Harmon Industries, Inc. v. Browner

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The Environmental Protection Agency has increasingly used overfiling as a tool to ensure that state agencies enforce environmental laws adequately. In Harmon Industries, Inc. v. Browner, the Eighth Circuit Court of Appeals held overfiling under the Resource Conservation and Recovery Act to be an invalid practice. The court rested its decision on two alternative grounds, both specific to the statutory language of RCRA. While this decision significantly limits EPA's enforcement authority under the RCRA, it should not be extended to invalidate EPA's overfiling ability under the Clean Air Act or the Clean Water Act.

CONTENTS

Introduction ........................................................................... 253
I. Background........................................................................... 255
II. Harmon Industries v. Browner.............................................. 258
  A. Factual and Procedural History ........................................... 258
  B. The Eighth Circuit Invalidates Overfiling............................ 260
     1. Statutory Analysis ........................................................ 260
     2. Res Judicata ................................................................ 264
III. Analysis ........................................................................... 265
  A. Analytical Flaws in the Harmon Decision.............................. 265
  B. Harmon's Impact on EPA's Ability to Overfile ...................... 269
Conclusion............................................................................... 272

INTRODUCTION

In the 1970s, Congress enacted the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), the Resource Conservation and
Recovery Act ("RCRA"), and many other statutes that frame modern environmental law. This development was labeled as "one of the most ambitious legislative and executive undertakings of the past half-century."2 Responding to a long history of inconsistent and ineffective attempts by states to handle environmental problems, Congress reasserted federal authority and divided administrative and enforcement responsibility between state and federal agencies.3 Ever since Congress enacted these environmental statutes, actors on both sides of this federalism issue have hotly debated the appropriate balance of authority between state agencies and the Environmental Protection Agency ("EPA") in properly effectuating environmental laws.4


3. See Robert V. Percival, Environmental Federalism: Historical Roots and Contemporary Models, 54 Md. L. REV. 1141, 1141-47, 1171 (1995) (reasoning that federal environmental laws were created in part to ensure national uniformity by overcoming "stubborn local particularism" and promoting standards for environmental protection); E. Blaine Rawson, Overfiling and Audit Privileges Strain EPA-State Relations, 13 NAT. RESOURCES & ENV'T. 483, 483 (1999) (stating that state regulation was ineffective due to inadequate resources and a fear of alienating industry).

4. Federalism under the Constitution can be viewed as a compromise between a powerful central government and a state exerting its rights. See Percival, supra note 3, at 1143. Justice O'Connor described federalism as "discerning the proper division of authority between the Federal Government and the States." See New York v. United States, 505 U.S. 144, 149 (1992). As federalism concerns increase, the progress achieved in federal environmental law over the past three decades is facing political backlash in Congress. See Peter P. Swire, The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law, 14 YALE J. ON REG. 67, 69 (observing that there has been a strong voice for devolution of federal environmental regulation by Republicans in the House of Representatives and numerous bills have been introduced to repeal various environmental provisions). Not surprisingly, Congress disfavors EPA overfiling. See H.R. REP. NO. 104-201, at 51 (1995) ("[EPA is expected to eliminate dual jurisdiction problems wherever possible and is directed to curtail the practice of overfiling on actions that have been previously filed by the States."). The Supreme Court has also been "openly and actively hostile" towards environmental law. See Lazarus, supra note 2, at 705-06 (concluding that "apathy or antipathy" towards environmental law results from the Justice's failure to appreciate "environmental law as a distinct area of law." They view it "as merely an incidental factual context in which environmental protection concerns are at stake, but there is nothing uniquely environmental about the legal issues being raised."). For an interesting discussion of why state power is valued, see Louise Weinberg, Fear and Federalism, 23 OHIO N.U. L. REV. 1295 (1997)
One aspect of this debate is EPA's practice of overfiling, a procedure where EPA brings its own enforcement action against an alleged polluter after a state agency has already initiated an action. Not surprisingly, many state agencies and members of the regulated community contest EPA's interpretation that most environmental statutes provide for overfiling. The recent Eighth Circuit decision, Harmon Industries, Inc. v. Browner ("Harmon")\(^5\) represents a landmark decision in resolving the validity of EPA's ability to overfile.\(^6\) In this closely watched case of first impression, the Eighth Circuit determined that EPA lacks authority to overfile under RCRA.\(^7\) This Note discusses the impact of the Harmon decision on EPA's ability to overfile under RCRA, as well as under the CWA and CAA.

I
BACKGROUND

RCRA embodies Congress' commitment to balance state and federal responsibility in the regulation of hazardous waste. Congress enacted RCRA to create a "cradle to grave"\(^8\) regulatory system for hazardous waste that imposes various regulations on generators, transporters, and facilities that treat, recycle, store, or dispose of hazardous waste.\(^9\) While initially placing administrative responsibilities with EPA, Congress intended that implementation of RCRA, like most other federal environmental laws, be delegated to state environmental agencies.\(^10\) Accordingly, the statute was designed to encourage states to

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\(^5\) 191 F.3d 894 (8th Cir. 1999).
\(^7\) See Harmon, 191 F. 3d at 902.
\(^9\) RCRA was originally enacted in 1976 as part of the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992(k) (1994).
\(^10\) See Jerry Organ, Environmental Federalism Part II: The Impact of Harmon, Smithfield, and Clean on Overfiling under RCRA, the CWA and the CAA, 30 ENV'TL. L. REP. 10,732, 10,742 (2000).
take primary responsibility for implementation and enforcement of the RCRA program.\textsuperscript{11}

Under Section 3006(b) of RCRA, a state can apply to EPA for authorization to administer and enforce a hazardous waste program.\textsuperscript{12} If the application is approved, the "[s]tate is authorized to carry out such program \textit{in lieu of} the Federal program."\textsuperscript{13} EPA's authorization allows states to issue and enforce permits for the treatment, storage, and disposal of waste.\textsuperscript{14} Section 3006(d) provides that any action taken by a state under a RCRA hazardous waste program has "the same force and effect" as an action taken by EPA.\textsuperscript{15}

Other sections of RCRA provide for federal enforcement responsibility. Section 3008(a)(1) states that "[EPA] may issue an order assessing a civil penalty for any past or current violation."\textsuperscript{16} Section 3008(a)(2) further provides that if a violation occurs in a state that is authorized to carry out a hazardous waste program, EPA "shall give notice to the State on which such violation has occurred prior to issuing an order or commencing a civil action."\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{11} See \textit{id}. States now have been delegated the authority to administer about seventy-five percent of major environmental programs. See Joel A. Mintz, \textit{Scrutinizing Environmental Enforcement: A Comment on a Recent Discussion at the AALS}, 30 \textit{ENVTL. L. REP.} 10,639, 10,640 (2000). Currently states conduct about ninety percent of all inspections and eighty to ninety percent of all environmental enforcement actions. \textit{id}. Forty-two states have been delegated CAA programs, 34 states have been delegated the CWA program, and 37 states have been delegated the RCRA program. See David L. Markell, \textit{The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide between Theory and Reality}, 24 \textit{HARV. ENVTL. L. REV.} 1, 32 (2000).
\item \textsuperscript{12} See 42 U.S.C. § 6926(b) (1994).
\item \textsuperscript{13} \textit{id}. (emphasis added).
\item \textsuperscript{14} \textit{id}. ("Such State is authorized to carry out such program in lieu of the Federal program ... and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste.").
\item \textsuperscript{15} 42 U.S.C. § 6926(d) (1994) (emphasis added) ("Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.").
\item \textsuperscript{16} 42 U.S.C. § 6928(a)-(b) (1994).
\item \textsuperscript{17} See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 898 (8th Cir. 1999). Section 6928(a) of RCRA states that:
\begin{enumerate}
\item Except as provided in paragraph (2), whenever on the basis of any information the [EPA] determines that any person has violated or is in violation of any requirement of the subchapter, the [EPA] may ... commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction. (2) In the case of a violation of any requirement of [RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of the title, the [EPA]
EPA enforcement responsibility includes revoking authorization of the delegated program if necessary. Following a public hearing and proper notification, EPA can withdraw authorization if it determines that the state is not administering and enforcing a program according to the regulatory requirements. EPA's position before Harmon was that it also retained the ability to overfile under RCRA. Overfiling occurs when EPA initiates an enforcement action for civil penalties at any time after a state begins an action on the same matter. EPA overfiles "where states fail to adequately assess penalties against violators of federal environmental laws."

Until 1997, EPA rarely overfiled under RCRA, and its authority to overfile was never seriously challenged. In 1997, however, EPA's Office of Inspector General recommended that EPA use overfiling as a way to ensure that states improve their economic recoveries. Since that recommendation, EPA has demonstrated an increased willingness to overfile. This has lead to a "recent flurry of cases" providing courts with the opportunity

shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section. 42 U.S.C. § 6928(a)(1)-(2) (1994).

19. See id. (stating that EPA can revoke authorization if "appropriate corrective action is not taken within a reasonable time").
20. Overfiling is described by EPA as "EPA's practice of taking enforcement actions (for example, fines, orders to correct violations, and other penalties) beyond what those states have already taken against individuals, companies, and other entities who have violated environmental laws." See "Putting Customers First"—EPA's Customer Service Plan, at http://www.epa.gov/opcustsv/report95/leaning.html.
21. See Miller, supra note 6, at 587 (stating that overfiling is most commonly done after a state concludes an enforcement action).
22. Brent A. Fewell, Decision Could Limit EPA's Power over States: Eighth Circuit Holds EPA Exceeded Authority by "Overfiling", 1 NO. 18 LAWYERS J. 3, 3 (1999); see Francis S. Blake, EPA Memorandum Effect on EPA of Enforcement Action Taken by State With Approved RCRA, http://www.gov/oeca/orc/rcra/cmp/050986.pdf (stating that "RCRA allows the Administrator to exercise complete prosecutorial discretion in deciding whether to commence federal enforcement when a state has taken action").
23. In fiscal years 1994 and 1995, EPA overfiled eighteen cases, only 0.1% of state enforcement actions. In 1997, EPA overfiled 4 cases. See Wiens & Hefner, supra note 6, at 6 (2000).
25. See Fewell, supra note 22, at 17.
to adjudicate the overfiling issue. Some courts directly avoided addressing overfiling in their decisions, while others sidestepped the question by resting their decisions regarding the validity of overfiling on the adequacy of the state enforcement activity.

II

HARMON INDUSTRIES V. BROWNER

Harmon is the first case to directly address the validity of EPA's overfiling policy under RCRA. The case arose after Harmon Industries ("Harmon") settled with the Missouri Department of Natural Resources ("MDNR") following the discovery of an improper waste disposal practice. Subsequently, EPA brought its own enforcement action, which the Eighth Circuit held to be invalid according to the language of RCRA and the principle of res judicata.

A. Factual and Procedural History

Harmon operates a plant in Missouri that assembles circuit boards for railroad equipment. From 1973 through 1987, maintenance workers at Harmon routinely discarded volatile solvent residue on the ground behind their plant. In November 1987, Harmon's personnel manager discovered this disposal practice and reported it to Harmon's management. Following this report, Harmon ceased the disposal activity and contacted the MDNR. The MDNR investigated and concluded that Harmon's past disposal practices did not pose a threat to either

27. See, e.g., United States v. Cargill, Inc., 508 F. Supp. 734 (D. Del. 1981) (holding that EPA's action to enjoin defendants from violating the terms of their discharge permit would be stayed in light of the state action for the same relief unless the defendant did not pursue the cleanup plan in good faith); United States v. Smithfield Foods, Inc., 191 F.3d 516 (4th Cir. 1999) (concluding that federal action is not barred under the CWA because the state enforcement scheme was not comparable).
28. See BKK Corp., 1984 WL 50073 (EPA, 1984) (holding that RCRA language did not allow EPA "unfettered authority" to overfile, but that EPA has the power to overfile when a state enforcement action is adequate); Martin Elecs., Inc., 1987 WL 109670 (EPA, 1987) (holding that EPA was not allowed to file because the state action was not inadequate).
29. See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 896 (8th Cir. 1999).
30. See id. at 894.
31. Id. at 896.
32. See id. at 897.
human health or the environment. Harmon and MDNR consequently created a clean-up plan, which Harmon implemented. Harmon also requested that MDNR not impose civil penalties, in part because of Harmon's voluntary self-reporting of the violation and full cooperation with MDNR. MDNR granted this request.

After failing to persuade MDNR to assess monetary penalties during implementation of the clean-up plan, EPA overfiled by initiating its own administrative enforcement action against Harmon, seeking over $2 million in penalties. EPA probably overfiled because it believed MDNR factored Harmon's cooperation and voluntary reporting too heavily in its lenient penalty assessment. Moreover, considering that MDNR and Harmon finalized their settlement after EPA began its enforcement action, it is also possible that EPA was frustrated by MDNR's overt disregard of its request to seek penalties.

In March 1993, while EPA's administrative action was pending, a Missouri state court judge approved a consent decree entered into by MDNR. The decree released Harmon from any claim for monetary penalties and acknowledged full accord and satisfaction. Harmon then litigated the EPA claim before an administrative law judge, who imposed a civil penalty against

33. See id.
34. The voluntary compliance plan detailed the way Harmon would clean up the contaminated land according to regulation requirements governing hazardous waste landfills. See id. at 896.
35. Id. at 897.
36. See Harmon Elecs., Inc., 1997 WL 133778, 5 (EPA 1997). EPA sent two letters notifying MDNR that it would pursue its own action if MDNR did not seek civil penalties. See id. The EPA requested $2 million dollars by calculating the penalties according to its four step Civil Penalty Policy. See Harmon Elecs., Inc., 1994 WL 730509, 14 (EPA 1994). This amount was reduced to $586,716 to reflect Harmon's self-reporting and cooperation as well as keeping the penalties assessed within five years after the initial filing of the complaint. See Harmon Elecs., Inc., 1997 WL 133778, 2 (EPA 1997) [hereinafter Harmon Elecs. 1997].
37. See Zahren, supra note 23, at 408; Rawson, supra note 3, at 486. EPA has stated that it sometimes overfiles "when a state fails to cite significantly prescribed penalties for violations..." Putting Customers First--EPA's Customer Service Plan, supra note 20.
38. See Zimmerman, supra note 26, at 6; see also Zahren, supra note 23, at 424 (listing various reasons EPA might overfile, including, personal relationships, personalities, staff availability, or pressure from the media, Congress, or the President).
Harmon of over $500,000. A three-person Environmental Appeals Board panel affirmed this decision.

Subsequently, Harmon filed a complaint in the Missouri Federal District Court challenging the Environmental Appeals Board's decision. The district court issued a summary judgment order finding that EPA could not impose civil penalties against Harmon. The court held that the plain language of RCRA did not provide for overfilling of an authorized state's enforcement of RCRA and that EPA's attempt to bring its own action against Harmon "contravened principles of res judicata" because MDNR and EPA have nearly identical interests.

B. The Eighth Circuit Invalidates Overfilling

In a unanimous holding, the Eighth Circuit affirmed the district court's decision. The Eighth Circuit articulated two alternative grounds for invalidating EPA's practice of overfilling under RCRA: (1) statutory analysis revealed that the plain language of RCRA did not allow for overfilling; and (2) res judicata barred EPA from bringing a civil enforcement action already concluded by the state.

1. Statutory Analysis

The Eighth Circuit held that EPA's interpretation of RCRA was inconsistent with the plain language of the statute. The


41. See Harmon Elecs. 1997, supra note 36. The case was heard before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein. Judge McCallum wrote the opinion, holding that "(1) RCRA authorized EPA to bring an action in an authorized State even if the State has taken action against the same respondent for the same violations; (2) State authorization . . . does not establish privity between EPA and the authorized State . . ." See id. at 34-35.


43. See id. at 997-98. To conclude that res judicata barred EPA's action, the court used a four-prong test from Hickman v. Elec. Keyboarding, Inc. 741 F.2d 230, 232 (8th Cir. 1984), to find that the parties were in privity. The interests of the two parties do not have to be identical, because it is enough that they assert the same legal rights. See id.

44. Harmon Indus., Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999) was heard by James M. Moody, United States District Judge for the Eastern District of Arkansas, sitting by designation, and circuit judges, Beam and Hansen. Judge Hansen wrote the opinion of the court.

45. See Harmon, 191 F.3d at 896-902.

46. See id. at 902-03.
court conceded that, under the *Chevron* standard of review, it must defer to EPA's interpretation of RCRA if it is consistent with the statute's plain language or, alternatively, if it is a reasonable interpretation of ambiguous language. To decide whether Congressional intent was clear and unambiguous, the Eighth Circuit determined that the "long-established plain language rule of statutory interpretation" required it to examine the text as a whole, considering "context, object, and policy."  

The court rejected EPA's argument that RCRA explicitly provides for overfiling by authorizing "either the state or EPA to enforce the state's regulations." According to EPA, this interpretation of RCRA is supported by Section 3008(a)(1) and (2), which provide that, after giving proper notice, EPA "may issue an order assessing a civil penalty for any past or current violation." Therefore, according to EPA, the agency is only required to notify the state before initiating its own action against an alleged violator.

Rejecting this interpretation, the court read Section 3008(a)(1) and (2) as giving EPA a "secondary enforcement right . . . only after state authorization is rescinded or if the state fails to initiate an enforcement action." The Eighth Circuit interpreted the notice requirement in Section 3008(a)(2) as an indication that Congress intended to give states the lead role in enforcement under RCRA. It urged that RCRA evinced Congress' intent "for an authorized state program to supplant the federal hazardous waste program in all respects."

The Eighth Circuit also rejected EPA's argument that the "in lieu of" language from RCRA § 3006(b) applied to determining which regulations are to be enforced in an authorized state, rather than who is responsible for enforcing those regulations.

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47. See *Chevron*, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984) (holding that "when reviewing a federal agency's interpretation of a federal statute, a court must defer to the agency's interpretation only if it finds that the agency's interpretation is consistent with the plain language of the statute or represents a reasonable interpretation of an ambiguous statute").

48. *Harmon*, 191 F.3d at 899 (citing *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996)).

49. Id. at 898.


52. Id. at 899.

53. See id. The court found the Congressional intent by harmonizing the language from Section 6928(a)(1) and (2) with Section 6926(b). See id.

54. See id.

55. "State is authorized to carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(b) (1994).
Furthermore, the court rejected EPA's reading of the "same force and effect" language in RCRA § 3006(a) to apply only to the issuing of permits and not to enforcement. In support of its position, EPA noted that "same force and effect" appears under the heading "Effect of State Permit," which indicates only that state-issued permits will have the same force and effect as permits issued by the federal government, not that it encompasses RCRA's enforcement mechanism.

The court was not persuaded by EPA's interpretation of the "in lieu of" and "same force and effect" language, holding that Congress did not intend competing enforcement actions between the federal government and the states. The court held that the plain language of RCRA clearly indicates that "[i]ssuance and enforcement are two of the functions authorized as part of the state's hazardous waste program," and that "any action" is not limited to issuance of permits. Moreover, the court explained that if Congress had intended to differentiate between the issuance and enforcement of permits it would have stated this clearly and unambiguously.

The court next addressed EPA's argument that RCRA's clear language in the citizen suit section, which does not allow for citizen suits when the same matter is being pursued by the government, should have been used to limit federal enforcement actions if that is what Congress really intended. The court rejected EPA's intra-textual argument, contending that the citizen suit language of RCRA § 7002(b)(1)(B) demonstrated that its reading of the plain language is logically consistent with the overall framework of RCRA. If Congress intended to limit EPA's authority, EPA argued, it would have done so by using similar limiting language as is found in RCRA's citizen suit provision. The court was not persuaded, stating that Congress need not use the same language in each section and that the "in lieu of" and "same force and effect" language is just as "unambiguous as the citizen suit provision" language. The Court also noted that

56. Harmon, 191 F.3d at 898.
57. See id. at 899.
58. See id. at 900.
59. Id.
60. See id.
61. See id.
62. Id.
63. See 42 U.S.C. § 6972(b)(1)(B) (1994) (providing that "if the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State," then a private citizen suit is not permitted).
64. Harmon, 191 F.3d at 900.
Congress limited the citizen suits to cases where EPA or the states had not taken enforcement action, which further demonstrated that Congress did not anticipate competing enforcement actions.  

Concluding that "through RCRA, [Congress] intended to vest primary enforcement authority in the states," evidenced the Eighth Circuit's decision to look to legislative history to interpret the statutory language. Citing the House Report, the court found that the legislative history "supports our interpretation of the statute—that the federal government's right to pursue an enforcement action under the RCRA attaches only when a state's authorization is revoked or when a state fails to initiate any enforcement action." 

Finally, the court rejected EPA's argument that public policy demands overfiling to ensure that states do a conscientious job of enforcing environmental laws and regulations, and to provide reasonable consistency in enforcement nationwide. In rejecting this argument, the court expressed more concern about "uncertainty in the public mind" regarding with whom companies should negotiate to finalize agreements; it also articulated its concern that those companies who do reach a final agreement with a state may later find it undermined by EPA. The court also stressed that EPA's overfiling policy results in inefficiency and confusion, which could cause "vastly different and potentially contradictory results."

The Eighth Circuit thus concluded that there was no support in RCRA's text or legislative history for allowing EPA to

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65. See id. at 900-01.
66. Id. at 901 (citing H.R. 1491, 94th Cong., at 24, reprinted in 1976 U.S.C.C.A.N. 6262, which states that it is "the Committee's intention that the States are to have primary enforcement authority and if at any time a state wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal, minimum requirements for both administering and enforcing the law"). The court continued citing the House Report stating, 

[(the House Report states that although the "legislation permits the state to take the lead in the enforcement of the hazardous wastes [sic] laws... the Administrator [of the EPA] is not prohibited from action in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan an implementing the federal hazardous waste program..."

Id.
67. Harmon, 191 F.3d at 901.
68. See id.
69. Id.
70. Id. at 996 (stating that overfiling could "predictably result in confusion, inefficiency, duplicative agency expenditures and thwart the public policy of early and non-judicial dispute resolution").
duplicate a state's enforcement authority with its own enforcement action. According to the court, EPA's interpretation "is not consistent with the plain language of the statute, its legislative history, or its declared purpose," and therefore is "an unreasonable interpretation to which we accord no deference."^71

2. *Res Judicata*

The court also invalidated EPA's ability to overfile through an alternative holding on res judicata grounds.^72 Following a four prong analysis under Missouri state law,^73 the court determined that the only disputed element was whether EPA and the states were one party, or "in privity," for enforcement purposes.^74 Privity is found where "two parties to two separate suits have a close relationship bordering on near identity."^75 Using RCRA as "the framework for the party identity analysis,"^76 the court held that RCRA's "in lieu of" and "same force and effect" language established that MDNR and EPA were in privity, as the interests of the two agencies were nearly identical. Therefore, res judicata precluded EPA's overfiling.^77

Following the Eighth Circuit's decision, EPA requested a rehearing in which it urged the court to consider the negative consequences its decision would have on the critically important federal-state partnership in environmental enforcement.^78 EPA was denied its request for a rehearing; the agency did not file a writ of certiori for review by the Supreme Court.^79

^71. *Id.* at 902.

^72. Principles of res judicata "require federal courts to give preclusive effect to the judgments of state courts whenever the state court from which the judgment emerged would give such effect." Hickman v. Elec. Keyboarding, Inc., 741 F.2d 230, 232 (8th Cir. 1984).

^73. In Missouri, res judicata requires: "(1) identity of the things sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made." Prentzler v. Schneider, 411 S.W.2d 135, 138 (Mo. 1966).

^74. *Harmon*, 191 F.3d at 902 (finding that in both the state and EPA action the parties sought to enforce RCRA, the complaints named Harmon as the defendant, and the actions involved the enforcement of regulations based upon identical facts and legal principles).

^75. *Id.* at 903 (citing United States v. Gurley, 43 F.3d 1188, 1197 (8th Cir. 1994)).

^76. *Id.*

^77. *See id.* at 903.

^78. EPA argued that the court had no statutory basis to restrict its enforcement authority, EPA's interpretation of the statute was reasonable, and the court did not properly apply principles of res judicata. See Wiens & Hefner, *supra* note 6, at 5.

^79. In EPA's request for rehearing, it stressed that the Eighth Circuit failed to sufficiently consider the impact its decision would have on the relationship between
III
ANALYSIS

The Eighth Circuit's conclusion that no support exists in the text or legislative history to allow EPA to overfile was incorrect. While the court's reading of the "in lieu of" and "same force and effect" language is consistent with the plain language of the statute, the court disregarded other text, legislative history, and policy considerations that favored EPA's position. 80

Because the court relied so heavily on the plain language of RCRA, the impact of the court's holding should be limited to RCRA. Following this decision, overfiling under the CWA and CAA is still valid, but debate regarding the appropriate division of authority between EPA and state agencies will continue.

A. Analytical Flaws in the Harmon Decision

Although some commentators have concluded that the Harmon decision is well grounded in the language of RCRA and makes practical sense, 81 the court could have just as easily found the statutory language ambiguous and given deference to EPA's interpretation. The Eighth Circuit focused on a limited amount of legislative history, ignoring other parts of the

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80. Courts tend to show great deference to agencies because those agencies will bring expertise to the issue. See Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

81. See e.g., Ridgeway M. Hall, Jr., Harmon Limits RCRA Enforcement to One Bite, 29 ENVTL. L. REP. 10,781, 10,784 (1999); Organ, supra note 10, at 10,742.
legislative history when it undermined the conclusion of the court. The court stated that it "must defer to the agency's interpretation only if it finds that the agency's interpretation is consistent with the plain language of that statute or represents a reasonable interpretation of an ambiguous statute." Following Chevron's approach, a court first looks to see if the statute is ambiguous, and if so, uses a deferential standard to determine if EPA's interpretation was reasonable. The Eighth Circuit determined the reasonableness of EPA's interpretation of the statute after employing an elaborate "plain language" analysis to find that EPA's interpretation was logically inconsistent.

The Eighth Circuit's conclusion that there "is no support either in the text of the statute or the legislative history" for EPA's overfiling practice is overstated in light of the substance of Section 3008(a)(1). This section states that "[EPA] may issue an order assessing a civil penalty for any past or current violation," and when read alone, explicitly allows EPA to bring its own enforcement action.

In addition, the court failed to fully consider the legislative history. The court looked to the House Report to show that Congress meant to limit federal enforcement power when a state has acted. But, the court made no mention of the Senate Report that indicates Congressional intent to model division of EPA and state responsibilities after similar sections in the CAA and the CWA. Both of these statutes allow EPA to bring its own enforcement action.

Finally, as part of its plain language analysis, the Eighth Circuit considered policy arguments from both sides. It

82. The United States Supreme Court has stated that to uphold EPA's interpretation of a statute, the Court "need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." Chem. Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985).

83. See Zahren, supra note 23, at 402.

84. Harmon Indus., Inc. v. Browner, 191 F.3d 894, 899 (8th Cir. 1999).


86. See Harmon, 191 F.3d at 899.

87. See S. Rep. No. 988, 94th Cong., at 17 (1976) ("In any regulatory program involving Federal and State participation, the allocation or division of enforcement responsibilities is difficult. The Committee drew on the similar provisions to the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972.").

88. The CWA states that "where the [EPA] determines . . . that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, [EPA] may proceed in a court of competent jurisdiction . . . ." 33 U.S.C. § 1342(h) (1994). The CAA provides that EPA may bring its own action 30 days after notifying the violator and the state. See 42 U.S.C. § 7413(a)(2)(C) (1994).
ultimately disregarded EPA’s viewpoint in favor of pro-business concerns—reflected in six amicus curiae briefs—urging the Eighth Circuit to affirm the district court’s decision. Considered that overfilling under RCRA could result in confusion and inefficiency, the court predicted overfilling would leave companies uncertain about with whom—the state or federal agency—they should negotiate. Such considerations regarding overfilling impacts on regulated entities and state agencies are important and often voiced, but the Eighth Circuit seemed too willing to support its holding with these considerations without considering EPA’s justifications for overfilling. While this balancing of policy would be better left to Congress, it is well supported that judgements of “policy and principle should be made by administrators rather than judges.”

The right to overfile is necessary to ensure that states conscientiously enforce environmental laws and regulations, and

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89. Approximately 30 different organizations filed six amicus curiae briefs, including the United States, state chambers of commerce, industrial trade associations, and the Texas Natural Resources Conservation Commission. No amicus briefs were filed in support of EPA. See Harmon, 191 F.3d at 997 n.3.

90. Id. at 996 (stating that overfilling could “predictably result in confusion, inefficiency, duplicative agency expenditures and thwart the public policy of early and non-judicial dispute resolution”).

91. See Rawson, supra note 3, at 484 (reasoning that “[r]egulated entities become concerned that, without involving the EPA, they cannot be sure a compliance schedule or a penalty amount agreed to by a state is final”); Miller, supra note 15 at 601 (suggesting that industries might also lose the incentive to self-report after voluntary audits); Jolley, supra note 1, at 196, 209 (noting that operators’ costs of defending these actions increase substantially and that states believe that they do a better, quicker job in environmental enforcement); Hubert H. Humphrey & LeRoy C. Paddock, The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship, 14 HARV. ENVTL. L. REV. 7, 13 (1990) (arguing that duplicating enforcement effort results in wasting limited government resources); see also, Marc Melnick & Elizabeth Willes, Watching the Candy Store: EPA Overfilling of Local Air Pollution Variances, 20 ECOLOGY L.Q. 207, 252 (1993) (urging that “multiple review consumes precious time and resources and that enforcement at the state level allows for more access to state courts and can be more tailored to the needs of each state”); Robert R. Kuehn, The Limits of Devolving Enforcement of Federal Environmental Laws, 70 TUL. L. REV. 2373, 2382-83 (1996) (stating that states have greater awareness of local conditions and “may facilitate more flexible, tailored enforcement programs that take into account local geographic, economic, and social conditions and focus on the area’s most severe enforcement problems”); Wiens & Hefner, supra note 6, at 6 (arguing that tensions are likely to increase between federal and state regulators).

92. Cass R. Sunstein, Law and Administration after Chevron, 90 COLUM. L. REV. 2071, 2088 (1990). Sunstein states that “Chevron is best understood and defended as a frank recognition that sometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual consideration of various kinds, including judgments about how a statute is best or most sensibly interpreted.” See id. at 2087-88.
to provide reasonable consistency in enforcement nationwide. Overfiling helps ensure that states maintain the minimum standard by enabling EPA to step in where states inadequately and inconsistently administer and enforce the federal programs that have been delegated to them. Overfiling effectively deals with interstate pollution and the "race-to-the-bottom" effect, which are frequently cited as justification for EPA's policy. If done sparingly and strategically, overfiling can achieve deterrence and uniformity.

Federal oversight alleviates concerns that states are inadequately enforcing federal environmental laws for social, political, or economic reasons. In addition, there are also instances where a state agency might not want to adversely enforce a regulation against a particular company for political reasons and could actually request that EPA overfile. Furthermore, the mere threat of overfiling can be a "powerful weapon and bully-pulpit of sorts through which EPA has been able to achieve more vigorous state enforcement."

By determining the plain language meaning through considerations of statutory construction, legislative history, and policy arguments, the court held that the statute was

93. See Zahren, supra note 22, at 414, 418; see also Percival, supra note 3, at 1171-72 (arguing that overfiling ensures a minimal level of protection for citizens regardless of where they live or travel).

94. See Zahren, supra note 22, at 420. Race to the bottom occurs when competition leads to a less efficient or otherwise desirable outcome. Viewed in the environmental law context, competition between states to attract new industry or keep companies from moving to another state would result in "relaxation of state environmental standards that also results in lower net social welfare." Scott R. Saleska & Kirsten H. Engel, "Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard Setting, 8 CORNELL J.L. & PUB. POL'Y 55, 62 (1998) (reviewing the race to the bottom debate and concluding from the available evidence that some states are apparently willing to relax standards for little or no benefit).

While there has been considerable debate in the literature regarding whether the race to the bottom is a valid justification for federal oversight of environmental enforcement, the traditional conclusion that "states err on the side of promoting industry and polluting the environment" seems to hold true. See Percival, supra note 3, at 1172. The wide belief that federal standards can help states resist industry pressures to relax regulatory standards is well supported. See Joshua D. Sarnoff, The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection, 7 DUKE ENVT'L. L. & POL'Y F. 225, 232 (1997) (stating that "federal regulation is more likely than state or local regulation to increase social welfare").

95. See Swire, supra note 4, at 69 (concluding that federal environmental regulation contributes to the overall goal of meeting citizen preference).

96. See Zahren, supra note 23, at 415.

97. See id. at 416.

98. See id. at 413.

unambiguous on the overfiling issue. Had the Eighth Circuit factored more heavily the contradictory legislative history and policy, it could have concluded that the language was ambiguous and no clear Congressional intent was revealed. It would have then been compelled to follow a deferential standard to determine if EPA's interpretation of RCRA was reasonable.

B. Harmon's Impact on EPA's Ability to Overfile

The Harmon decision significantly affects EPA's ability to overfile under RCRA. EPA, however, still retains several options to attempt to preserve its overfiling power in specific cases. First, because EPA made a tactical decision not to appeal the Eighth Circuit's holding, in other circuits, it can still fight each new overfiling case under RCRA on its merits. For example, EPA successfully distinguished Harmon in United States v. Elias. There, the Idaho District Court held that EPA was allowed to bring criminal sanctions under RCRA when a state expressly declined to authorize state sanctions. However, while there is certainly room for lawyering, the Harmon decision could affect the interpretation of other courts.

Second, because the Eighth Circuit did not address the validity of EPA overfiling when a state has not yet concluded its enforcement action, overfiling under RCRA could also be considered valid if EPA intervened sooner in the process. EPA

100. See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 899, 901 (8th Cir. 1999).
101. See Fewell, supra note 22, at 17. It is conceivable that EPA could fight out other cases in other circuits on their merits to produce a different outcome. In United States v. Rohm & Hass, Co., the EPA did not have the authority under CERCLA to recover its oversight costs for privately financed cleanup actions, but EPA has been able to effectively marginalize the impact of this by refusing to settle with private parties for cleanup action at CERCLA sites unless the parties agree to reimburse it for oversight costs. 2 F.3d 1265 (3rd Cir. 1993).
103. After the defendant had not properly disposed of cyanide waste, the EPA was allowed to seek federal criminal penalties that had no state counterpart in the approved state RCRA program in Idaho. The court found Harmon distinguishable for two reasons: "First, Harmon was not a criminal action; it was an appeal from an administrative proceeding involving the imposition of civil fines. Second, Harmon was not faced with a situation as exists here, where the EPA, in approving a state hazardous waste program, expressly declined to authorize the state sanctions." Id. at *1.
104. See Wiens & Hefner, supra note 6, at 7.
105. See Hall, supra note 81, at 10,785. EPA's becoming involved earlier in the process would also be beneficial, because it would allow industry to avoid additional burdens and uncertainty and it would be more efficient. See Steven D. Cook, State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws:
would still be required to avoid the res judicata bar, however, which might be difficult considering that the court grounded its Harmon determination on the fact that EPA and MDNR were in privity under RCRA.\textsuperscript{106} Therefore, in the limited context of RCRA, it seems that Harmon "redefines EPA's future involvement in RCRA enforcement actions."\textsuperscript{107}

Since EPA interprets nearly all federal environmental statutes to provide for overfiling, Harmon has the potential to affect EPA's enforcement authority under the CWA and CAA. Nevertheless, successful application of Harmon is unlikely due to statutory differences; the CWA and the CAA contain relatively clearer and much broader language than RCRA.\textsuperscript{108} For example, the language of the CWA allows EPA to enforce state permits if the state does not initiate "appropriate enforcement action" within thirty days of a notice of violation from the EPA.\textsuperscript{109} The CAA provides EPA with similar responsibility. Under the CAA, EPA can initiate enforcement proceedings against the violator of a state implementation plan with thirty days prior notice.\textsuperscript{110}

There is still the possibility, however, that Harmon's res judicata reasoning could affect EPA's ability to overfile in other areas of regulation. But the Eighth Circuit's opinion regarding res judicata relies heavily on the language found in RCRA, "so it may be of limited value in other contexts."\textsuperscript{111} Moreover, a defendant would have to establish that the state agency and EPA are in privity, which may be difficult to do considering this claim has only been successfully argued in one instance.\textsuperscript{112}

In two recent cases, courts declined to apply Harmon to the CWA and CAA. EPA successfully distinguished Harmon in U.S. v.
City of Youngstown,\textsuperscript{113} where the state's action against the city for violation of the CWA did not preclude similar enforcement action by EPA. In Youngstown, the United States brought actions against a city under the CWA for violating conditions and limitations of National Pollutant Discharge Elimination System permits.\textsuperscript{114} The city, relying exclusively on Harmon, argued that enforcement regime under the CWA closely paralleled RCRA.\textsuperscript{115} The court was not persuaded, basing it holding on Section 402(i) of CWA, titled "Federal Enforcement Not Limited," which reads that "[n]othing in the section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319," which grants enforcement authority to the EPA.\textsuperscript{116}

EPA also successfully distinguished Harmon in United States v. LTV Steel Co., Inc,\textsuperscript{117} which arose from a polluter's various violations of the CAA. The district court held that the polluters' settlement with a city environmental enforcement agency did not preclude EPA from seeking penalties for CAA violations in connection with the same conduct, stating that unlike RCRA, the CAA "contains language in its enforcement section which seems to anticipate overfiling."\textsuperscript{118} For example, it noted that the "[a]ct states that 'in determining the amount of any penalty to be assessed under this section . . . , the court shall take into consideration . . . payment by the violator of penalties previously assessed for the same violation.'"\textsuperscript{119} The court further noted EPA's consistent interpretation of the CAA to allow for concurrent enforcement on both state and federal levels.\textsuperscript{120} The court summarized its statutory analysis by stating that:

\begin{itemize}
  \item \textsuperscript{113} 109 F. Supp. 2d 739 (N.D. Ohio, 2000).
  \item \textsuperscript{114}  Id. NPDES is found in 33 U.S.C §§ 1319, 1342(i) (1994).
  \item \textsuperscript{115} Therefore, the defendants argued that EPA "is precluded from bringing a separate enforcement action where a 'primacy state' . . . is pursing a separate enforcement action." See id. at 740. A primacy state is a "state authorized by the USEPA to enforce an environmental regulatory scheme." Id.
  \item \textsuperscript{116} 33 U.S.C. § 1342(i) (1994). The court made clear its position that "[EPA]'s enforcement authority is not curtailed merely because [EPA] grants enforcement authority to a state agency." City of Youngstown, 109 F. Supp. 2d at 741.
  \item \textsuperscript{117} 118 F. Supp. 2d 827 (N.D. Ohio, 2000).
  \item \textsuperscript{118} Id. at 833. LTV Steel urged that its settlement with the city precluded the EPA from seeking penalties for the same conduct because overfiling is not allowed under the CAA and is barred by res judicata. But the court, noting the absence of the "in lieu of" and "same force and effect" language from the CAA, was not persuaded. See id. at 832.
  \item \textsuperscript{119} Id. at 833; see 42 U.S.C. § 7413(e) (1994).
  \item \textsuperscript{120} See LTV Steel, 118 F. Supp. 2d at 834. The court also stressed that overfiling allows EPA to effectively enforce federal laws "without the need to publicly declare the state in derogation of its enforcement duties or displace the state entirely in the enforcement scheme." Id. at 835. The court further reasoned that "[l]ocal and federal
the language of the Act, federal precedent, deference to the EPA, and common sense all lead to the conclusion that it is permissible for the EPA to seek penalties against a defendant for a violation of the [CAA] even after that defendant has agreed to pay a penalty to a local environmental enforcement agency in connection with the same conduct.\(^{121}\)

**CONCLUSION**

Assuming that *Harmon* does limit EPA's ability to overfile, the agency retains two other options to ensure viable environmental protection under RCRA. At one extreme, EPA could defer to the state's discretion to administer and enforce environmental actions. This full faith and credit approach would leave citizen suits as the only substantial check on a state agency's enforcement activities.\(^{122}\) Obviously, EPA is not comfortable with giving states total control over RCRA enforcement.\(^{123}\)

At the other extreme, EPA has the ability to revoke entire state programs, thereby taking all enforcement authority away from the state and giving it back to EPA.\(^{124}\) However, EPA has
never revoked a delegated state program, as revocation is considered a huge sanction that is extreme, inefficient, and impractical. EPA can also continue to threaten states with revocation to make them conform to EPA’s wishes, but it is unclear how long empty threats will remain an adequate source of deterrence.

Because neither of these options appears to be adequate, it is likely that EPA will strategically litigate in an effort to narrow the holding of Harmon. For now, the Harmon decision provides a clear limitation on EPA’s ability to overfile under RCRA. It also remains an example of the difficulty in deciding what the appropriate balance of responsibility should be between states and EPA. While both systems are needed for effective and efficient environmental enforcement, dividing the responsibilities to foster cooperation remains an elusive task.

extremely inefficient); see also, Percival, supra note 3, at 1175 (noting that EPA has little incentive to “assume programs that would add to it’s own responsibilities at a time when it is having difficulty finding funds to implement its existing programs”). It would also invoke “fierce tension” between the state and the EPA. See Zahren, supra note 23, at 382.

125. See Zahren, supra note 23, at 415 (considering revocation to be a “hydrogen bomb response”); see also, Percival, supra note 3, at 1175 (concluding that overfiling is “too blunt an instrument to be effective”).

126. See Jolley, supra note 1, at 207.

127. See Zahren, supra note 23, at 391; see also Mintz, supra note 10, at 10,642 (quoting EPA administrator, Steve Herman, “the system only works when there is both”). Federal and state governments are “equals sharing the responsibility and power of enforcement our Nation’s environmental laws.” Katherine C. Kellner, Separate but Equal: Double Jeopardy and Environmental Enforcement Actions, 28 ENVTL. L. 169, 169 (1998). Dividing responsibilities between state and federal government to implement and enforce federal environmental laws is complicated, because these laws create a relationship where states “paradoxically remain indispensable partners” with the federal government. John P. Dwyer, The Practice of Federalism under the Clean Air Act, 54 Md. L. Rev. 1183, 1190 (1995).