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Environmental Law Survey

John M. Stafford

ENVIRONMENTAL LAW SURVEY

INTRODUCTION

Modern environmental law enforcement relies on cooperative efforts of states and federal agencies. This approach is referred to as a cooperative federalism process. Under this process, the federal government sets national statutory or regulatory environmental standards but allows states the flexibility to determine how to meet those standards. Under most environmental regulations, the federal government delegates enforcement authority to the states, yet stands ready to step in if a state either fails to devise a method to meet the standards, takes inadequate action, or simply fails to take required enforcement actions against violators. The cooperative federalism approach raises the question of whether the federal government can seek enforcement of the national standards after a state initiates enforcement action. Thus far, courts have not held the doctrine of claim preclusion to defeat the federal government's independent jurisdiction following state enforcement actions.[1]

The federal government's paternalistic role serves as an enforcement safety net to the state's primary responsibility for environmental compliance.[2] The popular support for this federal safety net, however, has diminished in recent years. The emergence and popularity of the phrase "unfunded federal mandates," as a substitute term for "cooperative federalism," provides evidence of this decline. This Survey discusses two Tenth Circuit decisions from the survey year that involve conflicts resulting from the dual federal/state approach to environmental law.[3]

In *Espinosa v. Roswell Tower, Inc.*,[4] the Tenth Circuit limited New Mexico's authority to invoke federal jurisdiction to seek penalties under the Clean Air Act. This Survey analyzes the Tenth Circuit's approach, which recognizes the supervisory and enforcement role that court's traditionally attribute to the federal agencies. The Survey also discusses dicta from the opinion that reflects the Tenth Circuit's willingness to depart from the traditional

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1. *See* United States v. Ford Motor Co., 736 F. Supp. 1539, 1549-51 (W.D. Mo. 1990) (holding that the Clean Air Act provides for independent federal enforcement, even if state concludes manufacturer is in compliance); United States v. SCM Corp., 615 F. Supp. 411, 418-20 (D. Md. 1985) (refusing to dismiss or stay a federal enforcement action because of administrative consent order entered into after federal notice of violation issued). *But cf.* Alabama *ex rel.* Graddick v. Veterans Admin., 648 F. Supp. 1208, 1211 (M.D. Ala. 1986) (holding that a state cannot enforce state regulations without also enforcing federal regulations).

2. Espinosa v. Roswell Tower, Inc., 32 F.3d 491, 493 (10th Cir. 1994); *see also* Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 64 (1975).

3. The survey year covers decisions issued by the Tenth Circuit between September 1, 1993 and December 31, 1994. In the preceding year, the Tenth Circuit considered the federal/state interaction in United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994); see also Shane J. Harvey, *Environmental Law Survey*, 71 DENV. U. L. REV. 961, 978 (1994) (discussing the Tenth Circuit's recognition of state authority to regulate federal facilities).

4. 32 F.3d 491 (10th Cir. 1994).

claim preclusion doctrine.

In *Blue Circle Cement, Inc. v. Board of County Commissioners*,[5] the court considered the issue of whether the federal Resource Conservation and Recovery Act ("RCRA") preempted state and local hazardous waste regulations.[6] After identifying the consistent guidance the Tenth Circuit provided for the lower court to follow on remand, the Survey discusses the distinction between the application of the preemption test in the Eighth Circuit and various state Supreme Courts,[7] and the factual application proposed by the Tenth Circuit in *Blue Circle Cement*.[8]

I. STATES' AUTHORITY TO INVOKE FEDERAL JURISDICTION AFTER PREVAILING IN STATE ACTION: *ESPINOSA V. ROSWELL TOWER, INC.*[9]

A. *Background*

Whether referred to as cooperative federalism or unfunded federal mandates, the dual federal/state process constitutes a common thread in the enforcement of most modern environmental laws.[10] Under the Clean Air Act ("CAA"),[11] for example, the federal Environmental Protection Agency ("EPA") identifies criteria pollutants[12] and sets air quality standards[13] for such pollutants to provide, with an adequate margin of safety, for human health.[14] The standards established for the criteria pollutants constitute the National Ambient Air Quality Standards ("NAAQS"). The states have the responsibility of meeting these standards. The Act requires each state to submit a State Implementation Plan ("SIP") demonstrating its proposed method(s) of meeting the NAAQS.[15] If the EPA determines that the SIP is sufficient to meet the CAA standards, it must approve the SIP.[16] If, on the other hand, the EPA determines that a SIP proposed by a state is insufficient to meet the Clean Air Act standards, the EPA has the authority to implement a Federal Implementation Plan ("FIP") in lieu of a SIP.[17]

Both state and federal agencies can enforce a SIP. Section 7411(c) of the CAA authorizes state enforcement of a SIP[18] and § 7413(a) and (b) authorize

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5. 27 F.3d 1499 (10th Cir. 1994).
6. *Id.* at 1504.
7. See *infra* note 139 and accompanying text.
8. *See Blue Circle Cement*, 27 F.3d at 1508-09.
9. 32 F.3d 491 (10th Cir. 1994).
10. Another commonly employed method is to attach conformity conditions on the receipt of federal funds. *See* New York v. United States, 112 S. Ct. 2408, 2423-24 (1992).
11. 42 U.S.C. §§ 7401-7671q (1988 & Supp. V 1993).
12. Criteria pollutants refer to the substances for which EPA has established National Ambient Air Quality Standards ("NAAQS"). Criteria pollutants include carbon monoxide (CO), sulfur dioxide (SO_2), ozone (O_3), nitrogen dioxide (NO_2), lead (Pb), and particulates. 40 C.F.R. § 50.1-.12 (1994).
13. Standards are established based on a per unit volume basis. *Id.*
14. 42 U.S.C. § 7408 (1988 & Supp. V 1993).
15. 42 U.S.C. § 7410 (1988 & Supp. V 1993).
16. 42 U.S.C. § 7410(k)(3) (Supp. V 1993).
17. 42 U.S.C. § 7410(c) (Supp. V 1993).
18. Section 7411(c) states:
(c) State implementation and enforcement of standards of performance

federal enforcement of a SIP in federal district courts.[19] Once approved by the EPA, a SIP becomes enforceable federal law.[20] To enforce a SIP, the EPA can issue a Notice of Violation ("NOV").[21] If the violation continues 30 days after the issuance of the NOV, and the EPA cannot reach an agreement with the polluting source through negotiations, the EPA may enforce the SIP either by issuing an administrative order or by instituting an enforcement

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(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

42 U.S.C. § 7411(c) (1988).

19. Section 7413(a) & (b) provides:

(a) In general

(1) Order to comply with SIP

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which such notice of a violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of Title 28)—

(A) issue an order requiring such person to comply with the requirements or prohibitions of such plan or permit,

(B) issue an administrative penalty order in accordance with subsection (d) of this section, or

(C) bring a civil action in accordance with subsection (b) of this section.

(2) State failure to enforce SIP or permit program

Whenever, on the basis of information available to the Administrator, the Administrator finds that violations of an applicable implementation plan or an approved permit program under subchapter V of this chapter are so widespread that such violations appear to result from a failure of the State in which the plan or permit program applies to enforce the plan or permit program effectively, the Administrator shall so notify the State. In the case of a permit program, the notice shall be made in accordance with subchapter V of this chapter. If the Administrator finds such failure extends beyond the 30th day after such notice (90 days in the case of such permit program), the Administrator shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan or permit program (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement or prohibition of such plan or permit program with respect to any person by—

. . . .

(C) bring a civil action in accordance with subsection (b) of this section.

. . . .

(b) Civil judicial enforcement

The Administrator shall, as appropriate, in the case of any person that is the owner or operator of an affected source, a major emitting facility, or a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day for each violation, or both, in any of the following instances:

. . . .

42 U.S.C. § 7413(a)(b) (Supp. V 1993).

20. United States v. Ford Motor Co., 736 F. Supp. 1539, 1546 (W.D. Mo. 1990).

21. *Id.*

action under section 113 of 42 U.S.C. § 7413.[22] Section 113 provides for injunctive relief, civil penalties,[23] and criminal penalties.[24]

The statute authorizes the Administrator "to enforce a SIP in federal court, acting as a supervisor to insure [sic] that the federal [air quality] standards are met."[25] Temporal restrictions limit the supervisory role to the "period of federally assumed enforcement."[26] This period of federally assumed enforcement begins when the Administrator notifies a state that violations of the applicable enforcement plan are so widespread that they appear to have resulted from a state's failure to effectively enforce the plan. Federally assumed enforcement ends when the state demonstrates to the Administrator that it will enforce the SIP.[27]

Section 7411(c)(1) delegates the authority to states to implement and enforce the SIP. The New Mexico Environmental Department ("NMED") in *Espinosa* claimed that this delegation of authority was broad enough to allow NMED to file an additional action in federal court against the defendants following a successful state action.[28]

Any effort to bring a second, separate action that "arises out of the same nucleus of operative facts as the prior claim" potentially implicates the claim preclusion doctrine.[29] Under that doctrine, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."[30] The doctrine precludes relitigation of a claim on grounds that were raised or could have been raised in the prior action.[31] The binding status of the prior action bars subsequent admission of a matter that could have been raised in the prior action.[32]

In *Espinosa*, neither party contended that the issue in the federal action did not arise from the same nucleus of operative facts as the state action. Also, neither party claimed that the state action was not decided on the merits.[33] Whether claim preclusion barred the issue in the federal action, therefore, turned on whether the state could have initially brought a federal enforcement action.

B. *Facts*

Roswell Tower, Inc.,[34] Ray Bell, and Leonard Talbert (collectively

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22. *Id.*
23. Violators may be assessed up to $25,000 per day. *Id.*
24. Polluters who knowingly violate an SIP may face criminal penalties. *Id.*
25. Espinosa v. Roswell Tower, Inc., 32 F.3d 491, 492 (10th Cir. 1994).
26. 42 U.S.C. § 7413(a)(2).
27. *Id.*
28. *Espinosa*, 32 F.3d at 492.
29. Lane v. Peterson, 889 F.2d 737, 742 (8th Cir.), *cert. denied*, 498 U.S. 823 (1990).
30. Montana v. United States, 440 U.S. 147, 153 (1979).
31. Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1467 (10th Cir. 1993).
32. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 578-79 (1974).
33. *Espinosa*, 32 F.3d at 492 (seeking damages for the same conduct under the Clean Air Act and requesting that the district court recognize the state court judgment).
34. Roswell Tower, Inc. is a property management corporation. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at 1, Espinosa v. Roswell Tower, Inc., (No. CV-91-268)

"RTI") owned and operated a commercial office building in New Mexico.[35] During an eight year period (1982-1990), RTI conducted numerous abatement jobs to remove and dispose friable asbestos from the ceilings of the occupied office building.[36] The New Mexico Environmental Department and its secretary, Judith M. Espinosa (collectively "NMED"), brought suit in state court against RTI for alleged violations of environmental regulations and nuisance laws.[37] The state court awarded the plaintiff penalties of $76,837.[38] RTI's appeal is pending in state court. Subsequent to the state action, NMED initiated suit in the New Mexico federal district court on the same facts, requesting that the district court recognize the state court judgment.[39] The federal suit sought to recover money damages of $25,000 per day as available under federal law,[40] instead of the maximum $1,000 per day per violation available under New Mexico state law.[41] The district court granted summary judgment for RTI holding that: 1) even though NMED could file a federal action under 42 U.S.C. § 7412 to enforce the state emission standards, it could not seek the federal penalties provided by § 7413; and 2) claim preclusion prevented NMED from bringing suit in federal court.[42] In *Espinosa*, NMED appealed the lower court's decision that prevented NMED from invoking federal jurisdiction to seek federal penalties pursuant to the Clean Air Act after having prevailed on the same issue in the state enforcement action.[43]

C. *Tenth Circuit Decision*

The Tenth Circuit Court of Appeals affirmed the district court's holding that NMED, having prevailed in a state enforcement action, could not invoke federal jurisdiction to seek federal penalties under the Clean Air Act.[44] The Tenth Circuit found that states' authority, as delegated to the states by the Clean Air Act, is limited to enforcement of the federally approved SIP through the state administrative and judicial process.[45] The Tenth Circuit interpreted the language in § 7413[46] as the procedural prerequisite to the federal enforce-

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(N.M. Complaint filed July 29, 1991).

35. *Id.*

36. *See id.* at 2-4.

37. *Id.* at 6.

38. Appellee's Answer Brief at 2, Espinosa v. Roswell Tower, Inc., 32 F.3d 491 (10th Cir. 1994) (No. 93-2238).

39. *Espinosa*, 32 F.3d at 492.

40. 42 U.S.C. § 7413(b).

41. Appellee's Answer Brief at 3, *Espinosa* (No. 93-2238) (citing N.M. STAT. ANN. § 74-2-12(E) (Michie 1978)).

42. *Espinosa*, 32 F.3d at 492.

43. *Id.* Neither party contended that a successful state action enforcing the $1,000 per day state penalty precluded the EPA from bringing a federal action in federal court to enforce the $25,000 per day penalty. The Tenth Circuit declined to address the issue of whether "a state action, regardless of the outcome, could be followed by a federal action for the same violation." *Id.* at 493 n.2.

44. *Id.* at 494.

45. *Id.* at 492. The Court of Appeals included in the states' authority the possibility to enforce citizens' suits pursuant to § 7604. Id.; *see* 42 U.S.C. § 7604(e) (1988).

46. *See supra* text accompanying notes 19-24.

ment of the states implementation plan.[47] The court found no language in the Clean Air Act to allow states to pursue federal enforcement actions.[48] The provisions authorizing the Administrator to enforce the SIP when the state fails to do so "underscore the dual enforcement approach with the state government having primary control and federal action serving as an enforcement safety net."[49]

In concluding its opinion, the Tenth Circuit emphasized that its interpretation of §§ 7412 & 7413 was consistent with § 7416.[50] Section 7416 states that federal authority preempts state enforcement only when the state regulation is less stringent than the SIP.[51] Although the Tenth Circuit noted that some cases have acknowledged the availability of jurisdictionally independent enforcement actions,[52] it rejected the line of reasoning that concludes that the Clean Air Act allows states to bring federal enforcement actions under § 7412.[53] The court rejected *Alabama ex rel. Graddick v. Veterans Administration*[54] on the grounds that, under claim preclusion, an unsuccessful federal action brought by a state would result in foreclosing the EPA from filing suit under the Clean Air Act.[55]

D. *Analysis*

1. Cooperative Federalism

This case illustrates the respective federal and state roles under the doctrine of cooperative federalism. While the limitations of the federal government over the states trace back to the framing of the Constitution,[56] the limitations on the state role under the doctrine of cooperative federalism are a relatively recent articulation of the law.

One reason for the resurgence in the doctrine of cooperative federalism since the 1970s is the proliferation of environmental laws that require the state and local implementation of federally imposed standards. The Constitution, however, provides federal legislative authority over individuals as opposed to states.[57] Consequently, the federal authority over states to enforce the federal mandates imposed by modern environmental law, is restricted to economic reward or punishment, depending on the state's behavior.[58] If a state behaves as the federal government desires, economic reward in the form of continued

47. *Espinosa*, 32 F.3d at 493.
48. *Id.*
49. *Id.*
50. 42 U.S.C. § 7416 (1988 & Supp. V 1993).
51. *Espinosa*, 32 F.3d at 494.
52. *Id.*; *see supra* note 1.
53. *Espinosa*, 32 F.3d at 494 (rejecting the reasoning of Alabama ex rel Graddick v. Veterans Admin., 648 F. Supp. 1208 (M.D. Ala. 1986)).
54. 648 F. Supp. 1208 (M.D. Ala. 1986).
55. *Espinosa*, 32 F.3d at 494.
56. *See* THE FEDERALIST No. 15, at 33 (Alexander Hamilton) (Roy P. Fairchild ed., 1966) ("[W]e must extend the authority of the Union to the persons of the citizens,—the only proper objects of government.").
57. New York v. United States, 112 S. Ct. 2408, 2423 (1992).
58. *See id.*

federal funding of projects, such as federal highway programs, continues.[59] When a state "misbehaves," and does not comply with the federal mandate, the withdrawal of federal funding for such projects constitutes the punishment.[60] As long as states have the real choice to deny the federal mandate and accept the consequence, the cooperative federalism approach is not in danger of constitutional challenge.[61] The Supreme Court explicitly supported Congress's ability to "hold out incentives" provided they fall "short of outright coercion."[62]

The political ramifications of this type of system allow for the accountability of local interests to vest in the local electorate.[63] For example, in a state faced with a choice of implementing an unpopular federal mandate, the political system is empowered to elect representation reflecting the local preference to suffer the economic consequences rather than comply with the federal mandate. If the will of the people changes, the political system will reflect that change and elect new representation consistent with the local goals.

The divided responsibilities of state and federal agencies in promulgating and enforcing environmental laws create other advantages and disadvantages. Participation at the federal level provides for the establishment of a consistent set of national standards creating a minimum, or "floor," level of values that serve as an environmental safety net.[64] Federal involvement helps reduce the temptation at the local level to attract new business to the area at the expense of the environment by imposing a relaxed set of standards.[65] Federal involvement also helps prevent control of the state or local agency by the industries supplying jobs and economic health to a region when these industries are not in compliance with the law.

On the other hand, state involvement allows states to respond to state and local goals and set standards that are more restrictive than those established by the federal government. State action is not without cost however. Unfunded federal mandates placed on the states can be a significant financial burden and a source of political friction.[66] Also, a divided responsibility system creates problems relating to the division of responsibility, and the resolution of inconsistencies in the system. The ruling in *Roswell Tower, Inc.* indicates that the Tenth Circuit values the safety net provided by a consistent set of national environmental standards over the burdens resulting from the unfunded federal mandates, or any inconsistencies or conflicts stemming from the dual responsi-

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59. *See id.*
60. *See id.*
61. *See id.*
62. *Id.*
63. *Id.*
64. Train v. Natural Resources Defense Council, 421 U.S. 60, 98 (1975); *see also* United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977) (holding that states have rights to impose limitations and standards more stringent than federal regulations promulgated under the Clean Water Act).
65. United States v. Ford Motor Co., 736 F. Supp. 1539, 1550 (W.D. Mo. 1990).
66. *See* Printz v. United States, 854 F. Supp. 1503, 1507, 1518 (D. Mont. 1994) (questioning the proper relationship between the federal government and the several states, and in particular, the constitutionality of federally imposed unfunded mandates to the states).

bility system.

2. State Enforcement in Federal Court

Contrary to the Tenth Circuit's interpretation of *Alabama ex rel. Graddick*, the federal district court in that case did not condone state enforcement of *federal law* in federal court.[67] In *Graddick*, the Alabama federal district held that a state can enforce *state law* in either state or federal court.[68] The federal court exercised pendent jurisdiction because, pursuant to 42 U.S.C. § 7412(d)(1), the EPA adopted the state air pollution law.[69]

Standing alone, the language used by the *Graddick* court, stating that the "[state agency] cannot be said to be attempting to enforce state regulations without also being found to be enforcing federal regulations,"[70] appears ambiguous. In context, however, this statement becomes clear. The federal district court made this statement in response to the defendant's contention that the State of Alabama could not enforce *state* regulations for civil penalties in *federal* court.[71] The issue of whether a state could enforce *federal* law in *federal* court did not arise in *Graddick*.[72]

This contextual interpretation, (determining where state law may be enforced) is further supported in the federal district court's subsequent discussion of the House of Representatives Report No. 294, which addressed the state's "power to enforce *state sanctions* against federal facilities."[73] This discussion centered on whether federal parties may be defendants, not on whether the state may enforce federal law in federal court.

The real issue in *Espinosa v. Roswell Tower, Inc.*, therefore, was not whether a state could bring a state enforcement action in federal court after having brought the same action in state court, but rather, could a state enforce a federal law (the $25,000 per day civil penalty) in federal court after successfully bringing a state enforcement action ($1000 per day civil penalty) in state court? In this case, the Tenth Circuit held that the state has no authority to enforce the federal civil penalty.[74] Left unanswered, however, is *why* the state has no such authority. Two possibilities exist. First, the Tenth Circuit may be judicially limiting the "full authority to . . . implement and enforce . . . National Emission Standards for Hazardous Air Pollutants (NESHAP)" that the EPA granted to New Mexico.[75] The second possibility is that NMED's first action to enforce the $1000 per day state penalty precluded them from enforcing the $25,000 per day federal penalty under the doctrine of claim preclusion. This second possibility leaves unanswered the question of whether

67. *See Graddick*, 648 F. Supp. at 1211.
68. *Id.*
69. The state law adopted was Chapter 13 of the Alabama Department of Environmental Management's (ADEM) Air Pollution Control Regulation. *Id.*
70. *Id.*
71. *Id.*
72. *See id.*
73. *Id.* at 1212 (emphasis added).
74. *See supra* text accompanying note 48.
75. 55 Fed. Reg. 5990 (1990).

NMED could have enforced the $25,000 per day federal penalty if they had not previously enforced the $1000 per day state penalty.

In rejecting the *Graddick* analysis because "it would . . . permit an unsuccessful federal action brought by a state to foreclose the Administrator from filing suit under the [federal] Clean Air Act," the Tenth Circuit made an unnecessary statement.[76] It is unnecessary because it addressed a moot point. *Graddick* neither supported nor refuted the central issue in *Espinosa*[77] of whether a state agency may enforce a federal penalty in federal court. Rejecting the *Graddick* analysis, therefore, was unnecessary to the *Espinosa* decision.

3. Claim Preclusion

The lower court's ruling, affirmed by the Tenth Circuit, also held that claim preclusion prevents NMED from bringing a federal action.[78] Most of the Tenth Circuit's opinion addressed the state's authority to bring an enforcement action in federal court; the claim preclusion issue elicited no direct response. Since the court unanimously affirmed the lower court's decision, with no reversal in part concerning the claim preclusion holding, it appears that the Tenth Circuit concurred in toto with the decision below. In rejecting the reasoning in *Graddick*,[79] however, the Tenth Circuit concluded the opinion with dicta that seems to leave the door open for a federal suit brought by the EPA on the same claim unsuccessfully brought by a state in federal court.[80] Such a suggestion implies that if the state had the authority to, and did bring the action in federal court, the EPA could still bring a separate action despite its failure to join the state's federal enforcement proceedings. This contradicts the court's apparent affirmation that claim preclusion barred the present action.

Throughout its opinion, the court referred to the dual enforcement approach in a context of either state or federal action, rather than one of both state and federal action. For example, the court stated that the Administrator may assess the penalty if a state fails to do so;[81] and referred to "federal action serving as a federal safety net."[82] To allow federal action following unsuccessful state action in federal court goes beyond the intended purpose of providing a federal safety net.[83]

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76. *Espinosa*, 32 F.3d at 494.
77. *Id.* at 492.
78. *Id.*
79. 648 F. Supp. 1208 (M.D. Ala. 1986).
80. *See Espinosa* 32 F.3d at 494 (rejecting the analysis because "it would seem to permit an unsuccessful federal action brought by a state to foreclose the Administrator from filing suit under the Clean Air Act").
81. *Id.* at 493.
82. *Id.*
83. *See supra* text accompanying note 64.

II. STATE AND LOCAL PREEMPTION OF RCRA: *BLUE CIRCLE CEMENT, INC. V. BOARD OF COUNTY COMMISSIONERS*[84]

A. *Background*

Unlike the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[85] which addresses the cleanup of existing pollution, the Resource Conservation and Recovery Act ("RCRA")[86] regulates new and active contamination sources. RCRA's goal is to minimize pollution by tracing wastes[87] and by conserving resources.[88] To achieve at least a mini-

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84. 27 F.3d 1499 (10th Cir. 1994).

85. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

86. 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993).

87. RCRA established a "cradle to grave" tracking system for both solid and hazardous wastes to prevent the unauthorized storage, treatment and disposal of wastes that are harmful to health and the environment. This system requires that a manifest accompany all solid or hazardous wastes from the time of their "generation" to their ultimate disposal. One of the keys to understanding RCRA is the complex relationship between "solid waste" and "hazardous waste" and the differing statutory and regulatory definitions of each. Section 6903(27) of the statute defines solid waste as any "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities." 42 U.S.C. § 6903(27) (1988). The same section exempts from the definition of solid waste all solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permits under the Clean Water Act ("CWA"), 33 U.S.C. § 7342 (1988 & Supp. V 1993), or special nuclear, or byproduct materials as defined by the Atomic Energy Act ("AEA"), 42 U.S.C. 2011 (1988). *Id.* In other words, just about everything that is *discarded* constitutes a solid waste unless it is already regulated by the CWA or AEA or constitutes domestic sewage or irrigation runoff. Although the statute does not define the term discarded, the regulatory definition is any material which is abandoned [in certain ways], or recycled [in certain ways], or considered inherently waste-like. 40 C.F.R. § 261.2. (1994). Both the statute and the regulations contain definitions of hazardous waste. 42 U.S.C. § 6903(5); 40 C.F.R. § 261.3. (1994). Common to both the statutory and regulatory definition is the requirement that a hazardous waste must also be a solid waste. 42 U.S.C. § 6903(5). A substance, therefore, that meets the statutory definition of being a "substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of" is not subject to RCRA unless it is also a solid waste. *Id.* Practically, this means that even very dangerous substances are not regulated by RCRA until they are disposed. Thus, the regulatory definition determining when a substance is disposed of becomes a critical element in any RCRA action.

88. Section 6902 of RCRA states:

> (a) Objectives
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> The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—
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> . . . .
>
> (6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;
>
> (7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;
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> . . . .
>
> (11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

mum national environmental standard, Congress bars states and municipalities from imposing less stringent requirements than the federal RCRA provisions.[89] In keeping with the theme of a state/federal cooperative effort, states have the authority to adopt more stringent provisions than those set forth by the federal EPA.[90] The federal RCRA provisions, therefore, establish a "floor," as opposed to a "ceiling," limit on pollution standards.[91]

The policy objectives behind RCRA's promotion of recovering materials and properly conducting recycling and reuse[92] include: 1) recovering energy and other valuable items from discarded materials; 2) avoiding environmental dangers; 3) protecting a scarce land supply; 4) reducing the trade balance; and 5) reducing the nation's reliance on foreign energy and materials.[93] A state's ability to impose additional restrictions to address their local preferences regarding these goals, however, creates a potential for conflict between state and federal law. When, as in *Blue Circle Cement*, the state's RCRA provisions conflict with the federal provisions, preemption becomes an issue.

The Supremacy Clause of the United States Constitution states that "the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[94] In the absence of explicit preemptive language in a federal statute, the United States Supreme Court recognizes two types of implied preemption.[95] First, "field preemption" refers to situations where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for States to supplement it."[96] The second type of implied preemption is "conflict preemp-

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(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6902 (1988).

89. Section 6929 states:

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

42 U.S.C. § 6929 (1988).

90. *Id.*

91. *See* Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1292 (3d Cir. 1992).

92. 42 U.S.C. § 6902(a)(6).

93. Blue Circle Cement, Inc., v. Board of County Comm'rs, 27 F.3d 1499, 1505 (10th Cir. 1994).

94. U.S. CONST. art. VI, cl. 2.

95. *Blue Circle Cement*, 27 F.3d at 1504.

96. *Id.* (quoting Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

tion."[97] Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility"[98] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[99]

Because Congress set only a floor and not a ceiling in RCRA,[100] express or implied preemption does not exist where the state or local regulations are more restrictive than RCRA.[101] Congress explicitly provides in § 6929 that state and local governments may adopt solid and hazardous waste regulations more stringent than those imposed by federal EPA.[102] This explicit provision precludes an implication of federal supremacy via field preemption. Therefore, only if state or local ordinances regulating the treatment, storage, and disposal of hazardous waste frustrate the "full accomplishment of congressional purposes embodied in [RCRA]" (an example of conflict preemption), would the federal provisions preempt state or local provisions.[103]

B. *Facts*

In the early 1980s, Blue Circle Cement, Inc. ("Blue Circle") planned to convert its coal and natural gas fired cement kilns to use Hazardous Waste Fuels ("HWFs").[104] The zoning ordinance in effect at the time made no reference to recycling operations but required industrial operators to obtain a conditional use permit to establish an "industrial waste disposal site."[105] Blue Circle considered burning HWFs to constitute "recycling" or "burning for energy recovery"[106] rather than disposal.[107] Consequently, Blue Circle did not believe that the ordinance required a conditional use permit for their pro-

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97. *Id.*

98. *Id.* (quoting Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132, 142-43 (1963)).

99. *Id.* (quoting Hines V. Davidowitz, 312 U.S. 52, 67 (1941)).

100. *See supra* note 64 and accompanying text.

101. *Blue Circle Cement*, 27 F.3d at 1504.

102. 42 U.S.C. § 6929.

103. *Blue Circle Cement*, 27 F.3d at 1505.

104. HWFs are a less expensive type of fuel that contain industrial wastes with a high British Thermal Unit ("BTU") value. *Id.* at 1501-02.

105. *Id.* at 1502; *see* CLAREMORE-ROGERS COUNTY, OKLA., METROPOLITAN PLANNING COMM'N ZONING ORDINANCE § 3.13.2.

106. The EPA recognized that "burning of hazardous wastes as fuels can be a type of recycling activity exempted from regulation." 48 Fed. Reg. 11,157-58 (1983). The burning must constitute legitimate, as opposed to sham, recycling to fall within the exemption. 48 Fed. Reg. 11,158 (1983). The "energy value of the hazardous waste being . . . burned "is the primary factor in distinguishing sham from legitimate burning for energy recovery. A limit of 5000 BTU/lb. is generally considered the minimum for a legitimate hazardous waste fuel. 56 Fed. Reg. 7183 (1991). "If the wastes being burned have only de minimis energy value, the burning cannot recover sufficient energy to characterize the practice as legitimate recycling. . . . [T]he wastes, for practical purposes are being burned to be destroyed." 48 Fed. Reg. 11,158 (1983). The nature of the device used to burn the hazardous waste can be relevant to whether the material is being recycled by being burned for energy recovery or abandoned by being burned or incinerated. United States v. Self, 2 F.3d 1071, 1080 n.8 (10th Cir. 1993). High BTU materials burned in an incinerator that is unable to retrieve the energy from the material is considered to be burned for destruction. *Id.* Likewise, low BTU materials burned in a boiler or industrial furnace are also considered to be burned for the purpose of destruction because of their limited energy value. *Id.*

107. *Blue Circle Cement*, 27 F.3d at 1502.

posed conversion.[108] The board of County Commissioners of Rogers County, Oklahoma ("Board") disagreed and informed Blue Circle that the ordinance required the permit.[109] Rather than apply for the permit, Blue Circle filed suit in the United States District Court for the Northern District of Oklahoma, seeking a declaratory judgment that burning HWFs did not constitute industrial disposal.[110] While Blue Circle's suit was pending, the Board amended the ordinance to require a conditional use permit for "recycling" and "treatment" of HWFs.[111] Blue Circle amended its complaint to allege that the amended ordinance: 1) was preempted by RCRA; 2) constituted a violation of the Commerce Clause; and 3) could not equitably be enforced retroactively.[112] The District Court denied both Blue Circle's summary judgment motion and the Board's motion to dismiss.[113] Immediately before trial, however, the district court *sua sponte* issued a summary judgment in favor of the Board. The court held that: 1) RCRA did not preempt the Ordinance; 2) the Ordinance did not violate the Commerce Clause; and 3) Blue Circle had not acquired a vested right to use HWFs and, therefore, the amended Ordinance was constitutional as applied.[114] Blue Circle appealed the summary judgment.

C. *Tenth Circuit Decision*

The Tenth Circuit swiftly reversed the district court's *sua sponte* grant of summary judgment, citing procedural grounds and prejudice to the non-moving party.[115] Although Federal Rule of Civil Procedure 12(b) authorizes courts to treat motions to dismiss as requests for summary judgment, the Tenth Circuit found that Blue Circle had not received the requisite "reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[116] The court reasoned that because Blue Circle had been denied the opportunity to present its own factual materials in defense of the summary judgment motion, the district court's actions were prejudicial. The finding of prejudice prevented the Tenth Circuit from holding that the lower court's ruling constituted harmless error.[117] Accordingly, the Tenth Circuit remanded for further proceed-

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108. *See id.* at 1502.
109. *Id.*
110. *Id.*
111. *Id.* The Rogers County Ordinance, § 3.13.2, "Industrial Waste Disposal/Recycling/Treatment" as amended states:

> An Industrial Waste Disposal/Recycling/Treatment Site shall not be less than one hundred sixty (160) acres in size and no other industrial waste disposal/recycling/treatment site shall be nearer than one (1) mile (5,280 feet) in any direction from the proposed industrial waste/recycling/treatment site. The site will be as nearly square as possible.
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> . . . .
>
> All industrial waste disposal/recycling/treatment sites shall be located at least one (1) mile from any platted residential subdivision.

Id. at 1509.
112. *Id.* at 1502.
113. *Id.*
114. *Id.* at 1502-03.
115. *Id.* at 1503-04.
116. *Id.*; *see* FED. R. CIV. P. 12(b).
117. *Blue Circle Cement*, 27 F.3d at 1503-04.

ings on the summary judgment issue.[118]

The Tenth Circuit also reversed and remanded on the dormant Commerce Clause issue.[119] The court stated that because the ordinance operates evenhandedly, in that it does not distinguish between hazardous waste generated within and outside Rogers County, the less stringent *Pike* test applied rather than the stricter test reserved for statutes that explicitly discriminate based on the origin of the article of commerce.[120] Because the district court failed to apply the *Pike* test, the court of appeals held that the record was inadequate to support a summary judgment for the Board on the commerce clause challenge.[121]

On the retroactivity issue, the court affirmed the district court's grant of summary judgment in favor of the Board.[122] In the district court proceeding, Blue Circle contended that it would be inequitable to apply the amended ordinance after they had incurred engineering and planning costs in reliance on the conditions imposed by the original ordinance.[123] The district court ruled that Blue Circle had no vested rights in burning HWFs at its cement plant prior to the Board's amendment to section 3.13.2.[124] Blue Circle reformulated its argument on appeal.[125] Blue Circle alleged that the Board acted inequitably by amending the ordinance to specifically thwart their HWF project.[126] The Court of Appeals refused to follow *In re Julius Bankoff*,[127] the only authority supporting Blue Circle's claim, because the original opinion, "Bankoff I," had been withdrawn and superseded. Its successor, "Bankoff II,"[128] had not yet been released for publication and, therefore, the opinion lacked precedential value.[129]

On the issue of whether RCRA preempted the Board's ordinance, the Tenth Circuit held that a genuine issue of material fact existed and remanded for a factual determination.[130] The court's holding focused on the inappropriateness of the summary judgment.[131] The record reflected Blue Circle's contention that no 160-acre plot existed in the county meeting that could meet the

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118. *Id.*
119. *Id.* at 1512.
120. *Id.* at 1511-12. The *Pike* test requires the court to scrutinize: 1) the nature of the local putative benefits advanced by the ordinance; 2) the burden the Ordinance imposes on interstate commerce; 3) whether the burden is clearly excessive in relation to the local benefits; and 4) whether the local interests can be promoted as well with a lesser impact on interstate commerce. *Id.* at 1512; *see* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
121. *Blue Circle Cement*, 27 F.3d at 1512.
122. *Id.* at 1514.
123. *See id.* at 1502.
124. *Id.* at 1503.
125. *Id.* at 1513.
126. *Id.*
127. No. 69586 & No. 78146, 1992 WL 131940 (Okla. June 16, 1992) ("Bankoff I").
128. In re Julius Bankoff, 875 P.2d 1138 (Okla. 1994) ("Bankoff II").
129. *Blue Circle Cement*, 27 F.3d at 1513. Under Rule 1.200(B)(E) of the Oklahoma Rules of Appellate Procedure an unpublished opinion "shall not be considered as precedent by any court or in any brief or other material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case." *Id.*
130. *Id.* at 1510.
131. *Id.*

criteria listed in Rogers County Ordinance § 3.13.2.[132] The record also reflected, however, that the Board had identified three sites that, if rezoned from floodplain to industrial, would qualify under the ordinance.[133] Because Blue Circle could apply for a variance from the zoning requirements, the Board argued that the ordinance did not constitute an absolute ban on hazardous waste.[134] Blue Circle, in turn, argued that the alternative sites did not meet requirements for storing and burning hazardous wastes because of their floodplain status and, therefore, it was inconceivable the sites would be rezoned to permit such activity.[135] The court considered this exchange on the record to constitute "a serious [factual] dispute over whether this ordinance imposes a de facto ban on the burning of HWFs in Rogers County."[136]

In addition to reversing and remanding the district court's grant of summary judgment for the Board on the preemption issue, the Tenth Circuit provided explicit guidance to the lower court on remand. In so doing, the Tenth Circuit drew upon a somewhat limited, albeit consistent, body of case law to direct the preemption analysis.[137] Where state or local ordinances constitute an explicit or de facto total ban of an activity otherwise encouraged by RCRA, the federal RCRA provisions preempt those state or local provisions.[138] When the ordinance does not operate as a complete ban on the encouraged activity, no preemption results, provided that the ordinance is supported by a record establishing it as a reasonable response to a legitimate local concern for safety or welfare.[139] If the state or local ordinance does not address, or is not reasonably related to, a legitimate concern, then it "may be regarded as a sham and nothing more than a naked attempt to sabotage federal RCRA policy of encouraging the safe and efficient disposition of hazardous waste materials."[140]

The Tenth Circuit instructed the lower court on remand to follow the lead of the Eighth Circuit[141] and the Supreme Courts of Louisiana,[142] Arkansas,[143] and Wyoming[144] in concluding that a total ban on encouraged

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132. *See supra* note 116.
133. *Blue Circle Cement*, 27 F.3d at 1510.
134. *See id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1508.
138. *Id.*; ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986); Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436, 1446-47 (S.D. Cal. 1988); Jacksonville v. Arkansas Dep't of Pollution Control and Ecology, 824 S.W.2d. 840, 842 (Ark. 1992); Rollins Envtl. Servs. v. Iberville Parish Police Jury, 371 So.2d 1127, 1132 (La. 1979).
139. *Blue Circle Cement*, 27 F.3d at 1508; Lafarge Corp. v. Campbell, 813 F. Supp. 501, 508-12 (W.D. Tex. 1993); Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1296-97 (3d Cir. 1992); North Haven Planning & Zoning Comm'n v. Upjohn Co., 753 F. Supp. 423, 431 (D. Conn.), *aff'd*, 921 F.2d 27 (2d Cir. 1990).
140. *Blue Circle Cement*, 27 F.3d at 1508.
141. *See ENSCO*, 807 F.2d at 745 (finding that RCRA preempted county ordinance that imposed an outright ban on storage, treatment, or disposal of hazardous waste).
142. *Rollins*, 371 So.2d at 1132 (holding that RCRA preempted a parish ordinance's flat ban on hazardous waste disposal).
143. *City of Jacksonville*, 824 S.W.2d at 842 (holding that RCRA preempted a city ordinance that barred the incineration of hazardous waste because the local measure frustrated RCRA's "preference for treatment rather than land disposal of hazardous waste").
144. Hermes Consol., Inc. v. People, 849 P.2d 1302, 1311 (Wyo. 1993) ("[A]lthough [§ 6929]

activity will result in preemption by RCRA.[145] If, on the other hand, the lower court should find that the ordinance falls short of a total ban, a finding of preemption is only compelled if the record fails to support a legitimate concern.[146] Such a finding is likely since the Board conceded that no documents exist to support the Board's concern for the amendment to section 3.133.2.[147]

D. *Analysis*

The Tenth Circuit's decision in *Blue Circle Cement* makes a significant contribution to the analysis of RCRA issues regarding implied preemption. The two part test articulated by the court,[148] however, falls short of providing a clear guide to the present state of the law. For example, the first part of the test states: "ordinances that amount to an explicit or de facto ban on an activity that is otherwise encouraged by RCRA will ordinarily be preempted by RCRA."[149] Two problems arise in applying this part of the test to a given set of facts. First, the opinion provides no definition of the term "ordinarily." By including this term, the court correctly suggested that circumstances can exist that allow an ordinance with a total ban effect to avoid RCRA preemption. The court, however, did not address what constitutes such circumstances.

The second problem arises when the effect of an ordinance constitutes a total ban, yet the elusive circumstances allowing such a total ban to survive RCRA preemption are not satisfied. Theoretically, the district court could rule on remand that the effect of the Board's ordinance constituted a permissible de facto ban on HWF burning, an activity encouraged by RCRA. Without an articulated standard, Blue Circle is unable to overcome such a determination. This effectively removes the state from the purported cooperative federal/state process.

The Tenth Circuit recognized the possibility that a total ban on hazardous waste activity in a densely populated residential area, thereby constituting a significant threat to health or safety, could be upheld as a reasonable exercise of state and local authority over that of RCRA.[150] Such an example, with a clearly articulated factual determination of risk in a densely populated area, does little to guide the analysis of the next case in which the determination of risk and density of population may fall more in the "gray zone" of legal and factual certainty.

Perhaps a heightened degree of scrutiny should be built into part one of the implied preemption test. With this heightened scrutiny, courts could re-

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allows states to adopt more stringent regulations, it does not authorize them to defeat safe federal solutions . . . [or] to directly subvert RCRA and [EPA] decisions by outright bans on activities federal authorities considered safe.").

145. *Blue Circle Cement*, 27 F.3d at 1505. Implied preemption prevents the frustration of the full accomplishment of congressional purposes. *Id.*

146. *Id.* at 1510 n.10. Blue Circle had asked the Board to identify any documents that address the "scope, necessity, or basis" for the amendment. *Id.*

147. *Id.*

148. *See id.* at 1508.

149. *Id.*

150. *Id.* at 1508 n.7.

quire more than just a reasonable state or local interest for an ordinance that results in an explicit or de facto ban: a state or local ordinance could only survive preemption by RCRA if it constituted a means substantially related to a compelling state interest.

Part two of the Tenth Circuit's implied preemption rule states: "an ordinance that falls short of imposing a total ban on encourage activity will ordinarily be upheld so long as it is supported by a record establishing that it is a reasonable response to a legitimate local concern for safety or welfare."[151] Language such as "reasonable response" and "legitimate local concern" suggests that the court is applying a rational basis standard of review. The fact that the Tenth Circuit established a two part test, with the rational basis standard of review applied only to the second part, arguably suggests that the court envisioned a heightened level of scrutiny for part one, even if it did not explicitly articulate it as such.

The analysis of part two of the Tenth Circuit's implied preemption test reveals that it actually consists of four sub-parts. The first sub-part focuses on the effect of the ordinance. In essence, the effect of the ordinance determines whether part one or two of the test is controlling. Anything short of an explicit or de facto ban on the RCRA encouraged activity falls under part two of the test. Sub-part two requires that a record support both sub-parts three and four. Sub-parts three and four constitute the traditional elements of the rational basis standard of review. For example, sub-part three requires the ordinance to be a reasonable response to sub-part four, which requires a legitimate concern for safety or welfare.

In summary, the Tenth Circuit's decision in *Blue Circle Cement* consolidated a consistent body of law within the circuits regarding implied preemption in RCRA cases. It failed, however, to capitalize on an opportunity to set forth a clear rule articulating the consistent body of law within the circuits.

CONCLUSION

In *Espinosa v. Roswell Tower, Inc.*, the Tenth Circuit limited a state's enforcement authority of federally approved SIPs. The court held that a state may not pursue enforcement of federal sanctions when it has previously enforced state sanctions for the same violation. Under these facts, the Tenth Circuit limits states' authority to state administrative and judicial review. Whether this decision reserves all enforcement through the federal judicial process to the federal agencies, however, remains unanswered. This decision conforms to the congressional delegation of primary responsibility for the prevention and control of air pollution to states and the supervision and enforcement authority delegated to federal authorities.[152] The decision departs from accepted notions of claim preclusion, however, in that it implies that a federal agency may relitigate the same issue against the same party that successfully defended itself on that issue against a state agency.

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151. *Id.* at 1508.

152. *See* Train v. Natural Resources Defense Council, 421 U.S. 60, 64 (1975).

In *Blue Circle Cement, Inc. v. Board of County Commissioners*, the Tenth Circuit described its approach to the issue of federal preemption of state ordinances under RCRA. The court missed an opportunity to articulate a clear rule regarding the respective standard of review applicable to ordinances that constitute a total ban, or a partial ban of a RCRA encouraged activity. The decision, however, is consistent in structure with that of the Eighth Circuit and various state Supreme Courts. It implied that *Blue Circle Cement* is an example of federal RCRA preemption of a local ordinance due to the failure to show, on the record, that the ordinance reasonably relates to a legitimate state concern. The Tenth Circuit, in both *Blue Circle Cement* and *Espinosa*, affirmed the dominant role it ascribes to federal authority in the cooperative federal/state approach to environmental enforcement.

John M. Stafford