CBO TESTIMONY

Statement of
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before the
Environmental Restoration Panel
and the Department of Energy
Defense Nuclear Facilities Panel
Committee on Armed Services
U.S. House of Representatives

June 6, 1991

NOTICE

This statement is not available for public release until it is delivered at 10:00 a.m. (EDT), Thursday, June 6, 1991.

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I am pleased to be at this joint hearing to discuss the estimated costs of the waiver of sovereign immunity in H.R. 2194, the Federal Facilities Compliance Act of 1991, which was recently ordered reported by the Committee on Energy and Commerce. A similar waiver is contained in S. 596, which is being considered in the Senate.

Under the Resource Conservation and Recovery Act (RCRA), federal facilities are currently subject to all federal, state, interstate, and local requirements with respect to the control and abatement of hazardous waste. Some states have assessed fines against federal facilities under RCRA. Other states have tried and failed because some courts have held that RCRA does not explicitly waive the federal government's sovereign immunity from fines and penalties. In fact, the Supreme Court just agreed to hear a case involving Ohio's authority to assess penalties and fines against the Department of Energy under RCRA and the Clean Water Act. This bill would clarify that among the "requirements" that can be imposed on federal facilities are administrative orders and civil and administrative penalties and fines. CBO believes that the budgetary impact of this change is very uncertain and cannot be estimated with any precision.

BACKGROUND

Under current law, the Department of Defense (DoD) and the Department of Energy (DOE) as well as other federal agencies are planning to spend billions of dollars to comply with environmental laws and clean up hazardous waste at federal facilities. In a study published last year, CBO estimated that the costs for compliance and cleanup at defense and energy installations alone could approach $150 billion over the next 30 years. DoD is seeking $2.6 billion in its 1992 budget for environmental compliance and cleanup, and DOE has asked for $4.2 billion for environmental restoration and waste management at its facilities. No one expects these costs to decline in the near future.

H.R. 2194 would not change the government's responsibility to comply with hazardous waste law, nor would it change the number of federal facilities that must be cleaned up, nor would it modify in any way the standards to which they must be restored. It would, however, make clear that states could impose civil or administrative fines on federal facilities that do not comply with federal and state hazardous waste laws.

EXPERIENCE UNDER EXISTING ENVIRONMENTAL LAWS

In order to get a sense of the likely magnitude of state fines, we have looked at the government's experience under existing laws that allow such fines for environmental violations. A number of other major environmental protection laws, including the Clean Air Act and the Clean Water Act, specifically waive the government's sovereign immunity from state fines and penalties. CBO has obtained data from DoD and DOE on the number and types of fines and penalties that their federal facilities have paid. These data indicate that, despite the extensive authority available to states under current law, they have not levied a substantial amount of environmental fines on federal facilities.

DOE estimates that, from 1979 until today, it has paid a total of about $1 million in fines and penalties to states and to the Environmental Protection Agency (EPA) for violations of environmental laws--an average of less than $100,000 a year. In addition, DOE estimates that it is negotiating with EPA and various states over an additional $1 million in assessed environmental fines and penalties. We do not have sufficient information to identify separately the fines paid by federal agencies to EPA, which are intragovernmental transactions and thus do not affect the budget deficit.

During 1989 and 1990, DoD was assessed fines by only 16 states for violations of the Clean Air Act, the Clean Water Act, and RCRA, though it has facilities in all 50 states, the District of Columbia, and several territories. Typically, the amounts paid by DoD have not been large. The states assessed fines totaling $1.3 million in 1989, and DoD has paid only about one-third of those. In 1990, DoD was assessed about $230,000 in fines by various states, and paid about $100,000. The largest single payment during these two years was $380,000--for a clean water violation--but in all other cases, DoD paid $25,000 or less per fine.

THE LIKELY IMPACT OF H.R. 2194

The information we have on environmental fines paid by federal facilities indicates that states are not assessing many fines under RCRA or under existing statutes in which sovereign immunity has clearly been waived. If H.R. 2194 is enacted, it is reasonable to assume that more fines may be assessed by states against federal facilities, but it is not at all clear that the amounts would be significant. We do not believe that there is any reliable basis for estimating the number and value of fines that might be assessed if this bill becomes law; we also cannot predict the amount of the fines that are likely to be levied under the current RCRA statute and how they would be

adjudicated in the courts. To make such estimates, we would first need to predict how often and to what degree federal facilities will violate hazardous waste law. Then we would need to assess the efficiency, motives, and intentions of state enforcement officials. Finally, we would have to judge the extent to which penalties would be reduced through negotiations or adjudication. This is an impossible task.

Although the potential fines under RCRA of up to $25,000 a day per facility are quite large, federal agencies would probably not have to pay substantial sums to states, if recent experience under current law is any guide. Some analysts have suggested that if this bill is enacted, states could use hazardous waste law to raise needed revenues. This could happen, but the evidence does not suggest it will. States could use the Clean Air Act or the Clean Water Act today to raise revenues, if this were their motivation for assessing environmental fines--but they have not done so. It is even possible that states might take a less active role in enforcement, if they believe that EPA would use the added authority it would receive under this bill to seek improved compliance by other federal agencies. It is also worth noting that nothing in current environmental protection law, nor in H.R. 2194, alters the federal government's right to seek judicial relief from a state fine or penalty that it disputes.

The Departments of Defense and Energy face unique and challenging hazardous waste problems, particularly in the areas of mixed radioactive waste and essential military operations. However, the existence of these unique problems does not lead us to conclude that states will jeopardize federal compliance and cleanup efforts by imposing significant fines and penalties. If they did, section 6001 of RCRA allows the President to exempt federal facilities from the law if it is in the "paramount interest of the United States to do so."

States and EPA might seek to use the threat of fines to encourage compliance and expeditious cleanup of hazardous waste problems at federal facilities. Such action could induce federal agencies to accelerate their compliance activities at some facilities--possibly changing the timing of funding requests for some projects. Consequently, greater spending might occur in some early years, or agencies' compliance priorities might be reordered. Funding would be determined each year in the appropriation process. Total federal compliance costs over time are unlikely to change significantly as a result of this bill.

BUDGETARY SCOREKEEPING

It is possible that some added costs of **H.R.** 2194 would be considered direct spending--that is, funds spent without any action by the appropriators in the Congress. Under the Budget Enforcement Act of 1990, any such spending would be recorded on the pay-as-you-go scorecard.

Under **H.R.** 2194, new direct spending will occur if additional fines are paid to states out of the claims and judgments fund as a result of this bill. That fund is an open-ended, permanent appropriation that may be tapped under certain conditions without appropriation action. Historically, however, most of the environmental fines that we are aware of have been paid by federal agencies from appropriated funds. Thus, not only is there no reliable basis for projecting the total amount of additional fines under H.R. 2194, there is also no way to determine what proportion, if any, would be direct spending.