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The Hancock Amendment and the Increasing Burden on Missouri Environmental Programs. Missouri Municipal League v. State

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THE HANCOCK AMENDMENT AND THE INCREASING BURDEN ON MISSOURI ENVIRONMENTAL PROGRAMS

Missouri Municipal League v. State[1]

by Matthew D. Turner

I. INTRODUCTION

The Missouri Supreme Court's recent decision in *Missouri Municipal League*[2] profoundly impacts the implementation of Missouri's environmental programs. Viewed narrowly, the *Municipal League* case deals simply with the state of Missouri's payment of a portion of the cost of state-provided water testing. In a broader sense, the Court's interpretation and application of the Hancock Amendment[3] impedes the state's ability to comply with increasingly stricter federal regulations which set the standards required of many environmental programs in Missouri. The difficulty in complying with federal regulations may cost Missouri part of its autonomy and the power, granted by Congress, to implement environmental programs at the state level. This Note will discuss the serious impact of the Court's interpretation of the Hancock Amendment and its consequence to Missouri environmental programs.

II. FACTS AND HOLDING

On appeal to the Missouri Supreme Court, the Missouri Municipal League, appellants, challenged a summary judgment granted by the Cole County Circuit Court in favor of the state of Missouri and the Missouri Safe Drinking Water Commission, respondents.[4] The Missouri Municipal League[5] filed suit against the state of Missouri and the Missouri Safe Drinking Water Commission alleging that section 640.100.4 of the revised statutes of Missouri violated the Hancock Amendment.[6] Section 640.100.4 requires public water suppliers to pay fees for laboratory services which include testing of water for contaminants.[7] The Hancock Amendment prohibits the state from reducing the state financed proportion of any activities or services the state requires political subdivisions to undertake.[8] At issue was whether section 640.100.4, requiring the payment of fees by public water suppliers, violated the Hancock Amendment.[9]

The state of Missouri contended that because providing water is a discretionary activity, water testing is not "required" of a political subdivision,[10] and that where a city is performing a discretionary function, any law that results in an increase in cost to the city relating to that function is not in violation of Hancock.[11] The state further asserted that federal law "preempts" the field of

[1] 932 S.W.2d 400 (Mo. 1996)

[2] *Id.*

[3] "Hancock Amendment" is the popular name of article X, sections 16-24 of the Missouri Constitution, attributed to Missouri legislator Mel Hancock, who proposed the amendment. Section 21 in particular is at issue in the present case.

[4] *Missouri Municipal League*, 932 S.W.2d at 400.

[5] The Missouri Municipal League is an organization of Missouri municipalities. The League represents more than 80 plaintiff municipalities in this case. Brief for Respondents at 1, Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. 1996)(No. 78567).

[6] *Missouri Municipal League*, 932 S.W.2d at 401. (MO. REV. STAT. § 640.100.4 (Supp. 1992) is currently codified in § 640.100.3 (Supp. 1996)).

[7] Currently codified in MO. REV. STAT. § 640.100.3 (Supp. 1996).

[8] MO. CONST. art. X, § 21.

[9] *Missouri Municipal League*, 932 S.W.2d at 402.

[10] *Id.*

[11] *Id.* The state relied on City of Springfield v. Missouri Pub. Serv. Comm'n, 812 S.W.2d 827 (Mo. Ct. App. 1991), for the proposition that where a city is performing a discretionary function, any law that results in an increase in cost to the city relating to that function is not in violation of Hancock. *Id.*

public drinking water.[12] The state argued that section 640.100.4 serves to enforce the requirements of the Federal Safe Drinking Water Act (hereinafter "FSDWA"), and, therefore, that section 640.100.4 is not subject to the Hancock Amendment.[13]

The Missouri Municipal League contended that section 640.100.4 and 10 C.S.R. 60-16.030 violated Missouri Constitution, article X, section 21, which provides in pertinent part: "The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions."[14]

The Supreme Court concluded that water testing is clearly required because the state has mandated that testing "shall" be done to comply with both state and federal regulations[15] and that water testing is a required activity.[16] The Court stated that once the state imposes a requirement on a political subdivision, it makes no difference whether the underlying service is one traditionally performed by the government.[17]

In reversing the judgment of the Cole County Circuit Court, the Missouri Supreme Court held that section 640.100.4 reduced the state financed proportion of the costs of water testing, an existing activity required of counties and other political subdivisions, in violation of article X, section 21 of the Missouri Constitution.[18] The Court summarily rejected the state's argument that federal preemption of safe drinking water standards negated the application of the Hancock Amendment in state enforcement measures.

III. LEGAL BACKGROUND

A. Missouri Water Regulations

The state of Missouri began monitoring public drinking water services in 1919.[19] Until 1978, Missouri law required water suppliers to pay the costs of testing for contaminants.[20] In 1978, the General Assembly enacted Senate Bill 509, the Missouri Safe Drinking Water Act (hereinafter "MSDWA").[21] The MSDWA gave the state the authority to enforce state laws concerning public drinking water.[22] Section 640.100 of the MSDWA required the state to enact rules and regulations for the testing of public drinking water.[23] Section 640.100.4 provided specifically that the Division of Health "shall" provide testing free of charge.[24]

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[12] *Missouri Municipal League*, 932 S.W.2d at 403.

[13] *Id.*

[14] *Id.* (citing MO. REV. STAT. § 640.100.4 (1978)).

[15] *Id.* at 402.

[16] *Id.*

[17] *Id.* at 403.

[18] *Id.*

[19] *Id.* at 401. In 1919, the Missouri General Assembly granted the state Board of Health the authority to issue and enforce regulations to ensure the safety of drinking water. *See* MO. REV. STAT. § 5790 (1919) (required water suppliers to pay for water sample testing).

[20] *Missouri Municipal League*, 932 S.W.2d at 401. From 1928 to 1979 Missouri charged a fee to public water suppliers for the analysis of water samples required by the Missouri Safe Drinking Water Act. After demonstrating that the MSDWA was at least as stringent as federal laws on drinking water and thus obtaining primacy, Missouri began providing water tests free of charge, in accordance with the 1978 amendments to the MSDWA which did not provide for the collection of laboratory fees. Legal File at 36, Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. 1996)(No. 78567).

[21] *Missouri Municipal League*, 932 S.W.2d at 401 (citing MO. REV. STAT. §§ 640.100-.140 (1978)). The act took effect on August 1, 1978.

[22] *Id.*

[23] *Id.*

[24] *Id.* (citing MO. REV. STAT. § 640.100.4 (1978)).

The promulgation of the MSDWA gave the state "primacy" vis-à-vis the federal government which allowed Missouri to implement and enforce state laws on safe drinking water in lieu of federal law.[25] To obtain primacy, federal law requires a state to formulate a state program and adopt laws that are at least as stringent as the FSDWA and its implementing regulations.[26] Missouri obtained primacy in 1978 by conforming to federal law and regulations in the MSDWA.[27] The Missouri Department of Natural Resources implements the MSDWA through the department's Public Drinking Water Program.[28]

The General Assembly again amended section 640.100.4 in 1982 to require the Department of Natural Resources to collect fees for the reasonable costs of laboratory services and program administration fees (hereinafter "LSPA fees").[29] LSPA fees are required even if the water supplier is not using the state's services.[30] Section 640.100.4 allows two testing options for each public water supplier: the supplier may send its samples to the state for testing or obtain an analysis from a certified laboratory.[31] The water testing primarily determines the presence of certain contaminants in drinking water.[32]

The General Assembly amended the MSDWA in 1989 to include testing for all contaminants enumerated by the FSDWA.[33] The LSPA fee covers a portion of the cost to test water samples for contaminants to ensure that public drinking water systems comply with maximum contaminant levels established by state and federal law.[34] Missouri State regulations 10 C.S.R. 60-4.010 *et. seq.* enumerate sampling and monitoring requirements to ensure that public water systems provide drinking water with acceptable contaminant levels.[35]

In 1992, the Safe Drinking Water Commission amended

[25] Legal File at 35, *MissouriMunicipal League* (No. 78567). Despite the grant of "primacy," the EPA continued to enforce the federal regulations until 1979. *Id.*

[26] 42 U.S.C. § 300h-1 (1991). *See also* 40 C.F.R. pt. 142 (1996).

[27] 40 C.F.R. § 142.10 (1978).

[28] Respondents' Brief at 1, *Missouri Municipal League* (No. 78567). The Missouri Department of Natural Resources (MoDNR) is a state agency created under Mo. REV. STAT. § 640.010 authorized to implement sections 640.100-640.140. The MoDNR administers practically every Missouri environmental program and develops standards and regulations for environmental protection and helps enforce these standards. I MO. ENVT'L LAW, § 2.12 (MoBar 1991, 1992).

[29] *Missouri Municipal League*, 932 S.W.2d at 402. (The purpose of the fee was to defray the cost of laboratory services incurred by the state for monitoring public water systems and offset the costs of the MoDNR's Public Drinking Water Program. Respondents' Brief at 3, *Missouri Municipal League* (No. 78567). In response to the amendments of section 640.100.4, Missouri Municipal League and other plaintiffs filed suit on February 7, 1983, in the Circuit Court of Cole County. Missouri Municipal League v. Lasfer, No. CV182-1117CC (Cole County Aug. 29, 1983). The Circuit Court found in favor of the state of Missouri, but the ruling only applied to public water systems owned by municipalities, excluding privately-owned, state and federal facilities. The Department of Natural Resources subsequently began billing private, investor-owned, state and federal systems. Legal File at 37, *Missouri Municipal League* (No. 78567)).

[30] *Missouri Municipal League*, 932 S.W.2d at 402. (Section 640.100.4, as amended in 1982, fixed limits on fees ranging from $80 per year for small water systems to $230 per year for large systems. Legal File at 36, *Missouri Municipal League* (No. 78567)).

[31] *Missouri Municipal League*, 932 S.W.2d at 402.

[32] MO. CODE REGS. tit. 10, § 60-4.010-.020 (1997). The tests measure chemical, microbiological and radiological parameters. Acceptable levels are established by Missouri regulations, the FSDWA and its implementing regulations. Legal File at 38, *Missouri Municipal League* (No. 78567).

[33] *Missouri Municipal League*, 932 S.W.2d at 402. (The FSDWA is located at 42 U.S.C. §§ 300f to 300j-26 (1991 & Supp. 1997) with implementing regulations at 40 C.F.R. pts. 141-143 (1996). The parallel Missouri testing requirements are currently located in MO. REV. STAT. § 640.100.3 (Supp. 1996) and MO. CODE REGS. tit. 10, § 60-4.010 to -4.110 (1997)).

[34] Respondents' Brief at 4, *Missouri Municipal League* (No. 78567).

[35] *Id.* (citing MO. CODE REGS. tit. 10, § 60-4.010 to -4.110).

its regulations under section 640.100.4 again to reimpose LSPA fee regulations.[36] Since the adoption of these regulations, the state funds approximately eighty-eight percent of the costs of water testing and program administration and political subdivisions fund twelve percent.[37] On the date the Hancock Amendment became effective, however, the state provided water testing free of charge to all public water suppliers.

B. The Hancock Amendment (1980)

On November 4, 1980, subsequent to the enactment of the MSDWA, the people of Missouri amended the Missouri Constitution by passing the Hancock Amendment.[38] Section 21 of the amendment provides that it will be unconstitutional for the state to reduce "the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions."[39] The purpose of this limitation is to keep the state from shifting costs of governmental activities to local governments.[40]

The Hancock Amendment's drafters stated that one "purpose of the amendment is to put a halt to the growth of government at the state level."[41] The drafters opined that the high level of government involvement in society would eventually cause serious problems if not curtailed.[42]

The Hancock Amendment has been the subject of frequent litigation since its enactment on November 4, 1980.[43] Section 21 clearly provides that a statute which requires a city to furnish a new service or increase an existing service would be subject to its

[36] *Missouri Municipal League*, 932 S.W.2d at 402. (The amendment also raised previously set fee limits. Legal File at 37, *Missouri Municipal League* (No. 78567)). *See also* Mo. CODE REGS. tit. 10, § 60-16.030 (1997).S.W.2d at 402. (The amendment also raised previously set fee limits. Legal File at 37, *Missouri Municipal League* (No. 78567)). *See also* Mo. CODE REGS. tit. 10, § 60-16.030 (1997).

[37] *Missouri Municipal League*, 932 S.W.2d at 402. (The twelve percent of the LSPA fees paid by local governments was estimated at $281,400 for 1995. Legal File at 38, *Missouri Municipal League* (No. 78567)).

[38] *Missouri Municipal League*, 932 S.W.2d at 401. The Hancock Amendment is codified in article X, sections 16 through 24 of the Missouri Constitution. On November 4, 1980, Missouri voters approved an amendment to the Missouri Constitution initiated by state legislator Mel Hancock containing nine new sections known as the "Hancock" Amendment. Rhonda C. Thomas, *Recent Developments in Missouri: Local Government Taxation*, 49 UMKC L. REV. 491, 492 (1981). The Hancock Amendment limits legislative increases of revenue without voter approval. *Id.*

[39] This section specifically provides:

> The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency or counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs. MO. CONST. art. X, § 21.

[40] Thomas, *supra* note 38, at 493.

[41] Appellant's Brief at 44, Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. 1996) (No. 78567) (containing drafter's notes on the Hancock Amendment).

[42] The drafter's notes as summarized by the Taxpayer's Survival Association, chaired by Mel Hancock, convey rather strong ideas along these lines:

> It is the opinion of the drafters that government is rapidly overwhelming the free society, the productivity of our economy is declining, and the coercive power of taxation is creating a society which is rapidly becoming dependent upon government to provide its needs. This continued growth in government will eventually cause the collapse of our society as we have known it. Appellant's Brief at 44, *Missouri Municipal League* (No. 78567).

[43] For other Hancock Amendment cases dealing with Section 21, *see generally* State *ex rel.* Missouri Clean Water Commission of Missouri Department of Natural Resources v. City of Glasgow, 932 F.Supp. 243 (Mo. Ct. App. 1996); Division of Employment Security v. Taney, 922 S.W.2d 391 (Mo. 1996); City of Jefferson v. Missouri Department of Natural Resources, 916 S.W.2d 794 (Mo. 1996) (statute creating solid waste districts and requiring new management plans found unconstitutional as violation of Hancock Amendment); County of Jefferson v. Quiktrip Corporation, 912 S.W.2d 487 (Mo. 1995) (*de minimis* increase in administrative activity does not violate Hancock Amendment); Berry v. State, 908 S.W.2d 682

prohibitions.[44] The Hancock Amendment is less clear on whether the adoption of an administrative regulation issued by a state agency to comply with federal primacy requirements falls under the Amendment.[45]

Though on the effective date of the Hancock Amendment the state provided water testing free of charge to all water suppliers,[46] municipalities and political subdivisions currently pay twelve percent of the costs of water testing and program administration.[47] Nonetheless, to be subject to the Hancock Amendment, the activity must be one that is "required" of the county or political subdivision.[48] One Missouri case previously acted as definitional authority as to the meaning of a "required" activity.

In *City of Springfield v. Missouri Pub. Serv. Comm'n*,[49] the Public Service Commission amended gas safety rules which increased gas utilities' costs.[50] The city argued that the amended rules required either a new activity or service or an increase in activity in violation of the Hancock Amendment.[51] The amended rules included more frequent tests and inspections which cost the city utilities more and for which the state of Missouri made no appropriation.[52] The court noted that the operation of a gas utility is a discretionary function in that the state of Missouri does not require municipalities to operate gas utilities nor does it prohibit private ownership of gas utilities.[53] The Missouri Court of Appeals ultimately held that the amended gas safety rules were not a violation of the Hancock Amendment because the operation of a gas utility by a municipality is discretionary, thus not an activity required by the state to which Section 21 of the Hancock Amendment applies.[54]

(Mo. 1995); Associated General Contractors of Missouri v. Department of Labor and Industrial Relations, 898 S.W.2d 587 (Mo. Ct. App. 1995); Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo. 1995); City of Jefferson v. Missouri Department of Natural Resources, 863 S.W.2d 844 (Mo. 1993); State *ex rel.* City of Springfield v. Public Service Commission of the State of Missouri, 812 S.W.2d 827 (Mo. Ct. App. 1991)(overruled); Missouri Municipal League v. Brunner, 740 S.W.2d 957 (Mo. 1987); Miller v. Director of Revenue, 719 S.W.2d 787 (Mo. 1986); *In re* 1984 Budget for Circuit Court of St. Louis, 687 S.W.2d 896 (Mo. 1985); State *ex rel.* Sayad v. Zych, 642 S.W.2d 907 (Mo. 1982); Boone County Courtv. State, 631 S.W.2d 321 (Mo. 1982) (provides guidelines for interpretation of Hancock Amendment).

[44] Thomas, *supra* note 38, at 495.

[45] *Id.* The drafter's notes do indicate, however, that Section 21 would include "federally encouraged changes in state law." Appellant's Brief at 44, *Missouri Municipal League* (No. 78567).

[46] *Missouri Municipal League*, 932 S.W.2d at 402.

[47] *Id.* The Safe Drinking Water Commission promulgated LSPA fee regulations in 1994. Mo. Code Regs. tit. 10, § 60-16.030 (1997).

[48] Mo. Const. art. X, § 21. (The Director of the MoDNR Public Drinking Water Program, Jerry Lane, provided testimony by affidavit concerning the discretionary nature of Missouri water services: "Operating a water system in Missouri is a discretionary service, i.e. no statute or regulation of which I am aware requires that any corporation, municipality, person, or any other governmental subdivision operate a public water system." Respondents' Brief at 5, *Missouri Municipal League* (No. 78567)).

[49] 812 S.W.2d 827 (Mo. Ct. App. 1991).

[50] *Id.* at 827.

[51] *Id.* at 830.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 831. The logic of the opinion was solid:

> Operation of a municipal utility is not an activity required of government to serve public needs. It is a discretionary function often undertaken by private interests. Increased costs to a municipal utility are not a drain on general revenue, but are charges against the customers of the utility. The charges of a municipal utility are not in the nature of taxation. The imposition by the Commission of new and amended safety rules, against municipal utilities, does not violate the Hancock Amendment even when the rules increase the utilities' activity, service and costs. The increased costs do

C. Federal Law

When a state adopts drinking water laws, regulations and enforcement mechanisms which are "no less stringent" than federal law, the FSDWA allows the state to implement its own program at the state level.[55] Section 640.100 of the MSDWA adopts and serves to enforce the drinking water standards set by the FSDWA.[56] Since 1980, the EPA has modified water testing requirements, increasing test frequency and parameters and lowering maximum contaminant levels.[57]

"Federal regulations do not require the state to provide testing services, but only mandate that the water systems comply with federal water quality regulations."[58] Nonetheless, for the state of Missouri to be permitted to administer its own drinking water program through the Department of Natural Resources, the state must not only set federally acceptable standards, but also see to their enforcement.[59] Federal law sets out the requirements for "state primary enforcement responsibility" also known as "primacy."[60] State primacy means that the state will develop its own program for safe drinking water in accordance with federal law and regulations and will enforce and implement its program rather than the Environmental Protection Agency.[61]

To be allowed primacy, federal law requires, among other things, that a state adopt "drinking water regulations no less stringent than the national primary drinking water regulations" and adopt and implement "adequate procedures for enforcement."[62] If a state does not have primacy, the federal government, through the EPA, imposes the federal requirements directly on water providers.[63] Part of the reason for this federal comprehensive regulatory program is the importance of *national standards* for the protection of health.[64]

The state of Missouri asserts federal preemption as a secondary reason justifying the state imposition of water testing costs, despite the Hancock Amendment.[65] Though no state is required by federal law to implement a drinking water program, almost every state does operate its own program.[66] However, if the state does not comply with and enforce its drinking water program in accordance with federal guidelines, the state's power to

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not affect the municipality's tax structure by increasing the cost of operating government and impose no additional burden upon the taxpayers. *Id.*

[55] 42 U.S.C. § 300h-1 (1991). *See also* 40 C.F.R. pt. 142 (1996).

[56] *See* MO. REV. STAT. § 640.100 (Supp. 1996).

[57] The federal requirements are codified at 42 U.S.C. § 300f to 300j-26 (1991 & Supp. 1997) and 40 C.F.R. pts. 141-43 (1996).

[58] Legal File at 38, *Missouri Municipal League* (No. 78567).

[59] 42 U.S.C. § 300g-2 (Supp. 1997).

[60] 42 U.S.C. § 300g-2.

[61] 42 U.S.C. § 300g-2 enumerates the requirements that a state must meet to have primary enforcement responsibility or "primacy" to supervise its own public water system supervision program. 54 Fed. Reg. 52,126 (1989). "The federal government, through the EPA, oversees states' public drinking water efforts. This has been true since prior to 1980, when the Hancock Amendment was enacted." Respondents' Brief at 5, *Missouri Municipal League* (No. 78567).

[62] 54 Fed. Reg. 52,126 (1989). *See also* 42 U.S.C. § 300g-2 (Supp. 1997).

[63] The FSDWA states that whenever a public water system in a state without primary enforcement responsibility is not in compliance with the FSDWA, the EPA Administrator will "issue an order . . . requiring the public water system to comply . . . ." 42 U.S.C.A. § 300g-3a(2)(A) (Supp. 1997).

[64] Mattoon v. City of Springfield, 980 F.2d 1, 4 (1st Cir. 1992).

[65] *Missouri Municipal League*, 932 S.W.2d at 403.

[66] As of December 1989, all eligible U.S. states and territories had primacy and their own drinking water programs, with the exception of Wyoming, Indiana and the District of Columbia. 54 Fed. Reg. 52,126 (1989).

administer its own program will be lost.[67]

IV. THE INSTANT DECISION

The *Missouri Municipal League* case dealt with two primary issues in deciding the question of whether the amendments to the MSDWA violated the Hancock Amendment, thus requiring the state of Missouri to pay for the entirety of municipal water testing.[68] The first question involved the determination of whether water testing was "required" of the municipalities such that the Hancock Amendment applied.[69] The second issue concerned the question of federal preemption of the testing requirements relating to the state's argument that if the water testing requirements are imposed by federal law, they are not "required" by the state for the purposes of the Hancock amendment.[70] The controversy arises in the present case under the MSDWA which requires public water suppliers to pay the costs of laboratory services and program administration.[71]

Section 640.100.4 states that water testing "shall" be conducted.[72] The Missouri Municipal league argued that the testing is consequently a required activity.[73] The state of Missouri, however, took the contrary position that the activity is discretionary because municipalities are not "required" to provide drinking water.[74] No Missouri statute or regulation requires any of the municipalities in this case to operate a public water system.[75] The state contended that because the activity is discretionary, the increase in water testing fees is not in violation of the Hancock Amendment.[76]

The Missouri Supreme Court found water testing to be "a required activity" because the state mandates that testing "shall" be done to comply with both state and federal regulations.[77] Furthermore, water testing existed at the time of the Hancock Amendment's enactment.[78] As the MSDWA amendment[79] and the LSPA regulations now require political subdivisions to pay the costs of formerly state-financed water testing,[80] the Missouri Supreme Court held that the imposition of these costs violates the Hancock Amendment.[81] The Court thereby overruled *City of Springfield* and rejected the state's argument of federal preemption.[82]

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[67] 42 U.S.C. § 300g-2 (Supp. 1997).

[68] *Missouri Municipal League*, 932 S.W.2d at 402-403.

[69] *Id.* at 402.

[70] *Id.* at 403.

[71] *Id.* at 401.

[72] Mo. Rev. Stat. § 640.100.4 (Supp. 1996).

[73] *Id.* at 402.

[74] *Id.*

[75] Respondents' Brief at 4, *Missouri Municipal League* (No. 78567).

[76] *Missouri Municipal League*, 932 S.W.2d at 402 (citing City of Springfield, 812 S.W.2d 827 (Mo. Ct. App. 1991)).

[77] *Id.* (citing Mo. Rev. Stat. § 640.120 (1994)). In concluding that water testing was a "required" activity, the court overruled City of Springfield, rejecting the distinction between governmental or proprietary activities. The court indicated that the question of whether an activity is required of a municipality no longer necessitates the determination of whether the underlying service is one traditionally performed by the government. *Id.* at 403.

[78] *Id.* at 402 (citing Mo. Rev. Stat. § 640.100.4 (1978)).

[79] Section 640.100.4 was amended in 1982 requiring water suppliers to pay testing costs.

[80] *Missouri Municipal League*, 932 S.W.2d at 402. (In 1980, section 640.100.4 required the state to provide water testing free of charge. Mo. Rev. Stat. § 640.100.4 (1978)).

[81] *Id.* at 402.

[82] *Id.* at 403.

V. COMMENT*

A. Hancock Interpretation

The importance of the decision in *Missouri Municipal League* lies primarily in its overruling of *City of Springfield* with regard to the interpretation of the Hancock Amendment. The majority of the opinion centers on the reasons why *City of Springfield* should be overruled. In a brief discussion of the underlying reasons, the court abolished the sound logic of *City of Springfield* and struck a devastating blow to the intended application of the Hancock Amendment.

If only from the standpoint of fairness, it is illogical that a municipality would decide to engage in an activity with the knowledge that the activity is heavily regulated by the state, and then not expect to pay the costs of operating that activity that are caused by legislative changes responding to federal guidelines. If the State of Missouri is forever precluded from passing on the cost of compliance measures to regulated activity conducted by political subdivisions when federal regulations change, how can the state issue permits for activities, knowing that the state will have to bear any additional costs imposed by federal guidelines over which the state has little control?

By overruling the *City of Springfield* case, the Missouri Supreme Court eliminated the clear and simple solution to the problem: a literal interpretation of the Hancock Amendment. The Hancock Amendment prohibits the State of Missouri from "reducing the state financed proportion of any existing activity or service *required* of counties and other political subdivisions."[83] From a plain reading of this language, the central idea appears to be that the Hancock Amendment applies only to activities or services that are *required* by the state. The inconsistency arises in that supplying drinking water is clearly not "required" of a municipality. The rule in *City of Springfield* indicated that if an activity is not required, thus discretionary, the Hancock Amendment will not apply, and the prohibition against reducing state financing does not apply.[84] Under *City of Springfield* the state could pass on the increasing costs of water testing to municipal water suppliers. After all, the municipal water suppliers always have the option of leaving the water supply business if they do not like the additional costs.

The problem with the *Missouri Municipal League* opinion is that it overrules the *City of Springfield* interpretation of the Hancock Amendment without fully addressing the discretionary/required distinction. Instead, the court discusses the distinction between "proprietary" and "governmental" functions as per *Loving v. City of St. Joseph*,[85] which held that the Hancock Amendment does not distinguish between proprietary and governmental activities.[86] This distinction was never at issue in *Missouri Municipal League*, and *City of St. Joseph* provides no basis on which *City of Springfield* should be overruled. The *Missouri Municipal League* opinion offers no support as to why the Hancock Amendment must now be interpreted contrary to its plain meaning.

In one similar Missouri case, *Fort Zumwalt School District v.* State,[87] the Missouri Supreme Court held that the state's failure to maintain sufficient state funding for special education programs violated the Hancock Amendment.[88] The

* This author would like to thank Mr. Joseph P. Bindbeutel, Chief Counsel of the Environmental Protection Division in the Office of the Missouri Attorney General, for his helpful insight into the Hancock Amendment and its consequences to Missouri environmental programs.

[83] Mo. Const. art. X, § 21 (emphasis added).

[84] *See generally* City of Springfield v. Missouri Public Service Commission, 812 S.W.2d 827 (Mo. Ct. App. 1991).

[85] 753 S.W.2d 49 (Mo. Ct. App. 1988).

[86] 932 S.W.2d at 402-03 (citing Loving v. City of St. Joseph, 753 S.W.2d 49, 51 (Mo. Ct. App. 1988)).

[87] 896 S.W.2d 918 (Mo. 1995).

[88] *Id.* at 918.

Court held that the Missouri Constitution required the state to maintain a consistent ratio of state financing to local financing of mandated special education.[89] The Supreme Court examined a Missouri statute which required "the board of education of each school district to provide special educational services for handicapped children."[90] *Fort Zumwalt School District* differs from *Missouri Municipal League* in one significant aspect: the State of Missouri requires municipal school districts to provide special education whereas the operation and supply of drinking water by municipalities is not mandated by the state.

When the Hancock Amendment states in Section 21 that it will apply only to activities of municipalities that are required by the State of Missouri,[91] a threshold issue should always be whether or not the activity in question is required or discretionary. The Supreme Court should not have overruled *City of Springfield* because it eliminated any distinction between required and discretionary activities. The court in *Missouri Municipal League* seems to say that regardless of the nature of the activity, if it is undertaken by a municipality, the state will assume any new costs associated with the promulgation of new state regulations, despite their value and their necessity to comply with federal guidelines.

This result is entirely contrary to the intent of the Hancock Amendment. The intent of Hancock was not to increase state funding of all municipal activities. The purpose of the amendment was, in part, to assure that government's role is limited to those roles and those resources expressly approved by voters.[92] The concept of having all Missouri taxpayers subsidize the discretionary activities of a municipality confounds this approach.[93] As stated by Judge Price in his dissent in *Fort Zumwalt School District*, erroneous interpretations of the language of Section 21 of the Hancock Amendment will cause devastating consequences to the State of Missouri "by requiring a never-ending spiral of increased spending."[94]

B. Alternate Solutions

As Missouri does not have an unlimited supply of funds to funnel into municipal activities, what solutions are available now? The state of Missouri could provide only the amount of funding available before the passage of the Hancock Amendment and let municipal water systems decide for themselves whether or not they will comply with federal standards. The result would be the loss of state primacy and EPA control of Missouri drinking water systems. This would not further the purpose of the MSDWA. The Missouri Department of Natural Resources applies the MSDWA to ensure the provision of safe drinking water, not to extract unnecessary monies from municipal systems. The Department of Natural Resources simply does not have the resources to fund the implementation of every new federal primacy requirement. It may be an option for the state to simply give the problem back to the federal government and allow enforcement to be accomplished by the EPA.[95]

Another solution would be to carve out an exception to

[89] *Id.*

[90] *Fort Zumwalt*, 896 S.W.2d at 920.

[91] *See generally* State ex rel. Sayad v. Zych, 642 S.W.2d 907 (Mo. 1982) for a contrasting example of an activity that is truly "required" of a municipality by the state. In *Sayad*, the state of Missouri, through the St. Louis Police Board, required the city of St. Louis to appropriate funds to the Police Board. Section 21 of the Hancock Amendment prevents the Police Board from requiring an increased budget appropriation from the city after the effective date of the Hancock Amendment.

[92] Interview with Joseph P. Bindbeutel, Assistant Attorney General, in Jefferson City, Missouri (Apr. 3, 1997).

[93] *Id.*

[94] *Fort Zumwalt*, 896 S.W.2d at 924 (Price, J., dissenting). Judge Price interprets Section 21 of the Hancock Amendment as imposing no affirmative duty on the state, but rather prohibits the state from passing on costs of required activities "by affirmatively reducing the portion of costs borne by the state." *Id.*

[95] Interview with Joseph P. Bindbeutel, *supra* note 92.

Hancock for programs, environmental and others, that are subject to federal regulation. The exception could be that state programs whose implementation hinges on meeting federal guidelines and complying with federal law will not be subject to the Hancock Amendment. However, such an exception would be too narrow and has no precedential support.

The simplest solution would be to re-affirm the *City of Springfield* case and base the application of the Hancock Amendment on the required activity/discretionary activity distinction.[96] In that way, the true intent of Hancock will be served. Activities that are, in fact, required by the State of Missouri to be undertaken by municipalities will enjoy the protection Hancock provides, while discretionary activities will be required to bear the cost of compliance with state and federal law like any other industry.

C. Double Standard for Privately-Owned and Publicly-Owned Industries

A troubling feature of *Missouri Municipal League* is that it establishes two standards: one for some industries that must adhere to all state and federal laws, and another for public entities that need only pay for compliance with laws in effect up until the passage of the Hancock Amendment. This double standard causes an incongruous result. Private industries must bear the costs of operations when engaged in activities heavily regulated by the state, while public industries, subject to state regulations which often merely duplicate federal law, pass on the cost of compliance to the state of Missouri.

The industries that do not have to pay for regulatory compliance are those that happen to be owned by municipalities but that could be privately owned. The *Missouri Municipal League* decision gives municipalities an unfair competitive advantage over privately-owned, regulated industries. "The resulting subsidy of publicly owned enterprises would disturb the fiscally conservative drafters of the amendment."[97]

D. Hancock and the Burden of Primacy

It is easy to understand the purpose of Section 21 of the Hancock Amendment. The government simply cannot impose new or increased services or costs on municipalities. The logic of this restriction is clear. If the state, by itself, wants to require increased activity of a municipality, then it must pay the municipality for the cost of the increased regulatory burden. The problem in the instant decision remains that it is not the state of Missouri alone that sets the requirements.

The Court concedes that the standards for safe drinking water are preempted by the federal government[98] but states that the federal issuance of standards differs from the enforcement of the standards at the state level.[99] The court posits that the state of Missouri confused the federal standards with the "enforcement" of the standards which is left to the states.[100] Though federal statutes and regulations on safe drinking water do not technically "preempt" the state regulations,[101] state law basically duplicates the federal regula-

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[96] Michigan's Headlee Amendment at MICH. CONST. art. IX, § 29, which is nearly identical to the Missouri Hancock Amendment at section 21, has been interpreted recognizing the discretionary/mandatory distinction. Livingston County v. Department of Management and Budget, 425 N.W.2d 65 (Mich. 1988). The court in Livingston County held that as the county was not required by state law to operate a solid waste disposal site, the state was not required to appropriate to the county funds necessary to upgrade the landfill and bring it into compliance with a newly-enacted state law. *Id.* at 66.

[97] Interview with Joseph P. Bindbeutel, *supra* note 92.

[98] 932 S.W.2d at 403 (citing Mattoon v. City of Pittsfield, 980 F.2d 1, 4 (1st Cir. 1992)).

[99] *Id.* at 403.

[100] *Id.* (citing 42 U.S.C.A. § 300g-3e).

[101] The following explanation illustrates the meaning of "federal preemption" in environmental programs:
In states that choose not to apply for program delegation, the federal programs are operated and enforced by federal authorities. Again, this is consistent with constitutional principles of federalism approved by the Supreme Court in *New York*

tions.[102]

The Missouri Department of Natural Resources enjoys the privilege, afforded by the EPA, of handling state environmental policies provided that state guidelines are sufficiently strict. However, as the federal requirements to maintain primacy increase, the state's compliance becomes more difficult.[103] Many states, including Missouri, have stated that their lack of resources for drinking water programs will prevent them from implementing increased requirements under the FSDWA without increases in funding.[104] Though the EPA prefers a policy of "full primacy,"[105] some states, including Missouri, could be forced to give up their primary enforcement status in the future if resources are not sufficient to operate state programs in compliance with federal law.[106]

The problem for the State of Missouri is straightforward. When federal standards for environmental protection change, the Missouri Department of Natural Resources must impose equal standards in the state programs. If it does not, the State of Missouri and the Missouri Department of Natural Resources will lose the right to regulate and enforce their water program, and the EPA will take over. Whether Missouri operates its own drinking water program to retain primacy or discards the entire program and lets the EPA take over, the federal guidelines will nonetheless be met.

Requiring the state to pay all the municipal-level implementation costs when federal guidelines change will make it more difficult for state agencies to implement federal guidelines within the state. Though the federal guidelines on safe drinking water do not technically "preempt" state drinking water laws, the EPA does have the power to step in and remove the internal regulation of Missouri environmental programs by the Department of Natural Resources if the state cannot adequately enforce its drinking water program.[107] In fact, the EPA is required to do so.[108] In short, if federal preemption would be an exception to the Hancock Amendment, the courts should take into consideration the fact that the state and the Department of Natural Resources do not unilaterally require new or increased activities of the municipalities. The increased cost of water testing comes only in response to federally mandated guidelines.

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v. United States because it offers states a choice of regulating an activity "according to federal standards or having state law pre-empted by federal regulation." Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (citing New York v. United States, 112 S. Ct. 2408, 2424 (1992)).

[102] The court seems to indicate that the decision might have been different if the state activity was preempted by federal statute, yet even this is unclear. A fair inference to be drawn from the opinion is that if federal law preempts state law in the area of enforcement of federal drinking water standards adopted by the state, then the Hancock Amendment may not apply to such enforcement.

[103] The EPA recognizes the difficulty of many states to comply with primacy requirements when faced with changes in the FSDWA and its related regulations. "(S)ome States . . . may be unable to adopt the new requirements . . . and, thus, would be in violation of the primacy requirements. It is also possible that a primacy State may never agree to or be able to adopt all the new and revised requirements promulgated by (the) EPA." 54 Fed. Reg. 52,126, 52,128 (1989).

[104] 54 Fed. Reg. 52,126, 52,128 (1989).

[105] "Full primacy" is where the state alone operates and enforces its own drinking water program and regulations in accordance with federal law. 54 Fed. Reg. 52,126, 52,128 (1989). "Partial primacy" could occur if the EPA desired to keep a non-complying state program in place while filling in the gaps by EPA control and enforcement in the areas of non-compliance within a state. *Id.* The EPA's position on "partial primacy" is that it "would be extremely confusing to the regulated water systems and to the public when they try to determine who is responsible for citizen complaints, inquiries, and enforcement. *Id.* Redundancy in program operations (such as in laboratory analyses, sanitary surveys, review of design and construction plans, etc.) would be inefficient and costly." *Id.*

[106] 54 Fed. Reg. 52,126, 52,128 (1989).

[107] 42 U.S.C.A. § 300g-3 (Supp. 1997).

[108] *See* National Wildlife Federation v. EPA, 980 F.2d 765 (D.C. Cir. 1992).

E. Importance of Primacy

Primacy in the implementation and the application of the FSDWA through the MSDWA remains important. If federal guidelines are not complied with, the state will lose its power to implement its own environmental programs. Losing this power would be unfavorable from a policy standpoint.[109] Primacy permits the State Attorney General's Office to handle almost all of the state's drinking water cases, while the Missouri Department of Natural Resources provides nearly all enforcement of the MSDWA.[110] The existence of the Department of Natural Resources in Missouri and its maintenance of "primacy" under the FSDWA show Missouri's desire to preserve its autonomy and control its own environmental programs internally, as much as possible.

The loss of primacy for lack of funding and ability to implement and administer a drinking water program at the state level will affect small community water suppliers the most. It is not suppliers in St. Louis, Kansas City or other larger cities, for example, that have problems complying with qualitative or testing standards.[111] It is in small water systems in rural areas that the problems arise. Missouri provides a "door-to-door" application and administration of its drinking water program.[112] Its goal is to help all suppliers, even the smallest rural systems, to provide safe drinking water.[113] Federal contaminant testing requirements are not imposed arbitrarily. The contaminants for which testing is required are those that, over the course of time, have been found in water supplies, like carcinogens, that can have a serious impact on health.

If Missouri loses primacy, the EPA will enforce the FSDWA in the state. This will be disastrous to Missouri. The EPA regulatory environment is much stricter than that of the state.[114] Instead of the "door-to-door," tailored administration of the laws and regulations, the EPA will simply hand out administrative fines and penalties and close down non-compliant water supplies.[115] The hardest hit will be the small providers.[116] The federal government does not have the resources to go door-to-door and help small community suppliers.[117] The EPA will simply shut them down and refuse to issue them permits. The result will be that rural citizens will have to build their own wells or get water from greater distances at a much higher cost.

Ultimately, all water systems will comply with the federal guidelines regardless of whether it is the state of Missouri or the federal government which does the enforcement. Requiring the state of Missouri to bear the costs of putting regulated

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[109] By allowing states to apply federal environmental guidelines through state programs, a state preserves its autonomy "because most federal environmental standards established under this model are minimum standards with states expressly authorized to establish more stringent controls if they desire." Percival, *supra* note 101, at 1175.

[110] Interview with Joseph P. Bindbeutel, *supra* note 92.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] The dilemma remains that,

[w]hile EPA has the authority to withdraw a delegation of program authority to any state that is not meeting federal standards, this sanction is too blunt an instrument to be very effective. States understand that EPA has little incentive to assume programs that would add to the agency's own responsibilities at a time when it is having difficulty finding funds to implement its existing programs. As the burden of environmental expenditures increasingly falls on financially-strapped state and local governments, the quality of state administration of federal programs has become even more variable. Percival, *supra* note 101, at 1176.

industries owned by municipalities in compliance with federal guidelines contained in state-run programs will increase the burden on taxpayers and threaten Missouri's autonomy. This dramatic result will come from the *Missouri Municipal League* opinion by its overruling of *City of Springfield.* Without sufficient reason, the opinion abolished the required/discretionary distinction in Hancock Amendment interpretation as applied to municipal activities.

VI. Conclusion

The opinion in *Missouri Municipal League* could have clarified and examined the application of the holding in *City of Springfield.* Instead it abolished a plain and logical interpretation of the Hancock Amendment which could have a ripple effect throughout many state programs. The short term result in the present case will be an increased financial burden on the state of Missouri. The long term result will be continued confusion over Hancock Amendment interpretation as it presently stands and the possible elimination of state control over some environmental programs subject to federal guidelines.

"SAFE DRINKING WATER ADVISOR" www.awwa.org/govtaff/advisor/advisor.htm

This web site is maintained by the American Water Works Association (AWWA), an organization which promotes public health and welfare by providing information to utilities, regulators, consultants, and others regarding safe drinking water. This site focuses on compliance with federal legislation and regulations, and has links to federal agencies. Also available at the site are a Safe Drinking Water Library, Guidelines for Federal Agencies, Regulations, Text of Selected Public Laws, and internet links to related sites.

Company Will Not Mine Copper with Sulfuric Acid

Source: 27 INTERNATIONAL WILDLIFE 9 (Sept/Oct 1997).

The Copper Range Company has withdrawn its request for a federal permit to extract copper from a Michigan mine by injecting up to 11 billion gallons of sulfuric acid into the ground. The Company's plan, if granted the permit, was to use the acid to mine the copper and then store the waste acid underground for an indefinite period.

Environmental groups pressured Copper Range to withdraw its request for a permit, arguing that acid would eventually leak from the underground storage area into Lake Superior, which is located only five miles from the proposed storage site. The groups maintained that leaking would contaminate drinking water and the spawning grounds of certain trout populations.

Copper Range was the subject of a suit in 1995 by the National Wildlife Federation and the Michigan United Conservation Clubs, over mercury pollution from its copper smelter. The case was eventually settled.