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Alex P. Abrams

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# WHY “UNDERFILING” BY STATES CAN AND SHOULD BE USED TO ENFORCE ENVIRONMENTAL REGULATIONS

ALEX P. ABRAMS\*

**Abstract:** “Overfiling” occurs when the federal government files an environmental enforcement action in situations where the state environmental enforcement agency has not sufficiently prosecuted a violator of a federal environmental statute. A recent case from the Tenth Circuit appears to support the idea of overfiling under the Resource Conservation and Recovery Act, and other courts have upheld overfiling actions under the Clean Water Act and the Clean Air Act. This Note argues that the practice of “underfiling,” a process in which states file environmental enforcement actions even after the federal government has already overfiled, is also supported by these federal court decisions. This Note also suggests that states may intervene under Rule 24 of the Federal Rules of Civil Procedure in federal environmental enforcement actions in order to seek additional relief from violators of environmental statutes.

## INTRODUCTION

Since the early 1970s, the federal government has enacted a number of environmental statutes designed to regulate the nation’s air,<sup>1</sup> water,<sup>2</sup> and hazardous waste.<sup>3</sup> One of the common elements of these environmental statutes is that Congress has delegated enforcement authority to individual state governments.<sup>4</sup> While these environmental statutes grant initial enforcement authority to the U.S. Environmental Protection Agency (EPA), once a state can show that it has the capability of enforcing these regulations, EPA can then

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<sup>1</sup> Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671c (2000).

<sup>2</sup> Federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251–1387 (2000).

<sup>3</sup> Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2000).

<sup>4</sup> See 33 U.S.C. §§ 1319, 1342; 42 U.S.C. §§ 6926, 6928, 7413.

authorize the state to enforce the law.<sup>5</sup> This delegation of enforcement authority is known as “cooperative federalism.”<sup>6</sup>

Federal environmental statutes thus encourage states to develop their own environmental programs that will allow them to enforce federal environmental laws, rather than relegating primary enforcement responsibilities within their jurisdictions to the regional office of EPA.<sup>7</sup> While the state, after authorization by EPA, holds the status of primary enforcer of federal environmental laws, sometimes state environmental agencies and EPA do not agree about how to properly enforce federal environmental laws against a particular regulated organization or individual.<sup>8</sup> In these circumstances, EPA may decide to bring its own enforcement action against the organization or individual even if the state has already brought an enforcement action or negotiated a settlement.<sup>9</sup> This process is known as overfiling and has been the subject of two recent federal circuit court cases, as well as a number of district court cases.<sup>10</sup>

The states’ “ying” to the “yang” of federal overfiling has been termed “underfiling.”<sup>11</sup> Underfiling is when a state environmental agency, unsatisfied with the way in which EPA is handling its overfiled enforcement of environmental statutes against an individual or organization within its jurisdiction, files its own enforcement action against the individual or organization.<sup>12</sup> This can occur either while the federal enforcement action is still pending or after finality has been achieved through a court decision or a settlement agreement between the fed-

<sup>5</sup> See 33 U.S.C. §§ 1319, 1342; 42 U.S.C. §§ 6926, 6928, 7413.

<sup>6</sup> Lisa Dittman, Comment, *Overfiling: Policy Arguments in Support of the Gorilla in the Closet*, 48 UCLA L. REV. 375, 376 (2000).

<sup>7</sup> See *id.* at 377.

<sup>8</sup> See *id.*

<sup>9</sup> See Susan K. Wiens & William P. Hefner, *Disharmony in EPA’s Overfiling Policy*, 15 NAT. RESOURCES & ENV’T 3, 3 (2000).

<sup>10</sup> See generally *United States v. Power Eng’g Co.*, 303 F.3d 1232 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003); *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054 (W.D. Wis. 2001); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827 (N.D. Ohio 2000); *United States v. City of Youngstown*, 109 F. Supp. 2d 739 (N.D. Ohio 2000).

<sup>11</sup> The term “underfiling” was first used, according to the best information available, in July 2001 by Professor William Goldfarb of Rutgers University, in preparing the annual supplement to ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY* (2d ed. 1998 & Supp. 2001).

<sup>12</sup> See *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 768–69 (Va. 2001).

eral government and the regulated party.<sup>13</sup> It may seem unclear, though, why states would underfile a federal enforcement action, because one of the main goals of federal overfiling—to promote consistency in the enforcement of environmental laws throughout the country—does not apply to individual states.<sup>14</sup> Perhaps underfiling could be used to obtain different forms of relief than those available under the federal enforcement action, or to emphasize underlying political differences with the federal government. Regardless, states have attempted to use underfiling in their power struggle with EPA over enforcement of federal environmental regulations.<sup>15</sup>

A more pertinent question may be not why states would want to underfile, but rather if they are legally able to do so. While a state supreme court recently ruled that the practice of underfiling was barred by the legal doctrine of *res judicata*,<sup>16</sup> this Note will argue that the caselaw surrounding the overfiling issue actually overturns that decision and that underfiling can and should be pursued by states as a way to obtain other types of relief or for other reasons. Part I provides a background on the federal-state relationship in environmental enforcement, including overfiling and the applicability of *res judicata* to these actions. Part II discusses the court decisions that questioned the legality of federal overfiling. Part III shows how federal courts have begun to move away from a prohibition on overfiling. Part IV explores the latest federal circuit court case regarding overfiling, which created a circuit split. Part V applies the courts' recent analysis of overfiling to the question of underfiling, explores whether underfiling can and should become an effective state enforcement mechanism, and suggests an alternative to underfiling<sup>17</sup> should courts not approve using that mechanism.

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<sup>13</sup> See Wiens & Hefner, *supra* note 9, at 3 (describing the situation as encountered with overfiling).

<sup>14</sup> See Dittman, *supra* note 6, at 390-91.

<sup>15</sup> See, e.g., *Smithfield Foods*, 542 S.E.2d at 766.

<sup>16</sup> See *id.* at 771.

<sup>17</sup> This Note also suggests utilizing intervention in overfiling cases under Rule 24 of the Federal Rules of Civil Procedure, which requires analyzing the possibility of intervention under *United States v. Tex. E. Transmission Corp.*, 923 F.2d 410 (5th Cir. 1991).

## I. THE FEDERAL-STATE RELATIONSHIP IN THE ENFORCEMENT OF FEDERAL ENVIRONMENTAL LAWS

### A. *Cooperative Federalism and Overfiling*

Through cooperative federalism, the federal government creates standards under statutes or regulations and then allows the states to determine how to meet them.<sup>18</sup> Using this concept, federal environmental statutes allow EPA to delegate enforcement authority to the states for the standards issued under these laws.<sup>19</sup> This creates an effective use of limited federal resources for environmental regulation, and at the same time allows states to use more flexible and innovative techniques to find solutions to environmental problems and violations.<sup>20</sup> Under the Clean Air Act (CAA),<sup>21</sup> Federal Water Pollution Control Act (Clean Water Act or CWA),<sup>22</sup> and Resource Conservation and Recovery Act (RCRA),<sup>23</sup> however, the federal government also incorporated a strong federal oversight program to ensure that these standards were enforced uniformly throughout the country.<sup>24</sup>

EPA's supervisory role allows it to either withdraw authorization of state environmental programs<sup>25</sup> or utilize the practice known as overfiling.<sup>26</sup> EPA has been reluctant to withdraw state authorization,<sup>27</sup> but has instead used the practice of overfiling,<sup>28</sup> which allows the authorized state agencies to continue as the primary enforcers of the environmental statutes in other cases while EPA takes over primary enforcement in the overfiled matter.<sup>29</sup> In a typical EPA overfiling, a regulated party who has violated federal environmental statutes has first negotiated with the authorized state agency regarding the violations, and these negotiations might result in a court approved settle-

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<sup>18</sup> Erik R. Lehtinen, *Virginia As a Case Study: EPA Should Be Willing to Withdraw NPDES Permitting Authority from Deficient States*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 617, 621 (1999).

<sup>19</sup> Dittman, *supra* note 6, at 376.

<sup>20</sup> *Id.*

<sup>21</sup> 42 U.S.C. §§ 7401-7671c (2000).

<sup>22</sup> 33 U.S.C. §§ 1251-1387 (2000).

<sup>23</sup> 42 U.S.C. §§ 6901-6992k (2000).

<sup>24</sup> Wiens & Hefner, *supra* note 9, at 3.

<sup>25</sup> See Lehtinen, *supra* note 18, at 625-30.

<sup>26</sup> See *id.* at 619.

<sup>27</sup> *Id.* at 629.

<sup>28</sup> See *id.* at 631.

<sup>29</sup> See Stephen C. Robertson, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling Under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 593, 600 (1999).

ment.<sup>30</sup> Objecting to the settlement reached between these two parties, EPA then brings its own enforcement action against the regulated party in federal court.<sup>31</sup> This process can anger both the authorized state agencies and regulated parties because the prospect of overfiling by EPA creates uncertainty about the finality of any settlements reached between the regulated parties and the states,<sup>32</sup> and it also limits the states' flexibility in enforcing federal environmental standards within their jurisdictions.<sup>33</sup>

### B. *Res Judicata*

Res judicata (sometimes referred to as claim preclusion) and collateral estoppel (also known as issue preclusion)<sup>34</sup> are common law affirmative defenses embodying the principle that once a right, question, or fact has been decided by a court, the same parties or their privies cannot relitigate the same right, question, or fact in a later lawsuit.<sup>35</sup> While legal scholars have recently suggested broadening the phrase "res judicata" to include both issue and claim preclusion,<sup>36</sup> the term "res judicata" in the context of EPA overfiling decisions is understood to include only claim preclusion,<sup>37</sup> and thus the use of "res judicata" in this Note should be understood in this manner.

Res judicata treats a final judgment in a case as the full measure of relief to be granted to either party on the same claim or cause of action.<sup>38</sup> In order for res judicata to apply, the following four features must be the same in both the current case and the previous lawsuit in which there was a final judgment: (1) the type of relief sought; (2) the cause of action; (3) identity of the persons and parties to the actions; and (4) identity of the quality of the person for or against whom the claim is made.<sup>39</sup>

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<sup>30</sup> Dittman, *supra* note 6, at 377.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.* at 396.

<sup>33</sup> *See id.*

<sup>34</sup> *See* William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. L. REV. 199, 230-31 (1988).

<sup>35</sup> *See id.* at 231.

<sup>36</sup> 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2002).

<sup>37</sup> *See, e.g.,* United States v. Power Eng'g Co., 303 F.3d 1232, 1240 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003); Harmon Indus., Inc. v. Browner, 191 F.3d 894, 902-04 (8th Cir. 1999).

<sup>38</sup> *See Power Eng'g*, 303 F.3d at 1240.

<sup>39</sup> *Harmon Indus.*, 191 F.3d at 902.

The main aspect of res judicata that courts are likely to confront in overfiling and underfiling litigation is whether the identity of the person and parties to the action is the same as in a previously decided case.<sup>40</sup> While EPA and state environmental enforcement agencies (the prosecuting parties in enforcement actions) are not actually the same parties, they may still be bound by res judicata,<sup>41</sup> because EPA and state environmental agencies may be in privity with one another.<sup>42</sup> In the recent overfiling litigation, courts have evaluated the question of privity with two different analyses.<sup>43</sup> The first is a traditional analysis in which a court will preclude a party who was previously represented by another party with the authority to do so.<sup>44</sup> The second analysis is one in which a court will preclude a nonparty whose participation in the initial litigation was so extensive that it was a de facto party.<sup>45</sup>

The two different privity analyses in recent overfiling litigation are the result of two different federal cases decided about twenty years ago.<sup>46</sup> The Ninth Circuit in *United States v. ITT Rayonier, Inc.* used the first privity analysis.<sup>47</sup> In this case, EPA filed suit after the company had successfully defeated an enforcement order by the State of Washington's Department of Ecology in state court.<sup>48</sup> In examining the privity issue, the court noted that the state agency had filed only after EPA's instruction to do so and that the state agency vigorously asserted EPA's position in the state proceedings.<sup>49</sup> Additionally, the court found both parties to be enforcing the same permit.<sup>50</sup> Therefore, the state agency's and EPA's interests were identical, each had a level of involvement "sufficiently similar," and the relationship between the two agencies could be labeled "sufficiently 'close'" for purposes of issue preclusion.<sup>51</sup> This case was the first to hold that EPA

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<sup>40</sup> See, e.g., *Power Eng'g*, 303 F.3d at 1240-41; *Harmon Indus.*, 191 F.3d at 902-04.

<sup>41</sup> See Benton, *supra* note 34, at 248.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 250. Benton actually describes cases in which that court analyzed privity in three different manners. *Id.* Recent overfiling decisions, however, used only two of the three privity analyses. See, e.g., *Power Eng'g*, 303 F.3d at 1240-41; *Harmon Indus.*, 191 F.3d at 902-04.

<sup>44</sup> Benton, *supra* note 34, at 250.

<sup>45</sup> *Id.*

<sup>46</sup> See generally *Montana v. United States*, 440 U.S. 147 (1979); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980).

<sup>47</sup> *ITT Rayonier*, 627 F.2d at 1002-04.

<sup>48</sup> *Id.* at 999.

<sup>49</sup> *Id.* at 1003.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

and a state environmental enforcement agency were sufficiently close to bar an overfiling action in federal court.<sup>52</sup>

The leading case for the second privity analysis is the Supreme Court case *Montana v. United States*.<sup>53</sup> This was a case of pervasive and absolute control by a nonparty.<sup>54</sup> The Court held that the federal government had a sufficient "laboring oar" in that litigation to actuate principles of collateral estoppel.<sup>55</sup> The Court found this "laboring oar" because the federal government admitted to exercising control over the state court litigation against the State of Montana, even though it was not officially a party to the litigation.<sup>56</sup> As evidence of this federal control, the Court noted that the United States required the state lawsuit to be filed, reviewed and approved the complaint, paid attorneys' fees and costs, directed the appeal to the state supreme court, submitted an *amicus* brief in the state supreme court, directed the notice of appeal to the Supreme Court, and later effectuated the abandonment of that appeal.<sup>57</sup> A court applying this privity analysis to overfiling will look at whether EPA had the opportunity to exercise sufficient control over a state and its enforcement action in order to be bound by the outcome.<sup>58</sup>

### C. Upholding the Right to Overfile

The federal courts' recent decisions regarding overfiling began with *United States v. Smithfield Foods, Inc.*<sup>59</sup> In this case, EPA sued a company that owned and operated two swine processing plants<sup>60</sup> for violations of the CWA.<sup>61</sup> Smithfield violated its permit by discharging pollutants into the Pagan River at levels beyond those allowed under the company's permit, in addition to falsifying and destroying certain records and reports.<sup>62</sup> EPA initiated this suit after it appeared that the State of Virginia was not going to bring legal action against Smithfield

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<sup>52</sup> *Id.*

<sup>53</sup> 440 U.S. 147 (1979).

<sup>54</sup> Benton, *supra* note 34, at 256.

<sup>55</sup> *Montana*, 440 U.S. at 155 (quoting *Drummond v. United States*, 324 U.S. 316, 318 (1945)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Benton, *supra* note 34, at 256.

<sup>59</sup> 191 F.3d 516 (4th Cir. 1999).

<sup>60</sup> *Id.* at 520.

<sup>61</sup> *Id.* at 523.

<sup>62</sup> *Id.*



for its CWA violations.<sup>63</sup> Instead of then joining the EPA lawsuit, Virginia filed its own enforcement action in state court alleging that Smithfield violated the terms of its permit, but claimed different types of violations than those claimed by EPA.<sup>64</sup> In EPA's suit, the federal district court granted summary judgment for the United States on issues of liability in March of 1997, and then assessed a penalty of \$12.6 million after a bench trial in July of 1997.<sup>65</sup> The state enforcement action proceeded at the same time as the federal case, and in July the state court announced a decree which permitted Smithfield to make a minor change in order to satisfy the terms of its permits.<sup>66</sup> Soon thereafter, on the basis of this decree in the state environmental enforcement action, Smithfield filed a motion to dismiss or alternatively for summary judgment in the federal case.<sup>67</sup> The district court declined Smithfield's request to reverse its liability finding,<sup>68</sup> and the Fourth Circuit upheld that ruling.<sup>69</sup>

This case's importance to the issue of underfiling is not so much in the circuit court's legal analysis,<sup>70</sup> but rather because it was a rare example of EPA overfiling,<sup>71</sup> which had never before been used quite so liberally as it was in this case.<sup>72</sup> Additionally, EPA had lost the only overfiling case it had previously attempted,<sup>73</sup> and thus was taking sub-

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Smithfield Foods*, 191 F.3d at 523.

<sup>66</sup> *Id.* at 523-24.

<sup>67</sup> *Id.* at 524.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 532.

<sup>70</sup> This Note addresses whether one sovereign might be precluded from enforcing federal environmental regulations if another sovereign has already brought such an enforcement action, which was most likely not decided in *Smithfield Foods, Inc.* The district court acknowledged that certain provisions of the CWA barred the United States from bringing a civil penalty action when a state enforcement agency "has commenced and is diligently prosecuting an action under a State law" which was comparable to those provisions of the CWA. *Id.* at 525 (quoting 33 U.S.C. § 1319(g)(6)(A)(ii) (2000)). The district court found, however, that the Virginia enforcement law was not comparable in order to bar EPA's suit, thereby permitting overfiling. *Id.* While not applicable to *Smithfield Foods, Inc.*, in 1996 Virginia amended its enforcement scheme in order to make it comparable to the provision of the CWA. *Id.* at 525 n.2.

<sup>71</sup> Lehtinen, *supra* note 18, at 617.

<sup>72</sup> *Id.* at 631.

<sup>73</sup> See *United States v. Cargill*, 508 F. Supp. 734, 751 (D. Del. 1981).

stantial legal and political risks.<sup>74</sup> Finally, this case is the precursor to the major underfiling opinion discussed later in this Note.<sup>75</sup>

## II. LIMITS ON EPA'S OVERFILING POWER

### A. *The Harmon Decision*

Only two days after the Fourth Circuit announced its *Smithfield* decision, the Eighth Circuit found that overfiling by EPA was prohibited under RCRA.<sup>76</sup> In this case, employees of the company's Missouri circuitry board plant had been routinely discarding volatile solvent residue behind the plant's buildings.<sup>77</sup> Once management discovered this improper disposal, it ceased all such activities and voluntarily contacted the Missouri Department of Natural Resources (MDNR).<sup>78</sup> The company and the MDNR created a plan by which the company would clean up the disposal area.<sup>79</sup> In the midst of these settlement discussions between the company and the MDNR, EPA filed an administrative enforcement action against the company seeking more than \$2 million in penalties.<sup>80</sup> While this EPA administrative action was pending, a state court judge approved a consent decree entered into by the company and the MDNR.<sup>81</sup> After an assessment of penalties by an administrative law judge and an affirmation of the assessment by an environmental appeals board, the company filed a complaint in federal district court challenging EPA's decision.<sup>82</sup> In upholding the district court's decision barring overfiling, the Eighth Circuit held that under both a statutory analysis of RCRA,<sup>83</sup> as well as under the common law of *res judicata*,<sup>84</sup> EPA was barred from filing a competing enforcement action once a state had begun its own enforcement proceedings.<sup>85</sup>

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<sup>74</sup> Robertson, *supra* note 29, at 607.

<sup>75</sup> The major underfiling opinion is *State Water Control Board v. Smithfield Foods, Inc.*, 542 S.E.2d 766 (Va. 2001). See *infra* Part II.B.

<sup>76</sup> *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 902 (8th Cir. 1999). See generally 42 U.S.C. §§ 6926, 6928 (2000).

<sup>77</sup> *Harmon Indus.*, 191 F.3d at 896.

<sup>78</sup> *Id.* at 897.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Harmon Indus.*, 191 F.3d at 902.

<sup>84</sup> *Id.* at 904.

<sup>85</sup> See *id.* at 899, 904.

## 1. RCRA Statutory Analysis

The court noted that according to the language of RCRA, a state can apply to EPA for authorization to administer and enforce a hazardous waste program, and once the authorization is granted, the state's program operates "in lieu of" the federal government's own program.<sup>86</sup> Additionally, RCRA states that any action taken by a state pursuant to an authorized hazardous waste program has "the same force and effect" as an action taken by EPA.<sup>87</sup> EPA argued that the district court had misinterpreted the statutory phrases "in lieu of" and "same force and effect."<sup>88</sup> It believed that "in lieu of" referred to which statutes were to be enforced in an authorized state, and "same force and effect" referred to the effect of state-issued permits.<sup>89</sup> Further, EPA contended that the plain language of § 6928 allowed the federal government to initiate an enforcement action against a violator, even in states that have received RCRA authorization.<sup>90</sup>

In contrast to EPA's view, the Eighth Circuit found that an examination of the statute as a whole supported the district court's interpretation.<sup>91</sup> While EPA was correct that the "in lieu of" language referred to the enforcement program, the court found that the administration and enforcement of the program was "inexorably intertwined"; that RCRA contained congressional intent for state programs to replace the federal hazardous waste program in every aspect including enforcement;<sup>92</sup> and that RCRA's language established the "primacy of state enforcement" once the state had been granted authorization.<sup>93</sup> The court held that the only way the federal government has a right to pursue an enforcement action under RCRA is when a state's authorization has been revoked or when the state failed to initiate an enforcement action.<sup>94</sup>

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<sup>86</sup> *Id.* at 899 (quoting 42 U.S.C. § 6926(b) (2000)).

<sup>87</sup> 42 U.S.C. § 6926(d).

<sup>88</sup> *Harmon Indus.*, 191 F.3d at 898; *see* 42 U.S.C. § 6926.

<sup>89</sup> *Harmon Indus.*, 191 F.3d at 898; *see* 42 U.S.C. § 6926.

<sup>90</sup> *Harmon Indus.*, 191 F.3d at 898; *see* 42 U.S.C. § 6928.

<sup>91</sup> *Harmon Indus.*, 191 F.3d at 899. *See generally* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (2000).

<sup>92</sup> *Harmon Indus.*, 191 F.3d at 899; *see* 42 U.S.C. §§ 6926, 6928.

<sup>93</sup> *Harmon Indus.*, 191 F.3d at 900; *see* 42 U.S.C. §§ 6926, 6928.

<sup>94</sup> *Harmon Indus.*, 191 F.3d at 901.

## 2. Res Judicata Analysis

Alternatively, the Eighth Circuit upheld the district court's finding that the state court consent decree barred EPA's enforcement action under principles of res judicata.<sup>95</sup> While believing that all four distinct requirements for res judicata were met in this case,<sup>96</sup> the court noted that the only one in dispute was whether the parties were identical.<sup>97</sup> Though the United States and Missouri were not the same party, the court noted that parties can satisfy the identical party requirement when the new party is in privity with a party that litigated a prior suit, and that privity exists when the two parties have "a close relationship bordering on near identity."<sup>98</sup> The court found that the statutory language in RCRA creates a situation in which the federal and state environmental enforcement agencies "stand in the same relationship to one another," and Missouri law supports a finding of privity when the two parties "represent the same legal right."<sup>99</sup> As a result, EPA and Missouri were in privity because they both advanced the exact same legal right under RCRA in their own respective enforcement actions.<sup>100</sup> Further, the court found that privity is not dependent on the subjective interests of the individual parties, and thus EPA's argument that it had enforcement interests sufficiently distinct from Missouri's interests did not sway the court's decision.<sup>101</sup>

The court also rejected EPA's argument that unless it was actually a party to the prior lawsuits, the doctrine of sovereign immunity precluded the application of res judicata in this situation.<sup>102</sup> The court cited the Supreme Court's decision in *Montana v. United States* which held that if the United States "had a sufficient laboring oar in the conduct of the state-court litigation," this could bring about principles of estoppel.<sup>103</sup> The court found that while the federal government did not directly control the details of a prior state suit as in *Montana*,<sup>104</sup> in RCRA cases the federal government authorizes the state to act in its place, and thus the "laboring oar" is pulled on much earlier

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<sup>95</sup> *Id.* at 902.

<sup>96</sup> *See supra* Part I.B.

<sup>97</sup> *Harmon Indus.*, 191 F.3d at 903.

<sup>98</sup> *Id.* (quoting *United States v. Gurley*, 43 F.3d 1188, 1197 (8th Cir. 1994)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Harmon Indus.*, 191 F.3d at 903 (quoting *Montana v. United States*, 440 U.S. 147, 155 (1979)).

<sup>104</sup> *See Montana*, 440 U.S. at 155.

in the process.”<sup>105</sup> After this authorization, the state pursues enforcement actions “in lieu of” EPA, and therefore EPA must be bound by prior state actions initiated under RCRA.<sup>106</sup> The *Harmon* opinion thus produced much uncertainty as to whether EPA was allowed to overfile under RCRA and other federal environmental statutes.<sup>107</sup>

### B. Applying the Harmon Doctrine to Block Underfiling

In 2001, the Virginia Supreme Court addressed a new wrinkle in overfiling—whether a state could underfile once a final ruling had been litigated in a federal enforcement action.<sup>108</sup> After declining to join EPA’s enforcement activity against Smithfield,<sup>109</sup> which ultimately resulted in a large penalty against the company,<sup>110</sup> the State Water Control Board and the Department of Environmental Quality (collectively “the Board”) filed a suit in state court to enforce violations of a previously negotiated administrative order and of portions of a pollution discharge permit unrelated to the order.<sup>111</sup> After the Fourth Circuit upheld the penalties assessed by EPA against Smithfield, the company filed a plea in the state action, asserting that *res judicata* now barred the state enforcement action.<sup>112</sup>

As in *Harmon Industries, Inc. v. Browner*, the only requirement of *res judicata* at issue before the court was the identity of the parties.<sup>113</sup> The Board argued that privity did not exist because: (1) its interests in protecting the waters of Virginia, and thus the legal rights it sought to protect, were derived from the Virginia Constitution and the State Water Control Law; and (2) it did not share a subjective intent to coordinate the enforcement of the permit with EPA.<sup>114</sup> The court, however, found these arguments unconvincing.<sup>115</sup> It believed that the most important fact in the case was that the interests and rights of both EPA and the

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<sup>105</sup> *Harmon Indus.*, 191 F.3d at 904 (citing *Montana*, 440 U.S at 155).

<sup>106</sup> *Id.* (citing 42 U.S.C. § 6926(b), (d) (2000)).

<sup>107</sup> See generally *Harmon Indus.*, 191 F.3d at 904; *Environmental Enforcement Becomes Federalism’s Hazardous Battleground*, 31 Env’t Rep. (BNA) 896 (May 5, 2000) (discussing EPA’s viewpoint of the *Harmon* and *Smithfield* decisions) [hereinafter *Environmental Enforcement*].

<sup>108</sup> See *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 768 (Va. 2001).

<sup>109</sup> *Id.*

<sup>110</sup> See *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 531 (4th Cir. 1999).

<sup>111</sup> *Smithfield Foods*, 542 S.E.2d at 768.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 769; see *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 903 (8th Cir. 1999).

<sup>114</sup> *Smithfield Foods*, 542 S.E.2d at 769–70.

<sup>115</sup> *Id.* at 770.

Board were "vested in a single permit" for water pollution discharge.<sup>116</sup> The court also noted that the ability of both the Board and EPA to undertake enforcement activities did not "override the joint undertaking based on the agreement authorizing the state enforcement program."<sup>117</sup> This agreement said that the permit issued by the Board would protect the separate but mutual interests of both the state and federal governments.<sup>118</sup> Thus, the Board and EPA shared an "identity of interest" in the permit issued to Smithfield, and the Board's legal rights were represented when EPA prosecuted the company.<sup>119</sup>

The court found that its conclusion was consistent with federal cases which had considered the issue of *res judicata*.<sup>120</sup> For instance, it noted that the *Harmon* court had concluded that *res judicata* applied because the state advanced the same legal right as EPA.<sup>121</sup> In addition, the court found that, like in *Harmon Industries, Inc.*, privity did not require the parties to share a subjective intent—either they shared an objective "identity of interest" or they did not.<sup>122</sup> Further, while the Board argued that privity is precluded when EPA has independent enforcement powers, the court held that according to the Ninth Circuit in *United States v. ITT Rayonier, Inc.*,<sup>123</sup> the existence of concurrent enforcement powers did not contradict the application of *res judicata*.<sup>124</sup> Rather, the court found that determining privity between parties required a case-by-case analysis utilizing the principles of that doctrine.<sup>125</sup>

### III. FEDERAL DISTRICT COURTS LIMIT THE APPLICATION OF THE *HARMON* DOCTRINE

*State Water Control Board v. Smithfield Foods, Inc.* is the only known case in which courts have adopted the *Harmon* rationale and applied it to prevent dual enforcement of federal environmental laws by both the state and federal governments.<sup>126</sup> Since that decision, nu-

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Smithfield Foods*, 542 S.E.2d at 770.

<sup>121</sup> *Id.*; see *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 903 (8th Cir. 1999).

<sup>122</sup> *Smithfield Foods*, 542 S.E.2d at 771; see *Harmon Indus.*, 191 F.3d at 903.

<sup>123</sup> 627 F.2d 996 (9th Cir. 1980).

<sup>124</sup> *Smithfield Foods*, 542 S.E.2d at 770-71.

<sup>125</sup> *Id.* at 771.

<sup>126</sup> Gary A. Jones, "Single Permit Theory" Bars State Water Enforcement Action on *Res Judicata* Grounds, NAT. ENVTL. ENFORCEMENT J., Apr. 2001, at 3. See generally *Harmon Indus.*,

merous federal district courts have limited the application of the *Harmon* analysis.<sup>127</sup>

#### A. *Overfiling Under the Clean Water Act*

The Ohio Environmental Protection Agency filed an enforcement action against the City of Youngstown under the Clean Water Act (CWA).<sup>128</sup> Meanwhile, EPA brought its own enforcement action against Youngstown, and Youngstown claimed that under *Harmon Industries, Inc.*, EPA could not bring an enforcement action where the state was already pursuing its own separate enforcement action.<sup>129</sup> The court rejected Youngstown's reliance on *Harmon Industries, Inc.* for two reasons.<sup>130</sup> First, it found that the Sixth Circuit had decided that the federal government retained a right to file a similar enforcement action even after it granted enforcement authority of the CWA to a state agency.<sup>131</sup> Second, it refused to draw a parallel between the enforcement provisions as analyzed in *Harmon Industries, Inc.* under RCRA,<sup>132</sup> and those found in the CWA.<sup>133</sup> Unlike the *Harmon* court's finding that RCRA barred overfiling,<sup>134</sup> the court here found that because the CWA did not contain language similar to RCRA's "in lieu of" or "same force and effect,"<sup>135</sup> but instead stated that the federal enforcement was not so limited,<sup>136</sup> the CWA did not bar federal overfiling.<sup>137</sup> The *Youngstown* court, however, did not address the question of res judicata.

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*Inc. v. Browner*, 191 F.3d 894 (9th Cir. 1999); *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766 (Va. 2001).

<sup>127</sup> See *United States v. Murphy Oil U.S.A., Inc.*, 143 F. Supp. 2d 1054, 1087–93, 1116–17 (W.D. Wis. 2001); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 836 (N.D. Ohio 2000); *United States v. City of Youngstown*, 109 F. Supp. 2d 739, 741 (N.D. Ohio 2000).

<sup>128</sup> *City of Youngstown*, 109 F. Supp. 2d at 741. See generally 33 U.S.C. §§ 1251–1387 (2000).

<sup>129</sup> *City of Youngstown*, 109 F. Supp. 2d at 740; see *Harmon Indus., Inc.*, 191 F.3d at 897–903.

<sup>130</sup> *City of Youngstown*, 109 F. Supp. 2d at 741.

<sup>131</sup> *Id.*

<sup>132</sup> See *supra* notes 86–94 and accompanying text.

<sup>133</sup> *City of Youngstown*, 109 F. Supp. 2d at 741.

<sup>134</sup> *Harmon Indus.*, 191 F.3d at 902.

<sup>135</sup> See 42 U.S.C. § 6926(b), (d) (2000).

<sup>136</sup> 33 U.S.C. § 1342(i) (2000).

<sup>137</sup> *City of Youngstown*, 109 F. Supp. 2d at 741.

### B. *Overfiling Under the Clean Air Act*

Later in 2000, the same court addressed both the statutory permissibility of overfiling under the Clean Air Act (CAA),<sup>138</sup> as well as the implications of res judicata on enforcement by separate sovereigns of federal environmental laws.<sup>139</sup> In this case, the defendant, LTV, had negotiated a monetary settlement with the City of Cleveland in exchange for Cleveland agreeing not to pursue civil or criminal misdemeanor actions for violation of emissions regulations.<sup>140</sup> A year later, EPA issued a violations notice to LTV for emissions infractions, some of which were subjects of LTV's settlement with Cleveland.<sup>141</sup> Much like in *City of Youngstown*,<sup>142</sup> the court rejected LTV's claims that a state settlement precluded federal enforcement under *Harmon's* analysis of RCRA.<sup>143</sup> The court found that the *Harmon* court's statutory analysis was based on language found in RCRA, and that this language was not in the CAA.<sup>144</sup>

Unlike in *City of Youngstown*, this court also added a res judicata analysis of whether the overfiling was permissible.<sup>145</sup> While noting that LTV did not satisfy the same claim/cause of action requirement of res judicata,<sup>146</sup> it went on to analyze the issue of privity between the City and EPA.<sup>147</sup> It found that any preclusive effect must be determined by the level of federal participation in the previous enforcement actions.<sup>148</sup> The court, applying *Montana v. United States*, required the United States to have maintained a laboring oar in the earlier proceedings and settlement.<sup>149</sup> The court held that to determine whether the United States actually had a laboring oar, a court may look to factors such as whether it ordered the other party to file the lawsuit, filed an *amicus* brief, directed an appeal, or engaged in settlement negotiations.<sup>150</sup> The court found that EPA had done none of these things and

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<sup>138</sup> *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 832–35 (N.D. Ohio 2000); see 42 U.S.C. § 7413 (2000).

<sup>139</sup> *LTV Steel*, 118 F. Supp. 2d at 835–37.

<sup>140</sup> *Id.* at 830.

<sup>141</sup> *Id.*

<sup>142</sup> *City of Youngstown*, 109 F. Supp. 2d at 739.

<sup>143</sup> *LTV Steel*, 118 F. Supp. 2d at 832; see *supra* Part II.A.1.

<sup>144</sup> *LTV Steel*, 118 F. Supp. 2d at 832; see *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897–902 (8th Cir. 1999).

<sup>145</sup> *LTV Steel*, 118 F. Supp. 2d at 835–37.

<sup>146</sup> See *supra* note 39 and accompanying text.

<sup>147</sup> *LTV Steel*, 118 F. Supp. 2d at 836.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see *Montana v. United States*, 440 U.S. 147, 155 (1979).

<sup>150</sup> *LTV Steel*, 118 F. Supp. 2d at 836; see *Montana*, 440 U.S. at 155.



therefore had no laboring oar in Cleveland's prior enforcement efforts or in its settlement with LTV.<sup>151</sup> Thus, there was no privity between EPA and Cleveland under a traditional *res judicata* analysis.<sup>152</sup>

### C. Overfiling After a State Settlement

In another overfiling case, EPA sued Murphy Oil USA, a petroleum refinery, for violations of a number of federal environmental statutes after the company had settled some of these violations with the State of Wisconsin.<sup>153</sup> The court analyzed the issue of overfiling in the contexts of both the CAA and RCRA.<sup>154</sup>

In regard to the CAA violations, the court performed a *res judicata* analysis, focusing on the question of privity between the federal and state governments.<sup>155</sup> Like in *City of Youngstown* and *LTV Steel Co.*, the *Murphy Oil* court found that the *res judicata* prohibition as applied in *Harmon Industries, Inc.* was based on the specific language contained in RCRA, and that this language did not appear in the CAA.<sup>156</sup> Rather, an analysis of § 7413(e) of the CAA provided additional support for federal overfiling because: (1) Congress anticipated overfiling and approved it by allowing prior penalties to be taken into consideration in determining new penalties; (2) the 1970 amendments showed a congressional intent to respond to the slow progress of enforcement solely by states; and (3) the CAA lacked any reference to conditions on taking federal action.<sup>157</sup>

Furthermore, the court, applying *Montana v. United States*, found that the United States did not have a laboring oar in the controversy.<sup>158</sup> EPA did not direct the state to file its enforcement action, pay the state's costs or attorney's fees, or direct the course of litigation or terms of settlement.<sup>159</sup> Even though EPA closely monitored the state's enforcement action, that did not bring EPA into such a close working

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<sup>151</sup> *LTV Steel*, 118 F. Supp. 2d at 836.

<sup>152</sup> *Id.*

<sup>153</sup> *United States v. Murphy Oil USA*, 143 F. Supp. 2d 1054, 1062, 1087–92, 1114–17 (W.D. Wis. 2001).

<sup>154</sup> *Id.* at 1087–92, 1114–17.

<sup>155</sup> *Id.* at 1087–92.

<sup>156</sup> *Murphy Oil USA*, 143 F. Supp. 2d at 1090–91; see *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897–902 (8th Cir. 1999).

<sup>157</sup> *Murphy Oil USA*, 143 F. Supp. 2d at 1091.

<sup>158</sup> *Id.* at 1092; see *supra* notes 55–56 and accompanying text.

<sup>159</sup> *Murphy Oil USA*, 143 F. Supp. 2d at 1092.

relationship with the state government as to make the parties equivalent for purposes of res judicata.<sup>160</sup>

For the RCRA violations, Murphy Oil USA rested its challenge to EPA's enforcement action entirely on *Harmon Industries, Inc.*<sup>161</sup> While the present case differed from *Harmon Industries, Inc.*,<sup>162</sup> the *Murphy Oil* court still analyzed the RCRA violations through a discussion of overfiling.<sup>163</sup> The court disagreed with the *Harmon* court's interpretation of RCRA; that is, by giving states the right to implement and enforce hazardous waste programs, EPA could not pursue enforcement unless it withdrew a state's RCRA authorization.<sup>164</sup> Rather, the court found that the structure of RCRA suggests that the statute allows the federal government to bring enforcement actions in authorized states conditioned only on providing sufficient notice to the state government.<sup>165</sup>

#### IV. CIRCUIT COURT SPLIT DEVELOPS

While *City of Youngstown, LTV Steel Co.*, and *Murphy Oil USA* all declined to extend the *Harmon* doctrine,<sup>166</sup> they were only district court decisions. It was not until 2002 that another circuit court addressed the question of overfiling.<sup>167</sup> The defendant, Power Engineering, operated a metal refinishing and chrome electroplating business that produced hazardous waste covered by RCRA.<sup>168</sup> The Colorado Department of Public Health and Environment (CDPHE) issued an administrative penalty order—later found enforceable by a state court—after Power Engineering refused to comply with an initial compliance order.<sup>169</sup> Before the CDPHE issued its administrative penalty order, EPA requested that the CDPHE enforce RCRA's financial assurance requirements against Power Engineering.<sup>170</sup> The CDPHE did not en-

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1114.

<sup>162</sup> *Id.* In *Murphy Oil USA*, the court had stayed the state enforcement action, the court had not issued a decision or approved a consent judgment, and the parties had yet to agree to a settlement. *Id.*

<sup>163</sup> *See id.* at 1114–17.

<sup>164</sup> *Id.* at 1116; *see supra* note 94 and accompanying text.

<sup>165</sup> *Murphy Oil USA*, 143 F. Supp. 2d at 1117.

<sup>166</sup> *See supra* Part III.

<sup>167</sup> *United States v. Power Eng'g Co.*, 303 F.3d 1232 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003).

<sup>168</sup> *Id.* at 1235.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

force such provisions within the administrative penalty order, so EPA filed its own suit against Power Engineering.<sup>171</sup> While Power Engineering wanted the court to follow the *Harmon* decision,<sup>172</sup> the court flatly rejected both the Eighth Circuit's statutory and *res judicata* analysis in that case.<sup>173</sup>

### A. Statutory Analysis

The starting point for the court in *Power Engineering Co.* was that the RCRA provisions at issue were ambiguous.<sup>174</sup> Thus, the court would defer to the federal agency's reasonable interpretation of the statute—an interpretation that permitted overfiling—according to the *Chevron* doctrine.<sup>175</sup> Sections 6926 and 6928 of RCRA<sup>176</sup> were at issue in the case.<sup>177</sup> The court found that § 6928(a) required the federal government only to have to give notice to a state whose hazardous waste program is authorized before instituting its own enforcement action.<sup>178</sup> It also found that § 6926(b) reasonably could be interpreted as separating the state's authorization to carry out its program in lieu of the federal program from its authorization to issue and enforce permits.<sup>179</sup> Therefore, EPA's conclusion that the administration and enforcement of RCRA were not "inexorably intertwined"—that state program authorization did not strip EPA of its enforcement powers—was not unreasonable.<sup>180</sup> Because RCRA was ambiguous, the court had to defer to EPA's reasonable interpretation.<sup>181</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1236; see *supra* notes 76–107 and accompanying text.

<sup>173</sup> *Power Eng'g*, 303 F.3d at 1240, 1241.

<sup>174</sup> *Id.* at 1237.

<sup>175</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (holding that if a statute is silent or ambiguous, a court should defer to the agency's interpretation if based on a permissible construction of the statute and thus must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute"); *Power Eng'g*, 303 F.3d at 1236–37.

<sup>176</sup> 42 U.S.C. §§ 6926, 6928 (2000).

<sup>177</sup> *Power Eng'g*, 303 F.3d at 1237.

<sup>178</sup> *Id.*; see 42 U.S.C. § 6928(a).

<sup>179</sup> *Power Eng'g*, 303 F.3d at 1237; see 42 U.S.C. § 6926(b).

<sup>180</sup> *Power Eng'g*, 303 F.3d at 1238.

<sup>181</sup> *Id.* at 1240; see *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

### B. *Res Judicata*

The court analyzed the question of privity between the United States and Colorado for res judicata purposes under *Montana, Harmon Industries, Inc.*, and *ITT Rayonier, Inc.*<sup>182</sup> Applying *Montana*, the court recognized that a finding of a laboring oar in the controversy would be necessary to bind the United States as a party.<sup>183</sup> The court, however, found that none of the factors listed in *Montana* were present in the *Power Engineering* case, and thus there was no evidence that EPA assumed control over the litigation.<sup>184</sup> But even if the laboring oar could be pulled by a delegation of authority as in *Harmon Industries, Inc.*,<sup>185</sup> the court made a distinction when state governments act "in lieu of" EPA only with respect to administration of the program and issuance of permits.<sup>186</sup> Thus, the *Power Engineering* court found no complete delegation to the states.<sup>187</sup> Finally, the court distinguished *ITT Rayonier, Inc.* because that case did not follow the laboring oar analysis, but rather relied heavily on the identical interest between the state agency and EPA.<sup>188</sup> The court found that, unlike in *ITT Rayonier, Inc.*, the CDPHE did not maintain the "same position" as EPA since the CDPHE did not seek financial assurances as EPA had requested. Therefore, the two agencies did not have identical interests.<sup>189</sup> In conclusion, the court declined to extend the doctrine of privity to cover the situation in this case.<sup>190</sup>

### V. ANALYSIS OF UNDERFILING

On May 5, 2003, the Supreme Court denied certiorari in *Power Engineering Co.*<sup>191</sup> Thus, the questions about the legality of overfiling and underfiling remain open. In order to address these open issues, this Note argues that in a post-*Power Engineering* legal environment, courts, when assessing the legality of underfiling, should allow it. Additionally,

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<sup>182</sup> *Power Eng'g*, 303 F.3d at 1240-41; see *supra* Parts I.B, II.A.2.

<sup>183</sup> *Power Eng'g*, 303 F.3d at 1240; see *Montana v. United States*, 440 U.S. 147, 155 (1979).

<sup>184</sup> *Power Eng'g*, 303 F.3d at 1241.

<sup>185</sup> *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 904 (8th Cir. 1999).

<sup>186</sup> *Power Eng'g*, 303 F.3d at 1241.

<sup>187</sup> See *id.*

<sup>188</sup> *Id.*; see *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980).

<sup>189</sup> *Power Eng'g*, 303 F.3d at 1241.

<sup>190</sup> *Id.*

<sup>191</sup> *United States v. Power Eng'g Co.*, 303 F.3d 1232 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003).

this Part suggests important policy arguments in regards to overfiling and underfiling, and comments on one alternative to underfiling.

### A. *The Legality of Underfiling*

The legality of underfiling is analyzed under the legal doctrine of *res judicata*.<sup>192</sup> While overfiling decisions considered statutory permissibility under federal environmental laws, as well as *res judicata* concerns, only the federal government is uniquely restricted under federal environmental statutes.<sup>193</sup> Therefore, states might have greater freedom to pursue underfiling than the federal government has in pursuing overfiling.<sup>194</sup>

*State Water Control Board v. Smithfield Foods, Inc.* is the only published state court opinion dealing with the underfiling question. The court concluded that because the Board and EPA determined that their interests in protecting the water would be protected by the single permit, privity existed between the two different enforcement agencies for *res judicata* purposes.<sup>195</sup> This decision, however, relied primarily on two cases, *Harmon Industries, Inc.* and *ITT Rayonier, Inc.*, that have lately become questionable.<sup>196</sup> The EPA Senior Counsel who filed the *amicus* brief in this case argued that if the court had considered whether Virginia had played an active role in the earlier litigation, using the laboring oar test,<sup>197</sup> it would have found that Virginia had no laboring oar or any other role in the previous federal litigation, despite a rejected invitation from the federal government to join its suit.<sup>198</sup> Indeed, Virginia did none of the *Montana* factors.<sup>199</sup> Thus, while the court considered a

<sup>192</sup> See *supra* Parts I.B, II.A.2, II.B, and IV.B.

<sup>193</sup> This is because even if there are restrictions on overfiling to be found in federal environmental statutes, they only apply to the federal government. The idea that states are allowed to pursue their own enforcement actions can be inferred from the fact that they have primary enforcement authority under federal environmental statutes after being authorized by the federal government. See *supra* INTRODUCTION.

<sup>194</sup> Since states are not statutorily barred from pursuing underfiling, the only restriction might be *res judicata* concerns. However, generally state governments and the federal government are considered two separate parties for *res judicata*. 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4458 (2d ed. 2002).

<sup>195</sup> *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 770–71 (Va. 2001).

<sup>196</sup> See *Environmental Enforcement*, *supra* note 126, at 3; see also *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980).

<sup>197</sup> *Montana v. United States*, 440 U.S. 147, 155 (1979).

<sup>198</sup> See *Environmental Enforcement*, *supra* note 126, at 3.

<sup>199</sup> See *Montana*, 440 U.S. at 155. Virginia did not require the federal lawsuit to be filed, review or approve the federal complaint, pay attorney's fees and costs, direct any appeals,

joint permit program the sole test for privity, a more appropriate one may have been an analysis under *Montana*.

The *Montana* privity test, however, was applied by the Tenth Circuit in *Power Engineering Co.*<sup>200</sup> The court started its analysis by noting that for purposes of res judicata, the federal and state governments are usually considered separate parties unless the federal government had a laboring oar in a controversy.<sup>201</sup> This occurs when the federal government assumes control over the litigation.<sup>202</sup> Furthermore, since none of the *Montana* factors were present in the *Power Engineering Co.* overfiling, there was no evidence that EPA assumed control over the litigation, and thus was not in privity with the state environmental agency.<sup>203</sup> This appears to be the more sensible interpretation of the case law under which the question of privity for overfiling and underfiling has been analyzed—*ITT Rayonier, Inc.* and *Montana*.<sup>204</sup> The *Power Engineering Co.* court recognized that unlike in *ITT Rayonier, Inc.*, the Colorado environmental agency did not maintain the same position as EPA and did not do certain things that EPA had requested.<sup>205</sup> EPA was not in privity with the state agencies because: (1) any delegation of authority by EPA to the states was limited; and (2) the two agencies had different interests.<sup>206</sup>

A determination of privity by a future court in the context of underfiling should proceed according to the analysis in *Power Engineering Co.*<sup>207</sup> While some courts may look to the *Smithfield Foods, Inc.* opinion<sup>208</sup> for guidance, as it is the only reported decision on state underfiling, an analysis of privity in the context of underfiling using the *Power Engineering Co.* approach appears to be more appropriate. Thus, courts should look to see whether the state environmental enforcement agency had a laboring oar in the federal litigation, comparing the factors which evidenced "control over the litigation" in *Montana*

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or submit an *amicus* brief. See *id.* Rather, Virginia filed its own enforcement action. *Smithfield Foods*, 542 S.E.2d at 768.

<sup>200</sup> *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240–41 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003); see *Montana*, 440 U.S. at 155.

<sup>201</sup> *Power Eng'g*, 303 F.3d at 1240.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1241.

<sup>204</sup> See *supra* Part I.B. See generally *Montana*, 440 U.S. 147; *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980).

<sup>205</sup> *Power Eng'g*, 303 F.3d at 1241; see *ITT Rayonier*, 627 F.2d at 1003.

<sup>206</sup> *Power Eng'g*, 303 F.3d at 1241.

<sup>207</sup> *Id.* at 1240–41.

<sup>208</sup> *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766 (Va. 2001).

to the facts in the case before the court.<sup>209</sup> In most cases a court will likely not find a laboring oar because the reason for the state pursuing its own enforcement action is that it does not want to cooperate with the federal government. Additionally, a court should use the *Power Engineering Co.* court's analysis of *ITT Rayonier, Inc.*<sup>210</sup> and determine whether the state agency vigorously maintained the same position as EPA, and whether it had performed as EPA had requested them. Again, where a state is trying to underfile an EPA enforcement action, it is likely that it is not maintaining the same position as EPA—as it might be seeking more stringent damages, a different type of remedy, or has other motives for underfiling that would differentiate its position from that of EPA. Thus, after *Power Engineering Co.*, courts should find no privity between a state enforcement agency and EPA when the state underfiles, unless the state had a laboring oar in the federal litigation or is maintaining the same position as EPA.<sup>211</sup>

### B. Policy Arguments for Underfiling

The policy arguments in favor and against underfiling can be both compared and contrasted to those of overfiling.<sup>212</sup> The main policy argument in favor of overfiling is that it encourages states to be diligent enforcers of environmental laws, because EPA always retains the right file an enforcement action when it feels that the state is not meeting its responsibilities as the primary enforcer.<sup>213</sup> Additionally, many argue that overfiling is useful because it conserves scarce environmental enforcement resources.<sup>214</sup> Rather than EPA withdrawing authorization whenever it believes a state is not living up to its enforcement mandate—thus becoming the primary environmental enforcer in that jurisdiction itself, along with all the costs associated with such a responsibility—EPA can bring its own enforcement action in certain situations where it believes that the state has not acted properly without revoking the state agency's status as primary enforcer.<sup>215</sup>

On the other hand, the main policy argument against overfiling is that because a state environmental agency will not be the only party

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<sup>209</sup> *Montana*, 440 U.S. at 155.

<sup>210</sup> *Power Eng'g*, 303 F.3d at 1241 (citing *ITT Rayonier*, 627 F.2d at 1003).

<sup>211</sup> *See id.* at 1240–41 (citing *Montana*, 440 U.S. at 154–55).

<sup>212</sup> *See generally* Dittman, *supra* note 6 (describing policy arguments for and against overfiling).

<sup>213</sup> *See id.* at 390–92.

<sup>214</sup> Lehtinen, *supra* note 18, at 630; Robertson, *supra* note 29, at 606.

<sup>215</sup> *See* Lehtinen, *supra* note 18, at 630.

who can assess penalties, this will create uncertainty for regulated parties, and negotiations with states as the primary enforcers of environmental laws will not be as fruitful.<sup>216</sup> This will reduce the resources available to enforce environmental regulations and thereby limit their effectiveness.<sup>217</sup> Additionally, opponents of overfiling argue that the mechanism is fundamentally unfair, especially where the regulated parties are making a good faith effort to work with the state agencies.<sup>218</sup> This uncertainty and unfairness might also encourage regulated parties not to self-report environmental violations, and in this way, overfiling might discourage this very important regulation mechanism in environmental law.<sup>219</sup>

Policy arguments in favor of underfiling are a bit different. States should be allowed to underfile because EPA enforcement might not always incorporate all of the types of remedies a state is seeking from a regulated party which violates environmental laws. This creates an incentive for a regulated party to make sure it is complying with all environmental regulations, because if it is discovered to be in violation, the state, the federal government, or a combination of both, could bring enforcement actions requiring the regulated party to pay substantial fines and clean-up costs. Permitting underfiling also prevents a race to the courthouse.<sup>220</sup> This can be harmful, because if such a race occurs, it is likely that some enforcement actions will be rushed and thoughtless in order to avoid being precluded.<sup>221</sup>

Those against permitting the use of underfiling cite the unfairness and uncertainty of the practice because a regulated party could be punished by two different enforcement agencies for the same act.<sup>222</sup> Unlike overfiling, though, the argument for uncertainty would be less prevalent in underfiling because the regulated party would not have come to any final agreement with the state, as evidenced by the state filing suit after the federal government had already decided to take action.

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<sup>216</sup> Dittman, *supra* note 6, at 396.

<sup>217</sup> *Id.*

<sup>218</sup> Petition for Writ of Certiorari at 20–21, *Power Eng'g Co. v. United States*, 303 F.3d 1232 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003) (No. 02-1086).

<sup>219</sup> Dittman, *supra* note 6, at 397–98.

<sup>220</sup> *Environmental Enforcement*, *supra* note 126, at 3.

<sup>221</sup> *Id.*

<sup>222</sup> See Petition for Writ of Certiorari at 20–21, *Power Eng'g* (No. 02-1086).



### C. *The Alternative of Intervention*

While this Note argues that underfiling should be pursued and upheld as legal by federal and state courts, states may have an alternative option when they are trying to obtain additional relief after EPA has already filed an enforcement action in federal court against a regulated party. This alternative would be to move for either intervention of right or permissive intervention in the federal case under Rule 24 of the Federal Rules of Civil Procedure.<sup>223</sup> Intervention of right, according to Rule 24(a), must be permitted when either: (1) a federal statute confers an unconditional right to intervene; or (2) the "disposition of the action may impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."<sup>224</sup> Courts also have the discretion to grant permissive intervention when a federal statute confers a conditional right to intervene, or when an applicant's claim or defense and the main action have a question of law or fact in common.<sup>225</sup> States may thus be able to use these two types of intervention to become a party in an EPA enforcement action.

Intervention by individual states in a federal case in which EPA is enforcing environmental statutes may be limited, however, by *United States v. Texas Eastern Transmission Corp.*<sup>226</sup> In this case, the company operated a natural gas pipeline that ran from Texas to New York and passed through Pennsylvania.<sup>227</sup> After EPA learned that the company was allowing the release of toxic chemicals at eighty-nine sites in fourteen states along the pipeline system, it filed a complaint in federal district court alleging the company violated numerous federal environmental statutes.<sup>228</sup> Along with the complaint, EPA submitted a consent decree which the agency and the company had negotiated, and then moved for a stay of the district court proceeding to allow for notice and comment on the proposed consent decree.<sup>229</sup> During this notice and comment period, Pennsylvania and several other states filed motions to intervene, but the district court denied all of the intervention motions.<sup>230</sup>

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<sup>223</sup> FED. R. CIV. P. 24.

<sup>224</sup> FED. R. CIV. P. 24(a).

<sup>225</sup> FED. R. CIV. P. 24(b).

<sup>226</sup> 923 F.2d 410 (5th Cir. 1991).

<sup>227</sup> *Id.* at 412.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

The Fifth Circuit affirmed the district court's denial of motion to intervene of right and dismissed the appeal from the district court's denial of the motion for permissive intervention.<sup>231</sup> While the court quickly concluded that its review of the permissive intervention appeal was limited to an abuse of discretion standard because the district court's decision was completely discretionary,<sup>232</sup> it discussed more fully the question of Pennsylvania's intervention of right.<sup>233</sup> Pennsylvania argued that it met the requirements for intervention of right because: "(1) the consent decree may adversely effect Pennsylvania's enforcement efforts because of principles of *res judicata* and *stare decisis*, (2) the consent decree may preempt Pennsylvania laws, and (3) the consent decree may cause Pennsylvania to have to litigate the preemption issue in a subsequent action against Texas Eastern."<sup>234</sup> The court rejected the latter two claims under the theory that they were too speculative to satisfy the Rule 24 requirement that the disposition of the federal action would impair or impede Pennsylvania's ability to protect its interests.<sup>235</sup> In terms of the *res judicata* claim, the court held that Pennsylvania had not satisfied the requirements of Rule 24(a)(2),<sup>236</sup> because it was not a party to the federal action, the consent decree contained ample protections for Pennsylvania's laws, and its argument that a future judge might determine Texas Eastern's compliance with the consent decree relieved the company from complying with state laws was too theoretical.<sup>237</sup> The court also dismissed Pennsylvania's *stare decisis* argument, which claimed that if EPA was authorized to enforce RCRA here, *stare decisis* might impair Pennsylvania's future environmental enforcement capabilities.<sup>238</sup> The court found that because the district court's ruling was fact specific, it would not affect Pennsylvania's ability to enforce its own laws in the future.<sup>239</sup>

*Texas Eastern Transmission Corp.* was decided before any of the recent overfiling and underfiling decisions. Nonetheless, the court's analysis of intervention of right, in particular its *res judicata* analysis,<sup>240</sup> is important in the context of overfiling and underfiling. Since

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<sup>231</sup> *Id.* at 416.

<sup>232</sup> *Tex. E. Transmission*, 923 F.2d at 416.

<sup>233</sup> *Id.* at 413-16.

<sup>234</sup> *Id.* at 413.

<sup>235</sup> *Id.* at 414-16.

<sup>236</sup> *Id.* at 414 (citing FED. R. CIV. P. 24).

<sup>237</sup> *Id.*

<sup>238</sup> *Tex. E. Transmission*, 923 F.2d at 414.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 413-14.

the courts in both *Harmon Industries, Inc.* and *Smithfield Foods, Inc.* barred enforcement actions on res judicata grounds filed by one sovereign after the other sovereign already had a finalized negotiated agreement or a court judgment against the regulated party,<sup>241</sup> it seems that a state should be allowed to intervene in a federal environmental enforcement action because the disposition of the case might impair or impede its ability to enforce its rights.<sup>242</sup> Since some courts post-*Texas Eastern Transmission Corp.* have found privity between the state environmental agencies and EPA,<sup>243</sup> an argument of res judicata is not as theoretical as the *Texas Eastern* court described it.<sup>244</sup> Therefore, unless a judgment or consent decree contains specific provisions allowing states to later prosecute a regulated party who is being prosecuted by EPA in federal court,<sup>245</sup> states should be allowed to intervene as a matter of right in the federal case.

At least one state has contemplated the possibility of intervention in a federal court proceeding when the dispute is being litigated by the federal government through EPA.<sup>246</sup> Virginia passed a statute permitting intervention following the outcome in *Smithfield Foods, Inc.* which barred its enforcement action because of res judicata.<sup>247</sup> The statute specifically provides that, in addition to the authority possessed by the different state environmental agencies and their directors to enforce any law, regulation, case decision, or condition of a permit or certification, the state attorney general is authorized on behalf of these agencies and directors to seek to intervene pursuant to Rule 24 in federal cases in which EPA is litigating a dispute.<sup>248</sup> Although the statute gives the attorney general the right to pursue intervention in federal courts, courts will most likely apply *Texas Eastern Transmission Corp.*<sup>249</sup> and the res judicata analysis discussed earlier in this Note in determining whether to grant intervention.<sup>250</sup>

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<sup>241</sup> *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 904 (8th Cir. 1999); *State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 771 (Va. 2001).

<sup>242</sup> See FED. R. CIV. P. 24(a).

<sup>243</sup> See *Harmon Indus.*, 191 F.3d at 904; *Smithfield Foods*, 542 S.E.2d at 771.

<sup>244</sup> *Tex. E. Transmission*, 923 F.2d at 414.

<sup>245</sup> *Id.*

<sup>246</sup> See VA. CODE ANN. § 10.1-1186.4 (Supp. 2003).

<sup>247</sup> *Id.*; *Smithfield Foods*, 542 S.E.2d at 771.

<sup>248</sup> VA. CODE ANN. § 10.1-1186.4.

<sup>249</sup> *Tex. E. Transmission*, 923 F.2d at 410.

<sup>250</sup> See *supra* Part I.B.

## CONCLUSION

Underfiling should and can be used by states as an effective enforcement mechanism. It is another way in which society can make sure that environmental statutes and regulations are enforced to the fullest extent possible. While states should be effectively enforcing environmental statutes in order to prevent overfiling, states should still be able to extract other types of relief from parties through underfiling once overfiling occurs. Alternatively, states should also consider intervention in a federal enforcement action by passing legislation such as that in Virginia, because if other courts decide to bar underfiling on res judicata grounds, then states will have another option.

Moreover, the most recent overfiling case, *Power Engineering Co.*, seems to support the idea of underfiling. By dismissing the notion that res judicata concerns would bar overfiling by the federal government, it implicitly confirms the idea that underfiling is not barred by res judicata as well. And although the only reported case of state underfiling came out against the legality of the practice, that case may turn out to be the anomaly. Since the Supreme Court did not grant certiorari to decide *Power Engineering Co.*, and until another case like it is decided by the Court, lower courts should permit underfiling, in addition to overfiling, because the legal concepts of res judicata are not violated by enforcement of environmental laws by both the state and federal governments.

