

1-1-2004

Have the Courts Forgotten Res Judicata: The Environmental Protection Agency's Use of Legislation to Scrutinize Its State Delegates Challenges the Foundation of Our Law

Mark P. Daly
Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

9 Suffolk J. Trial & App. Advoc. 129 (2004)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

HAVE THE COURTS FORGOTTEN RES JUDICATA? THE ENVIRONMENTAL PROTECTION AGENCY'S USE OF LEGISLATION TO SCRUTINIZE ITS STATE DELEGATES CHALLENGES THE FOUNDATION OF OUR LAW

*It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?*¹

I. INTRODUCTION

The doctrine of res judicata is fundamental to our system of law.² Without it, precedence would lose all meaning, cases would lose predictability, and our court system would lose its foundation of legitimacy.³ The federal Environmental Protection Agency ("EPA") delegates its power to state agencies in a microcosmic model of our federalist system of government.⁴ Although the EPA delegates full power to the state environmental agencies, including privity to sue companies for violation of environmental laws, it tends to watch the state agencies closely in their exercise of that power.⁵ This has resulted in the EPA suing companies when it does not

¹ THE FEDERALIST NO. 62 (James Madison).

² See generally CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE JURISDICTION AND RELATED MATTERS §§4458-4466, Ch. 13 (2002) (discussing the importance of res judicata); U.S. CONST. art. IV § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); 28 U.S.C. § 1738 (2002).

³ See WRIGHT ET AL., *supra* note 2; U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2002).

⁴ See generally U.S. CONST. art. I-VII; 42 U.S.C. §§ 6901-6992k (2002).

⁵ See generally *United States v. Power Eng'g*, 303 F.3d 1232 (10th Cir. 2002) (explaining the structure of the EPA delegation of power); *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999); Marc Melnick and Elizabeth Willes, ECOLOGY LAW QUARTERLY, WATCHING THE CANDY STORE: EPA OVERFILING OF LOCAL AIR POLLUTION VARIANCES (discussing the phenomenon on EPA overfiling) (1993).

agree with the outcomes of state agency suits against those same companies.⁶ The United States Circuit Courts of Appeals are split on the issue of whether overfiling, the EPA's practice of duplicating enforcement actions already undertaken by state environmental protection agencies, is barred through *res judicata*.⁷ This Note will examine the division of the Eighth and Tenth Circuits on this issue in light of *res judicata* and its paramount importance in our judicial system.⁸

In *Harmon Industries*,⁹ the Eighth Circuit affirmed a judgment that the EPA had overstepped its bounds by filing an action independent of a state environmental agency action and was barred from doing so by the doctrine of *res judicata*.¹⁰ In discussing the issue of *res judicata*, the court reasoned that the EPA was suing the same defendant, on the same grounds, arising from the same incident and was legally an identical party to the state agency.¹¹ In contrast, the Tenth Circuit in *Power Engineering*¹² ar-

⁶ See generally *Power Eng'g.*, 303 F.3d 1232; *Harmon Indus.*, 191 F.3d 894 (showing an example of overfiling); *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th Cir. 1986); *United States v. LTV Steel*, 118 F. Supp. 2d 827 (N.D. Ohio 2000); *U.S. v. City of Colorado Springs*, 455 F. Supp. 1364 (Colo. 1978); *State Water Control Bd. v. Smithfield Foods*, 542 S.E.2d 766 (Va. 2001).

⁷ Compare *Power Eng'g.*, 303 F.3d 1232 (holding *res judicata* did not bar federal EPA suit although state enforcement action existed), with *Harmon Indus.*, 191 F.3d 894 (holding *res judicata* barred federal EPA action because of existing state agency action).

⁸ See generally *Power Eng'g.*, 303 F.3d 1232; *Harmon Indus.*, 191 F.3d 894.

⁹ See *Harmon Indus.*, 191 F.3d 896-97. *Harmon Indus.* ("Harmon") had approached the state environmental agency when the management discovered workers were dumping volatile solvent residue behind one of its warehouses. *Id.* Harmon and the state agency worked out a deal whereby Harmon would pay for the cleanup and the state would not seek further damages. *Id.* at 897. Based on this agreement, a judge held Harmon in full accord and satisfaction and released them from further penalties. *Id.* The EPA then filed a separate suit for over two million dollars in damages and won its case with reduced damages in the amount of \$586,716 against Harmon. *Id.* Harmon appealed and the federal court held that the EPA was barred from seeking damages because *res judicata* applied to the earlier judgment in state court between Harmon and the state agency. *Id.* The decision was affirmed over the EPA's Appeal. *Id.* at 904.

¹⁰ See *id.* at 904.

¹¹ See *id.* at 903. In a plain language analysis of 42 U.S.C. § 6926(b), the court determines that "in lieu of" means that a state program operates in lieu of the federal program. *Id.* The court reasons that a state's action has the same "force and effect" as an action initiated by the EPA. *Id.* As such, the court states that "the two parties stand in the same relationship to one another" and are therefore the same party for the purposes of *res judicata* analysis. *Id.*

¹² See generally *Power Eng'g.*, 303 F.3d 1232. The state health and environmental protection agency of Colorado discovered that Power Engineering ("Power") was dumping hexavalent chromium, a hazardous chemical, into the Platte River. *Id.* at 1235. After non-compliance with two orders to clean up the waste, the state agency obtained judgment against Power upholding the orders, one of which was a civil penalty of \$1.13 million. *Id.* The EPA had asked the state agency to include financial assurance and liability coverage for further accidents in its second order but the state agency did not. *Id.* at 1235-1236. After the judgment against Power, the EPA initiated its own suit for financial assurance. *Id.*

rived at the opposite result in its analysis of the issue of res judicata.¹³ In *Power Engineering*, the court reasoned that the EPA was not seeking the same cause of action as the state agency, and that state and federal governmental agencies are not identical parties for the purposes of res judicata.¹⁴ Examining the reasoning behind these divergent holdings will enable an objective analysis of res judicata and reaffirm its importance in the judicial system.

Part II of this Note will examine the statutory powers granted to the EPA by the Resource Conservation and Recovery Act ("RCRA") and discuss the concept of overfiling in light of its rules.¹⁵ Part III will discuss the application of res judicata with respect to EPA actions and will reveal the historical purpose of this doctrine. Part IV will analyze the application of res judicata to EPA actions in light of the doctrine's historic, present, and future purpose. Finally, this Note will show that barring the EPA from overfiling through res judicata will protect the authority of the RCRA and strengthen the source of our court system's power: its legitimacy.

II. OVERFILING: AN OVERVIEW OF LEGISLATIVE AUTHORITY THROUGH CASE LAW

Under the RCRA, states can gain authorization to administer and enforce a hazardous waste program.¹⁶ Once accepted, a state's program operates in lieu of the federal program and states may issue and enforce permits for treatment, storage, and disposal of hazardous waste.¹⁷ Additionally, the RCRA grants state actions the same force and effect as federal actions.¹⁸ Once authorization is granted to a state, it cannot be revoked unless the EPA finds good reason.¹⁹ Even when the EPA does find good

The district court granted summary judgment for the EPA and held that Power must provide \$2,119,044 in financial assurance and obtain liability insurance. *Id.* at 1236. The judgment was affirmed. *Id.* at 1241.

¹³ *Id.* at 1241.

¹⁴ See *Power Eng'g*, 303 F.3d at 1240-1241.

¹⁵ See 42 U.S.C. §§ 6901-6992k (2002).

¹⁶ See 42 U.S.C. § 6926(b). This section states in pertinent part: "Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program." *Id.*

¹⁷ See 42 U.S.C. § 6926(b). This section states in pertinent part: "Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State. . . ." *Id.*

¹⁸ See 42 U.S.C. § 6926(d). This section states: "Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter." *Id.*

¹⁹ See 42 U.S.C. § 6926(b), (e). Section (e) states:

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accor-

reason to revoke its delegated power, it must give notice to the public and allow a reasonable amount of time to correct the problem.²⁰ The statute provides that if an authorized state fails to initiate an enforcement action the EPA may initiate its own action only after providing notice to the state agency.²¹ The courts disagree, however, on the interpretation of this statute with regard to EPA's authority to file a suit after a state agency has already done so.²²

When reviewing a federal agency's interpretation of a statute, the first question is whether Congress has spoken directly on the issue.²³ If Congressional intent is silent or ambiguous within the statute, then the court defers to the agency's construction of the statute.²⁴ If the statute contains an express delegation of authority to an agency, then the agency's interpretation must be accepted so long as it is not arbitrary, capricious, or manifestly contrary to the statute.²⁵ If there is only an implicit delegation of authority, the court will accept a reasonable interpretation by the administrator of the agency.²⁶ In order to determine the reasonableness of an administrator's statutory interpretation, the court examines the statutory reading with the plain language rule.²⁷ Under this rule, the court examines the language of a statute as a whole, keeping in mind the statute's context, object, and policy.²⁸ In addition, the courts will not construe a statute in a

dance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal. *Id.*

²⁰ *Id.*

²¹ See 42 U.S.C. § 6928(a)(2). This sections states:

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 6926 of this title, 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. *Id.*

²² *Compare Power Eng'g.*, 303 F.3d 1232, with *Harmon Indus.*, 191 F.3d 894.

²³ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

²⁴ See *id.* at 843.

²⁵ *Id.* at 843-844.

²⁶ *Id.* at 844.

²⁷ See *Walker v. Dilworth*, 2 U.S. 257, 259 (1796).

²⁸ See e.g. *Pelofsky v. Wallace*, 102 F.3d 350, 353 (8th Cir. 1996) (requiring inquiry examining text of statute as whole); *Windsor on the River Assoc. v. Balcor Real Estate Fin.*, 7 F.3d 127, 130 (8th Cir. 1993) (holding all words must be given effect); *Minnesota Transp. Regulation Bd. v. United States*, 966 F.2d 335, 339 (8th Cir.1992) (stating titles do not alter plain meaning of statute and are only used in clarifying ambiguity).

way that renders words or phrases meaningless, redundant, or superfluous.²⁹

More recently, courts have disagreed on the interpretation of the RCRA based on these rules.³⁰ Courts do agree, however, that Congress has not directly expressed its intent in the RCRA and therefore they turn to the language of the statute for guidance.³¹ By discussing the language of the statute, the courts have disagreed on Congress' use of the words "in lieu of" when explaining the relationship between the EPA's power and the state agency's delegated power.³² Examining the statute as a whole, courts have also disagreed about the significance of the RCRA's requirement of notice by the EPA to a state agency before it commences its own action.³³

²⁹ See *Proctor & Gamble v. Haugen*, 222 F.3d 1262, 1272 (10th Cir. 2000).

³⁰ See *Power Eng'g*, 303 F.3d 1232 (holding action by EPA not barred by RCRA even when state agency obtained judgment). The court found that in RCRA, Congress had not directly addressed the question of whether the EPA could seek enforcement after state agencies had obtained judgment. *Id.* at 1240. It reasoned that RCRA was ambiguous to the permissibility of overfiling and therefore deferred to the EPA's reasonable interpretation "even if [the court] would have reached a different result had [it] construed the statute initially." *Id.* at 1240 (quoting *Wash. Dept of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985)). The court found that the EPA's interpretation of the statute had support within the text and agreed with the EPA's interpretation that RCRA permitted overfiling. *Id.* But see *Harmon Indus.*, 191 F.3d 894 (holding second action by EPA not permissible under RCRA because state agency had obtained judgment). The court states that by the statute's plain language RCRA permits the EPA to repeal a state's authorization if the state agency does not provide adequate enforcement or compliance with the program. *Id.* at 899. The court reasoned that this indicates that Congress intended to grant states the primary role of enforcing their program after being granted the power to do so. *Id.* The court applied a common sense meaning to the text of the statute and interpreted it to be consistent with the statute as a whole. *Id.* at 900. It found no support in the RCRA or legislative history that would allow the EPA to duplicate a states enforcement action. *Id.* at 901. The court found that the EPA's practice of overfiling exceeds the authority granted by the RCRA. *Id.* at 902.

³¹ See *Power Eng'g*, 303 F.3d at 123; *Harmon Indus., Inc.*, 191 F.3d 897.

³² See 42 U.S.C. § 6926(c)(1). Part (c)(1) states in pertinent part: "The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter..." See also *Harmon* at 899. *Harmon* argues that this language is plain and that it grants the state agency authority to administer and enforce in lieu of the EPA. *Id.* at 899. *Harmon* goes further to say that the language "in lieu of" reveals congressional intent for the state program including enforcement actions. *Id.* See also *Power* at 1237. The court in *Power* reasons that the term "program" is ambiguous and that because it is placed in a separate clause from the power of enforcement, it only pertains to administration of state programs rather than their enforcement. *Id.* Following this line of reasoning, the court interprets the statute to mean that the state is authorized to carry out its program in lieu of the federal program, and that the state is authorized to issue and enforce permit; in effect detaching the words "in lieu of" from the enforcement power granted. *Id.* at 1239.

³³ See 42 U.S.C. § 6928(a)(2). See also *Wyckoff v. EPA*, 796 F.2d 1197, 1201 (9th Cir. 1986) (conditioning exercise of federal authority on prior notice). The court reasoned that in meeting the prior notice requirement in 42 U.S.C. § 6928(a), the EPA is granted the authority to sue. *Id.* Compare *Harmon Indus.*, 191 F.3d at 902. *Harmon* argues that this

Overall, the case law has generated precedent both affirming and denying that the RCRA grants the EPA authority to file enforcement actions when a state agency has already obtained a judgment on the matter.³⁴ It is this result that demands an examination of the application of res judicata to this issue.³⁵

III. RES JUDICATA: A DOCTRINE FUNDAMENTAL TO OUR COURT SYSTEM

Res judicata,³⁶ a doctrine fundamental to our court system, finds its authority within the Constitution of the United States, specifically the Full Faith and Credit Clause.³⁷ Once the elements of Res Judicata are met, it will bar any future litigation of a cause of action.³⁸ Under the Full Faith and Credit Clause, and relevant case law, federal courts are bound to give preclusive effect to judgments of state courts.³⁹ Some circuits have recognized res judicata as barring EPA actions where a state agency has previously obtained judgment, while other circuits have held that it does not apply in such situations.⁴⁰ The main divide in precedent occurs when

allows the EPA to act in place of a state action and that *Wyckoff* did not involve competing enforcement actions with the consequence of overfiling. *Id.* See also *Power Eng'g*, 303 F.3d at 1238. The court in *Power* notes that although *Harmon* states that RCRA limits EPA's rights to bring an enforcement action in certain situations, the only explicit limitation is the requirement of prior notice. *Id.*

³⁴ See *supra* note 22 and accompanying text (comparing cases within circuit split).

³⁵ See *Power Eng'g*, 303 F.3d 1240 (discussing relevance of res judicata); *Harmon Indus.*, 191 F.3d 902 (introducing res judicata as pertinent to issue).

³⁶ Latin for "a thing adjudicated."

³⁷ See U.S. CONST. art. 4, § 1. Section 1, entitled "Full Faith and Credit" states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." See also 28 U.S.C. § 1738 (1982). Section 1738 states in pertinent part: "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage..." *Id.*

³⁸ See *Cromwell v. County of Sac*, 94 US 351, 352-53 (1876) (identifying elements of res judicata that will bar future action). The court defines the elements of res judicata as: (1) a prior litigation in which identical claims were raised, (2) parties identical in some manner as the prior litigation, otherwise known as privity, and (3) there must have been a final judgment on the merits in the original litigation. *Id.* at 352-53. See also *Montana v. United States*, 440 U.S. 147, 153 (1979) (stating final judgment bars further claims by parties or those in privity under same claim).

³⁹ See U.S. CONST. art. 4, § 1; 28 U.S.C. § 1738 (1982) (showing legislative roots of res judicata). See also *Hickman v. Electronic Keyboarding*, 741 F.2d 230, 232 (8th Cir. 1984) (requiring federal courts to give preclusive effect to judgments of state courts).

⁴⁰ Compare *Harmon Indus.*, at 894 (holding doctrine of res judicata foreclosed EPA's enforcement action), and *ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980) (estopping EPA from asserting cause of action previously litigated in state courts under res judicata), with *Power*

courts discuss the issue of privity between the EPA and a state agency as an element of res judicata.⁴¹

Pursuant to res judicata, the element of privity requires a substantial likeness of claims coupled with a showing that the parties in the two suits share a common interest.⁴² Generally, state and federal governments are different parties for the purposes of res judicata.⁴³ A party may be bound in privity, however, by litigation of a cause of action in their name by another or by assisting in a suit by another.⁴⁴ This reasoning may bind the EPA in privity to an action by a state agency and would therefore preclude the EPA from further action under the doctrine of res judicata.⁴⁵ In cases concerning the EPA and a state agency, courts look to the statutory language of the RCRA to provide the structure for their analysis of privity.⁴⁶ Because privity analysis is affected by the court's interpretation of the RCRA, holdings under the doctrine of res judicata tend to differ in cases of EPA overfiling.⁴⁷

Eng'g, 303 F.3d 1232 (holding res judicata doctrine inapplicable to EPA suit), and *LTV Steel*, 118 F.Supp.2d 827 (holding res judicata inapplicable on multiple grounds in EPA suit).

⁴¹ Compare *Harmon Indus.*, 191 F.3d at 903 (holding privity between state and EPA because RCRA state action holds same force and effect), with *Power Eng'g*, 303 F.3d at 1241 (reasoning no privity because of tenuous connection between state and EPA interest under RCRA).

⁴² See *Lowell Staats Mining v. Philadelphia Elec.*, 878 F.2d 1271, 1275 (10th Cir. 1989).

⁴³ See 18 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE, § 4458 (2d ed.), at 503.

⁴⁴ See *Montana*, 440 U.S. at 154, *Schnell v. Peter Eckrich & Sons*, 365 U.S. 260, 261 (1961); cf. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 111 (1969).

⁴⁵ *Drummond v. United States*, 324 U.S. 316, 317 (1945) (stating United States must have a laboring oar in controversy to be bound in privity). Compare *United States v. Candelaria*, 271 U.S. 432 (1926), with *Logan v. United States*, 58 F.2d 697 (10th Cir. 1932).

⁴⁶ See *Harmon Indus.*, 191 F.3d at 903 (holding RCRA language binds EPA to state as party). The court reasons that under RCRA a state action is in lieu of a federal action and has the same force and effect as an EPA action. *Id.* The court noted that privity is not dependant upon the subjective interests of the parties. *Id.* The court then determined that because the federal government authorized the state to act in its place and ceded its own authority under the RCRA, the EPA in effect became the same party as the state agency. *Id.* at 904. The court found that, with privity, the final element of res judicata was met and the EPA was barred under its doctrine. *Id.* But see *Power Eng'g*, 303 F.3d at 1240 (finding RCRA language supported EPA's position that it was a separate party from state). The court reasoned that because of the structure and language of the RCRA, the state acts in lieu of the EPA only in administration of the program and in issuance of permits and not in the litigation of claims. *Id.* at 1241. Therefore, the court reasoned, the EPA had limited connection to the state litigation. *Id.* The court articulated that the EPA had different interests from the state agency under the RCRA. *Id.* The court then held that privity did not exist between the EPA and the state with regards to the claim and therefore the doctrine of res judicata would not bar the EPA's suit. *Id.*

⁴⁷ See *Harmon Indus.*, 191 F.3d at 903 and accompanying text (comparing court interpretations of RCRA and showing effect of interpretation on judgment).

IV. MATCHING THE APPLICATION OF RES JUDICATA WITH RCRA INTERPRETATION

The RCRA statute is vague on the issue of whether the EPA may file a suit after a state has already obtained judgment on the matter.⁴⁸ As a result of this ambiguity, the courts rely on statutory interpretation.⁴⁹ The courts examine the construction of the statute as a whole for the purpose of interpreting it.⁵⁰ Under the statute, states apply for authorization to issue and enforce permits under federal guidelines in lieu of the EPA.⁵¹ Once the EPA accepts the state's application, it delegates to its state agent the power to implement a program whereby the policies and interests of the EPA are enforced.⁵² The interests and guiding principles of the EPA are also protected by the statute.⁵³ The EPA has the power to police the state agencies and it may enforce its policies by withdrawing the power it has delegated to the state.⁵⁴ The statute also provides that if a state has taken no action, the EPA may take its own action by simply notifying the state that it is going to do so.⁵⁵ In delegating its power to a state, the EPA and the state agency become the same entity, joined by policy and interest.⁵⁶

Once states gain the power to issue and enforce permits under federally granted policy, the RCRA calls for state agencies to uphold those policies.⁵⁷ If the state does not reasonably follow the interests of the EPA, its delegated power may be revoked.⁵⁸ By doing this, the EPA is assured that the delegated power is not being abused.⁵⁹ At the same time, this

⁴⁸ See *Power Eng'g*, 303 F.3d 1232 (holding action by EPA not barred by RCRA even when state agency obtained judgment). *But see Harmon Indus.*, 191 F.3d 894 (demonstrating different interpretations and differing holdings in different courts).

⁴⁹ See *Power Eng'g*, 303 F.3d 1232 (showing effect of ambiguity in statute is to examine statute as a whole).

⁵⁰ *Id.*

⁵¹ See 42 U.S.C. § 6926(b) (outlining state procedure in applying for federally delegated power).

⁵² *Id.*

⁵³ See 42 U.S.C. § 6926(b), (e) (allowing EPA to rescind delegated power after violation by state); *see also* 42 U.S.C. § 6928(a)(2) (showing federal procedure to raise claims after delegation of power).

⁵⁴ See 42 U.S.C. § 6926(b), (e) (allowing EPA to rescind delegated power after violation by state); *see also* 42 U.S.C. § 6928(a)(2) (showing federal procedure to raise claims after delegation of power).

⁵⁵ See 42 U.S.C. § 6926(b), (e) (allowing EPA to rescind delegated power after violation by state); *see also* 42 U.S.C. § 6928(a)(2) (showing federal procedure to raise claims after delegation of power).

⁵⁶ See 42 U.S.C. §§ 6901-6992k (creating relationship between state and federal agencies by matching parallel interests and enforcing identical policies).

⁵⁷ See 42 U.S.C. §§ 6901-6992k (showing reasoning for delegation of power after accepting state agency's proposed plan).

⁵⁸ See 42 U.S.C. § 6926(b), (e) (giving EPA revocation power to protect interests).

⁵⁹ *Id.*

model acts as a microcosm of the federalist system by decentralizing the power of the EPA and granting states autonomy.⁶⁰ In this way, the RCRA is a significant instrument when interpreted as detailed above.⁶¹

Additionally the court's interpretation of *res judicata* is of great significance.⁶² *Res judicata* protects litigants from the expense and vexation of multiple lawsuits from parties who have already sued them under the same cause of action.⁶³ It reduces the number of cases surrounding an incident, emancipating the court system from superfluous suits, and it enforces reliance on our judicial system by maintaining consistency of decisions.⁶⁴ The court system's power stems from its legitimacy, and *Res Judicata* strengthens the foundation of that legitimacy.⁶⁵ In interpreting this important doctrine, the courts must rely upon the elements of *res judicata*.⁶⁶

The element of *res judicata* that draws the most discussion in courts is privity of parties.⁶⁷ The main concern in EPA suits that follow state agency decisions is that state and federal governments are generally thought of as separate parties for the purposes of *res judicata*.⁶⁸ Although this argument has turned the decisions of some courts, precedent shows that a party may be bound in privity if another party litigates in the name of that party.⁶⁹ Under this premise, the federal government may be bound to a state government in privity if that agency litigates in the name of the federal government.⁷⁰ Once again, judicial interpretation of the RCRA becomes very important when examining *res judicata*.⁷¹

⁶⁰ See generally U.S. CONST. art. I-VII; 42 U.S.C. §§ 6901-6992k (2002).

⁶¹ See *id.*

⁶² See generally WRIGHT ET AL., *supra* note 2; U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2002).

⁶³ See generally WRIGHT ET AL., *supra* note 2; U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2002).

⁶⁴ See generally WRIGHT ET AL., *supra* note 2; U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2002).

⁶⁵ See generally WRIGHT ET AL., *supra* note 2; U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2002).

⁶⁶ See *Cromwell v. County of Sac*, 94 US 351, 352-53 (1876) (identifying elements of *res judicata* that will bar future action). See also *Montana v. United States*, 440 U.S. 147, 153 (1979) (stating final judgment bars further claims by parties or those in privity under same claim).

⁶⁷ Compare *Harmon Indus., Inc.* at 894 (holding doctrine of *res judicata* foreclosed EPA's enforcement action), and *ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980) (estopping EPA from asserting cause of action previously litigated in state courts under *res judicata*), with *Power Eng'g*, 303 F.3d 1232 (holding *res judicata* doctrine inapplicable to EPA suit), and *LTV Steel*, 118 F.Supp.2d 827 (holding *res judicata* inapplicable on multiple grounds in EPA suit).

⁶⁸ See WRIGHT ET AL., *supra* note 2, at 503.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *Power Eng'g*, 303 F.3d 1240 (discussing relevance of *res judicata*); *Harmon Indus.*, 191 F.3d 902 (introducing *res judicata* as pertinent to issue).

As examined above, the RCRA allows for the delegation of federal power to state agencies by the EPA.⁷² The state agency upholds the policies and interests of the EPA and in effect, acts as an agent of the EPA.⁷³ The EPA delegates its power through the RCRA and through proper representation of that power the state protects the interests of the EPA.⁷⁴ The delegation of power by the EPA to the state presupposes analogous interests between both agencies.⁷⁵ If the interests were dissimilar, the EPA would refuse the delegation of the power or it would simply revoke the delegated power, which is allowable under the RCRA.⁷⁶ This sharing of interests binds the parties in privity with one another.⁷⁷ Further, the litigation of claims by the state as an agent under these shared interests binds the EPA in privity for the purposes of *res judicata*.⁷⁸

Therefore, the EPA is barred by *res judicata* when it attempts to sue on a claim upon which the state has already attained judgment.⁷⁹ The authority for this assessment is found within the RCRA, which protects the EPA's interests by giving it a revocation power for any authority it delegates.⁸⁰ Because the EPA's interests are protected by the RCRA, and because the doctrine of *res judicata* is so fundamental to judicial review, the courts should act to uphold and protect the doctrine by barring EPA action of state agency litigated and adjudged claims.⁸¹

⁷² See 42 U.S.C. §§ 6901-6992k (2002).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See 42 U.S.C. § 6926(b); See also 42 U.S.C. § 6926(d).

⁷⁶ See 42 U.S.C. § 6926(b); See also 42 U.S.C. § 6926(b), (e).

⁷⁷ See generally WRIGHT ET AL., *supra* note 2; U.S. CONST. art. IV § 1; 28 U.S.C. § 1738 (2002).

⁷⁸ See *Harmon Indus.*, 191 F.3d at 903 (holding RCRA language binds EPA to state as party). *But see Power Eng'g*, 303 F.3d at 1240 (showing courts reasoning under privity).

⁷⁹ See *Cromwell v. County of Sac*, 94 US 351, 352-53 (1876) (outlining the elements of *res judicata* and stating its preclusive effect); *Montana v. United States*, 440 U.S. 147, 153 (1979) (stating final judgment bars further claims by parties or their privies under same claim); *Hickman v. Electronic Keyboarding*, 741 F.2d 230, 232 (8th Cir. 1984) (requiring federal courts to give preclusive effect to judgments of state courts); U.S. CONST. art. 4, § 1; 28 U.S.C. § 1738 (1982) (showing legislative roots of *res judicata*). Compare *Harmon Indus., Inc.* at 894 (holding doctrine of *res judicata* foreclosed EPA's enforcement action), and *ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980) (estopping EPA from asserting cause of action previously litigated in state courts under *res judicata*), with *Power Eng'g*, 303 F.3d 1232 (holding *res judicata* doctrine inapplicable to EPA suit), and *LTV Steel*, 118 F.Supp.2d 827 (holding *res judicata* inapplicable on multiple grounds in EPA suit).

⁸⁰ See 42 U.S.C. § 6926(b), (e) (showing when EPA's interests are not protected by state agency, EPA may revoke delegated power).

⁸¹ See 42 U.S.C. § 6926(b), (e); see also *Cromwell v. County of Sac*, 94 US 351, 352-53 (1876) (identifying elements of *res judicata* that will bar future action), *Montana v. United States*, 440 U.S. 147, 153 (1979) (stating final judgment bars further claims by parties or their privies under same claim), CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE JURISDICTION AND RELATED MATTERS* §§4458-4466, Ch. 13 (2002) (discussing the importance of *res judicata*); U.S.

V. CONCLUSION

Companies, just like individuals, rely on our court system to be consistent in its judgments. To allow the EPA to file suit on a matter that has already been decided will strain the court system and will challenge its legitimacy. If the courts fail to rely upon the doctrine of *res judicata* in such cases, it will operate as a threat to our court system. The courts should act to protect the doctrine of *res judicata* in their interpretation and application and in doing so will protect the fundamentals of our court system.

Further, it is important to look at the implications that befall a state when the EPA is allowed to file suit. We should not belittle the power or the legitimacy of states in their claim against companies. States have added interest in judgments against companies within their borders because of their proximity to the events surrounding a given controversy. The argument against this is implication of corruption and closeness between states and companies that help to run their economies. The safeguard against this is worked into the RCRA, which allows the EPA to police what the states are doing by following the RCRA within the confines of the law. In turn, this privilege is regulated by the procedure within the RCRA. Allowing the EPA to overfile without being barred by *res judicata* circumvents the express protections granted in the RCRA and threatens to undermine the legitimacy of the courts at the same time.

Other undesired effects may result from allowing the EPA to overfile. Companies may be less willing to settle suits so quickly for fear of impending EPA action. In addition, overfiling increases court costs, burdens the courts system, and may be time-consuming in situations where time may be of the essence. By barring the EPA from overfiling under *res judicata*, the court system will restore the authority of the RCRA while protecting and strengthening the source of the court system's power: its legitimacy.

Mark P. Daly

