JUDICIAL ENFORCEMENT OF STATE AND MUNICIPAL COMPLIANCE WITH THE CLEAN WATER ACT: CAN THE COURTS SUCCEED?

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I. INTRODUCTION

On November 23, 1988, about 9.5 million gallons of raw sewage poured into New Bedford Harbor in southeastern Massachusetts.[1] A relay switch in New Bedford's antiquated sewage treatment plant had malfunctioned and caused a power outage.[2] The disabled plant stored its sewage for four hours but then reached its storage capacity.[3] At that point, untreated sewage simply overflowed directly into the harbor.[4] The spill added yet another chapter to New Bedford's long history of Clean Water Act[5] (CWA) violations.[6]

New Bedford's history illustrates the difficulty of maintaining compliance with the CWA. Following thirteen years of noncompliance with federal water pollution standards,[7] New Bedford finally had filed a consent decree[8] with the United States Environmental Protection Agency (EPA) in federal district court in 1987, only one year before the sewage spill.[9] Pursuant to this consent decree, New Bedford had agreed to improve the operation of its present sewage plant and develop a schedule for the construction of a new plant.[10] The 1988 sewage spill, however, reveals that New Bedford already has slipped from the schedule outlined in the 1987 consent decree.[11]

Financial constraints have contributed to New Bedford's delays in meeting the consent decree schedule.[12] The new treatment plant and the accompanying improvements carry a price tag of $500 million.[13] New Bedford Mayor John Bullard has pointed out that this figure breaks down to a cost of $5000 per capita, the highest per capita cost in the nation.[14] The low income level of the city's inhabitants magnifies the impact of these enormous costs.[15] According to United States Census figures, New Bedford's 1987 per capita income stood

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[1] Larry Tye, *Sewage Floods Harbor in New Bedford*, BOSTON GLOBE, Nov. 24, 1988, at 1.

[2] *Id.* at 46.

[3] *See id.*

[4] *Id.*

[5] 33 U.S.C. §§ 1251–1387 (1988).

[6] *See* Tye, *supra* note 1, at 46.

[7] United States v. City of New Bedford, No. 87-2498T, 1987 EPA Consent LEXIS 115, at *5 (D. Mass. Dec. 7, 1987).

[8] For a complete explanation of consent decrees, see *infra* notes 188–203 and accompanying text.

[9] *City of New Beford*, No. 87-2498T, 1987 EPA Consent LEXIS 115, at *1.

[10] Tye, *supra* note 1, at 46.

[11] *See id.*

[12] *See* James L. Franklin, *New Bedford Tackling Costly Sewer Cleanup Job*, BOSTON GLOBE, July 16, 1990, at 17.

[13] *Id.*

[14] *Id.*

[15] *See id.* at 20.

at only $9325, in contrast to the Massachusetts state average of $14,389.[16]

Despite New Bedford's limited financial resources, city officials voted in June 1990 to double the city's sewer rates to $100 per household.[17] Although many New Bedford residents consider these new rates to be exorbitant, city officials estimate that annual rates must be raised to $800 per household by 1995 to keep pace with skyrocketing costs.[18] Diminishing federal financial assistance and uncertainty surrounding the state loan program may leave New Bedford unable to pay for federally mandated improvements to its sewer system.[19] This scenario likely would result in additional fines[20] that would further cripple New Bedford's financial status.[21] As a result, Mayor Bullard hopes to persuade the EPA to extend the city's compliance schedule.[22] The EPA, however, remains reluctant to alter the schedule.[23]

New Bedford's problems are not unique. In 1989, the EPA reported that over two-thirds of the nation's 15,600 wastewater treatment plants failed to comply with CWA standards.[24] EPA Administrator William K. Reilly conceded that the cost of the required improvements for these facilities would consume the entire amount of the EPA's $4.9 billion budget for the next seventeen years,[25] a time span that extends well beyond the compliance deadlines for all of these treatment plants.[26] Furthermore, approximately half of the municipalities served by noncompliant facilities are financially distressed and have per capita incomes that are less than seventy-five percent of the national average.[27] According to Senator John D. Rockefeller IV of West Virginia, forcing these communities to comply with the CWA without providing federal financial assistance

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[16] *Id.*

[17] *Id.*

[18] Charles Stein, *As Sewage Project Funds Sink, Mass. Budget Hole Deepens*, BOSTON GLOBE, July 31, 1989, at 6.

[19] *See id.*

[20] *See* Tye, *supra* note 1, at 46 (New Bedford fined $150,000 for sewage treatment violations in 1987).

[21] *See* Franklin, *supra* note 12, at 20.

[22] *Id.*

[23] *See id.*

[24] Douglas Jehl, *Clean Water Cost Put at $83.5 Billion*, L.A. TIMES, Feb. 15, 1989, at A4.

[25] *Id.*

[26] Municipal Wastewater Construction Grant Amendments of 1981, § 21(a), 33 U.S.C. § 1311(i) (1988).

[27] *Sewage Treatment: Rockefeller to Propose Deadline Extension for Municipal Sewage Treatment Requirements*, 19 Env't Rep. (BNA) 177 (June 3, 1988) [hereinafter *Proposed Deadline Extension*].

would push many of them into bankruptcy.[28] Moreover, not all communities are as willing to make a good faith effort to comply with the CWA as New Bedford has been.[29] For example, Robbie Savage, executive director of the Association of State and Interstate Water Pollution Control Administrators, recalled a meeting where one local official stated:

> OK, I've read the law, I know what it says, I know what the state and federal government are requiring of me. And I'm not going to do it. I don't have the money, I don't have the support, I don't have the need in my community to do it. I'm just not going to do it. And by the time the EPA figures out I didn't do it and gets around to enforcing against me, I'll be dead.[30]

The EPA faces difficult enforcement problems in bringing these financially distressed communities into compliance with the CWA. The agency has devised a strategy that favors the use of judicial action to compel compliance.[31] As a result, federal courts soon must adopt techniques to enforce previous federal court orders and consent decrees mandating compliance with CWA requirements.

In attempting to answer this question, Section II of this Comment begins by setting forth the various enforcement options contained in the CWA. Section II then explores both the indirect coercive techniques that courts traditionally have employed to compel compliance with injunctions, as well as instances of more direct enforcement orders by courts in cases involving CWA violations. In Section III, this Comment concludes by evaluating various enforcement techniques and proposing a course that courts should follow in enforcing orders against noncompliant publicly owned treatment works (POTWs).

II. ENFORCEMENT OF THE CWA

A. Statutory Provisions of the CWA

Twenty years ago, the United States Congress addressed the growing national water pollution crisis by passing the Federal Water

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[28] *Id.*

[29] *See* Franklin, *supra* note 12, at 20.

[30] Margaret E. Kriz, *Effluent, Not Affluent*, 21 NAT'L J. 740, 742 (1989).

[31] *Enforcement: Thomas Puts in Place Enforcement Strategy to Maximize POTW Compliance with '88 Deadline*, 18 Env't Rep. (BNA) 1436, 1437 (Oct. 2, 1987) [hereinafter *Enforcement Strategy*].

Pollution Control Act Amendments (FWPCA) of 1972,[32] commonly known as the CWA. The stated goal of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[33] The statute's success turns on the identification and regulation of effluent dischargers that are sources of pollution.[34] POTWs represent roughly twenty-six percent of the nation's effluent dischargers.[35] Accordingly, the CWA authorizes the EPA administrator to promulgate effluent standards with which all POTWs in the United States must comply.[36] The original compliance deadline for POTWs was July 1, 1977.[37] Congress extended this deadline to July 1, 1983[38] and later to July 1, 1988.[39]

To facilitate the enforcement of effluent standards, the CWA created the National Pollution Discharge Elimination System (NPDES),[40] a nationwide permitting system designed to regulate pollution discharges from a variety of sources including POTWs.[41] Each NPDES permit sets forth the specific level of contaminants permissible in the discharge from a given facility.[42] The EPA has broad discretion to prescribe whatever permit conditions are necessary to ensure that dischargers carry out the provisions of the CWA.[43] Accordingly, facilities need only comply with the effluent limitations set forth in their NPDES permit even though other sections of the CWA may call for higher standards.[44]

Upon receiving approval from the EPA administrator,[45] states may administer discharge permit programs on their own.[46] Permit re-

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[32] Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (1988)).

[33] 33 U.S.C. § 1251(a) (1988).

[34] *Id.* § 1251(a)(5).

[35] Note, *Regulation of Noncompliant Publicly Owned Treatment Works Under the Clean Water Act*, 10 WM. MITCHELL L. REV. 901, 904 (1984) [hereinafter *Noncompliant Treatment Works*].

[36] 33 U.S.C. § 1311(b)(1)(B) (1988).

[37] *Id.* § 1311(b)(1)(B)–(C). The 1977 amendments to the CWA included an additional provision to allow time extensions for municipalities. *Id.* § 1311(i).

[38] Clean Water Act of 1977, § 45, Pub. L. No. 95-217, 91 Stat. 1584 (current version at 33 U.S.C. § 1311(i) (1988)).

[39] Municipal Wastewater Construction Grant Amendments of 1981, § 21(a), 33 U.S.C. § 1311(i) (1988).

[40] 33 U.S.C. § 1342 (1988).

[41] *Id.* § 1342(a)(1).

[42] *See id.* Some effluent characteristics that the EPA may limit through NPDES permits include flow, biochemical oxygen demand, total suspended solids, settleable solids, and fecal coliform bacteria. *See* United States v. City of Providence, 492 F. Supp. 602, 607 (D.R.I. 1980).

[43] 33 U.S.C. § 1342(a)(1) (1988).

[44] *Id.* § 1342(k).

[45] *Id.* § 1342(a)(5).

[46] *Id.* § 1342(b)(1).

quirements in states that have gained such authority remain substantially the same as the requirements under the federal NPDES program.[47] Furthermore, states also may assume enforcement responsibilities under the CWA.[48] The EPA, however, retains its status as the ultimate enforcement authority.[49]

To encourage compliance with the NPDES requirements, the CWA provides the EPA with a broad range of enforcement options.[50] The mildest statutory enforcement option available to the agency is to issue administrative orders.[51] Administrative orders may take the form of a notice of violation to a noncompliant POTW, a demand for compliance, or an extension of the POTW's compliance schedule.[52] While administrative orders allow flexibility in facilitating compliance,[53] they often result in schedule extensions that cause additional delays in compliance.[54] Furthermore, many municipal officials in charge of POTWs view administrative orders as a method of avoiding judicial sanctions.[55]

A second enforcement option available to the EPA is to pursue injunctive relief.[56] Specifically, the EPA may seek a permanent or temporary injunction to correct any violation for which the agency is authorized to issue an administrative order.[57] Unlike administrative orders, injunctions carry the advantage of being a judicially sanctioned enforcement option.[58]

Finally, the EPA may seek both civil[59] and criminal[60] penalties against noncompliant dischargers. The Water Quality Act of 1987[61] set a maximum civil penalty of $25,000 per day[62] and a maximum criminal penalty of $50,000 per day[63] for as long as the violation

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[47] *Id.* § 1342(a)(3).
[48] *Id.* § 1342(b)(7).
[49] *Id.* § 1319(a)(3).
[50] *See id.* § 1319.
[51] *Id.* § 1319(a)(2)(A).
[52] *Noncompliant Treatment Works*, *supra* note 35, at 930.
[53] *Id.*
[54] *See Sewage Treatment: War Against Municipal Sewage Pollution Not Yet Over, According to NRDC Attorney*, 19 Env't Rep. (BNA) 462, 462 (Aug. 5, 1988).
[55] *Noncompliant Treatment Works*, *supra* note 35, at 931.
[56] 33 U.S.C. § 1319(b) (1988).
[57] *Id.*
[58] *See Enforcement Strategy*, *supra* note 31, at 1437.
[59] 33 U.S.C. § 1319(d) (1988).
[60] *Id.* § 1319(c).
[61] Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251–1387 (1988)).
[62] 33 U.S.C. § 1319(d) (1988).
[63] *Id.* § 1319(c).

persists. Attempts to fine noncompliant POTWs, however, often result in placing an additional burden on the municipality's taxpayers rather than punishing the municipal or state officials responsible for the violations.[64]

Using the options available, the EPA develops enforcement strategies and distributes those strategies to its ten regional offices and to state enforcement authorities.[65] For example, in 1984, to speed up POTW compliance with the 1988 deadline, the EPA developed the National Municipal Policy (NMP).[66] The general goal of this policy was to have all noncompliant POTWs working on enforceable compliance schedules by the end of fiscal year 1985.[67] The NMP spelled out the EPA's scheduling requirements both for facilities in existence at the time and for facilities to be constructed.[68]

Since 1987, the EPA has conducted its enforcement efforts primarily through the use of judicial action.[69] Specifically, the EPA enters into court-sanctioned consent decrees[70] with noncompliant communities. The terms of these consent decrees generally set forth a mandatory schedule of compliance,[71] and a POTW that is unable to meet the compliance schedule outlined in a consent decree risks being found in contempt of court.[72] Numerous communities that have entered into consent decrees with the EPA have experienced schedule slippage[73] placing them in violation of a court order.[74] The EPA now must seek the enforcement of these prior court orders[75] by asking the courts to direct the noncomplying communities or states[76] to appropriate and expend public funds, by a bond issue or tax levy.

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[64] *Noncompliant Treatment Works*, *supra* note 35, at 926; *see also* United States v. City of Providence, 492 F. Supp. 602, 610 (D.R.I. 1980).

[65] *Enforcement Strategy*, *supra* note 31, at 1436.

[66] 49 Fed. Reg. 3832 (1984).

[67] *Id.*

[68] *Id.*

[69] *Enforcement Strategy*, *supra* note 31, at 1437.

[70] *See Noncompliant Treatment Works*, *supra* note 35, at 931. Consent decrees are agreements, negotiated by the parties in dispute, that the court sanctions and enforces. *Id.* at 931 n.195.

[71] *Id.* at 931.

[72] *Id.*

[73] *See, e.g.*, Tye, *supra* note 1, at 46.

[74] *See id.*

[75] Because of the provision allowing for state permitting and enforcement under the CWA, 33 U.S.C. § 1342(b), there currently are court orders outstanding in both federal and state courts. *See Enforcement Strategy*, *supra* note 31, at 1437.

[76] To the degree that existing state law prevents a noncompliant community from raising sufficient funds, the CWA provides for state liability where a civil judgment has been rendered against the community. 33 U.S.C. § 1319(e) (1988).

B. Shifting the Financial Burden from the Federal Government to State and Local Entities

1. The Historical Decline of Federal Financial Assistance

The costs of constructing and maintaining water and sewer treatment facilities are staggering. For example, the cleanup of Boston Harbor alone will cost over $6 billion.[77] The EPA estimates that the overall cost of upgrading the nation's sewage treatment facilities to bring them into compliance with federal standards will exceed $83.5 billion.[78]

Congress recognized the severe financial burden that requiring construction of new treatment works places on communities. As a result, the CWA states that "it is the national policy that Federal financial assistance be provided to construct publicly owned treatment works."[79] Pursuant to this policy, Title II of the 1972 CWA created a comprehensive federal construction grants program.[80] Congress initially planned for the federal government to cover seventy-five percent of the cost of the construction of new POTWs.[81] Since the enactment of the CWA in 1972, however, the program has been marked by a series of reductions in federal assistance to state and local governments.[82]

Following the passage of the 1972 CWA amendments over his veto, President Richard M. Nixon impounded a portion of the authorized federal grant money in each of the following two fiscal years.[83] President Nixon directed the administrator of the EPA to disburse to the states only $2 billion of the $5 billion authorized for fiscal year 1973 and $3 billion of the $6 billion authorized for fiscal year 1974.[84] In addition, the administrator allotted only $4 billion of the $7 billion authorized for fiscal year 1975.[85] Although the United States Supreme Court ordered the release of the impounded funds in fiscal year 1976,[86] the series of impoundments had the effect of causing significant delays in the disbursement of federal grant

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[77] Tye, *supra* note 1, at 46.
[78] Jehl, *supra* note 24, at 4.
[79] 33 U.S.C. § 1251(a)(4) (1988).
[80] *Id.* §§ 1281–1299.
[81] Train v. City of New York, 420 U.S. 35, 37–38 (1975).
[82] *See infra* notes 83–94 and accompanying text.
[83] State Water Control Bd. v. Train, 559 F.2d 921, 924 n.18 (4th Cir. 1977).
[84] *Id.*
[85] *Id.*
[86] Train v. City of New York, 420 U.S. 35, 40–41 (1975).

money.[87] A cumbersome EPA grant approval process amplified these delays.[88]

The Municipal Wastewater Treatment Construction Grant Amendments of 1981[89] effectively reduced federal funding to only $2.4 billion annually for fiscal years 1980 to 1985.[90] Moreover, the 1987 amendments to the CWA[91] essentially phased out the grants program between fiscal years 1987 and 1990.[92] Beyond fiscal year 1990, the only federal financial assistance available has been in the form of seed money for state revolving loan funds,[93] and this assistance is expected to be eliminated by 1994.[94]

2. The New Financial Burden on State Revolving Loan Funds and the Increase in Local Contributions

After the 1987 amendments, funding efforts under the CWA shifted from the provision of federal grants to the establishment of federal/state revolving loan funds.[95] These funds provide federal and state seed grants[96] to leverage state and municipal bond issuances.[97] State loan fund programs invest the federal seed money, and the returns on these investments subsidize the interest costs of municipal bond issuers sponsored by the state programs.[98] The reserves that investing the seed grant money creates also serve to bolster the credit ratings of municipalities that issue bonds leveraged against the state fund.[99] These improved credit ratings allow communities to lower their overall borrowing costs.[100] Finally, states often set aside a portion of the fund to provide low-interest state loans directly to municipalities that do not have easy access to credit markets.[101]

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[87] *State Water Control Bd.*, 559 F.2d at 924.

[88] *See Noncompliant Treatment Works*, *supra* note 35, at 909–11.

[89] Pub. L. No. 97-117, 95 Stat. 1623 (codified as amended in scattered sections of 33 U.S.C. §§ 1251–1387 (1988)).

[90] 33 U.S.C. § 1287 (1988).

[91] Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251–1387 (1988)).

[92] 33 U.S.C. §§ 1291–1292 (1988).

[93] *Id.* §§ 1381–1387.

[94] *Proposed Deadline Extension*, *supra* note 27, at 177.

[95] Kriz, *supra* note 30, at 740.

[96] Patrice Hill, *New York State Offers $166.5 Million Issue to Clean Water Around New York City*, BOND BUYER, May 18, 1990, at 2. For example, seed grants for New York's revolving fund are expected to total $1 billion. *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Patrice Hill, *EPA Approves Grant for New York State to Set Up Largest Clean Water Fund*, BOND BUYER, Mar. 29, 1990, at 1.

The revolving loan fund program, however, experienced a slow start due to administrative complications.[102] The EPA employs a cumbersome letter-of-credit system to make federal seed payments under the program.[103] Thus far only two states, Minnesota and New York, have secured from the EPA an "aggressive leveraging exemption" allowing the states to bypass the system and receive cash quickly.[104] Unfortunately, the revolving fund program has yet to receive the full amount of annual funding provided for by the law.[105] Finally, Congress has failed to provide federal tax relief for state and local bond issuers.[106] Under the present system, state revolving funds cannot distribute bond proceeds rapidly enough to qualify for the federal tax law's arbitrage rebate relief provision.[107]

Potential problems with the revolving fund program also exist on the state side of the equation.[108] As of May 31, 1990, only ten states had implemented revolving fund programs.[109] Many states, such as Massachusetts, already are saddled with enormous debt service costs and plummeting credit ratings.[110] These states sometimes choose to employ escalating-payment plans to postpone their debt charges on state bonds issued under a revolving fund until future years.[111] As a result, these states will face the dual burden of paying enormous debt service costs for new projects at the same time that grant-subsidized projects completed in the 1970s become antiquated and require upgrading.[112] Accordingly, financing problems that contribute to POTW noncompliance with the CWA likely will not be eradicated through the revolving fund program in the foreseeable future.

C. Challenges to CWA Enforcement Based on the Lack of Federal Financing

Despite dwindling amounts of federal financial assistance, courts repeatedly have required local governments to comply with the CWA

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[102] Hill, *supra* note 96, at 2.

[103] Hill, *supra* note 101, at 1.

[104] *Id.*

[105] Hill, *supra* note 96, at 2.

[106] *See* Patrice Hill, *Congress Not Expected to Provide Aid, Tax Relief for Environmental Systems*, BOND BUYER, Mar. 12, 1990, at 2.

[107] *Id.*

[108] *See* Charles Stein, *Debt Payments Swamping Mass.*, BOSTON GLOBE, Dec. 7, 1989, at 21.

[109] Ted Hampton, *Massachusetts Plan for Revolving Fund May Ease MWRA's Borrowing Needs*, BOND BUYER, May 31, 1990, at 1.

[110] *See* Stein, *supra* note 108, at 21.

[111] Larry Tye, *Towns Gird for Rising Sewer Costs*, BOSTON GLOBE, July 30, 1989, at 25, 27.

[112] *See* Kriz, *supra* note 30, at 740.

even when the EPA has failed to provide federal funding.[113] In the landmark decision of *State Water Control Board v. Train*,[114] the United States Court of Appeals for the Fourth Circuit held that municipal compliance with the CWA effluent standards is not contingent upon the receipt of federal financial assistance.[115] In *Train*, the commonwealth of Virginia had sought a declaratory judgment exempting from the effluent limitations of section 301(b)(1)(B) of the CWA POTWs that did not receive federal construction grants.[116] Virginia argued that the legislative history of the CWA implies a link between the statute's enforceability and the timely award of federal assistance.[117] The court, however, pointed out that Congress expressly had refused to insert any blanket exemption into the legislation and, therefore, did not intend to allow any exceptions from the established deadline.[118] In dicta, the court anticipated that the EPA would not bring enforcement proceedings against "municipalities who, despite good faith efforts, are economically or physically unable to comply" with the statutory deadline.[119] Given the EPA's recent enforcement strategy favoring judicial enforcement,[120] this anticipation appears to have been somewhat misplaced.

The United States Court of Appeals for the Sixth Circuit reiterated the notion that the CWA's compliance and funding provisions are independent in *United States v. City of Detroit*.[121] In this case, Detroit and the EPA entered into a consent decree that called for the construction of approximately $100 million in major capital improvements to the existing treatment facilities.[122] In order to comply with the consent decree, Detroit sought to secure federal funding for the project.[123] Although federal money allotted to Michigan was available at the time and Detroit's projects were eligible for funding,[124] it became obvious that Detroit would not be able to meet certain EPA criteria for obligation.[125] Because Detroit would be

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[113] *See infra* notes 114–67 and accompanying text.

[114] 559 F.2d 921 (4th Cir. 1977).

[115] *Id.* at 924.

[116] *Id.* at 922.

[117] *Id.* at 924.

[118] *Id.* at 925–26.

[119] *Id.* at 927.

[120] *See Enforcement Strategy*, *supra* note 31, at 1437.

[121] 720 F.2d 443, 451 (6th Cir. 1983).

[122] *Id.* at 445.

[123] *Id.*

[124] *See id.* at 446–47 (discussing the specific procedure for securing federal construction grant money).

[125] *Id.* at 447. "Obligation" refers to the process whereby federal funds allotted to a state become usable for approved projects within that state. *See id.* at 446–47.

unable to meet these requirements before the expiration of the fiscal year, the money that was currently available would be subject to reallotment by the EPA administrator and subsequently might not be available in the following fiscal year.[126]

To prevent the loss of federal funds, Detroit petitioned the district court to reserve the available federal funds for use on its projects and to enjoin the administrator from reallotting those funds.[127] The district court subsequently granted an order reserving the funds for Detroit.[128] When the EPA alloted federal funds in the following fiscal year, Michigan moved that the district court modify its order to allow the funding for the Detroit projects to come from the new allotment.[129] The EPA and the county of Muskegon, whose projects would have been the beneficiaries of the reallotment that the district court's order barred, joined Michigan's motion.[130] Muskegon asserted that the district court lacked authority to "lasso" federal funds in the first place.[131]

In deciding *City of Detroit*, the Sixth Circuit touched upon three important principles that arise during judicial interaction with the CWA. The court held that lower court decisions affecting federal funding under the CWA can be subject to review by appellate courts despite the fact that the statute's one-year funding mechanism often renders the question moot.[132] The court also reinforced the holding of *State Water Control Board v. Train*[133] that compliance with the CWA was not contingent upon federal funding.[134] Finally, the Sixth Circuit stated that although the district court's order achieved the commendable objective of providing Detroit with desparately needed

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[126] *See id.*

[127] *Id.* at 445.

[128] *Id.* at 447.

[129] *Id.* at 448.

[130] *Id.*

[131] *Id.*

[132] *See id.* at 449–50. The CWA requires the administrator of the EPA to reallot all unobligated funds at the expiration of the fiscal year. *Id.* at 446 (construing 33 U.S.C. § 1285(b)(1) (1988)). In *City of Detroit*, the district court's "lasso" order occurred only 14 days prior to the close of the 1981 fiscal year. *Id.* at 449. Therefore, no matter how diligently Muskegon pursued judicial review of the order, there was no possibility that a court could accomplish such a review prior to the end of the one-year funding mechanism. *Id.* At the end of the 1981 fiscal year, allotments for fiscal year 1982 would begin, thus rendering the question of impoundment of the 1981 funds moot. *See id.* Under the year-to-year funding system, the maximum period for judicial review of a district court order of this nature is necessarily one year. *Id.* at 450.

[133] 559 F.2d 921, 924 (4th Cir. 1977).

[134] *City of Detroit*, 720 F.2d at 451.

federal financial assistance, such an order is unjustified because it breaches the constitutional separation of powers between the branches of government by directing the EPA to violate its statutory duty to reallot unused funds immediately.[135] The court therefore held that the district court was without authority to issue its order.[136]

Recent decisions also demonstrate the tendency of courts to avoid interfering with the EPA's administration of federal funds. In *Sacramento Regional County Sanitation District v. Reilly*,[137] the EPA required the plaintiff, a county sanitation district, to purchase mitigation wetlands as part of a construction project for a new treatment facility.[138] Although the EPA initially awarded a grant to cover the purchase of the mitigation wetlands, the agency later disallowed the grant, claiming that it did not have authority under the CWA to award a grant for such purposes.[139] The United States Court of Appeals for the Ninth Circuit ruled in favor of the EPA, holding that the terms "construction"[140] and "treatment works,"[141] which define the eligibility for grants under the CWA, did not encompass the purchase of the wetlands.[142]

Similarly, in *City of Mount Clemens v. EPA*,[143] the United States Court of Appeals for the Sixth Circuit upheld the district court's denial of Mount Clemens's motion to compel federal funding .[144] Mount Clemens had sought federal funding for a local treatment plant that appeared eligible for funding based on a "cost-effectiveness analysis" that the city had completed.[145] The EPA, however, denied funding on the grounds that constructing a regional treatment plant was a more "cost-effective" alternative despite the results of the city's analysis.[146] The Sixth Circuit endorsed the EPA's definition of "cost-effectiveness" and upheld the its denial of federal financial assistance.[147]

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[135] *Id.*

[136] *Id.*

[137] 905 F.2d 1262 (9th Cir. 1990).

[138] *Id.* at 1265.

[139] *Id.* at 1266.

[140] 33 U.S.C. § 1292(1) (1988).

[141] *Id.* § 1292(2).

[142] *Sacramento Regional County Sanitation Dist.*, 905 F.2d at 1270–71.

[143] 917 F.2d 908 (6th Cir. 1990).

[144] *Id.* at 918. The CWA provides that grants may be awarded only to the most cost-effective project in a given area. 33 U.S.C. § 1298 (1988).

[145] *City of Mount Clemens*, 917 F.2d at 910.

[146] *Id.* at 912.

[147] *Id.* at 918.

Despite the general reluctance to compel financing, however, some courts have issued direct funding orders for treatment works projects. For example, in *Inverness Forest Improvement District v. Hardy Street Investors*,[148] private land owners claimed that the defendant, the Inverness Forest Improvement District, had discriminated against them by refusing to supply water utilities to their land.[149] The lower court granted an injunction to the plaintiffs. The injunction ordered Inverness to sell municipal bonds, which already had received voter approval, and use the proceeds to construct the necessary projects to supply water utilities to the plaintiffs' land.[150] The court also enjoined Inverness from using the proceeds of the bonds on any project other than the expansion of water utilities to the plaintiffs' land.[151]

On appeal, the Court of Civil Appeals of Texas held that the lower court lacked authority to issue a permanent injunction requiring the allocation of the bond proceeds toward specific projects.[152] Nevertheless, the appeals court agreed with the plaintiffs' discrimination claims and sustained the trial court's power to compel Inverness to provide the necessary utilities to the plaintiffs' land.[153] Accordingly, while the trial court could not enjoin the use of the bond proceeds for other projects, it could enjoin their use until Inverness developed and implemented a plan to end the discriminatory practices.[154] Although this case did not arise under the CWA, it illustrates one court's willingness to channel the proceeds of a bond issuance to fund a treatment project.

In the recent case of *Michigan v. City of Allen Park*,[155] the United States District Court for the Eastern District of Michigan granted Allen Park's motion to compel EPA funding for the city's treatment works project.[156] The EPA and the Michigan Department of Natural Resources (MDNR) had tendered grants for the construction of a new sewer system for Allen Park.[157] These grants accounted for eighty percent of the total cost of the project.[158] In 1980, the district court ordered Allen Park to supply funding for only the remaining

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[148] 541 S.W.2d 454 (Tex. Civ. App. 1976).
[149] *Id.* at 456.
[150] *Id.*
[151] *Id.* at 460.
[152] *Id.* at 461.
[153] *Id.*
[154] *Id.* at 463.
[155] 739 F. Supp. 1102 (E.D. Mich. 1990).
[156] *Id.* at 1107.
[157] *Id.* at 1104.
[158] *Id.*

twenty percent of the total cost and to begin construction of the project.[159] After some delays, the district court entered a detailed schedule of compliance for Allen Park.[160] The city complied with this order, but the EPA and MDNR balked at providing the necessary funds.[161] Allen Park argued that this failure to provide funding violated the previous court order,[162] while the EPA and MDNR argued that federal courts have no authority to compel such funding and cited the Sixth Circuit's decision in *United States v. City of Detroit* to support their position.[163]

In holding that it did have the authority to compel funding, the district court pointed to the broad range of equitable powers at a court's disposal to enforce its orders and judgments.[164] The court determined that because its prior orders encompassed EPA and MDNR funding, the EPA and MDNR had an ongoing obligation to comply with those orders.[165] As a result, the court granted Allen Park's motion to compel funding from both the MDNR and the EPA.[166] The result in *Allen Park*, however, represents a fact-specific exception to a general trend that disfavors direct orders.[167]

D. Techniques for Enforcing Judicial CWA Compliance Orders

To avoid issuing direct orders to fund municipal compliance with the CWA, courts have adopted certain indirect coercive techniques to compel compliance: sequestration of funds, sewer moratoriums, receiverships, and contempt proceedings.

1. Structural Injunctions in General

Courts traditionally have employed a variety of coercive techniques to enforce court orders known as "structural injunctions."[168] A structural injunction is a court order aimed at preventing a gov-

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[159] *Id.*

[160] *Id.*

[161] *Id.* at 1105.

[162] *Id.*

[163] *Id.* For a discussion of *United States v. City of Detroit*, see *supra* notes 121–36 and accompanying text.

[164] Michigan v. City of Allen Park, 739 F. Supp. 1102, 1106 (E.D. Mich. 1990). The courts' broad range of equitable powers includes "inherent power to enter such orders as may be necessary to effectuate their lawful decrees and to prevent interference with, and obstruction to, their implementation." United States v. Wallace, 218 F. Supp. 290, 292 (N.D. Ala. 1963).

[165] *City of Allen Park*, 739 F. Supp. at 1106.

[166] *Id.* at 1107.

[167] *See infra* notes 204–76 and accompanying text.

[168] *See* James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1824–35 (1984).

ernmental unit from depriving members of a plaintiff class of certain rights.[169] Historically, courts have used structural injunctions in cases where a governmental entity has deprived a plaintiff class of a constitutional right.[170] The governmental institution involved typically has the responsibility of providing some type of service to a dependent plaintiff class;[171] as a result, injunctions of this type often arise in situations involving schools, prisons, and mental hospitals.[172]

Structural injunctions generally provide relief through a reorganization of the offending government institution to provide services without infringing on plaintiffs' rights.[173] These reorganization orders often carry with them heavy financial burdens for the governmental unit involved.[174] Controversies over structural injunctions arise when a lack of financial resources impedes the government's ability to comply with the injunction.[175] Courts have adopted various methods indirectly to combat financially based noncompliance.[176]

Injunctions under the CWA differ in certain ways from traditional structural injunctions. In most cases requiring compliance with the CWA, there is no deprivation of a constitutional right. Additionally, despite the CWA provision allowing citizens suits,[177] enforcement of the statute generally is entrusted to the EPA,[178] not a plaintiff class. Injunctions under the CWA, however, are similar to traditional structural injunctions in that they often take the form of consent decrees and call for the reorganization of a governmental institution, namely, a treatment facility.[179] Furthermore, in *Weinberger v. Romero-Barcelo*,[180] the Supreme Court held that the statutory scheme of the CWA places no limits on a court's traditional equitable discretion to prescribe injunctive relief in a case brought under the statute.[181]

In *Romero-Barcelo*, United States Navy pilots engaged in training maneuvers off the coast of Puerto Rico accidentally missed land

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[169] *Id.* at 1817.

[170] *See id.*

[171] *Id.* at 1818.

[172] *Id.* For example, prison inmates have brought suit against prison officials to correct conditions in prisons, such as insufficient food and medical care, that allegedly violated their Eighth Amendment right of freedom from cruel and unusual punishment. *Id.* at 1817.

[173] *See id.* at 1817–18.

[174] *Id.* at 1823.

[175] *See id.* at 1819.

[176] *See infra* notes 204–76 and accompanying text.

[177] 33 U.S.C. § 1365 (1988).

[178] *See id.* § 1319.

[179] *See infra* notes 188–203 and accompanying text.

[180] 456 U.S. 305 (1982).

[181] *Id.* at 320.

targets and bombed the surrounding waters.[182] As a result, the governor of Puerto Rico and others sued to enjoin the Navy operations because of CWA violations.[183] The United States District Court for the District of Puerto Rico held that the bombing was a discharge of pollutants and constituted a violation of the CWA because the Navy had not obtained an NPDES permit.[184] The court ordered the Navy to obtain an NPDES permit but, in exercising its equitable discretion, refused to enjoin the Navy operations in the meantime.[185] The United States Court of Appeals for the First Circuit vacated the district court's order and remanded with instructions to order the Navy to cease operations.[186] In reversing the First Circuit, the Supreme Court concluded that the CWA allowed the district court to order whatever relief it deemed necessary to ensure compliance with the CWA.[187] Accordingly, many of the coercive techniques that courts use to compel compliance with traditional structural injunctions they also may use to compel compliance with the CWA.

2. The Modification of Consent Decrees

Before applying coercive techniques to compel compliance with a structural injunction, courts sometimes are asked unilaterally to modify an existing consent decree.[188] In *United States v. City of Providence*,[189] however, the United States District Court for the District of Rhode Island held that any departure from the terms of a consent decree "must be based upon solid reason."[190] The court explained that there are two facets to a consent decree. A consent decree is a decree of the court and therefore carries with it the weight normally attached to a judicial sanction.[191] In addition, a

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[182] *Id.* at 307.

[183] *Id.* at 307–08.

[184] *Id.* at 309.

[185] *Id.* at 310. The district court determined that the Navy ordnance discharges caused no actual harm to the waters, and decided therefore not to enjoin the Navy operations. In justifying its use of discretion, the district court quoted language from an earlier case stating that "[t]he historic injunctive process was designed to deter, not to punish." *Id.* (quoting Hecht v. Bowles, 321 U.S. 321, 329–30 (1944)).

[186] *Id.* The First Circuit held that the CWA imposed an absolute statutory obligation on the district court to order the Navy to cease operations until it obtained a permit from the EPA. The First Circuit also noted that the president has the power to exempt the Navy from CWA requirements in the interest of national security if necessary. *Id.* at 311.

[187] *Id.* at 320.

[188] *See, e.g.*, United States v. City of Providence, 492 F. Supp. 602, 608 (D.R.I. 1980).

[189] 492 F. Supp. 602 (D.R.I. 1980).

[190] *Id.* at 609.

[191] *Id.*

consent decree is an agreement, freely entered into by the involved parties, that binds those parties to certain terms.[192]

In determining the limited situations in which a court may modify a consent decree, the *City of Providence* court followed the precedent set in *United States v. Swift & Co.*[193] In *Swift*, the Supreme Court held that a moving party must satisfy two requirements to justify the modification of a consent decree.[194] The modification must relate prospectively and not relate to "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change."[195] Moreover, the court must believe that because of changing circumstances, the original consent decree has become an "instrument of wrong."[196]

The *City of Providence* court applied the *Swift* test to the facts of its case.[197] The city of Providence unilaterally sought to modify the terms of a consent decree into which it had entered with the EPA and the state environmetal agency concerning Providence's wastewater treatment plant.[198] Providence had failed to comply with effluent limitations prior to the date that the consent decree had specified.[199] The court first determined that modification of the consent decree failed the first requirement of the *Swift* test because it "would alter rights essentially accrued at the time" rather than act in a purely prospective manner.[200] The court further pointed out that the city would suffer no "wrong" as a result of the court's refusal to modify a consent decree that already had afforded Providence relief from other penalties,[201] such as statutory fines.[202] Finally, the court noted that modification of the consent decree would "serve no useful purpose" because Providence could not determine when, if ever, it would be able to comply with the decree's terms.[203] The *City of*

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[192] *Id.*

[193] 286 U.S. 106 (1932).

[194] *See id.* at 114–15.

[195] *Id.* at 114.

[196] *Id.* at 114–15.

[197] United States v. City of Providence, 492 F. Supp. 602, 609 (D.R.I. 1980).

[198] *Id.* at 604.

[199] *Id.* at 607.

[200] *Id.* at 609. Providence's motion to modify the consent decree was filed just two days prior to the decree's expiration deadline. Accordingly, the rights to which the EPA was entitled—namely, the city's compliance with CWA standards—had essentially accrued. *Id.*

[201] *Id.*

[202] For a discussion of provisions for fines under the CWA, see *supra* notes 59–64 and accompanying text.

[203] United States v. City of Providence, 492 F. Supp. 602, 609 (D.R.I. 1980).

Providence opinion illustrates judicial reluctance to modify consent decrees.

3. Sequestration

In light of the difficulty of modifying consent decrees, courts have looked to indirect coercive techniques to compel compliance with their orders. One coercive method that courts utilize to compel compliance with structural injunctions is the sequestration, or withholding, of other funds to which the violator otherwise would be entitled.[204] A classic example of sequestration is *Delaware Valley Citizens' Council v. Pennsylvania.*[205] In this case, the commonwealth of Pennsylvania entered into a consent decree with the EPA pursuant to the Clean Air Act[206] (CAA) to establish a program for the inspection and maintenance of automobile emissions systems.[207] The Pennsylvania legislature, however, refused to appropriate the necessary money to fund this program.[208] The United States District Court for the Eastern District of Pennsylvania ordered the Secretary of Transportation of the United States to withhold federal highway funds for areas of Pennsylvania that the consent decree covered.[209] In affirming the district court order, the United States Court of Appeals for the Third Circuit noted that spending the sequestered funds on highways would contribute directly to the problems the CAA sought to combat, and that withholding these funds was an especially appropriate means of compelling compliance.[210] Furthermore, the state legislature easily could rectify any collateral harm that Pennsylvania's driving public suffered through the appropriation of funds necessary to comply with the consent decree.[211]

Sometimes, however, consideration of potential collateral harm prevents the use of sequestration as a coercive technique. In *Gautreaux v. Romney,*[212] the United States District Court for the Northern District of Illinois ordered the Secretary of Housing and Urban Development to withhold $26 million in federal funds from Chicago until the Chicago Housing Authority complied with the terms of a

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[204] *See* Hirschhorn, *supra* note 168, at 1846–49.
[205] 678 F.2d 470 (3d Cir. 1982).
[206] 42 U.S.C. §§ 7401–7642 (1988).
[207] *Delaware Valley Citizens' Council,* 678 F.2d at 472.
[208] *Id.* at 473.
[209] *Id.* at 474.
[210] *Id.* at 478.
[211] *Id.* at 478–79.
[212] 457 F.2d 124 (7th Cir. 1972).

consent decree into which it previously had entered.[213] In *Gautreaux*, the original court order required the Chicago Housing Authority to construct new public housing to combat existing discriminatory housing practices.[214] On appeal, however, the United States Court of Appeals for the Seventh Circuit reversed the district court's sequestration of Chicago's federal funds.[215] The Seventh Circuit reasoned that because the federal funds being withheld supported activities that were distinct from those addressed by the original court order, there was an insufficient connection between the sequestered funds and the violation to justify the sequestration.[216] Furthermore, according to the Seventh Circuit, the loss to the beneficiaries of the withheld funds outweighed any positive coercive effect on the city of Chicago.[217] Courts have not yet used sequestration to combat CWA violations.

4. Shutdowns and Moratoriums

One particularly severe coercive sanction is simply to shut down a noncompliant institution altogether.[218] In *New York State Association for Retarded Children v. Carey*,[219] the United States Court of Appeals for the Second Circuit indicated that shutting down a noncompliant state institution would be preferable to dictating to citizens of that state the ways in which they are to spend public funds.[220] Despite the sentiment expressed in this case, however, courts often threaten shutdowns but seldom actually pursue them.[221]

This technique would be particularly uneffective in the context of shutting down noncompliant treatment facilities under the CWA.[222] Closing such a facility in most cases would leave residents of the noncompliant municipality without any water utilities.[223] Accordingly, closing such facilities would jeopardize seriously the health

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[213] *Id.* at 126.

[214] *Id.* at 129–30 (Sprecher, J., dissenting).

[215] *Id.* at 129.

[216] *See id.* at 126. The original court order concerned the construction of low-income housing, whereas the sequestered funds would have been used for educational and job-training programs, health care centers, and other related activities, but not for housing of any kind. *Id.*

[217] *See id.* at 128.

[218] *See* Hirschhorn, *supra* note 168, at 1849.

[219] 631 F.2d 162 (2d Cir. 1980).

[220] *See id.* at 165.

[221] *See* Hirschhorn, *supra* note 168, at 1849.

[222] *See Noncompliant Treatment Works*, *supra* note 35, at 927–28.

[223] *Id.* at 927.

and welfare of that community.[224] As a result, rather than shutting down an entire treatment facility, some courts have opted to order moratoriums on new sewer connections.[225]

A court-ordered sewer moratorium prevents a noncompliant municipality from accepting additional hookups to its existing sewer system. Recently, in *United States v. Metropolitan District Commission*,[226] the United States District Court for the District of Massachusetts granted the EPA an injunction that imposed a moratorium on sewer connections in forty-three cities and towns whose water and sewer needs the Massachusetts Water Resources Authority (MWRA) manages.[227] A previous order by the same court had charged the MWRA with the cleanup of Boston Harbor.[228] Part of the previous order required the MWRA to adopt a program to deal with residuals management.[229] The program created a need for the MWRA to secure a landfill site and, in turn, required the Massachusetts legislature to vote to transfer the land for the landfill to the MWRA.[230] The legislature's repeated delays in transferring the land jeopardized the court-ordered compliance schedule for the Boston Harbor cleanup.[231]

As a result, United States District Judge A. David Mazzone ordered a moratorium on new sewer connections throughout the MWRA region. Judge Mazzone indicated several advantages to this form of remedy.[232] He first observed that, from a logical standpoint, an entity that falls behind schedule in eliminating pollution should not be allowed, at the same time, to increase pollution through additional sewer connections.[233] Furthermore, he noted that a moratorium order preserved the court's policy of avoiding involvement

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[224] *Id.* at 927–28.

[225] *See, e.g.*, United States v. Metropolitan Dist. Comm'n, 757 F. Supp. 121, 130 (D. Mass. 1991), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

[226] 757 F. Supp. 121 (D. Mass. 1991), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

[227] *Id.* at 122–23.

[228] *See generally* United States v. Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) 1350 (D. Mass. 1985).

[229] *Metropolitan Dist. Comm'n*, 757 F. Supp. at 123. Residuals management refers to the process of disposing of the solid waste deposits that remain after the treatment of sewage water. *Id.*

[230] *Id.* at 124. The MWRA selected a landfill site in the town of Walpole, Massachusetts. The selection generated a great deal of opposition from Walpole residents. The residents placed a great deal of pressure on state legislators, resulting in numerous postponements of the vote to transfer the land to the MWRA. *Id.* at 124–25.

[231] *Id.* at 125.

[232] *Id.* at 129.

[233] *Id.*

in substantive decisionmaking by merely providing an incentive to maintain the compliance schedule.[234] Finally, Judge Mazzone explained that because Congress explicitly has authorized moratorium orders,[235] the order circumvented the federalism issues involved with a direct court order to transfer the land.[236]

Individuals affected by sewer moratoriums have challenged them unsuccessfully on constitutional grounds. In *Peduto v. City of North Wildwood*,[237] condominium developers challenged a sewer moratorium and construction ban that the New Jersey Department of Environmental Protection and the city of North Wildwood had imposed, on the grounds that the moratorium and ban constituted an unconstitutional taking of land and violated due process.[238] The Cape May County Court dismissed the developers' complaint.[239] The developers did not appeal this decision and instead filed a separate action in federal district court.[240] The United States Court of Appeals for the Third Circuit subsequently affirmed the district court's dismissal of the developers' complaint on res judicata grounds.[241]

Similarly, in *E & T Realty v. Strickland*,[242] the implementation of a sewer moratorium withstood a challenge on Fourteenth Amendment grounds.[243] The plaintiff, E & T Realty, claimed that the Jefferson County Sewer Moratorium Committee had violated the Equal Protection Clause of the Fourteenth Amendment when it denied the plaintiff's building a permit for sewer allocation but granted a similar permit to a building just a few blocks away.[244] According to the United States Court of Appeals for the Eleventh Circuit, the lower court erred in holding that the permit denial violated the Equal Protection Clause because E & T Realty failed to show that the two buildings were similarly entitled to a sewer allocation.[245] In addition,

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[234] *Id.*

[235] 33 U.S.C. § 1342(h) (1988). The EPA "may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated." *Id.*

[236] United States v. Metropolitan Dist. Comm'n, 757 F. Supp. 121, 129 (D. Mass. 1991), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

[237] 878 F.2d 725 (3d Cir. 1989).

[238] *Id.* at 727.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] 830 F.2d 1107 (11th Cir. 1987).

[243] *Id.* at 1112–14.

[244] *Id.* at 1108–09.

[245] *Id.* at 1112. E & T Realty was not entitled to a sewer allocation according to the terms of the moratorium resolution. Accordingly, only if E & T Realty could show that the landlord

the Eleventh Circuit required a showing of intentional discrimination to maintain an equal protection claim.[246] Accordingly, the court remanded the case for further findings consistent with the higher standards it had outlined.[247]

5. Receivership

Another remedy available to the judiciary is the appointment of a receiver to manage a noncompliant facility.[248] Courts generally grant receivers wide-ranging authority, including the power to borrow funds, hire consultants, and manage all operations of the facility under their control.[249] For example, in *Morgan v. McDonough*,[250] the United States Court of Appeals for the First Circuit upheld the appointment of a receiver to oversee all aspects of the desegregation of the Boston School District.[251] Similarly, in *United States v. City of Detroit*,[252] the United States District Court for the Eastern District of Michigan appointed the Mayor of Detroit as a receiver and charged him with the administration of that city's noncompliant sewage treatment plant.[253] The district court pointed to the futility of other enforcement measures in this particular case to justify its resort to receivership as an enforcement mechanism.[254]

6. Contempt

Perhaps the most traditional means of coercing compliance with a structural injunction is to hold the violator in contempt of court.[255] Because the fundamental purpose of a civil contempt sanction is to

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of the other building also was not entitled to a sewer allocation would the two applicants be similarly situated for equal protection purposes. *Id.*

[246] *Id.*

[247] *Id.* at 1114–15.

[248] *See Noncompliant Treatment Works*, *supra* note 35, at 932.

[249] *See id.* at 932 n.208.

[250] 540 F.2d 527 (1st Cir. 1976).

[251] *Id.* at 533.

[252] 476 F. Supp 512 (E.D. Mich. 1979).

[253] *Id.* at 521.

[254] *Id.* at 520.

Where "[t]he more usual remedies—contempt proceedings and further injunctions—[are] plainly not very promising as they [invite] further confrontation and delay; and when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as receivership, to get the job done."

Id. (quoting Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976)).

[255] Hirschhorn, *supra* note 168, at 1826.

compel compliance with a court order,[256] courts may employ the mechanism only against those parties possessing a present ability to comply with such an order.[257] For example, in *Delaware Valley Citizens' Council*,[258] when the Pennsylvania legislature refused to appropriate funds for an emissions control program, the United States Court of Appeals for the Third Circuit upheld the district court's decision to hold in contempt the executive officials responsible for implementing the program.[259] The terms of the consent decree in *Delaware Valley Citizens' Council* specifically bound both the commonwealth of Pennsylvania and its "officers, agents, employees and successors of said parties."[260] Accordingly, the appeals court saw no bar to affirming the district court's contempt declaration.[261]

Courts sometimes have been reluctant, however, to pursue contempt proceedings against officials in charge of noncompliant institutions. In *Spallone v. United States*,[262] for example, the Supreme Court refused to hold officials of the city of Yonkers in contempt.[263] In *Spallone*, the United States District Court for the Southern District of New York had held members of the Yonkers City Council in contempt for refusing to vote for an affordable housing ordinance to end discriminatory practices in the location of low-income housing as required by a prior consent decree.[264] The Supreme Court reasoned that contempt sanctions against Yonkers alone would accomplish the desired result, and accordingly ruled that the district court had abused its discretion in applying contempt sanctions to city council members as well.[265] Furthermore, the Court found that the imposition of large fines on legislators encouraged them to vote with a view toward their personal well-being and not with a view toward the best interests of the city.[266] The Court concluded that such fines represented an impermissible intrusion on the legislative process.[267]

Similarly, in *New York State Association for Retarded Children v. Carey*,[268] the United States District Court for the Eastern District

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[256] *Id.* at 1828.
[257] *Id.*
[258] 678 F.2d 470 (3d Cir. 1982).
[259] *Id.* at 479.
[260] *Id.* at 475.
[261] *See id.* at 479.
[262] 110 S. Ct. 625 (1990).
[263] *Id.* at 634.
[264] *Id.* at 630.
[265] *Id.* at 634.
[266] *Id.*
[267] *Id.*
[268] 631 F.2d 162 (2d Cir. 1980).

of New York directed the state of New York to make certain improvements in a state institution for mentally retarded persons and finance a review panel to oversee these improvements.[269] In violation of the order, the state legislature refused to provide funds for the review panel.[270] The United States Court of Appeals for the Second Circuit, however, reversed the subsequent district court decision holding the state's governor and comptroller in contempt,[271] because the language of the original consent decree qualified the obligations of the executive officials as being subject to whatever legislative approval might be required.[272] It is also important to note in this case that the requirement of a review panel would not ensure directly that the violations would be corrected, but the panel was merely a step in that direction.[273] Thus, the failure of New York's executive officials did not perpetuate directly the violations that the decree addressed.

Generally, contempt proceedings involving consent decrees issued to facilitate CWA compliance are civil as opposed to criminal contempt proceedings.[274] A unique feature of civil contempt is that the contemner is afforded a chance to purge the contempt.[275] In other words, contemners must be given an opportunity to correct their wrongs and thereby avoid remaining in contempt.[276]

E. The Supreme Court Endorses Judicial Power To Tax: Missouri v. Jenkins

In the absence of indirect coercion techniques, courts must look to more direct methods of ordering the financing necessary to bring about POTW compliance. On April 18, 1990, the United States Supreme Court, in a 5-4 vote, held that a federal court possesses the power to tax in certain circumstances.[277] In *Missouri v. Jenkins*,[278] the Court was confronted with the segregated school system of the Kansas City, Missouri School District (KCMSD).[279] In 1985, the

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[269] *Id.* at 163.
[270] *Id.* at 164.
[271] *See id.* at 166.
[272] *Id.* at 163.
[273] *See id.* at 166.
[274] *See, e.g.*, United States v. City of Providence, 492 F. Supp. 602, 610 (D.R.I. 1980).
[275] *Id.*
[276] *Id.*
[277] Missouri v. Jenkins, 110 S. Ct. 1651, 1666 (1990).
[278] 110 S. Ct. 1651 (1990).
[279] *Id.* at 1655.

United States District Court for the Western District of Missouri had issued an order detailing both a desegregation plan for the KCMSD and the financing necessary to implement it.[280] The district court also concluded that certain provisions of Missouri state law limiting local property tax levies would prohibit the KCMSD from raising the funds necessary to comply with the order.[281] Accordingly, after determining that the KCMSD had exhausted all other possible sources of revenue, the district court ordered the KCMSD property tax levy increased to exceed state law limitations through the 1991–1992 fiscal year.[282]

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's setting of a property tax rate for the KCMSD, concluding that federal courts do have the power to tax.[283] The appeals court noted, however, that in the future, in keeping with principles of federal/state comity,[284] a district court should not set the actual tax rate but rather should direct the community to submit a tax levy proposal to the state and then enjoin the operation of the state laws that limit such a levy.[285]

In upholding judicial taxation in this case, the Supreme Court majority began its analysis by stating that principles of comity must temper a district court's exercise of its equitable discretion.[286] The majority cautioned that while a district court's remedial powers must be adequate to address the task before it, these powers are not unlimited.[287] The Court noted that respect for the integrity of local governmental units should be a prime consideration in evaluating the prudence of granting an injunction that compels a tax levy.[288] This consideration holds especially true when, but for a contradictory state law, local officials are willing and able to correct the existing constitutional wrong.[289]

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[280] *Id.* at 1656.

[281] *Id.*

[282] *Id.* at 1658.

[283] *Id.*

[284] *Id.* Although a federal district court may have authority to implement its orders by directing a tax levy, principles of federal/state comity provide that "maximum consideration should be given the views of the state and local officials concerned so long as they appear compatible with the goals to be achieved." United States v. Missouri, 515 F.2d 1365, 1373 (8th Cir. 1975). Accordingly, if it is possible, courts should give state and local officials deference on exactly how to implement a tax levy or bond issuance. *See Jenkins*, 110 S. Ct. at 1658–59.

[285] *Jenkins*, 110 S. Ct. at 1658–59.

[286] *Id.* at 1662–63.

[287] *Id.* at 1663.

[288] *Id.*

[289] *Id.*

The majority went on to cite *Griffin v. County School Board of Prince Edward County*[290] for the proposition that "a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court."[291] Using *Griffin* as a springboard, the majority affirmed the decision of the appeals court and held specifically that a federal court may order a local government with taxing authority to levy taxes in excess of state statutory limits when there is a constitutional ground for not observing those state limits.[292]

In a powerfully written opinion, Justice Kennedy, joined by three other justices, disagreed with the majority's holding with regard to judicial taxation.[293] Justice Kennedy used the principle that local governmental bodies derive their power from the sovereign state as the foundation for his analysis.[294] He further pointed out that state laws, including taxation provisions, define the actual powers of a body such as the KCMSD.[295] Accordingly, Justice Kennedy argued that it did not matter whether local officials themselves were willing to comply, and that the real issue the case presented was the constitutional validity of judicial taxation.[296]

Justice Kennedy noted that nowhere in the constitutional description of judicial powers is there any mention of the word "tax."[297] Yet, the list of legislative powers outlined in the Constitution[298] begins with the power to "lay and collect taxes."[299] Thus he argued that only Congress, not the courts, had the power to levy taxes.[300] Justice Kennedy further argued that judicial taxation constitutes a denial of due process.[301] According to Justice Kennedy, such an exercise of equitable discretion violates the requirement of notice to citizens and deprives them of the right to be heard.[302] Finally, he asserted that the majority misinterpreted the holding of *Griffin*.[303] Arguing that *Griffin* endorsed the power of a federal court to order

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[290] 377 U.S. 218, 233 (1964) (upholding district court order requiring local officials to levy taxes to maintain school system sufficiently free from racial discrimination).

[291] *Jenkins*, 110 S. Ct. at 1665.

[292] *Id.* at 1666.

[293] *Id.* at 1667 (Kennedy, J., concurring in part and concurring in judgment).

[294] *Id.* at 1670 (Kennedy, J., concurring in part and concurring in judgment).

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] U.S. CONST. art. I, § 8, cl. 1.

[299] *Jenkins*, 110 S. Ct. at 1671 (Kennedy, J., concurring in part and concurring in judgment).

[300] *Id.*

[301] *Id.* at 1670 (Kennedy, J., concurring in part and concurring in judgment).

[302] *Id.* at 1671 (Kennedy, J., concurring in part and concurring in judgment).

[303] *See id.* at 1673 (Kennedy, J., concurring in part and concurring in judgment).

a local authority merely to exercise an *existing* power to tax,[304] Justice Kennedy concluded that there were no grounds for the majority's support of judicial taxation because the KCMSD had no state authority to tax in the first place.[305]

Justice Kennedy concluded the minority opinion by warning that there was nothing in the majority decision to prevent the exercise of judicial taxation from spreading beyond the realm of constitutionally mandated desegregation cases.[306] He lamented that the Court had initiated "a process that over time could threaten fundamental alteration of the form of government our Constitution embodies."[307]

F. The Impact of the State Liability Provision of the CWA

The specific issue presented by *Jenkins*—the propriety of a federal court ordering a municipality to levy taxes in excess of state law limitations—cannot arise under CWA proceedings. Congress precluded this possibility by providing that states would be liable for municipal violations to the extent that state law prevents a municipality from raising the revenues necessary for CWA compliance.[308] Congress designed this provision to prevent states from shielding municipalities from enforcement of the CWA by limiting municipalities' ability to raise revenues.[309]

In *United States v. City of Hopewell*,[310] the United States District Court for the Eastern District of Virginia observed that the CWA state liability provision contemplated joining a state as a party defendant and not as a party plaintiff.[311] In *City of Hopewell*, the United States brought suit against Hopewell, the commonwealth of Virginia, and certain industrial offenders for NPDES permit violations.[312] Virginia, however, joined the action as a plaintiff seeking

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[304] *Id.*

[305] *Id.* at 1675 (Kennedy, J., concurring in part and concurring in judgment).

[306] *See id.* at 1678 (Kennedy, J., concurring in part and concurring in judgment).

[307] *Id.* at 1679 (Kennedy, J., concurring in part and concurring in judgment).

[308] 33 U.S.C. § 1319(e) (1988).

> Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

Id.

[309] *See* United States v. Duracell Int'l, Inc., 510 F. Supp. 154, 156 (M.D. Tenn. 1981).

[310] 508 F. Supp. 526 (E.D. Va. 1980).

[311] *Id.* at 527.

[312] *Id.*

punitive action against Hopewell.[313] In granting Hopewell's motion to dismiss the commonwealth as a party plaintiff, the court held that Virginia's statutory legal interest was to provide funds to meet any judgment against the municipal violator, and that this role constituted a defendant's position.[314] Accordingly, the court reasoned that it lacked jurisdiction to entertain Virginia's claim as a party plaintiff.[315]

States and municipalities have challenged the CWA state liability provision on the grounds that it violates their Tenth Amendment right to shield their municipalities from liability by limiting the municipalities' ability to raise revenues.[316] For example, in *United States v. Plaquemines Parish Mosquito Control District*,[317] the United States Court of Appeals for the Fifth Circuit held that requiring local governmental compliance with the CWA does not violate the Tenth Amendment.[318] In this case, the district court granted the EPA an injunction enjoining Plaquemines Parish from carrying out dredging activities without a permit under the CWA.[319]

The United States Court of Appeals for the Fifth Circuit denied Plaquemines Parish's Tenth Amendment challenge[320] using the three-part test that the Supreme Court set out in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*[321] In *Virginia Surface Mining*, the Court determined that congressional commerce power legislation violates the Tenth Amendment if it regulates the states as states; it addresses matters that are indisputably matters of state sovereignty; and states' compliance with the federal law directly would impair their ability to "structure integral operations in areas of traditional functions."[322] The Fifth Circuit in *Plaquemines Parish* determined that the CWA regulated individuals and businesses as well as states and their political subdivisions and therefore did not meet the first part of the *Virginia Surface Mining* test.[323]

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[313] *Id.*

[314] *Id.* at 528.

[315] *Id.*

[316] U.S. CONST. amend. X. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

[317] 16 Env't Rep. Cas. (BNA) 1649 (5th Cir. 1981).

[318] *Id.* at 1652.

[319] *Id.* at 1650.

[320] *Id.* at 1651–52.

[321] 452 U.S. 264, 287–88 (1981).

[322] *Id.*

[323] *Plaquemines Parish Mosquito Control Dist.*, 16 Env't Rep. Cas. (BNA) at 1651.

The court also rejected Plaquemines Parish's reliance on *National League of Cities v. Usery*[324] to support the proposition that the CWA violated the Tenth Amendment.[325] The Fifth Circuit pointed to the concurrence of Justice Blackmun in *National League of Cities*, which stated that the majority opinion in that case did not "outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater."[326]

Similarly, in *United States v. Duracell International, Inc.*,[327] the United States District Court for the Middle District of Tennessee struck down a Tenth Amendment challenge to the CWA state liability provision.[328] The court observed that the provision does not impose strict liability on a state.[329] Accordingly, because only state interference with municipal compliance is regulated, and because environmental protection is a federal interest and not an integral state governmental function, the court determined that the state liability provision does not violate the Tenth Amendment.[330]

In *Duracell*, the state of Tennessee also claimed that the state liability provision violated the Due Process Clause of the Fourteenth Amendment because it was arbitrary and capricious.[331] The court held that congressional concern for water pollution control justified the CWA as neither arbitrary nor capricious.[332] Furthermore, the court explained that congressional power to regulate pollution necessarily includes the power to enforce such regulations, even against the states.[333]

III. A Proposed Strategy for Enforcing POTW Compliance with Consent Decrees

A. Potential Solutions Through Indirect Coercion Techniques

Because of the shortcomings of the penalties provided in the CWA,[334] the extremely limited number of situations in which courts

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[324] 426 U.S. 833 (1976).
[325] *Plaquemines Parish Mosquito Control Dist.*, 16 Env't Rep. Cas. (BNA) at 1651–52.
[326] 426 U.S. at 856.
[327] 510 F. Supp. 154 (M.D. Tenn. 1981).
[328] *Id.* at 156–57.
[329] *Id.* at 157.
[330] *Id.* at 156–57.
[331] *Id.* at 157.
[332] *Id.*
[333] *Id.*
[334] *See supra* notes 50–64 and accompanying text.

modify consent decrees,[335] and the sensitive separation of powers and federalism issues that go hand in hand with judicial taxation or bond issuance,[336] courts likely will enjoy the most success by using indirect enforcement tools to compel compliance with CWA requirements. The effectiveness of the various coercive enforcement mechanisms may vary widely depending upon the specific mechanism chosen and the particular fact pattern confronting the court.

1. Ineffective Coercive Techniques for CWA Compliance: Contempt and Sequestration

Some of the traditional indirect coercion techniques used to compel compliance with structural injunctions will be ineffective in compelling compliance with CWA consent decrees. One example of an ineffective mode of indirect judicial coercion is holding the executive officials responsible for the implementation of consent decrees in contempt. The very reason that the EPA began to favor judicial remedies was because judicial orders carried with them the prospect of local authorities being held in contempt of court for noncompliance.[337] Holding local government officials in contempt, however, appears to be a remedy that courts are reluctant to pursue in practice.[338]

Judicial reluctance to use contempt orders to enforce compliance may result from the apparent unfairness of holding a local official in contempt when the root of the noncompliance lies at the state level. Courts may choose to circumvent inequity of this nature by making use of statutory provisions for state liability,[339] but additional impediments to the effectiveness of contempt proceedings remain. Courts are often hesitant to initiate contempt proceedings because they create additional confrontation and delay that is generally counterproductive to the original objectives of the consent decree, such as keeping a project on schedule.[340] Moreover, due to the civil nature of proceedings pursuant to decrees mandating CWA compliance, contemners must be given an opportunity to purge their contempt.[341] Because an opportunity to purge in this scenario is the functional

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[335] *See supra* notes 188–203 and accompanying text.

[336] *See supra* notes 277–307 and accompanying text.

[337] *See Enforcement Strategy*, *supra* note 31, at 1437 (EPA favored shift from administrative to judicial remedies because administrative orders are too easily circumvented).

[338] *See, e.g.*, United States v. City of Providence, 492 F. Supp. 602, 610 (D.R.I. 1980).

[339] 33 U.S.C. § 1319 (1988).

[340] *See, e.g.*, Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976).

[341] *See supra* notes 274–76 and accompanying text.

equivalent of an extension of the consent decree, the purpose of contempt proceedings seems to be defeated in situations involving POTW noncompliance.

Historically, the primary value of contempt proceedings has been to prod state or local officials to do what is necessary to bring about compliance.[342] Local officials now may feel insulated from possible contempt proceedings, however, in the wake of the *Spallone* decision, in which the Supreme Court permitted a contempt sanction against the city of Yonkers but not against the individual city council members.[343] In any event, holding a governmental officer responsible for a multi-million-dollar treatment facility does not bring that facility any closer to compliance with federal standards. In practical terms therefore, contempt proceedings offer only minimal assistance to courts attempting to enforce POTW compliance with consent decrees.

The effectiveness of sequestration of federal funds by a court apparently turns on two main considerations. First, there must be some link between the withheld funds and the injury that the injunction is designed to correct.[344] Second, the court must balance the good that coercing the noncompliant community to comply will achieve against any collateral harm that the withholding of the federal funds may cause.[345] Applying these considerations to the case of communities with POTWs that fail to comply with CWA standards, it becomes apparent that sequestration will be a viable remedy in only a very limited number of situations. To apply this technique a court first must find within the violating community a recipient of federal funding that is a contributor to the water pollution in question. Unlike air pollution, which knows no geographical boundaries, proof of a point source of water pollution requires much more detailed analysis.[346] Collecting evidence of this sort may turn out to be very expensive and time-consuming.

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[342] *See* Hirschhorn, *supra* note 168, at 1826.

[343] *See supra* notes 262–67 and accompanying text.

[344] *See, e.g.*, Delaware Valley Citizens' Council v. Pennsylvania, 678 F.2d 470, 478 (3d Cir. 1982). The use of federal highway funds directly would contribute to air pollution, the very problem that the injunction requiring an automobile emissions standard program sought to alleviate. *Id.*

[345] *See, e.g.*, Gautreaux v. Romney, 457 F.2d 124, 127 (7th Cir. 1972) (harm caused to low-income families by withholding funds outweighed possible good of coercing Chicago into constructing public housing).

[346] 33 U.S.C. § 1362(14) (1988). "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.*

In rare circumstances, certain factual situations may arise that clearly identify a recipient of federal funding as a source of water pollution. For example, highway funds in some cases may contribute to runoff that directly carries pollutants into a watercourse. Additionally, funds for public housing may prove to place an additional strain on a noncompliant treatment system and therefore may be a candidate for sequestration. Some courts, however, have required a strong showing that the sequestered funds contribute to the exact injury that the consent decree addresses.[347] It is also important to remember that even when a direct link exists, the court still must apply a benefit-versus-harm analysis. For example, a court may sequester housing funds only if the benefit of the reduced strain on the noncompliant treatment facility outweighs the collateral harm to the beneficiaries of those funds, the individuals who need housing. Because it applies only to an extremely limited number of situations, sequestration, like contempt proceedings, fails to provide courts with an effective tool for compelling POTW compliance with the CWA.

2. Potentially Effective Coercive Techniques for CWA Compliance: Receivership and Moratoriums

Receivership is a method of coercing compliance that, although somewhat extreme, sometimes may be well suited to the problem of a noncompliant POTW. A court-appointed receiver is often an executive official of the violating community.[348] Because appointment as a receiver puts the official under court direction, that official would gain the ability to manage the noncompliant facility while remaining above political pressures,[349] which often are a major cause of noncompliance. Furthermore, the official-turned-receiver would possess the power to borrow the necessary funds to finance compliance.[350] This power seems to allow receivers to circumvent the problem of state laws that limit property taxes. Another advantage of receivership is that it does not carry with it the potential of harm to the offending community that accompanies, for example, sequestration.[351] Moreover, receivership is particularly adaptable to municipal

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[347] *See, e.g., Delaware Valley Citizens' Council*, 678 F.2d at 478–79 (Pennsylvania legislature could have corrected collateral harm from impoundment of highway funds by appropriating funds necessary to facilitate compliance with consent decree).

[348] *See, e.g.*, United States v. City of Detroit, 720 F.2d 443, 445 (6th Cir. 1983).

[349] *See* United States v. City of Detroit, 476 F. Supp. 512, 521 (E.D. Mich. 1979).

[350] *See Noncompliant Treatment Works*, *supra* note 35, at 932 n.208.

[351] *Id.* at 933.

offenders.[352] Because receivership is a more realistic alternative than sequestration or contempt proceedings, municipalities that at one time considered themselves immune from enforcement now may be wary of this technique of compelling compliance.[353]

On the other hand, receiverships essentially compel communities to issue bonds or levy taxes indirectly by empowering the receiver to do so. Therefore, in cases in which municipalities can achieve compliance only through increased borrowing or taxing, courts merely are avoiding the complications of a direct court order by using a receiver as a buffer. It is highly questionable whether courts should be permitted to avoid the implications of the Supreme Court's decision in *Jenkins*[354] through the manipulation of legal techniques. In many cases, the local officials whom the receiver would replace are willing to comply with the CWA but cannot because of a lack of federal or state financial assistance.[355]

Although courts are unlikely to order the shutdown of a treatment facility, because of the logistical and health consequences,[356] moratoriums on new sewer connections appear to be a more promising remedy. Courts can justify resorting to moratorium orders easily because the CWA expressly provides for the remedy.[357] Furthermore, unlike shutdowns, which would compound pollution problems, moratoriums withstand logical scrutiny because they prohibit the introduction of additional pollutants into a noncompliant system. To date, courts have upheld moratoriums in the face of numerous challenges.[358]

State and local reactions to moratorium orders demonstrate their potential effectiveness. For example, the sewer moratorium imposed on the MWRA on February 25, 1991 had the potential to affect up to one hundred projects per month in the cities and towns that the moratorium order covered.[359] Such an impact can be devastating to the economy of an area and serve as a strong incentive to bring about CWA compliance. By March 15, 1991, less than three weeks after the court issued the moratorium order, the city of Boston

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[352] *Id.*

[353] *Id.*

[354] *See supra* notes 277–307 and accompanying text.

[355] *See* Franklin, *supra* note 12, at 20.

[356] *See supra* notes 222–25 and accompanying text.

[357] 33 U.S.C. § 1342(h) (1988).

[358] *See supra* notes 226–47 and accompanying text.

[359] James L. Franklin, *Judge Halts Sewer Hookups; Pushes State on Harbor Landfill*, BOSTON GLOBE, Feb. 26, 1991, at 1, 24.

already had requested hardship exemptions from the moratorium for twenty-nine projects in an attempt to maintain some economic development within the city.[360]

There are, however, limits to the effectiveness of moratoriums. For example, moratoriums such as the order against the MWRA, that are directed at state officials, may have a crippling effect on those, such as the city of Boston, who are powerless to address the situation that the order seeks to correct.[361] Furthermore, courts have used moratoriums primarily to overcome specific compliance problems, such as the timely transfer of land for a landfill. Courts have yet to employ moratoriums in situations where widespread noncompliance is due to a lack of funds. In these cases, the financial consequences of raising the funds necessary for compliance may outweigh the economic incentive that the moratorium supplies. This is especially true in areas that are primarily residential and do not experience much industrial or commercial growth. Finally, moratoriums imposed for extended periods of time may be more susceptible to constitutional challenges by those affected than previous unsuccessful claims.

Despite their limitations, indirect coercion techniques such as moratoriums and receiverships provide courts with a significant degree of enforcement power. Many cases of POTW noncompliance stem from pressure exerted on local officials not to increase taxes or utility rates. Each of these indirect coercion techniques attacks the political nature of many POTW noncompliance problems. Receiverships, for example, sever the management of a noncompliant facility from the political decisionmaking process. This separation aims to overcome politically motivated reluctance to generate the funds necessary for compliance. In contrast, moratoriums compel compliance by placing increased pressure on those responsible for political decisions. Moratoriums effectively halt the economic growth of a noncompliant community. Because many noncompliant communities depend on new economic growth for relief from present economic difficulties, officials responsible for noncompliance feel increased pressure expeditiously to generate the funding necessary for POTW compliance. If nothing else, the mere threat of receivership or moratoriums

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[360] James L. Franklin, *EPA Seeks Wider Ban on Sewer Hookups*, BOSTON GLOBE, Mar. 15, 1991, at 21.

[361] *See supra* notes 226–36 and accompanying text. Compliance with the MWRA order required the state legislature to vote to transfer land to the MWRA. City of Boston officials therefore were powerless in this situation. *Id.*

should provide local officials with sufficient incentive to seriously consider the long-term financial requirements of treatment facilities.

B. The Necessity of Direct Court Orders

Because indirect coercion techniques are not always successful in compelling compliance with CWA consent decrees, there is a need for courts to utilize their equitable powers by issuing direct orders to compel compliance. The most effective type of direct court order to combat financially motivated POTW noncompliance is an injunction mandating a bond issuance or a tax levy against the noncompliant community. To date, however, courts have been reluctant to issue orders of this nature.

1. Special Cases Favoring Direct Court Orders

There are at least two scenarios in which courts seem more willing to exercise their equitable discretion directly. The first scenario is when private individuals have initiated the enforcement proceedings.[362] In a limited number of cases in which discrimination against private citizens exists, courts have issued direct orders that require noncompliant communities to spend bond proceeds in a particular manner.[363] No court, however, has circumvented the general requirement of a public vote for bond issuance. Therefore, while courts are willing to compel the sale of issued bonds, the question of compelling bond issuance is analyzed best through a comparison with judicial taxation.[364]

A second scenario in which courts recently have issued direct orders as a means of compelling compliance is when noncompliance has lingered for a significant period of time, and when the initial court order clearly contemplated some type of funding, whether federal, state, or local.[365] In *Allen Park*, the court compelled previously promised federal funding in exactly this type of situation.[366] Although courts have been willing to order federal funding, amendments to the CWA have shifted much of the financial burden to states and municipalities.[367] Accordingly, it is now necessary for

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[362] *See* Inverness Forest Improvement Dist. v. Hardy St. Investors, 541 S.W.2d 454 (Tex. Civ. App. 1976).

[363] *See, e.g., id.* at 462.

[364] *See supra* notes 277–307.

[365] *See* Michigan v. City of Allen Park, 739 F. Supp. 1102, 1106 (E.D. Mich. 1990).

[366] *See id.* at 1106.

[367] *See supra* notes 77–94 and accompanying text.

federal courts to order previously contemplated state or local funding to prevent POTW noncompliance.

There are two possible definitional problems that may arise, however, in the direct ordering of funding in noncompliant POTW cases. First, how long must noncompliance persist before such an order is permissible? Second, how "clearly" must the initial court order have contemplated the funding in question?

With regard to the duration of time question, in all likelihood by the time such a case reaches the appellate level, noncompliance will have persisted for a significant amount of time. Even if this is not the case, the determining factor in answering this question probably will be whether the noncompliant governmental unit still is putting forth earnest efforts to obtain funding or, for all practical purposes, has given up.

The second question spawns much more controversy than the first. It seems fair to say that if an initial court order mentions particular funding mechanisms, those mechanisms were "clearly" contemplated by the order. This question is much more difficult to answer if a court can infer the contemplation of only certain sources of funds from the language of the initial order. For example, suppose a POTW compliance order provides for fifty percent of the project to be funded by an EPA construction grant and twenty-five percent of the project to be funded by a state grant. Can a court infer that such an order "clearly" contemplated by the local governmental unit to provide financing for the remaining twenty-five percent of the project? This question may turn on the number and availability of alternative financing options. Thus, courts should evaluate such inferences on a case-by-case basis.

2. The Impact of the Jenkins Decision

Aside from isolated cases involving discrimination against private individuals and funding contemplated by previous court orders, courts have not resorted to direct orders to compel POTW compliance with the CWA. Furthermore, the Supreme Court's decision in *Jenkins*[368] probably will not provide courts with justification to issue direct orders that compel tax levies in order to fund noncompliant POTWs. Although the Supreme Court's ruling in *Jenkins* empowers a federal court to order a municipality to levy taxes,[369] the situation

[368] Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

[369] *See supra* notes 277–307 and accompanying text.

becomes more complex when a state law limits a community's revenue-raising ability.

The *Jenkins* minority asserted that judicial taxation controverting existing state law was unconstitutional on separation of powers and federalism grounds. According to the minority, the power to tax was a legislative and not a judicial power.[370] The position of the *Jenkins* majority, however, can be read in two ways. According to Justice Kennedy, there are virtually no limits placed upon the majority's endorsement of judicial taxation.[371] If a court upholds this interpretation of the decision, then there is apparently no bar to judicial taxation under the CWA even in the face of a state law limiting local revenue-raising power. A federal district court would be entitled to order a municipality to levy taxes to the extent that state law permitted and then invoke the liability provision, thus requiring the state somehow to provide the balance of the necessary funds.

In contrast, the *Jenkins* majority stated that its decision was limited to situations involving a constitutional violation. The majority emphasized that school desegregation cases were special situations involving constitutional violations. Accordingly, absent a constitutional violation, a federal court could not order a local tax levy that exceeded state statutory limitations. In general, noncompliance with the CWA does not violate the Constitution. As a result, the majority's limitation of the *Jenkins* decision seems to close the door on judicial taxation in POTW noncompliance cases.

It is difficult to assess how the *Jenkins* decision might affect the case of court-ordered bond issues. On one hand, it seems that the power to tax—to remove money directly from the taxpayers' pockets—deserves stricter scrutiny than the issue of long-term borrowing. It is important to note, however, that while taxation is a power that local officials may exercise directly, bond issuances in many cases require voter approval.

Federal courts are not likely to attempt to apply the holding in *Jenkins* to CWA enforcement cases in the near future. The *Jenkins* majority prevailed only by a slim 5-4 margin. Furthermore, since the time of the decision, Justices Souter and Thomas have replaced Justices Brennan and Marshall, who were both members of the majority. Moreover, the minority opinion indicated in no uncertain terms that courts should not consider the *Jenkins* decision solid precedent for subsequent decisions. In fact, the United States Court

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[370] *See supra* notes 293–307 and accompanying text.

[371] *See supra* notes 293–307 and accompanying text.

of Appeals for the First Circuit recently cited *Jenkins* in support of the proposition that, in fashioning court orders, federal courts should avoid interference with state sovereignty.[372]

IV. CONCLUSION

In passing the CWA, Congress not only set ambitious goals for eliminating water pollution but also created a need for ambitious funding efforts. Almost immediately after passage of the CWA, however, the federal government began to hedge on its commitment to provide financing for mandated projects. During the 1980s, Congress gradually began to phase out federal funding for CWA projects, and will eliminate federal funding entirely by 1994. As a result, the enormous financial burden of eliminating wastewater pollution has shifted to state and local goverments.

In the meantime, to achieve POTW compliance with the CWA, the EPA developed a strategy that featured judicial enforcement. As a result, federal courts now must adopt methods of compelling economically strapped state and local governments to bring POTWs in compliance with CWA requirements. Although the CWA includes provisions for fining noncompliant POTWs, fines have proven especially ineffective when the reason for noncompliance has been a lack of sufficient funds. In these situations, local officials are reluctant to make a politically unpopular decision to raise taxes or increase sewer rates. Courts therefore should develop creative techniques for compelling compliance. The most successful coercion techniques will be those that harness political pressure and use it to compel funding or remove decisions concerning compliance from the political process altogether. Accordingly, active judicial coercion through the use of receiverships and sewer moratoriums will allow courts to achieve significant success in many POTW cases.

Ultimately, Congress should realize that it is responsible for the shortage of funds for POTW projects. To correct the situation, Congress should follow one of two possible paths. Congress could ease the financial burden on state and local governments by reinstituting some form of federal financial assistance. This course of action indeed would be noble but is highly unlikely. In the alternative, Congress should give courts the enforcement power they need by statutorily sanctioning judicial taxation or bond issuance.

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[372] United States v. Metropolitan Dist. Comm'n, 930 F.2d 132, 136–37 (1st Cir. 1991).