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Scaring the States into Submission- Divergent Approaches to Environmental Compliance

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SCARING THE STATES INTO SUBMISSION? DIVERGENT APPROACHES TO ENVIRONMENTAL COMPLIANCE

I. INTRODUCTION

The Environmental Protection Agency (EPA) and states that have passed legislation protecting environmental audit results are engaged in a battle that has, until recently, been primarily political. However, the battle has moved into the legislative and adjudicative arenas, and it appears that Congress or the courts will determine the final outcome of this conflict since the opponents, the EPA and the states, cannot settle their ideological differences.

This comment provides a historical overview of the partnership between the EPA and the states under various federal environmental legislative provisions. It describes the EPA's current policy on environmental audit results, as well as discusses the general content of most state audit immunity and privilege statutes. The comment explains the choices available to the EPA when it is dissatisfied with a state's actions and explains why those options are impractical. The comment concludes with a description of the potential limitations placed on the EPA's attempts to use environmental audit results in future dealings with the various entities as a result of a recent Eighth Circuit appellate decision in a case of first impression.

II. FEDERAL ENVIRONMENTAL STATUTES

Under provisions of the Resource Conservation Recovery Act (RCRA),¹ the Clean Air Act (CAA),² and the Clean Water Act (CWA),³ the EPA can delegate authority to a state to issue various permits. The state then becomes responsible for implementing environmental programs and enforcing certain EPA requirements.⁴ Two-thirds of all environmental enforcement actions taken in the United States occur under the provisions of these three programs.⁵ The RCRA establishes a program dealing with practices related to the generation and disposal of hazardous wastes.⁶ The CAA establishes a program to research, regulate, and prevent air pollution on a national level.⁷ The CWA establishes a program for protecting surface waters in the

1. 42 U.S.C. §§ 6901-6991i (1994 & Supp. 1996)

2. 42 U.S.C. §§ 7401-7671q (1994 & Supp. 1996)

3. 33 U.S.C. §§ 1251-1387 (1994 & Supp. 1996).

4. *See* Resource Conservation Recovery Act (RCRA) § 3006(b), 42 U.S.C. § 6926(b) (1994); Clean Air Act (CAA) § 502(d), 42 U.S.C. § 7661a(d) (1994); Clean Water Act (CWA) § 402(b), 33 U.S.C. § 1342(b) (1994).

5. *See* RESOURCES, COMMUNITY, AND ECON. DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS 19 (1998) [hereinafter ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS].

6. *See* 42 U.S.C. § 6902 (1994).

United States.⁸ Each state that wants to administer a program established under any of these three acts enacts legislation that meets minimum standards established by the acts.⁹ The EPA then determines whether the minimum standards set by the EPA were met by the state's statutory program and if so, approves the state's program.¹⁰ Once approval is received from the EPA, the state may then issue permits under the appropriate program.¹¹

Once approved, state laws are applied to administer the state's program; however, the EPA retains the authority to enforce permits issued under the state's programs and may initiate administrative, civil, or criminal actions against violators.¹² The result of the permitting programs is concurrent jurisdiction, which can result in conflicts where the boundaries between state and federal enforcement agencies are not clearly defined.¹³

If the EPA is dissatisfied with a state's program or with a state's enforcement efforts and wants to take action, it has two options available. First, the EPA can revoke permit-granting authority from the state if it deems the state is not meeting specified standards.¹⁴ Second, the EPA can intervene in a state action, a practice called overfiling.¹⁵ Both options are extreme measures and do not allow for a

7. See 42 U.S.C. § 7401 (1994).

8. See 33 U.S.C. § 1251 (1994).

9. RCRA § 3006(b), 42 U.S.C. § 6926(b) (1994) ("Any State which seeks to administer and enforce a hazardous waste program . . . may develop and . . . submit to the Administrator an application . . . for authorization of such program . . . Such State is authorized to carry out such program . . . unless . . . the Administrator notifies such State that such program may not be authorized . . . and finds that (1) such State program is not equivalent to the Federal program under this subtitle, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subtitle."); CAA § 502(d), 42 U.S.C. § 7661a(d) (1994) ("[E]ach State shall develop and submit to the Administrator a permit program under State or local law . . . meeting the requirements of this title. . . . The Administrator may approve a program to the extent that the program meets the requirements of this Act."); 42 U.S.C. § 7414(b) ("Each State may develop and submit to the Administrator a procedure for carrying out his section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section."); CWA § 402(b), 33 U.S.C. § 1342(b) (1994) ("[E]ach State desiring to administer its own permit program . . . may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist.").

10. See RCRA § 3006(b), 42 U.S.C. § 6926(b) (1994); CAA § 502(d), 42 U.S.C. § 7661a(d) (1994); CWA § 402(b), 33 U.S.C. § 1342(b) (1994).

11. See RCRA § 3006(b)

12. See CAA § 502(e), 42 U.S.C. § 7661a(e) (1994) (stating "[n]othing in this subsection should be construed to limit the Administrator's ability to enforce permits issued by a State"); CWA § 402(I), 33 U.S.C. § 1342(I) (1994) (stating "[n]othing in this section . . . shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act"). There are criminal, civil, and administrative enforcement options available to the federal government under RCRA § 3008, U.S.C. § 6928 (1994), CAA § 113, 42 U.S.C. § 7413 (1994), and CWA § 309, 33 U.S.C. § 1319 (1994).

13. See Steven D. Cook, Comment, *State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings*, 1987 B.Y.U.L. REV. 1085, 1086 (1987).

14. See RCRA § 3006(e), 42 U.S.C. § 6926(e) (1994) ("Whenever the Administrator determines . . . that a State is not administering and enforcing a program . . . in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator shall withdraw authorization of such program."); CWA § 402(c), 33 U.S.C. § 1342(c)(3) (1994) ("Whenever the Administrator determines . . . that a State is not administering a program . . . in accordance with requirements of this section, he shall so notify the State and . . . shall withdraw approval of such program.").

15. See RCRA § 3008, 42 U.S.C. § 6928 (1994) (authorizing EPA enforcement action); CAA § 113, 42 U.S.C. § 7413 (1994) (authorizing EPA enforcement action); CWA § 309, 33 U.S.C. § 1319 (1994) (authorizing EPA enforcement action). These provisions, together with CWA § 402(I), 33 U.S.C. § 1342(I) (1994) ("Nothing in this

manageable, reliable system where the EPA, the states, and entities required to comply with the regulations know what to expect.

III. THE RELATIONSHIP BETWEEN THE EPA AND THE STATES

The EPA's primary goal is to deter entities from committing environmental violations. The EPA's position is that minimum standards are required to provide for consistent environmental enforcement.¹⁶ This position is reasonable; however, the EPA appears to take a "bean counting" approach to enforcement efforts, evaluating the success of state programs based on the "number of inspections conducted and the number of enforcement actions taken against violators."¹⁷ This approach ostensibly encourages the EPA's deterrence goal, and "[u]nder this deterrence approach, it is assumed that the more inspections are conducted and enforcement actions taken, the greater the deterrent effect and the higher level of compliance."¹⁸ The EPA has stated that it will maintain an "imposing enforcement presence" currently and in the future by "continuing to take vigorous, timely, and quality enforcement actions."¹⁹

Enforcement actions may consist of "civil and criminal prosecution in courts, administrative orders, and other forms of action that take place after a violation has occurred."²⁰ The emphasis on enforcement and compliance has been criticized because these activities do not necessarily determine whether environmental goals are being met.²¹ Although the EPA insists that consistency is mandatory, the EPA has been attacked for inconsistencies in its approach within its various regions.²² The states indicate that they have received "mixed messages" from the EPA headquarters

section [providing for NPDES permit programs] shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.") and CAA § 502(e), 42 U.S.C. § 7661a(e) (1994) ("Nothing in this subsection [providing for state permit programs] should be construed to limit the Administrator's ability to enforce permits issued by a State.") appear to grant full enforcement authority to the states while retaining concurrent enforcement authority by the EPA. *But cf.* RCRA § 3006(b), 42 U.S.C. § 6926(b) (1994) ("Such State is authorized to carry out such program *in lieu of* the Federal program.") (emphasis added); and RCRA § 3006(d), 42 U.S.C. § 6926(d) (1994) ("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.") (emphasis added). The language in the RCRA appears to signify that a state program, once approved, replaces the federal program rather than supplementing it.

16. See *State-EPA Partnership Could Improve Consistency of Superfund Enforcement*, HAZARDOUS WASTE NEWS, June 16, 1997, available in 1997 WL 10931370. See also *Environmental Self Audits: Hearings Before the Subcomm. on Oversight and Investigations of the House Commerce Comm.*, 105th Cong. (1998) (statement of Steven A. Herman, Associate Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA).

17. ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 17.

18. Theodore L. Garrett, *Reinventing EPA Enforcement*, 12 NAT. RESOURCES & ENV'T 180, 180 (Winter 1998).

19. Steven A. Herman, *EPA's Enforcement and Compliance Assurance Priorities for Fiscal Year 1995*, 10 No. 1 NAAG NAT'L ENVTL. ENFORCEMENT J. 3, 3 (Feb. 1995).

20. *EPA Guide to Environmental Issues* (visited Aug. 10, 1998) <http://iridium.ntc.edu/env/general/guide.html>.

21. States Report Progress on Relationship with Federal Government on Enforcement, BNA NAT'L ENV'T DAILY, June 12, 1997, at d18.

22. ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 4. The report also states that state officials have commented that "a fragmented and inconsistent approach among different EPA offices on the appropriate use of alternative compliance strategies has made it difficult to devise a coherent, results-oriented approach acceptable to all key EPA stakeholders." *Id.* at 7.

and the EPA regional offices.²³ States claim that EPA's focus on quantitative enforcement outputs is in itself inconsistent with other EPA programs which focus on results.²⁴

The states consider themselves "laboratories" that can perform experiments to determine the best method of handling environmental compliance and improvements.²⁵ The states want to develop their own methods in response to their own needs. States actually initiate most of the enforcement actions in the United States,²⁶ and the states believe they do a better job of handling enforcement.²⁷ For example, Oklahoma Senator Jim Inhofe compared the remediation of two Oklahoma superfund sites, one administered by the state and the other by the federal government.²⁸ In Senator Inhofe's comparison, the federal government took eleven years to remediate its site, while Oklahoma took three years to remediate its site at one-third the cost of the federal site remediation.²⁹

States indicate that self-audit laws provide incentive for companies to discover, resolve, and remediate environmental problems that would otherwise go undetected.³⁰ Many states consider entity involvement crucial to improving the environment despite the fact that only two percent of regulated entities are on regulatory agency inspection schedules.³¹ Even with the combined efforts of the EPA and the states, the risk or possibility an entity will be inspected is marginal.³² Statistics support the view of some who argue "ignorance is rewarded while good faith compliance efforts create risks of punishment."³³ States believe the audit laws' focus on "positive encourage-

23. *Id.* at 56. See also EPA OFFICE OF INSPECTOR GENERAL, CONSOLIDATED REVIEW OF AIR ENFORCEMENT AND COMPLIANCE ASSISTANCE PROGRAMS, REPORT 7100306 (Sept. 30, 1997) (visited Aug. 10, 1998) <<http://www.epa.gov/oigearth/997sect1.htm>>, in which an OIG audit indicated inconsistent enforcement among three EPA regions. Over an 18 month period, Region 5 completed 33 enforcement actions and assessed more than \$6 million in penalties. Region 9 completed 25 actions and assessed approximately \$3.5 million in penalties. Region 6 completed 2 actions and assessed just over \$100,000 in penalties. *Id.*

24. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 8. Also, the General Accounting Office indicates that the EPA is encouraging the use of performance measures through its National Environmental Performance Partnership System (NEPPS). See *id.* at 46.

25. See *Environmental Self Audits: Hearings Before the Subcomm. on Oversight and Investigations of the House Commerce Comm.*, 105th Cong. (1998) (statement of Gale Norton, Attorney General, State of Colorado) [hereinafter Norton Statement].

26. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 16. In 1996 states took 9,306 administrative enforcement actions - 85% of all such actions taken that year. *Id.*

27. See *States Report Progress on Relationship with Federal Government on Enforcement*, *supra* note 21.

28. See *id.*

29. See *id.*

30. See Norton Statement, *supra* note 25.

31. See *Liability from Voluntary Environmental Audits: Hearings Before the Senate Environment and Public Works Comm.*, 105th Cong. (1997) (statement of Michael B. Enzi, Senator, State of Wyoming) [hereinafter Enzi Statement].

32. See RESOURCES, COMMUNITY AND ECON. DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL AUDITING: A USEFUL TOOL THAT CAN IMPROVE PERFORMANCE AND REDUCE COSTS 5 (1995). See also *State Environmental Audit Laws Advance Goal of a Cleaner Environment*, James M. Weaver, Robert J. Martineau, Jr., & Michael K. Stagg, 11 NAT. RESOURCES & ENV'T 6, 12 (Spring 1997) (citing TEXAS SENATE NAT. RESOURCES COMM., INTERIM REPORT TO THE 75TH LEGISLATURE: EFFECTIVENESS OF THE ENVIRONMENTAL AUDIT LEGISLATION (1996) "Texas has only 635 full-time enforcement employees and more than 200,000 regulated entities.") *Id.*

33. *S. 582 and Voluntary Environmental Audits: Hearings on S. 582 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Patricia S. Bangert, Senior Deputy Solicitor General, State of Colorado).

ment rather than penalties”³⁴ establishes the kind of innovative environmental policies that augment the limited resources available to both state and federal government agencies.³⁵ Because resources are so limited, the states believe that environmental audits provide a way to “identify and correct environmental problems”³⁶ before they are discovered by inspectors.³⁷ States have indicated the legislative processes involved in enacting self-audit laws have made people more aware of an “objective . . . to have a cleaner, safer environment--not to levy big fines.”³⁸

The often adversarial relationship between states and the EPA was characterized as one for which the “EPA’s perspective appears to be that they own the ranch and that we, the states, are the hired ranch hands.”³⁹ “What seems to be missing is EPA’s willingness to make a commitment in response to a commitment by industry to conduct audits. In short, EPA appears not to accept the proposition that self-evaluations are an essential tool to ensure compliance, and not a device to protect non-compliance.”⁴⁰ The Clinton Administration recognized that “the adversarial approach that has often characterized our environmental system precludes opportunities for creative solutions that a more collaborative system might encourage.”⁴¹

Despite increasing criticism, the EPA continues to emphasize strong enforcement as the means for deterring entities from committing environmental violations.⁴² The EPA appears proud of the “record level of civil and criminal fines and penalties, as well as record levels of civil and criminal referrals to the Department of Justice,”⁴³ which “sent a strong deterrent message to the regulated community”⁴⁴ in 1994.⁴⁵ The EPA is concerned with reduced enforcement because in 1996, states took seventeen percent fewer enforcement actions than were taken by the states in 1994.⁴⁶ A drop in enforcement actions, however, does not necessarily indicate fewer inspections; fewer actions could indicate that there are truly fewer violations and thus greater compliance.⁴⁷ Greater compliance is more likely the cause of fewer enforcement actions because inspections are focused on larger entities, who are now generally

34. Norton Statement, *supra* note 25.

35. *See id.*

36. ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS, *supra* note 5, at 25.

37. *See id.*

38. Enzi Statement, *supra*, note 31.

39. *Enforcement of Environment and Public Works: Oversight Hearing on the Relationship Between the Fed. and State Gov’ts in the Enforcement of Environmental Laws Before the Senate Comm. on Environment and Public Works*, 105th Cong. (1997) (statement of Patricia S. Bangert, Director of Legal Policy, Attorney General’s Office, State of Colorado) [hereinafter Bangert Statement II].

40. Lynn L. Bergeson, *EPA’s Plan: Covering the Bases or Covering Its Tracks? Vague Promises of Reassessment Make Business Nervous*, CORP. LEGAL TIMES, Sept. 1994, at 20.

41. Ben Lieberman, *Environmental Audits: Colorado Carrots Versus Federal Sticks in Environmental Enforcement*, Independence Institute Independence Issue Paper, Number 1-98 (visited Aug. 10, 1998) <<http://www.i2i.org/SuptDocs/Enviro/Audits.htm>>.

42. *See* ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS, *supra* note 5, at 4, 17, 47.

43. Herman, *supra* note 19, at 3.

44. *Id.*

45. *See id.*

46. *See* ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS, *supra* note 5, at 31.

47. *See id.* at 33. *See also* Garrett, *supra* note 18, at 180 (stating that “[a]t a time when corporations are reducing emissions and improving compliance, the government is somewhat perversely driven to bring an increasing number of lawsuits and to collect higher fines to justify their budgets and prove that they are performing.”).

aware of environmental compliance requirements and have taken necessary actions to comply.

IV. ENVIRONMENTAL AUDITS

A “‘voluntary self-evaluation’ is a self-initiated assessment, audit or review, not otherwise expressly required by law, performed for a company or person to determine whether the entity or individual is in compliance with environmental laws.”⁴⁸ Audits are conducted by teams comprised of qualified employees or contractors.⁴⁹ These teams evaluate an organization’s compliance with environmental regulations using tools such as checklists, audit standards, and their own professional judgment.⁵⁰ The teams may also evaluate the effectiveness of an organization’s efforts and systems used to monitor compliance.⁵¹

Environmental audits provide a myriad of benefits apart from the obvious motives to establish compliance and avoid civil penalties and criminal liability. By implementing environmental audits, a company may become less subject to assessments and improve its status as a good corporate citizen.⁵² Environmental audits can lower remediation and cleanup costs, correct problems, and reduce environmental, health, and safety hazards (thereby improving safety accident records) as well as ensure compliance.⁵³ Self-audits permit state and federal entities to use their resources elsewhere, and prevent pollution from taking place by detecting problems instead of merely fixing them after violations have occurred.⁵⁴ Self-audits may uncover more problems and thus lead to improved environmental conditions because inspections made by an entity of its own operations will generally be more thorough than inspections made by state or federal regulatory agencies due to the more detailed knowledge operators have of their own facilities.⁵⁵ Reliance on companies that perform self-audits actually releases scarce resources that can be used elsewhere, thus increasing environmental compliance coverage.⁵⁶

Despite the benefits of self-audits, many entities are not expanding their current environmental audit programs. A recent survey indicates that seventy-five percent of industrial companies have instituted some type of environmental program.⁵⁷ Almost half the companies with programs indicated they would be willing to expand

48. *Liability from Voluntary Environmental Audits: Hearings Before the Senate Comm. on Environment and Public Works*, 105th Cong. (1997) (statement of Patricia S. Bangert, Director of Legal Policy, Attorney General’s Office, State of Colorado) [hereinafter Bangert Statement III].

49. See RESOURCES, COMMUNITY AND ECON. DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, ENVIRONMENTAL AUDITING: A USEFUL TOOL THAT CAN IMPROVE PERFORMANCE AND REDUCE COSTS 2 (1995).

50. See *id.*

51. See *id.*

52. See *id.* at 18.

53. See *id.* at 2.

54. See John F. Cooney & Judson W. Starr, *Criminal Enforcement in a Decentralized Environment* (visited Aug. 10, 1998) <<http://www.venable.com/govern/crimenfc.htm>>.

55. See Weaver, et al., *supra* note 32, at 11.

56. See Lieberman, *supra* note 41.

57. See *id.*

their programs if they did not feel threatened by the possible use of audit information in either lawsuits or enforcement actions.⁵⁸ Ten percent of those with self-audit programs indicated the government used audit report information against them, while twenty-five percent indicated that third parties tried to obtain the companies' audit information.⁵⁹

Companies appear adequately justified in their concern that audit results may be used against them. A 1995 Price Waterhouse report surveyed 258 companies and noted that twenty-three of them "indicated that their audit findings had been involuntarily disclosed to federal or state agencies," while thirty-one companies "reported that such agencies had used voluntarily disclosed results against them in enforcement actions."⁶⁰

V. STATE ENVIRONMENTAL AUDIT LAWS

In recent years, various states have begun to develop alternative ways to promote compliance with environmental laws and regulations. The major development has been the enactment of environmental statutes which provide privileges or immunity, rewarding voluntarily performed environmental audits.⁶¹ Currently twenty-five states have enacted these type statutes.⁶² Many state legislatures have unanimously approved the audit laws.⁶³

The states adopting environmental audit legislation indicate that the audit protection furthers the goal of improving the environment by encouraging entities to

58. *See id.*

59. *See id.*

60. Timothy A. Wilkins & Cynthia A.M. Stroman, *Delegation Blackmail: EPA's Misguided War on State Audit Privilege Laws*, Washington Legal Foundation Critical Legal Issues, Working Paper Series No. 69, August 1996 (visited Aug. 10, 1998) <<http://www.bracepatt.com>> (citing *Elimination of Penalties Could Boost Environmental Self-Auditing, Survey Says*, DAILY ENV'T REP. (BNA), Apr. 7, 1995, at A-1).

61. *See* ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 24-5.

62. States with privilege and immunity legislation: Alaska, ALASKA STAT. §§ 09.25.450 - .25.490 (Michie Supp. 1997); Colorado, COLO. REV. STAT. ANN. §§ 13-25-126.5, 13-90-107(j), 25-1-114.5 (West 1998); Idaho, IDAHO CODE §§ 9-801 to -811 (Supp. 1997) (expired 12/31/97); Iowa, 1997 Ia. H.F. 681 (to be codified as IOWA CODE ANN. § 455J.1-J.13); Kansas, KAN. STAT. ANN. §§ 60-3332 to -3339 (Supp. 1997); Kentucky, KY. REV. STAT. ANN. § 224.01-040 (Michie 1995 & Supp. 1996); Michigan, MICH. COMP. LAWS §§ 324.14801 to .14810 (Supp. 1998); Minnesota, MINN. STAT. ANN. § 114C.20-C.31 (West 1997); Montana, MONT. CODE ANN. §§ 75-1-1201 to -1206 (1997); Nevada, NEV. REV. STAT. § 445C.010 - C.120 (1997); New Hampshire, N.H. REV. STAT. ANN. §§ 147-E:1 to -E:9 (Supp. 1997); Ohio, OHIO REV. CODE ANN. § 3745.70 -73; South Carolina, S.C. CODE ANN. §§ 48-57-10 to -110 (Law. Co-op. Supp. 1997); Texas, TEX. REV. CIV. STAT. ANN. art. 4477cc (West Supp. 1998); Virginia, VA. CODE ANN. §§ 10.1-1198 to -1199 (Michie 1998); and Wyoming, WYO. STAT. ANN. §§ 35-11-1105 to -1106 (1997 & Supp. 1998). Six states had enacted privilege only legislation: Arkansas, ARK. CODE ANN. §§ 8-1-301 to -312 (Michie Supp. 1997); Illinois, 415 ILL. COMP. STAT. 5/52.2 (West Supp. 1997); Indiana, IND. CODE ANN. §§ 13-10-13-1 to -12 (West Supp. 1996) (repealed); Mississippi, MISS. CODE ANN. § 49-2-51 (Supp. 1998); Oregon, OR. REV. STAT. § 468.963 (1997); Utah, UTAH CODE ANN. §§ 19-7-101 to -109 (1995 & Supp. 1998). Three states had enacted immunity only legislation: New Jersey, N.J. STAT. ANN. § 13:1D-125 (West Supp. 1998); Rhode Island, R.I. GEN. LAWS §§ 42-17.8-1 to -8 (Supp. 1997); and South Dakota, S.D. CODIFIED LAWS §§ 1-40-33 to -37 (Supp. 1998). Two legislatures have proposed privilege or immunity legislation: New Jersey, 1998 A.B. 136 (208th Leg., 1997-1998 Sess.) (proposed privilege legislation in addition to current immunity legislation); and New York, 1997 S.B. 4870 & 1997 A.B. 1183 (221st Leg., 1997-1998 Sess.). Nineteen states have seen proposed legislation fail or die without action: Alabama, Arizona, California, Delaware, Florida, Georgia, Hawaii, Maine, Maryland, Massachusetts, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, Tennessee, Washington, West Virginia, and Wisconsin.

63. *See* Wilkins & Stroman, *supra* note 60.

take action when, absent the audit statutes, they otherwise would not.⁶⁴ The states' position is that by encouraging compliance instead of strictly enforcing it, the states discover and resolve violations and problems where they otherwise might not encounter them, and stronger relations are established with the companies performing self-audits.⁶⁵ The states indicate that such privileges are necessary because traditional legal protections, such as attorney-client privilege, the work product doctrine, and the self-evaluative privilege, have practical limitations that inhibit the usefulness of the audits should they be invoked.⁶⁶ The attorney-client privilege restricts environmental experts who are not lawyers from fully implementing compliance efforts within their organizations, while the work product doctrine is likely not applicable to routine audits.⁶⁷ The self-evaluative privilege is restrictive because it is not recognized in all jurisdictions.⁶⁸

The majority of audit privilege laws contain one or both of two major provisions: privilege and immunity.⁶⁹ A privilege provision guarantees that information discovered in an audit and the audit documents are inadmissible as evidence in certain proceedings (generally administrative, civil, and criminal).⁷⁰ An immunity provision guarantees that companies are protected from penalties if they correct violations they have voluntarily discovered through self-audits.⁷¹ Privilege may be desirable in addition to immunity in order to protect a company's proprietary processes⁷² and other information that would otherwise not be disseminated to the general public. Generally, neither the privilege nor the immunity provision is unlimited; for example, a privilege will not protect information that is otherwise required to be revealed under other regulations.⁷³ Generally, the privilege and immunity statutes have three common denominators: 1) an entity discovers environmental violations in a self-conducted audit; 2) the entity "promptly and voluntarily" reports the violations; and 3) the entity corrects the violations.⁷⁴ Other than the privilege and immunity provisions, the individual states' audit laws vary in such areas as the definition of an audit and the determination of the conditions that must be met in order for the privilege or immunity provisions to apply.

Most state laws do not grant privileges or immunities when companies discover violations that are "environmentally serious, life-threatening, or deliberate."⁷⁵ Privileges and immunities are only granted when violations are reported to the

64. See Bangert Statement III, *supra* note 48.

65. See *id.*

66. See Bergeson, *supra* note 40, at 20.

67. See *id.*

68. See *id.*

69. See Alexander Volokh, *Carrots Over Sticks: The Case for Environmental Self-Audits*, WASH. MONTHLY, June 1, 1997, at 28, available in 1997 WL 9162157.

70. See *id.*

71. See *id.*

72. See *id.*

73. See *id.*

74. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 26.

75. Lieberman, *supra* note 41.

appropriate regulatory agencies and subsequently corrected.⁷⁶ Information that is legally required is still available to any agency that has enforcement authority.⁷⁷ Audit privilege and immunity statutes only provide limited access to audit results, thus keeping audit reports from being “used as a roadmap for an easy enforcement score.”⁷⁸

Colorado’s self-audit statutes grant limited immunity from civil, administrative, and negligent criminal fines for disclosures of violations discovered in audits and subsequently corrected.⁷⁹ The law does not allow companies to hide information.⁸⁰ Regulatory agencies can still obtain the information required to determine compliance with environmental regulations, because the law allows a privilege only for information that would not otherwise have to be disclosed.⁸¹ The law applies only if violations are corrected.⁸² In certain instances, audit results can be disclosed.⁸³ For example, audit results can be disclosed if violations are not being corrected, or if someone is trying to use the privilege for fraudulent purposes, or if the audit information demonstrates “clear, present and impending danger to the public health or environment.”⁸⁴ Additionally, regulatory agencies can still issue compliance orders, obtain injunctive relief, and criminally prosecute entities who are egregiously violating environmental regulations.⁸⁵

Colorado’s self-audit statute⁸⁶ was enacted partly in response to a self-audit performed by Coors Brewing Company (Coors). After Coors spent eighteen months and \$1.5 million on a self-audit performed to investigate its volatile organic compound emissions, the Colorado Department of Health (allegedly in response to EPA pressure) imposed a civil penalty of \$1.05 million against the company for state air pollution violations.⁸⁷ Essentially, Coors was fined for violations that neither Coors nor the health department knew about until the audit took place.⁸⁸ Eventually, the fine was reduced to a \$100,000 fine and a \$137,000 economic benefit payment, but companies were put on guard that their audit results could be used against them.⁸⁹

Since the enactment of Colorado’s self-audit law in 1994, twenty-eight

76. *See id.*

77. *See id.*

78. *Id.*

79. *See* COLO. REV. STAT. ANN. § 25-1-114.5(1), (4) (West Supp. 1998). *See also* Bangert Statement III, *supra* note 48.

80. *See* COLO. REV. STAT. ANN. § 13-25-126.5(4) (West Supp. 1998). *See also* Bangert Statement III, *supra* note 48.

81. *See* COLO. REV. STAT. ANN. § 13-25-126.5(4) (West Supp. 1998).

82. *See* COLO. REV. STAT. ANN. § 25-1-114.5(1)(e) (West Supp. 1998). *See also* Bangert Statement III, *supra* note 48.

83. *See* COLO. REV. STAT. ANN. § 13-25-126.5(3)(a)-(e) (West Supp. 1998). *See also* Bangert Statement III, *supra* note 48.

84. Bangert Statement III, *supra* note 48. *See also* COLO. REV. STAT. ANN. § 13-25-126.5(3)(a)-(e) (West Supp. 1998); COLO. REV. STAT. ANN. § 25-1-114.5(6) (West Supp. 1998).

85. *See* Bangert Statement III, *supra* note 48.

86. COLO. REV. STAT. ANN. § 13-25-126.5, § 13-90-107(j), § 25-1-114.5.

87. *See* Volokh, *supra* note 69, at 28.

88. *See id.*

89. *See id.*

disclosures and requests for immunity have been made.⁹⁰ The state's evaluation demonstrates that immunity is not automatic, as five requests were denied.⁹¹ Colorado believes that more entities would come forward if the EPA were not threatening to overfile or take administrative action against the companies using the audit laws.⁹² In Texas, during the first year after its statute became effective, 256 companies gave notice of intent to audit.⁹³ This figure may not be a firm estimate of the total number of entities conducting audits, as these notices are only from companies who may later seek immunity from penalties.⁹⁴ Other companies that have not given notice may seek only the privilege provision of the Texas law.⁹⁵ Texas also "received forty-two disclosures from regulated entities that had discovered violations."⁹⁶ These violations, and the information contained therein, were "public information,"⁹⁷ and Texas officials have claimed that the state would not have discovered many of the violations through the state's own process.⁹⁸

Although the states express that their audit laws have had a positive impact, a potential drawback to the enactment of state audit laws is the states' abilities to measure results that would show increased compliance or, more importantly, an improvement in the environment.⁹⁹ Both states and the EPA agree that there must be some method of evaluating the use of "alternative compliance strategies,"¹⁰⁰ such as environmental audits, in order to measure their success.¹⁰¹ Problems inhibiting measurement include lack of resources, lack of historical data to use for comparison purposes, difficulty in quantifying outcomes, and difficulty in identifying links between specific causes and effects.¹⁰²

The states recognize the importance of measuring their programs' success, not only to prove their position to the EPA, but also to provide accountability to the general public and the media, who are also closely watching their efforts.¹⁰³ The states also need to counter criticism that they may not be taking a hard enough position against polluters.¹⁰⁴ In measuring their programs' effectiveness, the states may have to focus more on measurement of outcomes and environmental indicators rather than traditional outputs.¹⁰⁵ Measurement of these outcomes and environmental

90. See Norton Statement, *supra* note 25.

91. See *id.*

92. See Bangert Statement III, *supra* note 48.

93. See Weaver, et al., *supra* note 32, at 12 (citing TEXAS SENATE NAT. RESOURCES COMM., INTERIM REPORT TO THE 75TH LEGISLATURE: EFFECTIVENESS OF THE ENVIRONMENTAL AUDIT LEGISLATION (1996)).

94. See *id.*

95. See *id.*

96. *Id.*

97. *Id.*

98. See *id.*

99. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 29.

100. *Id.* at 21.

101. See *id.*

102. See *id.* at 29.

103. See *id.* at 30.

104. See *id.* at 6.

105. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 32. Measuring outputs has been used historically to evaluate effectiveness because it is relatively easy to count the number of inspections made and enforcement actions taken. See *id.* Outcomes are characterized as results associated with a particular policy, and could

indicators is inherently more difficult, but may be necessary to demonstrate that the states' more lenient approach to compliance is as effective as the EPA's inflexibility.¹⁰⁶ In a 1998 report, the General Accounting Office indicated that the EPA needed to do more to "facilitate states' efforts to develop effective program measures."¹⁰⁷ This may be done by incorporating parts of the EPA's own National Performance Measures Strategy.¹⁰⁸ The growing program, which focuses on performance measures other than outputs, is currently applicable only to EPA enforcement measures, but could eventually extend to state measures.¹⁰⁹

VI. THE EPA'S POSITION ON STATE SELF-AUDIT LAWS

The EPA strongly opposes the passage of laws protecting environmental audit results.¹¹⁰ Historically, the EPA has discouraged states from passing such laws and has indicated its opposition stems from several beliefs, including its ability to effectively enforce environmental regulations and to access information concerning potential environmental hazards.¹¹¹ The EPA also opposes audit privileges and immunities because the EPA's methodology focuses on measuring success by totaling the number of infractions and counting the dollars assessed as penalties.¹¹² The states, as well as Congress, have attacked the EPA's position over the past few years, and in 1996 the EPA issued a new policy on audits that was intended to provide stronger support for protecting environmental results.¹¹³

The EPA's Audit Policy indicates that it fully supports the use of environmental audits themselves; however, it continues to discourage the enactment of laws protecting results.¹¹⁴ The policy states six specific reasons the EPA opposes such laws: 1) the idea that privilege inherently encourages secrecy instead of openness; 2) a lack of evidence to show that any privilege is necessary; 3) a tendency for entities to identify all evidence as audit material, thus preventing the government's ability to identify violations and assign responsibilities for them; 4) an increase in litigation as a result of privilege; 5) the belief that the provisions in the policy negate any need for privilege; and 6) an opposition to privilege in general by the law enforcement

be measured by the percentage of facilities in compliance with that particular policy. *See id.* Environmental indicators are associated with overall program goals, such as whether the environment has become cleaner. *See id.*

106. *See id.* at 32.

107. *Id.* at 42.

108. *See id.* at 46.

109. *See id.*

110. *See EPA Convenes 'Summit' on 'E' Audits as Industry, States Ponder 'Privilege,' AIR WATER POLLUTION REP.*, July 11, 1994, available in 1994 WL 2504456. *See also Environmental Self Audits: Hearings Before the Subcomm. on Oversight and Investigations of the House Commerce Comm.*, 105th Cong. (1998) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA).

111. *See Environmental Self Audits: Hearings Before the Subcomm. on Oversight and Investigations of the House Commerce Comm.*, 105th Cong. (1998) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA) [hereinafter Herman Statement I].

112. *See Lieberman, supra* note 41.

113. *See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706 (Dec. 22, 1995) [hereinafter *Incentives for Self-Policing*].

114. *See id.* at 66,710.

community.¹¹⁵

The two salient points to the EPA's 1996 Audit Policy are the elements pertaining to audit report requests and penalty assessments.¹¹⁶ The policy indicated the EPA would not routinely request or use audit results,¹¹⁷ however, it did not state that the EPA would not use the audit results as evidence of violations.¹¹⁸ The EPA continues to claim that although it will request audit reports on a limited basis, it needs to retain the ability to access the reports in order to maintain enforcement.¹¹⁹ The EPA's position on audit reports has been called "wildly inconsistent,"¹²⁰ for "[i]f EPA has no intention of using audits in inspections or enforcement, one cannot imagine how losing access to those audits would impair those inspection or enforcement efforts."¹²¹ The audit policy does not prevent regulatory agencies or other third parties from obtaining audit reports; therefore, sensitive and potentially critical proprietary information of an entity performing an audit could be disclosed. It is interesting that "[n]either the EPA nor the other opponents of state privileges can cite a single concrete example of an enforcement or compliance matter frustrated by the audit statutes."¹²²

The EPA included new penalty-related provisions in its 1996 Audit Policy.¹²³ Based on nine conditions stated in the policy, the EPA will, *at its discretion*, reduce or eliminate the gravity-based portion of civil penalties when violations discovered during an audit are disclosed and corrected.¹²⁴ Meeting the conditions does not reduce the economic benefit portion of the penalties.¹²⁵ Although the potential penalty reduction appears to be a positive step, the nine conditions required for penalty abatement have been called "highly convoluted and restrictive"¹²⁶ and may not offer as much benefit as hoped for by entities conducting self-audits.¹²⁷

[The] EPA has consistently opposed this approach (of state audit privilege laws),

115. *See id.*

116. *See id.* at 66, 707-08.

117. *See id.* at 66, 708.

118. *See id.*

119. *See Wilkins & Stroman, supra* note 60.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See Incentives for Self-Policing, supra* note 113, at 66,711.

124. *See id.* at 66, 711-12.

125. *See id.* at 66, 712.

126. Wilkins & Stroman, *supra* note 60.

127. *See Incentives for Self-Policing, supra* note 113, at 66,711-12 (Dec. 22, 1995). The nine conditions are: (1) discovery through an environmental audit or objective, documented, systematic procedure reflecting due diligence in preventing, detecting and correcting violations; (2) the violation was discovered voluntarily, not through a required reporting mechanism such as by permit or administrative order; (3) full disclosure in writing within ten days of discovery; (4) identification and disclosure prior to any agency action or inspection and prior to its imminent discovery by a regulatory agency; (5) correction of the noncompliance and remediation within sixty days of discovery; (6) agreement in writing to prevent recurrence of the violation; (7) the violation cannot be a repeat of a same or similar violation that has occurred within the past three years or part of a pattern of violations within the past five years; (8) the violation did not result in serious harm or present an imminent and substantial danger to human health or environment; and (9) the entity will cooperate as instructed by EPA by providing access to all documents and employees and assisting in EPA's investigation. *See id.*

principally because of the risk of weakening state enforcement programs, the imposition of unnecessary transaction costs and delays in enforcement actions and the potential increase in the number of situations requiring the expenditure of scarce agency resources, including the 'overfiling' of state enforcement actions.¹²⁸

The EPA believes that "[e]nvironmental audit privilege laws promote secrecy, interfere with law enforcement, impede public right-to-know, and can penalize employees who report illegal activity to law enforcement authorities. They interfere with government's ability to obtain the information it needs to protect human health and the environment."¹²⁹ The EPA "has expressed legal and policy reservations about many of these state laws because of its view that they may jeopardize these states' authority to enforce federal law and regulations."¹³⁰ Although the EPA has been developing results-oriented measures that do not focus on enforcement, it indicates that these measures cannot replace enforcement tools.¹³¹ The EPA continues to stress that enforcement actions are necessary because of the deterrent effect of those actions.¹³² The EPA also indicates that it expects states to use enforcement actions as a barometer of enforcement success because the EPA's own performance is evaluated by measures that count inspections and enforcement actions.¹³³

In addition, the EPA stressed that the policy is guidance only, and "does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties."¹³⁴ The EPA Audit Policy has been highly criticized because it is a non-binding policy, and grants no certainty that enforcement actions will not be taken in response to self-audits.¹³⁵ If the EPA does not follow its policy, a company does not have any legal protection to rely on.¹³⁶

The issuance of the EPA's audit policy did little to discourage states from enacting audit laws. However, the EPA responded to the enactment of audit laws with threats to either overfile or revoke states' delegation under the CAA, CWA, and RCRA.¹³⁷ For example, in 1996 Colorado received one overfile action, while in 1997 it received three overfile actions with the threat of ten more.¹³⁸ The total fines imposed by Colorado in these three instances was \$593,000, while the total fines imposed by the EPA was \$2,332,771, an increase of 293%.¹³⁹ In each of these three

128. *EPA Convenes 'Summit' on 'E' Audits as Industry, States Ponder 'Privilege,' supra* note 110.

129. Herman Statement, *supra* note 111.

130. ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 25, n.4. Specifically, the EPA is concerned about potential limits to states' abilities to either obtain penalties or injunctive relief or acquire information necessary to determine whether an entity has complied with program requirements. *See Id.*

131. *See id.* at 47.

132. *See id.*

133. *See id.* at 48.

134. Incentives for Self-Policing, *supra* note 113, at 66,712.

135. *See id.*

136. *See* George Van Cleve & Keith W. Holman, *Promise and Reality in the Enforcement of the Amended Clean Air Act Part II: Federal Enforceability and Environmental Auditing*, 27 ENVTL. L. REP. 10151, 10158 (Apr. 1997).

137. *See* Bangert Statement III, *supra* note 48.

138. *See id.*

139. *See id.* *See also* Radiator Company Agrees to Pay \$180,000 to Settle RCRA Violation Charges with EPA, BNA NAT'L ENV'T DAILY, Feb. 6, 1998, at d3, where one of the overfiled companies (Denver Radiator) agreed to settle for \$180,000. This is \$286,000 less than the original \$466,000 imposed by the EPA, but \$65,000 more than the

cases, the company corrected its violations; and the state indicated that there was "no continuing harm to the public or the environment."¹⁴⁰ As a result of fears that the EPA will use audit results to file some form of federal action, no self-audits have been performed in Colorado in over a year.¹⁴¹

Texas changed its audit laws in response to the EPA's threat to deny final delegation approval to the Texas CAA Title V program.¹⁴² Idaho allowed its environmental audit law to sunset because of threats of revocation of its CAA Title V program.¹⁴³ Michigan, Utah, Virginia, and Wyoming have made changes in their laws in order to satisfy the EPA,¹⁴⁴ and proposed audit legislation bills failed to pass in Delaware, Louisiana and West Virginia after EPA representatives testified against such legislation in those states.¹⁴⁵ Further, the EPA's legal and policy concerns kept it from issuing final approval to some states' environmental programs. In some instances, the EPA granted interim approval only.¹⁴⁶ The EPA regions were asked to investigate the "unacceptable drop in the number of enforcement actions" by states in those regions.¹⁴⁷

VII. THE EPA'S OPTIONS

If the EPA is dissatisfied with a state's enforcement efforts, it has two options: revocation of a state's permitting program or overfiling a state enforcement action. Both options are problematic; they are extreme and do not offer a practical, reliable solution that can be applied consistently. Revocation effectively takes away all state enforcement authority, bringing complete enforcement authority back to the EPA.¹⁴⁸ Revocation is impractical because it requires the EPA to reallocate resources to enforcement that a state had been handling, straining already limited resources. In addition, the EPA is likely dissatisfied with only one portion of a state's enforcement, and revoking complete enforcement authority may not be either necessary or desirable. The EPA appropriately likens this situation to "using a pretty big hammer to kill a pretty small gnat."¹⁴⁹ The use of revocation is a macro-level decision that forces the EPA into an all or nothing situation. It appears that the EPA will avoid

\$115,000 proposed by the state.

140. Bangert Statement III, *supra* note 48.

141. See Al Knight, *Reining in EPA's Goon Squads*, DENVER POST, May 10, 1998, at G03.

142. See Van Cleve & Holman, *supra* note 136, at 10,162 (citing Clean Air Final Interim Approval of Operating Permits Program; the State of Texas, 61 Fed. Reg. 32693 (1996)).

143. See Mark Anderson & Alisa Shiratori, *EPA, States Clash on Environmental Policies*, Environment News (visited Aug. 10, 1998) <www.heartland.org/environment/August/clash.htm>.

144. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 49.

145. See Anderson & Shiratori, *supra* note 143.

146. See ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS, *supra* note 5, at 7.

147. *Id.* States that have been delegated authority programs under the RCRA, CWA, and CAA are required to report on inspections they have made. They must provide the EPA with the number and type of inspections, inspections results, and any enforcement actions that occur as a result of violations found during the inspections. See *Id.* at 16.

148. See RCRA § 3006(e), 42 U.S.C. § 6926(e) (1994); CWA § 402(c), 33 U.S.C. § 1342 (1994).

149. Amy Porter, *Hazardous Waste: Court Rules EPA Has No RCRA Authority to 'Overfile' State Enforcement Actions*, 29 ENV'T REP. 917 (Sept. 4, 1998).

this choice if at all possible, mainly for practical considerations, because it is not reasonable to revoke the entire program given the EPA's strained resources unless the EPA is totally dissatisfied with a state's entire program. So far, although the EPA has threatened to revoke states' permitting programs, it has only used the threat of revocation to force states to change their laws prior to enactment in order to conform with the EPA's wishes.¹⁵⁰

The EPA's second option in response to audit laws is to overfile.¹⁵¹ Overfiling is also extreme, albeit on a micro-level basis because it focuses on one individual entity rather than a state's entire enforcement program. The courts have recognized that federal and state governments can take enforcement actions "concurrently or subsequent to one another."¹⁵² By overfiling, the EPA can circumvent the state audit laws that protect audit reports by bringing the action under federal law.¹⁵³

The EPA has indicated that overfiling takes place where "the state response to a violator or environmental condition fails to protect human health or the environment, fails to deter future violations by a major repeat violator, or fails to protect law-abiding facilities from competitive disadvantage."¹⁵⁴ The EPA will also overfile if "the state doesn't get a sufficient penalty or in some other way doesn't meet our needs."¹⁵⁵ The EPA indicates that overfiling should occur when a state "fails to take timely and appropriate action" or "where the state's action is clearly inadequate."¹⁵⁶ The EPA states that generally, overfiling actions should not take place where a state takes timely and appropriate action, but that the decision to overfile is a "policy matter, not a requirement of statutory or case law."¹⁵⁷

The EPA actually overfiles in very few instances. In 1992 and 1993, the EPA overfiled on approximately thirty cases.¹⁵⁸ From 1994 through 1996, the EPA took twenty-two overfiling actions.¹⁵⁹ However, although the total number of instances in which overfiling takes place is fairly minimal, the impact on an overfiled entity can

150. See *supra* notes 142-46 and accompanying text.

151. An overfiling action takes place "[w]hen the EPA exercises its authority to prosecute an alleged violator in an approved state that has already initiated its own enforcement action for the same requirements against the same defendant." William Daniel Benton, *Application of Res Judicata and Collateral Estoppel to EPA Overfiling*, 16 B.C. ENVTL. AFF. REV. 199, 203-04 (Winter 1988).

152. Katherine C. Kellner, Comment, *Separate But Equal: Double Jeopardy and Environmental Enforcement Actions*, 28 ENVTL. L. 169, 174 (Spring 1998) (referencing *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000-03 (9th Cir. 1980), in which the court noted that "[s]ection 1324(I) [of the CWA] reserves EPA's authority to bring an enforcement action notwithstanding an approved state permit system with concomitant enforcement powers. Enforcement actions could have been filed concurrently in both state and federal courts.").

153. See *Wilkins & Stroman*, *supra* note 60.

154. Herman Statement I, *supra* note 111.

155. Tripp Baltz, *EPA Overfiles State in RCRA Cases, Third Time in Colorado in Last Two Months*, BNA STATE ENV'T DAILY, Mar. 21, 1997 at d5.

156. EPA, *Guidance on RCRA Overfiling* (visited Aug. 10, 1998) <<http://envinfo.com/caain/enforcement/caad120.html>>.

157. *Id.*

158. See *Oversight Hearing on the Relationship Between the Fed. and State Gov'ts in the Enforcement of Environmental Laws Before the Senate Comm. on Environment and Public Works*, 105th Cong. (1997) (statement of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA) [hereinafter Herman Statement II].

159. See *id.*

be quite severe.¹⁶⁰

Envirocare, a Utah company, agreed to settle with the EPA for \$197,000 in exchange for the EPA's agreement to drop its overfiling charge.¹⁶¹ The state of Utah originally assessed a \$60,000 fine, settling with Envirocare for \$30,000.¹⁶² The state increased its penalty to \$79,000 because of the EPA's dissatisfaction with the original assessment; however, the EPA did not consider the \$79,000 to be a sufficient deterrent and overfiled with a penalty of \$601,503.¹⁶³

In West Virginia, a state agency imposed a \$2,000 penalty on the Beaumont Company, while the EPA overfiled and sought \$1.3 million.¹⁶⁴ Beaumont argued that the EPA was precluded from taking action where action had been taken by the state in an RCRA case.¹⁶⁵ The Director of the West Virginia Division of Natural Resources called the EPA's action a "breach of trust,"¹⁶⁶ and indicated that the "fines are nowhere nearly commensurate with the environmental harm or with the nature of the violations."¹⁶⁷

Congressional opinion of overfiling has been extremely negative:

[T]he Agency 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. In this regard, the Agency is asked to report by June 30, 1996 on the progress it has made in the reduction of dual jurisdictional problems as well as on the number and reasons for any overfilings it has undertaken during fiscal year 1996.¹⁶⁸

The duplicative nature of an overfiling action penalty is disturbing not only because it increases a penalty imposed on an entity, but because it does so without any additional work.¹⁶⁹ The EPA can obtain the necessary documentation of an entity's violations from a state entity's files, "then draft a complaint based on the state's work and file it in the local federal district court."¹⁷⁰ This method of imposing a penalty is less expensive and less cumbersome than initially obtaining information

160. See *supra* note 139 and accompanying text; see *infra* notes 161-67 and accompanying text.

161. See *Envirocare Gets \$197,000 Fine*, DEFENSE CLEANUP, Oct. 31, 1997, available in 1997 WL 12946153.

162. See Brent Israelsen, *EPA Deems Utah Fine Too Low, Nails Envirocare for \$600,000; Envirocare Faces \$600,000 Fine from EPA*, SALT LAKE TRIBUNE, Aug. 1, 1997, at A1.

163. See *Business & Technology: Parsons Recommends Rod Changes That Save EPA \$38MM at Lowry Landfill*, HAZARDOUS WASTE NEWS, September 1, 1997, available in 1997 WL 10931522. See also Tripp Baltz, *EPA Overfiles Utah in Waste Facility Case, Says State Fine Too Low to Deter Violations*, BNA STATE ENV'T DAILY, Aug. 1, 1997 at d2.

164. See *EAB Told Overfiling OK Only When State Completely Fails to Act*, PESTICIDE & TOXIC CHEMICAL NEWS, Apr. 12, 1995, available in 1995 WL 8217735.

165. See *id.* See also *supra* note 15 and accompanying text regarding differences between the language in the RCRA versus language in the CAA and CWA.

166. *EPA Actions Against Companies Trouble State Regulatory Agency*, STATE JOURNAL (Charleston W. Va.), Apr. 1, 1992, at V8, n4, § 1.

167. See *id.*

168. H.R. Rep. No. 104-201 at 51 (1995).

169. See generally Cook, *supra* note 13, at 1094.

170. *Id.*

to evaluate a second entity's compliance with environmental regulations.¹⁷¹ Although this process

may conserve EPA's enforcement resources, it is actually a duplication of effort and wastes limited enforcement dollars. EPA's efforts do not produce additional facts or other pertinent information necessary to bring additional actions against other pollution sources. Instead, EPA recycles the same data and creates the illusion that it is leading the way in cracking down on the nation's polluters. As a result, while federal and state agencies are pursuing one violator, other known or suspected violators are left outside the enforcement umbrella due to lack of money and insufficient personnel to pursue additional cases. Any money that is collected will end up in the general fund and will not create any additional funds for enforcement purposes. Consequently, the goal of fair and equitable treatment of the regulated community is not achieved as violators are either receiving a double blow or escaping untouched.¹⁷²

Overfiling impedes expedient resolution.¹⁷³ An entity assessed with violations may be required to negotiate with the EPA in addition to a state agency.¹⁷⁴ The environment does not receive additional benefit from a second set of negotiations because the entity that violated the regulations will have initiated compliance procedures required by any settlement agreement made with the state agency.¹⁷⁵ Overfiling may also prevent or delay settlement with a state on the basis that the EPA can always impose a second penalty in spite of enforcement action taken by a state agency.¹⁷⁶

The EPA's overfiling authority has been likened to extortion and is said to have been used as a "weapon" to force changes in state laws.¹⁷⁷ The EPA clearly envisions overfiling in response to audit privilege and immunity laws according to its Audit Policy, which states that it "reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law."¹⁷⁸ The suggestion was made that the EPA should be required to establish clear criteria under which conditions it will overfile¹⁷⁹ so that entities will not see it as a tool that the EPA uses when states' fines and penalties are not viewed as "high enough."¹⁸⁰ Establishing overfiling criteria would also prevent the practice from being viewed as a purely political tool that questions the judgment of state regulatory agencies.

171. *See id.*

172. *Id.* at 1094-95.

173. *See id.* at 1095.

174. *See id.*

175. *See Cook, supra* note 13, at 1095.

176. *See id.* at 1096.

177. Bangert Statement II, *supra* note 39.

178. Incentives for Self-Policing, *supra* note 113, at 66,712.

179. *See* Bangert Statement II, *supra* note 39.

180. *Id.*

VIII. POSSIBLE SOLUTIONS: LEGISLATIVE ACTION AND COMMON LAW DOCTRINES

The impasse resulting from the opposing positions of the states and the EPA leads many to believe that federal legislative intervention is necessary in order to establish an even playing field for all the parties involved.¹⁸¹ The 105th Congress submitted three bills that would have granted limited privileges and immunities to entities performing voluntary environmental self-audits.¹⁸² In spite of apparently strong support, however, none of the three passed as law. The Eighth Circuit recently upheld a controversial district court decision in *Harmon Industries, Inc. v. Browner*,¹⁸³ which may revive Congressional interest in state self-audit laws.

In the absence of federal legislation, companies may have to rely on the traditional common law doctrines of collateral estoppel¹⁸⁴ and res judicata¹⁸⁵ to avoid a second enforcement action by the EPA. Application of these doctrines is "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. "[The doctrines] protect[] [parties] from the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions."¹⁸⁶

The plain language of the Resource Conservation Recovery Act, Clean Water Act, and the Clean Air Act does not preclude application of either res judicata or collateral estoppel.¹⁸⁷ The statutes do not explicitly authorize overfiling,¹⁸⁸ so the statutes do not contain language to prevent preclusion resulting from the application of the common law doctrines.¹⁸⁹ However, to apply either of the doctrines, a "finding

181. See Norton Statement, *supra* note 25.

182. See S.866, 105th Cong. (1997); S.1332, 105th Cong. (1997) and H.R. 1884, 105th Cong. (1997).

183. *Harmon Indus., Inc. v. Browner*, No.98-3775, 1999 U.S. App. LEXIS 22405, at *1 (8th Cir. Sept. 16, 1999), *aff'g* 19 F. Supp. 2d 988 (W.D. Mo. 1998).

184. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). "Under the doctrine of collateral estoppel . . . the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Id.* at n

185. The res judicata rule requires that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

186. *Montana*, 440 U.S. at 153.

187. See RCRA § 3008, 42 U.S.C. § 6928 (1994) (authorizing EPA enforcement action); CAA § 113, 42 U.S.C. § 7413 (1994) (authorizing EPA enforcement action); and CWA § 309, 33 U.S.C. § 1319 (1994) (authorizing EPA enforcement action).

188. See *supra* note 15 and accompanying text.

189. See RCRA § 3008, 42 U.S.C. § 6928 (1994) (authorizing EPA enforcement action); CAA § 113, 42 U.S.C. § 7413 (1994) (authorizing EPA enforcement action); and CWA § 309, 33 U.S.C. § 1319 (1994) (authorizing EPA enforcement action).

that governments were in privity with one another”¹⁹⁰ would have to be made where “state and federal governments have concurrent enforcement authority.”¹⁹¹ The EPA would not be a party to a state proceeding, so in order for res judicata or collateral estoppel to apply, privity with the state party would have to be found.¹⁹²

Under the doctrine of collateral estoppel, “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.”¹⁹³ Under collateral estoppel, a party cannot relitigate an issue in a later action when “the issue was actually and necessarily determined by a final judgment in a prior action.”¹⁹⁴ The doctrine of collateral estoppel applies to administrative determinations and nonlitigated judicial consent decrees.¹⁹⁵ Collateral estoppel is an affirmative defense that must be raised for the doctrine to apply.¹⁹⁶

The res judicata rule requires that “a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.”¹⁹⁷ Res judicata prevents a subsequent suit “involving the same parties or their privies based on the same cause of action.”¹⁹⁸ Res judicata has been raised in the context of an overfile case, but has been classified as an affirmative defense.¹⁹⁹ Therefore, if it is not specifically pleaded, it is waived.²⁰⁰

“The existence of concurrent enforcement powers does not per se negate the application of res judicata principles.”²⁰¹ The court in *U.S. v. ITT Rayonier, Inc.*²⁰² noted that under the CWA, both a state agency and the EPA could bring enforcement actions against an entity.²⁰³ However, the court stated that “[t]his does not necessarily preclude the operation of collateral estoppel after one action reaches finality.”²⁰⁴ Based on the court’s evaluation of the CWA’s statutory language, it determined that the CWA did not “manifest countervailing policy reasons to abrogate the doctrine known generically as res judicata.”²⁰⁵ The court found that the

190. Benton, *supra* note 151, at 201.

191. *Id.*

192. *See generally id.* at 247-61. The article describes three categories in which there is potential for privity to be established between a state and the EPA. The first, or traditional, privity category takes place where “preclusion is extended to persons who were represented by parties with the authority to do so.” *Id.* at 250. In the second category, “preclusion is extended to nonparties whose participation is so extensive that they are de facto parties.” *Id.* In the third category, “the party to the first suit shared such an identity of interests with the subsequently precluded party so as to be its ‘virtual representative.’” *Id.*

193. *Montana v. United States*, 440 U.S. 147, 153 (1979).

194. David T. Buente Jr. et al., *The ‘Civil’ Implications of Environmental Crimes*, 23 ENVTL. L. REP. 10589 (Oct. 1993).

195. *See id.*

196. *See* Benton, *supra* note 151, at 253.

197. *Montana*, 440 U.S. at 153.

198. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979).

199. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 485 n.7 (D.S.C. 1995). *See also* Benton, *supra* note 151, at 253.

200. *See Friends of the Earth*, 890 F.Supp. at 485 n.7 (commenting on the applicability of res judicata as a result of supplemental briefs requested of the parties; res judicata was otherwise not raised).

201. *U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996, 1001 (9th Cir. 1980).

202. *Id.* at 996.

203. *See id.* at 1001.

204. *Id.*

205. *Id.* at 1002.

relationship between the state agency and the EPA was sufficiently close to determine that the EPA was collaterally estopped from relitigating the same enforcement issue that had been decided in state court, and the action was dismissed.²⁰⁶

Treatment under *ITT Rayonier* should be applicable to actions under the CAA and RCRA as well as the CWA, even though some of the language in each of the statutes is different.²⁰⁷ All three statutes reserve EPA enforcement authority while establishing a federal/state partnership.²⁰⁸ The permits under all three of the statutes “are derived from a single act of Congress, even if they are issued by a state.”²⁰⁹ In fact, treatment based on *ITT Rayonier* was recently used in *Harmon I*, where the court struck down the EPA’s authority to overfile.²¹⁰ In *Harmon I*, the court determined that the EPA was prevented from overfiling based on both the plain language of RCRA and the principle of res judicata.²¹¹

In 1987, the management of Harmon Industries, Inc. (Harmon), discovered that its employees were disposing of organic solvent, a hazardous waste, by emptying pails of the solvent on the ground behind Harmon’s plant.²¹² Harmon subsequently contacted the Missouri Department of Natural Resources (MDNR) and informed the MDNR of its violations.²¹³ The MDNR conducted an investigation and Harmon initiated cleanup procedures.²¹⁴ Harmon began to use nonhazardous cleaning material in place of the organic solvent and hired consultants to investigate the site.²¹⁵

The MDNR, the agency authorized to administer RCRA in Missouri, monitored Harmon’s progress in its cleanup efforts.²¹⁶ Harmon provided the MDNR with reports prepared by Harmon’s consultant, while the MDNR periodically conducted further investigations.²¹⁷ Harmon and MDNR entered into a Consent Decree in 1993 that provided that “Harmon’s compliance with this Consent Decree constitutes full satisfaction and release from all claims arising from allegations contained in [MDNR’s] petition.”²¹⁸ The Consent Decree stated that the terms of the Decree were applicable to anyone “acting in concert and in privity with” Harmon.²¹⁹ Because of Harmon’s cooperation and initiative in correcting its violations, the MDNR never

206. See *id.* at 998, 1003.

207. See Benton, *supra* note 151, at 255. The EPA itself has, in internal documents, noted the difference between the language of the statutes and formulated an argument that when EPA intervening action is precluded under the RCRA, it should not be under the CWA or the CAA based on the differences in the language. EPA, *Guidance on RCRA Overfiling* (visited Aug. 10, 1998) <<http://envinfo.com/caain/enforcement/caad120.html>>.

208. See Benton, *supra* note 151, at 255.

209. *Id.*

210. See *Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff’d*, No. 98-3775, 1999 U.S. App. LEXIS 22405, at *1 (8th Cir. Sept. 16, 1999).

211. See *id.*

212. See *id.* at 989.

213. See *id.*

214. See *id.*

215. See *id.* at 990.

216. See *Harmon*, 19 F. Supp. 2d 988 at 990-91 (W.D. Mo. 1998).

217. See *id.*

218. *Id.* at 992.

219. *Id.*

imposed a monetary penalty upon Harmon.²²⁰ In responding to the hazardous waste disposal violations, Harmon spent in excess of \$2.5 million apart from any potential penalty impact.²²¹

During the period the MDNR was investigating Harmon, copies of some of Harmon's reports were sent to the EPA.²²² Correspondence from the EPA to the MDNR indicated the EPA's view that "formal enforcement action seeking monetary penalties" should be sought by the MDNR.²²³ In 1991, the EPA filed an administrative complaint against Harmon, proposing a penalty of \$2,343,706.²²⁴ In a proceeding before an administrative law judge (ALJ), the penalty was reduced to \$586,716 in accordance with RCRA's Civil Penalty Policy and Civil Enforcement Policy.²²⁵

Harmon appealed the decision of the ALJ to the EPA's Environmental Appeals Board (EAB).²²⁶ On appeal, Harmon raised several issues, including "whether [EPA's] enforcement action against Harmon is precluded by the language of RCRA and by principles of *res judicata*"²²⁷ and whether the gravity portion of the penalty should be eliminated in accordance with the EPA's self-policing policy because "Harmon discovered and voluntarily reported its own violations and worked cooperatively . . . to remedy the violations."²²⁸

The EAB disposed of Harmon's statutory language argument quickly, stating that "it is well settled that, even when the authorized State has taken action, RCRA nevertheless authorizes the [EPA] to take its own action."²²⁹ This "well settled"²³⁰ reading of the RCRA appears to be established mainly on the EPA's own decisions and one district court case that may be distinguishable on its facts.²³¹ The EAB decided not to delve further into Harmon's statutory language argument because "Harmon has not offered any persuasive reasons to reopen this well-established reading."²³²

The EAB also rejected Harmon's argument that the EPA was precluded from bringing an enforcement action against Harmon based on the *res judicata* doctrine.²³³

220. *See id.* *See also* Porter, *supra* note 149; Harmon Electronics, Inc., No. VII-91-H-0037, RCRA (3008) Appeal No. 94-4, 1997 WL 133778, at *4 (EPA Env'tl. Appeals Board March 24, 1997).

221. *No Penalty for Self-Reported Violations, Harmon Argues*, PESTICIDE & TOXIC CHEMICAL NEWS, February 22, 1995, available in 1995 WL 8217440.

222. *See Harmon*, 19 F. Supp. 2d at 990 (W.D. Mo. 1998).

223. *Id.* at 992.

224. *See id.*

225. *See id.*

226. *See id.*

227. Harmon Electronics, Inc., No. VII-91-H-0037, RCRA (3008) Appeal No. 94-4, 1997 WL 133778, at *2 (EPA Env'tl. Appeals Board March 24, 1997).

228. *Id.*

229. *Id.* at *7.

230. *Id.*

231. *See id.* at *n.7. In the district court's decision in *EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1186 (N.D. Ind. 1989), *aff'd* 917 F.2d 327 (7th Cir. 1990), the court found that the state of Indiana was not actually authorized to enforce the provisions of certain amendments to RCRA, indicating that the state action may have been inappropriate. Although the case was appealed and affirmed, this particular issue was not included in the appeal.

232. *Id.* at *7.

233. *See* Harmon Electronics, Inc., No. VII-91-H-0037, RCRA (3008) Appeal No. 94-4, 1997 WL 133778, at *7-11 (EPA Env'tl. Appeals Board March 24, 1997).

The EAB determined that in this case, the EPA was not in privity with the state of Missouri because there was no "identity of interests"²³⁴ between the two parties.²³⁵ The EAB's privity evaluation hinged on the fact that the EPA wanted to impose a penalty while the state of Missouri did not:

[B]efore the entry of the consent decree, the [EPA] unequivocally expressed its interest in having substantial penalties assessed against Harmon (later proposing a penalty in excess of \$2.3 million). [Missouri], on the other hand, expressed its interest in rewarding Harmon for what [Missouri] viewed as Harmon's self-reporting of the violations charged in this action by settling the matter without penalties. Given this clash of interests over the propriety and amount of penalties, we conclude that no identity of interests existed between [EPA] and the State of Missouri with respect to the entry of the consent decree. In other words, the particular circumstances of this case do not establish a relationship of privity between [EPA] and [Missouri].²³⁶

The EAB also dismissed Harmon's argument that the gravity penalty should be reduced in accordance with the EPA's self-policing policy.²³⁷ The EPA had classified Harmon's audit as a "safety walk-through" rather than an audit, indicating that the provisions of its audit policy were not applicable,²³⁸ however, it has been recognized that the Harmon case is the first in which the applicability of the EPA's audit policy has been invoked.²³⁹ Harmon's request that the penalty be reduced because it had complied in "'spirit' and 'essence'"²⁴⁰ was rejected by the EAB, which stated that part of the policy would be "undermined if the penalty reduction provisions . . . were applied in full here."²⁴¹ The EAB noted that Harmon had not complied with all nine of the conditions required by the EPA's Audit Policy in order to reduce or eliminate a penalty, and also pointed out that "the policy is specifically intended as guidance in a settlement context and was never meant for use in an adjudicatory context."²⁴² The EAB also determined that once enforcement cases are being adjudicated, penalties cannot be mitigated even if the violations were self-reported.²⁴³

Harmon appealed the EAB's decision to the Western District Court of Missouri.²⁴⁴ The court reversed the EAB decision on the basis of both the statutory

234. *Id.* at *10.

235. *See id.*

236. *Id.*

237. *See id.* at *26-28.

238. *Audit Policy Does Not Apply to Harmon Overfiling Case, EPA Argues*, PESTICIDE & TOXIC CHEMICAL NEWS, April 12, 1995, available in 1995 WL 8217734.

239. *See Amy Porter, Harmon Electronics Ruling on Overfiling, Audit Policy Has Implications for Other Laws*, BNA NAT'L ENV'T DAILY, Mar. 26, 1997, at d4.

240. *Harmon Electronics, Inc., No. VII-91-H-0037, RCRA (3008) Appeal No. 94-4*, 1997 WL 133778, at *27 (EPA Envtl. Appeals Board March 24, 1997).

241. *Id.* at *28.

242. *Id.* at *27.

243. *See Waste Regulation: Appeals Board Backs EPA's Authority on Some State Enforcement Cases*, SOLID WASTE REPORT, April 3, 1997, available in 1997 WL 10909429.

244. *Harmon*, 19 F. Supp. 2d at 988.

language and res judicata arguments, treating the EPA's actions quite harshly.²⁴⁵

In its discussion of the statutory language argument, the court noted that "[t]his issue in the context of RCRA appears to be one of first impression."²⁴⁶ The court held that the plain language of RCRA "provides that the MDNR operates 'in lieu of' or instead of the federal program."²⁴⁷ The court stated that the "concept of co-existing enforcement powers . . . would predictably result in confusion, inefficiency, duplicative agency expenditures and would thwart the public policy of early and non-judicial dispute resolution."²⁴⁸

The court indicated that under the statutory language and legislative history of RCRA, the EPA can take enforcement action in an authorized state only when a state fails to take any action and the EPA gives notice that it will take action.²⁴⁹ If the EPA is dissatisfied with the manner in which a state is handling enforcement, its only other option is to withdraw authorization approval from the state.²⁵⁰ The EPA does not have "the option to reject part of a program or course of action on an incident-by-incident basis because the EPA believes the penalty to be inadequate . . . [S]uch a schizophrenic approach to enforcement of RCRA would result in uncertainty in the public mind."²⁵¹ The court took issue with the EPA's decision to impose a penalty:

The Court finds it interesting that the EPA only focused on seeking a penalty in this case. The EPA *does not take issue* with MDNR's *investigation, cleanup, or enforcement* of RCRA, but only takes issue with MDNR's choice *not* to pursue a penalty. Therefore, the Court finds the objectives of RCRA were met through the actions of the MDNR and finds it somewhat disconcerting that the only argument regarding MDNR's effectiveness is money.²⁵²

The court also found for Harmon on its res judicata argument.²⁵³ The decision hinged upon the establishment of privity between the EPA and the MDNR.²⁵⁴ Under Missouri law, "[p]rivacy connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right; and where this identity of interest is found to exist, all are alike concluded and bound by the judgment."²⁵⁵ The EPA argued that it did not have an identity of interest with Missouri, so it was not in privity to the Consent Decree.²⁵⁶ Harmon argued that the state authorization under RCRA itself established

245. *See id.*

246. *Id.* at 995.

247. *Id.*

248. *Id.*

249. *See id.* at 994-96.

250. *See Harmon*, 19 F. Supp. 2d 988, 994-96.

251. *Id.* at 996.

252. *Id.* at 996, n.8 (emphasis added).

253. *See id.* at 997-98.

254. *See id.* at 997.

255. *Id.*

256. *See Harmon*, 19 F. Supp. 2d at 997.

privity.²⁵⁷ In Missouri, parties have been found in privity where the “same legal rights were asserted”²⁵⁸ even though the parties’ interests “may not have been identical.”²⁵⁹ The court found that “MDNR was authorized as a state agency and the underlying interests are nearly identical.”²⁶⁰ It held that the EPA was prevented from imposing penalty violations because *res judicata* was applicable.²⁶¹

On September 16, 1999, the Eighth Circuit upheld the district court’s decision, affirming both the interpretation of the statutory language and the *res judicata* arguments.²⁶² In its brief opinion, the court noted that “[t]he permissibility of overfiling . . . is a question of first impression in the federal circuit courts.”²⁶³

The court first analyzed the statutory language of the RCRA, reviewing *de novo* the district court’s “findings and conclusions regarding the correctness of an agency’s statutory interpretations.”²⁶⁴ The EPA argued that the RCRA phrase “in lieu of” referred to the regulations to be enforced and not to the enforcing party; however, the Eighth Circuit found that “[a]n examination of the statute as a whole supports the district court’s interpretation.”²⁶⁵ The court determined that “[t]he plain ‘in lieu of’ language contained in the RCRA reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement.”²⁶⁶ The RCRA language indicates that the states themselves, rather than the EPA, should have the “primary role” of RCRA enforcement.²⁶⁷ Where the state has been authorized to enforce RCRA, the EPA is limited to a secondary role in which it may take enforcement action in two instances: (1) when the EPA has rescinded the state’s authority, or (2) when the state has taken no action whatsoever.²⁶⁸ The court noted that the RCRA’s legislative history demonstrated congressional intent that the states should have primary enforcement authority, further supporting the district court’s statutory interpretation.²⁶⁹

The court also rejected the EPA’s contention that the “same force and effect” language of the RCRA is limited to the issuance of state permits and is not applicable to enforcement action.²⁷⁰ The court noted that “[n]othing in the statute suggests that the ‘same force and effect’ language is limited to the issuance of permits but not their enforcement.”²⁷¹ The court found that “the meaning of the text is plain and obvious” and refused to apply the EPA’s interpretation in the absence of “clear and unambigu-

257. *See id.*

258. *Id.* at 998.

259. *Id.*

260. *Id.*

261. *See id.*

262. *Harmon Indus., Inc. v. Browner*, No. 98-3775, 1999 U.S. App. LEXIS 22405, at *1 (8th Cir. Sept. 16, 1999).

263. *Id.* at *6.

264. *Id.* at *4.

265. *Id.* at *9.

266. *Id.* at *9-10.

267. *Id.* at *10.

268. *See Harmon*, 1999 U.S. App. LEXIS 22405, at *11.

269. *Id.* at *16-17.

270. *See id.* at *12.

271. *Id.* at *13.

ous” instruction from Congress due to the “peculiar result” it would have.²⁷²

In summary, the court found that based on the plain language of the RCRA and its legislative history, the EPA cannot bring a second enforcement action when a state has already initiated one of its own.²⁷³ If the EPA feels that the state’s action is inadequate, it must notify the state and give the state an opportunity to “correct the deficiency” and then withdraw the state’s RCRA authorization.²⁷⁴ Otherwise, there could be two separate enforcement actions, which “would derogate the RCRA’s plain language and legislative history.”²⁷⁵ The court noted that “[s]uch a potential schism runs afoul of the principles of comity and federalism so clearly embedded in the text and history of the RCRA.”²⁷⁶ The court stated that “[t]he EPA’s interpretation simply is not consistent with the plain language of the statute, its legislative history, or its declared purpose. Hence, it is also an unreasonable interpretation to which we accord no deference.”²⁷⁷ Based on this interpretation, the court found that the EPA had exceeded its authority by initiating an overfiling action.²⁷⁸

The court also upheld Harmon’s res judicata argument, finding privity between the EPA and the state of Missouri because their relationship in the enforcement was nearly identical.²⁷⁹ The court reviewed the RCRA’s statutory language and found that “Missouri’s action has the same force and effect as an action initiated by the EPA. Accordingly, the two parties stand in the same relationship to one another.”²⁸⁰ Although the EPA argued that it had different enforcement interests than the state of Missouri, the court noted that privity does not depend on the “subjective interests” of the parties, but rather on the representation of the “same legal right.”²⁸¹ Therefore, the EPA and the state of Missouri were in privity and res judicata prevented the EPA’s enforcement action.²⁸²

The EPA raised a sovereign immunity defense on appeal, claiming that the doctrine prevented the application of res judicata in this case because the United States was not the named party in the prior lawsuit.²⁸³ The court noted, however, that under the RCRA, the “federal government authorizes the state to act in its place. It cedes its authority to the state pursuant to the authorization plan contained in the statute.”²⁸⁴ Once the EPA authorizes a state to enforce the RCRA, “the state ‘prosecutes’ enforcement actions ‘in lieu of’ the federal government and operates as if it were the EPA.”²⁸⁵ Therefore, the court held that the sovereign immunity defense

272. *Id.* at *12-13.

273. *See id.* at *18.

274. *See Harmon*, 1999 U.S. App. LEXIS 22405, at *18-19.

275. *Id.* at *19.

276. *Id.* at *20.

277. *Id.*

278. *See id.* at *20-21.

279. *See id.* at *23.

280. *Harmon Indus., Inc. v. Browner*, No. 98-3775, 1999 U.S. App. LEXIS 22405, at *23 (8th Cir. Sept. 16, 1999).

281. *Id.* at *24.

282. *See id.* at 27.

283. *See id.* at 24.

284. *Id.* at *26.

285. *Id.*

was not applicable and *res judicata* barred the EPA from bringing an enforcement action against Harmon.²⁸⁶

The *Harmon I* district court decision was called a "stunning blow to EPA's enforcement program."²⁸⁷ Industry attorneys have indicated that the decision should have a positive impact because companies will be able to negotiate settlements with state agencies without concern that the EPA will step in later.²⁸⁸ The question now is how the Eighth Circuit decision will impact enforcement activity in other circuits and as to other statutes, such as the CWA and CAA. The language of the other statutes is different, so it is uncertain whether *Harmon II* will apply,²⁸⁹ and it is also uncertain whether the EPA will pursue additional action in *Harmon II* or whether it will look to pursue a case in another circuit in order to create a conflict.²⁹⁰ Given the outcome of *Harmon II* and the EPA's desire to maintain the option to overfile, the prominence of debate on the overfiling practice has increased, and it is certain that additional activity will result.

IX. CONCLUSION

The public has become much more aware of environmental issues and their consequences since the first federal environmental statutes were enacted. Heightened public awareness demands solutions that do not rely on strictly delineated roles between the federal and state governments, but instead concentrate on the most important issue: resolving environmental problems so that individual and public health and safety concerns are reduced. The focus needs to be on improving the environment and the best way for obtaining that goal.

The EPA wants a consistent approach which continues to emphasize deterrence, while the states want flexibility in achieving environmental compliance and improvements. Both are valid arguments, but the EPA and the states have fundamental ideological differences that must be addressed in order to create an adequate solution.

The EPA's continued focus on deterrence might deter the wrong parties. The EPA stated that it originally imposed a \$2.3 million fine on Harmon as a deterrent. The fine was obviously not a deterrent to Harmon, who stopped the violative practice immediately upon discovery. In addition, Harmon voluntarily reported the violation, which may never have been discovered by either the EPA or the state agency. If the fine was assessed to deter others, the deterrence motivation may backfire by deterring entities from *reporting* violations rather than deterring entities from *committing* violations. Companies may prefer engaging in an inspection roulette game rather

286. See *Harmon*, 1999 U.S. App. LEXIS 22405, at *26-27.

287. *Court Strikes Down EPA Authority to 'Overfile' Enforcement Cases*, INSIDE E.P.A. WKLY. REP., Aug. 28, 1998.

288. See *id.*

289. See Susan Carhart, *Hazardous Waste: Attorneys Foresee Enforcement Changes Following Rejection of EPA Overfiling Powers*, BNA NAT'L ENV'T DAILY, Sept. 22, 1999. See also *supra* note 15 and accompanying text.

290. See Carhart, *supra* note 289.

than voluntarily coming forward with violations if the EPA's reaction is to immediately impose a heavy fine.

The EPA and the states need to focus on working together where they have concurrent enforcement authority. Although the EPA has oversight authority, it has no practical method of invoking that oversight authority when it is dissatisfied with a state's actions. It is limited to revocation of a state's permitting program or overfiling. Revocation is completely impractical due to resource concerns, while overfiling tends to have extremely negative backlash because entities can end up paying twice for the same violation. Overfiling could be a reasonable solution if either the EPA or Congress established overfiling requirements and limitations so that the states and entities subject to EPA regulations would know when the EPA could overfile, rather than leaving the practice completely discretionary. The entire practice of overfiling could be eliminated judicially depending on the outcome of *Harmon*, which would leave the EPA with little practical oversight authority at all.

The states must demonstrate that their innovative methods are actually working by improving the environment and are not simply providing a break to entities that may be committing environmental violations. The states have overcome any perception that they are soft on polluters due to their immunities and privileges self-audit laws. The states need to devise measurement criteria so that they can prove their methods work, and continue to impose penalties where self-audit laws are not applicable in order to convince both the EPA and the public that their flexible solutions are working both from a curative standpoint and a deterrent standpoint and that they will continue to engage in enforcement procedures where necessary.

What motivates compliance? What will encourage entities to discontinue environmentally harmful practices? Maybe in the past the command and control method used by the EPA was necessary to enforce compliance with environmental statutes because neither entities nor the general public was aware of the damage that resulted. However, public awareness is currently much greater, and other methods such as limited immunities, privileges, and other incentives may motivate compliance better than the threat of civil and criminal penalties and injunctions. What remains to be seen is whether the states will have the opportunity to try out those methods and see if they work.

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