The Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards

By William R. Shaw*

Introduction

In Chattanooga, Tennessee, as in hundreds of other communities and states, air pollution is a vital concern. Consequently, the Hamilton County Air Pollution Control Board has been authorized to fight air pollution in several ways. One is to require that stationary sources of air pollution (*e.g.*, incinerators, factories, hospitals and even apartment complexes) obtain permits to continue emitting smoke and other gas or particulates into the atmosphere. The permit requirement is used to learn how much pollution such facilities are creating and, if in violation of local standards, how they intend to reduce it. A permit is required of every owner or operator of a stationary facility capable of producing air pollution. However, one local facility, the Volunteer Army Ammunition Plant, has refused to comply with this permit requirement. Its refusal is premised on the ground that because the plant is owned by the United States Department of the Army, although operated by a private concern, the plant is a federal facility,[1] to which the County Board permit requirement does not legally apply. Consequently, litigation is now pending between the County Board and the Secretary of the Army to determine whether the Board has the authority to require that the federal facility obtain a permit.[2] The federal officials responsible for the plant have promised repeatedly that the Volunteer Plant will comply with the County Board's air quality standards, but continue to refuse to submit to the County permit requirement. Local officials are skeptical; in their view, full compliance without a permit is illusory.

While this conflict was developing in Tennessee, a different procedure led to a different result in Estaceda, Oregon. The Eagle Creek National Fish Hatchery there is a federal facility owned and operated by the United States Fish and Wildlife Service. This hatchery had discharged pollutants into Eagle Creek which decreased the oxygen content, raised the temperature and created aesthetic problems. The State of Oregon requires a water discharge permit for each facility capable of polluting the waters of Oregon. Unlike the permit system in Chattanooga, however, permits enforcing the Oregon law are issued by the United States Environmental Protection Agency (EPA) if the discharger is a federal facility. As a result, the Eagle Creek National Fish Hatchery applied for a water discharge permit from the regional office of EPA, which issued a permit to the hatchery on the condition that the hatchery meet a compliance schedule requiring it to purify its water by December 31, 1976. The compliance schedule requires the purchase and installation of necessary waste water treatment equipment. There is no lawsuit or conflict between local and federal officials in Estaceda.

These two situations illustrate the inconsistent compliance procedures which have been developed to ensure that over 20,000 owned and 60,000 leased federal facilities meet environmental quality standards.[3] These facilities include defense installations, fish hatcheries, national parks, research parks and laboratories, hydroelectric dams, nuclear power plants, hospitals, prisons, naval vessels and numerous other sources of environmental pollution. Congress has directed that these facilities meet state and local pollution control standards "to the same extent [as] any person."[4] The President has directed agency heads to see that facilities within their administrative control meet federal and non-federal environmental quality standards. The agency heads, themselves, have issued implementing regulations.[5] Yet inconsistent and inadequate enforcement procedures jeopardize the attainment of statutory standards. Instead of leadership in the nation's environmental effort or, at least, equal compliance with the obligations imposed on private enterprise, present compliance procedures have engendered insufficient efforts

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This article is based on a report which was prepared for the Committee on Compliance and Enforcement Proceedings of the Administrative Conference of the United States in support of a recommendation on the same subject. The report represents only the views of the author. While it has not been approved by the Committee or the Administrative Conference, the recommendation which it supported has since been adopted by the Conference. See Appendix A, 5 ELR 50228.

1. Federal facilities are defined by §2(4) of Executive Order 11752, 38 Fed. Reg. 34793 (Dec. 19, 1973), to mean "the buildings, installations, structures, land, public works, equipment, aircraft, vessels, and other vehicles and property, owned by, or constructed or manufactured for the purpose of leasing to, the Federal Government."

2. Hamilton County v. Callaway, Civil Action No. 6581 (E.D. Tenn.).

3. General Services Administration (GSA), *Inventory Report of U.S. Owned Real Property*, June 30, 1974, p. 8; GSA, *Real Property Leased to the U.S. Throughout the World*, June 30, 1974, p. 7.

4. Section 313 of the Federal Water Pollution Control Act (FWPCA), as amended, 33 U.S.C. §1323 (Supp. II, 1972). See identical requirements in §118 of Clean Air Act (CAA), 42 U.S.C. §1857(f) (1970), and §4 of the Noise Control Act, 42 U.S.C. §4903 (Supp. II, 1972). *See also*, E.O. 11752, 38 Fed. Reg. 34793, ELR 45017 (Dec. 19, 1973).

5. *See*, for example, Department of Defense Directive No. 5100.50 (May 24, 1973, as amended), Department of Agriculture Property Management Regulations, §104-52.000 (Nov. 1971, to be amended soon).

to ensure federal facility compliance with environmental quality standards.[6]

This article will examine the compliance programs imposed on federal facilities in five environmental areas: air, water, solid waste, noise, and ocean dumping.[7] Five different sets of procedures for ensuring compliance are currently in effect, one in each of these areas. The analysis which follows will suggest several recommendations which aim at a more uniform and effective federal compliance effort.

I. The Mandate to Abate (1948 to the present)

Over 25 years ago Executive Order 10014[8] directed federal agency heads to cooperate with state and local officials in an effort to reduce water pollution. In 1958, a similar order was issued in response to the growing concern over air pollution.[9] In 1966 two revisions were made: one for water[10] and one for air.[11] These revisions required agency heads to investigate their needs for pollution control equipment and to submit a request for funds along with plans for improvement to the Bureau of the Budget. Although these revisions directed agency heads to continue cooperation with state and local officials, the responsibility to ensure compliance with environmental quality standards remained with the very agencies that operated the facilities.

In early 1970 the executive orders were revised and superseded by Executive Order 11507.[12] This revision was a substantial improvement, setting more precise standards for compliance. It required that agency plans for improvement be submitted to the Director of the Bureau of the Budget (now the Office of Management and Budget (OMB)) "to facilitate budgeting for necessary corrective and preventive measures." It required concurrence by the "respective Secretaries" (now the Administrator of EPA) with the "performance specifications" outlined in the agency plans. And it guaranteed that funds allocated for pollution abatement projects "would not be diverted to other uses." The President's statement that accompanied the Order promised a renewed federal effort "to sweep its own doorstep clean."

The plans which Executive Order 11507 required from agency heads are still the heart of the Administrative strategy to ensure federal facility compliance with environmental quality standards although the order was superseded by Executive Order 11752 in 1973.[13] This strategy calls for an assessment of needs and the development of necessary plans by the agencies responsible for each federal facility. The plans are then submitted to OMB for special consideration and inclusion in the President's Annual Budget. OMB circulars A-78 and A-81,[14] dealing with air and water pollution control equipment respectively, focus special attention on all budget requests concerning air and water pollution control equipment.

EPA's Office of Federal Activities (OFA) also receives copies of these agency plans and budget requests. This office secures comments from EPA regional staff and attaches a "high," "medium," or "low" priority rating to each proposal. Only then does OMB decide whether to include the request in the President's Annual Budget. Several years experience with this procedure has produced very few "low" ratings by OFA, and still fewer omissions of the agency requests from the President's Annual Budget.[15]

This administrative strategy has worked well in many instances as Table I reveals.

TABLE I

Proposed Projects to Implement OMB Circulars A-78 and A-81[16]

	FY 1973	FY 1974	FY 1975	FY 1976
Number of Projects Proposed	1,982	647	549	906
Number of Depts. and Agencies Proposing Projects	13	13	16	16
Estimated Cost of Projects Proposed (in millions)	$394.7	$432.8	$401.3	$574.8

Whenever facility operators and their agency supervisors have, in fact, assessed their needs and proposed plans and budget requests, then the OMB program has virtually assured that funds are appropriated and spent

6. It is important to note that the National Environmental Policy Act of 1969 (42 U.S.C. §§4321 *et seq.*) fails to provide an effective means of addressing the problem of pollution from federal installations. NEPA's requirement that the responsible federal official prepare a statement detailing the environmental impacts of major federal actions significantly affecting the environment has had a profound influence on federal procedure and on agency decision making. However, the requirements of NEPA apply to new facilities or large additions or modifications to existing facilities, rather than to federal installations operating in the same manner now as they have for some time. Moreover, NEPA's operative provision, the impact statement requirement, is directed more at bringing about changes in federal decision-making practices than it is at the content of the decisions reached. NEPA, in itself, therefore, does not necessarily bring about specific reductions in levels of pollutant generated by federal facilities.

7. (1) Federal Water Pollution Control Act, 33 U.S.C. §§1251 *et seq.* (Supp. II, 1972); (2) Clean Air Act, 42 U.S.C. §1857 (1970); (3) Noise Control Act, 42 U.S.C. §§4901 *et seq.* (Supp. II, 1972); (4) Solid Waste Disposal Act, 42 U.S.C. §§3251 *et seq.* (1970); and (5) Marine Protection, Research and Sanctuaries Act; 33 U.S.C. §§1401 *et seq.* (Supp.II, 1972).

8. 3 C.F.R. 836 (1948).

9. E.O. 10779, 3 C.F.R. 421 (1958).

10. E.O. 11288, 3 C.F.R. 559 (1970).

11. E.O. 11282, 3 C.F.R. 549 (1970).

12. E.O. 11507, 3 C.F.R. 277, ELR 45001 (1973).

13. E.O. 11752, *supra* n. 4.

14. These circulars have been revised and consolidated in Circular A-106 (ELR 47009).

15. *See* Shaw, Review and Evaluation by the EPA of Proposed Air Pollution Control Projects at Existing Federal Facilities, IAS 73-12 (1974) (unpublished report for the Administrative Conference of the United States).

16. EPA's Report to OMB, Pollution Abatement Needs at Federal Installations, for fiscal years 1973, 1974, 1975, 1976.

on the proposed equipment. Regrettably, many facility operators and, in turn, their agency supervisors, have been cynical and suspicious.[17] They have feared that the funds for the proposed projects would be taken from elsewhere in their operating budgets and have recognized that related increases in operating and manpower budgets necessitated by the new equipment would *not* be given special consideration by OMB. Consequently, some have chosen not to initiate plans and budget requests, thereby aborting the whole strategy.

In the same year that Executive Order 11507 was issued, Congress, dissatisfied with the progress to date, revised its statutory requirements for federal facilities. Section 118 of the Clean Air Act was added to require expressly that agency heads "shall comply with Federal, State, interstate, and local requirements ... to the same extent that any person is subject to such requirements...." In 1972 the same language was included in the amendments to the Federal Water Pollution Control Act (FWPCA), and in §4 of the Noise Control Act of 1972.[18] Thus, by the end of 1972 Congress had imposed the same requirements upon federal facilities with respect to air, water and noise pollution as are applicable to private facilities, in order to compel recalcitrant agencies to initiate the OMB procedures for securing pollution control equipment.

In partial consequence of these three laws, other congressional acts,[19] and the ever-growing concern for environmental protection, the President revised the executive order again in late 1973.[20] This last revision expanded the coverage of the order to include five more pollution areas: ocean dumping, solid waste, noise, radiation and pesticides. Significantly, it also shifted some responsibility from agency heads to the Administrator of EPA.[21] Under the new Executive Order 11752, he is directed to (1) "maintain a review of Federal facilities compliance," (2) "mediate conflicts between Federal agencies and State, interstate, or local agencies in matters affecting the application of, or the compliance with applicable standards," and, most important, (3) "develop in consultation with the heads of other Federal agencies a coordinated strategy for Federal facility compliance with applicable standards...." Pursuant to the new executive order, OMB has replaced Circulars A-78 and A-81 with Circular A-106 (December 31, 1974) which includes the additional five pollution areas. Thus, at the end of 1974, it appeared that the President had implemented a consistent and adequate administrative procedure. Federal facilities were directed to request sufficient funds for pollution control equipment for seven major environmental areas. Requests made pursuant to the OMB Circular were virtually assured success in the appropriation process.

Despite this appearance of consistency and effectiveness, the strategy has serious shortcomings. It has worked quite well in securing necessary funds whenever facility operators decide to improve their pollution control equipment. But it has failed to ensure that federal facility operators seek those funds in the first place. Reliance on a carrot without an effective stick is like using a vise with only one jaw. A two-pronged management scheme is needed given the competing pressures on agencies and individual facilities. Every responsible administrator must weigh protection of the environment against production goals, personnel problems, budget restraints and other pressures or agency missions. To ensure that federal facilities will undertake the necessary actions to comply with environmental quality standards, an enforcement scheme must include compliance procedures which ensure the necessary actions by the agencies responsible. The scheme now in operation lacks the necessary compliance procedures in several of the program areas. In fact, no two program areas have similar compliance procedures. The different enforcement strategies in each program area are the subject of the next section.

II. Existing Compliance Programs

A. Water Quality

Maintenance of water quality is a long standing environmental problem and was initially a non-federal concern within the police power of the states. Over the last quarter century, however, Congress has steadily increased the federal role pursuant to its constitutional authority over interstate commerce and the health and welfare of the nation's citizens. The 1972 Amendments to the Federal Water Pollution Control Act mark the most serious intrusion in this previously state-dominated area. Central to the amendments is the National Pollutant Discharge Elimination System (NPDES),[22] which imposed a permit requirement for the discharge of any pollutant into the nation's waters. As of December 31, 1974, all dischargers must have secured a permit from either EPA or a state agency which has a permit system approved by EPA. In order to secure the permit, dischargers must meet or have scheduled to meet a "best practicable" treatment standard by July 1, 1977 and a "best available" treatment standard by July 1, 1983. In other words, for the first time, those who use the water for waste disposal must demonstrate they are endeavoring to terminate this use.

The Administrator of EPA has delegated his NPDES permit authority to his ten regional administrators. Ultimately, it is intended that the permit authority will

17. As reported by OMB budget examiners.

18. Section 313 (33 U.S.C. §1323) and §4 (42 U.S.C. §4903) respectively.

19. Resource Recovery Act of 1970, 42 U.S.C. §§3251 *et seq.* (1970); Marine Protection, Research and Sanctuaries Act, *supra*, n. 7; Federal Environmental Pesticide Control Act (FEPCA), 7 U.S.C. §135 (Supp. II, 1972); and §274(h) of the Atomic Energy Act, 42 U.S.C. §2021(h) (1970), as amended and transferred to EPA under Reorganization Plan No. 3 of 1970 (ELR 48001).

20. E.O. 11752, *supra* n. 4.

21. *Id.*, §3(d).

22. §402 of FWPCA, 33 U.S.C. §1342 (Supp. II, 1972).

be delegated further to the states.[23] In fact, 24 states already have submitted to EPA their proposed programs to implement a permit system and EPA has approved over 20 of these.

Permit requirements help environmental protection efforts by putting the major burden of enforcement on the water users, who must assess their need for pollution control equipment and provide information and plans for compliance to the permit authorities. This technique of environmental protection is a significant improvement over procedures which require pollution control authorities to inspect each facility that may pollute the water and issue citations to those not in compliance. The permit system thus provides a strong stimulus for self-enforcement and simplifies the official's task by providing initial data for an investigation.

Equally important is the provision for involving the interested public. The NPDES system has an elaborate procedure which requires that the public be given notice and opportunity for comment on permit applications. Public hearings and "adjudicatory hearings," with appeals to the Administrator and the courts, may be held to review permits.[24] As these hearing and appeal mechanisms are available to "any person," they provide an opportunity for the interested public to criticize inadequate permit conditions. There is also a citizen suit provision in the Act itself which allows recourse to the courts to stop violations of the Act or its implementing regulations.[25]

The NPDES is now well-established. Hostility and litigation exist, but the issues raised concern the operation of NPDES, not the underlying authority. Over 30,000 industrial applications and 20,000 municipal applications are on file at EPA. Five thousand of these comprise "major sources," generating 90 percent of all water pollution, and EPA has issued permits to nearly all of these dischargers.[26]

Continuing controversy surrounds the question of how the NPDES applies to discharges from federal facilities. Pursuant to §402 of the Act, the Administrator of EPA has received applications and issued permits to the federal facilities subject to the NPDES.[27] When confronted with the question of whether to delegate this authority to those states submitting acceptable PDES programs, EPA chose to reserve its authority to issue permits to federal facilities.[28] This reservation of permit authority was challenged by two states in lawsuits consolidated before the Ninth Circuit Court of Appeals. That court recently held in *California v. EPA*[29] that §313 of FWPCA requires federal facilities to comply with state procedural (permit) requirements in addition to state substantive requirements. It therefore ordered EPA to rescind the regulations which reserved to EPA the permit authority for federal facilities.[30] It further ordered EPA to stop rejecting the PDES programs for the states of Washington and California simply because they included federal facilities within the scope of their permit authority.

The Court of Appeals concluded that the language in §313, when read in the context of the whole Act, was sufficiently clear to constitute a waiver of the Plenary Powers Clause and the Supremacy Clause of the Constitution. It reached this result in spite of its admission that the legislative history was ambiguous, and it gave short shrift to Executive Order 11752 and the Sixth Circuit Court of Appeals' recent decision to the contrary.[31] Appeals from both decisions are slated for argument this term before the Supreme Court.

The decision in *California v. EPA*, if allowed to stand, may cause considerable turmoil. Federal facilities now are willing to apply for permits from EPA. They have shown great reluctance to apply for state permits, despite their obligation and stated intention to meet state and local substantive requirements. The most commonly expressed concern is the myriad of forms and procedures likely to deluge those federal agencies which own or operate facilities in numerous states.[32] In short, opposition has not been addressed to the permit requirement, but to the balkanization of its administration.

B. Air Quality

The second environmental program covered by Executive Order 11752 concerns air quality. Historically, the preservation of air quality has also been a state and local responsibility. Under the Clean Air Act of 1970, however, Congress directed the Administrator of EPA to develop minimum standards and prescribe essential elements for enforcement programs which each state must develop and maintain. Since 1970 all 50 states have submitted and received at least partial EPA ap-

23. *Id.*, §402(b).

24. 40 C.F.R. 125.32, 125.35, 125.36, and 125.36n; 33 U.S.C. §1369(b) (Supp. II, 1972).

25. 33 U.S.C. §1365 (Supp. II, 1972).

26. Energy and Environmental Analysis, Inc., Assessment of the National Pollutant Discharge Elimination System of Public Law 92-500, unpublished study prepared for the National Commission on Water Quality, 140-143 (1975).

27. EPA has relied on §§402, 313 and 301(a) of FWPCA to issue permits to federal facilities. However, the Department of Justice, Division of Lands and Natural Resources, has expressed doubt that these sections are explicit enough for the authority assumed by EPA. *See* Memorandum from Wallace H. Johnson, Asst. Attorney General, responding to an earlier draft of this article, dated Mar. 27, 1975, on file at the Administrative Conference.

28. 40 C.F.R. 125.2. *See* also §1 of E.O. 11752, *supra* n. 4.

29. 511 F.2d 963, 5 ELR 20213 (9th Cir. Feb. 13, 1975), *cert. granted* 43 U.S.L.W. 3674.

30. 40 C.F.R. 125.2(b).

31. In Kentucky v. Ruckelshaus, 497 F.2d 1172, 4 ELR 20484, (6th Cir. 1974), *cert. granted* 43 U.S.L.W. 3499, that court held that virtually identical language in §118 of the Clean Air Act did not require federal facilities to comply with state procedural requirements. See text accompanying n. 34, *infra*.

32. See agency responses to an earlier draft of this article, on file at Administrative Conference of the United States.

proval for their State Implementation Plans (SIP's). These plans are the heart of the statutory enforcement scheme for stationary sources of air pollution emissions.[33] Each state has established certain Air Quality Control Regions (AQCR's) and designated maximum emission standards applicable to each pollutant in each region. The SIP's then prescribe the states' enforcement programs to ensure compliance with those standards. Approximately one-half of the states require permits be obtained by operators of stationary sources of air pollution. The permits are often conditioned on schedules which ensure future compliance.

Section 118 of the Clean Air Act imposed state and local air quality control requirements on federal facilities, unless exempted by the President in "the paramount interest of the United States." As noted above, virtually the same requirement now appears at §313 of the Federal Water Pollution Control Act and §4 of the Noise Control Act. These sections require federal facilities to comply with state and local requirements to "the same extent [as] any person." That provision, coupled with the SIP's, suggested to many a rather simple enforcement scheme, namely that states impose SIP's equally on federal facilities and private enterprise. The simplicity of the proposal has not, however, insured its acceptance. Federal agencies have not agreed that such an application of §118 is consistent with the Supremacy Clause of the Constitution, nor with the concept of sovereign immunity. Their argument, which echoes the losing viewpoint in *California v. EPA*, admits that §118 imposes state and local substantive air quality standards on federal facilities, but denies that it imposes state and local procedural requirements; in other words, it deems permits, administrative orders and other procedural enforcement devices to be outside the mandate of §118.

This substantive-procedural gloss on §118 has been explored by two United States Courts of Appeals, which reached contrary conclusions.[34] An appeal is now pending before the Supreme Court. But it is unlikely that judicial resolution will insure effective compliance, for any decision will leave substantial procedural problems. If the Supreme Court upholds the states' authority to require permits, some agencies will have to comply with a multitude of different state and local procedures; if, on the other hand, the court rules against state procedural authority, that would leave only the present fragmented and ineffective federal procedures to ensure compliance by federal facilities with air and water quality standards. A Supreme Court decision may not totally resolve the issue, however. Despite their parallel language, §118 of the Clean Air Act, §313 of the FWPCA, and §4 of the Noise Control Act have differing legislative histories and statutory settings. In *California v. EPA* the Ninth Circuit explicitly stated that its decision interpreting §313 did not compel an identical interpretation of §118.[35]

There is no federal permit program in air quality comparable to NPDES. EPA has a unique role in the enforcement of federal facilities compliance with air quality standards. Under Executive Order 11752 it is directed to mediate disputes between federal agencies and non-federal authorities and to develop a coordinated strategy for federal facility compliance. Pursuant to this authority, EPA has developed a compliance strategy. Relying upon the cooperation of federal facilities and non-federal authorities, EPA proposes the drafting of "consent agreements" between non-complying federal facilities and EPA, co-signed by state enforcement officials. These "consent agreements" resemble the consent decrees used in some state enforcement programs as a device for securing compliance by private enterprise, but how EPA intends to get federal facilities to sign agreements is problematical. The method of enforcement is not discussed by the EPA compliance guidelines.[36]

When dealing with private enterprise, states can issue "administrative orders" which impose sanctions for non-compliance. Under this threat of enforcement and penalty, private concerns often agree to "consent decrees," which may be judicially enforced. But EPA does not have any threat of enforcement to compel or coerce agencies to execute a "consent agreement." Nor do the EPA compliance guidelines make clear whether or how EPA would enforce any such executed "consent agreements." The agreements are premised on cooperation by federal facilities—an untested and probably unrealistic expectation, since the cooperation is being sought from facilities that are already in non-compliance. Far more troubling is the fact that the agreements are concluded in sessions closed to the public. Only state enforcement officials are invited. This leaves room for compromise that may not reflect the local public interest. In fact, no public notice is given of the consent agreement sessions. The agreements are published only when complete, but, even then, only in the *Federal Register;* no local publication is required.

33. Motor vehicle emission and fuel standards are treated separately. Title II of the Clean Air Act, 42 U.S.C. §§1857f-1 *et seq.* (1970). The air pollution control program for motor vehicle emissions and fuel standards is focused on the manufacturing and distribution stages for motor vehicles and fuels. Since federal facilities are affected only indirectly, this article has omitted discussion of this subject. See the discussion in Subsection F, *infra,* concerning pesticide control.

34. The Sixth Circuit in Kentucky v. Ruckelshaus held that §118 of the Clean Air Act did not provide states with authority to require applications from federal agencies operating facilities in the state. The Fifth Circuit in Alabama v. Seeber, 502 F.2d 1238, 4 ELR 20793 (5th Cir. 1974) held to the contrary. California v. Stastny, 2 ELR 20561, 4 ERC 1447 (C.D. Calif. 1972) raised the same issue, and is now on appeal before the Ninth Circuit (No. 72-2905). *See* further discussion of the judicial confusion in this area in the text accompanying footnotes at 84-99.

35. 511 F.2d 963, 973; 5 ELR 20213, 20217.

36. *See* Federal Agencies' Guidelines for Compliance with Stationary Source Air Pollution Standards, 40 Fed. Reg. 20664 (May 12, 1975).

The consent agreements are helpful in one respect, however. Because they compel agencies to focus attention on recalcitrant facilities, they may compel greater agency use of the OMB Circular A-106 procedures to secure funds for improvement. The agreements will also provide greater specificity and commitment than now found in the compliance schedules which agencies unilaterally submit to OMB under the A-106 Circular.

The conclusions one reaches regarding the compliance procedures in the air quality area are confusing. There is a statutory mandate to meet non-federal requirements. If procedural requirements are not imposed by states, then by whom? EPA has developed a too restrained and optimistic consent agreement procedure. A citizen suit provision exists, but such suits are too quixotic and fortuitous to be relied upon as a regular enforcement procedure. Circuit Judge Lively has suggested that states employ the citizen suit provision and prosecute federal facilities in court rather than require permits,[37] but that suggestion assumes states' attorneys general have the time and staff to pursue the arduous task of investigation and court litigation. Permit procedures, containing necessary elements of fairness and opportunity for review, are far preferable. EPA has apparent authority to pursue litigation against a federal facility once a case of non-compliance can be proved.[38] Whether EPA exercises that authority is apparently within the agency's discretion;[39] however, and in any case it has a quiet policy of not litigating against sister agencies. Only recently has any hint of change been suggested. Last fall the Administrator of Region IV notified the Tennessee Valley Authority (TVA) of its non-compliance with state air quality standards in Alabama, Kentucky and Tennessee and offered the opportunity for a conference to discuss the violation.[40] It also noted the statutory provision[41] for further court action, if that should become necessary. Delivery of the notice was mandated by law, and although administrative orders were subsequently issued, any decision to pursue more stringent enforcement action lies within the discretion of the Regional Administrator.[42] This episode reveals an initial willingness to achieve a workable compromise through a conference, followed by a tougher enforcement attitude in the face of continued recalcitrance. To construe this one example as signaling a major departure from the "consent agreement" strategy would be premature, however. The "consent agreement" strategy seems far more likely to prevail in future EPA actions against non-complying federal facilities.

C. Solid Waste Management

Solid waste generated by federal facilities is also covered by Executive Order 11732. Solid waste became a major federal concern with the enactment of the 1965 Solid Waste Disposal Act, which, after several years of experience, was strengthened and renewed by the 1970 Resource Recovery Act.[43] To date the legislation does not impose federal control over local standards and programs. Rather, the Act provides grants for demonstration projects and local programs. What legislation will ultimately emerge from the debate in Congress is hard to determine, but it is fairly certain that successor legislation of some sort will be adopted in this important area.[44]

Section 211, which affects federal facilities, was added by Congress in 1970 for reasons similar to the addition of §118 of the Clean Air Act, viz., that federal facilities should provide environmental protection leadership. However, the language of this "federal facility section" is not consistent with §118 or similar sections in the water and noise control acts. Section 211 requires only that federal facilities comply with disposal guidelines promulgated by EPA; there is no requirement to meet state or local standards. The solid waste guidelines, authorized under §209 of the Act, are left to the discretion of the Administrator of EPA. Those guidelines were promulgated as proposed rules for review and comment on April 27, 1973.[45] Sixteen months later came the long-overdue final rules.[46] The preamble to the new rules admits they are less stringent than most state requirements. Specifically, they contain minimum requirements for both thermal treatment (incineration) and landfill disposal of solid waste. And they lack any procedures to ensure compliance with the standards established. Thus, the program provides still another unique and inadequate approach to federal facility pollution control.

The revised OMB Circular A-106 now mandates attention to solid waste disposal problems, requiring agency plans and budget requests for disposal equipment to be submitted and updated regularly; EPA's Office of Federal Activities is asked to comment on the priority that should be assigned to each such request. As noted, however, state rules and requirements are irrelevant despite the fact that they are often stricter. Thus, two neighboring communities—one a village, one a United States defense base—are held accountable to different standards. More importantly, the federal facility is not subject to any enforcement procedures. No per-

37. Kentucky v. Ruckelshaus, *supra* n. 31 at 1177, 4 ELR 20487.

38. Section 113 of FWPCA, 33 U.S.C. §1323.

39. Kentucky v. Ruckelshaus, *supra* n. 31 at 1177, 4 ELR 20487; New Mexico Citizens v. Train, 6 ERC 2061, 2065 (D.N.M. 1974).

40. Letter from Mr. Ravan, EPA Regional Administrator, to Mr. Wagner, Chairman TVA, Sep. 16, 1974.

41. Section 113(c) of the Clean Air Act, 42 U.S.C. §1857c-8(c).

42. *Id.*

43. 42 U.S.C. §§3251-59 (1970), ELR 41901.

44. *See, e.g.*, S. 1774 (Resource Recycling and Conservation Act) and H.R. 5487 (Waste Control Act of 1975).

45. 40 C.F.R. 240, 241; 38 Fed. Reg. 10544 (Apr. 27, 1973).

46. 39 Fed. Reg. 29328 (Aug. 14, 1974).

mit program, no state or local enforcement, not even a citizen suit provision is available to ensure that federal facilities live up to these minimum guidelines. This fact is especially deplorable in light of the growing attention the state and local governments are paying to the problems of solid waste.

D. Noise Control

The fourth area of environmental concern covered by the executive order is noise pollution. Once again, Congress has explicitly recognized the primary responsibility that state and local governments have over noise control.[47] Nonetheless, the Federal Noise Control Act brings the federal government squarely into the picture in several important ways. For example, it directs the Administrator of EPA, in conjunction with the Federal Aviation Administrator and the Secretary of the Department of Transportation, to promulgate noise emission regulations for aircraft, railroads and motor carriers engaged in interstate commerce.[48] EPA alone is made responsible for developing standards for a variety of commercial products which contribute excessively to noise pollution.[49] Nonetheless, the Act leaves most sources of environmental noise primarily within the control of non-federal agencies, mandating federal intervention only when factors such as interstate commerce are critical. Thus, railroads, interstate carriers and aircraft[50] are all subject to federal controls which preempt local control. Needless to say, the interface between local and federal concerns cannot always be clearly defined.

Recent technological developments have permitted development of particularized noise regulations which assign maximum decibel levels according to time, place, and source. At least 21 states have enacted land use noise control statutes, and five of these (Oregon, New Jersey, Illinois, Colorado and California) have promulgated regulations pursuant to those statutes.[51] At least 11 states have ordinances for motor vehicle operation. Over 150 local governments have adopted land use noise control laws and over 50 have implementing regulations. Many more communities are seriously considering the use of comprehensive noise pollution control laws. With this proliferation in state and local noise control requirements, a problem arises for federal facilities operating within those local jurisdictions.

The federal noise control law clearly covers federal facilities. Section three of the Act defines "persons" to include federal agencies. Section four uses the same language found in §118 of the Clean Air Act compelling federal facilities to meet state and local requirements. As a result, the same legal questions exist over the question of whether "requirements" is defined to include procedural as well as substantive regulations.[52] Yet, several important distinctions need mention. First, the FAA and EPA have clear preeminence in regulating a major source of local noise pollution—aircraft. Second, within the Act's requirements for new products an exemption has been carved out for the Defense Department, NASA and any other federal agencies using products such as machinery and equipment for "experimental work."[53] Third, the procedures to ensure compliance by federal facilities are quite unclear. The only section prescribing enforcement of the Act provides for criminal sanctions and specifically precludes enforcement against federal officials. The citizen suit provision is of no more help than suggested above in the air quality area; it is quixotic and expensive, putting the entire burden on the private citizen qua prosecutor.

For certain noise sources, the Secretary of Transportation or the Federal Aviation Administrator is given authority to secure compliance. Whether and how they might direct sister agencies to comply is unclear. The fourth difference is the newness of noise control. Prior to 1970, noise control was a subcategory of nuisance law (statutory or judge made). Since then, technology, the primary cause of more noise, has developed techniques for its measurement, and enforcement can be precise and often prospective. However, little litigation has developed to expose these new statutes and requirements to the scrutiny of the courts.

The newness of noise control statutes is significant in another way. Although relatively few states have yet adopted noise control regulations, a few purport to bind federal facilities. For example, in Oregon the regulatory language expressly includes federal facilities within the scope of regulated persons subject to compliance.[54] Although litigation in the air quality area concerns the question of how non-federal agencies can enforce permit compliance against federal sources, its outcome may not resolve the issue for noise control. Rather than permits, the strategy in noise control involves prescribing strict limits and then enforcing compliance against individual violators; procedures generally call for inspections or response to complaints. Once violations are apparent, local officials have authority to issue citations enforceable by local agencies or courts. Such procedures are bound to raise the same federalism difficulties experienced in the air quality programs.

47. Section 2 of the Noise Control Act, 42 U.S.C. §4901 (Supp. 1973).

48. Sections 17, 18, 42 U.S.C. §§4916, 4917, respectively.

49. Section 6, 42 U.S.C. §4905. These standards are enforced against the manufacturers, not users. Therefore, they would not be applicable to federal facilities directly.

50. Section 7, 42 U.S.C. §4906. Although EPA develops these standards, the OFA reports that DOT/FAA issues and enforces them and that they are not subject to E.O. 11752.

51. EPA, Noise Source Regulation in State and Local Noise Ordinances (Feb. 1975).

52. *See* Air Transport Ass'n v. Crotti, 5 ELR 20236, 7 ERC 1748 (N.D. Calif. Feb. 1975).

53. Section 3(3)(B) of the Noise Control Act, 42 U.S.C. §4902(3)(B).

54. Oregon Administrative Rules, Ch. 340, §35-015(23) (1974).

E. Ocean dumping

The fifth area covered by the executive order is one which presents an example of good administration in a difficult field. The territorial seas are primarily a national concern due to their impact on national defense and interstate and foreign commerce.[55] The marginal sea bed—out to three miles—is within the province of the riparian states, while the outer continental shelf is considered the province of the federal government.[56] When pollution caused by ocean dumping became a significant national problem, Congress enacted the Marine Protection, Research and Sanctuaries Act of 1972[57] to protect the nation's seas and sea beds. This ocean dumping legislation created yet another approach to the problem of ensuring that environmental standards are met by federal facilities. A reading of Title I reveals a proscription against ocean dumping by "any person" not holding a permit pursuant to the Act. The Act defines person to include "any officer, employee, agent, department, agency or instrumentality of the Federal Government. . . ."[58] Section 101 prohibits "any person" without the requisite permit from transporting material from the United States to the territorial seas or 12 miles beyond for the purpose of ocean dumping. A separate proscription, directed exclusively at federal agencies (*i.e.*, our overseas defense bases), bans the dumping of any material in any ocean waters if the material is being transported from outside the United States.

Within these proscriptions, the only avenue for those interested in dumping refuse into the ocean is a permit issued either by the Army Corps of Engineers for dredged material or by EPA for all other material. No exemption is made for federal agencies;[59] they must secure a permit in the same manner as anyone else. The permit process is described in the Act and the regulations issued by EPA and the Corps of Engineers.[60] Under the EPA regulations each applicant must provide basic information on what material he intends to dump and why. That application is made public and published in the local news media. If no objection is raised by the public or EPA, a permit listing restrictions and requirements is issued by the Regional Administrator. If, however, any person wishes to object, a public hearing will be held in that region to consider the contents and issuance of the permit. The presiding officer may recommend to the Regional Administrator whether to issue a permit or not, and what conditions, if any, should be imposed. This permit procedure is very similar to the water discharge permit system (NPDES) described earlier in Subsection A. The striking difference is that here the law clearly prescribes that a federal, not a state, agency shall issue the permits to its sister agencies. The problems of supremacy and sovereign immunity are thus avoided. Additionally, the hearing held is a public hearing, not an "adjudicatory hearing."

The enforcement procedures for the ocean dumping program are similar to the enforcement procedures for the NPDES. Section 105 of the Marine Protection Act provides for both criminal and civil penalties. Interestingly, despite the inappropriateness of both these sanctions to federal agencies, they are not exempt from either. Revocation of the permit is one viable enforcement option, but a more realistic alternative insofar as federal agency violations are concerned is the use of injunctions. Moreover, "any person," including state and local officials, can bring a citizen suit action against any federal agency or official for alleged violations of the Act or permit conditions.[61]

F. Pesticides, Radiation Control, and Safe Drinking Water

The last areas of concern addressed in the executive order are pesticides and radiation. Both are somewhat unique, are distinct from the previous five categories, and merit the special statutory and regulatory treatment they receive.[62]

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was a response to the problems caused by use, mis-use and over-use of pesticides. This act has been substantially revised by amendments since enacted in 1942. The latest and most important amendment is the Federal Environmental Pesticide Control Act of 1972 (FEPCA).[63] The main innovation of FEPCA was to give EPA authority to require registration of pesticides. It compels the manufacturers of pesticides to apply for and receive EPA registration and permission to distribute and sell their pesticides. While these provisions do not affect federal facilities directly, they do fall within the Act's provisions for enforcement against users of unregistered pesticides. To these provisions, however, there are two important exemptions applicable to local, state, and federal agencies. First, "any public official while engaged in the performance of his official duties" is exempt from the general coverage of

55. United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); and United States v. Maine, ___ U.S. ___, 5 ELR 20232, 7 ERC 1753 (1975).

56. Submerged Land Act of 1953, 43 U.S.C. §§1301 *et seq.* and the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§1331 *et seq.*

57. 33 U.S.C. §1401 *et seq.* (Supp. 1973).

58. Section 3(e) of the Marine Protection Act, 33 U.S.C. §1402(e).

59. An unresolved question is whether a loophole exists in §107(b), which authorizes the Administrator or Secretary of Army to delegate some or all their permit authority to other federal agencies.

60. 40 C.F.R. 220-227, 38 Fed. Reg. 28610 (Oct. 15, 1973). *See* also the U.S. Army Corps of Engineers' procedures at 33 C.F.R. 209.120, 39 Fed. Reg. 12118 (Apr. 3, 1974).

61. Section 105(g) of the Marine Protection Act, 33 U.S.C. §1415(g).

62. Radiation is not only unique, but also extremely complex; the specific statutes and regulations controlling that subject require study and clarification on their own terms and will not be examined closely here.

63. 7 U.S.C. §136 *et seq.* (Supp. II, 1972).

the Act.[64] Second, there is a broad exemption from the ban against use of unregistered pesticides where the user is a federal or state agency. Section 18 provides authority for the Administrator of EPA to exempt any such agency whenever he determines emergency conditions exist which require such exemption. The Administrator has implemented that authority by promulgating rules for administering the exemption.[65] These exemptions are rarely used. Instead, an agency may quietly urge EPA to register the pesticide in question, or grant an experimental use permit under §5.[66]

One other federal facility involvement does arise with respect to §4 of the Act. That section requires pesticide applicators to be certified pursuant to federal standards, either implemented by EPA or by EPA-approved state certification programs. Certification is required whenever the applicator is applying a pesticide registered for restricted use. In response to these provisions, EPA's certification rules establish a Government Applicators Program. Under this program, federal employees receive forms upon completion of a federally-sponsored training course. Each state then either indicates blanket acceptance of persons with such credentials, or requires additional state level training courses.[67]

In sum, it appears that pesticide problems, which affect air quality, water quality and solid waste management, are best treated with a compliance program distinct from air, water, solid waste, noise or ocean dumping problems. That is not to say special treatment, loose control or other problems should be tolerated. Rather, it seems clear that pesticide control is best focused on manufacturers, none of which are public entities. The certification of applicators and the enforcement procedures to prohibit use of unregistered pesticides are clearly subsidiary measures.

As for radiation, it is also sui generis. The problems associated with radioactive material arise in air, water and solid waste. For that reason, they are more akin to the problems encountered in the pesticide area than the others covered by the executive order. The national defense aspects of radioactive material further complicate any enforcement technique. Thus it is not surprising that EPA has a limited role[68] in this area which is subordinated to the general responsibility of the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission (NRC), previously the Atomic Energy Commission.[69] It is fair to conclude that radiation is a unique pollution problem that merits special attention outside the framework of this article.[70]

An eighth area of concern is safe drinking water. The Safe Drinking Water Act,[71] enacted December 16, 1974, contains federal facility compliance requirements which are somewhat different from all those previously discussed, but the fact that compliance procedures are as yet undelineated suggests that analysis at this time would be premature.

With this conclusion of these brief sketchs of seven pollution abatement programs covered by the executive order, and the one to be developed, which are applicable to federal facilities, it becomes clear that at least five have substantially similar qualities, three have virtually identical statutory language and two have similar permit programs; yet no two have parallel administrative procedures. The next section will address the various issues that have arisen in this area to date. An effective uniform scheme of enforcement is also proposed.

III. Issues and Analysis

This section focuses separately on four major interrelated concerns. The first is the lack of a uniform statutory scheme ensuring federal facility compliance with environmental quality standards. The second problem is the inconsistent procedural options used to implement those three statutes which do have a uniform scheme for compliance. The third concern involves the minimum elements of procedural openness and fairness that should be provided in any new or continued permit system implemented to control pollution emissions by federal facilities. Finally, there is the constitutional issue of supremacy, the doctrine of sovereign immunity and the persistent, though unnecessary intergovernmental conflict pervading this whole area.

A. Uniformity of Statutory Obligations for Federal Facilities

In three separate statutes dealing with air, water and noise pollution, respectively, Congress has inserted a section entitled "Federal Facilities." Each of these sections contains virtually identical language. In essence all require federal agencies to ensure that facilities owned or controlled by them comply with interstate, state and local pollution control requirements "to the same extent [as] any person." These sections are intended to attain two goals while reinforcing a third, equally important concept. The first goal is to ensure that pollution control begins at home; the second is an equal treatment standard for enforcing pollution control against private and federal facilities. The concept which is rein-

64. Section 12(b)(3) of FEPCA, 7 U.S.C. §136j(b)(3).

65. 40 C.F.R. 116.

66. *See, e.g., Environmental Protection Agency–Recent Developments*, 5 ELR 10060 (Apr. 1975), 5 ELR 10164 (Sep. 1975).

67. 40 Fed. Reg. 11698 (Mar. 12, 1975).

68. *See* §274(h) of the Atomic Energy Act, *supra* n. 19, as amended and transferred under Reorganization Plan No. 3 of 1970. §§2(a)(7), 6(2), effective December 2, 1970. *See also* FWPCA §502(6), *supra* n. 4; Marine Protection, Research and Sanctuaries Act, §3(c), *supra* n. 7; and National Environmental Policy Act, §102(2)(C), *supra* n. 6.

69. Energy Reorganization Act of 1974, Pub. L. 93-438.

70. The Tenth Circuit handed down a decision in late 1974 which further complicates this area. Colorado PIRG v. Train, 507 F.2d 743, 5 ELR 20043, held that the Administrator of EPA had the "duty of regulating the discharge of all radioactive material into the Nation's waters. . . ." The implications of this conclusion are interesting, if sustained on appeal. *Cf.* California v. EPA, *supra* n. 29.

71. P.L. 93-523, to be codified at 42 U.S.C. §300f-j; ELR 41131.

forced is the continued pre-eminence of state and local agencies with respect to setting and enforcing pollution control requirements.[72]

These goals and concepts are sound. With respect to the first, it is elementary that the federal intrusion into the province of pollution control, historically a state and local province, requires an effective commitment by the federal government to meet the requirements which it directly or indirectly imposes on private or non-federal enterprise. In fact, the leadership burden alone should dictate that the federal government set an example by promoting environmental quality.[73]

The second goal of these sections is equal treatment of federal and non-federal facilities. A looser standard, exclusively applied to federal facilities, corrupts federal integrity. For those citizens whose air is polluted or streams fouled or ears assaulted by a local facility, the ownership of the pollution source is irrelevant. An example occurred in the District of Columbia, when hearings were held concerning major sources of air pollution. Among the various facilities allegedly failing to meet their compliance schedules were the General Services Administration heating plant, the Naval Research Laboratory, and the Anacostia Annex and Naval Station. The public witnesses ignored the question of ownership of the facilities. They simply wanted the pollution abated.[74]

More important, the equal treatment concept is essential for those enforcing pollution control requirements. Their zeal, loyalty and effectiveness are integrally related to their ability to treat all violators alike. This fact can be illustrated well with two examples. First, consider the situation faced by a regional water quality control board which is attempting to clean up sources of water pollution, while a mammoth Defense installation and base is dumping nearly raw sewage near a local beach.[75] How long can one expect continued efforts to halt individual septic system violations while a neighboring facility, owned and operated by the federal government, obliterates any environmental gains that might occur. Second, consider an instance where a state water pollution official is attempting to write an effective compliance schedule for a facility owned by a large private corporation. The official knows and argues persuasively that six months is a reasonable time for the corporation to select, order, buy and install the necessary chlorine treatment equipment needed to control the pollution. Meanwhile, next door, a federal installation without any fear of sanctions for non-compliance or delay will agree only to a three year compliance schedule.[76] Its argument is based on the long budgetary cycle of its "corporate" owner, the federal government. These examples illustrate the problems faced by enforcement officials when compliance authority is unequal.

The last aim of the "federal facilities" sections is to support the continued preeminence of state and local governments with respect to establishing pollution control requirements. Although the federal government has become more visible and has established many of the minimum requirements of state and local pollution control standards, nonetheless, non-federal agencies continue to set the final requirements which must be met by the citizenry. More important, the state and local enforcement activity is clearly more extensive than the federal effort. Both in terms of manpower and dollars, local and state inspections, citations, response to complaints and ultimate prosecutions constitute the bulk of this nation's environmental protection enforcement program. Of equal importance is the unique quality of the environment within each state and local jurisdiction. This fact alone requires federal deference to environmental quality standards set by officials in these local jurisdictions. Federal views as to what level of smoke or wastewater is reasonable need always to be measured against the local concerns for maintaining their environmental quality.

It is appropriate to investigate why the above goals are found in only three of the five environmental areas. The omission in the ocean dumping area is understandable. There we address a problem more appropriately national in scope. The 1972 Act prescribing the method to resolve this and related problems confronting our national seas virtually abandoned the state and local authority over adjacent territorial seas by setting federal standards and delegating the permit-granting authority solely to federal agencies (EPA and the Army Corps of Engineers). Thus, the Act attains the two goals sought with the other "federal facilities" sections. It requires that federal agencies, like private enterprise, must secure a permit before dumping waste in the ocean. It also establishes a uniform standard for compliance by federal as well as private permittees. The only distinction is the nominal role assigned to state and local government. This distinction is reasonable in light of the lesser involvement non-federal governments have historically had in patrolling the territorial seas. Consequently, the omission of a specific "federal facilities" section in the ocean dumping legislation is reasonable and consistent with the goals set forth above.

The omission of a "federal facilities" section in the Solid Waste Disposal Act is more difficult to comprehend. The regulation of solid waste disposal has

72. This congressional recognition of state and local responsibility is explicit and implicit throughout all three environmental statutes. *See, e.g.*, §2(a)(3) of the Noise Control Act, 42 U.S.C. §4901(a)(3).

73. *See* 42 U.S.C. §4321 and E.O. 11752.

74. *See* Proceedings of the D.C. Department of Environmental Services, In the Matter of Proposed Compliance Schedules of Major Air Pollution Stationary Sources in the D.C., February 28, 1974.

75. *See* California v. Davidson, 1 ELR 20606, 3 ERC 1157 (N.D. Calif. 1971).

76. Reported by Regional Engineer, New York State Department of Environmental Conservation, Region IX.

been almost totally within the province of state and local jurisdiction. State and local governments have extensive statutes and regulations concerning solid waste disposal, yet under federal law they do not apply to federal facilities. Perhaps the rationale for the unusual approach taken by this Act is the limited involvement by the federal government in the regulation of solid waste disposal. But this justification must surely fall before the weight of the arguments presented above for imposing non-federal standards respecting air, water, and noise control on federal facilities. First, the federal government clearly has a leadership role to play. In fact, the major thrust of the Solid Waste Disposal Act is to promote research and develop improved models of solid waste disposal. Second, the concern over a double standard is just as vital here. A great deal of solid waste is disposed of by incineration, which is subject in part to local air pollution control requirements. Thus, for that method of disposal we have—statutorily at least—ended the double standard by enacting §118 of the Clean Air Act.[77] To avoid that double standard entirely, disposal of solid waste generated by federal facilities should be subject to state and local standards regardless of the disposal technique. The concept of continued pre-eminence by allowing state and local agencies to set the standards applies to solid waste as well as air, water and noise. Addition of a "federal facilities" section to the Solid Waste Disposal Act would properly honor the concept of continued pre-eminence of state and local pollution control and would further the goals of leadership and equal treatment of federal facilities.

B. Administrative Procedure to Ensure Compliance

If it is agreed that federal facilities should comply with state and local environmental quality standards (except with respect to ocean dumping), attention may be turned to developing the best method or procedure for accomplishing that task. Several options are available. The first option, now being used, has been described at some length, *supra*. In short, OMB Circular A-106 implements Executive Order 11752 by requiring agencies to assess their pollution abatement needs and initiate plans along with the requisite budget requests; the special attention given to these requests virtually assures availability of funds and requires that funds be spent on the plans proposed. The procedure also requires a regular update of developments within each agency.

These procedures may appear adequate at the outset, but their weakness is that they rely on a premise which is too sanguine; the whole procedure depends on agency personnel taking the initiative to set the ball in motion. But, in reality, there are and always will be individual facility operators or other responsible agency officials who (1) recognize that not all the funds necessary will be provided (*e.g.*, operation and maintenance of new waste treatment equipment), (2) are pressed by other administrative concerns[78] or (3) are uncooperative and, consequently, will never address the problems or else will underestimate the needs.[79] On the other hand, some may seek to use the A-106 procedure to secure equipment unrelated to pollution control.[80] In either event, the OMB procedure overrelies on an incentive system—the carrot.

The need for an effective stick, administered by an agency other than the facility owner or operator, is fully recognized in the ocean dumping and water programs as evidenced by the statutory imposition of a compliance scheme (permits) to ensure federal facilities meet the standards. It seems reasonable to suggest that the same or similar procedures to ensure compliance be implemented in the programs for air, noise and solid waste as well. But what type of procedures?

In ocean dumping and water pollution the Congress adopted a permit system. Half the states have done the same with respect to air pollution by stationary sources. Although the time-honored process of investigation, citation and enforcement orders (whether by courts or administrative agencies) are alternatives worth considering, on balance the permit system seems preferable. Permit procedures require polluters to come forth with information in their applications which accurately states their present emissions in both quantitative and qualitative terms. The applications must also provide a schedule for compliance within the statutory deadlines, if present emissions are not within applicable standards. The merits of this approach are significant. Each facility is compelled to assess its own problems. Once compelled, some operators will comply merely upon knowing they do not meet the standards. Others, compelled at least to admit their non-compliance, will be forced to deal with the problem. In either event permits require facility operators to address their problem.

The permit system has been criticized often as fostering legalized pollution. Admittedly, a permit does allow pollution to continue, but a permit system also requires all polluters to spell out their present levels of pollution, rather than rely on isolated spot checks by enforcement agencies. More important, permits require polluters to

77. *Cf.* Greater Anchorage v. Johnson, 4 ELR 20818, 6 ERC 1989 (D. Alas. 1974) where defendants, employees of a United States-owned railroad, disposed of telephone poles by burning them in violation of a local air pollution standard.

78. *E.g.*, A Veterans Administration Hospital in Canandaigua, New York, was out of compliance with local air pollution regulations for a long period of time. The hospital administrator blamed his plight on budget constraints.

79. The Puget Sound Air Pollution Control Agency reports continued non-cooperation from the United States Navy. *See also* affidavits of the Executive Officer of the California State Water Resources Board, noted in California v. EPA, *supra* n. 29. Staff in the New York State Department of Environmental Conservation (Region VII) were summarily refused admission to the Seneca Army Depot until pressure was supplied from other federal officials.

80. For example, an OMB budget examiner reported one instance in which the need to remove sewage from a ship was used as the basis for a request for funds for an entire new pier.

develop plans and compliance schedules to meet the standards within statutory deadlines. The administrative alternatives are (1) a case-by-case approach, with many polluters never being investigated or compelled to comply, or (2) an unrealistic, total ban on emission of pollutants. The growing use of permits for environmental protection reflects an acceptance of the facts that, although they are not perfect and do allow a continued level of pollution, they are preferable to ad hoc enforcement or total bans. Permits provide information and secure prompt compliance schedules without closing down valuable facilities in a wholesale fashion.

An additional advantage to permits is the relative speed and ease of enforcement should the polluter fail to comply with specified conditions. Incomplete or inaccurate information results in refusal to grant a permit, and a permitless discharge is a prima facie violation of the law. Should EPA fail to prosecute that violation, the citizen suit provisions in most of these acts allow "any person" to enjoin the violator from further discharge of the substance at issue (air, water, noise or materials to be dumped in the ocean). Hence, any state or local official could utilize this provision to bring a quick and relatively sure-fire suit. Should a permit be issued and then the polluter fail to meet with a compliance schedule, again EPA or "any person" has a prima facie case for an injunction. Without permits, enforcement involves a lengthier procedure requiring investigation, compilation of raw data, and time-consuming administrative and judicial procedures. Moreover, such procedures involve fortuitous enforcement, unnecessary delays, with all burdens of proof on the enforcer, not the polluter.

These arguments, buttressed by the fact that permit systems have been implemented by Congress in the ocean dumping and water area and by most states in controlling stationary sources of air pollution, raise the question of whether it is worthwhile to develop permit requirements for federal facilities to ensure compliance with air, solid waste and noise control standards as well.

The answer depends in part on the technical problems which arise in measuring and predicting accurately the quality and quantity of pollutants that will be emitted by a given facility. The technologies needed to establish standards upon which a permit system can be based have progressed further in some areas than in others. The state of the art in water quality management appears to be up to the task. Ocean dumping offers no serious problems; when dealing with stationary sources of air pollution, there is a consensus in EPA and many state agencies that permits are practicable. Solid waste disposal is similar to ocean dumping and is already regulated in part by air quality requirements affecting incinerators; it is susceptible to measurement and prediction.

In short, a permit system would seem to be a substantial improvement to the regulation of nearly all aspects of federal facility pollution. Noise control is the only program for which the state of the art may not be sufficiently advanced to enable at least the use of permits, at least for the present. However, the regulation of the sale of new products that cause noise pollution is promising. On balance, it seems fair to assume that noise is technically no less susceptible to a permit system than air quality. Consequently, the use of permits should be kept in mind as experience is developed in the control of this area of environmental concern. In any event, this analysis concludes that programs should be established leading to permit systems to control air pollution, solid waste disposal, and perhaps noise pollution, contingent upon the technological ability to do so.

C. Resolution of the Intergovernmental and Constitutional Conflicts

The present system for ensuring federal facility compliance with environmental quality standards has created a strain on daily intergovernmental relations as well as judicial disagreement over issues of statutory interpretation and the constitutional rights of the states.

The cases referred to in this article are the tip of an iceberg of cool intergovernmental relations. The exasperation of state officials is reflected in the following conversation:

> Q: How does your state office deal with the environmental problems caused by federal facilities?
>
> A: We throw up our hands.[81]

In Puget Sound (State of Washington), the director of the local air pollution control agency is notorious for filing suits against federal facilities, despite repeated dismissals.[82] But the real antagonism is best revealed by conversations with state and local officials. The Attorney General's office in Tennessee is anxious to bring several actions, but may not for lack of sufficient staff and financial resources. Some state officials are not so ardently opposed to the existing federal procedures, but these officials often represent states with few federal facilities. For example, one Georgia State Health Department official indicated satisfaction with federal facility compliance with air and water quality standards. He conceded, however, that his state had few problems due to its smaller number of federal facilities.

To be sure, the primary causes of dissatisfaction are the instances of non-compliance that state and local officials observe. But substantial friction is also caused by the confused enforcement procedure. In New York, for example, for a time state officials requesting permission to make an environmental inspection were denied admission to an army base. Only after referral to several levels of different state and federal agencies was their inspection allowed. Consequently, state officials now refer problems to the EPA regional office on a regular basis, but have no certainty as to the result. Tennessee state health officials had less knowledge or faith in pro-

81. Conversation with the Compliance Counsel for the New York State Department of Environmental Conservation.

82. *E.g.*, Puget Sound APCA v. USVA Hospital, 4 ELR 20010 (W.D. Wash. 1973).

cedures of the regional EPA staff. California and Washington were so unhappy with the federal procedures that they brought suit in the United States Court of Appeals and won complete authority over the water discharge permit system for federal facilities.[83] This dissatisfaction over the present set of federal enforcement procedures should be resolved, if possible.

One effort at resolution has been litigation. As noted above, a few significant cases have either been decided or are on appeal.[84] The results of the court decisions are not in harmony. In general they address the question of whether non-federal permits can be imposed on federal facilities. This issue involves both constitutional law and statutory interpretation.

The principal questions of constitutional law concern the Supremacy Clause and the doctrine of sovereign immunity. The Supremacy Clause was carefully analyzed by Chief Justice Marshall over 155 years ago. In that classic case over the states' authority to tax the National Bank, he summed up the issue neatly:

> First, that a power to create implies a power to preserve. Second, that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. Third, that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.[85]

This principle is alive and well today. Circuit Judge Lively relied explicitly on this rationale and the Supremacy Clause in the Sixth Circuit decision to exempt the Tennessee Valley Authority (a congressional creation comparable to the National Bank of Marshall's time) from the permit requirements of the State of Kentucky.[86] In fact, the Supremacy Clause was also considered a major hurdle in the Fifth and Ninth Circuit cases on the same issue.[87] That hurdle was surmounted in these latter two decisions, but not in the *Kentucky* case.

The rationale for evading the Supremacy Clause is straightforward, as indicated by the *California* decision which invokes a line of Supreme Court cases holding that Congress may waive exclusive legislative jurisdiction over federal facilities so long as that waiver is explicit and not overly broad.[88] The court went on to conclude that §313 of FWPCA was an explicit and not overly broad waiver. Therefore the Supremacy Clause was not a bar to the state's program. The Sixth Circuit reached an opposite conclusion with respect to §118 of the Clean Air Act, which has virtually the identical language as §313 of FWPCA.

> In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.[89]

The Fifth Circuit, also confronted with §118 of the Air Act, held contrary to the Sixth Circuit, simply noting its disagreement with the Sixth Circuit:

> It is on the proper interpretation of §118 that we part company with the Sixth Circuit.[90]

Thus, for the present, two circuits are split over the supremacy issue with respect to the Clean Air Act, and a third circuit leans in favor of the conclusion that an explicit waiver exists, given its view of §313 of FWPCA. All these cases are presently before the Supreme Court.[91]

A second constitutional objection to the authority of the states to impose enforcement procedures on federal facilities arises from the doctrine of sovereign immunity. This venerable defense has come under increasing attack recently.[92] Nonetheless, it still has some vitality in the courts, and the Sixth Circuit relied explicitly on this doctrine in the *Kentucky* decision.[93] Again its conclusion was not followed in the Fifth Circuit, which held:

> Our determination of the meaning of §118 also forecloses this contention. . . . Little or no inference is required to conclude that §118 embodies a waiver of sovereign immunity.[94]

Other lower court opinions have wrestled with this question and reached inconsistent results. The United States District Court of Washington concluded that §118 was an inadequate waiver of sovereign immunity.[95] It then considered whether §304 of the same Act was sufficient. It held that §304 "is merely a clause preserving any previously existing statutory authority or common law rights, and therefore does not support the bringing of an action for an injunction against the U.S. or Federal facilities." The United States District

83. California v. EPA, *supra* n. 29.

84. *E.g.*, Kentucky v. Ruckelshous, *supra* n. 31; Alabama v. Seeber, *supra* n. 34; and California v. EPA, *supra* n. 29.

85. McCullough v. Maryland, 17 U.S. (Wheat) 316, 4 L.Ed. 579 (1819).

86. Kentucky v. Ruckelshaus, *supra* n. 31 at 1175, 4 ELR 20486.

87. Alabama v. Seeber, *supra* n. 34 at 1247, 4 ELR 20797; California v. EPA, *supra* n. 29 at 967, 5 ELR 20214.

88. The court cited several cases. Primarily relying on Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949); *see also* Paui v. United States, 371 U.S. 245 (1963); United States v. Sharpnack, 355 U.S. 286 (1958).

89. Kentucky v. Ruckelshaus, *supra* n. 31 at 1176, 4 ELR 20486.

90. Alabama v. Seeber, *supra* n. 34 at 1247, 4 ELR 20797.

91. Kentucky v. Ruckelshaus, *sub. nom.*: Kentucky v. Train, No. 74-220 (*cert. granted* 43 U.S.L.W. 3499); California v. EPA, No. 74-1435 (*cert. granted* 43 U.S.L.W. 3674); Alabama v. Seeber, No. 74-851.

92. The Administrative Conference, among others, has recommended its abolition. ACUS Recommendation No. 69-1: Statutory Reform of the Sovereign Immunity Doctrine. *See* also S-800 (94th Cong., 1st Sess.).

93. Kentucky v. Ruckelshaus, *supra* n. 31 at 1175-1176, 4 ELR 20486. Citing *Larson*, *supra* n. 88, and Land v. Dollar, 330 U.S. 731, 738 (1947).

94. Alabama v. Seeber, *supra* n. 34 at 1248, 4 ELR 20797.

95. Puget Sound APCA v. USVA Hospital, *supra* n. 82.

Court in Alaska ruled to the contrary, concluding that §304 was a waiver of sovereign immunity, but for civil actions only.[96] The United States Eastern District Court of Wisconsin has also held §118 was a waiver of sovereign immunity.[97] These and other cases on point in the water quality area reveal substantial confusion.[98] It is doubtful that all of this confusion will be dispelled satisfactorily by the Supreme Court's review of the *Kentucky* decision concerning §118 of the Clean Air Act. Moreover, the issues are likely to arise anew as state and local officials implement the Federal Noise Control Act and their various state and local noise control regulations against federal facilities.[99]

Clearly, an alternative set of enforcement procedures is needed, both to eliminate a prevalent mood of discontent and to resolve a variety of inconsistent court opinions. One such alternative is for Congress to delegate express authority to a single federal agency (EPA) to establish enforcement procedures (preferably permits) which ensure federal facilities comply with state and local environmental quality standards. A statutory delegation of such authority would dissolve the question of federal supremacy and sovereign immunity. If federal permits were issued pursuant to state and local substantive standards for environmental quality, then most of the objections by state and local officials would be resolved, as well. In fact, as mentioned above, many state officials would welcome the removal from their shoulders of the burden of enforcing environmental quality standards against federal facilities. State and local officials repeatedly indicated in interviews with the author their willingness to transfer federal facility enforcement problems to an effective federal level enforcement program.

Several considerations support this suggestion for a federal enforcement program. Perhaps foremost among these is the notion that the federal government should tend its own fences. Why must an environmental program Congress has applied to federal facilities rely on state and local officials, plus interested citizens, to ensure compliance? Common sense in public administration suggests that the "front line" of enforcement be maintained by the level of government posing the problem. OMB Circular A-106 already imposes the responsibilities on federal agencies to assess problems, develop plans and budgets, and implement improvements. Sound management suggests that same level of government should investigate and enforce compliance as necessary. Should the federal government fail to police effectively its own facilities, there exists in four of these statutes a citizen suit provision which provides a "second line" of enforcement by non-federal officials or interested citizens. These citizen suit provisions are valuable for plugging holes that develop in a federal enforcement program, but they should not be relied upon as a primary source of surveillance and enforcement.

From an efficiency viewpoint the idea is also extremely attractive. It would relieve agencies with facilities nationwide from the multiplicity of compliance with forms and procedures created by each of 50 states, plus numerous local agencies. It would be a relatively simple matter to implement new enforcement procedures at EPA, given the existence and experience of (1) the Office of Federal Activities in receiving and reviewing budget requests from the agencies faced with needs for pollution control equipment pursuant to OMB Circular A-106, and (2) the ongoing issuance to federal agencies of NPDES and ocean dumping permits.

Adoption of this suggestion could alleviate some of the internal conflict at EPA concerning whether to use its authority to initiate suits against recalcitrant sister agencies; EPA would have a more amenable option. If it chose not to issue a permit due to excessive pollutant emissions or if it found a compliance schedule being violated, mere public notice of that fact would allow any non-federal official or citizen to commence a citizen suit with a prima facie case already provided. EPA need not engage in internecine legal warfare directly with sister agencies.

One major objection to such a proposal is perhaps overrated. It has been suggested on numerous occasions that federal agencies might vehemently oppose the delegation of authority to a single agency to issue or withhold vital permits for other federal agencies. The accretion of authority by one agency over the otherwise independent authority of other agencies is always a delicate concern.[100] That concern is magnified in direct proportion to the size and strength of the agencies involved. Here, we propose additional authority to EPA with a potential loss of flexibility at major departments that own or operate federal facilities (*e.g.*, Defense, Interior, HEW, Agriculture, Commerce). Several large administrations also have a vital concern (*e.g.*, VA, NASA, GSA). It is easy to anticipate major objections from these powerful executive branch members.

A few objections have already been voiced to EPA's growing authority and increased imposition of requirements on sister agencies. For example, the Tennessee Valley Authority has been quite vocal in its opposition

96. Greater Anchorage v. Johnson, *supra* n. 77.

97. Milwaukee County v. VA Center, 357 F. Supp. 192 (E.D. Wis. 1973).

98. California v. Davidson, *supra* n. 75; California v. Stastny, *supra* n. 34.

99. *E.g.*, Air Transport Assn. v. Crotti, *supra* n. 52, and City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 3 ELR 20393 (1973).

100. The Civil Service Commission does possess authority over the personnel policies and actions of sister agencies. Similarly, the General Services Administration exercises certain control over the physical space and facilities of most agencies. Of course, the Office of Management and Budget exerts strong influence and some direct authority over agencies within the Executive Branch due to its supervisory role within the Executive Office. The Department of Justice also exerts some control over agency matters through its role as representative in most agencies' litigation and through its role as legal counsel to other agencies.

to the air quality standards EPA proposed for State Implementation Plans. But the fact remains, most agencies have not raised major objections. In fact, the responses from agencies asked to comment on an earlier draft of this article revealed nearly unanimous willingness to accept the proposition of a single federal agency with the authority to enforce environmental quality standards.[101] With respect to the procedural requirements already imposed by EPA under the ocean dumping program, no formal opposition has arisen. No agency has yet challenged the permits issued. And there has been but one instance (in Region IV) where a federal agency opposed EPA issuance of water discharge permits. That opposition was quickly resolved. The agencies seem genuinely to favor a single enforcement agency at the federal level rather than a myriad of state and local enforcement program requirements.

D. Procedural Improvements in a Permit System

Under the present enforcement procedures to ensure federal facility compliance with environmental quality standards, problems exist with respect to public notice, opportunity for hearings and the role of the presiding officer at any hearings held. If EPA is to be given broader authority to issue permits, the difficulties in existing procedures should be resolved first.

1. Public Notice

The clearest illustration of the problems of adequate public notice may be found in the new EPA guidelines to ensure federal facility compliance with air quality standards. According to EPA, its regional staff are expected to negotiate a consent agreement with the recalcitrant federal facility without any public notice. In fact, except for the state agency with jurisdiction over the facility's pollution problems, no one is informed of what becomes a closed-door session to draft the consent agreement. Only upon completion of the agreement, for which state certification is not required, is any notice provided to the public. The EPA memorandum proposes that the completed agreement be published only in the *Federal Register;* no local publication is proposed.

It is interesting to compare this closed-door strategy with the experimental technique upon which it was based. EPA's Region III had explored the use of consent agreements for some time prior to agency-wide adoption of the policy. However, on those occasions which the EPA regional staff felt that negotiations would benefit from public involvement, local agencies and members of the interested public were invited to participate. Even that limited option for public involvement is now precluded.

It is noteworthy that the procedures required by Congress for issuing permits for ocean dumping and water discharges already provide public notice requirements for the application and issuance of permits.[102] Applications for permits are published in local newspapers and posted throughout the geographic area concerned, and mailed to any interested person, group or agency, whether they request specific notice of one permit or have filed a standing request. The thrust of these requirements is clear; to apprise the permit issuer of the views of any and all persons concerned and to provide the public with knowledge about the permit requirement and individual applicants. This approach recognizes that the public interest is best served when public business is done in the open.

It may be that negotiation of air quality consent agreements between state officials and private enterprise requires some degree of privacy. However, when dealing with federal facilities and federal agencies the clear trend is towards public notice, open meetings, and public disclosure of decision-making rationale.[103] Where agency proceedings are carried on pursuant to the Administrative Procedure Act's requirements for rulemaking and adjudication, broadened opportunity for public participation has been recommended.[104]

2. Hearings

A second problem in the existing permit procedures concerns the type of hearings that should be provided for applicant and public review of the permits issued. The ocean dumping permit procedures provide for an informal "public hearing." The water discharge permit procedures provide an option for both a public hearing (a little different from the public hearing in the ocean dumping program) and an "adjudicatory hearing." Under the air quality compliance guidelines, as presently proposed by EPA, no hearings are provided for review of the consent agreement; both parties, EPA and the agency concerned, must agree, and the public has no opportunity for input or review. These variations raise questions needing analysis. Why are the procedures so different? Is one procedure preferable?

Generally, as argued above, the interested public has a valuable role to play in the permit evaluation process, and EPA would benefit by providing a structured forum in which to play it. Public hearings are one such forum, though many enforcement officials feel that environmental issues are far less popular than when they were more novel (circa 1969-72). Public hearings allow interested members of the public to submit data and views, not to mention venting their ire. In addition, with respect to non-complying federal facilities, the suggestion by enforcement officials that public hearings

101. *See* comments from the Department of Defense, Agriculture, Interior, *et al.* in files of the Administrative Conference. Also, note well that the Administrative Conference adopted Recommendation 75-4, particularly §1. (Appendix A).

102. 40 C.F.R. 222.3, 40 C.F.R. 125.32, respectively.

103. *See, e.g.*, the Federal Advisory Committee Act, 5 U.S.C. App. I (Supp. II, 1972), and the Freedom of Information Act Amendments of 1974, P.L. 93-502, to be codified at 5 U.S.C. §552.

104. *See* Administrative Conference Recommendation No. 71-6: Public Participation in Administrative Hearings with its underlying reports by Professor Ernest Gellhorn and then-Chairman Roger Cramton. Volume 2 ACUS Reports & Recommendations at 35, 376, and 422, respectively (1972).

might be held strikes a responsive chord in the hearts of facility operators, administrators who must continue to administer a facility within the community which is invited to speak out at a public hearing. Awareness that there may be a public hearing on the permit at issue is a catalyst which encourages realistic cooperation by facility operators and their agency owners, who seldom wish to brave the adverse local publicity a public hearing can generate. Thus, even the potential of public hearings has a salutory impact. Hearings should be provided as an option within the procedure used to ensure federal facilities comply with environmental quality standards.

A tougher question is whether to provide, in addition to a public hearing, an adjudicatory hearing at the permit issuance stage similar to that provided for in the Administrative Procedure Act (APA).[105] The water permit system procedures now provide the option for an "adjudicatory hearing" similar to the APA hearing.[106] Such hearings are not specifically required by statute in other areas, but the developing case law, which requires a record for judicial review, may mandate their availability.[107] These hearings provide the applicant for a water discharge permit a formal review of any denial or imposition of a condition to which he objects.

The hearings were designed primarily to provide due process for private enterprise. Yet, for several reasons many private enterprise permit applicants are irate. This antipathy by the intended beneficiaries is worth considering. In essence, their opposition is based on the extensive cost and time involved in the hearings which, in their view, are merely a kangaroo court.[108] The presiding officer has no authority to determine issues of law. He makes no initial decision. He merely collects a record for review by the Regional Administrator of EPA. But the Regional Administrator, who frequently has already had some involvement with the initial permit proposal approved by his subordinate, is unlikely to be persuaded, without more, to reverse his decision or that of his subordinate. And the mere collection of a record of evidence without a conclusion is not likely to be very persuasive. Consequently, many applicants undertake the procedure only after deciding they need to pursue a total review to the level of the Administrator of EPA and, perhaps, then to the courts.

Given the dissatisfaction voiced by private applicants, some overriding benefit must be identified before such a system is promoted for federal facilities for which due process is not required. If a federal agency head is dissatisfied with a permit denial or condition, he can always seek review within the Executive Branch directly, by seeing the Administrator of EPA or the President, if the facility is that important. In fact, Congress authorized an exemption in each federal facility section whenever the President determines "the paramount interest of the United States" requires one.[109] If on the other hand, interested members of the public are concerned over a proposed permit, they may seek a public hearing. If still dissatisfied with the permit, they have the option of pursuing the citizen suit provisions found in most acts. In conclusion, "adjudicatory hearings" for permits to federal facilities are not likely to be worth the effort. They are costly and provide too little in return.

Thus, it seems that public hearings are worthwhile, but adjudicatory hearings are not. It is interesting to note that the existing procedures for ocean dumping permits provide just that—public hearings but not "adjudicatory hearings," and that these same procedures were commended *supra* for their beneficial public notice requirements.

3. Recommendations by the Presiding Officer

Questioning the role to be played by a presiding officer of a hearing in a permit procedure may seem, at first, an odd concern. However, in the turmoil over the water discharge permit hearings, that issue has been central. It is also an issue of growing concern in other areas.[110] At present the presiding officer is not required to be an administrative law judge (ALJ)[111] in either the public hearings or "adjudicatory hearings." In public hearings the presiding officer is generally an attorney or a bureau chief from the EPA regional office. For "adjudicatory hearings" EPA has recognized the need for a presiding officer with more independence from the permit issuing staff and therefore has assigned only administrative law judges to be presiding officers. Their role is to conduct an orderly hearing and to collect evidence and testimony. Although normally administrative law judges also make recommendations for resolving the disputes before them to the agency officials, the water permit procedures do *not* authorize the presiding officer of an "adjudicatory hearing" to provide any recommendation. Instead, the presiding officer performs virtually all the duties required in APA hearings, yet his final act is merely to transmit a certified record and any proposed conclusions or findings of the parties, without his own views and opinions. He is not asked to provide his own recommendation.

The role taken by presiding officers in ocean dumping public hearings is eminently more sound. The presiding officer over a public hearing under these regulations is directed to recommend approval, disapproval or specific conditions for the permit. The presid-

105. 5 U.S.C. §§554 *et seq.* (1970).

106. 40 C.F.R. 125.36.

107. Consider Wong Yang Sung v. McGrath, 339 U.S. 33 (1951), cited and discussed in Memorandum for General Counsel of EPA and General Counsel of CSC, from the Office of Legal Counsel, Dept. of Justice (June 5, 1973).

108. Expressed at ABA/EPA workshop or the NPDES Hearings, Aug. 19, 1974.

109. *E.g.*, §118 of the Clean Air Act, 42 U.S.C. §1857f.

110. *See* Rosenblum, Role of the Administrative Law Judge in the Administrative Process, Sept. 1975, A Report prepared for the Administrative Conference of the United States.

111. *See* §11 of the Administrative Procedure Act, codified at 5 U.S.C. §§1305, 5362, and 7521.

ing officer hears and considers all the evidence and may judge the demeanor of each witness. Although an agency official, less independent than an ALJ, he operates in a position of neutrality. Because he is selected by the Regional Administrator due to his sound judgment and experience, it seems utterly foolish not to request his recommendations on the matters addressed at the hearing. This is true whether he presides over an "adjudicatory hearing" or a public hearing. The one possible concern could be that his recommendation, once made public, would make it difficult for the Regional Administrator to act to the contrary. This objection has no merit. If the Regional Administrator is unable to give a persuasive justification for a contrary decision, then he should accept the advice of the presiding officer, whose viewpoint is too valuable to be ignored for petty reasons.

The foregoing analysis leads to the conclusion that the present procedures of the ocean dumping permit system should be extended to other EPA procedures to ensure compliance by federal facilities with environmental quality standards by incorporating the ocean dumping requirements for (1) adequate, local public notice, (2) opportunity for a public hearing, and (3) recommendations from the presiding officer.

IV. Summary and Conclusions

The present statutory framework for addressing the problems of federal facility compliance with environmental quality standards is consistent for three significant environmental areas: air, water, and noise. In each case, the law requires federal facilities to comply with "Federal, State, interstate and local requirements respecting control and abatement of ... pollution...." This statutory requirement is designed to ensure that federal facilities are subject to pollution control programs at all levels of government "to the same extent that any person is subject to such requirements." This requirement makes sense. Each of these environmental concerns has been and still is primarily within the province of non-federal levels of government. Despite the increased involvement by Congress and the federal government, environmental protection remains primarily a local responsibility. The principle that federally-owned or operated facilities should meet, respect, and comply with the local standards merits continuation.

One area, solid waste disposal, has not been incorporated within this statutory framework. Although solid waste disposal programs are less developed than air and water programs, it is clear that state and local standards should predominate in this field as in the others. Consequently, the principle in the air, water, and noise acts that federal facilities shall comply with state and local environmental control standards should be added by amendment to the Solid Waste Disposal Act.

The consistency obtained by this amendment should be further improved with respect to the enforcement procedures employed to ensure that federal facilities comply with the state and local environmental quality standards. At present each program, air, water, noise, solid waste disposal and ocean dumping, uses a unique set of procedures. The water quality act created a system which requires a permit for each discharger of pollutants into our nation's waters. Each state is encouraged under the Act to establish and implement such a permit program. Whether these state programs are authorized to require permits of federal facilities within their jurisdiction has not yet been resolved in the courts. Under the Clean Air Act, each state has set up its own enforcement procedures. One half of the state programs require permits for each stationary source of air pollution. The others rely on inspections, followed by administrative orders to abate any violation that is found. With respect to federal facilities, again the authority of the states is uncertain. One court of appeals held the State of Alabama may require permits of resident federal facilities. Another court of appeals held to the contrary for the State of Kentucky. A third has not yet decided a similar case pending before it. The two cases decided are being appealed to the Supreme Court. EPA has already developed its own unique compliance procedure which it would continue to use if the states are denied on appeal the authority to require permits from federal facilities. This procedure calls for inspection and monitoring of federal facilities for noncompliance. In those instances where a violation is occurring, the regional offices are directed to negotiate a "consent agreement" with the non-complying facility. Under the Noise Control Act, there is no enforcement program at the federal level and a variety of different state and local programs. Their authority over federal facilities is untested at present and therefore uncertain. Under the Solid Waste Disposal Act, EPA Guidelines have been issued for the use of all federal facilities. Since there is no statutory requirement that imposes state or local standards on federal facilities, these EPA Guidelines are the only requirements such facilities must meet. Unfortunately the Guidelines themselves admittedly fail to meet minimum standards in some states and localities and in addition no enforcement procedures exist to ensure that they are complied with.

These inconsistent and uncertain enforcement procedures have not proven satisfactory. Nor is there hope for an adequate resolution of the issues, without congressional action. Ocean dumping is a notable exception. When this pollution problem rose to a level of national concern, the Congress delegated nearly full authority to a single federal agency, EPA. The result is a permit program under which any person, including federal agency officials, who wishes to dump waste materials into the ocean must secure a permit from EPA. This system has proved effective and produced none of the legal uncertainity and intergovernmental conflict that arose with respect to the other environmental areas.

In light of the apparent success in the water discharge and ocean dumping permit programs, Congress should

consider delegating express authority to EPA to establish and maintain enforcement procedures which will ensure federal facilities meet state and local environmental quality standards in each major program, including air, water, noise and solid waste.

Lastly, this examination has noted the inconsistent use within the present enforcement procedures of three sound administrative requirements: 1) adequate local notice, 2) an opportunity for a public hearing, and 3) recommendations from presiding officers at any hearings employed within the enforcement procedures. These elements exist and function well in the ocean dumping and the water discharge permit programs. They should be incorporated in the enforcement procedures developed for air, noise and solid waste disposal programs.

Appendix A:

Administrative Conference of the United States

Recommendation 75-4: Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards

Adopted June 5-6, 1975. 1 CFR 305.75-4, 40 FR 27928 (July 2, 1975)

(a) The Federal Government owns or operates over 20,000 facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans' hospitals to individual fish [illegible]ies, Coast Guard stations and re[illegible]boratories. All of these facilities [illegible] federal law to comply [illegible] quality standards [illegible]al, State or local [illegible]

[illegible] of the Federal environ[illegible]on program, 1973 exec[illegible]s federal agencies to [illegible]llution control needs, de[illegible] improvement and submit [illegible] necessary budget re[illegible]ion in the President's [illegible]. This program has [illegible]cant results. Approxi[illegible]ion has been expended [illegible] over the past [illegible] years to improve and install pollution abatement equipment at federal facilities. Nonetheless, instances of noncompliance by federal facilities have persisted. Moreover, there are wide variations among the respective programs concerned with air, water, noise, solid waste and ocean dumping, in the openness and effectiveness of the procedures for securing federal facility compliance.

(c) The Clean Air Act, the Federal Water Pollution Control Act, and the Noise Control Act each require agencies with control over federal facilities to comply with both federal and nonfederal pollution control standards "to the same extent (as) any person," unless otherwise exempted by statute. The Marine Protection Act requires all "persons," including federal officials, to obtain a federal permit before dumping waste material in the ocean. Under the Solid Waste Disposal Act, federal agencies need comply only with the United States Environmental Protection Agency's guidelines, which are less stringent than those of some States and localities.

(d) The Federal air, water, noise control, and solid waste statutes do not establish or specifically authorize procedures for their enforcement where federal facilities are concerned. This problem is acute when considering nonfederal environmental quality standards, which constitute the bulk of the environmental standards federal facilities must meet, because the nonfederal efforts to impose their enforcement procedures have been challenged by federal agencies. Two United States Courts of Appeals have reached opposite conclusions concerning the authority of States to require federal facilities to obtain air emission control permits required of all nonfederal sources of air pollution; a third Court of Appeals has held that federal facilities must comply with State permit requirements with respect to water quality. But any decision, even of the Supreme Court, will leave substantial procedural problems. If the authority of the States to impose their permit and other enforcement procedures upon federal facilities is upheld, some agencies will have to comply with a multitude of different State and local procedures. Because of the insufficiencies of the statutory provisions, a result denying such authority to the States would leave only the present fragmentary and ineffective federal procedures to ensure the compliance of federal facilities with environmental quality standards.

Recommendation

1. (a) The Clean Air Act, the Noise Control Act and the Federal Water Pollution Control Act should be amended to vest in a single federal agency the exclusive authority to develop and administer procedures to ensure compliance by federal facilities with nonfederal environmental quality standards. That agency should consider the use of emission control permits where they are not now employed.

(b) If the Congress amends the Solid Waste Disposal Act to require that federal facilities comply with nonfederal environmental quality standards, the amendment should vest in the single federal agency referred to in paragraph (a) the exclusive authority to develop and administer procedures for compliance with such standards by federal facilities.

2. Procedures employed to ensure compliance by federal facilities with State, interstate and local environmental quality standards should provide for (i) local public notice and notice to local officials, (ii) opportunity for a public hearing (but not for a trial-type hearing except on issues of specific fact that the agency finds may best be resolved by trial-type hearing), and (iii) authority for the presiding officer at any such hearing to make recommendations concerning compliance.