

# NOTES

## OVERFILING AND UNDER- ENFORCEMENT

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*Environmental regulation is accomplished through a system of cooperative federalism—the federal Environmental Protection Agency (EPA) sets nationwide standards for various pollutants, but the responsibility for granting permits, inspecting facilities, and punishing violations is generally delegated to state agencies. This power-sharing arrangement has frequently created tensions between the federal and state environmental agencies. Overfiling is one of the most contentious of these tensions; it occurs when the federal government files an enforcement action against a polluter for a violation of a federal environmental statute after the delegated state agency has reached a settlement with the same polluter for the same violation. While overfiling occurs very rarely, it is a critical component of the cooperative federalism arrangement, and in this Note, I propose that it should occur more frequently in order to ensure that state agencies are not using low enforcement to de facto create a more hospitable landscape for polluters and damage public health and the environment.*

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\* Copyright © 2020 by Hannah R. Miles. J.D. Candidate, 2020, New York University School of Law. I would like to thank Ricky Revezs for his guidance and support throughout this process. He knew I could write a Note long before I believed it. Additionally, I would like to thank my mom, Naomi Freundlich, and Joe Tarantino for their generosity in being willing to proofread this Note early on. Finally, thank you to the *New York University Law Review* team, especially Alex Kristofcak and Kai Fiske, for improving this Note with their suggestions and editing.

## INTRODUCTION

Federal environmental enforcement, including criminal cases, civil penalties, and injunctive relief, has fallen to levels not seen in decades.<sup>1</sup> The number of cases that the Environmental Protection Agency (EPA) referred to the Department of Justice (DOJ) for criminal prosecution hit a 30-year low in 2018.<sup>2</sup> In 2017, the agency filed about 1/3 fewer civil cases than had been filed annually under the Obama Administration and sought just 39% of the penalties that the Obama Administration had sought, adjusted for inflation.<sup>3</sup> And actions seeking injunctive relief, where companies are required to spend money retrofitting their factories to cut pollution, have also fallen to just 12% of what was sought by the Obama Administration and 48% of what was sought by the George W. Bush Administration.<sup>4</sup> This rollback in enforcement is critical, because, as Senator Joseph Lieberman (D-Conn.) explained, without effective enforcement, “most of the rest of environmental protection lacks meaning, lacks truth, lacks reality.”<sup>5</sup>

The EPA under the Trump Administration has claimed that some of these alarming reductions in federal enforcement are justified because of increased deference to state enforcement.<sup>6</sup> However, fines imposed by state and local governments are also down. Between 2006

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<sup>1</sup> See generally LEIF FREDRICKSON ET AL., ENVTL. DATA & GOVERNANCE INITIATIVE, A SHEEP IN THE CLOSET: THE EROSION OF ENFORCEMENT AT THE EPA (2018), <https://envirodatagov.org/wp-content/uploads/2018/11/Sheep-in-the-Closet.pdf> (reporting findings after conducting ninety-seven interviews with EPA employees and recent retirees about the change in enforcement patterns during the Obama-Trump transition); INST. FOR POLICY INTEGRITY, IRREPLACEABLE: WHY STATES CAN'T AND WON'T MAKE UP FOR INADEQUATE FEDERAL ENFORCEMENT OF ENVIRONMENTAL LAWS (2017), [https://policyintegrity.org/files/media/EPA\\_Enforcement\\_June2017.pdf](https://policyintegrity.org/files/media/EPA_Enforcement_June2017.pdf) (identifying proposed reductions in the EPA's enforcement budget as evidence of declining federal enforcement of environmental laws).

<sup>2</sup> Ellen Knickmeyer, *EPA Criminal Action Against Polluters Hits 30-Year Low*, AP (Jan. 15, 2019), <https://www.apnews.com/d72a4d3dfb584d15949c88917b48ddf9> (reporting that the 166 cases referred to DOJ for prosecution in 2018 is the lowest number reported since 1988 and represents a drop of more than one-fourth from 2016, the last year of the Obama Administration).

<sup>3</sup> Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Oversight of the Environmental Protection Agency's Enforcement Program: Hearing Before the Subcomm. on Toxic Substances, Envtl. Oversight, Research & Dev. of the S. Comm. on Env't & Pub. Works*, 101st Cong. 101–503 (1989).

<sup>6</sup> See, e.g., Lipton & Ivory, *supra* note 3 (reporting instances in which EPA regional offices told state enforcement authorities that the “agency would back off some inspection and enforcement activity so the state could take the lead”); OFFICE OF MGMT. & BUDGET, MAJOR SAVINGS AND REFORMS, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2018, at 86 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/>

and 2016, state and local penalties averaged \$91 million annually, while in 2017 they totaled just \$38 million and in 2018, \$59 million.<sup>7</sup> This has been caused in part by reductions in federal grant money intended to help states pay for local environmental enforcement.<sup>8</sup> Records also indicate that fines imposed by states are “a tiny fraction of those imposed by the EPA for the same violations,”<sup>9</sup> and a 2011 report from EPA’s Office of the Inspector General found that state enforcement actions “frequently do not meet national goals and states do not always take necessary enforcement actions.”<sup>10</sup>

Lack of enforcement of environmental laws can lead to tragic results. Flint, Michigan made headlines in 2015 and 2016 as residents complained that their water smelled and tasted foul and further testing revealed that blood-lead levels in children citywide had doubled, and in some neighborhoods nearly tripled.<sup>11</sup> EPA’s Office of Inspector General (OIG) recently released an investigative report that uncovered failures at all levels of government that contributed to the water contamination crisis in Flint.<sup>12</sup> Since 1978, EPA has granted

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msar.pdf (justifying proposals for cuts to EPA enforcement budget as designed to avoid “duplication of enforcement actions carried out by the States”).

<sup>7</sup> FREDRICKSON, *supra* note 1, at 36.

<sup>8</sup> See *id.* at 84; INST. FOR POLICY INTEGRITY, *supra* note 1, at 1 (“[T]he Administration’s budget would also slash by 45 percent the EPA grants that states rely on to fund their own enforcement programs.”). EPA grants to states have been shrinking for decades, but these cuts represent the most drastic reductions by far. See *id.* at 2; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-883, EPA-STATE ENFORCEMENT PARTNERSHIP HAS IMPROVED, BUT EPA’S OVERSIGHT NEEDS FURTHER ENHANCEMENT 7 (2007), <https://www.gao.gov/assets/270/264845.pdf> (showing a nine percent decline in EPA grants to states from 1997 to 2006); ENVTL. COUNCIL OF THE STATES, STATUS OF STATE ENVIRONMENTAL AGENCY BUDGETS 2013-2015, at 16 (2017), [https://www.ecos.org/wp-content/uploads/2017/03/Budget-Report-FINAL-3\\_15\\_17-Final-4.pdf](https://www.ecos.org/wp-content/uploads/2017/03/Budget-Report-FINAL-3_15_17-Final-4.pdf) (showing grant funding continuing to fall). On average, the federal government provides twenty-seven percent of state environmental agencies’ budgets. ENVTL. COUNCIL OF THE STATES, TESTIMONY OF THE ENVIRONMENTAL COUNCIL OF THE STATES BEFORE THE HOUSE COMMITTEE ON APPROPRIATIONS, SUBCOMMITTEE ON INTERIOR, ENVIRONMENT AND RELATED AGENCIES ADDRESSING THE FY20 BUDGET FOR THE U.S. EPA 1 (2019), [https://www.ecos.org/wp-content/uploads/2019/03/ECOS-FY20-Budget-Testimony\\_House.pdf](https://www.ecos.org/wp-content/uploads/2019/03/ECOS-FY20-Budget-Testimony_House.pdf).

<sup>9</sup> Lipton & Ivory, *supra* note 3.

<sup>10</sup> U.S. EPA OFFICE OF INSPECTOR GEN., 12-P-0113, EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT 6 (2011), <https://www.epa.gov/sites/production/files/2015-10/documents/20111209-12-p-0113.pdf>.

<sup>11</sup> See Mona Hanna-Attisha et al., *Elevated Blood Lead Levels in Children Associated with the Flint Drinking Water Crisis*, 106 AM. J. PUB. HEALTH 283 (2016). Lead exposure can have serious health impacts on children, including, at relatively low levels, reduced IQ, behavioral changes like attention problems and antisocial behaviors, learning problems, and reduced educational success. *Lead Poisoning and Health*, WHO (Aug. 2019), <https://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health>.

<sup>12</sup> U.S. EPA OFFICE OF INSPECTOR GEN., NO. 18-P-0221, MANAGEMENT WEAKNESSES: DELAYED RESPONSE TO FLINT WATER CRISIS (2018), [https://www.epa.gov/sites/production/files/2018-07/documents/\\_epaig\\_20180719-18-p-0221.pdf](https://www.epa.gov/sites/production/files/2018-07/documents/_epaig_20180719-18-p-0221.pdf). In April 2014, Flint’s

Michigan primary authority to enforce the Safe Drinking Water Act (SDWA),<sup>13</sup> but EPA retains oversight and enforcement authority throughout the country and is responsible for ensuring that all states comply with the SDWA.<sup>14</sup> The OIG report found many deficiencies in federal oversight of the state program that contributed to the crisis in Flint, including EPA's failure to intervene even once it had become clear that local government's disinvestments were resulting in drinking water that did not come close to meeting federal standards.<sup>15</sup> OIG identified overwhelming evidence of which EPA was aware that should have triggered earlier intervention.<sup>16</sup> They concluded that "[w]hile Flint residents were being exposed to lead in drinking water, the federal response was delayed, in part, because the EPA did not establish clear roles and responsibilities, risk assessment procedures, effective communication and proactive oversight tools."<sup>17</sup> EPA's failure to intervene and enforce the SDWA illustrates how unexamined deference to state enforcement and failures by federal regulators to monitor compliance with federal laws can lead to tragic results.

Environmental laws function largely through cooperative federalism,<sup>18</sup> which allows the federal government to delegate enforcement of specific provisions of landmark environmental statutes like the Clean Water Act (CWA) and Clean Air Act (CAA) to state agencies while maintaining big-picture authority to set public health goals and ensure that all states are meeting or making progress towards those goals.<sup>19</sup> This arrangement allows states discretion in enforcement, as

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water system, which serves approximately 100,000 residents, stopped buying treated water from the Detroit Water and Sewerage Department and began sourcing and treating its own water supply from the Flint River. *Id.* at 1. The new water was not treated with a critical additive, necessary to prevent corrosion in pipes, which allowed lead and other dangerous substances to leach into the drinking water. *Id.* at 1–2.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 17.

<sup>15</sup> *Id.* at 17–18.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> OFFICE OF INSPECTOR GEN., EPA, No. 18-P-0221, AT A GLANCE: MANAGEMENT WEAKNESSES: DELAYED RESPONSE TO FLINT WATER CRISIS (2018), [https://www.epa.gov/sites/production/files/2018-07/documents/\\_epa\\_oig\\_20180719-18-p-0221\\_glance.pdf](https://www.epa.gov/sites/production/files/2018-07/documents/_epa_oig_20180719-18-p-0221_glance.pdf).

<sup>18</sup> Cooperative federalism, put most simply, is the sharing of power or authority between federal and state agencies and actors. *See generally* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 180 (2005) (defining cooperative federalism as “an arrangement under which a national government induces coordination from subordinate jurisdictions”).

<sup>19</sup> *See, e.g.*, Resource Conservation and Recovery Act (RCRA) of 1976 § 3006, 42 U.S.C. § 6926 (2012) (delegating the development of hazardous waste programs to the states); Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (2012) (allowing states to administer permits for pollutant discharge); Clean Air Act § 110, 42 U.S.C. § 7410 (2012) (requiring states to implement plans to meet national air quality standards); Clean Air Act § 111, 42 U.S.C. § 7411 (2012) (allowing states to develop procedures for enforcing

state agencies are considered better able to reflect public choices regarding pollution control, while ensuring that sufficient progress is made towards the public health and environmental quality goals passed by Congress. It also curtails the otherwise-necessary expansive growth of the federal government because it empowers state agencies to evaluate permit applications and manage the day-to-day business of environmental enforcement.<sup>20</sup>

Cooperative federalism, however, does not mean unconstrained deference to state actors. While states play a significant role in environmental regulation, the federal government is ultimately responsible for ensuring that the landmark environmental statutes are followed. One critical tool the federal government can use to ensure accountability is overfiling, the focus of this Note. Overfiling occurs when, after a state enforcement action, a similar federal enforcement action is initiated alleging that the same action violated the same law.<sup>21</sup> While instances of federal overfiling have remained exceedingly rare,<sup>22</sup> this Note will argue that the ever present threat of federal action is critical to ensuring that states enforce federal laws faithfully and that the federal government should be empowered to pursue overfiling more regularly. It proceeds in three parts. In Part I, this Note will explore the origins of the controversy regarding overfiling, situate that debate within the broader context of cooperative federalism, and evaluate the rationales offered for overfiling. In Part II, the Note will show that, with one notable exception, courts have generally approved of overfiling and recognized the role that it can play in stra-

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standards of performance for new stationary sources of air pollutants); Clean Air Act § 112, 42 U.S.C. § 7412 (2012) (delegating power to states to develop programs for enforcing standards of hazardous air pollutant emissions); *see also* Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328 (2012) (allowing states to develop programs for reclamation of abandoned mines); Safe Drinking Water Act, 42 U.S.C. §§ 300(f)–300(j) (2012) (describing state responsibilities for ensuring safety of public water systems).

<sup>20</sup> *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196, 1196 (1977) (“The federal government . . . is dependent upon state and local authorities to implement these polices because of the nation’s size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials’ limited implementation and enforcement resources.”); A. JAMES BARNES, *REVISED POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS* 21 (1986), <https://www.epa.gov/sites/production/files/2013-11/documents/enforce-agree-mem.pdf> (“EPA clearly does not have the resources to take action on or to review in detail any and all violations.”).

<sup>21</sup> *See Oversight of EPA Enforcement and Compliance Assurance Program: Hearing Before the S. Comm. on Env’t & Pub. Works*, 105th Cong. (1997), [https://www.epw.senate.gov/105th/epa\\_6-10.htm](https://www.epw.senate.gov/105th/epa_6-10.htm) (statement of Steven A. Herman, EPA Assistant Administrator of Enforcement and Compliance Assurance).

<sup>22</sup> For example, during 1994 and 1995, EPA overfiled on a total of eighteen cases, or about 0.1% of state enforcement cases. *Id.*

tegic enforcement. In Part III, the Note will conclude that, although rarely used, overfiling remains a key tool for ensuring state environmental agencies are upholding their side of the bargain of cooperative federalism and provide a proposal for additional federal oversight.

## I

### ORIGINS OF THE CONTROVERSY OVER OVERFILING

This Part will situate overfiling within the larger discussion of cooperative federalism in environmental law enforcement. Section I.A will describe cooperative federalism more generally, while Section I.B will provide policy arguments for and against overfiling. Section I.C will analyze how the EPA's policies towards federal-state power sharing, and overfiling more specifically, have evolved throughout successive presidential administrations.

#### A. Cooperative Federalism

Cooperative federalism mechanisms have been repeatedly used in federal environmental statutes.<sup>23</sup> While the Supreme Court has held that the Constitution's anticommandeering doctrine prevents the federal government from requiring states to directly enforce federal laws,<sup>24</sup> cooperative federalism programs remain permissible because such programs allow states a choice to either enforce the law themselves or allow the federal government to operate in the states directly. The division of power is generally consistent between environmental statutes. Congress establishes a goal by statute, EPA then sets nationwide standards, and states are invited to apply for authorization to implement programs to achieve these standards.<sup>25</sup> The federal standards represent a floor, but generally not a ceiling, on state

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<sup>23</sup> See *supra* note 19; see also Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, DUKE ENVTL. L. & POL'Y F. 1, 2 (2010) (“[T]hese laws envision a structure of ‘cooperative federalism’ whereby the federal government and the states share in the regulatory and enforcement burden.”).

<sup>24</sup> See *New York v. United States*, 505 U.S. 144, 176 (1992) (“[T]he Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program’, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.” (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n.*, 452 U.S. 264, 288 (1981))); *Printz v. United States*, 521 U.S. 898 (1997) (holding likewise that Congress may not conscript state executive branch employees to enforce federal laws).

<sup>25</sup> See, e.g., JOHN LINC STINE ET AL., *COOPERATIVE FEDERALISM 2.0: ACHIEVING AND MAINTAINING A CLEAN ENVIRONMENT AND PROTECTING PUBLIC HEALTH 2* (2017), <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf>.

enforcement.<sup>26</sup> Because the states are offered a real choice about whether to set up and fund their own enforcement programs, courts have upheld cooperative federalism programs as constitutional.<sup>27</sup>

States have, by and large, applied for and received authorization to implement permitting and enforcement programs through delegations from EPA. For example, under the Clean Water Act, states can apply to administer the comprehensive pollution permitting scheme themselves by submitting a package of materials to EPA.<sup>28</sup> To date, 35 states have been fully authorized for permitting under the CWA, 12 have been partially authorized, meaning EPA retains some categories of permits, and only 3 have chosen not to become authorized at all.<sup>29</sup> Under the CAA, regional offices of the EPA approve states to issue certain permits and all 50 states, as well as Puerto Rico and the District of Columbia, have applied and been approved.<sup>30</sup>

Federal statutes that employ cooperative federalism schemes vary as to how they actually divide authority between state and federal agencies. For example, the Surface Mining Control and Reclamation Act (SMCRA) gives states the exclusive authority to regulate surface mining once a program has been approved, with the federal government having only limited oversight authority,<sup>31</sup> while the CWA retains a much larger role for the federal government even once a state has been appropriately approved.<sup>32</sup>

EPA does not have the capacity to operate programs in all fifty states, but constitutional constraints mean that the federal govern-

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<sup>26</sup> See *id.* (noting that states can go beyond the federal standards if they choose to do so).

<sup>27</sup> See *New York*, 505 U.S. at 168 (describing cooperative federalism and noting that, in contrast to the unconstitutional commandeering at issue in the case, cooperative federalism allows “the residents of the State [to] retain the ultimate decision as to whether or not the State will comply” because “they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program”).

<sup>28</sup> EPA, *NPDES State Program Information*, <https://www.epa.gov/npdes/npdes-state-program-information> (last visited Jan. 25, 2020). The purpose of this process is to establish that the state will apply the same standards that EPA would otherwise apply when approving permits or launching enforcement actions. *Id.*

<sup>29</sup> *Id.* The three states that have not been authorized are Massachusetts, New Hampshire, and New Mexico. *Id.*

<sup>30</sup> See EPA, *Permitting Under the Clean Air Act*, <https://www.epa.gov/caa-permitting> (last visited Jan. 25, 2020) (compiling information from each of the ten EPA Administrative Regions).

<sup>31</sup> See Katie M. Sweeney et al., *Cooperative Federalism in Environmental Law: A Growing Role for Industry*, 2013 A.B.A. SEC. PUB. ENV'T, ENERGY & RESOURCES 2, 5, [https://www.americanbar.org/content/dam/aba/events/environment\\_energy\\_resources/2013/10/21st\\_fall\\_conference/conference\\_materials/17-sweeney\\_katie-paper\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2013/10/21st_fall_conference/conference_materials/17-sweeney_katie-paper_authcheckdam.pdf) (comparing the models of comparative federalism embodied in the CWA and the SMRCA and the role that the regulated industry can play in both).

<sup>32</sup> See *id.* at 2, 4.

ment can induce, but not coerce or commandeer, states to accept delegated authority.<sup>33</sup> Therefore a carrot-and-stick approach is used to encourage states to develop programs.<sup>34</sup> Incentives, such as grant funding for state environmental agencies<sup>35</sup> or chances for local officials to tailor specific requirements to their jurisdictions, can be offered to the states.<sup>36</sup> At the same time, Congress may “require federal agencies to impose the ‘stick’ of preemptive federal requirements if states do not regulate as desired”<sup>37</sup> and may threaten federal sanctions, such as loss of highway funds for noncompliance with the CAA,<sup>38</sup> or impose increased regulatory requirements. In states that do not apply for delegated authority, or where that authority is revoked, the federal government is obligated to directly administer environmental regulations, including evaluating permitting applications and day-to-day monitoring and enforcement.

The majority of inspections and enforcement actions are undertaken by the states. Typically, EPA conducts about 22,000 inspections annually, leading to about 3000 civil actions,<sup>39</sup> although this number has dropped precipitously under the Trump Administration, down to around 1000 civil actions in 2018.<sup>40</sup> By contrast, states conduct about 146,000 inspections a year and file about 9000 civil actions.<sup>41</sup> These actions do not have to be approved by EPA; once a state is given delegated authority, they are free to settle civil actions under the federal statutes as they see fit. It is against this backdrop of cooperative federalism that the process of overfiling must be evaluated.

### B. Policies Supporting and Opposing Overfiling

To properly consider the policy aspects of overfiling, we must first consider the reasons for the delegation of authority to states in the first place. Absent the historical practice, it is not immediately clear

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<sup>33</sup> Fischman, *supra* note 18, at 184.

<sup>34</sup> Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 205–06 (1997).

<sup>35</sup> See *supra* note 8; see also Jonathan H. Adler, Comment, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 577–78 (1998) (“State implementation . . . may receive limited funding from the national treasury.”).

<sup>36</sup> See, e.g., Fischman, *supra* note 18, at 189.

<sup>37</sup> Sarnoff, *supra* note 34, at 206.

<sup>38</sup> 42 U.S.C. §§ 7410(m), 7509 (2012).

<sup>39</sup> Andrew S. Levine & Catherine M. Ward, *EPA Budget Cuts: Welcome Change or Cause for Concern?*, LEGAL INTELLIGENCER (July 25, 2017, 12:00 AM), <https://www.law.com/thelegalintelligencer/almID/1202793747579/EPA-Budget-Cuts-Welcome-Change-or-Cause-for-Concern>.

<sup>40</sup> FREDRICKSON, *supra* note 1, at 32.

<sup>41</sup> Levine & Ward, *supra* note 39.

why, normatively, states should be involved in permitting and enforcing federal laws at all. Statements from EPA consistently affirm that it is “EPA’s policy . . . to transfer the administration of national programs to state and local governments to the fullest extent possible” and note that doing so prevents the duplication of labor that would occur if multiple levels of government were doing the same tasks.<sup>42</sup> While no one would argue the work should be done twice, why not keep enforcement responsibility in federal hands? Delegation, it is thought, “return[s] decision-making authority to a level of government closer to the people whose lives are actually touched by these decisions,” thus making regulation more responsive.<sup>43</sup> States, it is assumed, “are best placed to address specific problems as they arise on a day-to-day basis.”<sup>44</sup> Justice Brandeis endorsed the idea of states serving as laboratories of democracy, or testing grounds for implementation of different policies and procedures not yet adopted at the federal level.<sup>45</sup> Partially in response to these concerns, EPA is divided into ten regions, each serving just a few states, with significant power to respond to local and regional differences.<sup>46</sup>

The more fundamental explanation for delegation of environmental enforcement to the states is political compromise. When the landmark environmental laws were passed, it was understood that implementing them would require an expansion of government, in terms of both funding and personnel.<sup>47</sup> The question, then, was which level of government should be expanded? The CAA, CWA and other key environmental laws chose to give this authority to the states, with the understanding that nascent state environmental agencies would have to grow significantly in order to implement these federal statutes.<sup>48</sup> From 1986 to 1996, as delegations increased and CAA and CWA enforcement developed, the size of states’ environmental staff

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<sup>42</sup> WILLIAM D. RUCKELSHAUS, EPA POLICY CONCERNING DELEGATION TO STATE AND LOCAL GOVERNMENTS 1 (1984), <https://nepis.epa.gov/Exe/ZyPDF.cgi/900D0K00.PDF?Dockey=900D0K00.PDF>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2; see also Stewart, *supra* note 20, at 1196 (“The federal government . . . is dependent upon state and local authorities . . . because of the nation’s size and geographic diversity, the close interrelation between environmental controls and local land use decisions, and federal officials’ limited implementation and enforcement resources.”).

<sup>45</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 285 (1932).

<sup>46</sup> See generally EPA, *About EPA*, <https://www.epa.gov/aboutepa> (last visited Jan. 25, 2020).

<sup>47</sup> See EPA, *Evolution of the Clean Air Act*, <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> (last visited Jan. 25, 2020).

<sup>48</sup> See, e.g., ROBERT G. HEISS, EPA OFFICE OF ENF’T POLICY, ENFORCEMENT IN THE 1990S: PROJECT RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS 2–1 (1991) (“EPA’s policy has been to transfer the administration of national programs to State and local governments to the fullest extent possible.”).

increased by approximately sixty percent.<sup>49</sup> Even with this delegation, EPA employs more than 15,000 people,<sup>50</sup> and some congressional representatives regularly rail against its “overreach” and call for it to be curtailed.<sup>51</sup> The choice to split responsibility with the states made these laws more palatable to politicians concerned about the growth of the federal government and represented a compromise that has ramifications to this day.

When a state environmental agency resolves a violation of a federal environmental law, that resolution, whether a fine or an injunction, is relied upon by the violator. For this reason, critics of overfiling frequently express concern about its impacts on regulated industries. For example, Robert Harmon, chairman of Harmon Industries,<sup>52</sup> testified at a congressional hearing about “the way in which conscientious regulated industries who are seeking in good faith to comply with their obligations under the environmental laws can be whipsawed by EPA’s claimed ‘overfiling’ authority.”<sup>53</sup> This argument alleges some inherent unfairness about being held accountable to the federal and state government. However, dual sovereignty is a basic feature of our federalist system and its use in the environmental context is not unique.<sup>54</sup> Further, as a policy matter, increased deterrence is created when the regulated industry is aware that if it is able to negotiate an excessively lenient deal with state regulators, federal overfiling remains a possibility. Efficiency concerns are also frequently cited by those looking to limit incidences of overfiling. For example, Senator Jeff Sessions commented in a congressional hearing that “[i]f a settlement has been reached . . . [and] if the [EPA] or the [DOJ] says, ‘well, we don’t care, we don’t think that’s sufficient, we’re going to file

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<sup>49</sup> CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* 19 (2003).

<sup>50</sup> Lisa Friedman, Marina Affo & Derek Kravitz, *E.P.A. Officials, Disheartened by Agency’s Direction, Are Leaving in Droves*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/climate/epa-buyouts-pruitt.html>.

<sup>51</sup> See, e.g., John Walke, *Out-of-Control Criticism of EPA*, NRDC (Aug. 8, 2011), <https://www.nrdc.org/experts/john-walke/out-control-criticism-epa> (quoting congressional representatives saying that “the scariest agency in the federal government is the EPA . . . an agency that has lost its bearings” and calling it “the epitome of the continued and damaging regulatory overreach of [the Obama] Administration”).

<sup>52</sup> See *infra* Section II.A.

<sup>53</sup> See, e.g., *Oversight of EPA Enforcement and Compliance Assurance Program, Before the S. Comm. on Env’t & Pub. Works*, 105th Cong. (1997), <https://www.epw.senate.gov/105th/harmon.htm> (statement of Robert E. Harmon, Chairman of the Board of Directors, Harmon Industries, Inc.).

<sup>54</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (“[T]he Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State’s power to prosecute is derived from its own ‘inherent sovereignty,’ not from the Federal Government.”).

under a separate case,' then a lot of hard work can be undermined."<sup>55</sup> However, federal overfiling can be highly efficient when it increases deterrence, within both the regulated industry and the states that may not be faithfully executing the law.

Proponents of overfiling view it as an integral component of the complicated and interwoven landscape of environmental regulation. While the federal government retains the power to revoke delegation for an entire permitting program if standards are not met, states know that these threats are empty because the federal government does not have the capacity to replace the work on the ground that the states are doing.<sup>56</sup> Therefore, EPA needs a way to hold states accountable to their delegated responsibilities. While the states and EPA are partners in enforcement and compliance, they are not equal partners.<sup>57</sup> Under the statutory structure, EPA has ultimate responsibility for ensuring that the national laws are being followed.<sup>58</sup>

Another justification for overfiling is that, in some instances, the federal government has unique interests that are unlikely to be sufficiently represented by the states. One example of this interest is the interstate impacts of a violation,<sup>59</sup> commonly referred to as "spillover" effects. For example, if a discharge is made in the corner of one state into a river that soon drains into a lake in another state, the first state may not have a sufficient interest in preventing the adverse impacts in the second state. Instead, the first state is likely to weigh the small harm caused to its citizens and state lands against the jobs and economic benefit the polluting company contributes and offer a favorable settlement to the company. This settlement may not be adequate to compensate for the harm done to the second state, or to ensure future deterrence.<sup>60</sup> While neither state is acting irrationally, the federal gov-

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<sup>55</sup> *The Relationship Between the Federal and State Governments in the Enforcement of Environmental Laws, Before the S. Comm. on Env't & Pub. Works*, 105th Cong. 173 (1997) (statement of Sen. Jeff Sessions).

<sup>56</sup> See RECHTSCHAFFEN & MARKELL, *supra* note 49, at 17 (noting that EPA has never actually completed withdrawal of a final state authorization); *id.* at 20 (quoting Carol Browner, former EPA Administrator, testifying before Congress in 1993, saying "I will be very honest with you, we don't have the resources to manage even one major State if primacy were to be returned").

<sup>57</sup> See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190 (1995).

<sup>58</sup> See, e.g., HEISS, *supra* note 48, at 2-1.

<sup>59</sup> See *id.*

<sup>60</sup> See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996) ("The problem of interstate externalities arises because a state that sends pollution to another state obtains the labor and fiscal benefits . . . but does not suffer the full costs of the activity. Under these conditions, economic theory maintains that an undesirably large amount of pollution will cross state lines.").

ernment has a broader lens and can more accurately assess these impacts.

The federal government can also step in by overfiling when the states do not vigorously enforce. While states legally cannot set standards below the nationwide floor established by EPA, states are able to effectively lower standards by failing to enforce, creating insufficient deterrence for noncompliance. Inadequate enforcement can occur when a regulating agency offers polluters a collusive settlement, a consent agreement with an in-state polluter that contains a very low penalty that is unlikely to lead to behavior change, in this polluter or others. Without overfiling, this kind of settlement would prevent EPA from being able to directly enforce against the polluter at all. Whether these initial state actions are driven by political pressure to settle matters quickly or simply by lack of resources, the fact remains that EPA would be significantly constrained in its ability to ensure compliance with environmental law if any action, no matter how weak, by a state ended its authority.

Because it is hard for EPA to detect and sanction state under-enforcement, it “could be the most effective way of trying to make a state more attractive to industry seeking less stringent environmental standards” or of acquiescing to political pressure in the state.<sup>61</sup> A statistical analysis of Resource Conservation and Recovery Act (RCRA) enforcement actions undertaken by the state and federal governments investigated this phenomenon and found that, on average, state penalties were sixty-two percent lower than what the EPA penalty would have been, controlling for all other variables, including severity of the violation,<sup>62</sup> confirming theoretical justifications for overfiling.

Because the states are unable or unwilling to assess statutorily authorized penalties, overfiling fulfills two critical roles. First, it holds the states accountable, ensuring that EPA has a recourse if it disagrees with an enforcement decision made by the state, acting as the “gorilla in the closet”<sup>63</sup> to provide pressure on states to faithfully enforce the law. Second, it ensures that sufficient deterrence is placed on regulated entities because, even if they are able to convince the state government to grant them leniency, the polluter will have to grapple with the federal government. In this way, the approach offers double deterrence, incentivizing both state actors and industry players to follow

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<sup>61</sup> Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 *LAW & SOC'Y REV.* 939, 972 (2007).

<sup>62</sup> *Id.* at 964.

<sup>63</sup> Michael Gorn, *William D. Ruckelshaus: Oral History Interview*, EPA (Jan. 1993), <https://archive.epa.gov/epa/aboutepa/william-d-ruckelshaus-oral-history-interview.html>.

the rules. Federal enforcement capability can also be used as leverage in state enforcement negotiations, where state officials can warn that a sweetheart settlement with the state may result in follow-on federal proceedings.<sup>64</sup>

EPA officials believe that state regulators are concerned that “if the penalties they assess are too high, companies may move to neighboring states that are more lenient.”<sup>65</sup> This has sometimes been described as creating a “race to the bottom,” whereby states, competing for industrial developments and the tax revenue and employment benefits they bring, reduce their environmental standards to “sub-optimal levels.”<sup>66</sup> This occurs because “state government has an inherent economic interest in creating a hospitable business climate compared to other states.”<sup>67</sup> The solution, then, is to create strong environmental regulations and consistent enforcement at the federal level so that industry cannot play states against one another in an attempt to lower standards.<sup>68</sup> Overfiling is a natural part of this, because it allows the federal government to step in to any state in the country and ensure that they are not effectively lowering environmental standards by settling violations at cutthroat prices.

A related problem is the unfair marketplace that is created when, across the industry, companies are being effectively held to different standards because of different state enforcement rates.<sup>69</sup> Cynthia Giles, OECA head under Obama, reported that “companies would contact us frequently—even from Oklahoma, the home state of Scott Pruitt, the EPA’s current administrator—asking the EPA to take action against competitors that were skirting the law.”<sup>70</sup> If state

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<sup>64</sup> Joel A. Mintz, Comment, *Enforcement Overfiling in the Federal Courts: Some Thoughts on the Post-Harmon Cases*, 21 VA. ENVTL. L.J. 425, 426 (2003).

<sup>65</sup> OFFICE OF INSPECTOR GEN., EPA, E1DSF6-11-0002-7100146, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES 19 (1997) (quoting an EPA enforcement official in Region 3 describing the concerns of state regulators).

<sup>66</sup> RECHTSCHAFFEN & MARKELL, *supra* note 49, at 22.

<sup>67</sup> Atlas, *supra* note 61, at 942.

<sup>68</sup> Some scholars have challenged this view normatively, suggesting that allowing states to compete in setting state environmental standards will enhance net social welfare by allowing states to select the level of pollution they prefer. *See, e.g.*, Richard L. Revesz, *Rehabilitating Interstate Competition: Re-thinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). This argument is outside the scope of this analysis, as the environmental statutes, for better or worse, do not allow this kind of diversity of standards and states’ under-enforcement cannot legally be used as a substitute for discretion.

<sup>69</sup> *See* Reisinger et al., *supra* note 23, at 18–19.

<sup>70</sup> Cynthia Giles, *Why We Can’t Just Leave Environmental Protection to the States*, GRIST (Apr. 26, 2017), <https://grist.org/opinion/why-we-cant-just-leave-environmental-protection-to-the-states>.

enforcement agencies are allowed to arbitrarily set their own penalties, with some so low as to be ineffective, it will be impossible to maintain an even playing field.

Some research indicates that states may be more likely to be affected by industry capture, as they are unable or unwilling to prosecute violations against companies that are major economic drivers or employers within the state.<sup>71</sup> In just one example, EPA sued Southern Coal Corporation and twenty-six affiliated mining companies for major water pollution violations in the Appalachian region.<sup>72</sup> Alabama, Kentucky, Tennessee, and Virginia all joined the suit because pollution had harmed bodies of water within their borders.<sup>73</sup> West Virginia, despite sustaining damages to its waterways, failed to join.<sup>74</sup> A spokesperson for the EPA emphasized that West Virginia “was given the opportunity to participate in the settlement, but decided not to.”<sup>75</sup> Not coincidentally, Jim Justice, the owner of Southern Coal, is currently the state’s governor and has long been an extremely influential figure in West Virginia politics.<sup>76</sup> The case was settled in 2016 with a consent decree that included injunctive relief and penalties, payable to the United States and the four state plaintiffs, not including West Virginia.<sup>77</sup>

*United States v. Smithfield Foods, Inc.* provides another highly publicized example of overfiling.<sup>78</sup> In 1996, EPA recognized that

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<sup>71</sup> See RECHTSCHAFFEN & MARKELL, *supra* note 49, at 31. This research is admittedly mixed, with other commentators suggesting that “there is reason to be skeptical of the widely accepted notion that local government authorities are likely to be too favorably disposed to industry to engage in effective environmental protection.” Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1772 (1992). However, even if both levels of government are equally susceptible to industry capture, the best solution is to strengthen the dual-sovereign system of government to ensure that each level is capable of checking the other. See, e.g., THE FEDERALIST NO. 51 (James Madison) (explaining that one of the purposes of having a “compound republic” with “two distinct governments” is so that “[t]he different governments will control each other”).

<sup>72</sup> Ken Ward Jr., *EPA, Jim Justice Coal Firms Reach \$6M Deal over Water Pollution*, CHARLESTON GAZETTE-MAIL (Sept. 30, 2016), [https://www.wvgazette.com/news/special\\_reports/epa-jim-justice-coal-firms-reach-m-deal-over-water/article\\_a70f5107-c245-54e0-a417-3d30a9052879.html](https://www.wvgazette.com/news/special_reports/epa-jim-justice-coal-firms-reach-m-deal-over-water/article_a70f5107-c245-54e0-a417-3d30a9052879.html) (describing the settlement agreement reached in the case); see Giles, *supra* note 70 (citing the case as an instance of variance in enforcement across states due to political influence).

<sup>73</sup> See Ward, *supra* note 72.

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

<sup>75</sup> *Id.* (quoting EPA spokesman Nick Conger).

<sup>76</sup> Giles, *supra* note 70.

<sup>77</sup> See Consent Decree, *United States v. S. Coal Corp.*, No. 7:16-cv-00462-GEC (W.D. Va. Sept. 30, 2016), <https://www.epa.gov/sites/production/files/2016-09/documents/southerncoalcorp-cd.pdf>.

<sup>78</sup> See, e.g., *Smithfield Is Fined \$12.6 Million for Dumping Waste into River*, WALL ST. J. (Aug. 9, 1997, 6:19 AM), <https://www.wsj.com/articles/SB871121628389896000> (reporting

Smithfield had over 5000 violations of its state-approved CWA permit.<sup>79</sup> The state of Virginia had signed multiple Consent Special Orders with Smithfield, agreeing that they could continue to violate the CWA and imposing no monetary or injunctive penalties.<sup>80</sup> There were additional factors that might have led EPA to suspect that overfiling may be necessary. First, Smithfield repeatedly threatened to leave the state whenever regulations were tightened.<sup>81</sup> Second, Smithfield was a major contributor to the governor's political action committee, raising concerns that there was some impropriety.<sup>82</sup> When EPA realized that Virginia "did not intend to initiate legal action against Smithfield for its CWA violations, the EPA filed its own action."<sup>83</sup> Smithfield argued that the Consent Orders precluded federal enforcement,<sup>84</sup> but the Fourth Circuit disagreed and upheld the fine.<sup>85</sup> This case demonstrates a series of factors that would make federal regulators fear that the state was not up to the job of enforcing the CWA.

Federal enforcement has some additional practical benefits when compared to state enforcement. While effective state action can generate deterrence for other regulated entities within the state, federal actions have higher visibility and therefore have a greater deterrent effect nationally.<sup>86</sup> Therefore, federal enforcement is appropriate for dealing with long-term patterns or major instances of noncompliance.

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that the pork company was subjected to "the largest water-pollution fine ever, for dumping hog waste into a tributary of Chesapeake Bay").

<sup>79</sup> RECHTSCHAFFEN & MARKELL, *supra* note 49, at 341.

<sup>80</sup> *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 778 (E.D. Va. 1997).

<sup>81</sup> *Id.*; *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 520–21 (4th Cir. 1999).

<sup>82</sup> See RECHTSCHAFFEN & MARKELL, *supra* note 49, at 341; Stephen C. Robertson, *State Permitting: United States v. Smithfield Foods, Inc. and Federal Overfiling Under the Clean Water Act*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 593, 607 (1999).

<sup>83</sup> *Smithfield Foods*, 191 F.3d at 523; see also Ellen Nakashima, *Court Fines Smithfield \$12.6 Million*, WASH. POST (Aug. 9, 1997), <https://www.washingtonpost.com/archive/politics/1997/08/09/court-fines-smithfield-126-million/6da168cc-6c2d-4d6c-949f-5b80347fcadc> (reporting that during the trial, EPA "accused [the state agency] of coddling corporate polluters such as Smithfield").

<sup>84</sup> *Smithfield Foods*, 965 F. Supp. at 792 ("Defendants assert that the United States' claims for civil penalties and injunctive relief are barred by the Clean Water Act § 309(g)(6)(A)(ii), because for the last ten years, the Commonwealth, by issuing Special Orders, has commenced . . . an administrative action against Smithfield under Virginia law that is comparable to Section 309(g)."); *Smithfield Foods*, 191 F.3d at 525 ("Because Smithfield believes that since 1990 Virginia has been diligently prosecuting Smithfield through the issuance of Orders and enforcing a state statutory scheme that is sufficiently comparable to the CWA, Smithfield asserts EPA's enforcement action should have been barred.").

<sup>85</sup> *Smithfield Foods*, 191 F.3d at 519, 531 (upholding the district court's finding of liability and remanding to recalculate the four percent error margin used to determine the penalty).

<sup>86</sup> HEISS, *supra* note 48, at 2–2.

Additionally, economies of scale and efficiency favor a distribution of authority where the same science does not have to be done fifty times over. Certain work relating to environmental regulation—data collection, statistical analysis, standard setting, and economic analysis—can be done once at the federal level, and the information can be shared with state actors.<sup>87</sup> Some of this is inapplicable to the enforcement side of environmental regulation, as enforcement decisions are necessarily tied to specific violations and require individualized testing. However, in our increasingly nationalized economy, major regulated entities often operate in many states. According to Giles, under these circumstances, “[f]iling cases one state at a time is inefficient and leads to inconsistent results,” especially when compared to EPA, which “through a single case, can secure an agreement that cuts pollution at all of a company’s facilities nationwide.”<sup>88</sup>

The Trump Administration has demonstrated a notably contradictory approach to cooperative federalism. While agency rhetoric has emphatically supported the principles of federalism and prioritized delegations to states when states are seeking to deregulate,<sup>89</sup> when faced with state attempts to institute higher standards, the Administration has reversed course. For example, the Administration has proposed revoking California’s waiver under the CAA that allows it to set more stringent fuel efficiency and emissions standards to help it reach its pollution reduction goals.<sup>90</sup> According to some scholars, this dichotomy “really helps illustrate their true motivations. It’s not

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<sup>87</sup> Barry G. Rabe, *Power to the States: The Promise and Pitfalls of Decentralization*, in ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 32, 43 (Norman J. Vig & Michael E. Kraft eds., 2000) (“Each year the federal government outspends the states in environmental research and development by more than twenty to one, and states have shown little indication of wanting to pick up this burden . . . .”); see RECHTSCHAFFEN & MARKELL, *supra* note 49, at 28–29.

<sup>88</sup> Giles, *supra* note 70.

<sup>89</sup> One example of this rhetoric in full swing was during the Trump Administration’s push to replace the Obama Clean Power Plan with the Affordable Clean Energy (ACE) Rule. According to the White House, “[t]he Trump Administration is proposing the . . . ACE Rule in order to restore the proper role of States under the Clean Air Act” because the rule “gives States the flexibility needed to construct diverse, reliable energy portfolios that best fit their specific needs.” *President Donald J. Trump Wants Reliable and Affordable Energy to Fuel Historic Economic Growth*, WHITE HOUSE (Aug. 21, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-wants-reliable-affordable-energy-fuel-historic-economic-growth>.

<sup>90</sup> California has had this waiver since 1967 and “has used it to great benefit by creating stricter air standards for vehicle pollution that have been adopted by 15 other states that cover more than 40 percent of the U.S. population.” Natasha Geiling, *Donald Trump Doesn’t Care About States’ Rights*, SIERRA (Aug. 29, 2018), <https://www.sierraclub.org/sierra/donald-trump-doesn-t-care-about-states-rights>; see also Robinson Meyer, *The Coming Clean-Air War Between Trump and California*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/science/archive/2017/03/trump-california-clean-air-act-waiver->

states' rights; it's a commitment to an anti-environmental, anti-regulatory agenda driven by the very industries they're supposed to be regulating."<sup>91</sup> State regulators in California agree, noting that "[c]ooperative federalism' seems to have two completely opposite meanings, depending on whether the states are lining up in support or against the Trump [A]dministration[ ] . . . . The only consistent message here is that industries seeking relief from environmental regulation have a friend at EPA."<sup>92</sup>

### C. EPA Policies Reflect Changing Priorities on Overfiling

While overfiling remains rare, it occupies an outsized role in the minds of state enforcement authorities who bristle at the thought of the finality of their enforcement actions being undermined by federal actions, weakening their authority.<sup>93</sup> For EPA, however, it represents one of the few meaningful ways that the agency can react to an inappropriate enforcement action by a state. That said, while EPA retains the authority to withdraw approval of a state program wholesale, in reality, this "has become largely meaningless as EPA has not exercised its authority to withdraw state program approval" and states, probably correctly, view withdrawal as "an empty threat."<sup>94</sup>

The legal rationale for overfiling was first articulated in 1985 when the Office of Legal Counsel provided an opinion affirming the right of EPA to "exercise complete prosecutorial discretion in deciding whether to commence federal enforcement when a state has taken action."<sup>95</sup> While the opinion was specific to RCRA, it also ana-

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climate-change/518649 (citing reports of the EPA searching for means to withdraw its waiver).

<sup>91</sup> Geiling, *supra* note 90 (quoting Meredith Hankins).

<sup>92</sup> *Id.* (quoting Mary Nichols, California Air Resources Board chair).

<sup>93</sup> See, e.g., *The Relationship Between Federal and State Governments in the Enforcement of Environmental Laws: Hearing Before the S. Comm. on Env't & Pub. Works*, 105th Cong. 190 (1997) (statement of Mark Coleman, Oklahoma Department of Environmental Quality) ("Although the instances of overfiling are relatively few, the possibility of overfiling and the use of overfiling comes at a great cost. The potential for overfiling leads to mutual wariness and if not done with extreme care can rapidly damage the enforcement relationship.").

<sup>94</sup> Jerry Organ, *Environmental Federalism Part I: The History of Overfiling Under RCRA, the CWA, and the CAA Prior to Harmon, Smithfield, and CLEAN*, 30 ENVTL. L. REP. 10615, 10616 (2000). EPA has, on occasion, been able to convince states to make changes to their programs by threatening withdrawal. Texas and Utah modified their environmental audit and immunity laws, for example, because of threatened withdrawal of delegated authority. *Id.* at 10616 n.12.

<sup>95</sup> Memorandum from Francis S. Blake, General Counsel, to Lee M. Thomas, EPA Adm'r 4 (May 19, 1985), <https://www.epa.gov/sites/production/files/documents/rcraoverfiling-mem.pdf>.

lyzed case law under the CAA and the CWA.<sup>96</sup> As explained in a Reagan-era memorandum on State-EPA enforcement agreements, defining the relationship between federal and state enforcement action is “one of the most sensitive [tasks] in the EPA/State relationship, often compounded by differences in perspectives on what is needed to achieve compliance.”<sup>97</sup> While regions must be allowed substantial flexibility to implement programs according to community needs and local constraints, EPA must be diligent in ensuring that federal standards are being met by the state regulators. The memorandum specifies that if state performance fails to meet federal criteria for good enforcement, EPA may take various actions, including more frequent oversight inspections, technological assistance, de-delegation if there is continued poor performance, and, importantly, direct enforcement action “if State enforcement action has not been timely and appropriate.”<sup>98</sup>

There are four types of cases specified where EPA will consider taking direct enforcement action: (1) where the state requests EPA action; (2) where state enforcement action is not timely and appropriate; (3) where the case involves national precedents; or (4) where there is a violation of an EPA order.<sup>99</sup> The most controversial aspect of this policy is the determination that a state action is “inappropriate,” because it acknowledges that the federal government may overfile after a state enforcement action has occurred. If a state has already assessed a penalty, EPA established a standard of “grossly deficient” to govern when it would seek additional penalties.<sup>100</sup>

This power had been used infrequently. In a 1991 report, EPA acknowledged that some officials within EPA and DOJ felt that the agency had been “far too timid about overfiling State actions, believing that by deferring to States too much, EPA has lost credibility.”<sup>101</sup> Officials also said that EPA did not overfile frequently enough to push weaker states to develop stronger enforcement programs but that the threat of overfiling retained enough clout to often push states to act independently.<sup>102</sup>

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<sup>96</sup> See *id.* at 6–10.

<sup>97</sup> A. JAMES BARNES, DEPUTY ADM’R FOR ENF’T & COMPLIANCE MONITORING, POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS 1 (1986), <https://www.epa.gov/sites/production/files/2013-11/documents/enforce-agree-mem.pdf>.

<sup>98</sup> *Id.* at 20.

<sup>99</sup> *Id.* at 21.

<sup>100</sup> *Id.* at 23.

<sup>101</sup> HEISS, *supra* note 48, at 2–8.

<sup>102</sup> *Id.* at 2–12 (quoting a State interviewee who said, “[n]othing is as big a political buzzsaw as overfiling, even pulling back State grant funds”).

The Clinton Administration's understanding of federalism relied heavily on delegation. In an Executive Order titled "Federalism," Clinton wrote: "With respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible. Intrusive Federal oversight of State administration is neither necessary nor desirable."<sup>103</sup> Steve Herman, EPA Assistant Administrator for Enforcement and Compliance Assurance under Clinton, noted in 1997 that under his direction, the agency "prefers to work with the states to determine who should take the necessary enforcement action" rather than proceeding to overfiling.<sup>104</sup> Cases in which the federal government may overfile, he noted, included where it was acting to protect public health and environmental quality "or to maintain a level economic playing field for the regulated community within and among the states."<sup>105</sup>

During the Clinton Administration, the state-federal enforcement relationship was quite strained. Some attributed the animosity to politics—during the period, "thirty-seven or so governors were Republican, and EPA was run by Democrats. That fact alone led to friction."<sup>106</sup> The two most contentious issues during this period were state privilege and immunity statutes,<sup>107</sup> which EPA didn't want to recognize, and overfiling, which the states did not want to permit. After a rare legal defeat to overfiling in the 1999 case *Harmon Industries, Inc. v. Browner*,<sup>108</sup> the final years of the Clinton Administration were characterized by an "especially 'cautious approach'" which "[r]egrettably . . . took away some of EPA's negotiating leverage, both with individual violators and with recalcitrant states, because it undercut the perceived probability that EPA might overfile in any given case."<sup>109</sup>

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<sup>103</sup> Exec. Order No. 13132, 64 Fed. Reg. 43255, 43256 (Aug. 4, 1999), <https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf>.

<sup>104</sup> *Hearing Before the S. Comm. on Env't & Pub. Works, supra* note 21.

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

<sup>106</sup> JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES 127 (2012) (reporting on an interview with EPA employee Mike Stahl).

<sup>107</sup> In the 1980s, companies, eager to avoid aggressive environmental enforcement, began to conduct voluntary compliance audits of their facilities. They lobbied Congress and their states for privilege and immunity laws which would protect these findings from use against them. While they were unsuccessful at the national level, they convinced nearly half the states to pass some version of the policy. See STEVEN A. HERMAN ET AL., EPA, STATEMENT OF PRINCIPLES: EFFECT OF STATE AUDIT IMMUNITY/PRIVILEGE LAWS ON ENFORCEMENT AUTHORITY FOR FEDERAL PROGRAMS (1996), <https://www3.epa.gov/npdes/pubs/owm0129.pdf>.

<sup>108</sup> 191 F.3d 894 (8th Cir. 1999); see also *infra* Part II.

<sup>109</sup> MINTZ, *supra* note 106, at 128.

During the George W. Bush Administration, EPA continued and even accelerated its policy of limited federal enforcement; however, “Congress rebuffed an administration proposal to cut the EPA’s enforcement budget in favor of increased state enforcement.”<sup>110</sup> Because of congressional intervention, federal enforcement remained relatively constant throughout this period.<sup>111</sup>

In the Obama Administration, officials at EPA considered it a priority to increase compliance with federal environmental laws, noting widespread “unresolved and recurring issues” with environmental enforcement.<sup>112</sup> A 2011 Office of Inspector General report emphasized these deficiencies, reporting that “noncompliance is high and the level of enforcement is low. EPA does not hold states accountable for meeting enforcement standards . . . and does not act effectively to curtail weak and inconsistent enforcement by the states.”<sup>113</sup> In a 2013 memo, EPA identified federalism issues where scant progress had been made, including the “[r]outine failure of states to take timely or appropriate enforcement actions, potentially allowing pollution to continue unabated” and “failure of states to take appropriate penalty actions, which results in ineffective deterrence for noncompliance and an unlevel playing field for companies that do comply.”<sup>114</sup>

To respond to these problems, EPA proposed an “escalation approach to problem-solving” which included four tiers, intended to be used in a “progressive or escalating manner.”<sup>115</sup> Under the last tier, designed “to focus attention on the lack of progress in resolving significant state performance issues,” and available “only after other attempts to resolve issues have failed,” EPA could consider actions like “overfiling where a state fails to take appropriate action on a particular enforcement matter,” withholding grant money, temporary, partial, or even full withdrawal of delegation.<sup>116</sup> Notably, under this policy, overfiling is not limited to situations in which *all* other steps have failed, but only requires that some other steps have been tried. The policy specifically reminds states that “EPA has retained the right to take federal action for multiple purposes” in delegated states, including “to carry out EPA’s national enforcement initiatives, to provide adequate enforcement presence as a deterrent for maintaining a

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<sup>110</sup> Mintz, *supra* note 64, at 425.

<sup>111</sup> See generally MINTZ, *supra* note 106.

<sup>112</sup> EPA, NATIONAL STRATEGY FOR IMPROVING OVERSIGHT OF STATE ENFORCEMENT PERFORMANCE 3 (2013) [hereinafter NATIONAL STRATEGY], <https://www.epa.gov/sites/production/files/2014-06/documents/state-oversight-strategy.pdf>.

<sup>113</sup> U.S. EPA OFFICE OF INSPECTOR GEN., *supra* note 10.

<sup>114</sup> NATIONAL STRATEGY, *supra* note 112, at 4.

<sup>115</sup> *Id.* at 5.

<sup>116</sup> *Id.* at 6.

national level playing field, . . . and to assure adequate understanding of EPA's roles in ensuring compliance with federal laws."<sup>117</sup>

The Trump Administration, under Administrators Pruitt<sup>118</sup> and Wheeler, has sought to limit federal oversight and intervention in states' delegated programs, calling such intervention a "last option," even when there are significant concerns with the adequacy of state enforcement actions.<sup>119</sup> In an October 2018 memorandum outlining principles for cooperative federalism programs, Wheeler's first principle was "General Deference to States and Tribes Implementing Federally Delegated Programs," specifying that "[s]tates and tribes have the primary role in state- and tribal-implemented federal programs, and the EPA will generally defer to states and tribes in their day-to-day activities."<sup>120</sup> Wheeler acknowledged a continued role for EPA "to support and oversee the programs implemented by states and tribes and, in certain circumstances, to take direct action."<sup>121</sup> However, the situations in which direct action is considered warranted are considerably narrower than under the Obama Administration's EPA policies.

Direct federal action, according to the Trump EPA, is appropriate in certain, rare situations including when there is a "substantial risk of harm to human health or the environment"; the state does not have the "resources, capability or will to effectively implement programs"; the state's decisions are inconsistent with federal requirements; the issue is of national importance; or there is a documented history of the state not adequately addressing significant noncompliance.<sup>122</sup> Wheeler

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

<sup>118</sup> See EPA, WORKING TOGETHER: FY 2018-2022 U.S. EPA STRATEGIC PLAN (2018), <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf> (identifying "cooperative federalism" as a fundamental priority for the agency and Objective 2.1 to "enhance shared accountability" between the EPA and state and local coregulators); EPA YEAR IN REVIEW, 2017-2018 REPORT (2018), [https://www.epa.gov/sites/production/files/2018-03/documents/year\\_in\\_review\\_3.5.18.pdf](https://www.epa.gov/sites/production/files/2018-03/documents/year_in_review_3.5.18.pdf) (touting among Administrator Scott Pruitt's accomplishments a "return to cooperative federalism").

<sup>119</sup> See EPA, PRINCIPLES AND BEST PRACTICES FOR OVERSIGHT OF FEDERAL ENVIRONMENTAL PROGRAMS IMPLEMENTED BY STATES AND TRIBES 5 (2018) [hereinafter PRINCIPLES AND BEST PRACTICES], [https://www.epa.gov/sites/production/files/2019-04/documents/fep\\_oversight\\_memo.10.30.18.pdf](https://www.epa.gov/sites/production/files/2019-04/documents/fep_oversight_memo.10.30.18.pdf).

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 4. Another EPA memorandum provides examples of situations in which EPA may become involved in otherwise-delegated inspections and enforcement. Examples include emergencies where there is a significant risk to public health, significant noncompliance that the state has not addressed, or monitoring that requires specialized EPA equipment. SUSAN P. BODINE, EPA, INTERIM OECA GUIDANCE ON ENHANCING REGIONAL-STATE PLANNING AND COMMUNICATION ON COMPLIANCE ASSURANCE WORK IN AUTHORIZED STATES (2018) [hereinafter OECA GUIDANCE], <https://www.epa.gov/sites/>

further cautions that, if direct action seems potentially warranted, regional officials should warn states and, whenever practicable, give them an opportunity to rectify the deficiencies identified.<sup>123</sup> This approach amounts to a slowdown of federal enforcement, as attempts are repeatedly made to allow the state to do what they are unable or unwilling to do.<sup>124</sup> Additionally, justifications for direct federal involvement that had been present in policy statements made by other administrations are conspicuously missing. For example, under previous administrations, overfiling was used to maintain a level economic playing field in the regulated community between states, to “assure adequate understanding of EPA’s roles in ensuring compliance with federal laws” and to advance EPA’s national enforcement initiatives.<sup>125</sup> These justifications have disappeared from this Administration’s recent policy statements.

Advocates from top environmental organizations have criticized EPA’s highly deferential federalism stances, writing in a letter to Susan Bodine, EPA’s head of OECA, that they have concerns about EPA’s oversight of state implementation and enforcement of numerous federally authorized programs.<sup>126</sup> Specifically, concerns have been raised about OECA’s guidance document that requires Bodine to “personally approve any EPA enforcement action in cases where a state’s senior leadership has objected to federal involvement,” while requiring no such approval if the regional office wants to drop the action in response to the state’s objections.<sup>127</sup> According to the advocates, this will “lead to less EPA oversight and weaker enforcement of federal laws,” as the path of least resistance within the federal government will be to drop an enforcement action when presented with state pushback.<sup>128</sup>

The delicate balance of cooperative federalism has shifted significantly between presidential administrations, as some administrators are more willing to flex the resources of the federal government to

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production/files/2018-01/documents/guidance-enhancingregionalstatecommunicationoncompliance.pdf.

<sup>123</sup> PRINCIPLES AND BEST PRACTICES, *supra* note 119, at 4.

<sup>124</sup> See INST. FOR POLICY INTEGRITY, *supra* note 1 (analyzing the practical consequences of the Trump Administration’s proposed cuts to the EPA’s enforcement budget).

<sup>125</sup> Cf. NATIONAL STRATEGY, *supra* note 112, at 4 n.8, 6 (reserving overfiling as a possible action and listing purposes for which the EPA might take action).

<sup>126</sup> Letter from Eric Schaeffer, Exec. Dir., Env’tl. Integrity Project, to Susan Bodine, Assistant Adm’r for Enf’t & Compliance Assurance (Aug. 14, 2018), [http://www.environmentalintegrity.org/wp-content/uploads/2018/09/Letter-to-Bodine\\_EnforcementGuidanceIG-Flint-Report\\_signed.pdf](http://www.environmentalintegrity.org/wp-content/uploads/2018/09/Letter-to-Bodine_EnforcementGuidanceIG-Flint-Report_signed.pdf).

<sup>127</sup> *Id.* (citing OECA GUIDANCE, *supra* note 122).

<sup>128</sup> See *id.*

ensure compliance,<sup>129</sup> while others are content to allow delegated states to exercise virtually unchecked authority.<sup>130</sup> This political calculus has real consequences for citizens, as states and private actors adjust their behavior in response to the likelihood of federal oversight. When federal actors abdicate their responsibilities, states are more likely to offer sweetheart deals to violators with token penalties, knowing that their actions will not be scrutinized carefully.<sup>131</sup>

## II

### EMERGING CONSENSUS ON THE LEGALITY OF OVERFILING

Overfiling is one of the most contentious aspects of cooperative federalism.<sup>132</sup> While it occurs only rarely,<sup>133</sup> it consistently draws outsized reactions from both supporters and opponents and has frequently been the object of legal challenges, described in detail in this Part. In addition to state government's feelings of imposition discussed above, representatives of regulated industry often react strongly when EPA undertakes an enforcement action about a violation they thought had been settled with state authorities, feeling that such action is fundamentally unfair.<sup>134</sup> Conversely, EPA maintains that the critical impact of overfiling is understated by the few instances recorded, because "it's the threat of the overfilings that is a very powerful tool."<sup>135</sup>

Because of these strong convictions on both sides, the boundaries of authority between state and federal authority under specific environmental statutes have been frequently litigated. The Supreme Court, however, has shied away from involvement in this regulatory

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<sup>129</sup> See Gorn, *supra* note 63 (conceptualizing strong EPA enforcement as the "gorilla in the closet" that "could assume control if the state authorities proved too weak or inept to curb local polluters").

<sup>130</sup> See generally FREDRICKSON ET AL., *supra* note 1, at 59–67 (discussing and contextualizing the "extreme deference to states [by the Trump Administration] on matters of regulation and enforcement" in the environmental policy sphere).

<sup>131</sup> See generally *id.* at 36 (noting that fines imposed by state and local governments for pollution have also declined during the Trump Administration, from an average of \$91 million per year between 2006 and 2016 to just \$38 million in 2017 and \$59 million in 2018).

<sup>132</sup> See, e.g., HEISS, *supra* note 48, at 2–12 (noting that states feel that overfiling is a bigger imposition than even cutting federal grant funding, and that "[i]f poorly handled . . . overfiling can damage the Federal-State relationship itself").

<sup>133</sup> See *supra* note 22.

<sup>134</sup> See, e.g., *Enforcement of Environmental Laws: Hearing Before the S. Comm. on Env't & Pub. Works*, 105th Cong. 52–55 (1997) [hereinafter *Enforcement Hearing*] (statement of Robert E. Harmon, Chairman of the Board of Directors, Harmon Industries, Inc.) ("If the EPA has this authority, regulated industries cannot negotiate binding agreements with authorized State agencies since the EPA may later disagree with and completely override the State resolution.").

<sup>135</sup> *Id.* at 28 (statement of Sen. Chafee).

tug-of-war over overfiling. As discussed below in more detail, overfiling has been universally upheld under the CWA and CAA and upheld in all but one circuit under RCRA.<sup>136</sup>

The majority of instances in which EPA directly files enforcement actions in delegated states occur when the state has failed to initiate an enforcement action against the prospective defendant in a timely manner. These cases are not considered overfiling actions and tend to be less controversial because there are no competing lawsuits; defendant companies are only dealing with one level of government.<sup>137</sup> In other cases, defendant polluters argue that local municipal enforcement precludes EPA from acting. In *United States v. LTV Steel Co.*, for example, the court rejected an argument by the polluter that settlement with the City for violations of the municipal air pollution code precluded EPA enforcement of the CAA.<sup>138</sup> The City, the court explained, had no authority to enforce either the CAA or the State Implementation Plan (SIP) and was enforcing an entirely different law.<sup>139</sup> Both of these examples describe relatively routine enforcement actions and last-ditch efforts by polluters to avoid paying penalties, and they are distinct from the subject matter of this Note.

Overfiling, by contrast, raises real questions about the propriety of allowing the federal government to upset a legal settlement entered into between the polluter and the state as well as the application of res judicata. This Part will discuss the ways that courts have reacted to overfiling under federal environmental statutes. Section II.A will discuss authority under RCRA and demonstrate that despite one circuit's holding that RCRA does not allow overfiling, courts in the rest of the country allow it. Sections II.B and II.C will analyze, respectively, the CAA and the CWA and conclude that both statutes permit overfiling.<sup>140</sup>

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<sup>136</sup> See *infra* Section II.A.

<sup>137</sup> See, e.g., *United States v. Rineco Chem. Indus.*, No. 4:07cv001189 SWW, 2009 WL 801608, at \*2 n.5 (E.D. Ark. Mar. 4, 2009) (“[The overfiling debate] is of no consequence here, however, as the State of Arkansas has not initiated an enforcement action against Rineco concerning the matters before the Court.”).

<sup>138</sup> 118 F. Supp. 2d 827, 829 (N.D. Ohio 2000).

<sup>139</sup> *Id.* at 832 (“[T]here has been no state enforcement of the SIP; there has merely been municipal enforcement of the municipal code.”).

<sup>140</sup> Courts that have considered the issue have additionally permitted overfiling under CERCLA. See, e.g., *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469, 477 (Ind. 2008) (“For better or worse, federal ‘overfiling’ . . . is a risk known to parties negotiating a cleanup with a state agency.”), *cert. denied*, 558 U.S. 874 (2009).

### A. *Overfiling Under Resource Conservation and Recovery Act*

Under RCRA, EPA has broad authority to operate in delegated states. As long as they provide notice to the appropriate delegated state before proceeding against the violator, the federal agency can assess civil penalties for past or current violations, require compliance with the statute either immediately or within a specified time period, or commence a civil action in the appropriate federal district court.<sup>141</sup> Before 1999, courts had seemingly accepted the authority of EPA to engage in overfiling under the statute.<sup>142</sup>

In 1999, the Eighth Circuit upended federal enforcement of RCRA when it held in *Harmon Industries, Inc. v. Browner* that EPA was barred from assessing penalties because a prior agreement between the state and the polluter precluded federal enforcement.<sup>143</sup> In November 1987, Harmon Industry's management discovered that maintenance workers had been improperly disposing of toxic waste behind their factory for almost fifteen years.<sup>144</sup> They notified the state, which investigated and found no threat to human health or the environment and therefore signed a voluntary compliance agreement whereby Harmon would clean up the disposal area in exchange for paying no civil penalties.<sup>145</sup> Harmon's investigation cost the company approximately \$1.4 million, and their switch to using a non-hazardous cleaning material cost \$800,000 upfront, with an ongoing annual cost of \$125,000.<sup>146</sup> During the period of cooperation, but before a state judge approved the consent decree, EPA initiated a separate administrative enforcement action against Harmon that sought over \$2.3 mil-

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<sup>141</sup> Resource Conservation and Recovery Act (RCRA) of 1976 § 3008(a), 42 U.S.C. § 6928(a) (2012).

<sup>142</sup> See, e.g., *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1201 (9th Cir. 1986) (“Congress did not intend, by authorizing a state program ‘in lieu of the Federal program’ to preempt federal *regulation* entirely. . . . [And] section 3008(a)(2) does not explicitly *reserve* federal authority [if a state program has been authorized]; rather, it conditions the exercise of . . . authority on . . . notice.” (quoting 42 U.S.C. § 6926(b) (2012))); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 167 (6th Cir. 1973) (“[I]t is important to note that . . . undertaking [enforcement of a federally approved plan] on the part of the state does not detract from the Administrator’s primary ability to enforce federally the provisions of every state plan against citizens of that state which drew the plan.”).

<sup>143</sup> See *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999) (“The EPA may not . . . simply fill the perceived gaps it sees in a state’s enforcement action by initiating a second enforcement action without allowing the state an opportunity to correct the deficiency and then withdrawing the state’s authorization.”).

<sup>144</sup> *Id.* at 897–98.

<sup>145</sup> *Id.*

<sup>146</sup> JAMES V. DE LONG, CATO INST., *OUT OF BOUNDS, OUT OF CONTROL: REGULATORY ENFORCEMENT AT THE EPA* 71 (2002); see also *Enforcement Hearing*, *supra* note 134, at 53 (statement of Robert E. Harmon, Chairman of the Board of Directors, Harmon Industries, Inc.).

lion in civil penalties.<sup>147</sup> This action was litigated in front of an administrative law judge, who imposed a fine of \$586,716.<sup>148</sup> After an appeal to the administrative appeals board was dismissed,<sup>149</sup> Harmon challenged the fine in federal district court, arguing that the penalty should be thrown out because of the consent agreement with the state.<sup>150</sup> The district court agreed, reversing the appeals board's judgment.<sup>151</sup> The Eighth Circuit took up the question of the permissibility of overfiling and affirmed the district court.<sup>152</sup>

To support their decision, the Eighth Circuit looked at the entirety of RCRA and tried to harmonize provisions that the court thought were at odds with one another. Section 6928(a)(2) authorizes federal enforcement, specifying that if a violation occurs in a delegated state, "the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section."<sup>153</sup> Section 6926(b) details the process for authorizing a state program and notes that EPA has the right to withdraw state authorization if enforcement is inadequate.<sup>154</sup> The court held that, read together, "the notice requirement of § 6928(a)(2) reinforces the primacy of a state's enforcement rights under RCRA," not federal overfiling.<sup>155</sup>

For further support, the court looked at Section 6926(d), which states, "Any action taken by a State under a hazardous waste program authorized under this section [has] the same force and effect as action taken by the [EPA] under this subchapter."<sup>156</sup> It found that, despite the fact that the title of the section is "Effect of State *Permit*," it should apply to enforcement actions as well as permitting decisions.<sup>157</sup>

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<sup>147</sup> *Harmon*, 191 F.3d at 897.

<sup>148</sup> *In re Harmon Elecs., Inc.*, 1994 EPA ALJ LEXIS 35, at \*88, *aff'd*, 7 E.A.D. 1 (EAB 1997), *rev'd sub nom.* *Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999).

<sup>149</sup> *In re Harmon Elecs.*, 7 E.A.D. at 4.

<sup>150</sup> *Harmon*, 19 F. Supp. 2d at 993 ("Plaintiff claims that . . . EPA does not have statutory authority to seek a civil penalty because the state settlement is final and binding.").

<sup>151</sup> *Id.* at 1000. The district court barred EPA's action based on statutory analysis and an application of *res judicata*. *Id.* at 995–98.

<sup>152</sup> *Harmon*, 191 F.3d at 898–99.

<sup>153</sup> Resource Conservation and Recovery Act (RCRA) of 1976 § 3008(a)(2), 42 U.S.C. § 6928(a)(2) (2012).

<sup>154</sup> *Id.* § 6926(b).

<sup>155</sup> *Harmon*, 191 F.3d at 899.

<sup>156</sup> *Id.* at 897–900 (alteration in original) (quoting 42 U.S.C. § 6926(d)).

<sup>157</sup> *Id.* (emphasis added). Because the court found that the relevant text of RCRA was unambiguous, under *Chevron*, it reasoned that deference to EPA's interpretation of the law was not appropriate. *Id.* at 901–02.

If a state was operating “in lieu of” the EPA program,<sup>158</sup> the court reasoned, the state was responsible for “administration and enforcement of the program [which] are inexorably intertwined.”<sup>159</sup> The court added that that the legislative history and “principles of comity and federalism . . . embedded in” the framework of RCRA bolstered its interpretation and advised against the “potential schism” that may occur when “separate sovereigns institute . . . separate enforcement actions.”<sup>160</sup> It found there was “no support either in the text of the statute or the legislative history for the proposition that the EPA is allowed to duplicate a state’s enforcement authority with its own enforcement action.”<sup>161</sup> If EPA wanted to take additional enforcement actions, the court directed, they could do so after giving the state an opportunity to first correct the deficiency, or by withdrawing the delegation of authority altogether.<sup>162</sup>

The *Harmon* court also offered an alternative holding, analyzing the case under the principles of *res judicata* and finding that all requirements were met; EPA’s case impermissibly duplicated the state enforcement action.<sup>163</sup> Most significantly, it considered whether privity existed between the federal and state enforcement agencies such that their “relationship in the enforcement action is nearly identical.”<sup>164</sup> EPA had argued that its unique enforcement interests were enough to find that it was not in privity with the state, but the court returned to the “in lieu of” language, holding that “the State of Missouri advanced the exact same legal right under the statute as the EPA did in its administrative action” and therefore found the case to also be barred by *res judicata*.<sup>165</sup>

In *United States v. Power Engineering Co.*, just a few years after *Harmon*, the Tenth Circuit came to the opposite conclusion in a RCRA case with facts quite similar to *Harmon*.<sup>166</sup> Colorado regula-

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<sup>158</sup> An authorized state can “carry out such program *in lieu of* the Federal program under this subchapter . . . and . . . issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and . . . enforce permits deemed to have been issued under section 6935(d)(1) . . .)” unless EPA de-authorizes the state. 42 U.S.C. § 6926(b) (emphasis added).

<sup>159</sup> *Harmon*, 191 F.3d at 899.

<sup>160</sup> *Id.* at 901–02.

<sup>161</sup> *Id.* at 901.

<sup>162</sup> *Id.* at 901; see 42 U.S.C. § 6926(e).

<sup>163</sup> *Harmon*, 191 F.3d at 902–04 (“Missouri[ ] *res judicata* requires ‘(1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties of the action; and (4) identity of the quality of the person for or against whom the claim is made.’” (alteration in original) (quoting *Prentzler v. Schneider*, 411 S.W.2d 135, 138 (Mo. 1966) (en banc))).

<sup>164</sup> See *id.* at 903.

<sup>165</sup> *Id.*

<sup>166</sup> 303 F.3d 1232 (10th Cir. 2002).

tors had previously found that the Power Engineering Company (PEC) had discharged pollutants into a local river and had been treating, storing, and disposing of hazardous wastes without a permit.<sup>167</sup> The state ordered PEC to come into compliance with its hazardous waste laws, implement a cleanup plan for the soil, and participate in a reporting and inspection regime, but PEC failed to comply.<sup>168</sup> The state assessed a civil penalty of \$1.13 million, which PEC refused to pay.<sup>169</sup> A state court found the penalty enforceable as a matter of law in March of 1999.<sup>170</sup> While this action was unfolding, EPA had been in discussions with the state and asked it to additionally enforce RCRA's financial assurance requirement against PEC, which the state failed to do. EPA consequently filed its own suit against PEC. PEC, relying on *Harmon*, argued that overfiling was not permitted under RCRA.<sup>171</sup>

The Tenth Circuit disagreed. Relying on structural reasoning, such as the fact that RCRA explicitly bars citizens' suits from duplicating a federal or state action<sup>172</sup> and other canons of construction, such as the presumption against superfluosity,<sup>173</sup> the court found the RCRA was, at least, ambiguous.<sup>174</sup> The court criticized the *Harmon* court for its attempt at "harmonizing" different sections of the statutes," that went "well beyond the plain language of the statute."<sup>175</sup> The court, finding that the relevant text contained "ambiguities and contradictions," applied the *Chevron* doctrine<sup>176</sup> and deferred to EPA's interpretation, which permitted overfiling.<sup>177</sup> In addressing the issue of res judicata, the court found that because EPA did not have functional control over the lawsuit or an identity of posi-

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<sup>167</sup> *Id.* at 1235.

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

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

<sup>170</sup> *Id.*; Colo. Dep't of Pub. Health & Env't v. Power Eng'g Co., No. 99CA0863, 2000 Colo. App. LEXIS 915 (May 25, 2000).

<sup>171</sup> *Power Eng'g Co.*, 303 F.3d at 1235-37.

<sup>172</sup> *See id.* at 1237 ("Because Congress explicitly prohibits citizens from duplicating a federal or state RCRA action in section 6972(b)(1), but omits such language from section 6928, the statute suggests that Congress intended to prohibit duplicative citizen suits but not duplicative federal suits.").

<sup>173</sup> *Id.* at 1238 (using the presumption against superfluosity to interpret authorization for the state to operate "in lieu the federal program" to mean in lieu of the administration of the regulatory program, not enforcement).

<sup>174</sup> *Id.* at 1240.

<sup>175</sup> *Id.* at 1238 (quoting *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999)).

<sup>176</sup> *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (directing courts to defer to an agency's reasonable interpretation of ambiguous statutory language).

<sup>177</sup> *Power Eng'g Co.*, 303 F.3d at 1241.

tions with the state agency, the two parties were not in privity.<sup>178</sup> Several other cases have employed similar logic as *Power Engineering Co.* to uphold EPA's right to enforce in states where it has delegated authority, while *Harmon* and the Eighth Circuit has remained an outlier.<sup>179</sup>

Courts in other circuits that have considered the permissibility of overfiling under RCRA have universally approved of the practice. In the Seventh Circuit, for example, a district court in *United States v. Murphy Oil USA, Inc.* failed to apply *Harmon* to the RCRA claims, finding it distinguishable in part based on timing,<sup>180</sup> and concluding, "With respect, I find the Eighth Circuit's reading of [RCRA] unpersuasive."<sup>181</sup> The court found that *Harmon* "rested on a flawed interpretation of the act and in particular, a mistaken reading of the 'in lieu of' language."<sup>182</sup> Unlike the Court of Appeals for the Tenth Circuit, however, the court wrote that it agreed with the Eighth Circuit that RCRA was unambiguous on the subject of overfiling, but read it in the exact opposite way—to authorize what the *Harmon* court prohibited.<sup>183</sup> While the court disagreed with the contention that the courts' differing interpretations was conclusive proof of ambiguity, it noted in the alternative that if ambiguity was present, deference to the agency under *Chevron* would still allow overfiling.<sup>184</sup>

RCRA also includes provisions that permit criminal enforcement.<sup>185</sup> A number of cases have challenged the authority of EPA to bring federal criminal cases in states where authority for running

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<sup>178</sup> See *id.* at 1240–41. This argument also refutes the alternative holding under *Harmon* that the claim was barred by res judicata because it distinguishes the interest of the state and federal regulators. See *supra* notes 163–65 and accompanying text.

<sup>179</sup> See Thomas A. Benson, *Perfect Harmony: The Federal Courts Have Quarantined Harmon and Preserved EPA's Power to Overfile*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 885, 886 (2004) ("Rather than sparking an outbreak of similar cases, as observers had either hoped or feared, depending on their political orientation, *Harmon* has essentially been quarantined by the run of cases that followed it.").

<sup>180</sup> 143 F. Supp. 2d 1054 (W.D. Wis. 2001). The court distinguishes the cases because in *Harmon*, the state had a judicially approved consent decree with the defendant, whereas in the present case, "the state has done no more than initiate an action against [the] defendant." *Id.* at 1114.

<sup>181</sup> *Id.* at 1116 ("[T]he [*Harmon*] court read too much into the phrases 'in lieu of' and 'same force and effect' and at the same time gave inadequate effect to the provisions . . . that demonstrate Congress' intent to give the EPA its own independent enforcement authority even in states that have authorized hazardous waste programs.").

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 117.

<sup>184</sup> *Id.* (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984)).

<sup>185</sup> Resource Conservation and Recovery Act (RCRA) of 1976 § 3008(d), 42 U.S.C. § 6928(d) (2012) (making it a federal criminal offense to treat and store hazardous waste without a permit and authorization from EPA).

RCRA programs has been delegated to the states. In each case, the courts have found that the “in lieu of the Federal program” language at issue in *Harmon* did not preempt federal criminal enforcement.<sup>186</sup>

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

In what is likely the first acknowledgement of overfiling, in 1973 the Sixth Circuit wrote, while explaining the structure of the CAA, that “it is important to note [delegation to the state] does not detract from the Administrator’s primary ability to enforce federally the provisions of every state plan against citizens of that state which drew the plan.”<sup>187</sup> Under the CAA, a delegated state is required to write a State Implementation Plan (SIP) describing how it will come into compliance with the National Ambient Air Quality Standards (NAAQS), subject to approval by EPA.<sup>188</sup> The federalist structure of the CAA allows EPA to directly enforce a SIP after providing the violator and the applicable state with thirty days of notice.<sup>189</sup> A federal criminal case, by contrast, can be brought at any time, without the notice requirement.<sup>190</sup> The CAA also reserves for EPA the right to bring federal enforcement actions if the state fails to enforce in a widespread way.<sup>191</sup> EPA retains discretion to determine whether a state action is appropriate. In cases brought under the CAA, courts find support for overfiling by acknowledging that one of the factors a judge may consider when determining the penalty amount is “payment by the violator of penalties previously assessed for the same violation.”<sup>192</sup> If settlement with one agency was enough to stop further enforcement action, this provision would be unnecessary.<sup>193</sup>

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<sup>186</sup> See *United States v. Flanagan*, 126 F. Supp. 2d 1284, 1291–92 (C.D. Cal. 2000) (rejecting the reasoning that the “in lieu of” language precluded overfiling); see also *United States v. Elias*, 269 F.3d 1003, 1007, 1010 (9th Cir. 2001) (same), *cert. denied*, 537 U.S. 812 (2002); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 43–44 (1st Cir. 1991) (finding “no merit” in an argument that “after state program approval, permits issued by the state are to be . . . civilly enforced by the state alone”).

<sup>187</sup> *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 167 (6th Cir. 1973). This case was identified as the “first and only federal appellate court to speak to the issues of overfiling and res judicata in the 1970s” by the Environmental Law Institute. See Organ, *supra* note 94, at 10617–18.

<sup>188</sup> 42 U.S.C. § 7410 (2012).

<sup>189</sup> *Id.* § 7413(a)(2).

<sup>190</sup> *Id.* § 7413(c).

<sup>191</sup> *Id.* § 7413(a)(2).

<sup>192</sup> *Id.* § 7413(e).

<sup>193</sup> See, e.g., *United States v. Vista Paint Corp.*, 1996 U.S. Dist. LEXIS 22129, at \*41 (C.D. Cal. Apr. 16, 1996), *aff’d*, 129 F.3d 129 (9th Cir. 1997) (finding the small fine defendants had paid to local authorities was a “slightly mitigating factor” in calculating a penalty under the CAA); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827, 833 (N.D. Ohio 2000) (“[T]his statutory language would have been unnecessary if, once a violator

In *United States v. SCM Corp.*, a factory that manufactured white pigment used in paints was alleged to have violated various air quality standards under the CAA.<sup>194</sup> The Maryland Department of Health issued a notice of violation, and by December 1984, the agency and SCM negotiated a consent agreement which required SCM to install corrective equipment, be subject to performance testing and stipulated penalty payments for noncompliance, and pay a penalty of \$15,000.<sup>195</sup> They executed the agreement on January 7, 1985. Meanwhile, EPA had conducted its own tests in December and, on January 2, 1985, with knowledge of the consent order that had been negotiated (but not yet signed) between the state and SCM, EPA filed a case in federal court, seeking injunctive relief and significantly higher civil penalties.<sup>196</sup>

SCM argued that the court should dismiss or stay the EPA case because of its signed consent order with the state.<sup>197</sup> The court rejected this argument, warning that under SCM's interpretation of the law, "the state could nullify federal enforcement simply by adopting and using a state enforcement scheme which provided for minimal penalties," collusive action that the court found plainly contrary to congressional intent.<sup>198</sup> The court further reasoned that there was nothing inherently unfair about the holding because, "[i]n a federal system, each person and entity is subject to simultaneous regulation by state and national authority."<sup>199</sup>

In *United States v. Murphy Oil USA, Inc.*, in addition to the RCRA violations discussed above, EPA alleged that the oil refiner had violated the CAA.<sup>200</sup> After a period of state investigation and a series of misleading statements made by defendants, state officials initiated an enforcement action against Murphy in December 1992. The parties resolved the claims in a settlement in August 1994, releasing Murphy from liability for any emissions violations alleged in the state's complaint.<sup>201</sup> EPA was not a party to the settlement but had been closely following the progress, discussing the terms with the state

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paid a penalty to any enforcement entity, it was immune from enforcement actions by any other sovereign.").

<sup>194</sup> 615 F. Supp. 411 (D. Md. 1985).

<sup>195</sup> *See id.* at 414. For context, the CAA authorizes civil penalties of up to \$25,000 per day of violation. 42 U.S.C. § 7413(b) (2012).

<sup>196</sup> *SCM Corp.*, 615 F. Supp. at 413–14.

<sup>197</sup> *See id.* at 414.

<sup>198</sup> *See id.* at 419.

<sup>199</sup> *See id.* at 420.

<sup>200</sup> 143 F. Supp. 2d 1054 (W.D. Wis. 2001) (alleging that Murphy had failed to comply with permit requirements under the CAA, exceeded permissible discharge limits under the CWA, and violated hazardous waste requirements under RCRA).

<sup>201</sup> *See id.* at 1072.

and making it clear that “[i]t intended to file an action of its own if the state litigation was not resolved promptly.”<sup>202</sup> Murphy alleged that the doctrine of *res judicata* should apply, meaning that the settlement with the state government would preclude EPA from prosecuting the claims.<sup>203</sup> The court analyzed the requirements of privity<sup>204</sup> and found that the federal government was not in privity with the state because EPA was not directing or participating in the first litigation and because EPA has unique interests in the case, such as interstate impacts, that were not represented by the state.<sup>205</sup> This presents a direct conflict with the holding of *Harmon*, which found that the state agency and EPA were in privity because they represented the same legal interest.

The court in *Murphy* extensively distinguished *Harmon*’s statutory holding, finding it inapplicable because the CAA “does not contain the same language that the Eighth Circuit relied upon in interpreting [RCRA].”<sup>206</sup> The *Harmon* court had emphasized the “in lieu of” language, which is not present in the CAA. Additionally, the court pointed to the language in Section 7413(e), anticipating payment of prior penalties<sup>207</sup> and the legislative history of the 1970 amendments of the act, which demonstrates congressional intent to “give the federal government authority to bring enforcement actions to respond to the ‘regrettably slow’ progress that had been made under the previous statutory framework in which the federal government was prohibited from bringing an enforcement action unless a state failed to take appropriate action.”<sup>208</sup> Given the statute’s purpose, the court further argued, it would be illogical to prevent federal enforcement whenever the state has undertaken an enforcement action, “no matter how ineffectual or inadequate such actions have been.”<sup>209</sup> Finally, the court noted that the policy question of whether “sequential enforce-

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

<sup>203</sup> *See id.* at 1088.

<sup>204</sup> *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301 (7th Cir. 1985) (finding that privity exists between the plaintiff and the state because “(1) there is a ‘congruence of legal interests’ between them; (2) the state represented plaintiff’s interests adequately in the litigation it initiated; and (3) the relationship between the two parties is sufficiently close because of the identity of their interests”).

<sup>205</sup> *See Murphy Oil*, 143 F. Supp. 2d at 1090.

<sup>206</sup> *Id.* at 1091.

<sup>207</sup> *See id.*

<sup>208</sup> *Id.* (citing H.R. REP. NO. 91-1146 (1970)). The legislative history, although not specific to this point, does show general intent to strengthen enforcement authority: “[I]t is urgent that Congress adopt new clean air legislation which will make possible the more expeditious imposition of specific emission standards both for mobile and stationary sources and the effective enforcement of such standards by both state and federal agencies.” H.R. REP. NO. 91-1146 (1970).

<sup>209</sup> *Murphy Oil*, 143 F. Supp. 2d at 1090.

ment” over the same violation is wise was beyond the scope of the legal question presented.<sup>210</sup>

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

Under the CWA, EPA’s authority to enforce is similarly broad. EPA retains the authority to enforce the CWA notwithstanding the existence of a delegation of primary enforcement power to a state. Section 1342(i) states that “[f]ederal enforcement is not limited. Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act [33 U.S.C. § 1319].”<sup>211</sup> Section 1319 grants enforcement authority to EPA.<sup>212</sup>

In *United States v. Youngstown*, EPA brought an enforcement action against the City of Youngstown for violations of the CWA.<sup>213</sup> The City defended, relying on *Harmon* to argue that EPA was precluded from bringing an enforcement action when the authorized state was pursuing an enforcement action.<sup>214</sup> The court rejected this argument, noting that the Sixth Circuit had already held that EPA’s enforcement authority was not curtailed simply because the state agency has been granted authority.<sup>215</sup> The court cited § 1342(i), the section entitled “Federal Enforcement Not Limited,” to find that “the fact that the State of Ohio is suing Youngstown does not preclude a similar enforcement action by the United States.”<sup>216</sup> It also considered the *Harmon* precedent, but found it inapposite as the “in lieu of” language in RCRA that *Harmon* relies so heavily on is not present in the CWA, and the § 1342(i) language actually “compels the opposite conclusion.”<sup>217</sup>

This reasoning has been widely replicated,<sup>218</sup> including in *United States v. Rapanos*, where the Sixth Circuit held that the CWA “allows

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<sup>210</sup> *Id.* at 1092.

<sup>211</sup> 33 U.S.C. § 1342(i) (2012); *see also* *United States v. Sharon Steel Corp.*, No. C87-750, 1989 U.S. Dist. LEXIS 16736, at \*10 (N.D. Ohio July 12, 1989) (“§402(i) [33 U.S.C. § 1342(i)] reserves EPA’s authority to enforce the CWA notwithstanding the existence of a state water pollution control agency with concomitant enforcement powers.”).

<sup>212</sup> 33 U.S.C. § 1319 (2012).

<sup>213</sup> *United States v. City of Youngstown*, 109 F. Supp. 2d 739 (N.D. Ohio 2000).

<sup>214</sup> *See id.* at 740 (“[The city of] Youngstown places exclusive reliance on *Harmon* . . .”).

<sup>215</sup> *See id.* at 741 (citing *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enf’t*, 20 F.3d 1418 (6th Cir. 1994) (“USEPA retains independent enforcement authority in primacy states.”)).

<sup>216</sup> *Id.* (citing 33 U.S.C. § 1342(i) (2012)).

<sup>217</sup> *See id.* (citing *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897–98 (8th Cir. 1999)).

<sup>218</sup> *See, e.g., S. Ohio Coal*, 20 F.3d at 1427–28 (explaining that the CWA “sets up a system of ‘cooperative federalism,’” but that “the responsible federal agency retains

the federal government to pursue an action against an offender regardless of whether the state has instituted its own enforcement program.”<sup>219</sup> To my knowledge, no courts have found otherwise.

In *State Water Control Board v. Smithfield Foods, Inc.*, there was a strange instance of reverse-overfiling. Local officials tried to bring an enforcement action in state court after a successful action by EPA in federal court for violations of a CWA permit.<sup>220</sup> In dicta, the court validated the principle of overfiling, writing that even though the state had primary authority to enforce the permit, “the CWA expressly reserves the EPA’s right to pursue its own enforcement actions with regard to such permit.”<sup>221</sup> Smithfield had ongoing violations of their permit and had negotiated an administrative order with state enforcement authorities to allow discharge in excess of the limits for a specific period of time, but the state had granted an extension for compliance each year for the past six years.<sup>222</sup> In 1996, apparently fed up with the lack of state action, EPA informed local authorities that they were planning to sue Smithfield in federal court, but the state declined to join and instead filed their own action in state court.<sup>223</sup> In EPA’s federal case, the district court found, and the Fourth Circuit affirmed, that Smithfield had violated their permit and imposed penalties on the defendant, rejecting Smithfield’s argument that the federal action was precluded by the state’s agreement.<sup>224</sup> In state court, Smithfield then argued that *res judicata* barred state enforcement of the violations after the federal case had concluded. The court found that because “the interests and rights of both entities are vested in a single permit,” the state and EPA were in privity.<sup>225</sup> The state court approvingly cited the *res judicata* analysis of *Harmon*<sup>226</sup> and found that EPA’s action

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oversight power to ensure compliance with federal standards”), *cert. denied*, 513 U.S. 927; *United States v. City of Rock Island*, 182 F. Supp. 2d 690, 694 (C.D. Ill. 2001) (“Even assuming *Harmon*’s analysis of RCRA is correct, the decision clearly does not apply here . . . . The Clean Water Act has no ‘in lieu of’ or ‘same force and effect’ language.”); *United States v. Town of Lowell*, 637 F. Supp. 254, 257 (N.D. Ind. 1985) (finding defendant’s claim that prior proceedings should preclude EPA enforcement “groundless”).

<sup>219</sup> 376 F.3d 629, 647 (6th Cir. 2004), *vacated on other grounds*, 547 U.S. 715 (2006).

<sup>220</sup> 542 S.E.2d 766 (Va. 2001).

<sup>221</sup> *See id.* at 768 (citing 33 U.S.C. § 1342(i) (2012)).

<sup>222</sup> *See id.*

<sup>223</sup> *See id.*

<sup>224</sup> *See United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D. Va. 1997), *aff’d in part, rev’d in part*, 191 F.3d 516, 526 (4th Cir. 1999) (appeals court finding, in relevant part, that the state’s enforcement scheme was not “sufficiently comparable to § 309(g) to bar the EPA from bringing its own independent penalty action”), *cert. denied*, 531 U.S. 813 (2000).

<sup>225</sup> 542 S.E.2d at 770.

<sup>226</sup> *See id.*

barred the state's subsequent one.<sup>227</sup> Smithfield's arguments in the two cases are in direct conflict. If they had their way, the existence of the federal case would preclude the state case, and enforcement by the state would preclude the federal case—preventing any enforcement from occurring at all. From the two decisions, we can conclude that the CAA permits overfiling by EPA but may not allow subsequent action by state officials after the EPA enforcement is complete.

With *Harmon* as a major exception, overfiling has been upheld under both statutory and res judicata analysis. Courts interpreting RCRA, the CWA, and the CAA found that the statutes permit overfiling by the federal government even in states which have been otherwise delegated the power to grant and enforce permits. The same courts, when presented with an argument that traditional principles of res judicata prevented overfiling, have found that federal suits can go forward because of a lack of privity between the EPA and state agencies with which the polluters had crafted settlement agreements. EPA, the courts found, has unique federal interests that the state did not represent.

### III

#### PROPOSAL FOR INCREASED USE OF OVERFILING

Despite the initial claims of the fundamental unfairness of allowing overfiling to disturb settlements, a near-consensus has emerged on the legality of overfiling for the environmental laws. It is time to address the question that has been explicitly left unanswered by the courts: Is it wise for EPA to engage in overfiling?<sup>228</sup> This Part will propose and justify a more expansive use of overfiling.

The strongest rationalization for increased overfiling is the uneven track records of state enforcement programs. According to EPA's Office of Inspector General, "state enforcement programs frequently do not meet national enforcement goals."<sup>229</sup> EPA officials report that "in the interests of maintaining generally harmonious relations with States, EPA sometimes continues to defer to States on cases where Federal action would be appropriate."<sup>230</sup> This dynamic has

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<sup>227</sup> The state court did not establish a bright-line rule, but rather noted that "traditional principles" of res judicata would determine whether privity existed. *Id.* at 771.

<sup>228</sup> See *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1092 (W.D. Wis. 2001) ("One may question whether it is an effective use of finite agency resources to undertake sequential enforcement actions against the same alleged polluter or whether doing so conforms with some intuitive sense of fairness. These are policy questions that do not govern the legal determination . . .").

<sup>229</sup> U.S. EPA OFFICE OF INSPECTOR GEN., *supra* note 10, at 8.

<sup>230</sup> HEISS, *supra* note 48, at 2-1.

intensified under the Trump Administration. As the federal government has reduced its direct enforcement action, many states have not picked up the ball and instead are counting on a diminished appetite in federal regulators to protect unscrupulous settlements.

As discussed above, overfiling has an outsized impact on state regulatory programs.<sup>231</sup> There are real drawbacks to be considered. Overfiling can create distrust in the state-federal relationship and promote strong negative reactions from state regulators and their allies. EPA has to consider where to spend its limited political capital. For example, in the late 1990s, EPA undertook three overfilings in a two-year period in Utah. As a result, a nonbinding resolution was introduced in the state legislature in 1999 calling on Congress to investigate overfiling because of its impacts on the relationship between the EPA and the states.<sup>232</sup> However, although state actors may feel aggrieved by federal overfiling, in reality, overfiling targets polluters, not state actors. Through better communication, EPA may be able to reduce the tension created by overfiling by noting, when appropriate, that the federal action is not actually a rebuke to the state but merely an acknowledgement that the federal government has different priorities.<sup>233</sup>

One of the more serious consequences of an overfiling action is “increased reluctance of regulated entities to deal solely with state enforcement officials.”<sup>234</sup> After an instance of overfiling, violators may become concerned that the agreement they reach with the state, whether a compliance schedule or a penalty amount, is not final unless EPA signs off. Because of this, states may have trouble reaching settlements immediately after an overfiling.<sup>235</sup> Given the primacy of state enforcement, concerns about undermining state’s capacity are rightly prioritized, but clear guidelines that govern overfiling and effective and timely communication between state and federal actors can mitigate these concerns. Therefore, EPA should be careful and strategic about where to use overfiling authority but should by no means

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<sup>231</sup> See *supra* note 93 and accompanying text.

<sup>232</sup> See RECHTSCHAFFEN & MARKELL, *supra* note 49, at 340.

<sup>233</sup> EPA has not been clear on this point. See STEVEN A. HERMAN, EPA, OVERSIGHT OF STATE AND LOCAL PENALTY ASSESSMENTS: REVISIONS TO THE POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS 9 (1993), <https://www.epa.gov/sites/production/files/2013-11/documents/oversgt-penal-mem.pdf> (“Many states view it as a failure of their program if EPA takes an enforcement action. This is not necessarily the approach or view adopted here. There are circumstances in which EPA may want to support the broader national interest in creating an effective deterrent to noncompliance.”).

<sup>234</sup> See Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 14 (1990).

<sup>235</sup> See *id.*

abandon the procedure. In fact, given the weaknesses of state enforcement programs discussed above, EPA should use this important tool more frequently to keep states honest with regard to their obligations under the delegation of authority.

When EPA establishes that the state has not upheld its side of the bargain, there are few viable alternatives to overfiling. As a first alternative, citizens are granted authorization to sue polluters in each of the major environmental acts. However, this is not a true alternative because citizen suits depend on the discretion of non-governmental actors who cannot be relied upon to investigate state enforcement settlements and who have their own priorities. Additionally, the efficacy of citizen suits is limited because a citizen must establish standing, which involves proving an injury-in-fact from the violation, often an impenetrable barrier.<sup>236</sup> Citizens also cannot sue to enforce civil penalties for wholly past violations, because the Supreme Court has held that such injuries are not redressable and therefore not proper targets for citizen suits.<sup>237</sup> As a second alternative, EPA can withdraw the state delegation altogether. As addressed above, this is an extreme measure that EPA has never undertaken, in large part because it lacks the capacity to replicate the on-the-ground presence that the states have established.<sup>238</sup> Withdrawing delegation wholesale over a specific settlement would be seen as a complete overreaction. The lack of practicable alternatives presents still more support for overfiling.

To lessen some of the negative consequences, EPA must be clearer in its communications with states about when it will engage in overfiling actions. Because overfiling is discretionary and federal enforcement resources are necessarily limited, EPA cannot possibly overfile in every instance where such action might be justifiable.<sup>239</sup> As a result, priorities must be established. Cases in which there are interstate pollution concerns are a top priority. If states are unable to

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<sup>236</sup> See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (holding that to establish standing, a plaintiff “must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief” (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))); see also Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 *FORDHAM ENVTL. L. REV.* 21, 26 (2018) (describing standing in environmental cases as “incredibly restrictive”).

<sup>237</sup> See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83 (1998); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (“Past exposure to illegal conduct does not in itself present a case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.”).

<sup>238</sup> See *supra* note 56.

<sup>239</sup> See Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 *EMORY L.J.* 373, 415 (2000).

address or properly consider the impacts of transboundary or spillover pollution, EPA should be able to communicate early in the process with the state that this is an enforcement action that will be taken over by the federal authorities. This should prevent surprises and ease tensions, because ideally EPA will be able to identify these cases long before there is a finalized settlement agreement with an individual violator. However, if overfiling is necessary to hold polluters to the higher standard required to protect citizens of a neighboring state, this is a sensible role for the federal government to fill and can even ease tensions between states by allowing EPA to act as a well-informed mediator in the interstate dispute.

A second important goal of overfiling should be to achieve general deterrence.<sup>240</sup> Some commentators have derisively referred to this practice as “bean counting,” or EPA overfiling in order to increase their enforcement numbers.<sup>241</sup> While this might have been rooted in truth during a time when EPA assessed officers based on the number of enforcement actions taken annually, this is not the case today. EPA’s regional evaluations are not based on direct enforcement actions, but rather in progress on environmental indicators.<sup>242</sup> Deterrence is a key aspect to ensuring compliance with environmental goals. Today’s “modern” enforcement initiatives emphasize compliance assistance programs and other non-deterrence based programs, which certainly have a role, but improperly calibrated penalties can undermine the entire system of environmental enforcement. This is seen most clearly in situations where the state penalty does not require disgorgement of the economic benefit gained from noncompliance. If the penalty assessed is not *at least* equal to the money saved by breaking the law, the incentives for compliance fail entirely.<sup>243</sup> In most cases, the penalty should be much higher than simple disgorgement to account for the large percentage of violations that are undetected. Compliance is only economically sensible for profit-maximizing corporations when the size of the penalty, discounted by

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<sup>240</sup> EPA policies explain that “[d]eterrence of noncompliance is achieved through: 1) a credible likelihood of detection of a violation, 2) a timely enforcement response, 3) the likelihood and appropriateness of the sanction, and 4) the perception of the first three factors within the regulation community.” See HERMAN, *supra* note 233, at 1.

<sup>241</sup> See, e.g., Zahren, *supra* note 239, at 424–25.

<sup>242</sup> See CHRIS JONES & MICHAEL O. LEAVITT, ECOS-EPA VISION AND PRINCIPLES FOR ALIGNING PLANNING SYSTEMS: SUCCESSFUL PERFORMANCE PARTNERSHIPS (2004), [https://www.epa.gov/sites/production/files/2015-12/documents/eocs\\_epa\\_alignment.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/eocs_epa_alignment.pdf) (requiring “performance plans and measurement systems that assure internal and external accountability for performance and that focus on environmental results”).

<sup>243</sup> See HERMAN, *supra* note 233, at 3 (noting that to settle federal enforcement actions, “EPA policies require cash penalties, at a minimum, for recovery of the economic benefit of noncompliance plus some appreciable portion reflecting the gravity of the violation”).

the likelihood of non-detection, is higher than the economic benefit to be gained from noncompliance.<sup>244</sup> EPA should prioritize overfiling actions in cases where the state is unwilling to require sufficient financial penalties. The result that arises from a failure to do so is an unfair market where companies in some states are allowed to benefit from loosely enforced environmental laws while others are held accountable.

In practice, EPA should be more rigorous about requiring states to use pre-approved worksheets and other tools in order to create consistency and uniformity among penalties.<sup>245</sup> While it is impractical to require EPA review of each individual enforcement action undertaken by a state, the policies by which states will determine the appropriate penalties should be included in the Memorandums of Agreement that permit delegations. The current practice cedes far too much discretion to the states while offering scant reassurance to the federal government that the goals of the legislation are being achieved. While states prize the opportunity to create tailored programs for their local industries under delegated powers, this should not mean allowing arbitrary or unpredictable penalties. Pre-approved policies should be specific and include tools that allow state enforcement agents to ensure that they are treating each violator the same and not permitting sweetheart deals for favored industry actors. Any variations from the approved policies should be individually reviewed by EPA regional staff, along with a written justification for the divergence. This will ensure that EPA has an opportunity to intervene if necessary, before the agreement is finalized while limiting the inefficiency of having all or even most state enforcement actions individually reviewed. This approach may make overfiling more palatable for states, because they can be assured that if they follow their EPA-approved procedures, there is no reason to be worried about overfiling.

While overfiling can have unintended negative impacts on states' ability to reach settlements with polluters, these impacts can also be

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<sup>244</sup> See Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1148 (1989) ("Punitive damages should be set for the sake of deterrence at a level that eliminates the advantage of noncompliance and forces potential injurers to internalize the expected social costs of their actions."); Roseanna Sommers, *The Psychology of Punishment and the Puzzle of Why Tortfeasor Death Defeats Liability for Punitive Damages*, 124 YALE L.J. 1295 (2015) (explaining the role that punitive damages play in achieving both specific deterrence—deterring that individual—and general deterrence).

<sup>245</sup> EPA has written that states are "strongly encouraged to develop written penalty policies, criteria, or procedures for penalty assessment," HERMAN, *supra* note 233, at 2, but that should be translated into a requirement for authorization of delegation.

positive. News of an overfiling can ripple through a regulated community very quickly.<sup>246</sup> It promptly puts sophisticated actors, including industry groups, on notice that settlements that are “too good to be true” or appear collusive will not hold up. It gives scrupulous but out-gunned state officials cover to hold industry accountable and makes these sweetheart deals less attractive to companies that must worry about their finality if EPA catches wind of the terms. And while EPA has expressed an abundance of concern about upsetting the uneasy power sharing dynamics between the federal and state governments, this is based on a fundamental belief that the states are operating in good faith. This is not always the case, and EPA remaining blind to the obvious collusive relationships between some state environmental agencies and the regulated industries that fund state pollutions is naïve at best.<sup>247</sup>

EPA should also remain free to overfile for discretionary, pragmatic reasons. These overfilings should, however, be discussed prior to filing with states in order to ensure that unnecessary tension does not develop in the state-federal relationship. Pragmatic and discretionary reasons may include such indications as technical expertise, violations of a nationwide company across many states, very serious violations where increased awareness and publicity can be helpful, and to advance EPA policy objectives.

### CONCLUSION

Under the Trump Administration, EPA has retreated from its role as a backstop for environmental regulation. In EPA’s annual enforcement result press release for 2017, for example, it highlighted as an accomplishment that “EPA continued the trend of reducing the number of individual federal inspections and enforcement actions.”<sup>248</sup> This pride at reduced action is misplaced, both legally and for policy reasons. Cooperative federalism will not work when the federal government abdicates its role, and overfiling remains one of the key tools for EPA to ensure that states are holding up their side of the bargain.

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<sup>246</sup> See David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 87 (2000) (“[A]n EPA policy of increasing its number of overfilings is likely to have a ripple effect in the regulated community that extends well beyond the particular alleged violators targeted.”).

<sup>247</sup> See E. Blaine Rawson, *Overfiling and Audit Privileges Strain EPA-State Relations*, 13 NAT. RESOURCES & ENV’T 483, 484 (1999) (“Each state agency believes that it is doing a good job of implementing and enforcing its regulations.”).

<sup>248</sup> See Press Release, EPA, EPA Announces 2017 Annual Environmental Enforcement Results (Feb. 8, 2018), <https://www.epa.gov/newsreleases/epa-announces-2017-annual-environmental-enforcement-results>.

Accordingly, this Note argues for an increased use of strategic overfiling to hold accountable states, and by extension the polluters they regulate, to achieving the critical goals of the environmental statutes that they have been delegated the power to enforce.