] *See, e.g.*, Williams v. Leybold Tech, Inc., 784 F. Supp. 765 (N.D.Cal. 1992) (awarding citizen plaintiffs civil penalties in suit against manufacturer for its wholly past violation of section 311 of Emergency Planning and Community Right-to-Know Act for failing to file a Material Safety Data Sheet); Sierra Club, Inc. v. Electronic Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990) (approving CWA consent decree between environmental group and manufacturing plant, under which the plant admitted no violations, but agreed to pay various environmental groups funds to be applied in ways that would further the goals of the Act). *See also* Elizabeth R. Thagand, Note, *The Rule That Clean Water Act Civil Penalties Must Go to the Treasury and How to Avoid It*, 16 HARV. ENVTL. L. REV. 507 (1992).

[204] *See, e.g.*, Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800 (11th Cir. 1993), *cert. denied sub nom.* Southern Timber Purchasers Council v. Meier, 114 S. Ct. 683 (1994) (dismissing, for lack of standing, action under the Endangered Species Act, National Environmental Policy Act, and National Forest Management Act brought by timber companies and their trade association; plaintiffs' alleged economic and environmental injuries were not actionable under the preservation goals of the statutes).

[205] Over the past decade, the Supreme Court has issued several decisions restricting the scope of citizen enforcement of federal environmental laws. *See, e.g.*, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) (disallowing CWA citizen suits for wholly past violations); Hallstrom v. Tillamook County, 493 U.S. 20 (1989) (requiring strict compliance with the literal language of the 60-day notice requirement in RCRA's citizen suit provision as a prerequisite to filing suit); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (limiting environmental standing).

than a boost, to the enforcement goals of a given environmental statute. Regardless of the purported legal or policy basis underlying *Ohio* and the decisions following it, the underlying rationale for reaching such a myopic result stems from these courts' fundamental distrust of citizen enforcement actions. These courts apparently refuse to acknowledge that appropriate limits, such as those articulated in this proposal, can and have been drawn to minimize the potential drawbacks and enhance the potential gains inherent in citizen enforcement actions under federal environmental laws.

VI. Conclusion

The doctrine of sovereign immunity has drawn considerable criticism. Such criticism is justified in situations where the doctrine is applied to limit remedies authorized under the express language of a citizen suit provision. This practice undermines congressional intent and, ultimately, the effectiveness of environmental legislation. The early split in the circuits between broad and restrictive interpretations of immunity waivers, resolved in 1992 by the Supreme Court in *United States Department of Energy v. Ohio*, illustrates this point. Despite express statutory language, clear congressional intent, statutory rules of interpretation, and several policy considerations, the Court in *Ohio* held that neither RCRA nor the CWA allows citizens to sue federal facilities for civil penalties. In this context, use of the doctrine of sovereign immunity must be reformed. Post-*Ohio* cases under RCRA, the CWA, and CERCLA suggest the inception of a potential and welcome departure from the rationale articulated in *Ohio*.

However, the sovereign immunity doctrine in the context of citizen enforcement of federal environmental laws should not be completely abolished. The doctrine continues to serve a valuable purpose in limiting private actions brought under federal environmental statutes to those that Congress explicitly intended. Cases interpreting the Gorge Act illustrate this point by precluding takings claims against the administering agency under the Act. The courts had the opportunity to construe liberally or narrowly the congressional waiver of sovereign immunity embodied in the Act's citizen suit provision, yet the rules of the doctrine demanded a narrow construction from the courts.

Abiding by the express terms of citizen suit provisions allows an agency to implement congressional directives without "undue interference" from actions by citizens seeking to secure personal gain through "private" enforcement of environmental legislation.

Thus, the doctrine of sovereign immunity should not be abolished, but simply reformed so as to not unduly restrict the remedial focus of citizen suit provisions in federal environmental laws.