Perfect Harmony: The Federal Courts have Quarantined Harmon and Preserved EPA's Power to Overfile

Thomas A. Benson
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I. INTRODUCTION: RESTORING HARMONY

In September 1999, the Eighth Circuit upset an understanding about the nature of environmental federalism that had endured for three decades. Proclaiming that the permissibility of overfiling was a question of first impression, the court in Harmon Industries, Inc. v. Browner decided that statutory language in the Resource Conservation and Recovery Act ("RCRA") prohibited overfiling. The decision ignited a firestorm of questions about how broadly it applied to Environmental Protection Agency ("EPA") enforcement under RCRA, and whether it also barred overfiling under the Clean Air Act ("CAA") and Clean Water Act ("CWA"), leaving both environmentalists and regulated parties anxious to see how the decision would reverberate through the federal courts. In some instances,

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1 This is defined as Environmental Protection Agency ("EPA") enforcement actions filed after the initiation of state action. See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 898 (8th Cir. 1999).

2 Id. The trial court asserted that Resource Conservation and Recovery Act ("RCRA") overfiling was a question of first impression, and the circuit court apparently adopted the assertion for circuit courts while losing the RCRA qualifier. See Harmon Indus., Inc. v. Browner, 19 F. Supp. 2d 988, 995 (W.D. Mo. 1998); Harmon Indus., Inc. v. Browner, 191 F.3d 894, 898 (8th Cir. 1999). If one combines their qualifiers, the two courts were technically correct, but solely because the Eighth Circuit defined overfiling narrowly to apply only to cases of federal enforcement following the initiation of state action. See Harmon, 191 F.3d at 898. The two courts largely ignored a significant run of precedent that touched on overfiling. See infra notes 9-31.

3 Harmon, 191 F.3d at 902 ("Therefore, we find that the EPA's practice of overfiling, in those states where it has authorized the states to act, oversteps the federal agency's authority under the RCRA.").

4 See, e.g., Susan K. Wiens & William P. Hefner, Disharmony in EPA's Overfiling Policy,
imaginations ran wild. Writing in the immediate aftermath of the decision, a thirteen-year veteran of EPA's general counsel's office predicted that Harmon would apply with equal force to CAA, CWA, and Safe Drinking Water Act.\footnote{See Gerald H. Yamada, Federal Appeals Court Undercuts EPA's "Overfiling" Authority, LEGAL BACKGROUNDER, Dec. 3, 1999. Yamada's comment makes clear he was not a fan of overfiling; he calls Harmon a "poignant decision" in his first sentence. See id.}

Five years later, Harmon does indeed seem to have clarified the subject—but not in the way industry groups might have hoped. The federal courts that have considered overfiling after Harmon have uniformly distinguished, criticized, or flatly rejected its reasoning. The pattern that has emerged is not that of a hopeless morass of contradictory rulings, but of a single outlier renounced or distinguished by the weight of the federal judiciary. 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. Without a dramatic revival, its value as precedent is likely to continue to atrophy until it is regarded as a mere curiosity rather than a breakthrough.\footnote{The one thing that might rescue Harmon now is support from the Supreme Court, but the Court announced on May 5, 2003 that it would not grant certiorari for United States v. Power Eng'g Co., 303 F.3d 1232 (10th Cir. 2002), the most dramatic challenge to Harmon thus far, leaving the quarantine intact. Power Engineering Co. v. United States, 123 S. Ct. 1929 (2003). The Tenth Circuit opinion left standing by the Court's denial of certiorari removed any lingering doubt that there is a circuit split on overfiling. See Joel A. Mintz, Comment, Enforcement "Overfiling" in the Federal Courts: Some Thoughts on the Post-Harmon Cases, 21 VA. ENVTL. L.J. 425, 450–52 (2003) (noting that "it seems clear that such a conflict does exist," but that whether the Supreme Court will step in "is difficult to predict"). But see Elizabeth A. Clysdale, A Look at EPA Overfiling: Can Harmon and Power Engineering Exist in Harmony?, [2003] 33 Envtl. L. Rep. (Envtl. L. Inst.) 10,456, 10,465 (June 2003) (arguing that the narrow holdings of Harmon and Power Engineering can be reconciled to allow EPA enforcement when the "state fails to take adequate enforcement or bring any action at all"). This reconciliation seems to stretch both Harmon and Power Engineering beyond the breaking point. See infra Parts II.D., IV.C.}

This Article begins by examining the revolutionary nature of the Harmon decision in the context of the legal understanding of overfiling at the time. In Part III, it recounts the federal cases limiting the peripheral impact of Harmon. Part IV examines the most recent point of the quarantine: the first...
undeniable, direct challenge from a sister circuit.

II. *HARMON SHOCKS THE SYSTEM*

The trial and appellate court *Harmon* decisions had a particularly dramatic impact because they upset an uneasy cease-fire on overfiling. Since EPA was created in 1970, beginning the era of federal environmental regulation, state and federal officials had been engaging in turf battles, particularly over environmental enforcement.7 Mindful of this tension, EPA used its overfiling power "very sparingly," but the legal authority to do so was not seriously challenged in federal court until the *Harmon* trial court decision.8 In fact, EPA’s overfiling authority seemed to be stronger than ever when the Eighth Circuit ruled.

A. Overfiling’s History Before Harmon

The Sixth Circuit was the first appellate court to address overfiling in light of the new environmental statutes passed in the 1970s.9 In resolving a challenge to EPA’s approval of CAA State Implementation Plans (“SIPs”), the court went on to muse in somewhat contradictory dicta about dual enforcement. The court noted that a state had the power to enforce its SIP, but that such authority did not "detract from [EPA’s] primary ability to enforce federally the provisions of every state plan against citizens of that state which drew the plan."10 In a footnote to that statement, however, the court added in hypothetical terms that it believed dual penalties would not be appropriate and that jurisdiction should be vested in the court, whether state or federal, that received the first claim.11

Subsequent circuit opinions offered something for everyone, though they rarely addressed overfiling directly. In 1980, the Ninth Circuit reached a

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7 See Mintz, supra note 6, at 425.
9 See Buckeye Power, Inc. v. Envtl. Prot. Agency, 481 F.2d 162 (6th Cir. 1973); Organ, supra note 8, at 10,617–18 (calling Buckeye Power the “first and only federal appellate court to speak to the issues of overfiling and res judicata in the 1970s”).
10 Buckeye Power, 481 F.2d at 167.
11 See id. at 167 n.2.
bizarre split decision in *United States v. ITT Rayonier*: it found overfiling was allowed under CWA but barred by res judicata. The defendant in the case operated a pulp mill in Washington and obtained a discharge permit from the state, which had received delegated CWA authority.\(^\text{12}\) After a multi-sided dispute over the terms of the permit, EPA brought an enforcement action against the mill.\(^\text{13}\) Meanwhile, the state’s highest court upheld the defendant’s reading of the permit while the defendant’s federal appeal was pending before the Ninth Circuit.\(^\text{14}\) The Ninth Circuit found that the decision by the state court had res judicata effect on EPA’s claim.\(^\text{15}\) While the court found the CWA legislative history to be “replete with references to ‘dual’ or ‘concurrent’ enforcement authority,”\(^\text{16}\) it found that the statute did nothing to abrogate res judicata and went on to find privity between EPA and the state agency in question.\(^\text{17}\)

Six years later, the Ninth Circuit upheld EPA’s RCRA authority to compel information related to a substantial hazard to human health or the environment.\(^\text{18}\) The court found that the “in lieu of the federal program” language in 42 U.S.C. § 6926, which was to play a major role in the *Harmon* decisions, did not indicate Congressional intent to revoke EPA’s § 6934 power in delegated states and that EPA’s interpretation of its authority was reasonable and thus merited *Chevron* deference.\(^\text{19}\)

The most dramatic circuit statement on overfiling before *Harmon* came just one month after *ITT Rayonier*, when the Seventh Circuit went out of its way to declare, in dicta, that EPA had no RCRA overfiling authority.\(^\text{20}\) The case arose when a landfill operator wanted to contest statements the EPA

\(^{12}\) *United States v. ITT Rayonier*, Inc., 627 F.2d 996, 998 (9th Cir. 1980).

\(^{13}\) *Id.* at 999.

\(^{14}\) *Id.* at 999–1000.

\(^{15}\) *Id.* at 1003–04.

\(^{16}\) *Id.* at 1001 (citation omitted).

\(^{17}\) *Id.* at 1000–03.

\(^{18}\) *See Wyckoff Co. v. Envtl. Prot. Agency*, 796 F.2d 1197, 1201 (9th Cir. 1986) (discussing EPA’s power to issue orders under 42 U.S.C. § 6934 (2000)).

\(^{19}\) *Id.*

\(^{20}\) *See Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 375–76 (7th Cir. 1986). The landfill operator was afraid the regional administrator’s statements, which he said were false, would leave him with more responsibility for cleanup and closure than he deserved. The landfill operator also made other arguments that did not affect the overfiling discussion. *Id.*
regional administrator made during a permitting process.\textsuperscript{21} The posture was thus the opposite of most other overfiling cases: the defendant was arguing in favor of EPA authority so he could challenge the statements. Though the case had nothing to do with enforcement, the Seventh Circuit opined that:

> Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement.\textsuperscript{22}

This language seems to have had little effect, however. In the succeeding two years, two federal trial courts in Indiana, a delegated RCRA state, distinguished \textit{Northside} as being a standing case and upheld EPA enforcement actions where the state had failed to pursue enforcement.\textsuperscript{23} Then, in 1991, the First Circuit found that RCRA did nothing to prevent the federal government from bringing criminal RCRA claims where the state had apparently not pursued enforcement.\textsuperscript{24} The court also read the RCRA legislative history as manifesting a "desire to retain a strong federal presence."\textsuperscript{25} Similarly, the Fifth Circuit, again in a case without state enforcement action, found RCRA left EPA with "the power to enforce the substance of an approved state's program against private parties in that state."\textsuperscript{26} The consensus seemed to be reached that EPA could conduct enforcement in delegated states, though whether it could do so following state action was unclear.

While the federal appellate courts were tangentially addressing over-

\textsuperscript{21} \textit{Id.}
\textsuperscript{22} See \textit{id.} at 382 (citation omitted).
\textsuperscript{24} See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 44 (1st Cir. 1991). \textit{MacDonald} is also notable for the attorneys who prepared the case before the First Circuit. The EPA group included Richard B. Stewart, then an assistant attorney general and now a renowned professor at New York University Law School, and Lincoln C. Almond, a United States Attorney who later became governor of Rhode Island. \textit{Id.} at 38.
\textsuperscript{25} \textit{Id.} at 45.
\textsuperscript{26} United States v. Marine Shale Processors, 81 F.3d 1361, 1367 (5th Cir. 1996).
filing and a handful of district courts were allowing EPA enforcement, there was also a long-running battle within EPA and its adjudicatory system over whether the practice was allowed. In the first half of the 1980s, two Administrative Law Judges ("ALJs") found EPA enforcement barred in RCRA cases if the state had already brought an enforcement action. In one case, the matter was appealed all the way to the Administrator, who vacated the ALJ's overfiling ruling after the Agency decided to drop the action. The second case was vacated after a deputy administrator solicited an opinion from the agency's general counsel, who found that RCRA did not bar overfiling. That opinion quieted EPA's internal overfiling battle.

Overfiling was thus not quite the virgin territory that the Eighth Circuit suggested, though there was certainly no definitive answer on the issue when Harmon was decided, nor were there many cases addressing dual consecutive enforcement as the Harmon facts required. Ironically, however, the Harmon cases came at a time when overfiling seemed to be reaching equilibrium after the turbulence of the 1980s; until the Harmon trial court case, the sporadic cases that arose in the 1990s treated overfiling as uncontroversial and it may have appeared that the issue was settled.

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27 In addition to the Indiana cases, a pair of federal courts in Maryland also upheld EPA overfiling, this time in CAA cases where there had been state action. See United States v. SCM Corp., 615 F. Supp. 411, 419 (D. Md. 1985) (state enforcement "does not affect defendant's liability under federal law or preclude this Court from hearing the case on the merits" (citation omitted)); United States v. Harford Sands, Inc., 575 F. Supp. 733, 735 (D. Md. 1983) (stating that "a violation of the federal provisions just cited is unaffected by the defendant's cooperation with the state").

28 Organ, supra note 8, at 10,621–26.

29 See id. at 10,622–23.

30 See id. at 10,624–26.

31 See id. 10,626-28 (noting that all but one of the RCRA overfiling cases after the general counsel's opinion followed his direction and that the one outlier was overturned on internal appeal).

32 One example of the overfiling equilibrium is that when Power Engineering Company challenged the preliminary injunction against it, the company did not question EPA's authority to bring a suit after its settlement with the state. See United States v. Power Eng'g Co., 191 F.3d 1224, 1228–29 (10th Cir. 1999); cf. Mintz, supra note 6, at 428 ("Nonetheless, throughout the 1970s, 1980s, and 1990s, the EPA's legal power to overfile in cases of inadequate state enforcement proceedings was never seriously questioned.").
B. EPA Gets Ambushed

EPA may have helped generate the challenge that flowered in Harmon. In 1997, the Agency increased its overfiling "as a way to ensure that states improve their economic recoveries." While the EPA enforcement action at issue in Harmon was instituted well before that shift in policy, the trial court and the Eighth Circuit may have been aware of the new policy by the time the case arrived. In fact, some evidence suggests EPA was ambushed at the Eighth Circuit: one contemporary article noted that twenty-six parties filed amicus briefs on behalf of the Harmon defendant, while not one filed on behalf of EPA.

The amicus disparity suggests that regulated parties were looking for an opportunity to challenge overfiling, while EPA may have come to believe it was invincible on the issue. The facts of the case reinforce that impression. The story told by the trial and appellate courts is one of EPA picking on a responsible company. The appellate court begins by introducing Harmon as a company that makes parts for "railroad control and safety equipment," thereby implicitly casting EPA as opposing railroad safety. In 1987, Harmon's personnel manager discovered that workers had been discarding volatile solvent residue behind the plant, apparently for fourteen years. The manager reported the practice to his superiors and Harmon then stopped the disposal and contacted state authorities. The state found no threat to "human health or the environment" and reached an agreement with Harmon for the company to clean up the area. The court portrays EPA as an interloper, initiating a $2.3 million enforcement action "[w]hile Harmon was cooperating with" the state. The court seems to have massaged the facts slightly, but may well have concluded that EPA was overreaching in this "unique" case.

35 Wiens & Hefner, supra note 4, at 3. Interestingly, five states filed an amicus brief supporting EPA's request for rehearing en banc, though the request was denied. Id. at 5.
36 Harmon Indus., Inc. v. Browner, 191 F.3d 894, 896 (8th Cir. 1999).
37 Id. at 896-97.
38 Id. at 897.
39 Id.
40 Id.
41 See Wiens & Hefner, supra note 4, at 7 (calling Harmon a "unique" case because the
When Harmon reached the district court, and later at the Eighth Circuit, the judges were faced with a sympathetic fact pattern and may also have been aware that EPA was beginning to flex its overfiling power. At the same time, the courts were apparently unaware, or purported to be unaware, of overfiling’s generally accepted status. Several factors irrelevant to the pure legal status of overfiling were thus guiding the courts toward granting relief to Harmon.

C. The Opening Salvo Against Overfiling

The Harmon trial court decision represented the first federal court decision against overfiling on the merits, and it announced many of the themes that would be taken up by the Eighth Circuit, and later challenged by the quarantining courts.

After outlining the law and the arguments from each side at some length, the Harmon district court judge pointed to 42 U.S.C. § 6926(b), finding that the “plain language” of the provision provides that the state program is to operate “in lieu of” the federal one. The court found that the state and federal governments were in a cooperative relationship to enforce the hazardous waste program, but that such cooperation did not extend to dual enforcement, which “would predictably result in confusion, inefficiency, duplicative agency expenditures . . . .” The trial judge then pointed, rather unhelpfully, to the “same force and effect” language of § 6926(d) as meaning “exactly

42 See supra notes 9-31 and accompanying text.
43 See Harmon, 19 F. Supp. 2d at 995 (citing 42 U.S.C. § 6926(b) (2000), “[s]uch State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste”).
44 Harmon, 19 F. Supp. 2d at 995.
what it says." The judge went on to note that state action had the same binding effect as EPA action, essentially restating § 6926(d) without explaining what connection it had to overfiling. The court then called dual enforcement "a schizophrenic approach" that would "result in uncertainty" over to whom to go for negotiations and settlements. The court concluded by finding EPA's interpretation of the statute contrary to the purpose of authorizing state programs.

The judge then offered an alternative holding based on res judicata. The court found that, under Missouri res judicata law, all four requirements were satisfied, including privity between the state and EPA. The court decided that even if the interests of EPA and the state agency were not identical, they were asserting the same legal rights, which it determined was sufficient under Missouri law.

While not necessarily obvious in the opinion, the judge seemed to possess a latent skepticism about EPA and its motives that emerged in a pair of footnotes. In dismissing EPA's suggestion that the state settlement was unduly lenient, the judge wrote that if EPA believed Missouri was too friendly to industry it should withdraw authority from the state program. The footnote shows the judge was either unaware of or unconcerned with the impossibility of EPA withdrawing authorization from every state with a propensity toward cutting deals with industry. More telling, the court found "it interesting" that EPA accepted the state's investigation, cleanup, and enforcement and only sought a penalty in its enforcement action. The judge seemed offended by what he perceived to be EPA's uncouth obsession with the penalty, adding that he found "it somewhat disconcerting that the only argument regarding [the state's] effectiveness concerns money." While the judge gave no indication that his qualms with EPA affected his decision, it seems fair to surmise that he may have been looking, perhaps subconsciously, to find a legal justification to bar the EPA action.

45 Id. at 996 (citing 42 U.S.C. § 6926(d), "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter").
46 Harmon, 19 F. Supp. 2d at 996.
47 Id. at 996–97.
48 Id. at 997–98.
49 Id. at 998.
50 Id. at 998 n.12.
51 Id. at 996 n.8.
52 See Harmon, 19 F. Supp. 2d at 996 n.8.
D. The Eighth Circuit Disrupts the Equilibrium

Like the trial court, the Eighth Circuit seemed to have a preferred result for the case—a notion buttressed by the effort the court was willing to expend to reach its decision. As the Tenth Circuit later decided in *Power Engineering*, the simplest way to address overfiling was to find the statute ambiguous and thus let EPA’s interpretation control under *Chevron*.

To prevent EPA enforcement, the Eighth Circuit had to find RCRA in *Harmon* ambiguously prevented the possibility of overfiling.

The first sentence of the discussion section of the opinion suggested the case’s resolution. The court interpreted *Chevron* as requiring judicial deference “only if it finds that the agency’s interpretation is consistent with the plain language of the statute or represents a reasonable interpretation of an ambiguous statute.”

While technically a correct statement of the law, the phrasing seems to shift the default away from judicial deference and toward *de novo* interpretation.

In finding that the plain language of RCRA unambiguously bars overfiling, the court marshaled four primary arguments. First, looking to 42 U.S.C. § 6926(b)—outlining authorized state regulatory programs—the court found that the statute allows state programs to operate “in lieu of” the federal program.

Unlike the trial court, the Eighth Circuit conceded that the “in lieu of” language referred only to the permit program itself and not to enforcement, but went on to decide that “administration and enforcement . . . are inexorably intertwined,” and that the language reveals Congressional intent for authorized states to “supplant” the federal program “in all respects including enforcement.”

In the court’s view, the only authority left to EPA was in situations in which state authorization was rescinded or the state failed to pursue enforcement.

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54 *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 897 (8th Cir. 1999).
55 By contrast, the *Chevron* standard seems to create a default of agency deference unless the meaning of the statute is clear. See *Chevron*, 467 U.S. at 842-43 (if “Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute” (emphasis added)).
56 See *Harmon*, 191 F.3d at 899.
57 *Id.*
58 *Id.*
The court's second point of argument was the "same force and effect" language in § 6926(d). The court found the inclusion of the phrase "[a]ny action taken by a State" also indicated Congressional intent to allow states to supplant federal enforcement. Next, the court pointed to the citizen suit provision, § 6972(b)(1)(B), and found that its language supported a bar on overfiling as well. The statute prevents citizen suits if EPA or a state is diligently pursuing civil enforcement. The court found that the use of "or" rather than "and/or" indicated that Congress did not envision "competing enforcement actions between the federal government and the states." For the fourth pillar of its holding, the court looked to RCRA's legislative history and found that Congress "intended to vest primary enforcement authority in the states." Concluding its analysis, the court held that EPA's interpretation simply is not consistent with the plain language of the statute, its legislative history, or its declared purpose. Hence, it is also an unreasonable interpretation to which we accord no deference. Therefore, we find that the EPA's practice of overfiling, in those states where it has authorized the state to act, oversteps the federal agency's authority under the RCRA.

The court also affirmed the trial court's alternative holding that res judicata barred the EPA action. Applying Missouri law, it found the four state requirements were met. The court offered substantive analysis for only

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59 Id.
60 Id. at 900 (quoting 42 U.S.C. § 6926(d) (2000)).
61 See id. at 900-01.
62 See id.; 42 U.S.C. § 6972(b)(1)(B)(2000) (prohibiting citizen suits "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order").
63 Harmon, 191 F.3d at 901.
64 Id.
65 Id. at 902.
66 See id. at 902-03.
67 Id. at 902. The court listed the requirements as: "(1) [i]dentity of the thing sued for; (2) identity of the cause of action; (3) identify of the persons and parties to the action; and (4) identity of the quality of the person for or against whom the claim is made." Id. (citing Prentzler v. Schneider, 411 S.W.2d 135, 138 (Mo. 1966) (en banc)).
the identity of the parties requirement, and found that the same language that barred overfiling indicated that EPA and the state stood "in the same relationship to one another." 68

In eleven pages of the Federal Reporter, the Eighth Circuit completely upended the established understanding of EPA's overfiling power. Of course, the court gave no sign that it recognized what that understanding was. Of the previous federal court overfiling opinions, Harmon cited only the trial court decision and Wyckoff, and the latter only in a terse footnote distinguishing it as not applying to cases with dual enforcement actions. 69

Despite the Eighth Circuit's tenuous reasoning and dubious reading of precedent, the case was a clarion call for those hoping to curtail federal environmental enforcement and return control to the states. 70 Such a shift would mean a dramatic decrease in the environmental protections afforded in pro-business states. 71 EPA decided not to appeal to the Supreme Court and to hope instead for relief from the nation's lower federal courts. 72 The Agency would not have long to wait.

III. FEDERAL COURTS REACT BY QUARANTINING HARMON

One author noted that Harmon "gave rise to swift and pointed criticism from legal commentators." 73 The reaction from federal courts was nearly as

68 Harmon, 191 F.3d at 903.
69 See id. at 902 n.4 (citing Wyckoff Co. v. Envtl. Prot. Agency, 796 F.2d 1197 (9th Cir. 1986)). The Eighth Circuit only broached Wyckoff because EPA cited it as showing that EPA retained enforcement authority in delegated states. See id.
70 See Yamada, supra note 5 (finding the ruling "should force EPA to re-think its relationships with states authorized to implement and enforcement environmental programs, and act as a harbinger to EPA's enforcement program if the agency continues its paternalistic oversight of authorized states' individual enforcement actions."). Another commentator suggested, in 2000, that at the least "Harmon may serve as a 'wake-up' call to EPA... to be more circumspect in exercising its overfiling authority..." Jerry Organ, Environmental Federalism Part II: The Impact of Harmon, Smithfield, and CLEAN on Overfiling Under RCRA, the CWA, and the CAA, [2000] 30 Envtl. L. Rep. (Envtl. L. Inst.) 10,732, 10,755 (Sept. 2000).
71 See Mintz, supra note 6, at 426 (stating that without overfiling, EPA would be forced to accept "'pollution havens' in states with lax environmental enforcement policies" or withdraw state authorization, creating "an enormous strain" on the agency's resources).
72 See Coop, supra note 33, at 269.
73 Mintz, supra note 6, at 431.
swift once the Harmon challenges began to arrive. The Harmon decision was filed on September 16, 1999.74 Ironically, given the Eighth Circuit’s impression that it was giving the first word on the subject, sister circuits decided two cases at least tangentially related to overfiling in the eight days before September 16. In the first case, filed on September 8, the Tenth Circuit upheld a preliminary injunction for EPA while assuming that RCRA overfiling was allowed.75 On September 14, the Fourth Circuit rejected an overfiling challenge to a CWA enforcement action, finding that the state enforcement scheme was not sufficiently comparable to EPA’s enforcement authority.76 Thus, the Harmon court was not writing on the clean slate it had anticipated.

Over the next four years, every federal court that considered Harmon’s overfiling holding distinguished it in some manner, often while expressing skepticism about the decision.77 In doing so, the courts have created a jurisprudence where the weight of authority has isolated Harmon, making it an outlier rather than a precursor. This Part examines the quarantining cases by looking at their challenge to Harmon: either distinguishing based on differences in the statutory language at issue or on the quality of state enforcement action. These cases culminate with the unmistakable frontal assault in the Tenth Circuit’s Power Engineering opinion, discussed in Part IV.

A.  Distinguishing Based on Statutory Language

Five cases distinguished Harmon by pointing to statutory language differences between RCRA and either CWA or CAA. Ironically, the first opinion handed down was a Missouri district court case. Despite being an inferior court in the Eighth Circuit and thus bound by Harmon, the trial judge in Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc. ("CLEAN") found that a state settlement did not create a res judicata bar to the bulk of the citizen suit claims under CWA and CAA.78

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74 Harmon Indus., Inc., 191 F.3d at 894.
75 See United States v. Power Eng’g Co., 191 F.3d 1224, 1228-29 (10th Cir. 1999) (noting that neither party on appeal challenged EPA’s right to overfile). The same case would come back three years later at the summary judgment stage to give the court the chance to definitively challenge Harmon. See infra Part IV.
77 This analysis is based on electronic searches of cases containing some variation of "overfile" or citing Harmon. Not included are cases that cited Harmon for uncontroversial propositions outside the realm of EPA overfiling.
The *CLEAN* defendant was a massive hog farming operation with nine hundred thousand hogs at fifteen facilities in northern Missouri. A consortium of neighbors sued the farming operation in 1997, alleging violations of the CWA, CAA, and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Missouri brought its own claim in 1999 for violations of the state's version of CWA and within six months reached a settlement with the defendant that purported to release the farm from any liability for violations the state knew of at the time of the settlement, whether under state or federal law. The defendant then claimed that the citizen suit CAA and CWA claims were barred by the res judicata effect of the settlement.

In analyzing the res judicata question, the court followed *Harmon* for the proposition that the statute at issue could govern whether the parties were identical, but found that different language in CWA and CAA meant that under those statutes, identity was only met if the state "'diligently prosecuted' an action with respect to the same violations." Thus, even inside the Eighth Circuit, *Harmon* 's res judicata holding was quickly limited to RCRA.

The next two cases both came from federal district courts in Ohio, with one finding *Harmon* inapplicable to CWA and the next finding the case inapplicable to CAA. In the former case, the City of Youngstown claimed that EPA could not pursue CWA violations because the Agency had delegated that authority to the state, which was also proceeding with a claim. In a brief opinion denying the city's motion for judgment as a matter of law, the court found *Harmon* "inapposite" because of its reliance on

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CV-SJ-6, 2000 U.S. Dist. LEXIS 1990, at *63–64 (W.D. Mo. Feb. 23, 2000) (finding res judicata bars a citizen suit claim following state settlement only for the specific incidents common to both proceedings) [hereinafter CLEAN]. Technically, the decision was not an overfiling case at all, since the state settlement was preceded by a private suit, see id. at *2, but it represents an early limiting of *Harmon* and the only consideration of the issue inside the Eighth Circuit thus far.

79 Id. at *1–2. Even the judge seemed astounded at the scale of the farms, noting that state permits allowed the defendant, Premium Standard Farms, to put "more than 750 million gallons of animal waste" into the land each year. Id. (emphasis in original).

80 Id. at *2.

81 Id. at *2–3.

82 Id. at *3.

83 Id. at *39. The court noted that CAA and CWA lacked the "same force and effect" and "in lieu of" language relied upon by the *Harmon* courts. Id.

RCRA language. Indeed, the court found that the "language of CWA, on the other hand, compels the opposite conclusion." Three months later a second federal Ohio case found Harmon's analysis did not extend to CAA for overfiling or res judicata purposes. The defendant steel company challenged EPA enforcement based on the company's settlement with the city of Cleveland, which was exercising authority through Ohio's State Implementation Plan ("SIP"). The court first found that the settlement did not bind the state—which seemingly would have settled the case—but chose to address the overfiling claim assuming that the settlement did bind the state. Like the Youngstown court, the LTV Steel court found Harmon "simply not applicable" because of its reliance on specific RCRA language. The court pointed to 42 U.S.C. § 7413(e)—which instructs courts to consider previous payments assessed for the same violation in setting a penalty—as evidence that Congress actually expected overfiling under CAA, since otherwise the language would have been unnecessary. After interpreting the statute, the court turned to Chevron for additional support for its holding, noting that EPA had consistently interpreted CAA to allow overfiling. The court also rejected a res judicata defense, finding that neither the claims nor the parties were the same, and that Harmon had no relevance because it hinged on RCRA language not present in CAA.

The next element of the Harmon quarantine is strikingly similar to Youngstown. The case involved a city trying to avoid EPA liability based on a CWA agreement with the state. This time, the City of Rock Island, Illinois

85 Id. at 741.
86 Id. The court cited 33 U.S.C. § 1342(i) (2000), which states that, "Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of the title." Id.
88 Id. at 832.
89 Id. at 833.
90 Id.
91 Id. at 834–35. The court's nod to Chevron is somewhat confusing given that it never finds the statute ambiguous, as Chevron deference requires. See supra note 54 and accompanying text. The final statement of the holding appears to use Chevron as a policy guideline rather than binding authority: "The Court concludes, accordingly, that the language of the Act, federal precedent, deference to the EPA and common sense all lead" to upholding CAA overfiling. Id. at 835.
92 See id. at 836.
was caught discharging untreated sewer water from its treatment plant into the Mississippi River. The court first found that an agreement between the state and EPA did not bar EPA enforcement. Next, the court looked to CWA and found no statutory provisions impeding EPA enforcement; the court also noted 33 U.S.C. § 1342(i), as Youngstown had. The court then addressed the defendant's reliance on Harmon in now-familiar terms: "[T]he decision clearly does not apply here. Harmon relies heavily upon language in RCRA which does not appear in the Clean Water Act."  

The final case in this quintet went beyond merely distinguishing Harmon as applying only to RCRA to criticize the holding on its merits. EPA brought a twenty-four-count civil suit, including CAA, CWA, and RCRA claims, against a petroleum refinery. The defendant raised a res judicata challenge to the CAA claims based on a settlement reached with the state. Responding to an argument raised but not pressed by the defendants, the court noted that CAA did not have any language prohibiting overfiling and, like the LTV Steel court, pointed to 42 U.S.C. § 7413(e) as implicit recognition that overfiling may occur. The judge then turned to the res judicata claim and found that the identity of the parties requirement was not met. Like her peers, the judge first found that Harmon was "inapplicable to Clean Air Act enforcement actions." Moreover, the judge went on to question Harmon's application to RCRA:

I am not persuaded by the reasoning of the court of appeals in [Harmon] that the structure of acts such as the Clean Air Act and the Resource Conservation and Recovery Act bring the

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94 Id. at 691.
95 Id. at 693.
96 See id.
97 See id; supra note 86.
98 City of Rock Island, 182 F. Supp 2d at 694. Specifically, the court noted the absence of the "in lieu of" or "same force and effect" language and the presence of the "Federal enforcement is not limited" provision in § 1342(i). Id. The court concluded by citing Youngstown to buttress its point on the statutory language. See id. at 694 (citing United States v. City of Youngstown, 109 F. Supp. 2d 739, 741 (N.D. Ohio 2000)).
100 Id. at 1087. The court's RCRA analysis will be taken up in Part III.B., infra.
101 Murphy Oil USA, Inc., 143 F. Supp. 2d at 1087-88.
102 See id. at 1092.
103 Id. at 1091.
federal government and the state into such a close working relationship as to make them equivalent to the same party for purposes of res judicata.\textsuperscript{104}

In challenging Harmon's res judicata holding, the court implicitly called its overfiling holding into question, because the Eighth Circuit's res judicata decision was predicated on the RCRA language it adduced in its overfiling analysis.\textsuperscript{105}

The pattern for CWA and CAA cases is clear. In each of the five cases since Harmon, courts have rejected efforts to extend the case to other statutes, essentially walling off Harmon in the RCRA portion of the United States Code.

B. Distinguishing RCRA Cases Based on Lack of State Enforcement Action

Three cases have upheld RCRA overfiling by distinguishing the quality of the state action while at the same time implicitly or explicitly challenging Harmon's legal conclusions.\textsuperscript{106} The Harmon decision could be seen as providing persuasive authority for a broad bar on EPA enforcement in authorized states—whether the state initiated enforcement action or not—as defendants have argued. The narrowest reading, however, only bars overfiling if the state has initiated an enforcement action.\textsuperscript{107} The cases below embrace the narrowest readings of Harmon, while also implying or declaring a rejection of its legal conclusions.

The first case, United States v. Flanagan, in which the rejection of

\textsuperscript{104} Id. at 1092 (citations omitted).

\textsuperscript{105} See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 903 (8th Cir. 1999) ("As we determined in Part II(A) ... the plain language of the RCRA permits the State of Missouri to act in lieu of the EPA ... Accordingly the two parties stand in the same relationship to one another.").

\textsuperscript{106} This section does not include the district court or appellate court opinions in United States v. Power Engineering Co., an RCRA case in which the courts made no attempt to distinguish Harmon. These two opinions will be discussed in Part IV, infra.

\textsuperscript{107} The Harmon holding simply barred overfiling. See Harmon, 191 F.3d at 902. At the beginning of the opinion, however, the court defined overfiling as EPA's practice "of duplicating enforcement actions ... of duplicating enforcement actions ..." Id. at 898. Finally, when discussing the legislative history, the court concluded that Congress intended to allow EPA enforcement only if EPA withdrew state authorization or "if the state fails to initiate an enforcement action." Id. at 899.
*Harmon* is disguised by sleight-of-hand, involved defendants moving to dismiss criminal indictments under RCRA.¹⁰⁸ Each of the three defendants was charged with three counts of treating and storing hazardous waste without the required permit.¹⁰⁹ The court rejected their argument that *Harmon* stood for stripping EPA of its enforcement authority in authorized states, instead reading the case as being “not about if, but about when” EPA can bring enforcement actions in an authorized state.¹¹⁰

Because the case involved a challenge to EPA’s RCRA authority, however, the court could not simply distinguish *Harmon* as inapplicable, as CWA and CAA courts had done. The court had to conduct its own RCRA analysis. In doing so, it rejected the defendants’ argument—embraced by *Harmon*—that the “in lieu of the Federal program” language in § 6926(b) indicated that state enforcement supplanted EPA authority.¹¹¹ The court found the term “program” was ambiguous and that the statute as a whole and its legislative history were inconsistent with reading the clause to prohibit EPA enforcement.¹¹² The court gives no hint that *Harmon* considered the same issues and reached the opposite conclusion on each point. The Eighth Circuit found the same language to be unambiguous in favor of barring EPA enforcement and gleaned a Congressional intent to bar overfiling from the statute as a whole and legislative history.¹¹³ Thus *Flanagan* explicitly distinguishes *Harmon* on the facts of the case while implicitly challenging and rejecting the Eighth Circuit’s legal analysis.

The second court to consider RCRA overfiling in light of *Harmon* showed no such reluctance to explicitly challenge the Eighth Circuit’s legal conclusions. The *Murphy Oil* case, introduced in Part III.A., initially distinguished *Harmon* because it involved a consent decree approved by a state judge while the instant case involved only a state enforcement action that had been stayed without a judgment or settlement.¹¹⁴ The court then turned to the heart of RCRA overfiling. After an extensive review of *Harmon*’s reasoning,

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¹⁰⁹ Id.
¹¹⁰ Id. at 1289.
¹¹¹ Id. at 1286. Interestingly, the court does not discuss *Harmon* in this context and only mentions the case later in the opinion as a case cited by the defense. See id. at 1289 (mentioning *Harmon* for the first time).
¹¹² See id. at 1287.
¹¹³ See Harmon Indus., Inc. v. Browner, 191 F.3d 894, 901-02 (8th Cir. 1999).
¹¹⁴ United States v. Murphy Oil, 143 F. Supp. 2d 1054, 1114 (W.D. Wis. 2001).
the court concluded that it was "unpersuasive" and that the decision "rested on a flawed interpretation of the act and in particular, a mistaken reading of the ‘in lieu of’ language in § 6926(b). . .."115 The court challenged the "in lieu of" interpretation, suggesting that the structure of the clause meant it only applied to the regulatory program and not enforcement.116 The court also found that the Harmon interpretation of "same force and effect" in § 6926(d) was vitiated by the heading "Effect of State permit," which limited the language’s effect to permits rather than enforcement.117 In a concluding flourish, the judge noted that the Eighth Circuit found the statute unambiguous before adding,

I agree with the conclusion that the act is unambiguous. However, my reading of the act is that it authorizes the federal government to bring enforcement actions in states authorized to implement and enforce the hazardous waste program, provided only that notice is given to the state.118

That reading made resort to legislative history unnecessary, the court found.119 If legislative history review was necessary, the court found nothing suggested a Congressional intent to bar overfiling and that deference to EPA’s interpretation would be warranted under Chevron.120 The court thus read the statute and the legislative history to the exact opposite effect of the Eighth Circuit.

The final installment in this trilogy, United States v. Elias, represents the first time a sister circuit addressed overfiling post-Harmon. The case reached the Ninth Circuit as an appeal from an RCRA conviction for ordering employees to dispose of hazardous chemicals without proper protection.121

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115 Id. at 1116. The court cited the Power Engineering district court opinion for support. See id. (citing United States v. Power Eng’g Co., 125 F. Supp. 2d 1050, 1059 (D. Colo. 2000)).
116 See Murphy Oil, 143 F. Supp. 2d at 1116.
117 Id.
118 Id. at 1117.
119 See id.
120 Id.
121 United States v. Elias, 269 F.3d 1003, 1007–08 (9th Cir. 2001). The facts of the case are appalling. The defendant wanted to get one to two tons of cyanide-laced sludge out of the bottom of a storage tank and ordered four employees to do it. Despite the requests of one employee, he refused to provide any safety equipment. On the second day one of the workers collapsed and came close to dying. The defendant denied to a treating physician that there
The defendant argued that EPA could not charge RCRA violations because the state program supplanted EPA enforcement. The Ninth Circuit began its consideration of Harmon by citing Flanagan’s conclusion that the case was "not about if, but about when" EPA can bring enforcement actions. The court went on to say that Harmon did not support the defendant’s claim that state law in authorized states supplants federal law. The defendant read Harmon better than the Ninth Circuit, however. The Eighth Circuit found that the “in lieu of” language "reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects including enforcement." Thus, Elias chipped away at Harmon while purporting to merely read it fairly and concluded that RCRA only supplants the permitting, not enforcement, authority of EPA in authorized states. In addition to that disguised attack on Harmon, the court included a caustic footnote stating that the case "is also suspect for its marked lack of Chevron deference."

Perhaps because the RCRA cases brought courts closer to the heart of Harmon, these three cases all combined distinguishing the facts of the case with implicit or explicit challenges to the Eighth Circuit’s legal analysis. Those feints foreshadowed the direct assault that came in Power Engineering.

IV. THE TENTH CIRCUIT COMPLETES THE QUARANTINE

Where the Ninth Circuit had been circumspect in its challenge in Elias, the Tenth Circuit made its rejection of Harmon unmistakable in deciding United States v. Power Engineering Co. The court engaged in a point-by-point rebuttal of the Eight Circuit, and the resulting opinion reads more like

was cyanide in the tanks; luckily, the man was treated for cyanide poisoning anyway and recovered. A few weeks later, the defendant ordered a new employee to remove the same sludge, again without safety equipment. Id.

122 Id. at 1009. No state enforcement action was brought. See id. at 1008 (defendant moved to dismiss the federal indictment based on claim that United States ceded criminal enforcement authority to Idaho).
123 Id. at 1011 (citing United States v. Flanagan, 126 F. Supp. 2d 1284, 1289 (C.D. Cal. 2000)).
124 Elias, 269 F.3d at 1011.
126 See Elias, 269 F.3d at 1012.
127 Id. at 1011 n.25.
128 303 F.3d 1232 (10th Cir. 2002).
an overrule of that court than an affirmation of the trial court decision actually under consideration.

A. The Power Engineering Facts

Power Engineering Company ("PEC") was a Denver-based business specializing in metal refinishing and chrome electroplating that had been operating since 1968. Every month PEC produced more than one thousand kilograms of RCRA hazardous waste, including arsenic, lead, mercury, and hexavalent chromium. State environmental authorities eventually discovered hexavalent chromium contaminating the Platte River and local groundwater and traced the chemical to PEC. The state also discovered that PEC had "been treat[ing], stor[ing], and dispos[ing] of hazardous waste without a permit." The state issued an order for PEC to comply with the law, clean up contaminated soil, "conduct frequent inspections, and submit . . . reports." PEC failed to comply and the state assessed $1.13 million in civil penalties, which were upheld by a state court when PEC refused to pay.

Meanwhile, EPA asked the state to apply RCRA financial assurance requirements, and notified state officials that it would bring its own enforcement action if the state failed to enforce the requirements. The state declined to demand financial assurance and EPA brought a federal suit. The parties filed cross-motions for summary judgment, with PEC arguing, based on Harmon, both that RCRA prohibits overfiling and that res judicata barred the EPA claim.

B. The Trial Court Rejects Harmon Outright

The cross-motions for summary judgment presented the first chance for a federal court to review Harmon on the merits, without any opportunity to

129 Id. at 1235.
131 Power Eng'g, 303 F.3d at 1235.
132 Id.
133 Id.
134 Id.
135 Id. at 1235–36.
136 Id. at 1236.
137 Power Eng'g, 125 F. Supp. 2d at 1055.
simply distinguish the facts of the case. The trial judge first reviewed the Harmon facts and decision. The court noted that PEC relied on the "expansive holding" of the case, that EPA was barred from acting when a state takes any enforcement action. Because that holding was broad enough to cover the facts of the PEC proceeding, the judge found himself forced to address Harmon's RCRA interpretation on the merits.

The court first addressed the Harmon RCRA statutory analysis and found that it "incorrectly interprets RCRA." The court questioned the Eighth Circuit's conclusion that "administration and enforcement . . . are inexorably intertwined." Instead, the trial judge found that the RCRA structure indicated the opposite by devoting § 6926 to state administration and enforcement of state regulations while addressing § 6928 to "federal enforcement of such regulations." The court also found that the structure of the § 6926(b) "in lieu of" clause suggested that it applied only to administration and not enforcement. Furthermore, the judge concluded that reading the sentence as proposed by Harmon would make the enforcement clause "superfluous," since it would not be necessary to grant enforcement powers to the states if the first half of the clause already granted authorized states administration and enforcement power.

The court then found that without the presumed meaning of § 6926(b) requiring states to supplant federal administration and enforcement, several other of Harmon's textual arguments toppled. The judge went on to challenge Harmon's understanding of Congressional intent, pointing to both contrary legislative history and the fact that the citizen suit provision, § 6972, indicated that "Congress knew how to specifically prohibit enforcement action once any action is undertaken by a state." The court concluded by

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138 Id. at 1057.
139 See id.
140 Id. at 1059.
141 Id. (citing Harmon Indus., Inc. v. Browner, 191 F.3d 894, 899 (8th Cir. 1999)).
142 Power Eng'g, 125 F. Supp. 2d at 1059.
143 See id.
144 Id.
145 See id. at 1059–60.
146 Id. at 1061–64. The citizen suit provision barred such claims "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order." Id. at 1064 (quoting 42 U.S.C. § 6972 (b)(1)(B) (2000)).
spinning a hypothetical in which a state with a good enforcement record chose not to prosecute a company on the state border that provided significant jobs and tax revenue to the regulating state and whose pollution was shared among the bordering states. The court found that Harmon would force EPA to do nothing or withdraw authorization from the state—despite its previously stellar record of RCRA enforcement—and that there was “no evidence that Congress intended such an outcome.” The court also rejected the res judicata claim, calling that ground of Harmon an “unsupported expansion of the doctrine of res judicata as . . . applied to the federal government . . . .”

Thus the trial court rebuked the Eighth Circuit on virtually every point of its opinion and allowed EPA’s claim to proceed. PEC appealed to the Tenth Circuit, setting the stage for the most dramatic overfiling case since Harmon.

C. The Tenth Circuit Completes the Quarantine

Ironically, the Tenth Circuit began its analysis—as the Eighth Circuit had—by outlining its responsibilities under Chevron. Where Harmon found RCRA unambiguously barred overfiling and Murphy Oil found the statute unambiguously allowed overfiling, the Tenth Circuit found the statute to be ambiguous on the issue and that EPA’s interpretation was reasonable.

In finding the statute ambiguous, the court rejected a number of Harmon’s interpretations. The court first criticized Harmon’s reliance on the § 6926(b) “in lieu of” language. The Tenth Circuit noted its sister circuit’s concession that the clause referred only to the regulatory program and not enforcement, but that the Eighth went on to conclude that the two were “inexorably intertwined.” The Power Engineering court found that Harmon failed to account for the separation of the clauses in § 6926(b) and for the presence of separate sections detailing federal enforcement and state administration and enforcement. The court concluded that EPA was not unreason-

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147 See Power Eng’g, 125 F. Supp. 2d. at 1064–65.
148 Id. at 1065.
149 Id. at 1065; see also id. at 1066-67 (expanding its analysis).
150 United States v. Power Eng’g Co., 303 F.3d 1232, 1236-37 (10th Cir. 2002).
151 Id. at 1240.
152 Id. at 1237-38.
153 Id. at 1238 (citing Harmon Indus., Inc. v. Browner, 191 F.3d 894, 899 (8th Cir. 1999)).
154 Power Eng’g, 303 F.3d at 1238 (pointing to §§ 6928 and 6926, respectively).
able in concluding that administration and enforcement were “not inexorably intertwined.”

Next, the court questioned Harmon’s effort to “harmonize” the statutory language allowing EPA enforcement in certain circumstances with the provision allowing EPA to withdraw state authorization. Harmon concluded that reading the two together meant Congress only intended to allow EPA enforcement if authorization was rescinded or if the state failed to initiate enforcement. The Tenth Circuit found the harmonization went “well beyond the plain language of the statute,” adding that the only statutory requirement for EPA to bring an enforcement action was that it provide notice to the state.

The court also challenged the Eighth Circuit’s reading of the “same force and effect” language from § 6926(d). Reading the provision in the context of the statute as a whole, the court found that § 6926 addressed state program authorization, “not federal enforcement.” The court added that the heading of § 6926(d) “Effect of a State permit” indicated that the language meant only that “state permits [had] the ‘same force and effect’ as federal permits.” Thus, the Tenth Circuit rejected Harmon’s conclusion that limiting the provision to the issuance of permits “was ‘incongruous’ with RCRA as a whole.”

Concluding its overfiling analysis, the court found that both EPA and PEC could amass statutory language to support their arguments, and thus that Congress had not spoken to the issue, making Chevron deference to EPA’s reasonable interpretation appropriate.

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155 Id.
156 Id. (noting that § 6298(a)(1)-(2) outlines when EPA can bring enforcement actions, while § 6296(b) concerns withdrawing state authorization).
157 Harmon, 191 F.3d at 899.
158 Power Eng’g, 303 F.3d at 1238.
159 Power Eng’g, 303 F.3d at 1239.
160 Id.
161 Id. (quoting Harmon, 191 F.3d at 900).
162 Power Eng’g, 303 F.3d at 1240.
The court then rejected the res judicata defense for lack of privity between EPA and the state. The decision was based on the finding that "states act in lieu of the EPA only" in administration and issuing permits, rather than in enforcement. The res judicata analysis completed the Tenth Circuit’s systematic rejection of virtually every point of the Harmon decision.

While affirming the trial court in a case that had only a statute in common with Harmon, the Tenth Circuit wrote an opinion that read like an overrule of the Eighth. In 1999, the Eighth Circuit took eleven pages of the Federal Reporter to upset the legal convention on overfiling. Three years later, the Tenth Circuit needed just nine pages to complete the Harmon quarantine, ruling that its sister circuit was simply wrong in reading RCRA to find an unambiguous statutory bar to overfiling.

V. CONCLUSION: THE IMPORTANCE OF THE HARMON QUARANTINE

In the fiscal years 1994 and 1995, EPA brought overfiling enforcement actions in a total of eighteen cases, about 0.1 percent of all state enforcement proceedings. In 1997, the total was four cases. Based on those totals, the battle for EPA overfiling authority could be seen as a waste of time and resources. In reality, however, the overfiling power may be the fulcrum of environmental enforcement. States conduct about ninety percent of all inspections and eighty to ninety percent of environmental enforcement actions. EPA certainly does not have the staff, the budget, or the desire to take on that responsibility. The Agency has only two tools to ensure that states diligently enforce RCRA, CWA, and CAA: 1) withdrawing state authorization, and 2) overfiling in individual cases. The former would be

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163 Id. at 1241.
164 Id.
165 Coop, supra note 33, at 257 n.23.
166 Id.
168 Cf. Mintz, supra note 6, at 426 (federalizing enforcement in just one state would "place an enormous strain upon the EPA’s highly limited enforcement resources").
169 A recent decision by the Supreme Court confirms a third tool, though the language of the decision limits its use to the Prevention of Significant Deterioration Program ("PSD") under CAA. This third tool allows EPA to review the substance of PSD permits and overrule those it determines are unreasonable. See Alaska Dep’t of Envtl. Conservation v. Envtl. Prot.
prohibitively expensive for EPA and is not seen as a serious threat.\textsuperscript{170} Thus overfiling—and, more commonly, the prospect of overfiling—is the only federal leverage that prevents states from entering into “sweetheart deals” with polluters.\textsuperscript{171} Overfiling also addresses problems stemming from inter-state pollution and the “race-to-the-bottom” by giving EPA a way to ensure minimum enforcement standards are met.\textsuperscript{172} If RCRA, CWA, and CAA are the holy trinity of American environmental law,\textsuperscript{173} overfiling is the mundane tool that ensures their continued relevance.

Based on that understanding, \textit{Harmon} was rightly seen as a dire threat to overfiling, and, by extension, to the nation’s most important environmental laws. Ironically, EPA’s overfiling power in some ways appears stronger today than it did pre-\textit{Harmon}. Before the case, overfiling was a little-used trick up EPA’s sleeve—one that was believed to be legal but that had not been rigorously tested. The \textit{Harmon} decision appeared to provide defendants with an additional shield to fend off EPA enforcement at the same time EPA had decided for tactical reasons to increase its overfiling efforts. \textit{Harmon} also provided a common name and template for a type of challenge that had long existed without a settled rhetoric. Before 1999, overfiling challenges were scattered and inconsistent, which explains why the \textit{Harmon} courts thought it was a matter of first impression: the lack of common language prevented an easy catalog of previous cases. The Eighth Circuit immediately changed that, and all of the post-\textit{Harmon} defendants relied on the case and its language. Some defendants apparently did little else and were content to use the decision like a talisman to ward off overfiling.\textsuperscript{174}

\begin{footnotes}
\footnoteref{note170} Agency, No 02-658, slip op. at 36 (Jan. 21, 2004). The Court upheld EPA’s authority to halt construction upon finding that a delegated state’s determination of Best Available Control Technology—a statutory requirement for PSD permits—was unreasonable. See id. In one sense, this authority could be considered pre-overfiling, since it has a similar effect of overturning state action, but comes at the permitting stage rather than after permit violation.
\footnoteref{note171} Mintz, \textit{supra} note 6, at 450.
\footnoteref{note172} Coop, \textit{supra} note 33, at 267–68.
\footnoteref{note173} \textit{Cf.} Richard J. Lazarus, \textit{Restoring What’s Environmental About Environmental Law in the Supreme Court}, 47 UCLA L. REV. 703, 704 (2000) (calling the passage of the three landmark environmental laws “one of the most ambitious legislative and executive branch undertakings of the past half-century”).
\footnoteref{note174} Several of the post-\textit{Harmon} overfiling defendants appear to have relied exclusively on that decision to challenge EPA enforcement. See, \textit{e.g.}, United States v. City of Youngstown, 109
The combination of EPA bringing more overfiling cases at the same time a court provided a common vernacular for defendants created a flurry of Harmon challenges against EPA enforcement, which federal courts universally struck down. Thus while Harmon remains the law for RCRA in the Eighth Circuit, the new weight of federal authority clearly allows overfiling in CAA and CWA cases, while favoring overfiling in RCRA cases as well. Harmon and the cases quarantining it replaced a system of uniform uncertainty with a binary system of relative certainty in which the results differ depending on geography. At least for now, the statutory bar on RCRA overfiling has been quarantined in the strip of heartland states that comprise the Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

The quarantine, while salutary, does not ensure the health of the rest of the nation, however. The overfiling schism presents a stronger than usual case for Supreme Court review—though the Court apparently disagreed\(^1\)\(^7\) because the circuit split at issue means that a federal law designed to ensure uniform protection against the adverse health impacts of solid and hazardous waste is applied differently in different states. The problem can be seen at its starkest in a place like Kansas City, where a single metropolitan area spans two states (Kansas and Missouri) that happen to be in the opposing circuits. Revisiting the hypothetical spun by the Power Engineering trial court, one could imagine a major plant in the Kansas City area sitting near the Kansas/Missouri border. If we imagine that the plant’s state would choose a sweetheart settlement without the threat of overfiling—in order to keep on good terms with the company and maximize tax revenue and jobs—only the potential for EPA action would serve to ensure RCRA compliance. With the circuit split as it stands now, the polluting plant could be untouchable if it happened to be located on the Missouri side of the metropolitan area and thus within the jurisdiction of the Eighth Circuit, but subject to EPA overfiling enforcement if on the Kansas side.

In some ways this is a simple externalization problem, but it is particularly galling and ironic because it is caused not by local law but by

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\(^1\) See supra note 6.
\(^7\) See 125 F. Supp. 2d 1050, 1064-65 (D. Colo. 2000).
differing regional interpretations of a federal law designed to eliminate such problems. To the extent that polluters operate on the circuit dividing line, Eighth Circuit states will get more environmental protection than they pay for while the Tenth Circuit states get less. Eighth Circuit residents and businesses will enjoy some spillover benefits from the Tenth Circuit and will pay less to comply with RCRA themselves, because they will not face the prospect of more stringent federal enforcement. Meanwhile, states in the Tenth Circuit will get reduced benefits, because of spillover pollution from the Eighth Circuit, while paying increased costs to meet more robust federal compliance requirements.  

Both the new weight of precedent that has developed since Harmon and a fair reading of RCRA compel the same solution to the problem: a determination that RCRA is, at best, ambiguous on EPA overfiling and thus that EPA can reasonably decide either that the statute does or does not allow the practice. That solution can be reached in one of three ways: through Supreme Court intervention, amendment of RCRA, or the Eighth Circuit’s reconsideration of Harmon. None of these solutions seems likely, however, which leaves the Harmon quarantine created by the federal courts and anchored by the Tenth Circuit as the imperfect but vital response to a mistaken decision.

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177 This assumes that states and facilities will be more interested in economic than environmental impacts. While not always true, this assumption prevails often enough and explains why EPA enforcement is sometimes necessary.

178 EPA can even change its mind over time, presumably based on the changes in administration. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 863 (1984) (finding that the fact that EPA “changed its interpretation” of stationary source under the CAA did not mean “that no deference should be accorded to the agency’s interpretation of the statute”).

179 See Mintz, supra note 6, at 452-53 (advocating a Congressional amendment to RCRA to clarify EPA overfiling authority).