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HARMON V. BROWNER: A FLAWED INTERPRETATION OF EPA OVERFILING AUTHORITY?

I. INTRODUCTION

To combat the environmental problems of the United States, the federal environmental statutory scheme divides administrative and enforcement powers between state and federal agencies.¹ Congress empowers the Environmental Protection Agency (EPA), through the major federal environmental statutes, to delegate enforcement authority to the states in order to carry out federal environmental goals.² Consequently, states play a lead role in developing programs to enforce the nation's environmental laws, while EPA oversees and authorizes such programs.³ This statutory scheme is typically referred to as cooperative federalism.⁴

To ensure that state agencies adequately enforce our nation's environmental laws, EPA instituted the practice of overfiling.⁵ Overfiling occurs when EPA brings an enforcement action after a state action has been filed or is underway.⁶ This practice allows EPA to undertake an enforcement action after EPA has delegated such authority to the states.⁷ Such practices have created frustrations between state and federal government.⁸ Much of this frustra-

1. See Christina Coop, Note, *Harmon Industries, Inc. v. Browner*, 28 *ECOLOGY L.Q.* 253, 253 (2001) (splitting responsibilities of enforcement and administration between state and federal agencies in response to past ineffective and inconsistent attempts by states to address environmental problems).

2. See Lisa Dittman, Comment, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 *UCLA L. REV.* 375, 376 (2000) (referring to elements of federal environmental statutory scheme as delegation of enforcement authority to states).

3. See *id.* (noting delegation to states because states have greater understanding of conditions and greater ease to implement programs addressing environmental problems).

4. See *id.* at 376-77 (defining cooperative federalism as delegation of enforcement authority to state by federal agency).

5. See Coop, *supra* note 1, at 253 (discussing use of overfiling to oversee state enforcement of federal environmental laws and maintain consistency in compliance with federal statutes).

6. See *id.* at 255 (defining "overfiling" as practice of beginning enforcement action after state action is underway).

7. See Major Cotell, *No RCRA Double Jeopardy*, 1999 *ARMY LAW.* 44, 44 (1999) (defining overfiling practice under Resource Conservation and Recovery Act [hereinafter RCRA]).

8. See Ellen R. Zahren, Comment, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 *EMORY L.J.* 373, 374 (2000). Generally, states do not like federal power interrupting state's delegated powers over enforcement programs. *Id.*

tion stems from the challenge of striking the appropriate balance of authority between EPA and state agencies in the implementation of federal environmental law.⁹ States argue that EPA overfiling authority is not permissible under environmental statutes.¹⁰ Although major environmental statutes like the Clean Air Act (CAA) and the Clean Water Act (CWA) seem to allow EPA overfiling, other statutes, such as the Resource Conservation and Recovery Act (RCRA), are not clear as to whether such practices are permissible.¹¹

Harmon v. Browner highlights the frustrations surrounding overfiling practices under RCRA.¹² In *Harmon*, the Eighth Circuit Court of Appeals reviewed whether overfiling was permissible under RCRA and concluded that such practices were impermissible under this Act.¹³ Since this decision, several federal courts reexamined this issue and found flaws in the Eighth Circuit's decision, finding EPA overfiling practices permissible under RCRA as well as other federal environmental statutes.¹⁴

This Note focuses on the criticisms of the Eighth Circuit's *Harmon v. Browner* decision. Part Two of this Note describes the facts and procedural history of *Harmon*.¹⁵ Part Three examines the implications and debate surrounding overfiling under CWA, CAA and

9. See Coop, *supra* note 1, at 255 (addressing that there is debate between state and federal agencies regarding balance of authority in administrative and enforcement responsibility between state and federal Environmental Protection Agency [hereinafter EPA]).

10. See *id.* ("Many state agencies and members of the regulated community contest EPA's interpretation that most environmental statutes provide for overfiling.").

11. See Bryan S. Miller, *Understanding Overfiling: The Impact of Two Recent Federal Cases of EPA Overfiling*, 15 J. ENVTL. L. & LITIG. 21, 21-22 (2000) ("Although some federal statutes seem to allow for overfiling, others are less clear.").

12. See *id.* at 25 (asserting that *Harmon v. Browner* is first federal case to directly address issue of overfiling under RCRA).

13. See *Harmon Indus. v. Browner*, 191 F.3d 894, 895 (8th Cir. 1999) (holding once state is authorized EPA is precluded from bringing enforcement action under federal environmental law to administer hazardous waste program).

14. See *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1060-61 (D.Colo. 2000) (holding EPA action was not precluded by state's enforcement action and res judicata did not bar claim), *aff'd*, 2002 WL 2017134 (10th Cir. 2002); see also *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1060-61 (W.D. Wis. 2001) (concluding EPA was not precluded from its RCRA claims by pending state action); see also *United States v. LTV Steel Co., Inc.*, 118 F. Supp. 2d 827, 828 (N.D. Ohio 2000) (settling city air pollution charges under Clean Air Act [hereinafter CAA] did not preclude plaintiff from suing for additional penalties under fed law); see also *United States v. Youngstown*, 109 F. Supp. 2d 739, 740 (N.D. Ohio 2000) (finding EPA enforcement authority under Clean Water Act [hereinafter CWA] was not precluded because enforcement authority granted to statute).

15. For a discussion of the facts of *Harmon v. Browner*, see *infra* notes 19-35 and accompanying text.

RCRA.¹⁶ The Eighth Circuit's reasoning for prohibiting overfiling practices is discussed in Part Four and Part Five reviews and critiques weaknesses in the Eighth Circuit's interpretation of EPA overfiling practices.¹⁷ Finally, Part Six focuses on the practical repercussions the *Harmon* holding will have on future environmental enforcement actions.¹⁸

II. FACTS

Harmon Industries, a manufacturer of safety equipment for railroads, operated a plant in Grain Valley, Missouri.¹⁹ In 1973, Harmon Industries began to discard volatile solvent residue and continued to do so for 14 years, until November 1987.²⁰ After discovering that the corporation had discarded solvent residue behind Harmon's Grain Valley Plant, plant management notified the Missouri Department of Natural Resources (MDNR).²¹ Following the state agency's investigation of Harmon's disposal practices, MDNR concluded that Harmon's past disposal did not pose a threat to human health and the environment.²²

MDNR and Harmon Industries worked together to develop a plan to clean up the area affected by Harmon's past disposals.²³ While developing this plan, Harmon Industries requested that MDNR refrain from imposing civil penalties for the past disposal practices.²⁴ Because Harmon Industries voluntarily reported its environmental violations and fully cooperated with all aspects of the

16. For a discussion of the background of overfiling under CWA, CAA, and RCRA, see *infra* notes 36-116 and accompanying text.

17. For a narrative analysis of *Harmon v. Browner*, see *infra* notes 117-69 and accompanying text, and for a critical analysis of the decision see *infra* notes 170-225 and accompanying text.

18. For a discussion of the impact the *Harmon* decision may have on future environmental enforcement actions, see *infra* notes 225-69 and accompanying text.

19. See *Harmon Indus. v. Browner*, 191 F.3d 894, 896 (8th Cir. 1999) (noting plant in Missouri is used to assemble circuitry boards for rail road controls and safety).

20. See *id.* at 896-97 (discarding solvent residue for fourteen years where management was unaware of such practice).

21. See *id.* at 897. In *Harmon*, the personnel manager filed a report to the Missouri Department of Natural Resources [hereinafter MDNR] after discovering maintenance worker routinely discarded volatile solvent residue. *Id.*

22. See *id.* at 897 (investigating disposal activities after Harmon voluntarily contacted state agency).

23. See *id.* (discussing drafting of comprehensive compliance plan to clean up disposal area).

24. See *Harmon*, 191 F.3d at 897. Harmon Industries had made the request that no penalties be made while MDNR and Harmon cooperatively developed a clean up plan. *Id.*

investigation, MDNR agreed to release Harmon from any monetary penalties.²⁵ Subsequently, the Missouri state court entered a consent decree between MDNR and Harmon, acknowledging Harmon's cooperation with environmental law and releasing Harmon from monetary penalties.²⁶

While Harmon Industries worked with the state agency to develop and implement the remediation plan, EPA filed an administrative enforcement action against Harmon, seeking monetary penalties for RCRA violations.²⁷ While the EPA's administrative action was pending, the state court issued the consent decree.²⁸ EPA pursued the enforcement action and successfully litigated the federal enforcement action through the administrative process.²⁹

Soon thereafter, Harmon filed a complaint challenging the administrative decision in the Western District Court of Missouri.³⁰ That court reversed the administrative court's decision to allow EPA overfiling.³¹ The district court granted summary judgment to Harmon Industries, holding that EPA could not impose civil penalties.³² The district court found the practice of overfiling impermissible under RCRA, contravening principles of res judicata.³³ EPA appealed the district court decision to the Eighth Circuit Court of Appeals.³⁴ The Eighth Circuit affirmed the grant of summary judgment and dismissed the action, holding that once EPA authorized a state to administer and enforce a hazardous waste

25. *See id.* Following the investigation by MDNR, Harmon Industries willingly worked with MDNR to clean up the disposal area. *Id.*

26. *See id.* (entering decree to acknowledge that Harmon was working with MDNR to full accord and satisfaction).

27. *See id.* at 897 (seeking \$2,343,706 in penalties in enforcement action against Harmon).

28. *See id.* On March 5, 1993 the Missouri state court judge approved the consent decree that MDNR and Harmon entered into while the EPA administrative enforcement action was pending. *Id.*

29. *See Harmon*, 191 F.3d at 897 (litigating before administrative law judge where penalty against Harmon was found to be appropriate and was affirmed by Environmental Appeals Board panel).

30. *See id.* On June 6, 1997, Harmon filed a complaint in federal district court to challenge the Environmental Appeals Board's decision to affirm the administrative judge's decision. *Id.*

31. *See id.* (granting defenses request for summary judgment).

32. *See id.* The district court favored Harmon's argument and reversed the administrative appellate court decision to find EPA overfiling permissible under RCRA. *Id.*

33. *See id.* (holding that EPA was precluded from bringing enforcement action against Harmon thereby finding overfiling impermissible).

34. *See Harmon*, 191 F.3d at 897 (appealing summary judgment decision of district court).

program, an enforcement action brought by the state precluded EPA from assigning its own penalty.³⁵

III. BACKGROUND

A. Federal Statutory Environmental Scheme: CAA, CWA and RCRA

Congress enacted CAA, CWA and RCRA in the 1970's in response to the ineffective and inconsistent attempts by states to address environmental problems.³⁶ Under each of these statutes, EPA and the states attempt to work cooperatively to deliver a national enforcement system that protects the nation's environmental and public health concerns.³⁷ The main goal of environmental protection laws is deterrence.³⁸ To fulfill this goal, the federal government permits states to implement environmental programs and to enforce federal environmental laws.³⁹ States enforce federal environmental laws by adopting and administering their own adaptation of federal laws.⁴⁰ Under this cooperative federalism scheme, EPA maintains a supervisory role over state enforcement of federal environmental law to ensure that there is uniformity in compliance with federal environmental statutes.⁴¹

The three major environmental statutes, CAA, CWA and RCRA, delegate federal environmental standards to the states.⁴² These statutes encourage states to promulgate programs and imple-

35. See *id.* at 896-97 (upholding lower court's decision finding overfiling under RCRA impermissible).

36. See Coop, *supra* note 1, at 253 (asserting reasoning behind Congress's enactment of CAA, CWA and RCRA).

37. See David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 33 (2000) (describing partnership role of states and federal government in administering and enforcing federal environmental laws).

38. See Amy E. Jolley, Comment, *Scaring the States Into Submission? Divergent Approaches to Environmental Compliance*, 35 TULSA L.J. 193, 195 (1999) (noting primary goal of federal statutes is to deter commission of environmental violations).

39. See Jerry Organ, *Environmental Federalism Part II: The Impact of Harmon, Smithfield and Clean on Overfiling under RCRA, the CWA and the CAA*, 30 ENVTL. L. REP. 10732, 10732 (2000) (asserting states are delegated authority to administer most environmental programs).

40. See Markell, *supra* note 37, at 35. The states perform their role as a partner with the federal system to implement their version of environmental law. *Id.*

41. See Dittman, *supra* note 2, at 377-78 (delegating enforcement authority to states which have primary enforcement role but EPA oversees).

42. See Zahren, *supra* note 8, at 378 (maintaining that under CAA, CWA and RCRA Congress gave authority to states and federal government in administering and enforcing environmental statutes).

ment federal environmental standards.⁴³ EPA approves and authorizes such programs, generally overseeing the enforcement and implementation of these programs.⁴⁴

1. An Overview of CAA

Under CAA, states have the primary responsibility for the air quality within their states.⁴⁵ CAA developed National Ambient Air Quality Standards (NAAQS), which established uniform federal air quality standards for sources of hazardous air pollution.⁴⁶ Under this statute, states develop environmental programs, or State Implementation Plans (SIPs), which detail how the state will implement NAAQS.⁴⁷ The state then reports the SIP to EPA for authorization and approval.⁴⁸ Once approved, the state has the authority to enact the program to enforce NAAQS.⁴⁹ If a SIP is inadequate, EPA has discretion to assume enforcement authority.⁵⁰ Section 7413(a)(4) of 42 U.S.C. provides: "No order issued under this subsection shall prevent the State or the Administrator from assessing any penalties nor otherwise affect or limit the State's or the United States authority to enforce under other provisions of this chapter"⁵¹

CAA also implemented a national permit program under Title V of the Act.⁵² Sources releasing pollutants into the air are subject to the permit program and are required to have a permit.⁵³ The permits provide emission limitations and compliance standards that

43. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6942 (2000); Clean Air Act, 42 U.S.C. §§ 7401-7671 (2000).

44. See Zahren, *supra* note 8, at 383 (summarizing generally enforcement actions under each of three regulatory statutes).

45. See 42 U.S.C. § 7401(a)(3) (1994) (providing that "air pollution prevention . . . and . . . control at its source is the primary responsibility of States and local governments").

46. See 42 U.S.C. § 7409 (affording guidelines for states and requiring that EPA adopt uniform emission standards for sources of air pollutants).

47. See 42 U.S.C. § 7407(a) (developing plans to attain National Ambient Air Quality Standards [hereinafter NAAQS] and other requirements of CAA).

48. See 42 U.S.C. § 7410(a)-(b) (noting EPA will approve and fund State Implementation Plans [hereinafter SIPs] if statutory requirements are met).

49. See 42 U.S.C. § 7410(a) (maintaining each SIP becomes codified in Code of Federal Regulations).

50. See 42 U.S.C. § 7413(a)(2) (outlining enforcement authority if state fails to enforce SIP or permit program).

51. See 42 U.S.C. § 7413(a)(4) (allowing state and EPA to impose penalties or enforce other provisions of CAA after order has been filed).

52. See 42 U.S.C. §§ 7661a-7661h (describing permit programs under CAA).

53. See 42 U.S.C. § 7661b (outlining permit application process under CAA).

sources cannot violate.⁵⁴ States are responsible for the administration and enforcement of the permit program.⁵⁵ If states fail to accomplish the goals of CAA's permit program, however, EPA may exercise its enforcement authority.⁵⁶ Section 7661a(e) provides that "nothing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State."⁵⁷

2. *An Overview of CWA*

The goal of CWA is to restore and maintain the nation's waters.⁵⁸ This Act mandates that states control the discharges of pollutants into the country's waters.⁵⁹ CWA regulates pollutant discharge through a permit system, the National Pollutant Discharge Elimination System (NPDES).⁶⁰ The states play a primary role in the implementation of this permit system.⁶¹ Similar to CAA, under CWA, EPA delegates enforcement and implementation powers to the states so long as the state permit programs are equivalent to what federal law would provide.⁶² EPA has also retained enforcement powers under CWA to correct inadequate state action.⁶³ Section 1342(i) provides that, "[n]othing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of the title" ⁶⁴ Section 1319 allows

54. *See id.* (providing that it shall be unlawful to violate requirements of issued permit). Section 7661c provides for the establishing of permit requirements and conditions according to the national permit program of Title V under CAA. *See* 42 U.S.C. § 7661c.

55. *See* 42 U.S.C. § 7661a(b), (d) (2000) (setting out that states promulgate regulations under permit program and monitor issuance of permits).

56. *See* 42 U.S.C. §7661a(e) (establishing that EPA can suspend issuance of permits and have jurisdiction to administer and enforce federally issued permits).

57. *Id.* (referring to EPA's enforcement powers over states under permit program).

58. *See* 33 U.S.C § 1251 (b) (2000) (restoring and maintaining chemical, biological and physical integrity of nation's waters).

59. *See* 33 U.S.C. § 1342(b) (2000) (submitting proposal to EPA allows states to take over permit process to monitor discharges).

60. *See id.* (providing that EPA "shall" approve of state program so long as state met requirement under CWA).

61. *See* 33 U.S.C. § 1318(c) (describing state's primary role over federal agency in enforcing CWA).

62. *See id.* (detailing enforcement role of state and federal government).

63. *See* 33 U.S.C. § 1319(a)(2) (giving EPA authority to enforce any permit condition or limitation if EPA believes state failed to enforce permit conditions or limitations effectively).

64. 33 U.S.C. § 1342(i) (clarifying EPA's enforcement powers).

EPA to issue a compliance order or to commence a civil action whenever any person is in violation of a permit.⁶⁵

3. An Overview of RCRA

RCRA addresses problems posed by hazardous waste and attempts to reduce the threat hazardous waste poses to human health and the environment.⁶⁶ RCRA identifies hazardous chemical wastes and imposes regulatory requirements for dealing with such hazardous waste.⁶⁷ Similar to CWA and CAA, RCRA contains a permit system allowing a state to apply to EPA for authorization to administer and enforce a hazardous waste program.⁶⁸ Section 6926 prescribes RCRA's permit system, providing that EPA may authorize a state hazardous waste program where the state program operates "in lieu of" the federal program.⁶⁹ Under section 6926, the state must administer and implement a program that is equivalent to the federal program, providing adequate compliance and enforcement measures.⁷⁰ RCRA also includes a notice requirement, section 6928, which allows EPA to bring an enforcement action after giving the states adequate notice.⁷¹

B. Overfiling Practices under the Federal Environmental Statutory Scheme

Since the enactment of CAA, CWA and RCRA, nearly thirty years ago, EPA has used overfiling practices as a means of enforcement.⁷² Overfiling practices entail commencing an enforcement

65. See 33 U.S.C. § 1319(b). EPA may bring a "civil action for appropriate relief, including a permanent or temporary injunction" for violations which authorized to issue compliance order under section 1319(a). See *id.*

66. See 42 U.S.C. § 6901 (2000). The goal of RCRA is to address problems posed by hazardous waste and the role of state is to reduce its threat. 42 U.S.C. § 6902.

67. See 42 U.S.C. §§ 6921-6924 (defining hazardous wastes and summarizing means of dealing with such wastes).

68. See 42 U.S.C. § 6926 (describing permit system under RCRA that encourages primary state role in enforcement); see also Coop, *supra* note 1, at 256 (reiterating states' primary role in enforcement actions).

69. See 42 U.S.C. § 6926(b). EPA may withdraw authorization if the state enforcement action is inadequate. 42 U.S.C. § 6926(e).

70. See 42 U.S.C. § 6926(b). The state enforcement action has the "same force and effect" as a federal action. 42 U.S.C. § 6926(d).

71. See 42 U.S.C. § 6928(a)(1)-(2). Unlike the CAA and CWA, RCRA does not assign a specific number of days for giving notice to the state. *Id.*; see also Zahren, *supra* note 8, at 382 (comparing notice requirement of CAA and CWA with RCRA).

72. See Zahren, *supra* note 8, at 373 (noting that after thirty years of federal environmental regulation, environmental problems still require strong federal enforcement).

action after a state enforcement action is underway.⁷³ Although EPA overfiles in very few instances, EPA will overfile in the following cases: when a state penalty is not sufficient, when a state is not taking timely action or when a state is taking inadequate action against a violator of federal environmental laws.⁷⁴ Thus, the practice of overfiling responds to violations of environmental laws and instances when a state environmental program fails to adequately protect human health and the environment.⁷⁵

Though EPA uses overfiling to ensure adequate enforcement of environmental law, states have resisted the practice.⁷⁶ Environmental statutes give states primary responsibility in enforcement actions.⁷⁷ States contend that overfiling by the federal government infringes upon its enforcement role.⁷⁸ States argue that federal enforcement actions interfere with state autonomy; and overfiling takes away from a state's authority to implement and enforce environmental objectives.⁷⁹ Additionally, states argue that overfiling is a wasteful practice creating duplicative enforcement.⁸⁰ Critics of overfiling speculate that "[i]f the EPA stopped overfiling and spent those resources on other compliance matters, perhaps more enforcement would occur and costs would be saved."⁸¹

73. See Miller, *supra* note 11, at 21-22 (defining "overfiling" as practice of beginning enforcement action after state action is underway).

74. See Jolley, *supra* note 38, at 207 (noting EPA overfiled in 1992 and 1993 in about thirty cases and from 1994 to 1996 there were only twenty-two instances of overfiling); see also Zahren, *supra* note 8, at 373 ("Overfiling occurs when the EPA either steps in to fix, change, undo, or add to what a state has already done or takes action after a state has failed to act.").

75. See Jolley *supra* note 38 (overfiling occurs when state response fails to deter future violations or protect law abiding facilities).

76. See Zahren, *supra* note 8, at 373 (noting that states argue federal overfiling authority should not exist at all).

77. See *id.* The federal government retains some oversight and enforcement authority, but it is secondary to state enforcement authority. *Id.*

78. See *id.* at 411 (viewing overfiling practices as "unjustified interference" with state authority).

79. See *id.* at 429 (stating overfiling undermines state authority to carry out federal environmental laws).

80. See *id.* at 429-30 (describing state criticism of overfiling practices as duplicative, undermining certainty, efficiency and state authority, thereby creating waste).

81. Zahren, *supra* note 8, at 429-30 (asserting that valuable resources are wasted on overfiling).

C. Case Law Addressing the Issue of Overfiling Using the *Harmon* Overfiling Analysis

The Eighth Circuit's decision in *Harmon v. Browner* illustrates the ongoing tensions surrounding the issue of overfiling.⁸² Prior to the *Harmon* decision, EPA claimed it had the authority under RCRA to overfile.⁸³ The *Harmon* court undermined this position when it found such overfiling practices impermissible.⁸⁴ Although the administrative courts in *Harmon* found EPA overfiling permissible, the district court and Eighth Circuit reversed the administrative court's ruling, resting their decisions on the statutory interpretation of the language and principles of res judicata.⁸⁵

The Eighth Circuit analyzed EPA's interpretation of RCRA overfiling through the statutory analysis developed in *Chevron U.S.A Inc. v. Natural Resources Defense Council Inc.*⁸⁶ In *Chevron*, the Supreme Court held that deference must be given to EPA's interpretation when the legislative history or meaning of a statute is ambiguous as to a specific issue.⁸⁷ Applying this standard, the Eighth Circuit analyzed the ambiguity of the RCRA language pertaining to overfiling practices and concluded that RCRA did not permit overfiling.⁸⁸ The *Harmon* court did not defer to EPA's interpretation of overfiling under RCRA.⁸⁹ According to the Eighth Cir-

82. See David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 937 (asserting that EPA dedication to rational polluter model has caused ongoing fight with states over enforcement actions that are not on par with EPA's policy).

83. See Miller, *supra* note 11, at 22 (maintaining that first federal case to address overfiling was *Harmon v. Browner*).

84. See *id.* at 27. Prior to *Harmon*, EPA thought it had free authority under RCRA to overfile. *Id.* The *Harmon* decision greatly limited this position. *Id.*

85. See *Harmon Indus. v. Browner*, 191 F.3d 894, 897 (8th Cir. 1999) (reversing administrative court decision that found EPA monetary penalty permissible).

86. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 865 (1984) (asserting that when legislative history of statute is silent to instant issue, EPA or agency interpretation must be deferred to).

87. See *id.* at 843-45.

If Congress has explicitly left a gap for the agency to fill there is an expressed delegation of authority to the agency to elucidate a specific provision of the statute by regulation We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme is entrusted to administer, and the principle of deference to administration interpretations.

Id.

88. See *Harmon*, 191 F.3d at 897. To determine whether overfiling practices were permissible under RCRA the Eighth Circuit court used the *Chevron* standard to review the correctness of the EPA's interpretation of RCRA to allow such practices. *Id.*

89. See *id.* at 901 (holding there was no support in RCRA's text or legislative history to find EPA overfiling practices permissible).

cuit, the plain language meaning of RCRA's section 6926 authorized state regulations to supplant those of the federal government.⁹⁰ The court also concluded that, the notice requirement found in section 6928 of RCRA gives the states a primary role in enforcement, thereby precluding EPA overfiling.⁹¹

Further, the court read RCRA's statutory language as establishing a privity relationship between the state and federal agency.⁹² According to the court, the state agency and federal agency were in a privity relationship, having a "close relationship bordering on near identity."⁹³ Having found a privity relationship between the state and federal agencies, the court determined that the doctrine of res judicata precluded overfiling.⁹⁴

Following the *Harmon* decision, several federal courts found flaws in the Eighth Circuit's analysis of RCRA overfiling. In *United States v. Power Engineering*, the District Court of Colorado disregarded the *Harmon* court's analysis and adopted EPA's interpretation of RCRA and overfiling practices.⁹⁵ Recently, the Tenth Circuit affirmed the District Court of Colorado's decision, finding EPA overfiling practices under RCRA permissible.⁹⁶ The Western District of Wisconsin came to a similar decision in *United States v. Murphy Oil*, also finding flaws in the *Harmon* court's interpretation of overfiling under RCRA.⁹⁷

Power Engineering, like *Harmon*, entailed a state environmental agency seeking to force defendants to comply with orders under

90. See *id.* at 899 (stating § 6926 of RCRA "in lieu of" language authorizes that state enforcement actions supplant EPA enforcement actions).

91. See *id.* (noting that § 6928 reinforces primacy of state right to enforce under RCRA).

92. See *id.* at 903 (referring to § 6926(b) "in lieu of" language and § 6926(b) "same force and effect" language as establishing grounds for privity relationship or nearly identical relationship).

93. *Harmon*, 191 F.3d at 903 (citing *United States v. Gurley*, 43 F.3d 1188, 1197 (8th Cir. 1994)).

94. See *id.* (maintaining that Missouri's action was in lieu of EPA action and had same force and effect as EPA action; thus, privity relationship is established where EPA is precluded to put forth same legal right under RCRA as state under doctrine of res judicata).

95. See *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1057 (D.Colo. 2000) (finding EPA interpretation of RCRA correct in allowing overfiling).

96. See *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1236-40 (10th Cir. 2002) (deferring to EPA interpretation that RCRA permits EPA overfiling and that overfiling is not barred by res judicata principles).

97. See *Power Eng'g*, 125 F. Supp. 2d at 1065 (ruling that overfiling under RCRA by EPA was permissible, insisting Eight Circuit misinterpreted RCRA); see also *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1054 (W.D. Wis. 2001).

RCRA.⁹⁸ EPA in *Power Engineering* filed an enforcement action to seek financial assurance from the defendants when the state agency failed to do so.⁹⁹ While the defendants argued that *Harmon* precluded EPA from overfiling under RCRA, the court determined that RCRA did not prohibit the plaintiff's action, and the court deferred to EPA's interpretation of RCRA.¹⁰⁰ Adopting EPA's interpretation, the district court in *Power Engineering* referred to the statutory language found in section 6928's notice requirement as evidence that RCRA allowed EPA to institute enforcement actions after providing notice to the states.¹⁰¹ Additionally, the Colorado district court did not find a privity relationship between the state agency and EPA; therefore, the court reasoned that overfiling did not go against principles of *res judicata*.¹⁰²

Similar to the *Power Engineering* court, the District Court for the Western District of Wisconsin in *Murphy Oil* found overfiling a permissible practice under RCRA.¹⁰³ Like the district court in *Power Engineering*, the district court in *Murphy Oil* held that EPA overfiling practices were permissible, interpreting RCRA to allow EPA enforcement actions when a state enforcement action was already underway.¹⁰⁴ The *Murphy Oil* court deferred to EPA's interpretation of RCRA to permit overfiling, reading the Act as allowing EPA enforcement actions so long as EPA gave notice to the state.¹⁰⁵

98. See *Murphy Oil*, 143 F. Supp. 2d at 1054 (charging defendant with treating, storing and disposing of hazardous wastes without proper state and federal permits).

99. See *id.* (asserting that state agency, Colorado Department of Public Health and Environment, failed to demand financial assurance even though EPA requested financial assurance enforcement).

100. See *id.* at 1116 (quoting *Power Eng'g*, 125 F. Supp. 2d 1050 (D. Colo. 2000)). The Tenth Circuit "assumed without deciding . . . that the EPA may [overfile] even after the state has taken its own enforcement actions." *Id.*

101. See *Power Eng'g*, 125 F. Supp. 2d at 1062-63 (refusing to disregard regulations found in 40 C.F.R. §271.16(c) and 40 C.F.R. § 271.19 to determine EPA's interpretation of RCRA and power to overfile). The district court agreed with *Harmon's* interpretation of section 6926. *Id.* According to the district court, section 6926 of RCRA demonstrated that Congress intended the states to have a lead role in enforcement; this, however, did not indicate that EPA was unable to overfile. *Id.*

102. See *id.* at 1062. Additionally, the Colorado court's reading of section 6926 did permit EPA overfiling in enforcement actions. *Id.*

103. See *Murphy Oil*, 143 F. Supp. 2d at 1017 (finding that federal agency was not precluded from bringing enforcement action under RCRA by pending state action concerning same violations).

104. See *id.* at 1054 (finding EPA not precluded from bringing enforcement action under RCRA by pending state action concerning same violations).

105. See *id.* at 1117. The court found RCRA to be ambiguous and as per *Chevron*, the court deferred to EPA interpretation of RCRA to allow overfiling as "a reasonable interpretation of an ambiguous statute." *Id.*

Courts have also addressed whether the *Harmon* analysis under RCRA applies to overfiling actions under CWA and CAA.¹⁰⁶ In addition to addressing overfiling practices under RCRA, the court in *Murphy Oil* also addressed the *Harmon* analysis of overfiling as it pertained to CAA.¹⁰⁷ The defendant in *Murphy Oil* violated CAA and argued that the *Harmon* reasoning and principles of res judicata barred EPA from overfiling under CAA.¹⁰⁸ Nevertheless, the court read the statutory language of CAA to permit overfiling and declined application of *Harmon's* overfiling analysis to CAA enforcement actions.¹⁰⁹

The Northern District Court of Ohio in *United States v. Youngstown* and *United States v. LTV Steel Co.* has also declined application of *Harmon's* overfiling reasoning to CWA and CAA violations.¹¹⁰ The district court in *Youngstown* rejected the argument that the *Harmon* reasoning should be applied to violations of CWA.¹¹¹ In *Youngstown*, a state action against the city for CWA violations did not preclude EPA from bringing an enforcement action.¹¹² The City of Youngstown argued that CWA paralleled RCRA, which would preclude an EPA enforcement action under the *Harmon*

106. See *id.* (determining EPA overfiling practices were not precluded under CAA); see also, *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 829 (N.D. Ohio 2000) (permitting EPA overfiling practices under CAA); see also *United States v. Youngstown*, 109 F. Supp. 2d 739, 739 (N.D. Ohio) (finding EPA could overfile under CWA).

107. See *Murphy Oil*, 143 F. Supp. 2d at 1089-91. In *Murphy Oil*, plaintiff argued that CAA's statutory scheme did not bar the federal government from overfiling against a violator of the Act. *Id.* Conversely, the defendant argued that the plaintiff was barred from bringing its CAA claims because the defendant had settled a suit with the state to address the same violation. *Id.* The defendant based its argument on principles of res judicata and relied on *Harmon* to support its argument. *Id.*

108. See *id.* at 1117. The defendant argued that under terms of settlement, they were released from liability for its CAA violations. *Id.* This settlement barred plaintiff from further proceedings. *Id.*

109. See *id.* (concluding *Harmon* reasoning did not apply to CAA enforcement actions since CAA did not contain language that Eighth Circuit relied on to reach decision and further interpreted Congress anticipated overfiling under CAA).

110. See *LTV Steel Co.*, 118 F. Supp. 2d at 829 (maintaining settlement of state claim of city air pollution charges did not preclude federal government from suing for additional penalties); see also *Youngstown*, 109 F. Supp. 2d at 739 (stating EPA enforcement authority was not taken away because enforcement authority to state agency was allowed under CWA).

111. See *Youngstown*, 109 F. Supp. 2d. at 741 (noting defendant exclusively relied on *Harmon* decision to argue EPA was barred from pursuing enforcement action separate from state action).

112. See *id.* (reviewing violations of National Pollutant Discharge Elimination System [hereinafter NPDES] permits under CWA and EPA's ability to bring enforcement after state brings such action).

analysis.¹¹³ The Ohio court disagreed, finding major differences in language contained in the enforcement provisions of the two statutes.¹¹⁴ The Ohio district court came to a similar decision in *LTV Steel*, where the court determined that language in CAA also permitted overfiling.¹¹⁵ The *LTV Steel* court determined that EPA was permitted to seek penalties from violators of CAA who have settled with the local enforcement agency.¹¹⁶

IV. NARRATIVE ANALYSIS

The Eighth Circuit in *Harmon* examined both the statutory language of RCRA and the principles of res judicata to conclude that EPA did not have the right to overfile its action against Harmon Industries.¹¹⁷ The Eighth Circuit, in a unanimous decision, found EPA's enforcement action both duplicative and impermissible.¹¹⁸ The *Harmon* court based its decision on statutory interpretation and preclusion principles.¹¹⁹

EPA argued that RCRA permitted the agency to file an enforcement action after authorizing a state action.¹²⁰ The state agency claimed that a federal enforcement action was impermissible once EPA authorized a state enforcement action under

113. *See id.* (maintaining similarities between enforcement provision of CWA and RCRA).

114. *See id.* Relying on *Harmon* was inappropriate since it involved RCRA which contains "in lieu of" language that CWA did not contain. *See id.*

115. *LTV Steel*, 118 F. Supp. 2d at 832 (reviewing authority of EPA to overfile where manufacturer was charged with violating city's air pollution code and settled with City of Cleveland).

116. *See id.* (asserting that "Ohio EPA's lack of involvement in LTV's settlement with the City of Cleveland negates all of LTV's argument regarding the preclusive effect of an Ohio EPA settlement on EPA enforcement action.")

117. *Harmon Indus. v. Browner*, 191 F.3d 894, 902-04 (8th Cir. 1999) (holding that RCRA precluded EPA from assessing its own penalty against Harmon in these circumstances).

118. *See id.* at 896 (affirming decision of district court that granted summary judgment in favor of Harmon and reversed decision of administrative courts).

119. *See id.* at 898-904 (referring generally to review of federal agency's interpretation of statute and res judicata standards under Missouri law).

120. *See id.* at 898. The EPA argued that the lower court's interpretation of RCRA was against the plain language meaning of the statute. *Id.*; *see also* Miller, *supra* note 11, at 26 (stating EPA's main argument was that RCRA statutory language permitted overfiling).

RCRA.¹²¹ Both EPA and Harmon asserted that their interpretation of the statute was correct.¹²²

EPA contended that the language of section 6928 allowed the federal government to initiate an enforcement action under RCRA.¹²³ The statute provides that “states [are] authorized to carry out [hazardous waste programs] in lieu of the Federal program under this subsection and to issue and enforce permits.”¹²⁴ According to EPA, “in lieu of” referred to which regulations were to be enforced in an authorized state and did not refer to who was responsible for enforcing the regulations.¹²⁵ Additionally, EPA argued that RCRA should be interpreted as a whole, authorizing states and EPA to enforce state regulations in compliance with EPA’s policies.¹²⁶

The Eighth Circuit analyzed RCRA using the *Chevron* standard of review, considering the congressional intent behind RCRA and EPA’s interpretation of the statute.¹²⁷ Under this analysis, a court must first ask whether Congress’s intent was clear.¹²⁸ If the statutory language clearly evinces the intent of Congress, the court must adopt the legislative interpretation of the law.¹²⁹ If the court finds the interpretation ambiguous, the court must then defer to the

121. See *Harmon*, 191 F.3d at 899. Harmon argued that RCRA’s plain language supported its interpretation of the Act. *Id.*; see also Miller, *supra* note 11, at 26 (summarizing that state agency in *Harmon* analyzed statute to prohibit overfiling once federal agency approved of enforcement program).

122. See *Harmon*, 191 F.3d at 899 (noting that both parties argued that plain language of statute supports their position).

123. See *id.* According to EPA, section 6928(a)(1) of RCRA provides that EPA may “initiate enforcement actions against suspected environmental violators.” *Id.* However, section 6928(a)(2) permits EPA to enforce hazardous waste laws under RCRA if EPA gives the state written notice. *Id.*

124. 42 U.S.C. § 6926(b) (2000) (authorizing state issuance of permits for treatment storage and disposal of hazardous wastes).

125. See *Harmon*, 191 F.3d at 898 (explaining EPA contends that plain language allows enforcement action under § 6928 and that district court misinterpreted “in lieu” of language of § 6928).

126. See *id.* (according to EPA, RCRA authorizes either state or EPA enforcement of state regulation to comply with EPA standards). In addition, EPA argued that the “same force and effect” language in section 6926(d) referred to the effect of state issued permits. *Id.*

127. See *id.* at 897 (asserting *Chevron* standard of review for statutory interpretation looking to the legislative intent of the statute before deferring to EPA interpretation); see also, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 842-45 (1984) (stating that court must give deference to agency interpretation, if legislative history is silent to meaning of statute).

128. See *Harmon*, 191 F.3d at 897 (referring to *Chevron*, standard to determine correctness of EPA interpretation of RCRA).

129. See *id.* (describing holding in *Chevron* to first consider legislative intent before differing to agency interpretation where statute silent on issue).

agency's interpretation of the statute.¹³⁰ The Eighth Circuit rejected EPA's statutory interpretation because the court deemed it inconsistent with RCRA's plain language and the legislative intent of the statute.¹³¹ The Eighth Circuit maintained that "[w]hile the EPA is correct that the 'in lieu of' language refers to the program itself, the administration and enforcement of the program are inexorably intertwined."¹³² The Eighth Circuit explained that using the words "in lieu of" in section 6926(b) evidenced that Congress intended the state program to supplant the federal program in all respects.¹³³ The fact that EPA could repeal an inadequate state enforcement program supported this interpretation.¹³⁴ The *Harmon* court read such language to mean that EPA had secondary enforcement powers and could only begin an enforcement action after first repealing state authorization.¹³⁵ According to the court, EPA's authorization of a state enforcement action was granted "in lieu of" a federal government hazardous waste program.¹³⁶

To further support this interpretation of RCRA, the Court examined the "same force and effect" language of section 6926(d).¹³⁷ According to the Eighth Circuit, Congress intended to give the states a role in enforcing hazardous waste programs.¹³⁸ Referring to the House Reports, the Eighth Circuit noted that the House of Representatives wanted to vest primary enforcement of hazardous

130. See *id.* (examining clarity and legislative intent of statute with regard to EPA interpretation of RCRA). For a further discussion of *Chevron*, see *supra* notes 86-92 and accompanying text.

131. See *Harmon*, 191 F.3d at 899-900 (disagreeing with EPA claim that district court incorrectly interpreted "in lieu of" and "same force and effect language").

132. *Id.* at 899 (believing RCRA allows states to receive authorization from federal government to administer and enforce program that is to operate "in lieu of" EPA regulatory program).

133. See *id.* (holding legislative intent of Congress to give state primary role to authorize program and enforce under RCRA).

134. See *id.* Referring to section 6926(b), the *Harmon* court provides that "the statute permits the EPA to repeal a state's authorization if the state's program 'does not provide adequate enforcement of compliance with the requirements of the RCRA.'" *Id.*

135. See *id.* (insisting language in § 6928(a)(1) and (2) when read with language in § 6926(b) demonstrates that EPA has secondary enforcement right since EPA has right to withdraw state authorization if state enforcement is inadequate).

136. See *Harmon*, 191 F.3d at 899 (determining that Congress intended EPA to have enforcement rights after state action rescinded or state fails to enforce action adequately).

137. See *id.* (maintaining that "same force and effect" language provides support for states to play lead role in RCRA enforcement).

138. See *id.* at 899-901 (noting that congressional intent is found in language of § 6926(b), § 6928(a)(1) and (2) and House reports).

waste programs with the states.¹³⁹ Using the words “same force and effect” in section 6926(d) indicated that the states had a primary enforcement role under RCRA.¹⁴⁰ The Eighth Circuit dismissed EPA’s argument that “same force and effect” rested with the state’s permits because the words appeared under a heading entitled “Effect of State permit.”¹⁴¹ The Eighth Circuit determined that any action taken by the state had the “same force and effect” as any action taken by EPA.¹⁴² According to the Eighth Circuit, “any action” under the 6926(d) provision applied to any state enforcement action.¹⁴³

The *Harmon* court found that the notice requirement of section 6928 further supported EPA’s role as a secondary enforcer and the state’s role as a primary enforcer.¹⁴⁴ According to the Eighth Circuit, the notice requirement of section 6928 reinforced the primary role of state enforcement.¹⁴⁵ The notice requirement operated as a means to allow the state the first opportunity to initiate the enforcement action.¹⁴⁶ The court found that section 6928 only allowed EPA to enforce the hazardous waste laws of RCRA if the agency first gave written notice to the states.¹⁴⁷ Accordingly, the court asserted that EPA could only give notice to the states after

139. *See id.* at 901 (noting U.S. House Reports state “legislation permits the states to take lead in the enforcement of the hazardous wastes [sic] laws.”); *see also*, H.R. REP. 94-1491, at 24 (1976) reprinted in 1976 U.S.C.C.A.N. 6238, 6262 (“It is the Committee’s intention that the States are to have primary enforcement authority and if at any time State wishes to take over the hazardous waste program it is permitted to do so.”).

140. *See Harmon*, 191 F.3d at 900 (referring to “same force and effect” language found in § 6926(d) that refers to actions taken by states in hazardous waste program).

141. *See id.* at 899-900 (arguing that heading “Effect of State permit” found in section 6926(d) supports EPA position to overfile).

142. *See id.* (agreeing with district court’s finding that “same force and effect” encompasses RCRA enforcement mechanism).

143. *See id.* (observing that terms “any action” found in §6926(d) provision was not limited to issuance of permits).

144. *See id.* at 899 (reviewing language of § 6828(a)(2) to reinforce role of state government to take lead enforcement role). Section 6928 permits the EPA to enforce hazardous waste law provided that it give states notice. *Id.*

145. *See Harmon*, 191 F.3d at 899 (interpreting § 6928(a)(2) to allow EPA enforcement action if written notice given to state). Section 6928(a)(2) must be interpreted with Section 6926(b) providing that EPA may withdraw state authorization if there is inadequate state action. *Id.* This gives the federal agency a secondary role. *Id.*

146. *See id.* (asserting that EPA in certain circumstances under § 6926(b) could withdraw state authorization if state enforcement inadequate).

147. *See id.* (asserting that under section 6928(a)(2), EPA may enact enforcement action after written notice given to state).

first withdrawing authorization of a state program or to enforce a state program if the state had not acted.¹⁴⁸

The court also noted that Congress did not intend to have competing enforcement actions from the state and the federal agency.¹⁴⁹ The Eighth Circuit reasoned that if Congress intended the state and federal actions to compete with each other, the legislators would have used “and/or” in the statute rather than just stating “or” in the statute.¹⁵⁰ Additionally, if Congress intended to have the federal agency duplicate a state enforcement action, this intention would have been stated explicitly within the statute.¹⁵¹

The Eighth Circuit upheld Harmon’s preclusion argument, holding that EPA’s enforcement action against Harmon Industries violated principles of *res judicata*.¹⁵² EPA argued that the state judgment had no bearing on the enforcement action against Harmon because elements of *res judicata* were present.¹⁵³ EPA also argued that there was no *res judicata* effect to the consent decrees issued by the state court.¹⁵⁴

The court referred to the four requirements of *res judicata* under Missouri law to determine if preclusion would apply.¹⁵⁵ The first *res judicata* element was met because both MDNR and EPA sued for the same thing, the enforcement of RCRA.¹⁵⁶ The identical cause of action created by both the MDNR and EPA met the

148. *See id.* (maintaining EPA may rescind authorization of state action if state action is inadequate or state fails to initiate enforcement action).

149. *See id.* at 900-01 (reinforcing that state role is lead enforcer, not both EPA and State competing for primary role to enforce RCRA).

150. *See Harmon*, 191 F.3d at 901 (citing language in § 6926 to give state primary enforcement rights over federal agency). The Eighth Circuit used a reverse plain language argument to support their reasoning that if Congress intended to allow competing enforcement action “and/or” would have been used in the statute as opposed to “or”. *Id.*

151. *See id.* (evaluating that Congress intended use of “or” in statutory language to prevent competing enforcement actions).

152. *See id.* at 902 (defining *res judicata* as doctrine derived from Full Faith and Credit Clause of Constitution, requiring that federal courts give preclusive effect to state court judgments whenever state court would do same).

153. *See id.* (arguing *res judicata* principals could not give state court consent decree preclusive effect).

154. *See id.* at 900 (arguing that Congress provided right to bring enforcement action under RCRA).

155. *See Harmon*, 191 F.3d at 902. Missouri law requires the following elements for *res judicata*: “(1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made.” *Id.* (quoting *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966)).

156. *See Harmon*, 191 F.3d at 902 (referring to first element of *res judicata* as identity of thing being sued for).

second *res judicata* requirement.¹⁵⁷ Finally, the fourth element was met because MDNR and EPA both named Harmon as the defendant.¹⁵⁸ The only dispute, however, centered on whether the parties were identical under the third requirement of *res judicata*.¹⁵⁹ The court referred to the statutory language of section 6926(b) and 6926(d) to find an identical relationship between MDNR and EPA thereby fulfilling the third requirement of the *res judicata* doctrine.¹⁶⁰

The *Harmon* court noted that a party is identical if the party is one of the same parties that previously litigated the suit.¹⁶¹ An identical party would also exist if the party were in privity with one of the parties that previously litigated the former action.¹⁶² The Eighth Circuit found that privity between EPA and MDNR existed because their relationship was nearly identical.¹⁶³

The *Harmon* court also reviewed the text of RCRA to find an identical relationship between MDNR and EPA in their enforcement actions.¹⁶⁴ The Eighth Circuit referred to “in lieu of” language in section 6926(b) of RCRA and the “same force and effect” language of section 6926(d) to find a privity relationship between EPA and MDNR.¹⁶⁵ The language was interpreted to mean that the federal program operated “in lieu of” a state program and that the state action had the “same force and effect” as an EPA action.¹⁶⁶ The court construed this language to find a privity relationship be-

157. *See id.* (acknowledging that second element of *res judicata* is identity of cause of action).

158. *See id.* (finding that identity of quality of person for or against whom claim is made also was met).

159. *See id.* at 902-03 (referring to third element of *res judicata* under Missouri law as whether parties are identical).

160. *See Harmon*, 191 F.3d at 903 (resolving that relationship between United States and State of Missouri were nearly identical in enforcement action based on § 6926(b) “in lieu of” language and § 6926(d) “same force and effect” language).

161. *See id.* at 902-03 (noting EPA and Missouri were not same party for privity although previous case was based on same facts and legal principles).

162. *See id.* at 903 (finding EPA was not in privity with Missouri when case previously litigated, but both EPA and state agency were in close relationship that was nearly identical for privity).

163. *See id.* (relying on “in lieu of” language and “same force and effect” language in RCRA, to find nearly identical relationship).

164. *See id.* (explaining privity under Missouri law exists when two parties represent same legal right).

165. *See Harmon*, 191 F.3d at 903 (noting statutory language found in 42 U.S.C § 6926(b) and (d) to support interpretation that two parties stood in same relationship with each other).

166. *See id.* (finding state of Missouri advanced same legal right as EPA).

tween the federal and state agencies.¹⁶⁷ Reasoning that a privity relationship depended on the advancement of the same legal right, the Eighth Circuit court found that Missouri advanced the same legal right as the EPA under RCRA.¹⁶⁸ Therefore, the court concluded that the doctrine of res judicata barred EPA from overfiling under RCRA.¹⁶⁹

V. CRITICAL ANALYSIS

The Eighth Circuit's decision to prohibit overfiling under RCRA is unsupported by subsequent case law.¹⁷⁰ Since the *Harmon* decision, courts in other circuits have declined to adopt the *Harmon* analysis of RCRA overfiling.¹⁷¹ These courts found the Eighth Circuit's conclusion prohibiting overfiling to rest on a flawed statutory interpretation of RCRA and a narrow application of res judicata principles.¹⁷²

A. RCRA and Overfiling Powers: Statutory Analysis

The Eighth Circuit erred in its statutory analysis of RCRA when it concluded that there was no support in the text or legislative history to allow overfiling.¹⁷³ The Eighth Circuit analyzed the statutory language of RCRA, finding that EPA can only take enforcement action if the state agency fails to take adequate ac-

167. See *id.* (agreeing with district court that privity is not based on subjective interests of parties).

168. See *id.* (seeing interests of EPA and interests of state are not distinct).

169. See *id.* (ruling that pursuant to Missouri law, EPA must be bound by prior judgments).

170. See *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1059 (D.Colo. 2000) (declining to apply *Harmon*'s RCRA analysis), *aff'd*, 303F.3d 1232 (10th Cir. 2002); see also *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1092 (W.D. Wis. 2001) (finding *Harmon* decision to be unpersuasive reasoning to preclude overfiling under CAA and RCRA); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 833 (N.D. Ohio 2000) (declining application of *Harmon* RCRA overfiling analysis to EPA overfiling under CAA); *United States v. Youngstown*, 109 F. Supp. 2d 739, 740 (N.D. Ohio 2000) (refusing to apply *Harmon* overfiling reasoning to EPA overfiling under CWA).

171. For a discussion of the subsequent case law declining *Harmon* application, see *infra* notes 82-116 and accompanying text.

172. See *Murphy Oil*, 143 F. Supp. 2d at 1092 (stating that court was not persuaded by Eighth Circuit's decision to find RCRA statutory language and res judicata precluded EPA from filing enforcement action under RCRA); see also *Power Eng'g*, 125 F. Supp. 2d at 1059 (finding Eighth Circuit's decision to preclude overfiling under RCRA incorrect).

173. See *Coop*, *supra* note 1, at 265 (contending Eighth Circuit's decision to prohibit overfiling is not supported by text or legislative history).

tion.¹⁷⁴ When analyzing the statutory construction of RCRA, the Eighth Circuit should have given greater deference to EPA's interpretation under the *Chevron* standard of review.¹⁷⁵ The *Harmon* court relied heavily on the plain language of the text rather than reading the statute as a whole.¹⁷⁶ Additionally, the Eighth Circuit overlooked important policy considerations and the legislative history of RCRA when it concluded overfiling was impermissible.¹⁷⁷

The Eighth Circuit could have allowed overfiling practices under RCRA had the court found that the statutory language of RCRA was ambiguous and accordingly deferred to EPA's interpretation of the statute.¹⁷⁸ Under the *Chevron* statutory analysis, the statutory test requires interpretation as a whole, considering both context and policy.¹⁷⁹ The Eighth Circuit gave little thought to EPA's interpretation of RCRA, ignoring important policy considerations.¹⁸⁰ EPA interpreted the notice requirement under section 6928 as the only restriction to its enforcement authority under RCRA.¹⁸¹ The EPA overfiles when states inadequately administer

174. See *Harmon*, 191 F.3d at 898-900 (referring to "in lieu of" and "same force and effect" language in RCRA § 6926).

175. See *Coop*, *supra* note 1, at 265 (asserting Eighth Circuit's reading of "in lieu of" and "same force and effect" disregarded policy considerations, text, and legislative history favoring position of EPA); see also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 843-44 (1984) (deferring to agency's interpretation when Congress has charged agency to administer statute and statutory language is ambiguous).

176. See *Coop*, *supra* note 1, at 265-66 (stating that impact of Eighth Circuit's decision should be limited to RCRA because court relied too heavily on "elaborate" plain language interpretation of RCRA).

177. See *id.* at 267 (ignoring policy concerns in favor of pro-business interests reflected in amicus briefs urging Eighth Circuit to affirm lower court ruling). The Eighth Circuit did not refer to the Senate Report which provides support that Congress intended RCRA's division of EPA and state responsibilities to be similar to CWA and CAA's provisions, allowing EPA to bring its own enforcement action. *Id.* at 266.

178. See *id.* at 265 (pointing out that had Eighth Circuit considered policy arguments and RCRA's entire legislative history, it would have deferred to EPA's interpretation of statute).

179. See *id.* at 261 (referring to established rule of statutory interpretation to consider plain language of statute examining as whole regarding "context, object, and policy.").

180. See *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1061 (D. Colo. 2000) (asserting Eighth Circuit gave "short shrift" to EPA's interpretation of RCRA).

181. See *id.* at 1061 (asserting EPA belief that only restriction to authority was notice requirement from 40 C.F.R. § 271.16(c) and § 271.19). The Code of Federal Regulation reflects EPA's statutory interpretation of RCRA and its powers to overfile. *Id.* at 1062. 40 C.F.R. § 271.19 reflects EPA's RCRA interpretation that EPA has overfiling authority. *Id.* In addition, EPA's "Note" to section 271.16(c) supports their interpretation that overfiling was permissible under RCRA. *Id.* at 1061. The "Note" was part of a settlement resulting from a lawsuit challenging

environmental laws.¹⁸² Overfiling is a safeguard built into the federal environmental system to insure consistency and uniformity in federal environmental enforcement.¹⁸³ Allowing uniform enforcement of federal laws avoids a race to the bottom and protects states from spill over pollution effects.¹⁸⁴ The Eighth Circuit's decision in *Harmon* disregarded these policy concerns motivating EPA overfiling practices when it dismissed EPA's interpretation of RCRA.¹⁸⁵

The United States District Court for the District of Colorado in *Power Engineering* analyzed the Eighth Circuit's statutory interpretation of RCRA and found flaws in the Eighth Circuit's plain language analysis.¹⁸⁶ As Chief Justice Babcock asserted, "[w]ith all due respect, I conclude that the *Harmon* decision incorrectly interprets the RCRA."¹⁸⁷ Lending support for the Colorado district court's interpretation was the Tenth Circuit's decision to affirm the district court decision and allow EPA overfiling under RCRA.¹⁸⁸ The District Court of Colorado agreed with the Eighth Circuit's conclusion that the notice requirement in section 6928 gave the states a primary role in enforcement under RCRA, however, it still allowed EPA to file an enforcement action after giving notice to the states.¹⁸⁹ While the *Power Engineering* district court found that Congress intended for the states to have a lead role in enforcement, this

requirements and procedures for separate state permit programs authorized under certain environmental statutes like the CWA and RCRA. *Id.*; see also 40 C.F.R. § 271.16(c) (2002) and 40 C.F.R. § 271.19 (2002).

182. See Zahren, *supra* note 8, at 419. States occasionally do not implement federal environmental programs properly. *Id.* Accordingly, EPA overfiling is justified in such circumstances. *Id.*

183. See *id.* at 420 (stating that federal enforcement keeps implementation of delegated programs legitimate and federal standards ensure consistency and uniformity).

184. See *id.* (noting some states weaken their standards or lessen enforcement to induce polluting industries to invest in their states).

185. See *Power Eng'g*, 125 F. Supp. 2d at 1062 (refusing to disregard regulations found in 40 C.F.R. §§ 271.16(c), 271.19, to determine EPA's interpretation of RCRA and power to overfile).

186. See *id.* at 1057-61 (summarizing Eighth Circuit's interpretation of RCRA and its analysis of "in lieu of" and "same force and effect" to preclude overfiling under RCRA).

187. *Id.* at 1059 (disagreeing with Eighth Circuit's interpretation of statutory language found in § 6926 and § 6928, finding textual analysis "superfluous").

188. See *Power Eng'g*, 2002 WL 2017134, at *7 (10th Cir. Sept. 4, 2002) (affirming ruling of Colorado district court).

189. See *Power Eng'g*, 125 F. Supp. 2d at 1059 (viewing EPA enforcement role as secondary but still permitted to overfile so long as notice given to state).

did not indicate that EPA was unable to overfile as the *Harmon* court reasoned.¹⁹⁰

The District Court of Colorado found the Eighth Circuit's interpretation of "in lieu of" and the "same force and effect" language questionable.¹⁹¹ In *Harmon*, the Eighth Circuit read section 6928 together with the "in lieu of" language of section 6926(b) and "same force and effect" language.¹⁹² Section 6926 addressed the administration and enforcement of state regulations by authorized states, while section 6928 concerned federal enforcement.¹⁹³ The *Power Engineering* court disagreed with the Eighth Circuit's reasoning that the administration and enforcement of RCRA programs were "inexorably intertwined."¹⁹⁴ Reviewing the plain language of the statute, the District Court of Colorado, unlike the Eighth Circuit, found that the "in lieu of" language did not indicate that the state regulatory programs supplanted federal regulatory programs in all respects.¹⁹⁵ The Colorado district court determined that the "in lieu of" language contained in section 6926(b) suggested that Congress did not intend this language to apply to federal enforcement actions, because of the chosen sentence structure in section 6926.¹⁹⁶ The court found that the plain language of section 6926(b) "indicated that the 'in lieu of' appearing in the first clause does not modify the second clause in which the question of enforcement is explicitly addressed."¹⁹⁷ Based on this structural inter-

190. *See id.* (concluding § 6928(a)(2) notice requirement evinces primary role of state enforcement under RCRA and allows EPA to initiate enforcement action after giving notice); *see also* Zahren, *supra* note 8, at 402 (finding Congress intended states to have primary role in enforcement but giving notice to states did not preclude EPA from overfiling).

191. *See Power Eng'g*, 125 F. Supp. 2d at 1059 (concluding *Harmon* court incorrectly interpreted statutory language of RCRA).

192. *See id.* at 1058 (reviewing *Harmon* court's holding which was based on plain language analysis of RCRA).

193. *See id.* at 1059 (summarizing § 6926 and § 6928 and noting that structure of RCRA suggests administration and enforcement are not "inexorably intertwined").

194. *See id.* (explaining that *Harmon* court reasoned § 6926 was inexorably intertwined with § 6928).

195. *See id.* at 1058-59 (finding plain language argument from *Harmon* unsupported and finding plain language of RCRA not indicating federal enforcement authority supplanted by state authority in hazardous waste programs).

196. *See Power Eng'g*, 125 F. Supp. 2d at 1059 (referring to district court basing its decision on structure of sentence containing "in lieu of" language in § 6926).

197. *Id.* at 1059-60 (interpreting "in lieu of" language and sentence structure to evidence congressional intent); *see also* 42 U.S.C. § 6926(b) (2000) (noting state "is authorized to carry out [its] such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . .").

pretation of the statute's text, the district court found that Congress did not intend for the administration and enforcement under RCRA to be "inexorably intertwined," and therefore did not ban EPA from overfiling in enforcement actions.¹⁹⁸

In addition, the district court disagreed with the Eighth Circuit's analysis to conclude that the "same force and effect" language found in the permit section of 6926(d) applied to enforcement actions under RCRA.¹⁹⁹ According to the Colorado district court, a more apt interpretation would be to conclude that the "same force and effect" language was intended by Congress to be restricted solely to section 6926(d) state issued permits.²⁰⁰ The *Power Engineering* court suggested that the Eighth Circuit disregarded the heading of section 6926(d), which is entitled "Effect of State permit."²⁰¹ Using this heading indicated that Congress intended to limit the language "same force and effect" to the state permit process.²⁰² According to the Eighth Circuit, it was not the intent of Congress to have such language apply to section 6928, which addressed EPA enforcement powers.²⁰³

The Wisconsin court in *Murphy Oil* agreed with the *Power Engineering* decision and found flaws in *Harmon's* overfiling reasoning.²⁰⁴ The *Murphy Oil* court, like the *Power Engineering* court, did not find enforcement and administration of state regulations to be "inextricably intertwined."²⁰⁵ The *Murphy Oil* court determined

198. See *Power Eng'g*, 125 F. Supp. 2d at 1059 (disagreeing with Eighth Circuit's interpretation that enforcement of environmental program by state or federal agency are "inexorably intertwined.").

199. See *id.* at 1060 (asserting that, "[t]he *Harmon* court's interpretation of Section 6926(d) similarly rests on a flawed interpretation of Section 6926(b).").

200. See *id.* at 1060-61 (noting § 6926(d) relates to state issued permits and that Congress intended to restrict "same force and effect" language to permitting process).

201. See *id.* at 1060 (referring to *INS v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183 (1991), where Supreme Court held that "the title of a statute or section can aid in resolving an ambiguity in the legislation's test.").

202. See *id.* at 1060 (noting that Congress intended to restrict 6926(d) to state issued permits "otherwise there could be doubt as to whether the recipient of a state permit also needs to obtain a permit from the EPA in accordance with Section 6925(a)").

203. See *Power Eng'g*, 125 F. Supp. 2d at 1061 (maintaining that limiting "same force and effect" language "gives effect to every word of the statute, and does not necessitate 'harmonizing' Section 6928 by adding restrictions on the EPA's enforcement power not found in the plain language of that section.").

204. See *United States v. Murphy Oil USA Inc.*, 143 F. Supp. 2d 1054, 1116 (W.D. Wis. 2001) (finding Eighth Circuit's RCRA interpretation unpersuasive, turning to *Power Engineering* court's interpretation of RCRA).

205. See *id.* (viewing Eighth Circuit's interpretation of "inextricably intertwined" as erroneously contrary to congressional intent).

that Congress did not intend the state enforcement program to supplant the federal program in all respects including enforcement.²⁰⁶ In addition, the court supported EPA's interpretation of RCRA when it found that the title "Effect of State permit" and the phrase "same force and effect", appearing under the title limited this language to state permits.²⁰⁷ Therefore, the court disagreed with the Eighth Circuit's interpretation that "same force and effect" applied to any action taken by a state in a hazardous waste program.²⁰⁸ The court referred to the legislative history in its interpretation of RCRA, and found nothing suggesting that Congress precluded overfiling; rather the court read RCRA "as permitting independent [enforcement actions] by different sovereigns."²⁰⁹

Both the Wisconsin and Colorado courts found that the Eighth Circuit misinterpreted the congressional intent of RCRA.²¹⁰ The Eighth Circuit's decision to prohibit overfiling under RCRA overlooked the complete legislative history of the statute.²¹¹ The Eighth Circuit solely looked to the House Reports to conclude that Congress intended to limit federal enforcement power under RCRA.²¹² Had the Eighth Circuit read the Senate Reports more closely, the court would have noted that Congress intended to model RCRA after sections of CAA and CWA, which allow enforcement actions in the absence of appropriate state enforcement actions.²¹³

206. *See id.* at 1117 (referring to Eighth Circuit's interpretation of language as incongruous against legislative intent of permit holders).

207. *See id.* at 1116 (referring to Eighth Circuit's disregard for title leads to misinterpretation of statute).

208. *See id.* ("This disregard for the heading undermines the [Eighth Circuit's] conclusion.")

209. *Murphy Oil*, 143 F. Supp. 2d at 1117 (deferring to agency interpretation to allow for separate state and federal actions).

210. *See Power Eng'g*, 125 F. Supp. 2d at 1059-61 (maintaining that *Harmon* court misinterpreted congressional intent behind § 6926 and § 6928 of RCRA); *see also Murphy Oil*, 143 F. Supp. 2d at 1116-17 (analyzing congressional intent behind RCRA notice requirement in § 6928(a)(2) and language found in § 6926 (b) and (d), disagreeing with *Harmon's* interpretation of that intent).

211. *See Coop*, *supra* note 1, at 265 (stating that Eighth Circuit failed to evaluate full legislative history and only looked at House Reports in analysis).

212. *See Harmon Indus. v. Browner*, 191 F. 3d 894, 901 (8th Cir. 1999) (looking to House Reports to determine congressional intent of RCRA).

213. *See Coop*, *supra* note 1, at 269 (pointing out that Senate Reports indicate RCRA sections like that of CWA and CAA regarding enforcement and both CWA and CAA have allowed overfiling); *see also* 33 U.S.C. § 1342(h) (2000) (permitting EPA to commence appropriate enforcement under CWA); 42 U.S.C. § 7413(a)(2)(c) (2000) (allowing EPA to bring own enforcement action under CAA);.

B. RCRA and Overfiling: Res Judicata Interpretation

While the *Harmon* decision significantly affects EPA's ability to overfile, it is questionable whether other courts will agree with its decision.²¹⁴ The Eighth Circuit was able to find a privity relationship between EPA and MDNR based on principles of res judicata under Missouri law.²¹⁵ The requirements of res judicata may be different in other states, resulting in a different overfiling outcome under RCRA and the other regulatory statutes.²¹⁶

The *Harmon* court relied on its statutory interpretation of RCRA's text to find a privity relationship between EPA and MDNR.²¹⁷ The Eighth Circuit interpreted RCRA to authorize the state to proceed with its action "in lieu of" the federal government and "with the same force and effect" as the federal government.²¹⁸ The Eighth Circuit reasoned that a nearly identical relationship resulted when EPA authorized states to enforce federal environmental goals.²¹⁹ In other words, the Eighth Circuit reasoned that the interests of the state and EPA were so closely aligned as to have an identical relationship or privity relationship under Missouri law.²²⁰ The *Harmon* court found a privity relationship between EPA and the state during the authorization stage; however, existing precedent invalidates this reading of the *Harmon* facts under the doctrine of res judicata.²²¹ The *Harmon* court was the only authority finding a privity relationship between EPA and a state agency in RCRA overfiling enforcement actions.²²²

214. See *Coop*, *supra* note 1, at 270 (referring to limited value in other contexts due to Eighth Circuit's heavy reliance on plain language interpretation of RCRA).

215. See *Harmon*, 191 F.3d at 902-03 (referring to Missouri law of res judicata to find privity).

216. See *Coop*, *supra* note 1, at 270 (stating state agency and EPA have been found in privity in only one instance under Missouri law).

217. See *Harmon*, 191 F.3d at 903 (using statutory language of RCRA as guideline for party identity or privity analysis).

218. See *id.* (finding privity relationship from language found in § 6926 and § 6928 of RCRA).

219. See *id.* (finding privity when party is identical to party that has litigated prior suit).

220. See *id.* (defining privity as relationship when two parties in two separate suits have nearly identical, close relationship).

221. See *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1065 (D. Colo. 2000) ("In my view the *Harmon* decision results in an unsupported expansion of the doctrine of res judicata . . .").

222. See *id.* at 1065-66 (inferring no authority supports finding EPA and state agency in privity relationship actions for purposes of res judicata when overfiling under RCRA).

The district court in *Power Engineering* asserted that, “the *Harmon* decision results in an unsupported expansion of the doctrine of res judicata as it is applied to the federal government under existing Supreme Court authority.”²²³ The *Power Engineering* court also noted that the Eighth Circuit failed to cite existing authority that found a close or privity relationship between EPA and state enforcement actions.²²⁴ Such a relationship would give a preclusive effect to EPA’s enforcement actions.²²⁵

VI. IMPACT

A. The Effect of *Harmon*’s Overfiling Reasoning Under RCRA

Our federal government’s environmental regulatory scheme has been widely criticized.²²⁶ Much of the criticism stems from tensions between the state and federal enforcement of environmental laws.²²⁷ Ideally, the federal system strives to “strike[] a balance between a desire for uniformity and an interest in promoting state autonomy.”²²⁸ The inconsistent state and federal interpretation of overfiling practices reinforces the strain between the state and federal enforcement systems.²²⁹

The decision in *Harmon v. Browner* represents the difficulty of balancing the responsibility between the state and federal government when granting authorization of enforcement programs.²³⁰ It is foreseeable that the ruling from *Harmon* may be further narrowed under RCRA through subsequent overfiling litigation, as was

223. *Id.* (declining to apply res judicata principles as *Harmon* had done when state brings suit and federal government brings similar suit).

224. *See id.* at 1066 (quoting, “[t]he *Harmon* court failed to cite any authority in which the federal government was deemed to have a ‘laboring oar’ on the basis of a similar attenuated connection . . .”).

225. *See id.* (failing to cite authority where privity relationship exists if EPA grants state agency enforcement of EPA interests through state hazardous waste program).

226. *See* Markell, *supra* note 37, at 1 (asserting that critics may seek to revamp environmental regulations).

227. *See id.* (referring to government’s approach to promoting compliance with state and federal relations with regard to enforcement authority).

228. *Id.* at 36 (reconciling competing objectives of consistency in regulation and state’s independence to administer and enforce environmental laws).

229. *See* Zahren, *supra* note 8 at 416 (quoting, “overfiling does create tension between the states and the federal government, but it is a tension that pushes both sides to work for a more effective and efficient system without causing unnecessary damage to the environment.”).

230. *See* Coop, *supra* note 1, at 272 (explaining that there are difficulties determining proper boundaries between state and federal systems’ powers of enforcing environmental statutes).

the case in the Western District of Wisconsin and the District Court of Colorado.²³¹

B. The Effect of *Harmon's* Overfiling Reasoning on CWA and CAA

Although there is concern that *Harmon's* reasoning may affect other federal environmental laws like CWA and CAA, the court's interpretation to ban overfiling may be limited to RCRA and is unlikely to affect federal environmental statutes.²³² CWA and CAA are similar to RCRA, however, there are differences in the text and language used in these statutes.²³³ In all three regulatory schemes, Congress intended the states to administer environmental programs and to have primary enforcement authority.²³⁴ CWA and CAA, unlike RCRA, contain clearer language regarding federal enforcement action.²³⁵ The court in *Harmon* relied on the statutory language of "in lieu of" and "same force and effect" to ban EPA overfiling and to find a privity relationship between the state and federal enforcement action, which would preclude overfiling.²³⁶ While this language is contained in the provisions of RCRA, CWA and CAA do not contain such broad and ambiguous language in their respective provisions.²³⁷

CWA provides EPA with the authority to overfile and oversee state actions.²³⁸ Although states are to take a primary role in en-

231. See *id.* at 273 (quoting, "it is likely that EPA will strategically litigate in an effort to narrow the holding of *Harmon* . . .").

232. See *id.* at 270 (stating that "*Harmon* has the potential to affect EPA's enforcement authority under CWA and CAA."); see Coop, *supra* note 1, at 270 (finding statutory language in CWA and CAA to have differences from language in RCRA, thereby limiting *Harmon's* interpretation of overfiling).

233. See Zahren, *supra* note 8, at 402. "RCRA more clearly states that the state authorized hazardous waste program takes the place of the federal program. On the other hand RCRA's enforcement provision reads similarly to the CAA enforcement provision leaving the question of overfiling fairly ambiguous." *Id.*

234. See *id.* at 401 (indicating that Congress's language in major environmental statutes, including CWA and CAA, makes states primary enforcers of regulatory environmental programs).

235. See *id.* at 404. There are significant differences in language between CWA, CAA and RCRA. *Id.* RCRA's use of "in lieu of" and "same force and effect" language leads to ambiguity which neither CWA nor CAA uses. *Id.*

236. See *Harmon Indus. v. Browner*, 191 F.3d 894, 899-902 (8th Cir. 1999) (providing that "in lieu of language" of § 6926(b) and "same force and effect" language of § 6926(d) when read with notice requirement of § 6928 precluded overfiling under RCRA contravening res judicata principles).

237. See Zahren, *supra* note 8, at 407 (describing CWA and CAA to have clearer language than that found in RCRA; "therefore, they are not likely to undergo the same attack.").

238. See 33 U.S.C. § 1319(a)(3) (2000).

forcement, the federal agency's enforcement powers are not limited.²³⁹ CWA's enforcement provision, section 1319, discusses unambiguously EPA's enforcement authority in a state with an approved enforcement program.²⁴⁰ The statute maintains that EPA shall act if the state has not commenced "appropriate" action.²⁴¹ The term "appropriate" allows EPA to determine when overfiling is necessary to correct inappropriate or inadequate state action, even where the state has taken enforcement action on a particular matter.²⁴² Further, section 1342(i) of the permit section provides that nothing shall limit the authority of the Administrator to take action pursuant to section 1319 of CWA.²⁴³ Although EPA must provide notice to the state under the CWA before bringing an enforcement action, the statute does not prevent EPA from bringing an enforcement action after a state action is underway.²⁴⁴

Similarly, CAA endorses EPA overfiling to correct deficient state actions.²⁴⁵ The court in *LTV Steel* found that CAA contained clear language in section 7413 that addressed enforcement actions and allowed for overfiling.²⁴⁶ Particularly, "in determining the amount of any penalty to be assessed under this section . . . , the

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of . . . [33 USC § 1311, 1312, 1316, 1317, 1318, 1328, or 1345] or is in violation of any permit condition or limitation implementing any of section in a permit issue under . . . [33 USCS § 1342] by him or by a State or in a permit issued under section . . . [33 USCS § 1344] by a State, he shall issue an order requiring such person comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

Id.; see also Zahren, *supra* note 8, at 405 (referring to language in enforcement section, § 1319, to allow overfiling).

239. See 33 U.S.C. § 1342(i). Federal enforcement not limited. Noting in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 USCS § 1319]. *Id.*

240. See 33 U.S.C. § 1319(b) (1994) (establishing that if appropriate action not taken by state, EPA may bring civil action or compliance order).

241. See Zahren, *supra* note 8, at 405 (citing to enforcement provision of CWA to find that EPA's authority to overfile and oversee state actions under approved programs is clear).

242. See *id.* (quoting, "the term 'appropriate' leaves the EPA with discretion to decide when overfiling is necessary to correct inappropriate or inadequate state action, even where the state has taken some enforcement action in a particular matter.").

243. See 33 U.S.C. § 1342(i) (referring to § 1319, enforcement section of CWA).

244. See 33 U.S.C. § 1319(b) (setting out that EPA may commence civil action or seek injunctive relief provided that notice given immediately to state).

245. See Zahren, *supra* note 8, at 405 (comparing similarities between CWA and CAA in allowing EPA to overfile).

246. See *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 833 (N.D. Ohio 2000). According to the *LTV Steel* court, the language found in section 7413(e)

court [] shall take into consideration . . . payment previously assessed for the same violation.”²⁴⁷ According to the *LTV Steel* court, this language found in section 7413(e) of CAA and implied that Congress contemplated overfiling to be within EPA’s enforcement authority since such language would not be used if overfiling was not permitted.²⁴⁸

Similar to CWA, section 7413 allows EPA to bring a compliance order, bring a civil action or issue penalties against violators of a SIP or permit.²⁴⁹ Although notice must be given to the states, this does not limit EPA’s enforcement authority.²⁵⁰ Additionally, the permit section of Title V allows EPA to impose sanctions on states with inadequate SIPS.²⁵¹ Like CWA’s permit section, CAA’s section 7661a(e) provides that nothing shall limit the enforcement powers of EPA to enforce permits issued by the States.²⁵²

Courts have addressed application of *Harmon* to CAA and CWA overfiling actions. The Northern District Court of Ohio declined to adopt the reasoning in *Harmon* to prohibit overfiling for CWA enforcement actions in *Youngstown* and CAA violations in *LTV Steel*.²⁵³ In *Youngstown*, the court referred to CWA statutory language to find that the language of CWA explicitly provided for overfiling practices.²⁵⁴ EPA filed an action after the state had done so pursuant to

maintains that overfiling was not barred, rather Congress anticipated such practices under the Act. *Id.*

247. *Id.* at 833 (quoting language in CAA that contemplates overfiling); *see also* 42 U.S.C. § 7413(e) (2000) (allowing concurrent enforcement on state and federal levels).

248. *See LTV Steel*, 118 F. Supp. 2d at 833 (lending further support that CAA language did not ban overfiling practices noting that, “this statutory language would have been unnecessary if once a violator paid a penalty to any enforcement entity, it was immune from enforcement actions by any other sovereign.”).

249. *See* 42 U.S.C. § 7413(b) (detailing civil judicial enforcement authority of EPA).

250. *See id.* (providing that notice be given to state air pollution control agency before bringing civil action).

251. *See* 42 U.S.C. § 7661a(e) (describing Federal Suspension Power); *see also* Zahren, *supra* note 8, at 405-06 (describing EPA enforcement powers under Title V of CAA).

252. *See* Zahren, *supra* note 8, at 405-06 (referring to SIP plan providing for implementation and enforcement of NAAQS); *see* 42 U.S.C. 7661a(e) (1994). “Nothing in this subsection should be construed to limit the Administrator’s ability to enforce permits issued by a State.” *Id.*

253. *See LTV Steel*, 118 F. Supp. 2d at 827; *see also United States v. Youngstown*, 109 F. Supp. 2d 739, 739 (N.D. Ohio 2000). For a further discussion of subsequent law, *see supra* notes 86-116 and accompanying text.

254. *See Youngstown*, 109 F. Supp. 2d at 741 (referring to language found in § 1342 and § 1319).

violations of CWA.²⁵⁵ The defendants relied on the *Harmon* overfiling analysis to argue that it was impermissible for EPA to overfile under CWA.²⁵⁶ The *Youngstown* court held that EPA filed its suit pursuant to its authority under section 1319 and found that overfiling practices were permitted under CWA.²⁵⁷ According to the *Youngstown* court, the language in CWA differed from the language in RCRA and permitted overfiling practices.²⁵⁸ Similarly, in *LTV Steel*, the same court refused to apply *Harmon* to overfiling actions under CAA, finding that CAA contained clear language that addressed enforcement actions and allowed for overfiling.²⁵⁹

More recently, the district court in *Murphy Oil* addressed the *Harmon* analysis of overfiling as it pertained to CAA and principles of res judicata and found that the analysis should not be applied to CAA enforcement action.²⁶⁰ The *Murphy Oil* court found that the language relied on by the *Harmon* court to find overfiling practices impermissible under RCRA was absent from CAA.²⁶¹ Like the *LTV Steel* court, the *Murphy Oil* court noted that the language in section 7413 anticipated overfiling and allowed such actions.²⁶² Moreover, unlike the district court in *Harmon*, this court did not find a privity relationship between the state agency and EPA to preclude overfiling practices.²⁶³ The court found the *Harmon* res judicata argument unpersuasive.²⁶⁴

255. *See id.* at 740 (noting that State of Ohio was also suing Youngstown for violating NPDES permits issued to Youngstown by state agency).

256. *See id.* (maintaining that Youngstown placed exclusive reliance on *Harmon* interpretation of RCRA overfiling to argue against overfiling under CWA).

257. *See id.* at 741 (explaining “[t]he action against Youngstown was filed pursuant to USEPA’s enforcement authority under § 309(b) and (d) [§ 1319(b) and (d)] . . .”).

258. *See id.* (quoting “the language of CWA, on the other hand, compels the opposite conclusion” when referring to language of “in lieu of” and “same force and effect” language of RCRA).

259. *See United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 833 (N.D. Ohio 2000) (referring to language in CAA § 7413 that anticipates overfiling); *see also* 42 U.S.C. § 7413(e) (allowing concurrent enforcement on state and federal levels).

260. *See United States v. Murphy Oil USA Inc.*, 143 F. Supp. 2d 1054, 1091 (W.D. Wis. 2001) (concluding that *Harmon* reasoning is inapplicable to enforcement action under CAA).

261. *See id.* (quoting “the act [is] devoid of language the Eighth Circuit deemed important.”).

262. *See id.* (relying on language of § 7413(e) which provides that Congress anticipated overfiling actions when it provided in § 7413(e) that prior penalties could be considered to determine new penalties).

263. *See id.* (refusing to be persuaded by *Harmon* reasoning that state agency is in close working relationship to make them equivalent to same party for res judicata).

264. *See id.* at 1091 (asserting conclusion of res judicata precluding overfiling ignores language of CAA).

It is likely that the impact of the *Harmon* decision will be limited to RCRA.²⁶⁵ As reflected by the case law that has followed *Harmon*, the statutory argument against overfiling has been limited to RCRA and has not been successfully argued under CWA or CAA.²⁶⁶ A solution would be a Congressional revision of RCRA to describe more clearly EPA's authority to overfile.²⁶⁷ Perhaps language similar to language used in CWA and CAA should be used if RCRA is revised.²⁶⁸ Nevertheless, the issue of overfiling is clearly far from settled.²⁶⁹

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265. See Coop, *supra* note 1, at 273 (stating EPA will "strategically litigate" to narrow *Harmon* holding).

266. For a discussion limiting *Harmon's* analysis to CWA and CAA, see *supra* note 232-264 and accompanying text.

267. See Zahren, *supra* note 8, at 407 (noting that Congress may need to revise language of enforcement provisions to describe EPA authority to overfile).

268. See Coop, *supra* note 1, at 270 (quoting that "CWA and the CAA contain relatively clearer and much broader language than RCRA.").

269. See Zahren, *supra* note 8, at 407 (discussing future of judicial interpretation of overfiling under RCRA, CWA and CAA).