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STATE PERMITTING: United States v. Smithfield Foods, Inc. and Federal Overfiling Under the Clean Water Act

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I. INTRODUCTION

United States of America v. Smithfield Foods, Inc.1 was a highly publicized2 and bitterly contested environmental enforcement case. Under a permit from the Virginia environmental agency, Smithfield Foods, Inc., a meat products company located in Smithfield, Virginia, was allowed to discharge wastewater into the Pagan River. When Smithfield consistently violated its permit requirements, resulting in minimal enforcement action from the State, the Environmental Protection Agency (EPA) initiated its own enforcement action. The defendant in the case, Smithfield, implicitly argued that if the EPA was able to “overfile” a state suit, all state permitting would be in peril.3 Smithfield suggested that such an overfiling would lead to unpredictability which would, in turn, lead to failure in both compliance and enforcement.4

Such an argument carries with it the inevitable suggestion that if the federal government were to trump the state, both business and the environment would suffer. As is often the case, however, the rhetoric of the defense may have overstated the possible ramifications of such a situation. Specifically, “overfiling” is a tactic of last resort for the federal

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2 See, e.g., infra notes 6, 9, 10, 12 and 13.

3 See generally United States v. Smithfield Foods, Inc., 965 F. Supp. 769 (E.D. Va. 1997). Smithfield filed a Motion to Join the Virginia Department of Environmental Quality (DEQ), arguing that it had an enforceable contract with DEQ that precluded EPA’s suit.

4 See id. Smithfield’s legal arguments evidently were not so patently political, but the court’s response to many of the issues Smithfield raised focuses on the dual sovereignty issues, and the question of to whom Smithfield is ultimately answerable.
government, and economic realities suggest that it is likely to remain so.\(^5\)

Politics, in particular, may have played an important role in the Smithfield case—both to the company’s benefit and to its detriment. Historically, Smithfield persistently violated its state issued permits.\(^6\) However, the state agency responsible for enforcing those permits, the Department of Environmental Quality (DEQ),\(^7\) rarely, if ever, took Smithfield to court. DEQ preferred instead to approach the problem from a conciliatory perspective.\(^8\)

Another political possibility was that Democratic forces in Washington, D. C. saw the Smithfield case as a chance to embarrass the Republican, “pro-business” administration of Virginia’s Governor George Allen.\(^9\) Beyond a motive of embarrassment, however, was the likelihood that the federal and state governments truly disagreed on how the government should address environmental issues.\(^10\) One environmental lawyer in Richmond suggests that “Smithfield just happened to be caught in the crosshairs of a dispute between Virginia and the federal government.”\(^11\)

One could argue, however, that if Smithfield found itself in the crosshairs of an inter-governmental feud, the company played a substantial role in placing itself in such a situation. On numerous occasions, Smithfield’s CEO, Joseph Luter III, had leveraged his company’s economic power to “threaten” state regulators. For example, he frequently suggested that he would move the entire Smithfield operation to a more pro-business state if Virginia regulators were too strict.\(^12\) Furthermore,

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\(^6\) See Deanna C. Sampson, And in Virginia, They Too Often Don’t, ROANOKE TIMES & WORLD NEWS, Nov. 24, 1996, at 3.

\(^7\) In Virginia, the state agency empowered to carry out federal environmental policy is the Department of Environmental Quality. At various times the agency has had different names, and its present name came only with its recent reorganization.

\(^8\) See Smithfield, 965 F. Supp. at 773-778 (reviewing the state’s relationship with Smithfield).


\(^10\) See Rex Springton, Caught in a Crunch, RICHMOND TIMES DISPATCH, Oct. 27, 1996, at C-1 (stating that the “unusual one-two punch of state and federal crackdowns on Smithfield Foods smacks of politics and honest disagreements”).

\(^11\) Id.

Luter's substantial contributions to Governor Allen's political action committee focused attention not only on the state's environmental policies, but also specifically on Smithfield.\(^\text{13}\)

This Note assesses the impact of the *Smithfield* decision on the state's ability to enforce and administer federal environmental laws. Specifically, it addresses the administration of the Clean Water Act (CWA),\(^\text{14}\) and by analogy, the impact the decision will have on other areas of environmental enforcement. Part II contains a short history of environmental regulation in the United States. Issues of federalism are key to understanding the history of environmentalism in the United States; much of the legislation and debate in the area revolves around the relationship between federal and state government. Consequently, this Note addresses the question of federalism on various planes.

While Part II focuses on historical themes, Part III addresses the Clean Water Act itself and the essential elements of its administration, along with some mention of academic considerations of the Act and the underlying issues. This Part also addresses some of the conflicts and compromises that occur between states and the federal government. Finally, Part IV focuses on the *Smithfield* case itself in light of the historical, political, and legal precedents.

This Note concludes that state administration of federal environmental laws in the future may be unpredictable. For reasons other than those directly addressed in the suit, the *Smithfield* decision itself may have very little impact on business's ability to predict and comply with the state's environmental standards. Notably, the recent changes in the structure of the DEQ and the traditional laissez-faire attitude of Virginia's regulatory community may undermine predictability more than federal overfiling. EPA's historic lack of resources will also continue to hinder overfiling situations. Perhaps most importantly, the *Smithfield* case may provide a roadmap for states to avoid an EPA overfiling if a state legislature is motivated to try to avoid federal regulation.

For reasons that should be clear as this Note progresses, the relationship between the federal and state government *vis-à-vis* the EPA and DEQ should reflect the relationship of the EPA to other state's environmental agencies. That said, however, Judge Smith's decision in


Smithfield makes clear that some elements of the EPA's ability to overfile in this specific case rested on the similarity, or dissimilarity, of certain parallel code sections of federal and state law. Accordingly, without a state-by-state examination of each state's enabling statutes, any specific conclusions as to Smithfield's applicability is impossible.

II. HISTORY OF ENVIRONMENTAL REGULATION

The history of environmental regulation in the United States is a checkered one. The federal government prosecuted the first pollution suits under laws that were not designed to affect pollution. Nevertheless environmental advocates have used such laws as the Rivers and Harbors Act of 1899 (Refuse Act) to at least stem pollution, if not to punish the polluters.

Although Congress intended the Refuse Act to address issues of the maintenance of navigable waterways, important Supreme Court decisions expanded the Act's definition of "refuse" to include pollutants. This expansion of the Act helped it to serve as an environmental statute despite the fact that its original purpose had been related solely to navigation. Historically, private rights to use the water had been the seminal issue. Regulators barely considered what modern citizens would think of as public concepts of environmental protection.

The use of the Refuse Act as environmental legislation paralleled a growing awareness of the potential effects of industrial pollution. The popular success of books such as Rachel Carson's Silent Spring, in conjunction with notable environmental disasters such as Japan's mercury

16 See FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3-88 (1988).
17 See id.
19 See, e.g., United States v. Standard Oil Company, 384 U.S. 224 (1966) (holding that gasoline fell within the definition of "refuse" as covered by the Act).
20 See 33 U.S.C. § 401 (stating that one of the purposes of the Act was to "prohibit . . . the erection of obstructions to navigation").
21 GRAD, supra note 16, § 1-19.
22 See generally GRAD supra note 16.
23 See generally RACHEL CARSON, SILENT SPRING (1962) (indicating a growing awareness of the hazards, as well as the benefits, of pesticides).
poisoning tragedy at Minimata and a proposal to dam the Grand Canyon,24 heightened this awareness. As the "environmental movement" grew, the federal government moved to enact new legislation to control pollution directly.25 This growing awareness of environmental issues in general, in conjunction with a grassroots political movement, culminated in the nation's first Earth Day, on April 22, 1970.26

Prior to the environmental activism of the 1960s and 1970s, most environmentalism focused on "scenic resources."27 One may label, broadly, most of the public's previous concern with the environment as "national park environmentalism" made popular by the works of John Muir, and through the exploits of President Theodore Roosevelt.28 Professor Grad notes, however, that as the environmental movement grew, its emphasis changed from form to substance. "It is fair to say that the dangers of hazardous waste served to emphasize the public health concerns on environmental law and that, in the eighties, these became dominant concerns of the field."29 The broad ideas of environmental health naturally expand to include resource conservation; with the world population over six billion persons and rising, overpopulation presents another serious concern.30

These health concerns and global issues, especially issues such as global warming and acid rain, highlight one the largest problems of previous environmental regulations—the limited perspective of state and local regulators. Part of the reason for the advent of national standards of environmental regulations is that "smaller units of government were unable to cope effectively with problems national in scope, and in part from the slow response of state governments to the emerging problems."31 Even some of the first federal legislation left the state governments to set the standards.32 Such legislation was consequentially ineffective.33

26 See Percival, supra note 24, at 1159.
27 See GRAD, supra note 16, §1-5.
28 See id. § 1-7.
29 Id.
30 See id.
31 Id. § 1-24.
Much of what modern citizens consider environmental regulation was probably carried out in earlier days under the auspices of nuisance law. This common law theory holds that one may not use his land in a way that harms others. But the reach of private nuisance law is limited to those who are personally affected; nuisance law is of little practical use in addressing problems of national or international scope.

Because of the ineffectiveness of nuisance laws, the Refuse Act was the best hope for environmental "regulators," but the effectiveness of the Act was limited not only by its form, but also by the courts. Furthermore, Congress did not intend the Act as a pollution statute, and its use was consequently limited. As new legislation tried to fill the gaps in environmental regulation, courts further limited the Refuse Act's applicability. Yet even today regulators continue to use the Refuse Act to prosecute polluters when no other statute fits the situation.

How the regulatory community attempted to use previous legislation may have influenced the development of "modern" environmental legislation. The emphasis of the CWA, for example, is on national standards. The 1972 legislation shifted the emphasis away from local and state standards to uniform national standards for primary

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33 See GRAD, supra note 16, § 1-24 (discussing problems with handling hazardous waste disposal on a state-by-state basis).
35 See BLACK'S LAW DICTIONARY 1065 (6th ed. 1990) ("Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working... injury... to another.").
36 See THOMAS F.P. SULLIVAN, ENVIRONMENTAL LAW HANDBOOK 8 (1997) ("[Nuisance] determination varies from one community to another and from one period of time to another depending on local attitudes and customs.").
37 In this context, the author uses the term very loosely to include anyone who tried to inhibit pollution.
38 See GRAD, supra note 16, § 3-94.
39 See id.
41 See GRAD, supra note 16, § 3-94.
42 See id. § 3-100 (pointing to Congressional intent expressed in S. REP. NO. 414, 92 Cong., 1st Sess. 8 (1971)).
43 See 33 U.S.C. § 1251(b) (1994) (stating that the primary responsibilities and rights of States' to control pollution and manage natural resources must be recognized, preserved, and protected).
enforcement guidelines.\textsuperscript{44} Within the new framework states would still be responsible for administering the standards, but the standards themselves are decidedly federal. The CWA retains "ultimate authority" for the federal agency.\textsuperscript{45} This "ultimate authority" was the essential issue of the Smithfield case.\textsuperscript{46}

The 1972 amendments to the CWA illustrate a new philosophical attitude towards pollution and the responsibilities to abate it.\textsuperscript{47} Not only did the Act institute national standards for the first time, it also assumed a national stature because of those standards.\textsuperscript{48} Along with this new, broader philosophical scope came a broader legal scope. Professor Grad notes, "the expansive regulatory philosophy of the 1972 Federal Water Pollution Control Act Amendments is matched by an equally expansive assertion of federal jurisdiction for water pollution control."\textsuperscript{49} One important aspect of this expanded jurisdiction is the definition of "all waters" as "navigable."\textsuperscript{50} The significance of such a definition is obvious. However, a recent Circuit Court case may have cast doubt on this definition.\textsuperscript{51}

An important case that solidified the expansive interpretation of the CWA was \textit{E.L. du Pont de Nemours & Co. v Train}.\textsuperscript{52} In \textit{Du Pont}, Justice Stevens outlined a broad interpretation of the CWA.\textsuperscript{53} The case established the validity of national effluent standards, and it also established the states' relationship to the EPA as subordinate when necessary.\textsuperscript{54} The importance of this case is hard to overstate. When the EPA sets effluent standards, it is doing so at the behest of Congress, but the implications of allowing the agency itself to set the standards are far-reaching.\textsuperscript{55} From a governmental perspective, the agency is actually

\textsuperscript{44} See Grad, supra note 16, §3-72 (referring to Pub. L. No. 91-604, 84 Stat. 1076 (1970)).
\textsuperscript{45} See 33 U.S.C. § 1251(b).
\textsuperscript{47} See Grad, supra note 16, § 3-71.
\textsuperscript{48} See id.
\textsuperscript{49} Id. § 3-107.
\textsuperscript{50} See United States v. Ashland Oil and Transportation Co., 364 F. Supp. 349 (W.D. Ky. 1973) aff'd, 504 F.2d 1317 (6th Cir. 1974).
\textsuperscript{51} See United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (holding that the regulation defining "waters of the United States," as used in the CWA, exceeded Congressional authorization and was invalid.)
\textsuperscript{52} 430 U.S. 112 (1977).
\textsuperscript{53} See id. at 126-136.
\textsuperscript{54} See id. at 124-36.
\textsuperscript{55} See generally Grad, supra note 16, § 3-106.
making legislative decisions, because inherent in the effluent levels is a balancing of economic versus environmental interests.\(^5\)

The history of environmental legislation in the United States has been inconsistent at best.\(^7\) One scholar notes that Congress mandated national environmental standards only after a long history of failed efforts to encourage states to act on their own.\(^5\) Thus, in the 1972 Amendments to the CWA, the federal legislature finally established national standards, but even as it did so it retained for the states the ability to administer the programs, as long as the states complied with certain EPA standards.\(^5\)

III. ORGANIZATION OF FWPCA, AND FEDERALISM'S ROLE IN ENVIRONMENTAL REGULATION.

In rare circumstances, the EPA will use its authority to prosecute a polluter even though the state in which the polluter is situated has already initiated prosecution. This action is called an “overfiling.”\(^6\) The EPA overfiles only when certain specific criteria are met: (1) when a state does not take “timely and appropriate” action, and (2) when the EPA considers a state’s action “clearly inadequate.”\(^6\) For example, EPA might overfile when it believes that the state is seeking fines or penalties that are far out of proportion to what the EPA deems appropriate.\(^6\)

To understand the impact of the Smithfield case one must have at least a passing familiarity with the CWA and how it is jointly administered by the states and the federal government. Some political and social issues form the foundation not only of the modern amendments to the CWA, but also how each state monitors its program.\(^6\) Some particular sections of

5\(^6\) See id.
5\(^7\) See Percival, supra note 24, at 1160.
5\(^8\) See id.
5\(^9\) See id. See also 33 U.S.C. § 1251-1376 (1972).
6\(^1\) Id. at 204 (quoting Memorandum from A. James Barnes, Deputy EPA Administrator, to Regional administrators (May 19, 1986)).
6\(^2\) See id.
6\(^3\) See Hodas, supra note 5, at 1563-78. Not all states have an EPA approved system. Professor Hodas points out that the EPA has primary responsibility for eleven states. He and other commentators note the political advantages a state can draw from its own administration of environmental standards. Of course those advantages are counterbalanced by the cost of funding such a program, not to mention the possible political ramifications of seeming tough on business.
the CWA are particularly important to the Smithfield case.\textsuperscript{64}

The idea of "citizen suits" is central to the CWA's enforcement policies.\textsuperscript{65} Citizen suits are beyond the scope of this Note; nevertheless, one should not overlook the ability of citizen suits to encourage enforcement when states fail to vigorously pursue violators. Many of the same issues in suits such as Smithfield are also at play in citizen suits, but to a lesser extent because of restrictions that the CWA itself places on those suits, such as sixty day notice letters to polluters and government enforcement agencies.\textsuperscript{66}

The trend in these citizen suits, and in the case law that controls them, seems to be toward a decrease in the power of citizens to effectively force the state governments to more closely regulate industry.\textsuperscript{67} Nevertheless, one should be aware of the substantial part these suits play in the context of state/federal enforcement schemes for the CWA. Citizen suits represent what one scholar terms the "third leg" of the "triangular enforcement system" of the CWA.\textsuperscript{68} Despite the judicial trend decreasing their legal power, these suits retain a power stemming from their potential impact on public opinion. When one considers the CWA, therefore, one should remember the potential "outside" effects of these citizen suits, and how they might affect the federal/state balance.

Those with an interest in legal issues occasionally have a tendency to overlook the practical aspects of the law in favor of its theory. In this context, one should focus not only on the law of the CWA, but also on its practical application. National standards will not be national standards, for instance, if the states fail to enforce them.\textsuperscript{69} As one scholar notes, "the degree to which laws protect the public health and improve the quality of our environment depends not only on the soundness of the laws, but also


\textsuperscript{66} See Garrison, supra note 65, at 419 (for example, the argument that allowing citizen suits for past violations would undermine the primacy of governmental enforcement).

\textsuperscript{67} See id. at 434 (stating "Gwaltney reduces the scope, and therefore the deterrent effect, of citizen suits").

\textsuperscript{68} See Hodas, supra note 5, at 1617-47.

\textsuperscript{69} See id. at 1554.
on the effectiveness of enforcement." Accordingly, as one examines the CWA's enforcement scheme, one should remember the practical effects of state enforcement or non-enforcement.

Obviously, almost all legislation reflects policy, and one of the main policy reasons for the CWA was to encourage states not to pander to businesses with "low" environmental standards as a means of encouraging new business in the state. This "race to the bottom" theory is widely discussed and debated. It is not solely the province of theorists and scholars—Smithfield itself has threatened to leave Virginia if the state agency strictly enforced federal law. In light of the political importance of "3000 jobs," one must at least take the theory of the "race to the bottom" seriously, if not accept it.

Directly related to the "race to the bottom" is the issue of the "level playing field." National environmental standards have the potential to give all localities an equal chance to attract and retain new businesses. However, lax state enforcement of the type discussed above can make the field uneven. If the federal government cannot maintain a level playing field, then the states that want to comply with environmental regulations are at a great economic disadvantage compared to those that do not enforce the regulations. State officials work hard to attract and maintain businesses, and the perception that a certain state is hostile to business is politically very dangerous. Accordingly, state officials are hesitant to enforce strict federal regulations when other states do not.

The "race to the bottom" may have found expression in a spate of state laws that require that state standards not exceed the EPA's standards. For example, a Virginia statute sets the federal floor as

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70 Id.
71 See Percival, supra note 24, at 1171-72.
72 See id. See also Hodas, supra note 5, at 1615 ("A significant number of states are reluctant to impose civil penalties for fear of creating a bad business climate.").
73 See North Carolina Officials Wary of Smithfield Proposal, supra note 12.
74 See id.
75 See Hodas, supra note 5, at 1574-75.
76 See id.
77 See id. at 1615.
78 See id.
79 See id.
Virginia’s ceiling for water pollution. It “prevents the pollution control board from requiring the Commonwealth, or any political subdivision thereof, to upgrade the level of treatment in any works to a level more stringent than that required by applicable provisions of the Federal Water Pollution Control Act, as amended.” One scholar notes that such legislation, considered in tandem with the historical trend for states to fail to effectively regulate their own citizens’ pollution, “provides some evidence that the concern about a ‘race to the bottom’ in the absence of federal minimum standards remains valid.”

Others see federal regulations in a better light. Professor John Dwyer suggests that the impact of the Clean Air Act has silver linings. Instead of looking to legislation that implies the state is only going to carry its bare minimum responsibility, Dwyer looks to the necessary interdependence of the state and federal government in the Act. Professor Dwyer suggests that the federal system of pollution control forces the states to develop their own bureaucracies; these bureaucracies, he argues, then take on a life of their own, ensuring their existence and effectiveness. Eventually the agency will develop its own goals and agendas regardless of state policy. One should note, however, that some states actively attempt to limit the effectiveness of their own agencies, and in the face of powerful political movements, state agencies can fare poorly.

Ironically, when Governor Allen decreased the staff at Virginia’s Department of Environmental Quality, a coalition of groups representing diverse interests united to protest the firings and called on the Governor to reverse his decision. Traditional supporters of business as well as environmental groups agreed that the downsizing of the state’s regulatory

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81 See VA. CODE ANN. § 62.1-44.15:1 (Michie 1998).
82 Organ, supra note 80, at 1379 (citing VA. CODE ANN. § 62.1-44.15:1 (Michie 1993)).
83 Id. at 1393.
85 See id. at 1193.
86 See id. at 1224-25.
87 See id.
89 See id. The coalition included, among others, the Virginia Manufacturers Association, the Sierra Club, the Virginia Waste Industries Association and the Virginia Municipal League. See id.
agency would be bad for all concerned. Their shared belief was that the “restructuring” would limit the agency’s ability to work with business and its ability to protect the environment.

The CWA, as it functions today, is the result of years of tinkering with enforcement strategies combined with major philosophical changes. As a result:

to discourage potentially inconsistent enforcement philosophies, Congress designed . . . CWA to be a sanctioning-oriented Act [which] dictates strict liability for all CWA permit violations and provides that district courts shall assess civil penalties on violators to deter present and future violators.

Paradoxically, this sanctioning attitude is not paralleled in the states that administer the federal program. As Professor Hodas notes, the attitude of many states is tempered by their desire to maintain a good working relationship with industries that supply jobs. Consequently, one can find a distinct clash of philosophies within the same system, the system designed by the federal government, but administered principally by the states.

Section 402 of the CWA lays out the minimum requirements for a state to take over the administration of the program. This section states that any person, including a corporation, who discharges a pollutant into any water must have a permit to do so. Under the Act, only two parties have the authority to issue a permit: (1) the federal government through the EPA, or (2) a state with an EPA approved program. The EPA gave its approval to Virginia’s program in March 1975, vesting in Virginia the

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90 See id.
91 See id.
92 See generally Hodas, supra note 5, at 1563-71.
93 Id. at 1567-68. See also Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc., 108 S. Ct. 376 (1987) (discussing citizen suits regarding past violations).
94 See Hodas, supra note 5, at 1567.
95 See id.
96 See id.
98 See id. § 1362(5).
99 See id. §1342(a). See also 33 U.S.C. § 1311(a).
100 See id. § 1342(c).
power to issue pollution permits.\footnote{101}

A legal system recognizing not only two sovereigns, but also citizen attorneys general, is predictably complex. Although the state derives its power to enforce pollution standards from the EPA, the EPA must nevertheless defer to the state in certain enforcement actions.\footnote{102} This deference to the state is limited, however, to when the state “is diligently prosecuting an action . . . or the State has issued a final order not subject to further judicial review and the violator has paid a penalty.”\footnote{103} The 
\textit{Smithfield} case illustrates the consequences of state and federal disagreement as to what is “diligently prosecuting.”\footnote{104}

The practical effects of this dual sovereign system are varied. Some differences are philosophical, as previously mentioned.\footnote{105} Some, however, are simply financial. The federal government does not fully fund the states taking on the administration of the CWA.\footnote{106} Thus, the state receives a mandate from the federal government to maintain certain standards without the direct support to pay for all the programs to monitor and ensure compliance.\footnote{107} One scholar points to the “unfunded mandates legislation” that may have an impact on the federal/state relationship.\footnote{108}

Section 309 of the CWA\footnote{109} is a critical section, both philosophically and legally. This section retains EPA’s right to “issue [a compliance order] . . . or . . . bring a civil action”\footnote{110} in a United States District Court\footnote{111} or assess civil penalties administratively,\footnote{112} when a

\begin{footnotes}
\item[102] See 33 U.S.C. §§ 1342(a)(5), 1391(c).
\item[103] Id. § 1319(g)(6).
\item[104] See \textit{Smithfield}, 965 F. Supp. at 779 (quoting from a letter from EPA Regional Director, which states that “the Commonwealth’s actions were not resulting in compliance”).
\item[105] See supra notes 70 to 87 and accompanying text.
\item[106] EPA does, however, have purse strings it can tighten for states that fail to toe the line, such as federal programs relating to data collection. See \textit{Clean Environment is a State’s Right}, \textit{ROANOKE TIMES & WORLD NEWS}, Dec. 2, 1996, at A-6.
\item[107] See generally Dwyer, supra note 84.
\item[108] See \textit{id.} at 1185 (citing Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (to be codified in scattered sections of 2 U.S.C.)). This legislation is beyond the scope of this Note, but it does highlight important philosophical issues inherent in environmental regulations.
\item[110] \textit{Id.} § 1319(a)(1).
\item[111] See \textit{id.} §1319(b).
\item[112] See \textit{id.} §1319(g).
\end{footnotes}
permittee violates a state-issued permit. Philosophically, this section of the code illustrates Congress’s intent to retain a measure of power for the EPA even when the state is responsible for the Act’s administration; it is, in effect, a supremacy statement. Legally, it empowers the EPA to second guess the state’s enforcement actions. The EPA sued Smithfield under the power of Section 309.

The EPA can trump the state in specific circumstances; it has the ability to revoke the state’s capacity to issue permits under the CWA. However, the EPA has never revoked a state program. There are, of course, financial constraints on the EPA as well as the states. Given that the states perform the vast majority of site inspections, the practical reality of the EPA’s taking over an entire state’s inspection program is “more theoretical than real” because the EPA simply lacks the resources to administer the enforcement programs of even one of the states.

Selected prosecution of notable offenders is more likely than a federal takeover of an entire state program, but even such selected targeting is rare. The question for this note then becomes, “Why Smithfield?” Professor Hodas notes that the EPA’s “Policy Framework” recommends that the EPA consider its relationship with the states as a partnership, and that the EPA look to “three broad categories when deciding whether to take direct enforcement actions: (1) the type of case, (2) the timeliness and appropriateness of the state enforcement action, and (3) the adequacy of the penalty imposed at the state level.”

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113 See id. §1319(a)(1).
114 See Hodas, supra note 5, at 1581-83.
115 See id.
118 See Hodas, supra note 5, at 1586. Hodas points out, however, that the EPA frequently had petitions before it recommending such action be taken. For example, the Chesapeake Bay Foundation requested that the EPA withdraw Virginia authority because the state “failed to enforce the CWA.” Id.
119 See id. at 1578.
120 See id. at 1582-3.
121 See id. at 1588. Professor Hodas notes, “E.P.A. action because of an inadequate state penalty is essentially nonexistent.” Id.
122 See id. at 1584 n.160.
123 Id. at 1586.
Clearly the EPA will not publicize the reasons for making such a rare policy decision as the one involved in filing suit against Smithfield. However, one can imagine that Virginia’s unrelated suit against the EPA over “the [EPA’s] final action disapproving Virginia’s proposed program for issuing air pollution permits”\(^\text{124}\) may have strained the relationship between the two governments. Furthermore, the contributions of Smithfield’s Chief Executive Officers to Allen’s political action committees at a time when the company was in violation of its permit, may have led the EPA to believe that the Allen administration was not acting in a disinterested manner.\(^\text{125}\)

The legal and political risks of such an overfiling were substantial. The EPA had lost the only overfiling case it had previously attempted.\(^\text{126}\) In addition, the EPA also faced various legal strategies that the defendants could have anticipated as an effective means of repelling such a suit.\(^\text{127}\) However, two important defense strategies for overfiling, \textit{res judicata} and collateral estoppel, do not apply to cases in which a court has not rendered a final decision.\(^\text{128}\)

While these two defense strategies were not available to Smithfield, they are significant in the context of the philosophical issues at play in such a suit.\(^\text{129}\) At the core of these doctrines is the idea that once a defendant (or plaintiff in the case of offensive collateral estoppel, a doctrine unlikely to be applied to EPA suits), has received a court’s decision, then it should not be subject to contrary decisions by other courts.\(^\text{130}\) In the environmental context, these ideas can easily be extended to “protect” polluters once they have been punished—especially in a case in which the state prosecuted a permittee to intentionally prohibit federal prosecution.\(^\text{131}\)

\(^{125}\) See \textit{supra} note 13 and accompanying text.
\(^{127}\) See generally Benton, \textit{supra} note 60 (discussing two defensive techniques for such a situation).
\(^{128}\) See United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980) for an example of the successful use of collateral estoppel against the EPA.
\(^{129}\) See Benton, \textit{supra} note 60.
\(^{130}\) See \textit{id}.
\(^{131}\) EPA Region III (the region which includes Virginia) Administrator, Michael McCabe accused Virginia of just such preclusive actions in a letter to Thomas C. Hopkins,
More applicable to the Smithfield case, and potentially devastating to the EPA's suit, was United States v. Cargill and the doctrine of abstention. Abstention is a judge-made doctrine related to a "stay." A federal court will sometimes order a stay to postpone a federal action, allowing the participants to complete a state suit on the same matter. In these cases, the state court's decision may preclude the federal government from establishing a contrary decision in federal court. Abstention, however, occurs when a federal court decides to postpone or decline jurisdiction in a particular suit; it functions as a permanent stay because the suit becomes moot when the court declines jurisdiction. Abstentions and stays are frequently argued in tandem with res judicata and collateral estoppel because the arguments revolve around a similar philosophical core.

Although commentators cite Cargill as representative of the abstention doctrine, the court in that case actually rejected the application of the doctrine to the facts, and implicitly to the CWA in general. The court explicitly found that in the CWA, the EPA has the right to bring suit even when the state is already suing the permittee. The court held that the citizens suit provision provided weight for the argument that Congress had intended that outsiders be able to influence recalcitrant states. By analogy, a federal suit, even when a state action is already underway, is appropriate if the state's action is inadequate. The court further held that
to deny the EPA the right to prosecute polluters whom the states were inadequately prosecuting "would yield the absurd result of denying the official charged with primary enforcement responsibility the same power which is granted to citizens."  

The court went on to conclude that the circumstances of Cargill were not those appropriate for application of the abstention doctrine.  

It pointed to the broad duty of federal courts to accept cases within their jurisdiction, and it noted the narrowness of circumstances that would warrant application of the abstention doctrine.  

Despite its rejection of the applicability of the abstention doctrine, the court nevertheless found the means to grant Cargill relief from the double attack of state and federal government.  

The court looked to its inherent power of discretion to issue a stay in the case.  

It noted that "[i]t has long been recognized that federal district courts have the inherent discretionary power to stay proceedings pending the disposition of parallel proceedings in a second court."  

In exercising its discretionary power, the Cargill court first looked to the factual circumstances of the case.  

It noted, most importantly, that the federal action had caused the defendants to suspend construction of treatment facilities that would ensure compliance with the CWA.  

The court also looked to the overriding intent of the CWA: "Congress clearly and unambiguously stated that the principal purpose of the [CWA] was to restore and maintain the purity of the nation's waters and eventually to eliminate the discharge of all pollutants into them."  

The court proceeded to note that it should issue judicial stays only in exceptional circumstances, and it found, in light of the CWA's intent, that "the fact that the present suit is preventing the expeditious cleansing of our

134 Id.

135 See id. at 745-47.

136 See id. at 745 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)). Notably, the court also listed the three categories of abstention as defined by the cases Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941), Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Younger v. Harris, 401 U.S. 37 (1971), and rejected their application in turn.

144 See Cargill, 508 F. Supp. at 747.

145 See id.

146 Id.

147 See id. at 747-48.

148 Id.

149 See id. at 749.

150 See id. at 737.

151 See id. at 737.

152 Cargill, 508 F. Supp. at 737.
nation's waters . . . [is an] exceptional factor."

The stay in the Cargill case was a "limited one." One may assume that when the court emphasized the specific circumstances in the case, the precedential value of the case was closely limited to its facts. Accordingly, those in the regulated communities who hope to draw parallels with Cargill in order to defend against an EPA overfiling will need have a closely similar set of facts, part of which includes active construction work designed to eliminate the pollution in question.

The facts in Smithfield are the necessary starting point for an understanding of the state/federal conflict. Smithfield Foods, Inc., is a meat products company located in Smithfield, Virginia. It is a public corporation, chartered under Delaware law. The plant in Smithfield discharges wastewater into the Pagan River, which, via the James River, flows into the Chesapeake Bay. At the time of the suit, the company had completed one half of a connection to the Hampton Roads Sanitation District, and the other half was expected to be completed soon after the trial; these connections would eliminate all discharge into the Pagan River.

In March 1986 Virginia's State Water Control Board (Board) issued a VPDES permit to Smithfield, allowing the company to discharge into the Pagan River. The permit set guidelines and limits for Smithfield's discharge of wastewater into the river. The limits addressed not only specific effluents, but also their allowable concentrations. For a state permit to be valid, despite the state's primary authority to issue and control permits, the EPA must approve the permit

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153 Id. at 750.
154 See id. at 749.
155 See supra notes 148-150 and accompanying text (discussing the court's concern that the federal action in Cargill was thwarting the intent of the CWA).
156 See Cargill, 508 F. Supp. at 737.
158 See id. at 772-73.
159 See id.
160 See id.
161 See supra note 7. The Water Control Board was the legal predecessor of Virginia's Department of Environmental Quality.
162 VPDES permits are Virginia's permits, authorized by the National Pollutant Discharge Elimination System (NPDES) program incorporated in the CWA at 33 U.S.C. § 1342 (1994).
164 See id.
and any changes to it. Consequently, the EPA retains not only a right to enforce permits, but a veto in approving those permits. These issues are central to the Smithfield case.

After issuing Smithfield the permit, the state issued a "special order" on May 13, 1986, that imposed 'interim limits' for certain effluents. Subsequently, the state reopened the permit to incorporate stricter state standards for phosphorus in accordance with the state’s Policy for Nutrient Enriched Waters. The CWA explicitly allows states to publish standards that are stricter than the national standards of the EPA. The same statute allows the federal government to prosecute parties who violate the state standards even when the standards are above and beyond the federal minimums. The EPA approved the January 4, 1990 modified permit. After Smithfield contested the new phosphorus limits, the state issued another special order on March 21, 1990, which allowed the company time to bring its treatment plant into compliance. The order stated, "Smithfield is further required to attain full compliance with the phosphorus limitation by January 4, 1993."

The defendant’s case in Smithfield relied heavily on the state’s authority under the CWA to issue permits and on the state’s ability to issue special orders and amendments to modify the permits. Smithfield argued that it relied on the state’s representation of enforcement terms to its detriment. The EPA countered that the state lacked authority to bind the federal government, and the court agreed. Specifically, the court held that the "Permit did not incorporate, nor was it conditioned, revised,

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166 See id.
167 See Smithfield, 965 F. Supp. at 774. The legal significance of a state "special order" was contested in the Smithfield case, with the court finding that such a state order has no legal effect on the federal government when the EPA made no affirmative statements that it approved such an order.
168 See id. at 774.
169 See VA ADMIN. CODE tit. 9, § 25-40-10 (Michie 1998).
171 See id.
172 See Smithfield, 965 F. Supp. at 774.
173 See id.
174 id.
175 See id. at 784.
176 id.
177 See id. at 788.
The court noted that a state could undermine the EPA's ability to enforce the CWA if the state could modify permits by special orders or similar methods. Such methods, not subjected to EPA scrutiny, would defeat the national standards of the CWA. The court continued, "States and permittees should not be allowed to circumvent the Act by issuing consent order or interpretive letters which are binding on the EPA without its consent or approval."

This statement highlights important policy issues that are at the core of Smithfield. It is clear that the court believes that the state was colluding with Smithfield to help the company avoid its permit responsibilities. This idea probably played a part in the court's decision not to defer to the state court, which was simultaneously hearing a state suit based on many of the same permit violations. In light of any abstention or stay arguments that Smithfield wished to put forward in the case, one should not underestimate the importance of the court's perception of the state's relationship to the permittee.

Furthermore, the court noted Smithfield's "cavalier" attitude toward the CWA violations. While not strictly legal issues, these perceptions of the court probably influenced the court's exercise of its judicial discretion. The doctrines of stays and abstentions are, as previously noted, almost wholly dependent upon judicial construction and discretion. Accordingly, the defendant's "cavalier" attitude toward violations may well have played a part in the court's decisions.

The court's analysis of the core defense in Smithfield (that the state's actions modified the permit) contained surprisingly little case law. One can interpret this as another indication of the importance of

178 Id. at 784.
179 See id. at 788 n.24.
180 See id.
181 Id. (emphasis added).
182 See id. at 779.
183 See supra notes 10 and 132 and accompanying text.
185 See supra notes 133-139 and accompanying text.
186 For further examples of the court's pointed language addressing the defendant, see Smithfield, 965 F. Supp. at 983 (noting "the mischaracterization and distortion . . . frustrating . . . the court").
187 See id. at 781-796.
the specific facts in an overfiling case. However, it simply may be a result of a dearth of case law because the EPA has so rarely overfiled. The court systematically addresses the issues involved in the defendant’s liability for the permit violations, including summary judgment standards, corporations as “person” under the CWA, Discharge Monitoring Reports (DMRs) as a basis for summary judgment and the CWA’s strict liability standard. But the court seems to have decided the core issue of whether the state’s actions modified the permit based mainly on policy and the broad intent of the CWA.

The court did, however, explicitly address the defendant’s other main argument. Smithfield asserted that the federal government was precluded from seeking penalties against it because the state had previously prosecuted the corporation under CWA section 309(g). This part of the Smithfield decision may have the broadest impact on future overfiling cases, and the response of states and permittees to these cases. The court acknowledged that “Section 309(g)(6)(A)(ii) of the Act does bar the United States from bringing a civil penalty action for ‘any violation’ whenever a state enforcement agency has ‘commenced and is diligently prosecuting an action under a State law comparable to this subsection.’”

The court went on to compare Virginia law and section 309 to decide if they are in fact “comparable.” The court concluded that sections of Virginia’s law are sufficiently at variance with the federal law to hold that the two are not comparable. Specifically, the court found that important “public notice and participation” elements are missing from the state law. Furthermore, the court held that the state law requires that a violator “consent” to a fine, while federal law authorizes the EPA to fine violators administratively. While the political give and take of the court’s rulings on Smithfield’s other main argument (modified permit).
may seem, at first glance, to be the most interesting and contentious aspect of this case, the seemingly mundane distinctions of law the court made in regard to the state/federal comparability may well be the most important aspect of the case.199

One should take careful note of two issues. First, as the court noted, Virginia changed its law to allow the public notice that the court found essential to establish comparability to section 309.200 Second, the court drew a distinction between Virginia law and federal law based on the state’s inability to fine violators without their consent—an aspect of state law that the legislature could easily change.201

Interested observers should note the fine the court imposed on Smithfield. Twelve million, six hundred thousand dollars is the largest fine ever assessed for such violations.202 In addition to the court’s perception of Smithfield as “cavalier” towards its violations, the size of the fine must indicate the court’s perspective on the importance of the case and the message it might send to similar violators.203

V. Conclusion

The Smithfield case is notable for many reasons, not the least of which is that it is one of the very few (two, by some counts) cases of EPA overfiling. Furthermore, the size of the fine demands that one take overfiling seriously. Some aspects of the case’s notoriety, however, may make its legal precedential value suspect. One should be careful not to see a pattern in a sample of two.

The case does, however, remind those involved in environmental regulation that there remains a separation of powers under the CWA despite its “partnership” tone. Therefore, a state’s enforcement agency under the CWA will need to stay within the bounds of the EPA’s guidelines or risk being preempted. That said, the practical realities of the federal/state relationship continue to suggest that the two sovereigns must

199 See supra notes 74-82 and accompanying text.
200 See Smithfield, 965 F. Supp. at 795 n.37 (“The Commonwealth amended Section 62.1-44.29 of the Virginia Code in 1996... [to allow] the violator and ‘any person who has participated... to appeal a special order.’”).
201 See generally Organ, supra note 80 (describing states’ attempts to limit the impact of federal standards).
202 See Nakashima, supra note 9, at A-1.
cooperate in order to satisfy the intent of the CWA.

In a time of increasing resentment of federal regulation, and further restriction of government budgets, the idea of the EPA taking over a previously approved state permitting program is problematic. However, if the EPA were to decide that a state were acting in concert with a permittee to consistently avoid CWA regulation, then the federal government would have a duty to revoke the state's program.

In light of the "race to the bottom" debate, the more likely result of the Smithfield case is a state legislature's careful molding of state law to ensure that it is compatible with section 309 of the Act. If the state's intent truly were to help business avoid potentially devastating fines from the EPA, then such a course of legislative action would logically follow. A state's adoption of such legislation to ensure "compatibility" with section 309 would almost certainly throw off the delicate balance of federal/state sovereignty that the Act tries to maintain.

The premise of the CWA is that all states would like to protect their environment if they could do so without suffering an economic disadvantage. The Act is built around the idea that if the federal government sets national standards, then the state governments can avoid competition for businesses at the expense of the environment. If, however, the federal government, in conjunction with the states, cannot ensure compliance with those national standards, then the Act is a hollow shell.

The holding in the Smithfield case has the capacity to affect the balance of the Act. If states see federal intervention as a potential threat to business in the state, the state regulators may take more care to ensure that its permittees comply. On the other hand, states may craft state law to ensure that they have the power to preempt the EPA through section 309 of the Act. If that occurs, the Act could become totally ineffective, and Congress may well have to return to the drawing board.

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204 See Hodas, supra note 5, at 1586 (noting EPA has never taken back the primary enforcement role from an approved state).
205 See supra notes 108-115 and accompanying text.