Application of Res Judicata and Collateral Estoppel to EPA Oversiling

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APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL TO EPA OVERFILING

William Daniel Benton*

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  Government.

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I. INTRODUCTION

A defendant in an environmental case may face both state and federal government prosecution, because major federal environmental statutes are designed to foster concurrent responsibility for their enforcement. The leading examples of such statutes are the Clean Air Act (CAA),1 the Clean Water Act (CWA),2 the Safe Drinking Water Act (SDWA),3 and the Resource Conservation and Recovery Act (RCRA),4 the current enforcement statutes. These federal statutes typically mandate the establishment of uniform national standards and encourage the states to seek federal approval from the Environmental Protection Agency (the EPA) to take over and administer the programs. Once one of its programs has passed muster with the EPA, a state becomes an “approved” state under that federal statute. However, these same statutes usually allow the federal government to retain the power to enforce sanctions even with an approved program of state laws in place.

Historically, defendants facing multiple prosecutions arising from a single transaction may find some relief in the common law doctrines of res judicata and collateral estoppel when subsequent suits are brought by the same plaintiff or a different party in privity with that plaintiff.5 It has been suggested that these doctrines apply with equal force and effect in the field of environmental law without any particular refinement or distinction.6 Even a critic of the application of collateral estoppel to concurrent enforcement situations concedes

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5 Res judicata bars a second suit on a cause of action where there has been a valid final judgment on the merits, while collateral estoppel precludes relitigation in a different cause of action of issues actually and necessarily determined in a final judgment. Together, these doctrines are referred to generically as preclusion doctrines. Montana v. United States, 440 U.S. 147, 153 (1979).
that preclusion and related stay and abstention doctrines ought to be used by a court in its discretion to avoid jurisdictional strife.7

Application of either res judicata or collateral estoppel in a situation where the state and federal governments have concurrent enforcement authority generally depends upon a finding that governments were in privity with one another. Otherwise, the violator of an environmental law is generally in the same position as any other person in a federal system. He would be subject to concurrent regulation by both federal and state authorities, like a bank robber whose single act can lead to simultaneous prosecutions in both jurisdictions.8 However, the existence of concurrent enforcement authorities does not per se prevent application of preclusion principles.9

It seems improbable that res judicata, a principle of Roman law, and collateral estoppel, a principle of medieval Germanic law, should be adopted independently by English law10 and later be combined to help shape the development of environmental law in the late twentieth century; but such seems to be the case.

In environmental case law, res judicata and collateral estoppel can occur in four different fact patterns. Perhaps the most obvious of these is when the federal government, in the person of the EPA, sues a defendant under the same statute and for the same event for which it has already been prosecuted by a state. When this occurs in the context of one of the previously mentioned joint federal/state programs, the action by the EPA is referred to as overfiling. The leading overfiling case is United States v. ITT Rayonier,11 a 1980 Ninth Circuit case.

A second fact pattern, a variation of the first, occurs when a state takes action under one of these concurrent enforcement statutes, but the federal government bases its action on a different statute,
such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),\(^\text{12}\) which does not have comparable provisions for giving states primary enforcement authority. This pattern might also arise when a state acts under one of the concurrent enforcement statutes, but the EPA bases its action on portions of the same statute which have no provisions for state enforcement, such as RCRA Section 7003.\(^\text{13}\) Although a number of cases have allowed both state and federal recoveries,\(^\text{14}\) none has specifically addressed the res judicata and collateral estoppel issues. These first two fact patterns will be referred to collectively as the overfiling scenario and are the primary objects of investigation and analysis in this Article.

The two final fact patterns involve successive actions by the federal government alone.\(^\text{15}\) The first one involves multiple suits by the EPA against the same defendant to remedy a problem at a single site. A complex cleanup of an abandoned hazardous waste site under CERCLA presents such an opportunity for multiple suits. Such suits can lead to conflict with an aspect of res judicata known as claim splitting and are discussed with a synopsis of CERCLA. The final fact pattern involves successive EPA prosecutions in different federal circuit courts of the same defendant for the same issue arising at different plant locations of the defendant. While the most narrow of all the situations, this one was the subject of a Supreme Court case, United States v. Stauffer Chemical Company.\(^\text{16}\) It is discussed along with other issues that are unique to situations in which the United States is a litigant.

Although there are no reported preclusion cases under RCRA or the SDWA, several cases under the CAA and the CWA suggest that the EPA's enforcement options may no longer be unfettered once a


\(^{13}\) 42 U.S.C. § 6973 (1982 & Supp. IV 1986). This section is the "imminent hazard" provision of RCRA which allows the EPA Administrator to take swift action against imminent and substantial endangerments to health or the environment. Similar provisions are found in the other media-specific (that is, air, land, or water) statutes discussed herein.


\(^{15}\) It has also been suggested that EPA should be estopped by a final judgment in a case brought under a citizen suit provision of one of these laws when the EPA passes up its opportunity for intervention. See Miller, Private Enforcement of Federal Pollution Control Laws, Part II, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10063 (1984). No environmental cases explore this possibility, and it is generally beyond the scope of this Article, but some of the issues it raises will be discussed later under the topic The Federal Government as a Litigant. See infra notes 388–415 and accompanying text.

state has taken final action against a specific polluter for a specific incident or transaction. This Article explores the potential application of res judicata and collateral estoppel principles to environmental scenarios to determine whether either may be asserted by a defendant who has reached “final judgment” in a prior action brought against it by a state or the EPA, only to find itself subject to a second action brought by the EPA.

In addition to res judicata and collateral estoppel, other defense strategies to concurrent enforcement are explored. Most significantly, these other strategies do not require privity between a state and the EPA. For example, some of these environmental laws contain statutory language that can give rise to arguments that Congress intended to preclude concurrent enforcement in certain circumstances. Even where common law preclusive and statutory interpretive arguments fail, successful abstention and discretionary stay arguments can yield similar results.

This Article begins with an overview that will explore the influence of statutory enforcement and state power sharing provisions in the overfiling scenario. A more detailed examination of the general principles of res judicata and collateral estoppel follows. Because of its significance, privity is explored separately, after which a group of issues related to the special nature of federal litigation is considered. Finally, this Article concludes that the preclusion doctrines remain viable defenses in overfiling situations, although more than the mere fact of an overfiling is required to invoke them.

II. CONCURRENT ENFORCEMENT PROVISIONS

A. Overfiling

When the EPA exercises its authority to prosecute an alleged violator in an approved state that has already initiated its own

17 Of the seven major environmental laws administered by the Environmental Protection Agency (EPA), only two will not be discussed directly: the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601–2629 (1982 & Supp. IV 1986), and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y (1982 & Supp. IV 1986). TSCA is nondelegable to the states by law, whereas FIFRA is run almost entirely by the states. C. Wasserman, Improving the Efficiency and Effectiveness of Compliance Monitoring and Enforcement of Environmental Policies II-I, V-I (undated paper prepared on behalf of The Organization for Economic Co-operation and Development). Although these facts make it unlikely that either statute would be involved in the first overfiling scenario, they are potentially covered by the other three preclusion scenarios described. Because of the EPA’s use of cooperative agreements with states to delegate otherwise nondelegable statutes or nondelegable portions of mostly delegable statutes, even these two statutes have some possibility of falling under the first overfiling scenario. Id. at V-1 to V-2.
enforcement action for the same requirements against the same defendant, this action is known as “overfiling.”\textsuperscript{18} The EPA’s policy is that overfiling is appropriate “when the state fails to take timely and appropriate action” or when the “state’s action is clearly inadequate,” such as when “the relief requested and penalties to be assessed by the state” do not comport with the EPA’s own analysis of what is appropriate.\textsuperscript{19} The EPA holds that its authority to overfile is unfettered and totally within its discretion,\textsuperscript{20} thus implicitly rejecting the application of preclusion doctrines to the overfiling situation. Generally, however, the EPA’s policy is to avoid dual enforcement and to exercise its concurrent authority only “following unsuccessful, or what it believes to be unsatisfactory, state enforcement actions.”\textsuperscript{21}

In an exercise of its oversight authority, the EPA established in June 1984 a detailed policy framework as a blueprint for state/EPA agreements. This framework included oversight criteria to define “good performance” by a state and criteria to determine when overfiling is appropriate.\textsuperscript{22} One of the good performance criteria is “timely and appropriate enforcement response” by the state, which includes:

(1) A set number of days from detection of a violation to initial response;

\textsuperscript{18} Wasserman, supra note 17, at V-6. See also Memorandum from A. James Barnes, Deputy EPA Administrator, to Regional Administrators 1 (May 19, 1986) [hereinafter Barnes Memorandum], regarding guidance on RCRA overfiling.

This Article presumes that the most common overfiling scenario is one in which the state brings an action against a defendant under state law, and the EPA subsequently brings suit under federal law based upon those portions of state law subsumed into federal regulations. As a result, the issue of whether or not to apply either res judicata or collateral estoppel will be before a federal judge in the EPA suit.

\textsuperscript{19} Barnes Memorandum, supra note 18, at 1–2.

\textsuperscript{20} Id. at 1; see also In re BKK Corp., No. IX-84-0012, slip op. at 5 (EPA May 10, 1985).


Where two actions are pursued simultaneously, the first to reach final judgment is entitled to res judicata and collateral estoppel effect. 18 Wright, supra note 8, § 4404, at 22. Thus, where the EPA files suit after the state, but prior to final judgment in state court, a defendant might instead seek a stay or dismissal in federal court under one of several abstention and discretionary stay doctrines. See, e.g., United States v. Cargill, Inc., 508 F. Supp. 734, 745–51 (D. Del. 1981); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813–21 (1976); see also Menzel v. County Util. Corp., 14 Env’t Rep. Cas. (BNA) 1126 (E.D. Va. 1979); infra notes 413–488 and accompanying text.

(2) Adequacy of response, gauged by how expeditiously compliance occurs;
(3) A set number of days to determine whether compliance has been achieved or whether further action is necessary;
(4) A specific point for determining the need for escalation to judicial enforcement;
(5) Establishment of final physical compliance date; and
(6) Expeditious physical compliance.\(^\text{23}\)

In the absence of good performance by a state, the EPA considers itself justified in initiating its own direct enforcement action. If the state has already taken enforcement action, the EPA’s action would be an overfiling. One of the situations specified by the EPA in which it might take direct enforcement action in approved states is when the “[s]tate enforcement response is not timely and appropriate.”\(^\text{24}\)

This criterion, that is, bad state performance, is defined to include situations where:

1. The state action is untimely, or, after notification by the EPA, the state does not move expeditiously;
2. The content of the enforcement action is inappropriate, i.e., remedies are inappropriate, compliance schedules are too extended, or there is no appropriate penalty or other sanction; and
3. The state has not assessed a penalty or other appropriate sanction.\(^\text{25}\)

The specific timeframe in which the EPA expects a state to take enforcement action varies from statute to statute.\(^\text{26}\) A January 1987 report on the success of this program reported a rate of 75% for National Pollution Discharge Elimination System (NPDES), 46% for RCRA, and 22% for CAA.\(^\text{27}\) The report also noted that there are “philosophical differences” between the EPA and the states on the overall use of penalties to achieve compliance, perhaps indicating that what seems appropriate to the EPA does not necessarily seem

\(^{23}\) Id. at 11-12.

\(^{24}\) Id. at 21.

\(^{25}\) Id. at 22-23.

\(^{26}\) According to the EPA:

[If a facility were determined to be in significant violation of RCRA, Air, and NPDES all on the same day, the State or EPA would be expected to either have returned the facility to compliance or taken a formal enforcement action within 120 days for Air; 90 days for RCRA, and 180–270 days for NPDES, depending on when during the quarter the violation was reported.


\(^{27}\) Id. at 1, 12.
so to states.\textsuperscript{28} A comparison showed that the EPA sought penalties in 93\% of RCRA and 81\% of CAA cases, while states sought penalties in 49\% of RCRA and 62\% of CAA cases.\textsuperscript{29}

While such a detailed oversight policy and the degree of control it seeks to impose does not mean that the state and the EPA will be inevitably considered alter egos for the application of res judicata and collateral estoppel, it certainly enhances such an argument. If a state must act "expeditiously" after prompting by the EPA and impose penalties acceptable to the EPA, and if a given statute gives the EPA the authority to see that the state abides by the published EPA policy, this control tends to make the state appear less like an independent sovereign and more like an agent of the EPA.

This Article discusses CWA, SDWA, and RCRA first because their enforcement schemes bear the most resemblance to one another. They are all based primarily on the initial establishment by the federal government of maximum concentrations of pollutants in permitted discharges and subsequent establishment of equivalent programs by the states. The CAA, by contrast, is based primarily on the initial establishment by the federal government of maximum concentrations of ambient air pollutants. These concentration levels are then implemented by state permit programs that set maximum emissions so as to achieve the desired ambient conditions. CERCLA resembles the first group in establishing numerical reportable quantities of the substances it covers, but differs from the other statutes in having no provisions for delegation of primary enforcement authority to federally approved state counterpart programs.

\textbf{B. Clean Water Act}

The Clean Water Act is the primary statute for dealing with water pollution in the United States.\textsuperscript{30} Although the present statute can trace its roots back to the Federal Water Pollution Control Act of 1948, it did not achieve its present structure until the 1972 amendments and did not take its present name until the 1977 amendments.\textsuperscript{31} As now constituted, it seeks to "restore and maintain the

\begin{itemize}
\item \textsuperscript{28} Id. at 12.
\item \textsuperscript{29} Id. at 1, 12.
\item \textsuperscript{31} T. Truitt & R. Hall, \textit{supra} note 21, at 179.
\end{itemize}
chemical, physical, and biological integrity of the Nation's waters."

The issuance of permits to regulate discharges of pollutants into navigable waters under Section 402, and the prohibition of unpermitted discharges under the enforcement provisions of Section 301, are central to achieving this purpose.

One of the policies enumerated in the CWA is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution... and to consult with the Administrator in the exercise of his authority under this chapter." Consistent with this policy, Section 402 allows each state to develop a program for issuing discharge permits within its jurisdiction. Section 309 provides for state enforcement.

Under Section 402(b), the governor of a state desiring to administer its own program for discharge permits may do so by submitting to the Administrator of the EPA (Administrator) a program description under state law and a statement on program authority from the chief legal officer of the state. The Administrator shall approve the program within ninety days unless he or she finds that it lacks the authority to meet the eight criteria set forth in the statute to ensure equivalence with the federal program. Approval of the state program suspends issuance of federal discharge permits. Thereafter, applicants must comply with the state program.

While approval of a state program might appear to be a functional delegation of federal authority to the state, Congress has tried to avoid that term, perhaps to forestall the argument that the EPA and the state are in privity for the sake of res judicata and collateral estoppel under an agency argument. In making its point about

33 CWA § 101(b), 33 U.S.C. § 1251(b) (1982).
delegation, however, Congress concedes that a state program functions "in lieu of" the federal program, a fact also relevant to the privity argument.

Although the approved state permit program supplants that of the EPA, active federal participation does not end. The CWA requires the state to send the EPA a copy of each permit application and notice of every action related to its consideration. The EPA can withdraw approval of state programs subsequently found not to be administered in accordance with Section 402 if corrective action is not taken within ninety days. On a less drastic plane, the Administrator can veto proposed state permits he finds to be "outside the guidelines and requirements" of CWA Subchapter IV. If the state does not resubmit a permit revised to meet the EPA's objections, or if no hearing on the EPA's action is requested, the EPA may issue the permit itself. The EPA may, however, waive all or part of the notification requirement and limit its veto authority when approving a state's program, and regularly does so in regard to small discharger categories of less than 50,000 gallons per day.

Senate had used the word "delegate" in its report, it did not do so with precision. 541 F.2d at 905.

37 See H.R. CONF. REP. NO. 880, 95th Cong., 1st Sess. 104 (1977), reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4424, 4479 which provides as follows:

The conferees wish to emphasize that such a State program [for § 404 discharges] is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority. This is a point which has been widely misunderstood with regard to the permit program under section 402 of the Act. That section, after which the Conference substitutes concerning State programs for the discharge of dredged or fill material is modeled, also provides for State programs which function in lieu of the Federal program and does not involve a delegation of Federal authority.


40 It has been suggested that collateral estoppel should be applicable where EPA vetoes a state permit that has been litigated to finality in the state judicial system. Note, Jurisdiction to Review Informal EPA Influence Upon State Decisionmaking Under the Federal Water Pollution Control Act: Shell Oil Co. v. Train, 92 HARV. L. REV. 1814, 1821-22 (1979); see also Bullwinkel, Environmental Law-The Uneasy Accommodation Between State and Federal Agencies, 25 DE PAUL L. REV. 423, 433 (1976) (discussing the thorough administrative review and available judicial review in Illinois that should preclude litigation in the United States Court of Appeals). It is difficult to see how such a case would arise factually, given the time constraint on the exercise of EPA's veto authority—90 days after notice of the proposed permit. 33 U.S.C. § 1342(d).


44 Interview with David T. Buente, Jr., Chief, Environmental Enforcement Section, United States Department of Justice (April 7, 1987).
In a similar vein, the EPA enforcement authority continues in approved states. Section 309(a)(1) permits enforcement by the EPA of permits issued by a state if the state does not initiate "appropriate enforcement action" within thirty days of notice of a violation from the EPA. If permit violations are widespread in a given state, and if the EPA believes that this condition is a result of ineffective state enforcement, the EPA can declare a period of "federally assumed enforcement" and take enforcement action directly without the thirty day notice. This provision has never been used, perhaps because Section 309(a)(3) also provides authority for the EPA to take enforcement action on a state-issued permit without regard to the appropriateness of the state action and without a thirty day notice. In addition, Section 504 authorizes the Administrator to act whenever there is evidence of an imminent and substantial endangerment to personal health or welfare.

Because the EPA enforcement in an approved state can be triggered by a lack of "appropriate" state action, this ambiguous standard can be seen as statutory justification for the previously mentioned EPA overfiling policy, at least for actions under the CWA. A statutory basis for an action, however, does not necessarily prevent the operation of res judicata or collateral estoppel, at least where there is no explicit or implicit repeal of those doctrines.

Although the CWA states specifically that devolution of permitting authority to the states does not limit the EPA's enforcement authority, this condonation of overfiling, by itself, may not preempt common law res judicata and collateral estoppel principles either.
Moreover, other provisions, which bear a suspicious resemblance to res judicata, explicitly limit the enforcement authority of the EPA to bring successive (or simultaneous) actions for the same event. Section 311(b)(6)(E), which covers discharges of oils and hazardous substances, prohibits assessment of civil penalties under both Section 311 and Section 309 for the same discharge.\(^{50}\) One might argue that this impliedly repeals other applications of res judicata and collateral estoppel by omission, or that, since it applies only to successive federal actions, it is irrelevant to federal/state actions except to show that res judicata principles are not inherently inimical to the enforcement scheme under the CWA. Perhaps this subsection only reinforces the notion that the meaning of the CWA is not always clear.\(^{51}\)

If the arguments on the relevance of Section 311(b)(6)(E) have any merit, they are probably also applicable to the 1987 amendment to the CWA,\(^{52}\) which added expanded provisions to CWA Section 309. The criminal penalties provision of Section 309(c)\(^{53}\) now provides that, for its purposes, “a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.”\(^{54}\) The Section 309(d) provision for civil penalties had identical language added.\(^{55}\)

The same amendment added to Section 309(g) a new provision for administrative penalties. This provision contained the limitation that a violator being prosecuted diligently under it by the EPA, Secretary of the Army, or a state under a comparable law, or against whom a final order had been issued by any of those and the fine paid, could not be subjected to civil actions under Section 309(d), Section 311(b), sections cannot expressly repeal the application of res judicata or collateral estoppel to the overfiling scenario. See infra notes 371–77 and accompanying text.

\(^{50}\) This provision was added by the 1978 amendment to the Federal Water Pollution Control Act, Pub. L. No. 95-576, § 311(b)(6)(E), 92 Stat. 2467, 2469 (1978). Its legislative history, however, is unenlightening. See H.R. REP. No. 1097, 95th Cong., 1st Sess. (1978).

\(^{51}\) See, e.g., United States v. Redwood City, Cal., 640 F.2d 963, 969 & n.7 (9th Cir. 1981) (citing Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1162 (2d Cir. 1978)).


\(^{53}\) Successive criminal prosecutions for the same act raise the possibility of application of another doctrine—double jeopardy. Double jeopardy is an element of the fifth amendment and most state constitutions. It neither supplants nor abrogates res judicata or collateral estoppel. These doctrines take a broader view of what constitutes a single offense, and may be available when the prohibition on double jeopardy is not. On the other hand, double jeopardy is available in the absence of a judgment, while these doctrines are not. Annotation, Res Judicata—Criminal Cases, 9 A.L.R. 3d 203, 220–24 (1966 & Supp. 1988).


\(^{55}\) See id. at 45–46.
or Section 505 (citizen suits). These specific provisions indicate that Congress is taking an increasingly broad view of what constitutes a single cause of action under the CWA, and an equally dim view of redundant enforcement actions.

CWA enforcement provisions make clear that the EPA exercises much influence over states with approved programs, in spite of a savings provision for state authority. While the CWA's policy may be to recognize that primary enforcement authority rests in the states, the Act also gives the EPA the tools necessary to ensure that the exercise of the states' authority is consistent with the EPA's view of the Act. First of all, state programs must provide protection equivalent to the EPA's program to be approved. Even when a state has its own program, the EPA can still veto individual permits and issue permits more to its liking. If a state steps too far out of line, the entire state program can be put on hold until corrections are made. If a state does not take "appropriate" action against a polluter, it can suffer the embarrassment of an overfiling. If a state becomes too lax in the eyes of the EPA, it can suffer the indignity of federally assumed enforcement. If one can assume that there are economic advantages driving a state to achieve and retain approved status, the EPA's ability to influence state action is great indeed.

C. Safe Drinking Water Act

Congress passed the SDWA in 1974 to deal with perceived widespread contamination of drinking water with synthetic organic chemicals. The SDWA instituted two different regulatory programs that the states can assume: one establishing numerical drinking water standards for public water systems and one regulating underground injections.

56 Id. at 48.
59 The fact that there is some advantage to having an approved program can be seen from the number of states that have achieved that status. Thirty-eight states and one territory were recently reported as having approved programs under section 402. 52 Fed. Reg. 27,579 (1987).

The statutory power to rescind approval of a program previously delegated to a state may be less awesome than it appears, however, because of political realities. The EPA recently abandoned efforts to withdraw North Carolina's RCRA authority after a firestorm of protests. EPA Postpones North Carolina Hearing; Final Policy on RCRA Withdrawal Yet to Come, 19 Env't Rep. (BNA) 738--39 (1988).

60 Durenberger, Revising the Drinking Water Law, EPA JOURNAL, Sept. 1986, at 4; T. TRUITT & R. HALL, supra note 21, at 422.
Congress' plan for the drinking water program was that the EPA would establish national drinking water standards and the states would monitor the quality of water delivered to consumers by public water systems and take enforcement action when necessary.61 A state can achieve primary enforcement responsibility upon a finding by the Administrator that its regulations meet criteria set forth in Section 1413(a), including adequate inspection, monitoring, and enforcement.62 Upon approval, the state is deemed to have "primary enforcement responsibility."63 The EPA retains the authority under Section 1413(b)(1), however, to determine whether a state is no longer meeting the criteria and presumably no longer has enforcement authority.64

Primary enforcement responsibility gives the state authority to grant variances under Section 1415 from the EPA drinking water regulations.65 Primary enforcement responsibility also gives the state the authority to grant an exemption under Section 1416 from the EPA regulations for compelling factors, including economic factors. The state must give the EPA prompt notification of both variances66 and exemptions67 the state grants. The EPA can modify state-granted variances and exemptions if the EPA finds that the state has abused its discretion in a substantial number of instances.68

The EPA retains authority to enforce the drinking water regulations through administrative orders and civil court actions in states


62 All but two states have done so. Only the states of Indiana and Wyoming, plus the District of Columbia, do not have primary enforcement responsibility. See Who Keeps Your Drinking Water Safe?, EPA JOURNAL, Sept. 1986, at 21.


67 SDWA § 1416(c), 42 U.S.C. § 300g-5(c) (1982).

68 The provision for variances is at SDWA § 1415(a)(1)(G)(1), 42 U.S.C. § 300g-4(a)(1)(G)(i) (1982); and the provision for exceptions is at SDWA § 1416(d)(2)(A), 42 U.S.C. § 300g-5(d)(2)(A) (1982). While each provision might appear to give the EPA substantially less oversight than under the CWA, which allows the EPA to veto permits on a case by case basis before they become final, waiver by the EPA of its CWA veto authority may result in little difference in practice. See supra note 42 and accompanying text.
with primary enforcement authority, but must first give a thirty day notice to the state and the water system. The EPA is required to act if the state does not commence appropriate enforcement action within that period. Unlike the situation under the CWA, under the SDWA the EPA may act only if the state fails to do so or if the state’s action is ineffective. As restrictive of the EPA’s discretion as this language is, this provision was actually more restrictive before the SDWA amendments in 1986. Even where a court agrees with the EPA that a state’s action has not been appropriate and the statute specifically contemplates overfiling, a defendant might argue that relitigation of specific issues already decided in the state case ought to be precluded under collateral estoppel if the relationship between the state and the EPA is one of privity under the SDWA. In response, the EPA might, however, seek to preclude relitigation of some issue decided favorably to its interests in the first case by asserting nonmutual offensive collateral estoppel against the defendant.

The SDWA also has a savings provision for state authority, allowing adoption or enforcement of any state drinking water law or regulation. Interestingly, this provision expressly provides that compliance with such a state law or regulation that is not part of the EPA-approved state program will not relieve any requirement for compliance under the SDWA. This provision seems to preclude any arguments for the application of res judicata or collateral estoppel to any final judgments resulting from such state laws. One is left to wonder what effect Congress intended for final judgments resulting from state laws enacted pursuant to the SDWA and approved by the EPA. At least to the extent that state enforcement actions leading to those judgments can be deemed “appropriate,” it seems that Congress intended for the EPA to stay its hand. Thus, a state’s action under the EPA-approved portion of its SDWA program will

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69 42 U.S.C. § 300g-3(a)(1), (b).
73 See infra note 275 for a discussion of mutuality.
74 See SDWA § 1414(e), 42 U.S.C. § 300g-3(e) (1982).
have more preclusive effect on the EPA than an action under the unapproved portions of its law, a result consistent with sovereignty considerations. An enforcement action by a state under its ordinary laws is a purer exercise of sovereignty, whereas, for the approved laws, Congress apparently views the state and the EPA as alternate enforcers of a single scheme.

Similarly, the plan for the underground injection control (UIC) program requires the EPA to establish minimum requirements for effective state programs to protect drinking water supplies from underground injections.\textsuperscript{75} State programs must require permits for underground injections and prevent underground injections of pollutants which endanger drinking water supplies.\textsuperscript{76} States determined by the EPA to need such a program to protect their groundwater are required to apply to the Administrator for approval, and, upon obtaining it, acquire primary enforcement responsibility.\textsuperscript{77} Such authority may be withdrawn only after opportunity for a public hearing.\textsuperscript{78}

As with the drinking water program, the EPA retains authority to enforce the UIC program in states with primary enforcement authority and is required to take action on violations that continue for thirty days after notice to the state and violator if the state does not take “appropriate enforcement action.”\textsuperscript{79} The EPA can take administrative or civil action and can also take criminal action for willful violations.\textsuperscript{80} There are no analogous provisions for variances or exemptions, but there is a savings provision similar to that of the drinking water program for other state laws not included in the approved program.\textsuperscript{81} The impact of this provision on res judicata and collateral estoppel is also similar to that described above for the drinking water program.

In addition to the authority to enforce the UIC program, the EPA retains the authority to act against imminent endangerments to health.\textsuperscript{82} The Administrator is required to consult with state author-

\textsuperscript{75} SDWA § 1421(b)(1), 42 U.S.C. § 300h(b)(1) (1982).
\textsuperscript{76} T. TRUITT & R. HALL, supra note 21, at 423.
\textsuperscript{81} SDWA § 1431(d), 42 U.S.C. § 300h-1(d) (1982).
ities only “to the extent he determines to be practicable” in executing this authority, thus confirming the continuing ability of the EPA to act independently of the state.

In conclusion, the SDWA enforcement programs are similar to those of the CWA, with perhaps more emphasis on state primacy. The statute presents the same opportunity for the EPA overfiling, includes an “appropriateness” standard for state enforcement actions, and is ambiguous as to the effect of prior state action under its approved program. It is not ambiguous, however, with regard to prior state actions under other water laws. These state laws outside the approved program do not have an effect equivalent to res judicata or collateral estoppel. Perhaps by omission one can infer that prior state enforcement action under approved portions of a state program would have preclusive effect on subsequent EPA actions, at least to the extent that the state actions were “appropriate.” Whether or not res judicata and collateral estoppel could be applied in an overfiling situation might well turn on how much discretion a court would allow the EPA in its determination that a given state action was inappropriate. That no such issue has yet arisen in a reported case is not surprising, given the dearth of enforcement action under the SDWA at all levels.

D. Resource Conservation and Recovery Act

RCRA Subtitle C establishes a comprehensive program for the control of hazardous wastes from the time of their generation until their ultimate disposal. The federal government through the EPA is empowered and required to identify and list hazardous wastes and to establish standards for generators, transporters, and owners and operators of facilities to treat, store, and dispose of hazardous wastes. RCRA also requires a federal permit program for owners or operators of new or existing treatment, storage, or dis-

83 Id.
84 Durenberger, supra note 60, at 5 (citing a 1981 GAO compliance study).
89 42 U.S.C. § 6924; 40 C.F.R. pt. 265 (1987). The regulations at 40 C.F.R. part 265 apply to interim status permits, that is, to those applicable to facilities already in existence on the effective date of statutory or regulatory requirements that have not yet obtained final status, while the regulations at 40 C.F.R. part 264 apply to final permits.
positional facilities. Finally, the EPA is required to promulgate guidelines for development of comparable state programs.

Any state desiring to administer and enforce its own hazardous waste program can apply to the Administrator under guidelines promulgated by the EPA. Such proposed programs must be "equivalent to the Federal program" of the EPA, be "consistent with Federal or State programs applicable in other States," and "provide adequate enforcement of compliance." The approved portions of a state's proposed program then become the federal law applicable in that state and are codified in the Code of Federal Regulations.

Congress described the system created by RCRA as a "Federal-State partnership" for the control of hazardous wastes. Once a program has been established by a state and approved by the EPA, that state then takes over primary responsibility for issuance of permits and enforcement. The EPA becomes, in effect, a senior partner with oversight responsibility and power to withdraw state authority for cause. The EPA also has explicit continuing authority to take enforcement action on its own, even if the state has an approved program that supplants the federal program in that state. In addition, the EPA retains its authority to act against "imminent and substantial endangerments to health or the environment."

Once a state's program is approved by the EPA, that state is authorized to carry out such a program in lieu of the federal pro-

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91 42 U.S.C. § 6926(a).
92 42 U.S.C. § 6926(b).
93 Only the states of Delaware and Montana have had the approved portions of their state programs incorporated by reference and made a part of the hazardous waste management program through codification in the Code of Federal Regulations. See 40 C.F.R. §§ 272.401, 272.1351 (1987). What action the EPA can legally take in the other forty states with approved programs but without such promulgations is problematic. To date, no defendant has raised this lack of codification as an issue in an overfilling case. Telephone interview with Susan Absher, Chief of Oversight, State Programs Branch, Office of Solid Wastes, EPA (Mar. 3, 1987).
94 RCRA § 1003(a)(7), 42 U.S.C. § 6902(a)(7) (1982 & Supp. IV 1986), amended, 42 U.S.C.A. § 6902(a)(7) (West Supp. 1988), lists one of the objectives of the statute as "establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will... give a high priority to assisting and cooperating with states in obtaining full authorization of State programs...."
96 See RCRA § 3006(e), 42 U.S.C. § 6926(e) (1982).
gram. Thereafter, a state’s action under its hazardous waste program has the same force and effect as the EPA’s action under the federal program. However broad the powers of a state with an approved program, the “in lieu of” language has not been interpreted in a way that seriously disables the continuing authority of the EPA. Citing this explicit continuing enforcement authority, the Ninth Circuit has held that an approved state program does not entirely preempt the EPA. Rather, the EPA continues to have the authority to issue orders requiring owners and operators to monitor, test, analyze, and report results. Although the court’s language holds forth the possibility of a partial preemption, it does not explain its scope.

In contrast to the Ninth Circuit, one administrative court held that Congress did intend that the EPA be precluded from taking enforcement action in an approved state when the state had already taken adequate enforcement action itself on the same alleged violation. In the Matter of BKK Corporation involved the operation of a hazardous waste facility in California that had been authorized to operate its own hazardous waste program. The EPA filed an administrative complaint against BKK after BKK had entered into a comprehensive and objectively reasonable settlement agreement with the state. Citing the legislative history of RCRA and the “in lieu of” and “same force and effect” language in the statute, the administrative law judge concluded that, in this situation, the EPA was precluded from overfiling. The judge reasoned that to decide otherwise would eliminate any reason for a defendant to negotiate seriously with a state. On appeal, the Chief Judicial Officer rejected the EPA’s claim of “unfettered” enforcement authority. Instead, he held that the state’s action was reasonable and appropriate and that to allow the EPA to seek double penalties would undermine the authority granted to states in RCRA.

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99 42 U.S.C. § 6926(b).
101 Wyckoff Co. v. EPA, 16 Env't L. Rep. (Env't L. Inst.) 20866, 20867-68 (9th Cir. 1986).
102 Id.
103 See id. at 20868.
105 See id. at 9. The agreement obligated BKK to spend $1,306,000, commit to a firm work schedule, and submit to daily supervision under the state’s authority. Id.
106 See id. at 1, 25.
107 Id. at 34-35.
108 In re BKK Corp., No. IX-84-0012, slip op. at 7-10 (EPA May 10, 1985). Res judicata was technically inapplicable because the state action was embodied in an informal settlement agreement without judicial approval. Id. at 9 n.9.
On an appeal by the EPA for reconsideration, the precedential effect of these two holdings—that the EPA action could be precluded by prior state action—evaporated. The EPA Administrator, noting that the EPA was no longer challenging the previous findings that the state’s actions were reasonable and appropriate, dismissed the original complaint by the EPA, vacated the two administrative decisions, and ruled that they would have no precedential effect. An additional fact tending to limit the circumstances under which the issue might arise again is the previously discussed EPA overfiling policy, implemented after the BKK complaint was filed, which restricts the EPA overfilings to situations where state action has not been timely or appropriate. As long as the EPA adheres to such a policy, it should not matter whether the restriction is self-imposed or required by the language of RCRA or any other statute. In no reported case has a judge considered such a statutory interpretation of RCRA, although an attempt to argue for a similar interpretation of the CAA was unsuccessful.

In spite of the Administrator’s action in BKK, it still may be possible to argue that the EPA policy embodies a statutory standard precluding subsequent EPA action as long as the state’s prior action is adequate by some objective standard. Even the defendant, BKK, conceded that the EPA could “step in” when state action was “inadequate.” At the very least, the language of RCRA seems to open the door to judicial scrutiny of the EPA overfilings based on determinations that certain state actions are inadequate, using the standards of the Administrative Procedures Act. It remains to be seen just what facts would allow a judge to overrule a finding by the EPA, because lack of “adequacy” as defined by the EPA is far from an objective standard. Presumably, the EPA would be entitled to a great deal of deference, as it is elsewhere in environmental law.

110 18 WRIGHT, supra note 8, § 4404, at 22.
112 See United States v. SCM Corp., 615 F. Supp. 411, 419 n.20 (D. Md. 1985). The issue was also raised in a subsequent administrative case under RCRA, but the administrative law judge ruled that the state action was inadequate because it could not obtain meaningful compliance from the defendant within a reasonable period of time. EPA v. Cyclops Corp., No. RCRA-V-W-85-R-002, slip op. at 7 (EPA Sept. 24, 1985).
113 In re BKK Corp., No. IX-84-0012, RCRA(3008)84-5, slip op. at 10 n.11 (EPA May 10, 1985).
115 E.g., Chemical Mfrs. Ass’n v. Natural Resources Defense Council, Inc. (NRDC), 470 U.S. 116, 126 (1983) (“We should defer to [EPA’s] view unless the legislative history or the
This deference is still limited, however, by a reviewing court’s power to ensure consistency with statutory mandates and congressional policy. 116

In exploring the continued value of the BKK defense, the language of the statute should be instructive, but it is not. The only specifically stated constraint placed on the EPA when taking enforcement action in a state with an approved RCRA program is that the Administrator must first give notice to the state. 117 This provision clearly preserves the right of the EPA to take enforcement action in authorized states, but just as clearly gives some deference to states through the notice requirement while not addressing the effect of a prior enforcement action taken by the state. Neither this provision nor any other specifically refers to overfiling, res judicata, or collateral estoppel.

RCRA’s legislative history also makes no reference to overfiling, res judicata, or collateral estoppel. As originally enacted, RCRA required the Administrator to give the state a thirty day notice before commencing an enforcement action. 118 This thirty day period was designed to encourage corrective action by continuous emitters but was eliminated in 1980 to make it easier to prosecute midnight dumpers and other single occurrences. 119 Neither the legislative history of the original language nor that of the new language evidence any explicit consideration of the overfiling situation.

purpose and structure of the statute clearly reveal a contrary intent on the part of Congress.”); see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 555 (1978) (“the role of a court in reviewing the sufficiency of an agency’s consideration of environmental factors is a limited one”).

In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006 [§ 6926 of Title 42], the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.


Thus, both the language of RCRA and its legislative history are silent on the issue of overfiling. The law is also silent on the application of res judicata and collateral estoppel to overfilings. Prior notice to the state is a precondition to all filings by the EPA in authorized states, whether or not the state has contemplated, initiated, or completed action on its own. The law makes no mention of overfilings as a separate subcategory of filings and places no additional restrictions on them. On its face, then, the statute seems to leave the decision on overfiling to the discretion of the Administrator. At the same time, it seems to leave to the courts by default the decision on application of res judicata and collateral estoppel.

Although the EPA Office of General Counsel continues to insist that the language of RCRA affords the Administrator "complete prosecutorial discretion," RCRA does not explicitly preempt common law res judicata and collateral estoppel. There is no inherent contradiction in this, however, because res judicata and collateral estoppel are affirmative defenses and do not technically limit a prosecutor's discretion, although they can have a devastating effect on the prosecution's success.

Ironically, the BKK argument—that the language of RCRA preempts EPA overfiling when there has been prior adequate state action—may be at odds with arguments that the EPA and the states are in privity for res judicata and collateral estoppel purposes. The BKK argument depends on independent preemptive state action, whereas privity, in at least one of its forms, depends upon a finding of the EPA control over the state. While theoretically a defendant might be able to make both arguments in the alternative, it is unlikely that the facts of a given case would support arguments for both independent and subservient state action. It may be better defensive strategy to make only the argument with the best chance for success on the particular facts of a given case.

E. Clean Air Act

The CAA is the major federal legislative effort to deal with air pollution from both mobile and stationary sources. The law creates a program recognizing the primary responsibility of states for regulation of stationary sources, while establishing federal preemp-

120 Memorandum from Francis S. Blake, EPA General Counsel, to Lee M. Thomas, EPA Administrator, at 1 (May 9, 1986) (regarding effect on EPA enforcement of enforcement action taken by state with approved RCRA program).
tion in the regulation of mobile sources.\textsuperscript{122} Thus, the portions of the Act relating to stationary sources is of primary importance in the overfiling analysis. The federal role in stationary source regulation is to establish uniform national standards for the concentration of criteria pollutants in the ambient air, called national ambient air quality standards (NAAQS). NAAQS are achieved in each state through the implementation of a state implementation plan (SIP). The NAAQS are used as the basis for establishing emission limits in individual permits issued to sources under the SIP.

The CAA differs markedly from the other statutes discussed here because the centerpiece of the program, the establishment of NAAQS, lacks any enforceable provisions at the federal level in the absence of an approved state program. Not until the EPA has approved an SIP for a state is there any mechanism to enforce the federally established standards. As a result, there is no federal NAAQS program to be delegated to the states.

Apart from the NAAQS and the SIP, however, the CAA established four programs under the Act that are enforceable by the federal government before the EPA approves corresponding state programs, just as under the other statutes. These programs are the new source performance standards (NSPS) in Section 111 of the Act, the national emission standards for hazardous air pollutants (NESHAPS) in Section 112, noncompliance penalties for stationary sources in Section 120, and the program for prevention of significant deterioration (PSD) in Sections 160–169.\textsuperscript{123} States can carry out these programs as well as the SIP by submitting an adequate procedure to the EPA and obtaining its approval.\textsuperscript{124} In the case of a PSD program, a state must revise its SIP and get the EPA approval of the new provisions.\textsuperscript{125} The EPA’s authority to enforce the provisions is retained in approved states.\textsuperscript{126}

\textsuperscript{122} CAA §§ 209(a), 233, 42 U.S.C. §§ 7543(a), 7573 (1982). There is, however, a waiver provision in section 209(b), 42 U.S.C. § 7543(b) (1982), that allows California to set standards for vehicles.

\textsuperscript{123} Miller, Enforcement Under the Clean Air Act, in ENVIRONMENTAL LAW II 329 (A. Reitze ed. 1987).


\textsuperscript{125} See id. Interestingly, the statute refers to this transfer of authority to the states for the first three CAA programs as a delegation, the very term that was studiously avoided under the CWA. See id. The considered avoidance of this word in the CWA may indicate that, by using it in the CAA, Congress did intend that the EPA would be precluded by prior state action. See supra note 37.

Although states have some latitude in deciding to take over the four preceding programs, promulgation of an SIP is hardly a voluntary act on the part of a state. According to the CAA, each state "shall" adopt and submit a plan within nine months after an initial promulgation or revision of a NAAQS.\(^{127}\) Of the numerous provisions to encourage or force state acquiescence, the strongest is probably the provision that allows the EPA itself to promulgate an SIP for a state that fails or refuses to do so.\(^{128}\) It is no surprise, then, that all states have SIPs.\(^{129}\)

In order for a state to obtain the EPA approval for its SIP, the SIP must meet detailed and lengthy requirements specified in the Act.\(^{130}\) Of primary concern here is the requirement of Section 110(a)(2)(D) that an SIP include a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source.\(^{131}\) By dictating the specifics of an enforcement program and limiting a state's enforcement discretion, the line between the EPA and its state counterpart is blurred and leads to the argument that the two are in privity by virtue of the EPA's strong influence. Further strengthening the EPA influence over the state program is the fact that courts have accorded the EPA wide latitude in the approval or disapproval of SIPs.\(^{132}\)

In addition to influence over programs, the EPA can enforce the requirements of an SIP by first giving notice to the state and the violator. Any violation extending beyond the thirtieth day after notice can be enforced by an administrative order or a civil judicial action.\(^{133}\) No notice is required before direct federal enforcement of the other programs mentioned above that are enforceable without being incorporated into the SIP.\(^{134}\) As with the CWA, widespread


\(^{129}\) Approved SIPs are reprinted at 40 C.F.R. §§ 52.50–52.2900 (1987).

\(^{130}\) CAA § 110, 42 U.S.C. § 7410(a)(2) (1982). This section, which embodies the primary list of requirements, contains eleven paragraphs of specifics, while other programs in the Act require additional details in the SIP. For example, in order to obtain an extension to the deadline for compliance with the NAAQS for photochemical oxidants or carbon monoxide, the SIP must be revised to comply with the eleven requirements of section 172, 42 U.S.C. § 7502 (1982), as well.


\(^{132}\) See, e.g., Connecticut Fund for the Environment, Inc. v. EPA, 696 F.2d 169, 173 (7th Cir. 1982); Steel Corp. v. EPA, 633 F.2d 671, 673 (3d Cir. 1980). See generally 1 W. RODGERS, supra note 7, § 3.10, at 259.


violations of an SIP can lead to a period of "federally assumed enforcement" during which the thirty day notice is not required.\textsuperscript{135} Finally, as with the other statutes, the EPA has independent authority to bring suit immediately to deal with an "imminent and substantial endangerment."\textsuperscript{136}

Unlike the SDWA and the ambivalent provisions of the CWA, the EPA enforcement under the CAA is not presently explicitly predicated upon a lack of appropriate state action. Prior to the 1970 CAA Amendments, the Air Quality Act of 1967 permitted federal enforcement only where the state had failed "to take reasonable action to enforce such standards."\textsuperscript{137} The repeal of this provision\textsuperscript{138} was cited in a district court opinion for the proposition that Congress intended to eliminate bars to federal enforcement from prior state action while another opinion cited the new language for its holding.\textsuperscript{139} Both of these cases, however, involved situations where there was no final state judicial action and the defendants were arguing for abstention by the federal judge. Another district court reached the same conclusion in a factually similar case based upon a general reading of the statute. The judge was simply unwilling to accept any nullification of federal enforcement authority by a state action.\textsuperscript{140}

In addition to the approval of delegated programs, the CAA has provisions giving the EPA control over state enforcement that do not have counterparts in other statutes. Delayed compliance orders, which may be issued by the states to sources that are not able to comply immediately, can be voided by the EPA if they pertain to a non-major source. In addition, these orders are not effective until the EPA validates them in the case of a major source.\textsuperscript{141} Moreover, the EPA can void a state noncompliance penalty under Section 120

\begin{itemize}
\item \textsuperscript{135} CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2) (1982).
\item \textsuperscript{136} CAA § 303, 42 U.S.C. § 7603 (1982).
\item \textsuperscript{138} \textit{See generally} Senate Committee on Public Works, 93d Cong., 2d Sess., A Legislative History of Clean Air Act Amendments of 1970, 112–13, 133, 146, 163 (Comm. Print 1974).
\item \textsuperscript{140} United States v. SCM Corp., 615 F. Supp. 411, 419 (D. Md. 1985). The same district court held in an earlier case that an agreement with the state to a compliance schedule did not insulate the defendant from a federal enforcement action, but would be considered in determining the amount of the civil penalty to be levied. United States v. Harford Sands, Inc., 575 F. Supp. 733, 735 (D. Md. 1983).
\item \textsuperscript{141} CAA § 113(d)(2), 42 U.S.C. § 7413(d)(2) (1982 & Supp. IV 1986)
\end{itemize}
if it objects to the state’s assessment.\textsuperscript{142} All in all, it appears that a state enforcement program under the CAA has less independence from the EPA than under other statutes, enhancing the argument that actions of the state ought to be considered actions of EPA under a res judicata or collateral estoppel analysis.

Although no case directly addresses the effect of the EPA control over state enforcement, an early Sixth Circuit CAA case addressed the issue of res judicata in a footnote:

\begin{quotation}
It would seem to us that the court which first acquired jurisdiction of enforcement proceedings would have exclusive jurisdiction to proceed to determine the litigation, and its judgment would be res judicata of the issues litigated. In view of the fact that both federal and state courts acquire jurisdiction by a single Act of Congress, we do not think that Congress ever intended that the parties defendant to enforcement proceedings would be subject to double penalties, i.e., penalties in each jurisdiction.\textsuperscript{143}
\end{quotation}

This focus on a single statutory construct is probably enhanced by the fact that the Act is generally silent as to its intended effect on multiple prosecutions. In addition, the CAA specifically states that actions under Section 120 are to “be in addition to any other permits, orders, payments, sanctions, or other requirements established under this chapter, and shall in no way affect any civil or criminal enforcement proceedings brought under any provision of this chapter or State or local law.”\textsuperscript{144} On the one hand, it is perhaps a fair inference that Congress by its silence intended that in other situations the common law preclusion rules would apply. On the other hand, a counterargument can be formulated from the fact that several provisions preserve federal enforcement authority in the face of approved state plans\textsuperscript{145} and the fact that state authority to enact more stringent regulations than required by the EPA is also preserved.\textsuperscript{146}

\section*{F. Comprehensive Environmental Response, Compensation, and Liability Act}

In many ways, CERCLA is unique. It is the most recent of the statutes, dating only from December 11, 1980; it is the only one to

\begin{itemize}
\item \textsuperscript{142} CAA § 120(a)(2)(C), 42 U.S.C. § 7420(a)(2)(C) (1982).
\item \textsuperscript{143} Buckeye Power, Inc. v. EPA, 481 F.2d 162, 167 n.2 (6th Cir. 1973), \textit{after remand}, 523 F.2d 16 (6th Cir. 1975), \textit{cert. denied}, 425 U.S. 934 (1976).
\item \textsuperscript{144} CAA § 120(f), 42 U.S.C. § 7420(f) (1982).
\item \textsuperscript{145} \textit{See supra} note 125.
\item \textsuperscript{146} CAA § 116, 42 U.S.C. § 7416 (1982).
\end{itemize}
mention collateral estoppel by name, and it is the only one that does not have as a goal the delegation of primary enforcement responsibility to the states. In spite of this last distinction, CERCLA does present opportunities for preclusion arguments because of potential overlap with analogous state programs and because it presents factual situations in which the EPA itself is likely to seek multiple recoveries from the same defendant.

Congress passed CERCLA after experience with the infamous Love Canal hazardous waste site and other events showed that existing law was inadequate to deal quickly with many actual or threatened releases of hazardous substances. Section 7003 of RCRA, which dealt with imminent hazards and was RCRA’s only retroactive provision, had the most promise of existing laws, but could not deal with releases of contamination from abandoned facilities, vessels, and other sources not subject to RCRA. CERCLA was created to fill the gaps in existing laws by providing coverage for all releases, intentional or accidental, from all facilities, active or inactive, and at all times, past or present. Courts have held the standard of liability created thereby to be strict, joint, and several.

CERCLA directs its efforts toward “hazardous substances,” which are defined by reference to lists from other statutes as well as by rulemaking under CERCLA itself. The primary thrust of the law is to compel responsible parties to report and clean up releases of these hazardous substances when they occur without a federal permit. The EPA is given the authority to initiate the cleanup itself or to require those potentially responsible to do it.

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147 CERCLA provides in part:
[N]o person asserting a claim against the Fund pursuant to this subchapter shall as a result of any determination of a question of fact or law made in connection with that claim be deemed or held to be collaterally estopped from raising such question in connection with any other claim not covered or assertable against the Fund under this subchapter arising from the same incident, transaction, or set of circumstances. CERCLA § 112(e), 42 U.S.C. § 9612(e) (1982) (emphasis added).


150 Id. at 1-2; see also Frank & Atkeson, supra note 148, at 2. Congress used CWA § 311 as the model for CERCLA. See generally Superfund: How It Will Work, What It Will Cost, CHEMICAL WEEK, Dec. 17, 1980, at 38–41.


153 Mays, supra note 151, at 283–84.
handles the cleanup itself, it draws upon a fund, nicknamed the Superfund, created by the Act and derived primarily from a tax on chemical feedstocks.\textsuperscript{154}

Enforcement actions under CERCLA are generally of two types: those under Section 106 to force parties responsible for the contamination to clean it up, and those under Section 107 to recover costs from the responsible parties when others have done the cleanup, such as when the EPA has used Superfund money.\textsuperscript{155} Section 106 is couched in the broadest of terms by specifying no class of defendants, authorizing the President to seek “necessary” relief, and requiring either an actual or threatened release of a hazardous substance. Such an action is expressly allowed “in addition to any other action taken by a State or local government,” thus foreclosing the \textit{BKK} argument for an implicit statutory preclusion defense.

Several sections of CERCLA deal openly with the possibility of multiple lawsuits. The law prohibits double recoveries by stating that a person who has received compensation under CERCLA may not also receive compensation under any other state or federal law for the same removal costs, damages, or claims, and vice versa.\textsuperscript{156} Double recoveries from the fund itself are also prohibited.\textsuperscript{157} Section 112(e), however, provides that determinations of law or fact in connection with a claim against the fund will not have collateral estoppel effect in other claims not asserted or assertable against the fund “arising from the same incident, transaction, or set of circumstances.” Decisions by a Board of Arbitrators set up under a former provision to hear claims are similarly limited in preclusive effect.\textsuperscript{158} There is also a savings provision that expressly protects other statutory or common law claims from preclusion arguments when a Section 107 cost recovery is being sought, including protection from the argument that the plaintiff has split a cause of action.\textsuperscript{159}

\textsuperscript{154} Frank & Atkeson, \textit{supra} note 148, at 2.
\textsuperscript{155} Id.; see also \textit{HALL}, \textit{supra} note 149, at 1–3.
\textsuperscript{156} CERCLA § 114(b), 42 U.S.C. § 9614(b) (1982).
\textsuperscript{157} CERCLA §§ 107(f)(1), 112(f), 42 U.S.C. §§ 9607(f)(1), 9612(f) (1982 & Supp. IV 1986). Section 9607(f)(1) also prohibits double recovery for damages to natural resources. The legislative history indicates that neither of these provisions was intended to prohibit additional claims or actions for different damages arising from the same transaction, a statement that limits the application of res judicata. See H.R. REP. No. 962, 99th Cong., 2d Sess. 221, \textit{reprinted in} 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3313.
\textsuperscript{159} CERCLA § 112(c) provides in part:

Regardless of any State statutory or common law to the contrary, no person who asserts a claim against the Fund pursuant to this subchapter shall be deemed or held
This mention of claim splitting is a reference to res judicata. A cause of action is "split" when the same cause of action (injury) is the basis for two or more separate suits, even though the legal theories or grounds for recovery may differ. Res judicata discourages claim splitting by the simple principle that the judgment in the first suit to reach finality will bar any recovery in subsequent suits on the same cause of action. The effect of res judicata and its rule against splitting is to force the plaintiff to advance in its first suit all theories and grounds for recovery arising from a given cause of action.\(^{160}\)

The scope of such a bar depends, of course, upon how broadly a cause of action is defined. In limiting the application of res judicata through Section 112(e) of CERCLA, Congress seems to have implicitly presumed that the term "cause of action" would be broadly defined to include all injury arising from the same incident, transaction, or set of circumstances.\(^{161}\) It is also noteworthy that Congress did not specifically sanction the splitting of causes of action in successive CERCLA Section 107 actions. Thus, CERCLA acknowledges the potential application of preclusion defenses to situations it creates and does not provide protection from preclusion arguments for multiple actions brought under CERCLA Section 107 as it does for other statutory or common law claims.

Consistent with this distinction, CERCLA specifically provides that it does not preempt the right of states to impose additional liability for releases of hazardous substances.\(^{162}\) Perhaps because of CERCLA's language, many states have enacted similarly far-reaching statutes. As of September 1, 1985, twenty-six states had passed their own so-called "mini-superfunds."\(^{163}\) Because of CERCLA Section 112(e), there is little basis for preclusion arguments when there

\(\text{to have waived any other claim not covered or assertable against the Fund under this subchapter arising from the same incident, transaction, or set of circumstances, nor to have split a cause of action.}\)

CERCLA § 112(e), 42 U.S.C. § 9612(e) (1982).

\(^{160}\) 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.410[2] (2d ed. 1988) [hereinafter MOORE].

\(^{161}\) See infra notes 199-216 and accompanying text for more discussion of the significance of broad versus narrow definitions of a cause of action.

\(^{162}\) CERCLA § 114(a), 42 U.S.C. § 9614(a) (1982).

\(^{163}\) HALL, supra note 149, at 1-10, 1-12 (specific references to each state's statutes are collected at 1-14 to 1-20). A more recent survey of state law concludes that forty-seven states have some type of hazardous waste response law, although not all are sufficiently close to CERCLA to qualify as mini-superfunds. For an outline of these statutes see Rich, Hazardous Waste Clean-up Enforcement under CERCLA and State Statutes: A Comparative Analysis, NAT'L ENVTL. ENFORCEMENT J., Mar. 1988, at 3, 15–21.
are multiple prosecutions of the same defendant for the same trans-
action under CERCLA and a mini-superfund statute. Mini-super-
fund statutes are not based on an express delegation from
CERCLA and they cannot be said to be in lieu of CERCLA or to
have the full force and effect of CERCLA because Congress specif-
ically sanctioned the traditional liability of multiple sovereigns. This
analysis is altered, however, if the state is acting pursuant to an
express agreement with the EPA.

The possibility for such agreements arose in 1986 when the Su-
perfund Amendments and Reauthorization Act (SARA) extensively
amended CERCLA. SARA amended CERCLA Section 104(d)(1)
to allow the President the discretion to enter into cooperative
agreements or contracts with states to carry out federal responsi-
bilities under CERCLA, including enforcement actions, if the Pres-
ident determines that the state has the capability to carry out such
actions. The agreement may be site-specific or as broad as the
President desires. Because an action by a state under such an
agreement is described as "acting in behalf of the President," res
judicata and collateral estoppel would surely be as applicable to such
a state action as they would be if the EPA had brought the action
for the President. Because different federal officials who bring suc-
cessive actions are in privity with one another under preclusion
analysis, a strong argument can be made that a state official acting
under contract to the President is also in privity with federal officials,
regardless of independent authority under state law.

The primary opportunity for preclusion analysis under CERCLA
is not in successive federal-state actions, but in successive federal
actions. Because the federal government can bring suit under Section
106 to force a polluter to clean up his releases, or can bring suit
under Section 107 to recover its costs when it performs the cleanup,
there are two likely scenarios. First, the federal government might decide initially to sue under Section 106, and then later decide to clean up the site itself and seek reimbursement under Section 107. Such a fact pattern occurred in United States v. Outboard Marine Corporation, where the Seventh Circuit upheld a dismissal of a Section 106 action without prejudice to a future cost recovery suit so that the government could maintain a Section 107 action without being barred by res judicata.171

Second, a complicated government cleanup might entail immediate expenditures to remove an imminent threat to health and safety and subsequent expenditures to form a complete remedy. If expenses are incurred over a period of years, the government might seek to sue under Section 107 for successive cost components as they occur rather than waiting until the cleanup is completed.

It is far from certain that either res judicata or collateral estoppel could theoretically be applied to either of these scenarios, and, even if either could, the frequency of use would depend heavily upon the facts of each case. Even in Outboard Marine, the only reported case, the issue of preclusion was not clearly raised and the language used by the district judge in dismissing the Section 106 action without prejudice to a subsequent Section 107 action seemed to be an attempt to dispel ambiguity rather than an attempt at a definitive ruling on preclusion.172 For res judicata, the critical issue will be whether separate suits are based on separate causes of action. To the extent that different injuries can be identified, separate actions can be maintained. Collateral estoppel is more problematic, and it may very well be that some issue decided in the first suit, such as causation, would have collateral estoppel effect in a later suit at the same site.

SARA clarified somewhat the multiple recovery picture by adding to Section 113 a subsection 113(g)(2). This subsection created a statute of limitations for cost recovery actions and distinguished between removal actions and remedial actions under Section 107. An initial action to recover the costs of removal work must now generally be brought within three years of its completion, while an initial action to recover costs for remedial work must generally be brought within

171 789 F.2d 497, 507–08 (7th Cir. 1986), aff’g 104 F.R.D. 405 (N.D. Ill. 1984). The district judge had expressed skepticism that a trial on the merits of the Section 106 case would have resulted in a judgment on issues which would have a collateral estoppel effect in a subsequent Section 107 case, apparently because of factual differences in the cases. See Outboard Marine, 104 F.R.D. at 411 n.1.

172 Outboard Marine, 104 F.R.D. at 411 n.1. This point was also noted by the Seventh Circuit. See Outboard Marine, 789 F.2d at 508.
six years of the beginning of "physical on-site construction." Subsequent action to recover additional response costs or damages are allowed, but must be commenced within three years of the completion of all response actions.

In addition to providing a statutory basis for distinguishing between removal and remedial actions, the legislative history leaves no doubt that the law now specifically contemplates successive actions. The President may bring a series of claims under Sections 104, 106, and 107. Earlier claims do not bar other later claims, but collateral estoppel remains applicable.\footnote{H.R. REP. No. 253, 99th Cong., 2d Sess. 223, \textit{reprinted in} 1986 U.S. CODE CONG. & ADMIN. NEWS 3124, 3316 provides: The conference substitute also provides . . . for the entry of a declaratory judgment, which is to have a binding effect in future claims for future response costs as to the vessel or facility in question. This is consistent with the overall structure of CERCLA, which contemplates that the President may bring a series of claims for response costs under section 107, injunctive relief under section 106, or actions for access under section 104 with regard to a particular site or facility. If the President brings an earlier action for such claims, he is not barred in a subsequent action from bringing other claims. The doctrine of collateral estoppel remains applicable in these actions. \textit{Id.} at 3316 (emphasis added).}

The legislative history's focus on "other claims" indicates that the doctrine of res judicata and the rule against claim splitting also remain applicable. For each distinctive claim, the EPA must be cautious to seek all the relief to which the government is entitled. Even in successive claims, collateral estoppel will still be applicable. Protection of the government's interests will require careful pleading with an eye toward remaining issues.

III. COLLATERAL ESTOPPEL AND RES JUDICATA

\textbf{A. Terminology}

The terminology applied to describe the effects of a prior judgment is not always consistent. There is a growing trend toward the use of the term "res judicata" in a broad sense to apply to both res judicata and collateral estoppel as they are more traditionally defined.\footnote{The \textit{RESTATEMENT (SECOND) OF JUDGMENTS} is perhaps the most influential advocate of the broad definition. \textit{See Re} STATEMENT \textit{(SECOND) OF JUDGMENTS, ch. 3, at 131 \textit{(1982)}} [hereinafter \textit{RESTATEMENT OF JUDGMENTS}]; \textit{see also} 18 \textit{WRIGHT, supra} note 8, \textit{§ 4402, at 6–11}.} Advocates of this broad definition of res judicata substitute the descriptive phrases "claim preclusion" for the narrow usage of
res judicata and "issue preclusion" for collateral estoppel and its rare counterpart, direct estoppel.176

Although the Supreme Court has acknowledged the existence of this trend,177 it has yet to adopt it and continues to use res judicata in the narrow sense. For the sake of clarity in quoting from the numerous Supreme Court cases in this area, this paper will use the narrow definition throughout. Using this narrow definition, res judicata and collateral estoppel are mutually exclusive terms and synonymous with claim preclusion and issue preclusion, respectively.

B. Origins and Policy

Res judicata and collateral estoppel are traditional common law affirmative defenses178 that are closely related to the very purpose for which the courts were created, "the conclusive resolution of disputes within their jurisdictions."179 According to the Supreme Court, they embody the fundamental principle that, once a right, question, or fact has been put in issue and decided by a court, the same parties or their privies cannot relitigate the same right, question, or fact in a subsequent lawsuit.180 The high esteem the Court holds for these doctrines is significant because res judicata and collateral estoppel, having been created by judges, do not depend on either constitutional or statutory bases for their application.181

Despite their common law origins and the sound of their names, res judicata and collateral estoppel are not dusty theoretical concepts

175 18 WRIGHT, supra note 8, § 4402, at 6–11.
176 Because "collateral" refers to the fact that the preclusive effect of a collateral estoppel occurs in a second case based on a different cause of action, the phrase "direct estoppel" has been used to describe the preclusive effect of an estoppel in a second case based on the same cause of action. In most situations, res judicata rather than direct estoppel is the doctrine applied when the second cause of action is the same. Nevertheless, there are situations when res judicata is inapplicable but an estoppel is still available. Id.; RESTATEMENT OF JUDGMENTS, supra note 174, § 17 comment c, at 149. Due to the rarity of direct estoppel, this Article assumes that res judicata is the doctrine to be applied when the second cause of action is the same as the first.
178 MOORE, supra note 160, ¶ 0.408[1], at 288.
180 The precise quote is as follows:
A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ."
Id. (quoting Southern Pacific R.R. v. United States, 168 U.S. 1, 48–49 (1897)).
181 18 WRIGHT, supra note 8, § 4403, at 19.
that rarely see the light of day in court. On the contrary, they are concepts frequently discussed by courts, including the Supreme Court. To understand how they might be allowed to restrict enforcement activity by the EPA in furtherance of the important societal goal of improving environmental quality, it is necessary to understand that they also have strong policy underpinnings.

The Supreme Court has noted that these doctrines serve policies that are important both to the judiciary and to the public. They serve the judiciary by conserving its resources, presenting the opportunity to resolve other disputes, and fostering reliance on judicial decisions. Such reliance results from minimizing inconsistent decisions. They serve the public by sparing litigants the cost and vexation of multiple lawsuits and providing the certainty of finding an end to litigation and a binding answer. Whatever the mix of reasons cited in a specific case, conservation of judicial resources always seems to figure prominently on the list in recent cases. This is due in part, no doubt, to the heavy workload faced by the Supreme Court and the warning by the former Chief Justice of the Court's need to resort to summary dispositions.

The fact that the policies underlying res judicata and collateral estoppel are independent of the "truth" is an indication of their strength. That is, they apply whether or not the case in whose name they are invoked was rightly or wrongly decided. As the Supreme Court has observed, "res judicata renders white that which is black, and straight that which is crooked. . . . No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy." Although the Court has also cautioned that res judicata should only be invoked after careful inquiry, the Court has more recently rebuked the Ninth Circuit for carving out an exception based on "public policy" and "simple justice." To put it succinctly, the Court reminded the Ninth Circuit

See infra notes 188–89, 192–93, 245, 317, 396, 404 and accompanying text.


Montana, 440 U.S. at 153–54; Allen, 449 U.S. at 94; Brown, 442 U.S. at 131.

Heiser v. Woodruff, 327 U.S. 726, 733 (1946); 18 Wright, supra note 8, § 4403, at 15.


18 Wright, supra note 8, § 4403, at 17.


Federated Dep't Stores v. Moitie, 452 U.S. 394, 401–02 (1981). In its rebuke, the Court said:
that every litigant is entitled to but a single opportunity to present his or her case and the right to appeal the result.\textsuperscript{191} The Court has, however, recognized the need for redetermination if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.\textsuperscript{192}

Acknowledging that collateral estoppel serves the same public policies as res judicata, the Supreme Court has identified one situation where it grants trial courts broad discretion in determining when collateral estoppel should be applied: when it is asserted, either offensively\textsuperscript{193} or defensively,\textsuperscript{194} by one who was not a party to the first suit.\textsuperscript{195} None of the environmental statutes previously discussed contains an express rejection of either preclusion doctrine in the overfiling situation. Thus, the strong Supreme Court policy endorsing res judicata and collateral estoppel should prevail in an overfiling situation unless the statute in question implicitly mandates a different result. To consider this possibility, it is necessary to understand the sometimes subtle distinctions between the two doctrines, because the doctrines may not stand or fall in unison.

\textbf{C. Distinctions}

Under claim preclusion, or res judicata, a judgment is the full relief between the parties on that claim or cause of action. When the

\textit{"Simple justice"} is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." ... [The] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts ...

\textit{Id.} at 401 (citations omitted) (italics in original).

\textsuperscript{191} See Moore, supra note 160, ¶ 0.405[4.1], at 221 (citing Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982)).

\textsuperscript{192} Montana v. United States, 440 U.S. 147, 164 n.11 (1979).

\textsuperscript{193} Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 331 (1979).


\textsuperscript{195} This situation cannot arise in the overfiling scenario because that scenario presumes that collateral estoppel, if applicable, will be asserted by a party to the first suit, the defendant. For the sake of simplicity, the private party litigant in our hypothetical has been consistently referred to as the defendant. For the application of res judicata principles, however, it is only necessary that this person be a party to the first suit. The analysis would be the same if in the first suit the private party were to be the plaintiff in a declaratory judgment action, for example. See, e.g., Aminoil U.S.A., Inc. v. California, 674 F.2d 1227, 1236 (9th Cir. 1982).
plaintiff prevails, its claim is "merged" in the judgment and it cannot seek further relief in a subsequent action. When the defendant prevails, that judgment is a "bar" to subsequent action against the defendant by the plaintiff on that claim. Under claim preclusion, the merger and bar effects of the judgment extend to all issues relevant to the claim, whether or not they were raised at trial. In contrast, issue preclusion, or collateral estoppel, is based upon the recognition that different claims or causes of action between parties may involve issues common to them all. Issue preclusion bars the relitigation of such a common issue in a subsequent lawsuit on a different cause of action, but only if that issue was actually litigated and necessary to the decision in the prior judgment.196

Thus, the "cause of action" holds the key to determining which doctrine, if either, is applicable to an overfiling scenario. If the suit brought by the EPA involves the same cause of action as the state suit, then res judicata is the potentially applicable doctrine. If the EPA suit involves a different cause of action, then only collateral estoppel can be applicable.

The applicable doctrine will determine the scope of the preclusive effect of the state judgment in the overfiling scenario. If res judicata applies, then the prior state judgment would totally preclude the EPA action through either merger or bar, depending upon which party prevailed initially. By contrast, collateral estoppel would give preclusive effect in the EPA's suit only to specific issues decided in and necessary to the prior state case. This limitation on collateral estoppel, however, may not yield a different result than res judicata

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196 This analysis is based on an oft-quoted formulation by Judge Rubin of the Fifth Circuit: "[C]laim preclusion," or true res judicata, ... treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.

The second doctrine, collateral estoppel or "issue preclusion," recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. ... [I]ssue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation. . . .

It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered.

Kaspar Wire Works, Inc. v. Leco Eng'g and Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978) (footnotes and citations omitted) (italics in original).
in a given case. For example, if the issue decided in the earlier case is central to the second case, collateral estoppel can result in dismissal of the second case as surely as res judicata.\(^{197}\)

Although the cause of action is the key factor, a number of other factors may determine whether res judicata and collateral estoppel are actually applicable. Assuming that the first case will be brought by the state alone, as this Article does, res judicata can only be asserted against the EPA if it is in privity with the state on the facts of the case. Because the state will bring suit under state law, and the EPA will bring the second suit under federal law, the causes of action may be distinct even though they both have their roots in RCRA, and thus res judicata would be inapplicable. Identity of parties and causes of action are not required for collateral estoppel, so it initially appears to be the more likely candidate for applicability.

There are other potential limitations, however, to the application of collateral estoppel against the United States yet to be explored. Privity, causes of action, and other related concepts must be examined in more detail to reach any conclusions about the applicability of the two doctrines to the EPA overfilings. Applicability of res judicata will be discussed first because res judicata is a more complete defense, foreclosing issues that might have been litigated but were not, and because it has more elements that must be satisfied.

D. Cause of Action

Analyzing the causes of action is the first logical step in identifying factors affecting applicability of res judicata and collateral estoppel to the EPA overfilings. Res judicata forces plaintiffs to assert in their first suit all the legal theories and demands for relief to which they are entitled for each cause of action.\(^{198}\) This is the so-called rule against claim splitting, previously discussed in regard to CERCLA.\(^{199}\) Under older cases, including those of the Supreme Court, each legal theory yielded a different cause of action. Thus, the same set of facts could result in separate causes of action when the rights were created by different sovereigns, different statutes, or by statute and common law.\(^{200}\) Under such a narrow definition, res judicata

\(^{197}\) See, e.g., Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 n.22 (1982); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980).

\(^{198}\) Moore, supra note 160, ¶ 0.410[1], at 351, 352.

\(^{199}\) See supra note 160 and accompanying text.

could not be asserted in an overfiling scenario because the EPA and the state would have separate causes of action.

The concept of a cause of action has evolved and broadened through the years, however, and presently neither different statutes nor different theories of recovery necessarily define different causes of action for res judicata purposes, thus opening the door to application of res judicata in the overfiling situation. Nowadays, courts cannot simply count legal theories, but must analyze whether or not the allegedly different claims actually involve different acts, different material facts, and different witnesses and documentation.\textsuperscript{201} Even actions by different sovereigns do not yield different causes of action when they are in privity.\textsuperscript{202}

Exploring the evolution of the definition of a cause of action is necessary to understand the present application of res judicata. The definition of "cause of action" or "claim"\textsuperscript{203} in the context of res judicata has steadily expanded beyond its original meaning, and now focuses on the alleged injury or transaction for which relief is sought, rather than the legal theory under which relief is sought.\textsuperscript{204} According to the Restatement of Judgments, which represents the broadest current formulation, a final judgment extinguishes all rights "to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."\textsuperscript{205}

This transactional definition is a pragmatic one that looks upon a cause of action as a set of facts.\textsuperscript{206} These facts must be related in time, space, origin, or motivation and must form a convenient trial unit.\textsuperscript{207} In addition, their treatment as a unit must conform to the parties' expectations.\textsuperscript{208} Such a broad definition of a single cause of action, if used by a court, has the effect of greatly expanding the potential application of res judicata through its preclusion of matters that could have been litigated in the first instance, even though they were not.

\textsuperscript{201} United States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984).
\textsuperscript{202} See infra note 279 and accompanying text.
\textsuperscript{203} The \textsc{Re}state\textit{ment} (Second) of Judgments has substituted the word "claim" for "cause of action" to avoid confusion with its understanding in other contexts, thus it uses the term "claim preclusion" for res judicata. See \textsc{Re}state\textit{ment} of Judgments, supra note 174, § 24, comment 9, at 196.
\textsuperscript{204} Moore, supra note 160, ¶ 0.410(1), at 350.
\textsuperscript{205} \textsc{Re}state\textit{ment} of Judgments, supra note 174, § 24(1).
\textsuperscript{206} \textit{Id.} § 24(2).
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.}
The language of CERCLA indicates that Congress had just such a broad definition in mind in establishing the preclusive effects of claims against the Superfund.\textsuperscript{209} Thus, by sanctioning in CERCLA the broadest definition of a cause of action, Congress has encouraged the maximum application of res judicata. The Supreme Court has not gone quite so far, however, at least with respect to adopting the broad definition for a cause of action.

In 1982, the Supreme Court in \textit{Kremer v. Chemical Construction Corp.} noted the increasing acceptance of this broader definition in the federal courts, but did not have to face the issue squarely because the application of either res judicata or collateral estoppel yielded the same result in this case.\textsuperscript{210} The Court again avoided ruling on the transactional definition in 1983 in \textit{Nevada v. United States}.\textsuperscript{211} The Court noted that definitions of the "same cause of action" have not remained static, citing the expansion in the definition from the first to the second Restatement of Judgments.\textsuperscript{212} The significance of these references is, however, that the Court may well be laying the foundation for the acceptance of the transactional definition when the appropriate case presents itself.

Acceptance of the transactional definition of claim or cause of action is important because it favors the application of res judicata rather than collateral estoppel to the overfiling scenario. This conclusion follows from the presumption that a single chain of events, such as the violation of a permit or failure to meet regulatory requirements under an approved state plan, would be the basis for both the state suit and the EPA overfiling. The fact that, from a practical standpoint, a state law must be quite similar to the federal law it supersedes in order to assure approval bolsters this conclusion.\textsuperscript{213} In fact, if the state law differs at all from the federal law, it is likely to be the more encompassing of the two, because the state law must be at least as stringent as the federal law and may be more stringent.\textsuperscript{214}

\begin{footnotes}
\item[209] See \textit{supra} note 161 and accompanying text.
\item[210] 456 U.S. 461, 481 n.22 (1982).
\item[212] \textit{Id.} at 130 n.12.
\end{footnotes}
The only exception to this conclusion would be in the case of newly-enacted federal legislation or regulatory amendments that have not yet been added by revisions to state plans. For example, RCRA Section 3006(g) provided that the requirements or prohibitions applicable to the generation, transportation, treatment, storage, or disposal of waste imposed by the 1984 amendments would be immediately enforceable in all states by the EPA, regardless of whether or not they had approved plans.

While the necessary similarity between state and federal law might lead to the prediction that under the transactional definition there will be a single cause of action and res judicata will be the applicable doctrine, this may not be true. In actual practice, the applicable doctrine may vary from case to case depending upon how nearly the factual pleadings by the EPA resemble those of the state. If the EPA is merely seeking a more stringent penalty for the same set of operative facts, res judicata is more likely, but careful pleading by the EPA may be able to influence the determination. Having determined that actions by a state and the EPA involve the same set of facts only leads to the next inquiry—whether both actions involve the same parties.

The major limitation on finding the causes of action of a state and the EPA to be identical, and hence the major limitation on the application of res judicata in the overfiling scenario, is the fact that the EPA is not a party of record to the first judgment. The requirement of an identity of parties is one element of a cause of action that may not have been influenced as much by the liberal transactional analysis. The usual assumption is that every plaintiff has a separate cause of action. Nonetheless, it is well established that the EPA's ability to overfile. In United States v. Chemical Resources, Inc., the defendant was found to be in violation of the state's financial responsibility requirement, which is not part of the federal program. No. 86C-714C, slip op. (N.D. Okla. July 19, 1988), quoted in INSIDE E.P.A. WEEKLY REPORT, Aug. 26, 1988, at 15. The state dropped its enforcement action when the defendant provided proof of insurance, but the EPA then brought its own action to revoke the defendant's permit. The court held that "the EPA is not entitled . . . to enforce financial responsibility requirements established by a State in excess of that proscribed [sic] by the federal government." Although some have hailed this as a general limitation on EPA's "interference" in programs delegated to the states, it remains to be seen if the principle can be applied beyond the financial responsibility requirements of the underground injection well program. Court Decision Reaffirms State RCRA Primacy Authority Setting Precedent, INSIDE E.P.A. WEEKLY REPORT, Aug. 26, 1988, at 15.


216 18 WRIGHT, supra note 8, § 4407, at 52; RESTATEMENT OF JUDGMENTS, supra note 174, § 24 comment a, at 198.
requirement of identity of parties for finding a single cause of action for application of res judicata does not mean literally parties of record.\textsuperscript{217} However broad this definition of "party" is for determining a single claim or cause of action, it is also well established that, beyond it, there are nonparties who may be bound by the judgment under collateral estoppel.

For example, in \textit{Montana v. United States} the federal government vicariously asserted a first cause of action through a contractor in state court and then asserted a second cause of action in its own right in federal court.\textsuperscript{218} The \textit{Montana} Court held that these two causes of action differed by definition because there was no identity of parties, but also held the federal government bound by collateral estoppel.\textsuperscript{219} The topic of parties and privies is sufficiently complex to warrant its own separate treatment.\textsuperscript{220}

If res judicata is inapplicable because the cause of action is not the same in the second suit, the next inquiry is whether or not preclusive effect under collateral estoppel can be given to some issue decided in the first suit. For collateral estoppel to apply, the issue precluded must be the same as in the prior suit, necessary to that decision, actually decided,\textsuperscript{221} and fully and fairly litigated.\textsuperscript{222} Furthermore, the controlling facts must remain unchanged.\textsuperscript{223} With so many qualifications and conditions, it may seem unlikely that either res judicata or collateral estoppel would find much application, but the overfiling scenario may provide the appropriate factual setting.

In summary, the identity of the causes of action will determine whether res judicata or collateral estoppel is the potentially applicable doctrine. If the cause of action asserted by the EPA in its overfiling is determined to be the same as the cause of action previously asserted by the state in its action, then res judicata is the applicable doctrine. The transactional definition of a cause of action, with its reliance on common facts rather than legal theories, should make it easier to find such an identity. If res judicata is inapplicable, however, then the next inquiry should be whether the two causes of action involved some common issue or issues. Collateral estoppel is

\textsuperscript{217} \textsc{Moore}, \textit{supra} note 160, ¶ 0.411[1] n.8, at 391. \textsc{Wright}, \textit{supra} note 8, § 4407 n.8, at 53.


\textsuperscript{219} \textit{Id.} at 154–55.

\textsuperscript{220} \textit{See infra} notes 268–362 and accompanying text.

\textsuperscript{221} \textsc{Moore}, \textit{supra} note 160, ¶ 0.443[1], at 759.

\textsuperscript{222} \textsc{Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.}, 402 U.S. 313, 329 (1971).

\textsuperscript{223} \textsc{Commissioner v. Sunnen}, 333 U.S. 591, 600 (1948).
applicable to a common issue litigated in, decided by, and necessary to the first action. Both doctrines, however, depend upon yet another element—a final judgment in the first action.

E. Final Judgment

The existence of a final judgment in the first action, the state action in the overfiling scenario, is a necessary element for application of either res judicata or collateral estoppel. While the concept might seem unlikely to provoke serious arguments, it has expanded in recent years much like the transactional analysis has expanded the traditional view of a cause of action. This section will examine the impact of these changes on the overfiling scenario.

Because res judicata and collateral estoppel both give effect only to final judgments,224 it is axiomatic that there must be a final judgment.225 The concept of a final judgment has traditionally been straightforward, applying only to final decrees in litigated cases, whether or not they have been appealed to the next higher court.226 Over time, however, the concept has expanded. Of particular relevance to environmental practice is the fact that the concept now includes certain administrative determinations and unlitigated judicial consent decrees. As with litigated judicial decrees, both parties and their privies may be bound when res judicata or collateral estoppel is applicable to these administrative determinations and consent decrees.227

Given the administrative nature of environmental practice and the financial incentive for both government and industry to settle cases by consent, the expansion of the definition of “final judgment” to encompass both these situations is potentially significant. Indeed, it has been said that most enforcement cases are settled by negotiated consent decrees.228 As a result, this Article will discuss consent

224 Restatement of Judgments, supra note 174, § 13, at 132. It should be noted, however, that finality is a more flexible concept for collateral estoppel than for res judicata. See id.
225 Id. at comment a.
226 18 Wright, supra note 8, §§ 4432, 4433; see also Moore, supra note 160, ¶ 0.409[1-1], at 306.
227 For holdings that administrative determinations are applicable to privies, see Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985); Artrip v. Califano, 569 F.2d 1298, 1300 (4th Cir. 1978). For similar holdings regarding consent decrees, see cases collected at Annotation, Res Judicata as Affected by Fact that Former Judgment was Entered by Agreement or Consent—Federal Cases, 97 L. Ed. 1188, 1192 n.20 (1952) [hereinafter Agreement or Consent].
decrees first, followed by a discussion of administrative decrees, including coverage of administrative consent decrees.

1. Consent Decrees

Once a lawsuit is filed, there are a number of possible outcomes short of a full litigation ending in a final judgment, and each presents its own defenses. This section will place consent decrees into this overall picture from a standpoint of preclusion analysis.

In the absence of a prior final judgment, the defendant in an overfiling situation might argue for a stay or abstention in federal court in order to gain time to finalize a judgment in existing parallel state court litigation. Alternatively, if there is merely an extra-judicial settlement or compromise, there is no judgment on which to base res judicata or collateral estoppel, but a court may dismiss subsequent litigation by enforcing the settlement as a contract. If the parties to the settlement present it to a court and it is embodied in a consent decree, however, the settlement becomes a judicial act and the analysis changes. The potential now exists for application of res judicata or collateral estoppel.

A consent agreement resulting in a dismissal of charges that specifically states that it is with prejudice obviously presents a barrier to subsequent litigation. The more difficult task for the litigants is to determine the preclusive effect of consent agreements that result in judgments on the merits. Without a record of trial documenting all the issues actually litigated and inferring those that could have been, a consent decree is inherently more ambiguous than a decree after full litigation. Res judicata presents fewer conceptual difficulties, however, than does collateral estoppel.

Because a decree based on the consent or stipulation of the parties is nonetheless a judicial decree, it does no violence to the expectations of the parties to accord the same finality under res judicata to such a decree as to a fully litigated result. Even in a litigated case the concepts of merger and bar extinguish the various theories of recovery that were not but could have been advanced in the cause

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229 See infra notes 414–490 and accompanying text.
231 Kaspar Wire Works, Inc. v. Leco Eng’g & Mach., Inc., 575 F.2d 530, 538 (5th Cir. 1978).
232 Id.
233 MOORE, supra note 160, ¶ 0.409[5], at 325.
of action. Only the judgment survives. Thus, judicially-approved consent agreements are entitled to res judicata effect.

By contrast, collateral estoppel presents serious theoretical difficulties because it operates only against issues actually litigated and necessary to the judgment. Because a consent decree does not result from litigation of issues, the states are split as to whether consent decrees should be given collateral estoppel effect. State responses vary from propositions that consent decrees are never entitled to collateral estoppel effect, or that consent decrees are entitled to collateral estoppel effect only when the parties to the judgment intended that result, or that consent judgments are entitled to collateral estoppel effect to the same extent as other judgments. Such widely divergent views warrant further explanation.

Those jurisdictions that do give collateral estoppel effect to consent judgments seem to justify it on either of two theories. According to one theory, courts can infer findings from the decree because they can presume that courts will still exercise their judgment as to the merits. According to the second theory, consent of the parties to subsequent preclusion can be inferred from their agreement. Despite these two theories, however, the weight of authority favors the view that collateral estoppel is inapplicable. Although federal courts usually say that consent judgments are to be treated as other judgments for the sake of preclusion, they generally have not given collateral estoppel effect to consent judgments.

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234 See id. at 331.
235 Id. ¶ 0.409(5), 0.444(1), at 799.

Nonetheless, application of res judicata to consent judgments is subject to several exceptions not applicable to litigated judgments. Annotation, Modern Views of State Courts as to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect, 91 A.L.R. 3d 1170, 1173–74 (1979 & Supp. 1982) [hereinafter Modern Views]; see also Agreement or Consent, supra note 227, at 1193–95.

236 MOORE, supra note 160, ¶ 0.444(1), at 793.
237 Id. ¶ 0.444(3).

238 See Modern Views, supra note 235, at 1174.
239 MOORE, supra note 160, ¶ 0.444(3), at 811–14.

242 See Kaspar Wire Works, Inc. v. Leco Eng’g & Mach., Inc., 575 F.2d 530, 539 (5th Cir. 1978). It is important to note, however, that because of full faith and credit requirements, it is the law of the state, not federal law, which initially determines whether its judgments have res judicata or collateral estoppel effect in subsequent federal litigation. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380–82 (1985). See infra note 364 and accompanying text.
In summary, a prior consent decree with a state may well be entitled to preclusive effect as a "final judgment" in a subsequent overfiling by the EPA if the other elements are established. Preclusive effect is especially likely in a res judicata situation, but the result will vary based upon each particular state's law. By comparison, the preclusion rules applicable to administrative determinations have been more consistent.

2. Administrative Determinations

As administrative bodies have matured and adopted the procedural safeguards of judicial proceedings, courts have become more willing to accord preclusive effect to their decisions. Even so, many courts continue to state that the application is qualified, and less rigid than in the strict judicial context. The Restatement insists that a decision of a qualifying administrative tribunal "has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

Taking a position similar to the Restatement's, the Supreme Court has made clear that certain administrative decisions can have preclusive effect in subsequent judicial proceedings. In Kremer v. Chemical Construction Corp., the Court clearly indicated that the administrative nature of the tribunal did not ipso facto rule out subsequent preclusion. Rather, the question was whether the administrative agency was acting in a judicial capacity, as evidenced by whether the opposing parties had an adequate opportunity to litigate disputed issues of fact. It is also clear that such preclusion can be asserted

243 See Kaspar, 575 F.2d at 538.
244 See, e.g., Long v. United States Dep't of the Air Force, 751 F.2d 339, 343-44 (10th Cir. 1984); Korah v. Chicago Mercantile Exch., 747 F.2d 414, 416 (7th Cir. 1984); Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 708-11 (8th Cir. 1982); see also 18 Wright, supra note 8, § 4475, at 764.
245 See, e.g., Martin v. Donovan, 731 F.2d 1415, 1416 (9th Cir. 1984); Artukovic v. Immigration and Naturalization Serv., 693 F.2d 894, 898 (9th Cir. 1982); Sierra Club v. Alexander, 484 F. Supp. 455, 464 (N.D.N.Y. 1980), aff'd, 633 F.2d 206 (2d Cir. 1980); see also cases collected at 1 FEDERAL PRACTICE DIGEST 3d 513-16 (West & Supp. 1984).
246 RESTATEMENT OF JUDGMENTS, supra note 174, § 83(1), at 266.
247 In Kremer v. Chemical Constr. Corp., the Supreme Court said:
Certainly, the administrative nature of the factfinding process is not dispositive. In United States v. Utah Construction & Mining Co., we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity."

Kremer involved an employment discrimination claim that a New York administrative
against the United States, and that administrative determinations can be "judicial" for the application of full faith and credit principles.

The most frequently cited Supreme Court case on the issue of whether an administrative determination is entitled to preclusive effect is United States v. Utah Construction and Mining Co.. The Utah Construction Court held that agency decisions are entitled to preclusive effect when the agency acts in an adjudicatory, judicial, or quasi-judicial capacity. This case and others establish the rule that an administrative decision is entitled to preclusive effect if the forum is an adequate procedural substitute for a court and the statutory scheme that created the forum did not intend to prohibit preclusion. Thus, a spectrum of administrative proceedings can be envisioned running from an administrative tribunal almost indistinguishable from a court, one whose determinations are clearly preclusive, to nonadversary executive decisionmaking, which clearly does not meet the Utah Construction test.

Just where the dividing line lies between the extremes on this spectrum is not precise. Administrative proceedings based solely on written records without live witnesses and cross-examination probably do not pass the test. The Restatement of Judgments has identified five "essential elements of adjudication" for preclusion that can be summarized as follows: 1) adequate notice to those to be bound; 2) presentation of evidence and argument and the opportunity to rebut that of the opposition; 3) formulation of issues of law and fact regarding a specific transaction; 4) a final decision; and 5) other

agency found to be meritless. Id. at 461. Utah Construction held that the decisions of the Armed Forces Board of Contract Appeals were conclusive for claims over which it had jurisdiction. See 384 U.S. 394, 423 (1966).


In both cases, the plaintiffs lost because they failed to show that the United States was in privity with a party to the first case, not because the doctrine was inapplicable against the United States. Cappaert involved a prior state administrative adjudication of water rights to an underground aquifer in Nevada that conflicted with federal claims of reserved water rights. As a result of the outcome in that case, the McCarran Amendment, 43 U.S.C. § 666, was passed to allow the mandatory joinder of the United States in state adjudications of entire watercourses. See W. Goldfarb, Water Law 30–31 (1984).

See Kremer, 456 U.S. at 478; United Farm Workers v. Arizona Agric. Employment Bd., 669 F.2d 1249, 1255 (9th Cir. 1982).


18 WRIGHT, supra note 8, § 4475, at 765.

Id.

Id. at 766.
procedural rules necessary because of complexity, urgency, or opportunity to obtain evidence.\textsuperscript{254}

If an administrative forum meets these elements, and the parties prefer to enter into a consent decree rather than litigate, the consent decree may also be entitled to preclusive effect. In \textit{United States v. SCM Corp.}, the EPA overfiled after Maryland and SCM entered into an administrative consent order designed to bring the defendant into compliance with the CAA.\textsuperscript{255} The court did not have to determine the preclusive effect of a decree because the defendant was seeking a stay or dismissal under an abstention argument. The court noted, however, that collateral estoppel would have been a more appropriate theory, implying that the administrative consent decree was not inherently unworthy of preclusive effect.\textsuperscript{256}

Two additional CAA cases also address the effect of previous state administrative proceedings. In \textit{United States v. Harford Sands, Inc.}, a case involving an EPA overfiling, the judge correctly refused to give any preclusive effect to an informal agreement with the state.\textsuperscript{257} In a second case, \textit{United States v. Lehigh Portland Cement Co.}, the judge summarily dismissed a preclusion argument based upon a prior administrative consent order with the state because "there was no previous state court action."\textsuperscript{258} While such reasoning is clearly inconsistent with the Supreme Court's holding in \textit{Utah Construction}, it appears that the administrative decision may not have been issued after an adjudicatory process, and thus \textit{Lehigh} may be factually consistent with \textit{Utah Construction}.

Several CWA cases also discuss the effect of previous state administrative proceedings. In \textit{United States v. Pennsylvania Environmental Hearing Bd.}, a case reminiscent of \textit{SCM}, the Third Circuit considered the validity of an order by the Board that levied civil penalties on a contractor operating a government ammunition plant.\textsuperscript{259} The court cited \textit{Utah Construction} and other authorities,
but bypassed the issue of the preclusive effect of the Board order after noting that neither party had raised the issue of the order’s res judicata effect on the federal case.\textsuperscript{260} The preclusion issue was raised again in \textit{United States v. Scott Paper Co.}, but, in that case, the court also failed to give preclusive effect to prior state administrative action.\textsuperscript{261} The order of the state Pollution Control Hearing Board apparently lacked finality because the order was specifically conditioned by the language "unless a court for good cause orders otherwise."\textsuperscript{262}

Thus, there is no reported environmental case that has applied preclusion against the EPA based on a prior state administrative decree, but there are courts suggesting that the issue is a proper one to raise. Once again the variability of state law makes it impossible to generalize as to which environmental statute’s administrative decisions might qualify for preclusion. Under full faith and credit principles, however, administrative judgments that are judicial in nature are entitled to enforcement just as judicial decrees would be, as long as state rules on preclusion comport with constitutional due process.\textsuperscript{263}

In comparison with the overfiling cases, cases dealing with citizen suits provide some insight on what kinds of state administrative action will qualify for preclusion. Each environmental statute under consideration in this Article has a provision that allows a citizen to sue as a private attorney general if the state or the EPA is not diligently prosecuting the alleged polluter in state or federal court.\textsuperscript{264} As a result, the question of whether state administrative enforcement is equivalent to state court action has arisen in a number of

\textsuperscript{260} Id.


\textsuperscript{262} Id.


cases, much like the question of whether a state administrative action is "judicial" under *Utah Construction*.

Unfortunately for this comparison with the EPA overfilings, citizen suit cases have not focused on whether the administrative actions were judicial in nature. Rather, they have focused on whether the administrative agency in question had the same enforcement authority as the given statute provided to judicial courts in its civil penalties provisions. For example, under the CAA courts have asked whether the agency could enjoin violations, assess penalties of up to $25,000 per day, and permit citizen intervention by right.265 Using such a focus, one court found the Pennsylvania Environmental Hearing Board to fall short,266 while another found the New York State Department of Environmental Conservation (DEC) to pass muster.267 Although these citizen suit cases do not precisely follow the preclusion analysis, they do present fertile ground for the argument that preclusion is potentially applicable.

The requirement that the prior state administrative enforcement authority be equivalent to any applicable state judicial action seems more technical than that required for preclusion in general under *Utah Construction*. Nevertheless, a defendant who has already been before an agency like the New York DEC certainly has a potent argument that the DEC’s decisions have res judicata and collateral estoppel effect because the DEC has been found to be equivalent to a state court. Perhaps when preclusive effect is given to such an agency’s determinations outside the citizen suit context, the way will be opened for the *Utah Construction* test, the Supreme Court’s general test for determination of the preclusive effect of a prior administrative action, to then be applied to other states’ environmental agencies.

IV. PRIVITY

A. Overview

As a general rule, parties may be bound by the preclusive effects of prior judgments, while nonparties may not. Although this rule is

265 Miller, *supra* note 228, at 10069–70.
far from being swallowed by its exceptions, many nonparties may be bound nonetheless. A privy is one such exception. In the jargon of res judicata and collateral estoppel, a privy is anyone who may be bound by a judgment even though not literally a party to it.

Privity is a conclusion about the relationship between a party and a nonparty, rather than an analytical tool. The Restatement of Judgments avoids using "privity," as well as "cause of action," because they are both ambiguous. Similarly, "party" and "privity" are flexible concepts. The flexibility in all these concepts may give judges de facto discretion in the application of res judicata and collateral estoppel that would otherwise seem unavailable after the strong policy pronouncements of the Supreme Court discussed previously.

This Article adopts the traditional use of "privy" to describe a nonparty who may be bound by a judgment, while recognizing that case law holds that some additional nonparties have been precluded by a prior judgment without a finding of privity. For example, both the Restatement of Judgments and the Supreme Court speak of nonparties who may be bound to a judgment by their conduct without being "in privity." In order to cover the topic completely, then, this section will begin by discussing the traditional notion of privity as it has developed to the present, and will also discuss other nonparties who have been precluded by prior litigation without being labeled as privies.

Use of the traditional definition of privity requires one other caveat to reflect varying usages by the courts: some privies may be treated as parties while others may not. The effect of this distinction is to intertwine the concepts of privity and cause of action and thus affect the applicability of res judicata versus collateral estoppel. For example, if the relationship is such that a privy is bound as a "party," then there is an identity of parties, allowing the possibility of an identity of causes of action and a res judicata situation. If, however, the relationship is such that the nonparty may be bound but is not a "party," only collateral estoppel may be asserted against that nonparty. Such fine distinctions may serve no real purpose, because,

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268 Restatement of Judgments, supra note 174, § 62 comment a.
269 Restatement of Judgments, supra note 174, Ch. 1, Introduction, at 13–14.
270 Moore, supra note 160, ¶ 0.411[1].
271 18 Wright, supra note 8, § 4448.
272 See supra notes 182–94 and accompanying text.
274 Id.
as mentioned elsewhere, application of either doctrine seems frequently to produce the same result in actual cases. Analysis, rather than labels, is the key to understanding this aspect of res judicata and collateral estoppel.

As traditionally defined, then, privity is a key issue in the application of either res judicata or collateral estoppel because neither may be asserted against one who was not a party or privy to the first action. This conclusion follows logically from the definition of res judicata, which requires an identity of parties in the first and second suits. In the case of collateral estoppel, which has not required an identity of parties since the abolition of the mutuality rule, it follows from the fundamental requirement of due process that the party against whom preclusion is sought must have had a full and fair opportunity to litigate the issue in a prior suit.

In the application of privity issues to the overfiling scenario, one must start with the fact that the EPA will not be a named party to a state suit that precedes an EPA suit, and the general rule that separate governments are separate parties. Then one must consider what EPA actions, in light of the federal-state partnership arrangement of the CWA, SDWA, CAA, and RCRA and the overfiling policy of the EPA, might lead to privity. Such actions might include pretrial action, such as pressure on the state to bring suit, to bring suit within a certain time, or to seek certain minimum penalties; and actions during trial, such as assisting the state by providing strategy and evidence.

276 MOORE, supra note 160, ¶ 0.411[1].

Use of collateral estoppel by one who is not bound by the judgment in the first suit is said to be nonmutual. For many years, the mutuality rule prevented the use of collateral estoppel by one who was not a party or privy to the first judgment. The Supreme Court generally eliminated the mutuality rule in federal cases and approved the use of nonmutual collateral estoppel in Parklane.

Mutuality is not an issue in our scenario because collateral estoppel will be asserted by a party to both suits, the private party litigant in Parklane did not alter the requirement that the party against whom collateral estoppel is asserted must always be a party or privy to the first suit. Collateral estoppel will be asserted defensively in our scenario, that is, by the defendant against the plaintiff. The distinctions between offensive and defensive nonmutual collateral estoppel are irrelevant, however, because mutuality is present in our scenario. See id. at 326 & n.4.

279 See 18 WRIGHT, supra note 8, § 4458. This is the so-called “two-sovereign” or “dual sovereignty” rule.
There are three categories of cases extending preclusion that are relevant to the potential for privity in the overfiling scenario. The first category involves a traditional privity analysis in which preclusion is extended to persons who were represented by parties with the authority to do so. The second category involves situations in which preclusion is extended to nonparties whose participation is so extensive that they are de facto parties. The final category covers cases in which the party to the first suit shared such an identity of interests with the subsequently precluded party so as to be its "virtual representative." United States v. ITT Rayonier, Inc. represents the first group, Montana v. United States represents the second group, and Aerojet-General Corp. v. Askew represents the last.

B. Cases

1. United States v. ITT Rayonier, Inc.

One of the leading environmental cases to address the privity issue is United States v. ITT Rayonier, Inc. In that case, the Ninth Circuit found the EPA to be in privity with the State of Washington Department of Ecology (DOE) in an enforcement action under the CWA involving mutual defensive collateral estoppel. In November 1973, the EPA approved the state's permit program and transferred permit-issuing authority to the DOE. In August 1974, the DOE issued a permit to Rayonier. Because the EPA had not yet issued effluent limitations for pulp mills, the permit incorporated discharge limitations from prior legislation and provided in a footnote that they would be modified to conform to final effluent guidelines when promulgated by the EPA.

Thereafter, a dispute arose over Rayonier's implementation plan. After being advised by the EPA that Rayonier would be a candidate for federal enforcement if the state did not act, DOE issued a compliance order in December 1975 that Rayonier appealed to the state Pollution Hearings Board. In February 1976, prior to the hearing by the Board, the EPA promulgated standards that Rayonier and

281 Id.
282 627 F.2d 996 (9th Cir. 1980).
284 511 F.2d 710 (5th Cir.), cert. denied, 423 U.S. 908 (1975).
285 627 F.2d 996 (9th Cir. 1980).
286 See id. at 1003.
287 Id. at 999.
other pulp mills challenged in federal court.288 At the hearing in July 1976, Rayonier argued that the footnote in its permit extended its compliance schedule until final judicial approval of the new effluent limits. Rayonier lost at the Board level, but appealed and won a reversal in state court.289 DOE subsequently appealed to the state supreme court.290

In April 1977, several weeks after the first state court decision, the EPA filed suit against Rayonier itself in federal district court. In October 1977, the district court construed the same footnote against Rayonier and granted the EPA’s summary judgment motion.291 During the appeal of that judgment, the D.C. Circuit Court of Appeals upheld, with one exception, the effluent limits for the pulp industry.292 Also, the Washington Supreme Court upheld the prior ruling of the state court, thereby rendering it a final judgment.293 Thus, by the time the case reached the Ninth Circuit, the permit had expired. Rayonier had installed new conforming control equipment, and the only remaining issue concerned civil penalties for past alleged misconduct.294

The Rayonier court first examined the CWA to see if there were any policy reasons that would abrogate res judicata principles.295 The court noted that the EPA’s authority was preserved despite the state permit-issuing power, but ruled that this concurrent enforcement authority did not per se negate res judicata and collateral estoppel. It found significant the fact that CWA permits are issued under a single system authorized by a single act of Congress, even though the state program functions in lieu of federal authority.296 Finally, in ruling that the Act itself was not hostile to res judicata, the court observed that the EPA had the authority to veto state-issued permits, revoke a state’s permit-issuing authority, and bring an action if it was dissatisfied with a state’s enforcement.297

Next, the Rayonier court considered whether collateral estoppel was factually applicable, and found that privity was the only element in contention because both suits arose out of the same set of opera-

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290 Id. at 684-86, 586 P.2d at 1157.
291 United States v. ITT Rayonier, Inc., 627 F.2d 996, 999 (9th Cir. 1980).
292 Id.
293 Id. at 999-1000.
294 Id. at 1000.
296 Rayonier, 627 F.2d at 1000–02.
297 Id.
tive facts to enforce the same permit. Before examining the relationship between the EPA and the DOE, the court laid the ground rules by stating that it was "no longer bound by rigid definitions of parties or their privies," and that "'privy' may include those whose interests are represented by one with authority to do so."  

In examining the privity issue, the court observed that the DOE had filed suit only after prompting by the EPA and, furthermore, that the DOE had vigorously litigated in the state proceedings. In addition, the court found that the interests of the DOE and the EPA were identical because they had maintained the same positions before the state board and courts and both had acted to enforce the same permit. The court ruled that, whatever the proper label for their relationship, it was "sufficiently 'close' under the circumstances to preclude relitigation of the issue already resolved in state court" as to the interpretation of the permit footnote.

In deciding the Rayonier case on collateral estoppel, rather than res judicata grounds, the court went no further than necessary to reach a judgment on the facts of that case. The interpretation of the permit footnote was a sine qua non of the EPA's case. Once the court determined that the footnote issue was assertable against the EPA in the present litigation under collateral estoppel, the EPA's case vanished as completely as it would have under res judicata. The facts cited by the court, however, suggest that there was but a single cause of action and thus that res judicata would have been applicable to preclude relitigation of any issue that might have been raised in the state case. The single permit, the single program based on a single act of Congress, and the single set of operative facts cited by the court are evidence that there was but one cause of action, at least under a transactional analysis.

This evidence becomes more significant in light of the fact that, on one issue, the Rayonier court did go further than was necessary to decide the case on collateral estoppel grounds: the court held that the "existence of concurrent enforcement powers does not per se negate the application of res judicata principles." Thus, through dicta, the court opened the door for application of res judicata as well as collateral estoppel in statutes with federal and state power-

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298 Id. at 1002.  
299 Id. at 1003.  
300 Id.  
301 Id. at 1002.  
302 Id. at 1001.
sharing arrangements. The element missing for a determination that res judicata was applicable in *Rayonier* was a finding that the EPA was a “party” to the state suit.

Subsequent to *Rayonier*, the Ninth Circuit refused to apply non-mutual offensive collateral estoppel against the EPA in a case under the CAA. It reaffirmed its *Rayonier* decision in *Aminoil U.S.A., Inc. v. California State Water Resources Control Bd.*, however, a case involving the proper application of the definition of “wetlands” under the CWA. In that case, Aminoil sought, as the logical corollary to collateral estoppel, the mandatory joinder of the EPA in its state court action to avoid the necessity of subsequent litigation with the EPA in federal court. Acknowledging the logical symmetry of such an argument, the court nevertheless ruled that the doctrine of sovereign immunity precluded the exercise of jurisdiction by a state over the EPA. Thus, res judicata and collateral estoppel remain affirmative defenses that must be pled in every case in which they are arguably applicable.

Under the combined analyses of *Rayonier* and *Aminoil*, the EPA retains the discretion to decide for itself whether to join in a suit in state court or to abstain and run the risk (if being precluded by their abstention from joinder in subsequent litigation. Although many commentators have urged that mandatory joinder and concepts of privity for collateral estoppel be combined in a single rule, *Aminoil* is consistent with the opposing position that the two should remain merely analogous. The critical facts of *Rayonier* are those necessary to the finding of privity between the EPA and the state, because they determine the breadth of application to the overfiling scenario. Although the court stated that the suit “may be sui generis,” a statement it reiterated in *Aminoil*, the court was probably referring to the construction of the permit issued before final EPA regulations rather than the factual circumstances that led to privity. The court cited for its conclusion only the fact that the permit in *Rayonier* had

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303 *See Western Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 808 (9th Cir. 1980). This case arose before the Supreme Court ruled that non-mutual collateral estoppel could not be asserted against the United States. *See infra* note 406 and accompanying text.
304 *See* 674 F.2d 1227, 1236 (9th Cir. 1982).
305 *Id.* at 1237.
306 18 WRIGHT, supra note 8, § 4407, at 51.
307 *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1004 (9th Cir. 1980).
308 *Aminoil U.S.A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1236 (9th Cir. 1982).
expired and that the relevant regulations had been finalized, leaving the EPA's attempt at a duplicative penalty the only issue.\textsuperscript{309} Even if the court was referring to privity, the most that can be said about the "sui generis" references is that the court failed to anticipate the EPA policy on overfiling and the frequency with which such facts might arise in the future.

Although \textit{Rayonier} stands alone as an example of the successful use of res judicata or collateral estoppel in an overfiling situation, other courts have presumed in dicta that the preclusion doctrines are potentially applicable. In \textit{Reserve Mining Co. v. EPA}, also a CWA case, the Eighth Circuit declined to apply res judicata only because the state case relied upon by the private party litigant had been remanded by the state supreme court and hence was not final.\textsuperscript{310} In the only other reported circuit court case, the Sixth Circuit spoke with approval of the application of res judicata in the context of overfiling under the CAA.\textsuperscript{311}

The failure of \textit{Rayonier} to generate more of its kind is something of a mystery, assuming that such cases exist. At least in some instances, this lack of companion cases can be charged to a failure of defendants to raise the issues of res judicata and collateral estoppel. Such an omission is fatal to affirmative defenses and is a flaw not lost on judges, who have pointedly noted this fact in their opinions.\textsuperscript{312} In another line of cases, the EPA has succeeded in preempting res judicata and collateral estoppel by bringing suit before the parallel state case reached final judgment.\textsuperscript{313} Finally, \textit{Rayonier} oc-

\textsuperscript{309} \textit{Rayonier}, 627 F.2d at 1004.

\textsuperscript{310} See 514 F.2d 492, 535 (8th Cir. 1975), \textit{modified}, 529 F.2d 181 (8th Cir. 1976).


\textsuperscript{312} In United States v. SCM Corp., 615 F. Supp. 411 (D. Md. 1985), the judge felt compelled to point out, both in the text and in a footnote, that the defendant had not raised the issues of res judicata or collateral estoppel in a case under the CAA where the EPA was seeking injunctive relief and civil penalties for precisely the same transaction for which the defendant had previously entered into an administrative consent order with the state. See id. at 415, 418 n.16. Instead, the defendant sought a stay or dismissal under the \textit{Colorado River} doctrine, which was said by the court to require actual litigation in concurrent jurisdictions. See id.; see also United States v. Pennsylvania Envtl. Hearing Bd., 584 F.2d 1273, 1276, n.15 (3d Cir. 1978).

\textsuperscript{313} For example, see the following three CWA cases: United States v. Cargill, Inc., 508 F. Supp. 734, 750 (D. Del. 1981); United States v. Scott Paper Co., 10 Env't Rep. Cas. (BNA) 2017 (W.D. Wash. 1977); Reserve Mining Co. v. EPA, 514 F.2d 492, 535 (8th Cir. 1975), \textit{modified}, 529 F.2d 181 (8th Cir. 1976); and the following two CAA cases: United States v. Lehigh Portland Cement Co., 24 Env't Rep. Cas. (BNA) 1697 (N.D. Iowa 1984); United States v. Hartford Sands, Inc., 575 F. Supp. 733 (D. Md. 1983). In \textit{Cargill}, the court stayed the
curred before recent Supreme Court cases demonstrated that the philosophy behind the use of res judicata and collateral estoppel to conserve judicial resources could outweigh competing philosophies favoring federal agency relitigation.\textsuperscript{314} As a result, a recent Supreme Court case approving the use of mutual defensive collateral estoppel against the EPA by defendants sued in different federal circuits may bring preclusion defenses to the attention of other defendants.\textsuperscript{315} There surely will be other such defendants, unless the EPA is completely satisfied with all the state enforcement actions in all the programs in all the states.

If the EPA intends to overfile under the CAA, CWA, RCRA, or the SDWA because the relief sought by the state is too lenient,\textsuperscript{316} it is difficult to see how such a case would factually differ from \textit{Rayonier}. Like the CWA, the other three statutes set up a federal/state partnership, reserving the EPA enforcement authority.\textsuperscript{317} The permits under the CWA and the permits under the other statutes are derived from a single act of Congress, even if they are issued by a state.\textsuperscript{318} Thus, it is unlikely that \textit{Rayonier} and its finding of some level of privity between the EPA and a state in an overfiling situation is an isolated aberration or an event that will not be repeated. \textit{Rayonier} remains the most significant case applying preclusion to the overfiling scenario.

2. \textit{Montana v. United States}

\textit{Montana v. United States}\textsuperscript{319} stands next to \textit{Rayonier} in its importance to the application of preclusion to the overfiling scenario. In \textit{Montana}, the Supreme Court held that the United States was collaterally estopped from challenging the constitutionality of a Montana gross receipts tax.\textsuperscript{320} This tax was applied to contractors of public construction projects and had previously been litigated and upheld in state court in a suit brought by a federal contractor.

\begin{footnotes}
\item[314] But see Western Oil & Gas Ass’n v. EPA, 633 F.2d 803, 808 (9th Cir. 1980) and cases cited therein.
\item[316] This situation is one listed in the EPA Policy Statement. See EPA Policy Statement, \textit{supra} note 22, at 22–23.
\item[317] See \textit{supra} notes 43, 68, 81, 96, 125 and accompanying text.
\item[318] See \textit{supra} notes 32, 61, 76, 94, 120 and accompanying text.
\item[319] 440 U.S. 147 (1979).
\item[320] \textit{Id.} at 161–62.
\end{footnotes}
Although the United States was not a named party in the state suit, the Court applied the rule that collateral estoppel is applicable "when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved."\(^{321}\) As evidence of federal control, the Court cited the fact that the United States required its contractor to file the suit in state court, reviewed and approved the complaint, paid attorney's fees and costs, directed appeal to the state supreme court, appeared and submitted a brief as an amicus before the state supreme court, directed the filing of a notice of appeal to the United States Supreme Court, and later directed the abandonment of that appeal.\(^{322}\)

On its face, *Montana* seems to be a case of pervasive and absolute control by a nonparty. The precedent case quoted by the Court suggests, however, that a personal stake in the outcome, and assistance in litigation in furtherance of that interest, can be enough,\(^{323}\) although participation must certainly amount to more than filing an amicus brief.\(^{324}\) Acting vicariously through the state, the EPA must be able to affect the introduction of evidence, examination of witnesses, and appeal.\(^{325}\) The question, then, is whether the overfiling scenario presents opportunities for the EPA to exercise sufficient control over a state to be bound by the outcome of its enforcement action.

The control given to the EPA in RCRA is typical of the other statutes and clearly gives the EPA extensive control over the states with approved programs.\(^{326}\) The EPA is the approval authority for state plans.\(^{327}\) It can require modification of approved plans\(^{328}\) and can withdraw approval for cause.\(^{329}\) Moreover, the EPA can suspend or revoke any permit issued by a state\(^{330}\) and can sue to enforce such permits on its own behalf.\(^{331}\) Finally, the EPA allocates financial grants for development and implementation of authorized state hazardous waste programs.\(^{332}\) In short, the EPA has many coercive

\(^{321}\) *Id.* at 154.

\(^{322}\) *Id.* at 155.

\(^{323}\) *Id.* at 154 (quoting Souffront v. Compagniedes Sucreries, 217 U.S. 475, 486–87 (1910)).

\(^{324}\) *Moore, supra* note 160, ¶ 0.411[6], at 442–43.


\(^{326}\) *See supra* notes 311–12.


\(^{328}\) 40 C.F.R. § 271.21 (1987).

\(^{329}\) RCRA § 3006(e), 42 U.S.C. § 6926(e) (1982).


tools at its disposal to encourage state compliance with the EPA’s “timely and appropriate” enforcement guidelines.

Although the existence of the foregoing measures does not necessarily mean that the EPA controls every state enforcement action, the presence of a few additional facts could result in a strong argument for state control. For example, if a state took enforcement action only after notice from the EPA that the EPA was about to file itself, such notice might make a prima facie case for control. While there is no environmental case that explores this “control” issue in the overfiling situation, the Ninth Circuit did consider control in another setting. In *Shell Oil Co. v. Train,* the court rejected the theory that denial of a permit or variance by a state water board because of alleged EPA domination or coercion was a federal agency action reviewable in federal court. The Ninth Circuit seemed especially disturbed by the novelty of the theory. As a result, the case may not be a precedent for the overfiling situation. Nevertheless, while a cause of action based upon control of a state by EPA might be novel, a determination that two parties are in privity for res judicata and collateral estoppel purposes because one party controls the other is not.

3. *Aerojet-General Corporation v. Askew*

In addition to the two categories of cases represented by *Rayonier* and *Montana,* there exists a third category that is relevant to the potential for privity in the overfiling scenario. This third category of cases, represented by the “virtual representation” standard of *Aerojet-General Corp. v. Askew,* has been described as the most radical departure from traditional preclusion rules. Under this standard, “a nonparty is bound if a party who had the same interests litigated the prior case, even though the nonparty was neither a participant nor in privity with a party in the prior proceeding.”

The *Aerojet* case is not only instructive for preclusion purposes, but also shows the hazards of buying land in south Florida. Aerojet obtained an option to purchase land it was leasing from two Florida state agencies. Afterwards, the state enacted a law prohibiting

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333 Shell Oil Co. v. Train, 585 F.2d 408 (9th Cir. 1978).
334 Id. at 413.
335 Id.
337 Motomura, supra note 280, at 1029.
338 Id.
339 Aerojet, 511 F.2d at 713.
the sale of land to private buyers unless the land was first offered to the county in which it was located. When Aerojet sought to exercise its option, the agencies refused and Aerojet then obtained a federal judgment for specific performance.\textsuperscript{340}

In this first suit, neither of the two defendant state agencies argued that the new state law affected the option.\textsuperscript{341} Dade County, the location of the land, then sought and received a writ of mandamus from a state court to compel the state agencies to convey the land to it in accordance with the statute.\textsuperscript{342} The county then sued to quiet title in state court while Aerojet countersued in federal district court to enjoin the mandamus action, arguing that Dade was precluded by the res judicata effect of Aerojet's first federal suit.\textsuperscript{343} The county's suit was then removed to federal district court and consolidated with Aerojet's suit.\textsuperscript{344} The district court agreed with Aerojet,\textsuperscript{345} and the Fifth Circuit upheld the district court by applying the concept of virtual representation to the relationship between the county and the state, a participant in Aerojet's first suit.\textsuperscript{346}

The concept of virtual representation was not new, having long been used in probate proceedings to bind those unknown or not yet born,\textsuperscript{347} but the express application in a less arcane setting certainly was. The court in \textit{Aerojet} found the necessary identity of interests in the fact that the state's interest was in avoiding a sale to Aerojet, and that a sale to the county would have achieved that result.\textsuperscript{348} Although the state's desire was to keep the land itself, this interest was not contrary to the county's interest because the county had no right under the statute unless Aerojet's option was valid.\textsuperscript{349} Because the state could have raised the law to protect its interest in the first suit, and because both the state's suit and the county's suit concerned the same subject matter and therefore constituted a single cause of action,\textsuperscript{350} res judicata precluded relitigation.

\textsuperscript{341} \textit{Aerojet}, 511 F.2d at 713-14.
\textsuperscript{342} \textit{Id.} at 714.
\textsuperscript{343} \textit{Id.}
\textsuperscript{345} \textit{Id.} at 910.
\textsuperscript{346} \textit{Aerojet}, 511 F.2d at 719-20.
\textsuperscript{347} 18 WRIGHT, supra note 8, \S 4457, at 494; see also Motomura, supra note 280, at 1029 n.260.
\textsuperscript{348} \textit{Aerojet}, 511 F.2d at 719-20.
\textsuperscript{349} \textit{Id.} at 719.
\textsuperscript{350} \textit{Id.} at 718.
The virtual representation analysis has not achieved wide acceptance, but it has survived and carved a niche for itself in other circuits, even though it has yet to be expressly endorsed by the Supreme Court. It has even achieved a grudging acceptance from commentators. One of these commentators suggested that virtual representation should be applied where there has been a "close nonlitigating relationship with a party, participation, apparent acquiescence, and perhaps deliberate maneuvering to avoid the effects of the first action," and where "adequate litigation remains the central requirement." A Fifth Circuit case may have enhanced the chances for survival of the doctrine by limiting it to situations in which there is an "express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." Nonetheless, its explicit application to the overfiling scenario has not yet occurred.

Although the Rayonier court cited Aerojet in its discussion, the court does not seem to have relied upon virtual representation, preferring instead to couch its holding in more traditional privity language. Two subsequent cases out of the Ninth Circuit, citing the Rayonier reference to Aerojet, seemed to depend more on the latter's logic. In Sierra Club v. Block, an environmental group was precluded from litigating an issue that had been decided against two of its co-plaintiffs in an earlier administrative action and appeal. The district judge found an identity of interests in the fact that the plaintiffs did not seek recognition of any interests peculiar to themselves. Rather, the plaintiffs sought vindication of a public right to require Forest Service compliance with the National Environmental Policy Act of 1969 (NEPA).

Similarly, in United States v. Geophysical Corporation of Alaska, the Ninth Circuit held that all of the partners to a limited partnership were bound by a prior judgment against one of them requiring release of geophysical data to the Secretary of the Interior under the terms of a permit. The Ninth Circuit adopted the accountability language of the Fifth Circuit, albeit in less restrictive terms. The

351 See cases collected in 18 WRIGHT, supra note 8, § 4457; see also Motomura, supra note 280, at 1026–32.
352 18 WRIGHT, supra note 8, § 4457, at 502.
353 Id. § 4457 (Supp. 1988).
354 Pollard v. Cockrell, 578 F.2d 1002, 1008 (5th Cir. 1978).
355 United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980).
357 Id.
358 732 F.2d 696, 697–98 (9th Cir. 1984).
court required as a basis for virtual representation only an express or implied legal relationship making a party accountable to a non-party, rather than the collusive relationship required in Aerojet.\textsuperscript{359} While the environmental statutes considered in this Article do create a legal relationship between the EPA and each state, it is not certain that the EPA's authority to rule on the adequacy of state programs, to veto permits, and to control certain purse strings would create the accountability required by the Ninth Circuit.

Like the Sierra Club court, a fifth circuit district court applied virtual representation, in \textit{Environmental Defense Fund, Inc. v. Alexander}, a case involving claims under NEPA and the Fish and Wildlife Coordination Act.\textsuperscript{360} The case arose in reaction to the construction of the Tennessee-Tombigbee waterway. Prior litigation by an environmental group was held to bar subsequent litigation by other such groups as well as by an individual and a railroad.\textsuperscript{361}

Because both of the environmental cases that have been based on Aerojet have used virtual representation to preclude relitigation of NEPA issues by environmental groups, one might ask whether multiple litigators on the government side can be similarly treated. Because citizen suit provisions can have preclusive effect on subsequent federal enforcement,\textsuperscript{362} it seems that state enforcement action would be accorded the same effect. The answer depends, however, upon whether virtual representation is limited to its narrow factual Fifth Circuit application or whether it is given the broader Ninth Circuit application.

If Aerojet is limited to its facts, that is, two agencies of the same government acting in collusion to perpetuate litigation, virtual representation is not likely to be applied to the overfiling situation. If the partnership between the federal and state governments encouraged by environmental statutes creates the necessary relationship, however, and if the "appropriate and timely" oversight standards of the EPA are adhered to by a given state, then the doctrine could apply. Virtual representation might well preclude attempts by the

\textsuperscript{359} Id. at 697.


\textsuperscript{361} Id. at 749.

EPA to overfile if the EPA is merely dissatisfied with the result achieved by the state. The degree of independence exercised by a given state in any given case might be a controlling fact in the analysis. Thus, the EPA's enforcement authority could actually be enhanced by states whose enforcement practices deviate regularly from the EPA's efforts to standardize penalties, because the EPA's ability to overfile would be less subject to challenge.

V. FEDERAL ISSUES

A. Full Faith and Credit

Although it was stated earlier that res judicata and collateral estoppel were creations of judges and the common law, in one relevant situation they have a statutory basis: when a federal court must decide the effect to be given a prior state court decision. In this situation, Congress has spoken through the full faith and credit statute, which requires federal courts to give state judicial proceedings the same full faith and credit as they would enjoy in that state's courts.

The Supreme Court has repeatedly interpreted the full faith and credit statute as a congressional requirement that all federal courts give the same preclusive effect to a state court judgment that the courts of that state would give to it, and no more. In most cases, though, the rules of res judicata and collateral estoppel are the same in both jurisdictions. Thus, in the overfiling situation, the application of res judicata or collateral estoppel has the explicit command of Congress over and above the rationale of the common law. The Supreme Court has even seized upon full faith and credit as an additional philosophical justification for preclusion. The Court has noted that the preclusion doctrines promote "the comity between

366 18 WRIGHT, supra note 8, § 4469, at 659.
367 This is true in the overfiling situation because it presumes that the state action will be the first to reach final judgment and thus be entitled to preclusive effect. At the same time, states must also follow federal rules in determining the effect to be given to final federal judgments, although not because of 28 U.S.C. § 1738. See RESTATEMENT OF JUDGMENTS, supra note 174, § 87. This was a major issue in Aerojet-General Corporation v. Kirk, previously discussed. 318 F. Supp. 55 (N.D. Fla. 1970), aff'd sub nom. Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971), cert. denied, 409 U.S. 892 (1972). See supra text accompanying note 340.
state and federal courts that has been recognized as a bulwark of the federal system.\textsuperscript{368}

The statute originates in the full faith and credit provision of article IV, section 1, of the Constitution.\textsuperscript{369} That provision requires each state to give full faith and credit to the acts, records, and judicial proceedings of every other state and gives Congress the power to enact enabling legislation.\textsuperscript{370} When Congress enacted the enabling statute in 1790,\textsuperscript{371} it went beyond the Constitution and extended the full faith and credit requirements to federal courts as well as state courts.\textsuperscript{372}

The statutory basis for full faith and credit, when that requirement is applied to federal courts, opens the door for the argument that a specific subsequent statute either explicitly or impliedly repeals the full faith and credit requirement. There is no explicit general rejection of res judicata and collateral estoppel in the environmental statutes covered herein, but there remains the question of whether there is an implied partial repeal of the full faith and credit statute in any of them. The Supreme Court has not specifically addressed this issue in the environmental law context, but, in two recent cases under the Civil Rights Act of 1871 and Title VII of the Civil Rights Act of 1964, the Court made clear that repeal by implication was "disfavored."\textsuperscript{373} The Court went on to say that there are two categories of repeals by implication: (1) irreconcilable conflict between the two acts, or (2) coverage of the entire subject by the later one indicating its intention to be a substitute.\textsuperscript{374} Under either test, legislative intent to repeal must be "clear and manifest,"\textsuperscript{375} and more is required than just the creation of a federal remedy.\textsuperscript{376}

Again using RCRA as a model, either test seems to present an insurmountable burden of proof of implied repeal because of the ambiguity of the EPA's enforcement authority under Section 3008, the explicit authorization of state programs under Section 3006, and the absence of any explicit legislative history to provide clarifica-

\textsuperscript{368} Allen v. McCurry, 449 U.S. 90, 96 (1980).
\textsuperscript{370} Moore, supra note 160, ¶ 0.406[1], at 265.
\textsuperscript{372} 18 Wright, supra note 8, § 4469, at 662 n.5.
\textsuperscript{373} Id. at 468. (citing Allen, 449 U.S. at 99).
\textsuperscript{374} Id. at 468.
\textsuperscript{375} Id.
\textsuperscript{376} Currie, supra note 200, at 328; see also Moore, supra note 160, ¶ 0.406[1], at 274; Restatement of Judgments, supra note 174, § 86 comment d, at 307.
The provision that allows the EPA to take enforcement action in approved states is not inconsistent with res judicata and collateral estoppel because the provision does not necessarily presume that the state has already taken enforcement action and because any prior state action may not necessarily have res judicata or collateral estoppel effect. This lack of res judicata and collateral estoppel effect, even when otherwise appropriate, arguably undercuts the states' authority, contrary to the explicit emphasis on their primary role in enforcement.

In one administrative case, these arguments were taken to the extreme conclusion that the language of RCRA precluded overfiling. It is not necessary to go that far, however, to conclude that RCRA leaves intact the statutory full faith and credit requirement of giving res judicata and collateral estoppel effect to state court decisions where factually applicable. Similar arguments can be made for the other statutes, thus disproving any contention that these statutes impliedly repeal the full faith and credit statute. Application of full faith and credit, however, is of no benefit to defendants in the overfiling scenario independent from the remainder of the preclusion analysis.

Full faith and credit is usually mentioned as an independent basis for a conclusion reached through the traditional res judicata and collateral estoppel analysis. For example, the Supreme Court has cited Montana as an example of adherence to full faith and credit principles, although the Court did not mention these principles in its Montana analysis. The Rayonier case did not discuss full faith and credit either, but, in a footnote, the Ninth Circuit indicated that it would have reached the same result under such an analysis. In contrast other environmental cases that have applied res judicata and collateral estoppel, such as Sierra Club, have not explicitly mentioned full faith and credit as did Rayonier. These other cases can only be read as implicitly rejecting the argument that the statute on which the suit is based supersedes the full faith and credit statute.

379 See In re BKK Corp., No. IX-84-0012, slip op. (EPA May 10, 1985). On an appeal for reconsideration, the EPA Administrator dismissed the original complaint by the EPA and ruled that the BKK decision would have no precedential effect. Decision on Reconsideration, In re BKK Corp., No. IX-84-0012 (RCRA (3008) 84-5), slip op. at 4 (EPA Oct. 23, 1985).
In addition to providing a statutory basis for preclusion, the full faith and credit doctrine incorporates into overfiling cases the state rules on preclusion issues generally. For example, a federal court must first look to state law to determine whether state administrative\textsuperscript{382} or consent decrees\textsuperscript{383} constitute final judgments. The same is true for determining what constitutes a single cause of action.\textsuperscript{384} In other words, a federal court must look to state law to determine if a given judgment meets all the preclusion requirements of state law.\textsuperscript{385} If so, the appropriate party is then entitled to preclusive effect of that judgment in federal court under the full faith and credit principle of federal law.

While the full faith and credit statute is obviously a powerful tool for defendants, its potential can only be realized when the elements of res judicata or collateral estoppel are also met. In other words, it is of no benefit to a defendant to have a final judgment in state court that is entitled to recognition in federal court unless that judgment can be used against the federal government. In the overfiling situation, that use depends, of course, on a finding of privity between the state and federal government. While the Supreme Court has made it clear that a state's rules determine which state decisions are entitled to preclusive effect,\textsuperscript{386} no case explicitly suggests that state rules would govern a privity argument made to a federal judge.

**B. The Federal Government as a Litigant**

In addition to all the issues that are relevant to preclusion analysis generally, such as causes of action, final judgment, privity, and full faith and credit, the mere presence of the federal government as a litigant might also affect the final analysis. Because the overfiling scenario always has the federal EPA as the named plaintiff in the second suit, one should consider whether exceptions are available to the EPA.

In *Montana*, the Supreme Court added one final step to the preclusion analysis. In addition to privity, it asked whether the particular circumstances of the case justified an exception to the general principles of estoppel.\textsuperscript{387} The Court went on to list three specific

\textsuperscript{382} *Kremer*, 456 U.S. at 481–84.
\textsuperscript{383} *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 720–21 (5th Cir.), cert. denied, 423 U.S. 908 (1975).
\textsuperscript{386} *Migra*, 465 U.S. at 87.
areas that might warrant exceptions: (1) cases involving issues of law arising in successive actions involving unrelated subject matter; (2) cases involving rights of litigants who properly invoked federal district court jurisdiction to consider constitutional claims and who were then involuntarily compelled to accept a state court determination of those claims; and (3) cases involving unfairness or inadequacy in state court procedures. 388

The first exception, involving unmixed questions of law, has given the Court some trouble. In Montana, the exception was said to apply to "issues of law [that] arise in successive actions involving unrelated subject matter." 389 In such circumstances, stare decisis, rather than collateral estoppel, is generally said to be the applicable doctrine. 390 The Court conceded that its seminal case on the subject was "not very illuminating," its underlying purpose was "far from clear," and its application was uncertain, while at the same time acknowledging that "the exception is generally recognized." 391 In practice, though, the Court has had more difficulty explaining the exception than in finding it inapplicable, as it did in Montana. 392 In any event, this exception is unlikely to be arguable in the typical overfiling scenario based on inadequate state action because the facts are likely to be identical in both cases.

The second exception, relating to constitutional issues raised by the party facing preclusion, is also unlikely to arise in the typical overfiling case because it is difficult to conceive of a constitutional defense the EPA might have to preclusion. If the state case were to turn on a constitutional issue, however, and if preclusion of the EPA by that case was otherwise appropriate, the EPA could argue that it had not freely submitted this question to a determination in the state court. The outcome will depend, as it did in Montana, on whether the EPA controlled the state action. 393

388 Id. at 163–64. The Court has since discussed these three exceptions in two unanimous holdings: United States v. Mendoza, 464 U.S. 154 (1984) (announcing a seemingly broad prohibition on the use of nonmutual offensive collateral estoppel in a case involving immigration law); United States v. Stauffer Chem. Co., 464 U.S. 165 (1984) (approving the application of mutual defensive collateral estoppel against the EPA in a case involving use of private contractors to conduct inspections under the CAA).
389 440 U.S. at 162.
390 Moore, supra note 160, ¶ 0.442[1], at 749.
392 See id. at 172–73; see also Yellin, Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking, 92 YALE L.J. 1300, 1306 (1983) (suggesting that separating fact from law may be an unattainable goal).
Finally, the Court has recognized that "redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."394 This exception has found its primary application in the civil rights area. Even there, however, it is a minority position.395 In any event, because the states have equivalent or more stringent programs that operate in lieu of the CWA, SDWA, CAA, and RCRA, factual circumstances revealing an open hostility to vindication of federal environmental laws and a systematic state court refusal to enforce them are not likely. No environmental case has suggested such a possibility.

In addition to the three general exceptions, the Supreme Court also allows the federal government to argue that it is "a unique litigant with special responsibilities and concerns that justify exempting it from the preclusive effect of a decision rendered against it in a prior case."396 For example, in Mendoza the government had previously litigated and lost the key issue with other plaintiffs.397 Because the new plaintiff was not a party to the prior suit, it sought to assert nonmutual offensive collateral estoppel to preclude relitigation of the same issue decided against the government in the prior suit. For two reasons, the Court agreed that the special status of the government entitled it to an exemption for issues such as those involved in the case.398 Most importantly, nonmutual collateral estoppel would force the Solicitor General to appeal many more cases lost by the government to avoid their preclusive effect, contrary to the goal of reducing unnecessary litigation.400 Moreover, the doctrine would prevent development of the law in different circuits because the law would be frozen in the first circuit court to decide the issue.401 In light of the important public questions regularly litigated by the government and the importance of "percolation" in the circuits, the Court felt that allowing the first circuit court to hear an issue to settle it for all the circuits would be intolerable.402

394 Id. at 164 n.11.
398 See supra note 277 for a discussion of mutuality.
399 Mendoza, 464 U.S. at 162.
400 Id. at 161; see also Levin and Leeson, Issue Preclusion Against the United States Government, 70 IOWA L. REV. 113, 119 (1984).
401 Mendoza, 464 U.S. at 160.
402 Note, supra note 396, at 849–50.
Mendoza represents the first generally recognized exception limiting the use of collateral estoppel against the United States.\textsuperscript{403} Although the Court limited its holding to offensive use, some commentators regard the decision as a blanket exemption from nonmutual collateral estoppel for the United States.\textsuperscript{404} In the same term, though, the Court showed it had no fundamental problem with the use of collateral estoppel against the United States by allowing defensive use in a mutual setting in contrast to the offensive use in the nonmutual setting of Mendoza.

In Stauffer Chemical Company v. EPA,\textsuperscript{405} the EPA had previously litigated and lost in the Tenth Circuit the issue of whether contractors were “authorized representatives” for the purpose of performing inspections under the CAA.\textsuperscript{406} When the EPA sought to litigate the same issue against the same defendant in the Sixth Circuit, which had not previously addressed the issue, that court, in a split decision, applied collateral estoppel,\textsuperscript{407} and was upheld by the Supreme Court.\textsuperscript{408} The Court again examined the unique issues presented by the presence of the federal government as a litigant, but found that the problems of Mendoza were not present in the different setting.

The concerns about unnecessary appeals were absent in the Stauffer setting because the requirement of mutuality meant that the government need not appeal to preserve the issue against other defendants.\textsuperscript{409} Failure to appeal would bind the government to that issue only in subsequent suits with the same defendant, and then only in circuits that had not previously taken a different stand on the issue. The Stauffer Court saw preclusion of issues against a single defendant as a minor imposition on the special role of the United States as a litigant.\textsuperscript{410} Therefore, the presence of the federal government in the setting of Stauffer did not justify an exemption to the otherwise applicable rule of collateral estoppel. To relitigate

\textsuperscript{404} See Note, supra note 396, at 879 n.14.
\textsuperscript{405} Stauffer Chem. Co. v. EPA, 647 F.2d 1075 (10th Cir. 1981).
\textsuperscript{406} Id. at 1077.
\textsuperscript{407} Collateral estoppel was the appropriate doctrine, rather than res judicata, because the causes of action were different. The causes of action were different because they were derived from events at two different Stauffer plants, even though the litigants were the same.
\textsuperscript{409} Id. at 173.
\textsuperscript{410} Id.
the issue in another circuit, the government need only pick a different defendant.411

Giving Stauffer and Mendoza their broadest reading, the use of nonmutual collateral estoppel against the United States, either offensive or defensive, is presumably prohibited, while the use of mutual collateral estoppel against the United States, either offensive or defensive, is presumably permitted.412 Whatever the value of percolation and other unique benefits of litigation by the federal government, they are outweighed by the unfairness inherent in repeatedly litigating the same issue over and over with the same defendant, an unfairness eliminated by res judicata and collateral estoppel. In Montana, the Court also recognized that this same unfairness is present when the first case is brought by the federal government's surrogate.413 Thus stated, these principles can now be applied to the overfiling of a prior state enforcement action by the EPA.

These three Supreme Court cases support the application of issue and claim preclusion in the overfiling situation because that scenario has mutuality as a necessary element whenever there is a finding of privity between the federal government and the state. Mutuality follows from the assumption that preclusion will be asserted by a party to both suits, the defendant, against a party to both suits, the state government or its privy, the EPA. Thus, there appears to be no general exception to preclusion doctrines available to the govern-

411 Id. at 173 n.6.

412 At the risk of further complicating the confusing terminology of collateral estoppel, the following is offered as an explanation of all the possible permutations in the collateral estoppel matrix. For the sake of providing as much simplicity as possible, it will be presumed that there are only two parties to the first cause of action, P (plaintiff) and D (defendant). The new party in the non-mutual situation will be referred to as X. It will also be assumed that, in any cause of action, only one party will find it advantageous to assert collateral estoppel.

Because mutuality requires an identity of parties in both causes of action, and because either party to the first cause of action can be aligned as either the plaintiff or defendant in the second, there are four possible assertions of mutual collateral estoppel: P can assert it against D offensively (if P is again the plaintiff) or defensively (if P is now the defendant). Similarly, D can assert it against P (plaintiff) or D (defendant). While the addition of a third party in the non-mutual situations might seem to mathematically increase the possible number of combinations to eight, there are still only four, because collateral estoppel can only be asserted against a party to the first cause of action. In other words, neither A nor B can assert non-mutual collateral estoppel against X, either offensively or defensively, because X was not a party to the first cause of action. Thus, the possible combinations in the non-mutual situation are that X can assert collateral estoppel offensively against P or D if X is the plaintiff in the second cause of action, or defensively against P or D if X is the defendant in the second cause of action.

ment in the overfiling scenario, and the key issue remains whether a given fact pattern leads to a determination of privity. Important as well is the fact that the logic of these three cases is consistent with that of the Ninth Circuit in Rayonier and may boost its influence. The EPA has yet to show why it should enjoy a greater immunity from preclusion than other elements of the federal government.

C. Abstention and Stay

Abstention, like res judicata and collateral estoppel, is a judge-made doctrine. Abstention and stay arguments often occur in conjunction with res judicata and collateral estoppel because many of the same issues arise. A stay of federal court proceedings pending the outcome of state proceedings can give the defendant the opportunity to obtain the final judgment necessary for arguing preclusion against the federal government. Abstention, the decision by a district court to decline or postpone the exercise of jurisdiction, is the ultimate stay. Abstention necessarily involves the same arguments, and can achieve the same result, as res judicata or collateral estoppel without the difficulty of proving privity.

The power to stay proceedings is discretionary and "is incidental to the power inherent in every court to control the disposition of the


415 See, e.g., Menzel v. County Util. Corp., 14 Env't Rep. Cas. (BNA) 1126 (E.D. Va. 1979). In this case, which arose under the CWA, the district judge ruled that the plaintiffs in the federal case, Menzel and other citizens of the city of Virginia Beach, were in fact the same party as the Commonwealth of Virginia in the state case under the doctrine of parens patriae. After first ruling that he would be bound under the full faith and credit doctrine to the state court's interpretation of a state-issued NPDES permit, the judge elected to stay the federal proceedings pending the outcome of the appeal of the state judgment to the state supreme court. Id. at 1130.


Abstention does not always result in dismissal. See infra note 484 and accompanying text. In some situations, it only results in a stay pending the outcome of state proceedings. Thus, it is the rationale for the action rather than the action taken by court which identifies abstention.

418 Note that where privity can be proven, though, it presents the opportunity to argue that the federal court should refrain under the doctrine of comity. Under the doctrine of comity, a federal court may decline to exercise its concurrent jurisdiction to prevent "unseemly" conflicts between state and federal courts when there is a suit pending in state court between the same parties. 36 C.J.S. Federal Courts § 10(1), at 51–52 (1960); 21 C.J.S. Courts § 528 (1960 & Supp. 1988).
cases in its docket with economy of time and effort for itself, for counsel and for litigants." 419 These basic principles have not been altered by environmental law. 420 It would probably be an abuse of discretion, however, to grant a stay for the mere fact that the same issue of law is under consideration in a parallel forum, 421 in other words, for the mere fact that there is an overfiling. To meet the evidentiary burden necessary to convince a judge to exercise the court's discretionary power, the proponent of a stay must make out a clear case for hardship or inequity. 422 One way of meeting this burden might be to show a close relationship between the plaintiffs in both suits. Because proof of a close relationship is also likely to be used to prove control of the state by the EPA and thus privity between them, the requirement to argue privity between the EPA and state might not be completely avoided by seeking abstention in lieu of preclusion. In order to get a stay, a proponent in federal court will have to argue successfully many of the same points that would otherwise be required for preclusion. 423 To understand a proponent's chance for success, one must understand the philosophical underpinnings of abstention.

Although jurisdiction of federal courts is ordinarily a matter for Congress, the Supreme Court has justified abstention at various times on the broad remedial discretion of a court at equity, on comity, and, more recently, on concerns for federalism. 424 This last justification is particularly intriguing in the environmental law context because each of the statutes covered in this Article, except CERCLA, contains a prefatory assertion of the primary responsi-

420 See Ohio Envtl. Council, 565 F.2d at 396.
421 See id.
422 The Supreme Court has described the evidentiary burden and prospects for success of the proponent of a stay as follows:
[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.
424 See Wells, supra note 414, at 1108-11. One commentator has argued that judges have no inherent or legislated authority to make such doctrine. Thus, abstention is "a judicial usurpation of legislative authority, in violation of the principle of separation of powers." Redish, supra note 414, at 76. The Supreme Court, however, has not acknowledged such a limitation.
bilities of the states. Whether these provisions are merely a sop to the states, or are in fact a true expression of federalism, remains to be seen. The federalism argument has yet to be made successfully in this context and, at least for now, the independent enforcement authority of the federal government seems to outweigh concerns for federalism.

Unlike its two preclusion companions, abstention does not date from ancient Roman or Germanic law but rather from the United States judiciary of 1941. Because of its recent heritage and gaps in its development, abstention is not as well-settled as the other doctrines and is subject to significant clarification with each new Supreme Court case. One thing is clear, though: abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and "is the exception, not the rule." To understand this extraordinary and narrow exception, and how it might be applied to overfiling, one must examine its present manifestations.

Currently, there appear to be three distinct types of abstention. Each type is known by the seminal case for each situation: Pullman abstention, Burford abstention, and Younger abstention. In addition, there is another doctrine usually discussed in the same context called the Colorado River doctrine, also named for its seminal case. According to the Supreme Court, the Colorado River doctrine is not an abstention doctrine, but involves considerations of wise judicial administration. This doctrine can result in a dismissal as well as a stay, however, when applicable.

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426 Lehigh, 24 Env't Rep. Cas. (BNA) at 1700.
429 See generally 17A WRIGHT, supra note 427, § 4241; see also Wells, supra note 414, at 1108. The Supreme Court has cautioned that these are not rigid pigeonholes into which the cases must fit. Nevertheless, the Court itself uses these classifications. Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519, 1526 n.9 (1987).
434 Id. at 817.
435 17A WRIGHT, supra note 427, § 4247. These authors also point out, though, that the distinction between a stay and a dismissal is artificial. A stay that allows a parallel state proceeding to determine an issue has the practical effect of a dismissal of the federal proceeding because of res judicata and collateral estoppel. Id. The Supreme Court has noted that a stay
1. Railroad Commission of Texas v. Pullman Company

Abstention under *Railroad Commission of Texas v. Pullman*, the oldest of the four doctrines, permits a federal district court to avoid deciding sensitive constitutional questions by allowing time for a state court to first decide unsettled state law issues that might moot the constitutional issues. The requirement for unsettled state law issues can frequently be met in the environmental context because Congress routinely amends the statutes, thus requiring revision of state plans and reapproval by the EPA. As a result, the system ensures a steady supply of fresh state law to be interpreted. Because abstention does not require identical proceedings in state court between the same parties, the parallel state proceedings in the overfiling scenario, if they have not yet reached final judgment, should suffice as the forum for deciding the unsettled state law questions.

The additional requirement for sensitive constitutional questions is more difficult to find. There is one overfiling case, however, where a defendant succeeded in obtaining a stay. *United States v. Interlake, Inc.* is a CAA case in which the defendant was charged in identical state and federal actions with violating a rule of the Illinois Pollution Control Board. This rule was a part of the state implementation plan relating to emission control devices on coke oven facilities. The federal judge first held that the rule could be challenged as unconstitutionally vague and as a denial of due process. The judge then granted a stay pending the outcome of the state case to see if the state case would result in an interpretation of the rule that would avoid the necessity of addressing the constitutional question in federal court.

*United States v. Congoleum Corporation*, a later case, criticized the *Interlake* decision and expressly refused to follow it. Like *Interlake, Congoleum* was a CAA case, with similar facts. *Congoleum* involved a defendant’s allegations that a rule of the Pennsylvania Administrative Code was unconstitutionally vague and viola-
tive of due process and equal protection.\textsuperscript{443} The court refused to abstain, holding that it was appropriate for a federal court to address these issues because, once a SIP is approved by a state, it becomes federal law, and cannot be changed without the EPA approval.\textsuperscript{444} Another court has also refused to follow\textit{Interlake} in a case involving issues under CWA, but the court in that case seemed skeptical about the legitimacy of the alleged constitutional issues.\textsuperscript{445} As a result, the major impediment to the application of\textit{Pullman} abstention in environmental cases appears to be the existence of a "sensitive" constitutional question.

2. \textit{Buiford v. Sun Oil Company}

In contrast to\textit{Pullman}, the next abstention doctrine to be developed is less likely to apply to an overfiling situation. Although\textit{Buiford v. Sun Oil Company}\textsuperscript{446} was decided only two years after\textit{Pullman}, it has been cited in fewer Supreme Court cases and is not as well developed.\textsuperscript{447} Unlike\textit{Pullman}, it is applicable whether or not there is a parallel state proceeding pending,\textsuperscript{448} it requires dismissal rather than just a stay,\textsuperscript{449} and it is usually reserved for cases involving complex state regulation of a business that the federal government has chosen not to regulate.\textsuperscript{450} Because of this last factor,\textit{Buiford} abstention presents a particularly difficult problem of proof under environmental statutes, which, by their nature, involve broad federal regulation of industry. The one reported environmental case that considered\textit{Buiford} abstention in depth, a CWA case, rejected it because the parameters of the state law had been established by comprehensive federal laws and regulations.\textsuperscript{451} Given the similarity among the enforcement provisions of the statutes considered here, the same arguments should work against this type of abstention under the other statutes as well as the CWA.

\begin{footnotes}
\item[443] Id. at 176.
\item[444] Id. at 177, 178 n.4.
\item[446] 319 U.S. 315 (1943).
\item[447] Wells, supra note 414, at 1115.
\item[449] Id. at 64.
\item[450] Id. at 77; see also United States v. Cargill, Inc., 508 F. Supp. 734, 746 (D. Del. 1981); Wells, supra note 414, at 1115.
\item[451] Cargill, 508 F. Supp. at 746–47.
\end{footnotes}
3. Younger v. Harris

The final and most recent abstention doctrine is also unlikely to arise factually in the environmental setting. Abstention under Younger v. Harris[^452] is only appropriate where "federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings,"[^453] or "when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[^454] Younger abstention is therefore intended for situations where a private defendant is seeking to affect pending state proceedings. Thus, situations in which abstention might bar a suit by the United States would be rare.[^455] The situations in which it might bar a federal environmental suit are even more rare because of concurrent enforcement authority.[^456] This was the point of the only reported environmental case to discuss Younger abstention at length: the EPA rather than a private criminal defendant will be the party bringing the federal suit in the overfiling situation.[^457] Other environmental cases that have considered Younger have also rejected it because the necessary factors were not present.[^458]

4. Colorado River Water Conservation District v. United States

A doctrine that has met with somewhat more success than abstention in the environmental arena is that of Colorado River Water Conservation District v. United States.[^459] In Colorado River, there were parallel proceedings in state and federal courts to adjudicate water rights among federal and private water users.[^460] A federal statute, the McCarren Amendment, had been passed to allow the mandatory joinder of the United States in such state actions.[^461]

[^457]: Id.
[^460]: Id. at 820.
Supreme Court first examined the three abstention doctrines and found them to be inapplicable. But, the Court also announced that, apart from considerations of constitutional adjudications and federalism, there were considerations of wise judicial administration that could apply to situations involving the contemporaneous exercise of concurrent jurisdictions. The Court noted that these other situations were exceptional and considerably more limited than the circumstances appropriate for abstention, but found such a situation in the *Colorado River* facts nonetheless. In effect, the Court held that the inherent discretionary power that a court exercises in granting a stay could also extend to a dismissal or abatement.

According to the Court, the most important factor warranting exercise of this discretion to grant a stay was the congressional deference to the state system evidenced by the McCarren Act. Less important factors cited by the Court included “absence of any substantial progress in the federal-court litigation; presence in the suit of extensive rights governed by state law; the geographical inconvenience of the federal forum; and the Government's previous willingness to litigate similar suits in state court.” A subsequent case mentioned two additional factors arguing against a stay. Pursuant to this case, a stay would also be appropriate if a federal law would determine the decisional rule on the merits, regardless of the forum, and if substantial doubt would remain about the existence of an adequate state law remedy for the aggrieved party.

Case law provides the best illustration of the application of *Colorado River* and its importance to overfiling defendants. The one environmental case to grant a stay based upon *Colorado River*’s principles, and to review thoroughly the abstention doctrines as well, was *United States v. Cargill, Inc.* Cargill operated a chicken processing plant in Delaware whose wastewater treatment plant was the source of objectionable odors and water pollutants. As a result, the state filed two lawsuits: one for violations of the state regulations governing the control of odors (odor suit), and another for violation

463 Id. at 818.
464 Id. at 819.
467 See id. at 24, 27. See generally 17A Wright, supra note 427, § 4247 (discussion of avoidance of duplicative legislation in federal and state fora).
469 Id. at 742.
of the CWA National Pollution Discharge Elimination System (NPDES) permit (water suit). Because the two problems had a common source, the state chose to enter into a comprehensive settlement of the odor suit, while holding the water suit in abeyance as a "bargaining stick." The state told Cargill that it would settle the water suit for a $5000 penalty if the reconstruction of the treatment plant resulting from the air suit settlement proved itself after a full year's operation.

After the entry of the order in the settlement, Cargill complied with its terms, spent $342,000 in remedial action, and received a construction permit to modify the treatment plant at an additional cost of $1.5 million. At this point, however, the EPA also filed suit for violations of the NPDES permit, in spite of the fact that they had participated in the settlement. The EPA sought an injunction and a civil penalty of $10,000 per day for past violations. The EPA took this action over the objection of the Delaware Department of Natural Resources and Environmental Control primarily because of dissatisfaction with the proposed settlement of the water suit for $5000. The EPA was dissatisfied because the EPA settlement policy would have calculated a "proper" penalty at $405,000. As a result, Cargill gave notice that it would be forced to stop work on the abatement program, out of fear that this program might be inconsistent with any injunctive relief granted in the federal case.

Cargill then sought a stay or dismissal of the federal action on abstention grounds, but did not argue res judicata or collateral estoppel. The judge rejected all the abstention doctrines, and then looked to see if the "exceptional circumstances" of the Colorado River doctrine were present. In balancing all of the factors, the judge determined that a stay pending the fulfillment of the state settlement was appropriate, noting that the EPA might also be collaterally estopped by the finalization of the state judgment.

Weighing most heavily in this decision, among a total of seven factors

470 Id. at 743.
471 Id. at 744.
472 Id.
473 See id.
474 Id.
475 See id. at 745.
476 Id. at 745.
477 Id. at 744-45.
478 See id. at 737, 745.
479 See id. at 745-51.
480 See id. at 750-51 & n.56.
favoring a stay, was the fact that the EPA had brought Cargill's construction efforts under the state agreement to a halt by seeking injunctive relief. The halt in the abatement program actually thwarted the principal goal of the CWA—the prevention of water pollution. Among the eight unavailing factors cited by the court as weighing against a stay, the two carrying the most weight were the fact that the EPA was not a party to the state litigation and was seeking a different penalty, and the fact that the EPA had an interest in promoting consistency with its uniform penalty policy.

Subsequent environmental cases, all under the CAA, have refused to apply Colorado River. In United States v. SCM Corp., the court held that a prior administrative consent decree with the state did not fulfill the requirement for parallel state court proceedings as an adequate vehicle for the resolution of the same claim. An informal agreement with the state has likewise been held inadequate.

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481 Id. at 749.
482 Id. Those factors cited as favoring a settlement were:
(a) the avoidance of federal/state friction, (b) the [state's] greater familiarity . . . with the factual background of the case, (c) the state's interest in the enforcement of its air pollution laws and regulation, (d) the presence of parallel state litigation and the existence of adequate statutory and regulatory authority at the state level to protect the public interest, (e) the need to conserve judicial resources, (f) congressional intent that primary responsibility for enforcement of the NPDES program rest with the state, and (g) the fact that, as a practical matter, the United States by seeking injunctive relief . . . has brought Cargill's construction efforts to a halt and is thus thwarting the principal goal of the [CWA]—the prevention of water pollution.

Id. Reliance on this last factor was curious, in light of the judge's rejection of a Younger-type abstention because of the "remote possibility that the remedy imposed in the federal action will be inconsistent with the state-imposed remedy." Id. at 747.

483 See id. at 750. Those factors cited by the court as weighing against a stay were
(a) this Court's heavy obligation to exercise the jurisdiction granted it, (b) the fact that, as a practical matter, the injunctive relief sought by EPA does not differ from that sought by the state and agreed to by Cargill and hence, there does not appear to be a serious possibility of conflicting obligations being placed upon Cargill, (c) the fact that there are no enforceable requirements that Cargill install pollution control equipment, (d) congressional intent that there be some cases where dual state/federal enforcement actions be brought, (e) the congressional grant of discretion to the Administrator as to when such suits should be brought, (f) the EPA's interest in overseeing enforcement at the state level and ensuring uniformity, (g) the fact that the EPA is not a party to the state litigation and it is seeking a different remedy from the one the state will settle for, and (h) the EPA's interest in ensuring that adequate and uniform penalties be sought under its penalty policy.

484 See United States v. SCM Corp., 615 F. Supp. 411, 417–18 (D. Md. 1985). Unfortunately, SCM Corp. does not mention Cargill. In failing to acknowledge and use the exhaustive and logical step-by-step analysis of Cargill, the court missed an opportunity to encourage uniformity in an analytical area that badly needs it.

United States v. Lehigh Portland Cement Company, the facts of Cargill were distinguished. 486 In Lehigh, the judge held that federal efforts would not disturb those of the state but would supplement them. 487 Thus, only in Cargill has a defendant in an overfiling situation actually gotten relief by the Colorado River doctrine.

It appears, then, that environmental laws do not expressly or impliedly rescind the authority of a federal court to abstain, because courts continue to consider such authority. As in other areas of the law relevant to preclusion, however, the fact patterns where abstention should apply are rare. Nonetheless, if res judicata and collateral estoppel are technically inapplicable to a given fact pattern, defendants may well find relief in the Colorado River doctrine as well as “real” abstention.

As with Rayonier and BKK, the underlying factor seems to be objectively reasonable enforcement action by the state that appears to be threatened by subsequent EPA action. It may well be that the Cargill decision influenced the subsequent formulation and practice of the EPA’s “timely and appropriate” overfiling policy as a way of promoting initial adequate state response to avoid the risk of preclusion or abstention that accompanies overfiling. 488

VI. CONCLUSION

General principles of res judicata and collateral estoppel are undoubtedly applicable to final judgments under state environmental statutes, as they would be to any other state judgments. Environmental law contains no explicit or implied blanket repeals of either common law res judicata and collateral estoppel principles or statutory full faith and credit principles. Use of such judgments defensively in an overfiling situation is therefore theoretically possible, but depends upon a showing of privity between the state agency and the EPA.

The overfiling scenario explored in this Article contains many elements favoring a finding of privity between the state and the EPA. The language of the CWA, SDWA, CAA, and RCRA fosters violation of the federal provisions . . . is unaffected by the defendant’s cooperation with the state”.

488 18 WRIGHT, supra note 8, § 4404, at 22.
the image of the state as an agent or duly-anointed surrogate of the EPA in its enforcement actions. These statutes specifically provide for approval of equivalent state programs, which are to be carried out by the states in lieu of the federal programs. These state programs in fact become the federal enforcement programs, displacing those previously promulgated by the EPA. Permitting actions taken by the states then have the same force and effect as those taken previously under the federal programs.

Standing against this evidence of the state and federal governments acting as alternate enforcers of a single statutory scheme is the fact that every statute gives the EPA continuing enforcement authority in approved states, without any explicit limitation on its power. If each statute’s reference to congressional intent to give states primary enforcement responsibility is to be meaningful, however, the states must be in a position of strength to negotiate compliance agreements and other settlements with violators. The states cannot negotiate from a position of strength if the EPA is always free to seek additional fines and more costly remedial actions through overfiling. No sane defendant would negotiate a major settlement unless there was a strong likelihood that the EPA was also bound by the result. The bridge to resolving this dilemma is found in the statutory references to “appropriate” state enforcement actions.

It seems implicit in each statute that Congress intended the states to take the lead in enforcement, but expected the EPA to step in when a state failed to take enforcement action when action was appropriate or failed to seek appropriate remedies. Although the EPA’s “timely and appropriate” enforcement policy standards are said by the agency to be discretionary and not mandatory under the Acts, it is more likely that these mandatory standards capture the essence of the scheme envisioned by Congress. If Congress did not intend the EPA to overfile on objectively reasonable state actions, the EPA’s ability to overfile is not unfettered—it is limited by the objective reasonableness of the prior state action. The determination of whether or not there is a statutory mandate for these enforcement policy standards will have to wait for a case that addresses squarely whether a judge can substitute his or her own determination of the objective reasonableness of a state’s action for that of the EPA.

While the EPA retains the right to take enforcement action in approved states after notice, these statutes are silent as to the effect of prior state enforcement action. Even a broad interpretation allowing the EPA action regardless of state action is not inconsistent with collateral estoppel, which forecloses issues rather than causes of
action. The same is not true of res judicata, which would always totally preclude the EPA’s enforcement authority if authorized by the statute. The harshness of the res judicata result might tip the balance against a statutory interpretation allowing application of res judicata under a transactional definition of a cause of action.

Application of res judicata (but not collateral estoppel) in the overfiling scenario will not be possible as long as the Supreme Court adheres to a literal interpretation of “party” for delineating a single cause of action as it did in Montana (or as the Ninth Circuit did in Rayonier). There may be no good theoretical reason why a privy can be treated as a party against whom either preclusion doctrine can be asserted but cannot be treated as the same party for determining whether res judicata is appropriate rather than collateral estoppel, but such seems to be the law. Because the outcome in both of these situations would be the same under res judicata, however, perhaps the issue of res judicata applicability in lieu of collateral estoppel has not been settled.

This issue would be squarely before the court if the EPA were to prosecute the same defendant as the state, only to seek additional penalties, under the same statutory provisions, alleging the same facts, and after the state had successfully prosecuted the defendant to final judgment. Because the state’s prosecution of the defendant would have been successful in such a case, all significant issues presumably would have been resolved against the defendant and collateral estoppel would be of no benefit. Only res judicata, which sets up the first prosecution as a bar to any subsequent prosecution, would benefit the defendant. Identity of parties would constitute the only element necessary to decide that both cases represent the same cause of action, allowing assertion of res judicata. Although the language of the CAA, CWA, RCRA, and SDWA provides many arguments that the EPA and the state are the same party, it is unlikely that a court would go so far to restrict federal authority in the face of ambiguous statutory language that can be interpreted in the EPA’s favor and case law giving a literal interpretation of “party.”

By contrast, in a collateral estoppel analysis, the EPA’s policy of overfiling when prior state action has been “untimely or inadequate” may enhance the perception of control over the state that would justify a finding of privity between the state and the EPA (or that the EPA is a nonparty that has already had its day in court under a Montana analysis). Inherent in such a system is constant contact with the state and continuous effort by the EPA to influence the
states to bring the majority of enforcement actions in a way acceptable to the EPA so that the EPA can conserve its limited resources for the most important cases. However commendable such a policy may be from a standpoint of efficient use of the EPA resources, it may nonetheless have the unforeseen effect of giving defendants the use of res judicata and collateral estoppel in subsequent overfiling suits.

Although it has been eight years since Rayonier, the last reported successful use of preclusion principles in an overfiling case, the Montana and Stauffer cases suggest that the Ninth Circuit approach is closer to that of the Supreme Court than is the EPA’s approach of unfettered enforcement authority. With the exception of the offensive use of nonmutual collateral estoppel against the United States, the Supreme Court has consistently fostered use of preclusion principles since the 1971 Blonder-Tongue case. Lack of similar cases subsequent to Rayonier probably indicates judicious use by the EPA of its overfiling authority, and the limited number of fact patterns where the defendant actually benefits from the application of collateral estoppel.489

In addition to the many cases that indicate that the preclusion doctrines are favored by the courts, the increasingly more expansive definitions of cause of action, final judgment, and privity ensure that the EPA’s assertion of unfettered enforcement authority will be tested again. The principle of full faith and credit ensures that state practices will also be a factor in the outcome. If the philosophical underpinnings of res judicata and collateral estoppel have any merit, such a result is not inherently unwelcome to the judicial system as a whole. If such a result is outweighed by society’s need to have an omnipotent EPA to deal with environmental threats, then statutory changes must be sought.

Determining that res judicata and collateral estoppel are theoretically applicable does not mean that either will actually apply to a given situation. As the case law amply demonstrates, the theoretical preclusive effect of a final state judgment is of little consolation when there is no final state judgment. Prompt action by the EPA when it is dissatisfied with state action is all that is necessary to avoid

489 To expand upon this latter point: because merger and bar are elements of res judicata, rather that collateral estoppel, collateral estoppel is useful only to the defendant in subsequent litigation with the EPA where the defendant either prevailed against the state or had some significant issue decided in its favor. If the state prevailed, collateral estoppel would actually benefit the EPA rather that the defendant in subsequent litigation.
preclusion. Because of this fact, stay and abstention doctrines in federal court may ultimately have more profound effects than res judicata and collateral estoppel.

If res judicata and collateral estoppel are technically inapplicable to a given fact pattern, then the *Colorado River* doctrine, if not abstention and stay in general, is likely to apply. In addition, behind the logic of *BKK* there lurks the possibility that a given statute will not only be interpreted to allow preclusion, but also to mandate preclusion of the EPA when a state has exercised its “primary enforcement authority” in an objectively appropriate fashion. If there is a safe prediction in all this, it is that *Rayonier, Cargill,* and *BKK* indicate that a court or administrative tribunal can be expected to act to preserve the reasonable results of a state enforcement action in the face of apparently unnecessary action by the EPA. When the basis for the tribunal’s action is abstention, the EPA’s authority remains intact. The risk to the EPA, however, is that the basis might also be res judicata, collateral estoppel, or statutory construction. Strict adherence by states to the EPA’s overfiling policy is thus the best insurance the EPA has against challenges to its “unfettered” enforcement authority.

The most striking feature of res judicata and collateral estoppel is the frequency with which the Supreme Court has addressed them in recent years. Although the Court has limited the use of nonmutual collateral estoppel against the United States, the Court believes that these doctrines serve valuable judicial and societal goals and will continue to demand their application.

While this Article concludes that res judicata and collateral estoppel remain applicable to overfiling cases, this analysis was not undertaken to provide avenues of escape to those who have violated the law. Rather, the purpose of this Article is to present a realistic expectation of a court’s analysis to encourage the most efficient enforcement strategy. As a former official of the President’s Council on Environmental Quality once noted, perhaps somewhat reluctantly, “[e]ven polluters are entitled to certain basic procedural rights.”