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## CASENOTE

## REASSESSING “OVERFILING”—CAN THE EPA PUNISH VIOLATORS UNDER RCRA WHEN A STATE HAS ALREADY TAKEN ACTION?

*United States v. Power Engineering Co.*<sup>1</sup>

## I. INTRODUCTION

Put simply, overfiling occurs when two agencies take action in response to one violation of the law.<sup>2</sup> These two agencies often include the United States Environmental Protection Agency (“EPA”), and a state agency that is authorized to administer and enforce a hazardous waste program within the state’s borders. When a person or organization violates hazardous waste laws, the Resource Conservation and Recovery Act (“RCRA”) permits both agencies to take action.<sup>3</sup> However, RCRA does not make clear whether one agency<sup>4</sup> is permitted to take action once the other agency<sup>5</sup> has already taken action for the same incident. In 1999, the Eighth Circuit held in *Harmon Industries, Inc. v. Browner*<sup>6</sup> that RCRA does not allow the EPA to overfile.<sup>7</sup> However, the EPA and federal district courts did not uniformly follow this decision throughout the country.<sup>8</sup> In *US v. PEC*, the Tenth Circuit limited *Harmon* and held that in most situations RCRA allows the EPA to overfile.<sup>9</sup>

## II. FACTS AND HOLDING

This case arose when the EPA filed suit against Power Engineering Company (“PEC”).<sup>10</sup> The EPA demanded financial assurances regarding PEC’s liability for several hazardous waste violations and demanded compliance with the applicable Colorado hazardous waste laws.<sup>11</sup> The suit was filed in addition to a suit that the Colorado Department of Public Health and Environment (“CDPHE”) had previously filed against PEC; the suits were identical except that CDPHE’s did not demand financial assurances.<sup>12</sup> This case dealt with whether the EPA may “overfile” a state enforcement action.<sup>13</sup>

<sup>1</sup> 303 F.3d 1232 (10th Cir. 2002).

<sup>2</sup> See *infra* n. 13.

<sup>3</sup> For a further explanation of the “action” the EPA and State agency can take, see *infra* n. 35-36.

<sup>4</sup> This “overfiling” agency is almost always the EPA.

<sup>5</sup> This “overfiled” agency is almost always the authorized State agency.

<sup>6</sup> 191 F.3d 894 (8th Cir. 1999).

<sup>7</sup> *Id.* at 902.

<sup>8</sup> See *infra* nn. 74-84 OR Section III-C.

<sup>9</sup> See *infra* nn. 119-124.

<sup>10</sup> The EPA also named as defendants Redoubt, Ltd., (the company that owned the land and buildings that PEC leased) and Richard Lilienthal (an officer of both PEC and Redoubt, Ltd., as well as the sole shareholder of both companies). *PEC*, 303 F.3d at 1235.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1235-36.

<sup>13</sup> The 10th Circuit defined “overfiling” in this context as “the EPA’s process of duplicating enforcement actions.” *Id.* at 1236. The District Court below said overfiling occurs when “the federal government initiates

When CDPHE discovered that PEC<sup>14</sup> was discharging hexavalent chromium into the Platte River,<sup>15</sup> CDPHE inspected PEC's activities and determined that PEC's discharge was also contaminating groundwater in Denver.<sup>16</sup> It further found that PEC was treating, storing, and disposing of hazardous waste without a permit.<sup>17</sup> CDPHE brought initial action to force compliance.<sup>18</sup> Two years later it issued a Final Administrative Compliance Order requiring PEC to comply with hazardous waste laws, implement a cleanup plan for chrome-contaminated soil, conduct frequent inspections, and submit periodic reports.<sup>19</sup> When PEC failed to comply, CDPHE filed suit in Colorado state court to force compliance.<sup>20</sup> The Colorado state court held that the Final Administrative Compliance Order was valid.<sup>21</sup>

Before CDPHE had issued its Final Administrative Compliance Order, however, the EPA requested that CDPHE also demand financial assurances from PEC.<sup>22</sup> CDPHE declined to do so.<sup>23</sup> As a result, the EPA filed its own suit against PEC in the United States District Court for the District of Colorado, demanding compliance with CDPHE's Administrative Compliance Order as well as financial assurances.<sup>24</sup>

The EPA and PEC filed cross-motions for summary judgment.<sup>25</sup> PEC claimed that the EPA did not have the authority to overfile a state enforcement action.<sup>26</sup> The district court granted summary judgment for the EPA and held that the overfiling was permissible, and that PEC must provide financial assurances.<sup>27</sup> The Tenth Circuit upheld this decision, reasoning that when the administering agency reasonably interprets an ambiguous statute, the court should defer to the agency's interpretation.<sup>28</sup> Applying the reasoning to the facts of the present case, the court held that when the agency interprets an ambiguous statute to permit overfiling, and the case is not one in which *res judicata* prohibits overfiling,<sup>29</sup> the court will find that the overfiling is permissible.<sup>30</sup>

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an enforcement action after a state government begins an action on the same matter." *U.S. v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1054 (D. Colo. 2000).

<sup>14</sup> PEC is a metal refinishing and chrome electroplating business, which has operated in Denver, Colorado, since 1968. It produces over 1000 kilograms of waste each month, including arsenic, lead, mercury, and chromium. *PEC*, 303 F.3d at 1235.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The first notice of violation was issued on June 11, 1993. CDPHE later issued an Initial Compliance Order in July 1994. *Id.*

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.* The Colorado state court also found that CDPHE's Administrative Penalty Order requiring PEC to pay \$1.13 million was enforceable. *Id.*

<sup>22</sup> *Id.* This demand was pursuant to the RCRA and corresponding Colorado statutes. *Id.* See 42 U.S.C. 6901-6992(k); 6 Colo. Code Regs. 1007-3 *et. seq.* Plaintiff United States believed that Defendant Lilienthal was trying to divest himself of his assets and might "leave the country, declare bankruptcy, or liquidate Defendant PEC." *PEC*, 125 F. Supp. 2d at 1053 (D. Colo. 1999). Therefore it requested CDPHE seek financial assurance from PEC in the amount of \$3,500,000 pursuant to 6 Colo. Code Regs. 1007-3 Sec. 266. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1054.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* The district court also held that PEC had to obtain liability coverage for accidental occurrences. *Id.*

<sup>28</sup> *Id.* at 1237.

<sup>29</sup> *Id.* at 1241.

## III. LEGAL BACKGROUND

## A. Overfiling before Harmon

Both the EPA and state environmental agencies enforce hazardous waste laws.<sup>31</sup> Individual states may develop and administer their own hazardous waste programs after they receive EPA approval.<sup>32</sup> When the EPA approves a program, the “State is authorized to carry out [its] program in lieu of the Federal program...and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . . .”<sup>33</sup> Further, “[a]ny action taken by a State under a hazardous waste program authorized under [RCRA] shall have the same force and effect as action taken by the [EPA] . . . .”<sup>34</sup>

Upon discovering that a person or an entity is violating hazardous waste laws, the EPA or state may assess civil penalties, require future compliance, or both.<sup>35</sup> The EPA or state may also file a lawsuit in the proper United States district court to seek the appropriate relief.<sup>36</sup> However, if the EPA takes action in a state with an authorized program, the EPA must first provide the state with notice.<sup>37</sup>

After authorizing a state program, the EPA can withdraw its authorization if the EPA determines that the state has failed to take appropriate enforcement action in accordance with the requirements of RCRA.<sup>38</sup> However, the EPA has rarely, if ever, exercised this option.<sup>39</sup> The EPA has been more likely to exercise a second option—overfiling.

There are two general issues raised in questions of overfiling.<sup>40</sup> The first deals with whether the EPA has the statutory authority to take or continue enforcement action when a state with an approved program has already taken action.<sup>41</sup> The EPA has historically interpreted the RCRA statute to mean that the EPA has the authority to overfile.<sup>42</sup> In 1986, the legal counsel to the EPA Administrator rendered a legal opinion on this issue and concluded that RCRA authorizes the EPA to bring an action in an authorized state even if the state has already prosecuted the same person for

<sup>30</sup> *Id.*

<sup>31</sup> See 42 U.S.C. § 6902(a)(7) (2000).

<sup>32</sup> 42 U.S.C. § 6926(b) (2000).

<sup>33</sup> *Id.*

<sup>34</sup> 42 U.S.C. § 6926(d).

<sup>35</sup> 42 U.S.C. § 6928(a)(1) (2000); 42 U.S.C. § 6926(d).

<sup>36</sup> *Id.*

<sup>37</sup> 42 U.S.C. § 6928(a)(2).

<sup>38</sup> See 42 U.S.C. § 6926(e). The EPA must first provide notice and offer the State a chance to take corrective action. *Id.*

<sup>39</sup> See U.S. GAO, *EPA and the States—Environmental Challenges Require a Better Working Relationship*, GAO/RCED-95-64, 18 (1995).

<sup>40</sup> In the 1970s, the first Federal appellate court to address the issue of EPA overfiling was the Sixth Circuit, in *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). In that case, the court discussed overfiling hypothetically in a footnote, stating that “It would seem to us that the court which first acquired jurisdiction of enforcement proceedings would have exclusive jurisdiction to proceed to determine the litigation, and its judgment would be *res judicata* of the issues litigated.” *Id.* at 167.

<sup>41</sup> See e.g. *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 898 (8th Cir. 1999).

<sup>42</sup> The EPA is the agency that Congress has charged with the administration of RCRA. See 42 U.S.C. § 6912 (2000). Because of this express charge, any statutory silence or ambiguity shall result in judicial acceptance of the agency’s interpretation of the statute, provided the interpretation is not arbitrary, capricious, or an abuse of discretion. *Chevron U.S.A., Inc. v. Nat. Resources Defense Council*, 467 U.S. 837, 843 (1984).

the same violations.<sup>43</sup> Numerous agency decisions by the Environmental Appeals Board since that time have affirmed this position.<sup>44</sup>

The Federal appellate courts, however, have not agreed with the EPA. In *Northside Sanitary Landfill, Inc. v. Thomas*,<sup>45</sup> the Seventh Circuit addressed whether the EPA could bring an enforcement action when a state had already taken action. The court stated, in dicta, that "...so long as the State has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement."<sup>46</sup> Thus, until *Harmon*, no clear answer existed as to whether the EPA had the statutory authority to overfile when a state had already taken action.

The second main overfiling issue is whether res judicata prohibits the EPA from overfiling under RCRA.<sup>47</sup> Under the doctrine of res judicata, "a final action on the merits bars further claims by parties or their privies based on the same cause of action."<sup>48</sup> No federal appellate court before *Harmon* had decided an overfiling case involving RCRA, but the Ninth Circuit did decide the issue with regard to the Clean Water Act.<sup>49</sup> That court held in *ITT Rayonier* that res judicata bars a federal enforcement action following a resolution of the same issues in state court.<sup>50</sup> The *ITT Rayonier* Court held that "where a state court has entered a final judgment on an identical issue, the EPA cannot invoke [the corresponding federal statute] to avoid any preclusive effect that judgment may have."<sup>51</sup> Further, the court stated that "the delicate partnership" between the federal and state governments would be strained if the Federal government could re-litigate identical claims that states have already litigated.<sup>52</sup>

### B. Overfiling under *Harmon*

*Harmon Industries, Inc. v. Browner* was the first federal appellate court decision to address the issue of overfiling under RCRA in the context of consecutive enforcement actions.<sup>53</sup> In that case, decided in 1999, the Eighth Circuit held that the EPA lacked the statutory authority to overfile under RCRA.<sup>54</sup> The *Harmon* case involved a Missouri company that was dumping hazardous waste behind its facility, prompting the Missouri Department of Natural Resources to take action.<sup>55</sup> While

<sup>43</sup> See *In re: Bil-Dry Corp.*, 2001 EPA App. LEXIS 1, \*31.

<sup>44</sup> See e.g. *In re: Gordon Redd Lumber Co.*, 1994 EPA App. LEXIS 29; *In the Matter of: Southern Timber Prod., Inc.*, 1990 EPA App. LEXIS 23.

<sup>45</sup> 804 F.2d 371 (7th Cir. 1986).

<sup>46</sup> *Id.* at 382.

<sup>47</sup> See e.g. *Harmon* 191 F.3d at 902.

<sup>48</sup> *U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980) (quoting *Montana v. U.S.*, 440 U.S. 147, 153 (1979)).

<sup>49</sup> In the context of overfilling, RCRA and the Clean Water Act are very similar statutes. Both represent environmental programs that the EPA administers by giving a substantial amount of responsibility to the states, while still retaining the ability to bring its own enforcement action. Cf. 33 U.S.C. § 1344(q) (2000).

<sup>50</sup> *ITT Rayonier*, 627 F.2d at 1002.

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

<sup>52</sup> See *id.* at 1001 (quoting *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1284 (5th Cir. 1997)).

<sup>53</sup> See *Harmon*, 191 F.3d at 898.

<sup>54</sup> See *id.* at 902. It also established a fact pattern in which *res judicata* barred the EPA from overfiling under RCRA. *Id.* at 902-04.

<sup>55</sup> *Id.* at 896-97.

the company was cooperating with the state in developing a cleanup plan, the EPA instituted an enforcement action of its own.<sup>56</sup>

The court first examined whether the RCRA statute gives the EPA the authority to overfile.<sup>57</sup> The court held it did not give such authority, basing its holding on six factors.<sup>58</sup> First, because “the *administration and enforcement* of ... program[s] are inexorably intertwined,” the “in lieu of” language found in 42 U.S.C. § 6926(b) reaches the statute as a whole.<sup>59</sup> This means that an authorized state program should operate wholly “in lieu of” the EPA’s regulatory program, that administration and enforcement are not separable such that the state could control one and the EPA control the other.<sup>60</sup> Second, the fact that the EPA has the authority to withdraw authorization for a state program evinces Congress’ intention that states enforce their own hazardous waste programs.<sup>61</sup> Third, harmonizing Sections 6928(a)(1) and (2)<sup>62</sup> with Section 6926(e)<sup>63</sup> manifests a Congressional intent that the EPA must withdraw authority before it can bring an action of its own.<sup>64</sup> Fourth, the “same force and effect” language of Section 6926(d)<sup>65</sup> applies to the statute as a whole, because if Congress had wanted it to apply only to enforcement and not administration, it would have made this desire clear.<sup>66</sup> Fifth, the word “or” used in Section 6972(b)(1)(B) of RCRA indicates that Congress did not contemplate competing enforcement actions between the EPA and the states.<sup>67</sup> Sixth, legislative history shows Congress intended to vest primary enforcement authority for RCRA in the states.<sup>68</sup>

The court also examined whether *res judicata* barred the EPA from overfiling.<sup>69</sup> The court found that, because the state program operated “in lieu of” the federal program, the state’s action has “the same force and effect” as the federal action, and thus, “the two parties stand in the same relationship to one another.”<sup>70</sup> As privity exists when two parties advance the same legal right,<sup>71</sup> and Missouri advanced the same legal right under RCRA as the EPA did under RCRA, the identity of the parties was the same, and *res judicata* therefore foreclosed the EPA’s enforcement action against Harmon.<sup>72</sup>

<sup>56</sup> *Id.* at 897.

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

<sup>58</sup> *Id.* at 902.

<sup>59</sup> *Id.* at 899. (emphasis added) *See supra* n. 33.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See supra* nn. 35 and 37. This section addresses the EPA’s ability to bring enforcement actions.

<sup>63</sup> *See supra* n. 38. This section addresses the EPA’s ability to withdraw a State program’s authorization. The *Harmon* court refers to this as Section 6926(b), but Section 6926(e) actually deals with the EPA’s ability to withdraw authorization for a State program. *See Harmon*, 191 F.3d at 899.

<sup>64</sup> *Harmon*, 191 F.3d at 899.

<sup>65</sup> *See supra* n. 34.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 900-901. In 42 U.S.C. § 6972(b)(1) (2000), individual citizens are forbidden from taking any action “if the [EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court...to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.” (emphasis added).

<sup>68</sup> *Harmon*, 191 F.3d at 901.

<sup>69</sup> *Id.* at 902.

<sup>70</sup> *Id.* at 903.

<sup>71</sup> *Id.*

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

### C. Overfiling after Harmon

Even after the Eighth Circuit held overfiling to be invalid in *Harmon*, the EPA maintained that it still had the ability to overfile.<sup>73</sup> In a 2001 Environmental Appeals Board decision, the EPA said, “[i]t is well settled that, even when the authorized State has taken action, RCRA nevertheless authorizes the [EPA] to take its own action. *Harmon* has not offered any persuasive reasons to open this well-established reading of the statute, and we decline to do so.”<sup>74</sup>

Some district courts have helped the EPA maintain its pro-overfiling stance. In *U.S. v. Murphy Oil USA, Inc.*,<sup>75</sup> the United States District Court for the Western District of Wisconsin accepted the EPA’s interpretation of *Harmon*,<sup>76</sup> but distinguished cases in which a judgment on the merits or consent judgment has been issued (i.e. *Harmon*), from the state’s mere initiation of an action under RCRA.<sup>77</sup> In *U.S. v. Flanagan*,<sup>78</sup> the District Court for the Central District of California interpreted *Harmon* as being “not about if, but about when” the EPA can overfile.<sup>79</sup> Finally, in *U.S. v. Power Engineering Company*,<sup>80</sup> the Colorado District Court concluded that the Eighth Circuit’s interpretation of RCRA was “flawed”<sup>81</sup> and refused to apply it to the case,<sup>82</sup> a conclusion that the Tenth Circuit has upheld.<sup>83</sup>

### IV. INSTANT DECISION

The Tenth Circuit first established that since the EPA is charged with the administration of RCRA the court should use the *Chevron*<sup>84</sup> method to review the EPA’s interpretation of the statute.<sup>85</sup> Under this method, the court must discern whether Congress has spoken directly to the question at issue.<sup>86</sup> If Congress has not, the court will accept the agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.”<sup>87</sup> After reviewing Section 6926(b), the court concluded that the statute was ambiguous,<sup>88</sup> that the EPA’s interpretation of the statute was reasonable,<sup>89</sup> and that therefore, the court should defer to the EPA’s interpretation.<sup>90</sup>

<sup>73</sup> See *Bil-Dry*, 2001 EPA App. LEXIS 1 at \*30.

<sup>74</sup> *Id.*

<sup>75</sup> 143 F. Supp. 2d 1054 (W.D. Wis. 2001).

<sup>76</sup> *Id.* at 1114.

<sup>77</sup> *Id.* The Court further stated that the Eighth Circuit read too much into the phrases “in lieu of” and “same force and effect,” while at the same time giving inadequate effect to the statutory provisions that demonstrate Congress’s intent that EPA have its own independent enforcement authority even in states that have authorized hazardous waste programs. *Id.* at 1116.

<sup>78</sup> 126 F. Supp. 2d 1284 (C.D. Cal. 2000)

<sup>79</sup> *Id.* at 1289.

<sup>80</sup> 125 F. Supp. 2d 1050 (D. Colo. 2000)

<sup>81</sup> *Id.* at 1060.

<sup>82</sup> See *id.* at 1071.

<sup>83</sup> *P.E.C.*, 303 F.3d at 1241.

<sup>84</sup> See *Chevron U.S.A., Inc. v. Natl. Resources Defense Council*, 467 U.S. 837.

<sup>85</sup> *P.E.C.*, 303 F.3d at 1236.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1237.

<sup>89</sup> *Id.* at 1238.

<sup>90</sup> *Id.* at 1237.

To conclude that the EPA's interpretation was reasonable, the court first noted that the statute consists of two clauses, one dealing with the administration of authorized state programs and the other with the enforcement of state regulations.<sup>91</sup> Because the phrase "in lieu of" appears in the first clause and not in the second clause, the court held that one could reasonably interpret the statute as saying that a state is permitted to carry out its program in lieu of the federal program and, also, that the state can issue and enforce permits.<sup>92</sup>

The court next examined the Eighth Circuit decision in *Harmon*, and distinguished that case by holding that the Eighth Circuit's interpretation did not account for the placement of "enforcement" and "in lieu of" in separate clauses of Section 6926(b).<sup>93</sup> The Tenth Circuit further concluded that the *Harmon* court did not adequately consider the fact that state enforcement of regulations is discussed in a different section of RCRA than federal enforcement of regulations.<sup>94</sup> Because of this bifurcated statutory structure, the Tenth Circuit found it reasonable to conclude that the administration and enforcement of RCRA are not inexorably intertwined, and therefore authorization of a state program does not deprive the EPA of its enforcement powers.<sup>95</sup>

The court then disagreed with the premise that Section 6926(d) applies to RCRA as a whole,<sup>96</sup> rejecting the notion that the phrase "same force and effect" reaches the enforcement clause as well as the administration clause.<sup>97</sup> The court found that such an interpretation reads too much into the statute.<sup>98</sup> It focused on the fact that Section 6926 applies to state programs, not federal enforcement.<sup>99</sup> By looking at the statutory heading of Section 6926(d)—"Effect of a State Permit"—the court further concluded that this statute only intends for state permits to have the "same force and effect" as federal permits.<sup>100</sup> As a result, the court found that it would be reasonable to conclude that Congress only intended this section to clarify that recipients of state permits do not also need to obtain a permit from the EPA.<sup>101</sup> Thus, the court found that it was reasonable to conclude that this section provided only that the EPA could not deny the validity of a state permit.<sup>102</sup> The section did not prevent the EPA from taking action when a violation occurred.<sup>103</sup>

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<sup>91</sup> *Id.* at 1238.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The Tenth Circuit found significance in the fact that section 6926 addresses the administration and enforcement of state regulations by authorized states, while the federal enforcement of such regulations is addressed in section 6928. *Id.*

<sup>95</sup> *Id.* The Tenth Circuit buffers its conclusion by stating that the only way that it could reach the *Harmon* holding was by "harmonizing" Sections 6928(a)(1) and (2) (allowing the EPA to bring an enforcement action in certain situations) with Section 6926(e) (allowing the EPA to withdraw state authorization in certain circumstances), which it refused to do. If one reads the two statutes harmonized, one could conclude that the EPA had to rescind the state's authority before bringing an action itself. However, the court held that this interpretation was "well beyond the plain meaning of the statute," since nothing in the statute suggests that rescinding state authority (an "extreme" and "drastic" step) is necessary before the EPA can bring an enforcement action. *Id.* at 1238-39.

<sup>96</sup> *Id.* at 1239.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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

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

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

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

<sup>103</sup> *Id.*



The court proceeded to discard the notion that, given Congress's use of the word "or" in Section 6972(b)(1), Congress did not intend for both federal and state governments to pursue the same action.<sup>104</sup> The court held that the language was "ambiguous at most"<sup>105</sup> and did not address the issue of overfiling.<sup>106</sup>

Finally, the court dismissed the argument that res judicata barred overfiling.<sup>107</sup> To do so, the court had to determine whether the EPA was in privity with CDPHE, and whether the cause of action was the same in both suits.<sup>108</sup> In determining privity, the court recognized that state and federal governments are usually separate entities for purposes of res judicata,<sup>109</sup> but an exception occurs when the federal government "assumes control over litigation."<sup>110</sup> Here, the court decided that the federal government did not assume control over litigation.<sup>111</sup> Further, since CDPHE did not maintain the same position as the EPA (by not seeking financial assurances), the court decided that privity did not exist.<sup>112</sup> Since privity was nonexistent,<sup>113</sup> and the EPA had not assumed control over the litigation, the court held that res judicata did not prohibit overfiling.<sup>114</sup>

Because RCRA is ambiguous regarding the permissibility of overfiling<sup>115</sup> and the EPA is the agency charged with the administration of RCRA,<sup>116</sup> the court held that it must defer to the EPA's reasonable interpretation of the text.<sup>117</sup> Because the EPA's interpretation of the statute has substantial support in the text and is therefore reasonable,<sup>118</sup> and because res judicata does not prohibit overfiling,<sup>119</sup> the court held that the EPA's suit against PEC was permissible even though CDPHE had already filed a suit in the same action.<sup>120</sup>

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<sup>104</sup> *Id.* at 1240.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* PEC had argued that Congress would have used the phrase "and/or" if it had intended both federal and state governments to overfile suits. *Id.* The court held that the word "and" is unnecessary because the statute clearly states that a suit by either government is sufficient to bar citizen suit. *Id.*

<sup>107</sup> *Id.* at 1241. The court first established that the Colorado state court decision was a final judgment on the merits in favor of CDPHE, based on a cause of action brought under RCRA. *Id.* at 1240.

<sup>108</sup> *Id.*

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

<sup>110</sup> *Id.* The court listed examples of how the federal government "assume[s] control over litigation," including: (1) requiring the lawsuit to be filed; (2) reviewing and approving the complaint; (3) paying the attorney's fees and costs; (4) directing the appeal from the lower court to the appellate court; (5) appearing and submitting a brief as amicus; (6) directing the filing of a notice of appeal; and (7) effectuating the abandonment of an appeal on advice of the solicitor general. The court said that none of these factors were present in this case. *Id.* at 1240-41.

<sup>111</sup> *Id.* at 1241.

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

<sup>113</sup> Since it decided that no privity existed between CDPHE and the EPA, the court felt it did not need to decide whether the cause of action was the same in both cases. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1240.

<sup>116</sup> *Id.* at 1236.

<sup>117</sup> *Id.* at 1241.

<sup>118</sup> *Id.* at 1240.

<sup>119</sup> *Id.* at 1241.

<sup>120</sup> *Id.*

## V. COMMENT

Both the Tenth Circuit and the Eighth Circuit heard mostly the same arguments, but the two courts resolved the arguments in opposite ways. The facts in the two cases differed in only one significant aspect. In *Harmon*, the EPA brought the same action that the Missouri Department of Natural Resources did;<sup>121</sup> in *PEC*, the EPA brought the same action as the Colorado Department of Public Health and Environment did, except that the EPA also asked for financial assurances.<sup>122</sup> This difference turned out to be significant. In *Harmon*, it made overfiling seem unfair, whereas in *PEC*, it made overfiling seem fair. Because allowing overfiling seemed unfair to the Eighth Circuit, the court decided all the arguments against allowing overfiling. Because allowing overfiling seemed right to the Tenth Circuit, it decided all the arguments in favor of allowing overfiling. As a consequence of this results-based reasoning, the two courts slanted their views on some of the minor, close-call arguments to achieve the outcome desired by each court. An even look at each court's reasoning shows that no obvious answer exists to the arguments about overfiling.

On the first issue, whether state enforcement operates "in lieu of" EPA enforcement, the two courts reach differing results<sup>123</sup> because each court appears to use a different approach to answer the question. Both courts ultimately boil the issue down to whether "administration" and "enforcement" are such closely related concepts that one is necessary for the other.<sup>124</sup> In one sense, administration and enforcement seem necessary to each other, because it would be useless to promulgate regulations if they were not enforced, and vice versa. This is the approach that the Eighth Circuit apparently took in deciding that the two are "inexorably intertwined." In a different sense, though, administration and enforcement might be necessary to each other, but they do not have to be executed by the same entity. For example, it is not far-fetched to imagine a scenario in which a state administers environmental regulations that are stricter than the federal regulations, but the state yields the ultimate responsibility for enforcement of those regulations to the EPA. This is the approach that the Tenth Circuit apparently adopted in finding that the two were not inexorably intertwined.

By itself, the Tenth Circuit's reasoning seems more persuasive because it appears to fit the context of the case. However, it is ultimately too simplistic because it does not account for the context of the subsection as a whole. The subsection begins with the sentence "Any state which seeks to *administer and enforce a hazardous waste program* may [submit an application to the EPA]."<sup>125</sup> This line seems to indicate that, for the purposes of this subsection, administration and enforcement are to be executed by one entity – the state. Understood in this context, the Eighth

<sup>121</sup> *Harmon*, 191 F.3d at 897.

<sup>122</sup> *P.E.C.*, 303 F.3d at 1236.

<sup>123</sup> The *Harmon* court held that administration and enforcement are "inexorably intertwined." 191 F.3d at 899. Therefore the "in lieu of" language of Section 6926(b) reaches the whole act, and consequently a State program operates in lieu of Federal EPA regulation as to *both* administration and enforcement. *Id.* The *PEC* court held that "enforcement" and "in lieu of" are in separate clauses of Section 6926(b), thus "in lieu of" does not reach "enforcement," and a State program operates in lieu of EPA regulation as to only administration, not enforcement. *P.E.C.*, 303 F.3d at 1237. The *PEC* court further looked to the fact that state enforcement of regulations is discussed in a different section (Section 6926) than federal enforcement (Section 6928), and thus an interpretation that administration and enforcement are not "inexorably intertwined" is reasonable. *Id.* at 1238.

<sup>124</sup> See *supra* nn. 60 and 100.

<sup>125</sup> 42 U.S.C. § 6926(b) (emphasis added).

Circuit's interpretation that administration and enforcement are inexorably intertwined is the better approach.

The second issue that the two courts diverged on was whether it was reasonable to "harmonize" the section allowing the EPA to bring enforcement actions with the section allowing the EPA to withdraw authorization of a state program. This harmonization would lead to the conclusion that the EPA had to rescind the state's authority before bringing action itself.<sup>126</sup> The Tenth Circuit, rejecting harmonization, seems to have the better logic on this issue. Nothing in the statute suggests that the EPA has to rescind the authorization of a state program before it can take an enforcement action. When the EPA rescinds a state program, it is an "extreme" and "drastic" step that is to be done when the entire state program is ineffective.<sup>127</sup> This is not a step the EPA should take lightly, since it will create an increased administrative/enforcement burden on the EPA itself, and the EPA's taking on more responsibility is not a step that is likely to improve local environmental protection overall. Also, authorizing a new state program will take time. Therefore, overfiling is not a remedy for a state program that is faulty on the whole, but rather it is the EPA's remedy when a state program has proven inadequate in one particular case.

The third issue the courts diverged on is whether the "same force and effect" language applies to the statute as a whole or just to state permits.<sup>128</sup> Both courts had valid points, because while the title is "Effect of State Permit," the subsection does not use the word "permit," but rather the word "action."<sup>129</sup> The text, when read separately from the title, implies that any action that the state takes will have the same force and effect as any action the EPA could take. A plain language reading of the statute would likely lead a reader to interpret "any action" to go beyond merely the issuance of permits. None of the surrounding sections of RCRA limit the word "action" to permits.<sup>130</sup> The word is used in two contexts: corrective action taken by violators<sup>131</sup> and civil actions brought by a state or the EPA.<sup>132</sup> Under the canon of statutory interpretation that dictates that a particular word used in a statute should be given the same meaning throughout the statute,<sup>133</sup> it would seem logical to define "any action taken by a State"<sup>134</sup> as "any lawsuit filed by the State." This definition would allow the subsection to be interpreted as meaning that a lawsuit filed by a state shall have the same force and effect as a lawsuit filed by the EPA (so violators do not have to worry about a lawsuit from both).

<sup>126</sup> The *Harmon* court found this interpretation acceptable and proper. *Harmon*, 191 F.3d at 899. The *PEC* court found this interpretation to be "well beyond the plain meaning of the statute." *P.E.C.*, 303 F.3d at 1238.

<sup>127</sup> See *id.* at 1239 (quoting *Waste Mgmt., Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989)).

<sup>128</sup> The *Harmon* court held that it applied to the whole statute, reasoning that the plain language of the subsection deals with "any action" the State takes, not just the issuance of permits. *Harmon*, 191 F.3d at 900. The *PEC* court held that the language applies only to State permits, reasoning that the subsection was inapplicable to federal enforcement because federal enforcement was addressed in a different section, and because the subsection title—"Effect of State Permit"—limited the language to permits. See *P.E.C.*, 303 F.3d at 1239.

<sup>129</sup> See 42 U.S.C. § 6926(d).

<sup>130</sup> See generally 42 U.S.C. § 6901 *et seq.* (2000).

<sup>131</sup> See *e.g.* 42 U.S.C. § 6925(i) (2000).

<sup>132</sup> See *e.g.* 42 U.S.C. § 6928(a)(1).

<sup>133</sup> See generally *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("... classic case for the application of the 'normal rule of statutory construction' "that identical words used in different parts of the same act are intended to have the same meaning.'")

<sup>134</sup> 42 U.S.C. § 6926(d).

On the other hand, the title does address only state permits,<sup>135</sup> and Federal enforcement options are discussed in a completely different section.<sup>136</sup> In that light, *PEC*'s reading of the statute<sup>137</sup> is not unreasonable. However, the language probably does not quite rise to the level of "ambiguous at most," as the *PEC* court said.<sup>138</sup> Since the rest of Section 6926 deals with authorization of state programs generally,<sup>139</sup> it seems unlikely that Congress would have limited this particular subsection to deal only with permits.

The fourth issue the courts disagreed on was whether the word "or" meant that Congress did not contemplate whether both the EPA *and* the states could bring an enforcement action. The *Harmon* court held that Congress' use of "or" meant that Congress did not intend overfiling,<sup>140</sup> the *PEC* court held that the language was too ambiguous and did not address overfiling.<sup>141</sup> In the Tenth Circuit's favor there are many situations in which "and" can mean "or" and "or" can mean "and."<sup>142</sup> The exact meaning of the term "or" can thus be unclear. Also, Section 6972 deals with suits filed by individual citizens, not by the EPA or states.<sup>143</sup> In this sense, the Tenth Circuit has the better reasoning on this case.

The fifth issue that the courts disagreed on was whether *res judicata* prohibits overfiling. Both courts felt the answer depends on whether privity exists between the state program and the EPA in the particular situation.<sup>144</sup>

These two holdings, more than any other issues, were dictated by the facts of the respective cases. In *Harmon*, the EPA and Missouri advanced the same issues.<sup>145</sup> In *PEC*, the EPA wanted financial assurances in addition to the action Colorado had already taken.<sup>146</sup> Therefore, *res judicata* was only appropriate in the *Harmon* case, not in *PEC*. However, the reasoning that the two courts used was not identical. The *PEC* court applied a more stringent test for *res judicata*, one that would have required the EPA to "assume...control over [the] litigation"<sup>147</sup> before *res judicata* would bar the EPA from overfiling.<sup>148</sup> The test that the *Harmon* court used was fairer, because it actually analyzed

<sup>135</sup> *Id.*

<sup>136</sup> See 42 U.S.C. § 6928.

<sup>137</sup> *PEC*'s interpretation was that permits issued by a State shall have the same force and effect as permits issued by the EPA, so that producers do not need to obtain two permits. *P.E.C.*, 303 F.3d at 1237.

<sup>138</sup> *Id.* at 1240.

<sup>139</sup> The original Section 6926 contained five subsections, all of which deal with authorization of State programs in general. Subsection (a) directs the EPA to establish guidelines by which states can develop hazardous waste programs. Subsection (b) deals with authorization of state programs. Subsection (c) addresses when interim authorization was appropriate, before January 1986. Subsection (e) focuses on withdrawal of authorization. Subsections (f), (g), and (h) were added later by amendment. Only the title of subsection (d)—"Effect of State Permit"—indicates otherwise, though the text of subsection (d) addresses State program "action" having the same effect as "action" taken by the EPA. 42 U.S.C. § 6926(a-h).

<sup>140</sup> See *Harmon*, 191 F.3d at 901.

<sup>141</sup> See *P.E.C.*, 303 F.3d at 1240.

<sup>142</sup> For example, the sentence "Every student from Kentucky or Tennessee is in this class" means the same thing as "Every student from Kentucky and Tennessee is in this class."

<sup>143</sup> See 42 U.S.C. § 6972 (2000).

<sup>144</sup> See *Harmon*, 191 F.3d at 902-903.; *P.E.C.*, 303 F.3d at 1240.

<sup>145</sup> *Harmon*, 191 F.3d at 894.

<sup>146</sup> *P.E.C.*, 303 F.3d at 1235-36.

<sup>147</sup> *Id.* at 1240.

<sup>148</sup> In *PEC*, the court held that, since state and federal governments are generally considered separate parties for *res judicata* purposes, and since the EPA did not assume control over the litigation, *res judicata* did not

whether the issues and parties were substantially identical, instead of simply deciding that *res judicata* almost never applies to the federal government.<sup>149</sup>

## VI. CONCLUSION

Ultimately, the *PEC* decision is probably better aligned with Congress' intent in passing the RCRA than that offered by the *Harmon* court. Because environmental issues vary throughout the country, Congress felt it needed environmental standards that were broad enough to reach so many diverse areas. However, the EPA itself was not big enough to administer and enforce all of these standards on its own. So, Congress delegated some of the authority for doing so. Nonetheless, since RCRA ultimately established standards for the whole country, the federal government should have the ultimate responsibility for enforcement. In this sense, overfiling is appropriate.

Luckily for the EPA, *Harmon* did not turn out to be as limiting as some commentators had originally feared.<sup>150</sup> It was limited basically to prevent the EPA from taking the same action that a state had already taken, where a court had rendered judgment. In any event, the states that comprise the Eighth Circuit (including Missouri) are ultimately the only ones bound by the *Harmon* decision. Until another federal appellate court or the U.S. Supreme Court rules, the EPA will remain free to overfile in most situations.

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bar overfiling. *Id.* at 1240-41. Alternatively, the *PEC* court held that, since the "in lieu of" language applied only to administration and not enforcement, the agencies had different interests, and therefore privity did not exist. *Id.* at 1241.

<sup>149</sup> The *Harmon* court held that, since privity exists when the two parties have a "close relationship bordering on near identity," and the plain language permits Missouri to act in lieu of the EPA with its action having the same force and effect as the EPA's action, the parties are in the same relationship with one another. *See* 191 F.3d at 503. Therefore the court held that privity existed, and *res judicata* barred overfiling. *Id.*

<sup>150</sup> *See generally e.g.* Christina Coop, Student Author, *Harmon Industries, Inc. v. Browner*, 28 Ecology L.Q. 253, 273 (2001) ("For now, the *Harmon* decision provides a clear limitation on EPA's ability to overfile under RCRA.")