ENVIRONMENTAL FEDERALISM AND THE THIRD SOVEREIGN: LIMITS ON STATE AUTHORITY TO REGULATE WATER QUALITY IN INDIAN COUNTRY

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States manage their water resources not only through allocation decisions, but also through regulation of environmental quality. Water quality regulation has been federalized under the Clean Water Act (CWA),[1] which delineates the states' obligations and opportunities with respect to their water resources. Nonetheless, the federal role under the CWA does not comprise the full restraint on state authority to manage water quality. The rights of Indian tribal governments to regulate water resources, both as a matter of inherent sovereignty and pursuant to the CWA, also serve to limit state power.

Two recent federal court decisions have clarified the role of Indian tribes under the CWA. The result of these decisions, explored in more detail below, is that tribal authority to regulate water quality not only limits the power of states within tribal territories, but imposes constraints on state power outside Indian country as well when the effects will be felt in tribal territories.

ENVIRONMENTAL FEDERALISM AND THE CLEAN WATER ACT

The CWA, like most federal pollution control legislation, operates on the principle of cooperative federalism.[2] The federal government establishes programs and sets uniform minimum standards applicable nationwide, and the states may seek "primacy" from the Environmental Protection Agency (EPA) to implement and administer the federal programs within their borders. The pollution control laws expressly preserve the right of the states, when they assume primacy, to set more stringent standards than those established under the federal laws. In the absence of an approved state program, the EPA will administer the federal program with its minimum standards in the state.

The CWA, enacted to protect the nation's surface waters, establishes a number of programs that operate on the cooperative federalism model. Premier among these programs is the National Pollutant Discharge Elimination System (NPDES), under which a permit is necessary for any "point source" to discharge pollutants into the navigable waters. A "point source" is defined as "any discernible, confined and discrete conveyance," such as a pipe, ditch, conduit, well, container, or vessel.

NPDES permits limit the discharge of pollutants from point sources in two ways. First, every NPDES permit contains technology-based standards that limit the rate, concentration, and amount of pollutants that can be discharged from the point source. If the NPDES permits are issued by the EPA, the technology-based standards will be the uniform minimum standards applicable nationwide. But states may seek primacy to administer the NPDES permit program within their borders. Pursuant to an EPA-approved program, states may implement technology-based standards more stringent than the federal ones.

Second, NPDES permits may contain additional effluent limitations based not on technology, but on water quality standards established for the receiving body of water. Section 303 of the CWA requires states to promulgate water quality standards (WQS) for surface waters within the state.[3] As the first step in the WQS process, the state determines the designated uses for each water body within its jurisdiction. State designated uses must protect existing uses of waterways and are subject to a federal minimum standard that fishable/swimmable uses be protected. In addition, states must consider a federal list of designated uses, but are nonetheless free to adopt more protective designations than the federal standards. Once a state has designated the uses of its surface waters, it designs WQS--which may be either numeric criteria or narrative standards--to achieve and protect those uses. The state WQS and the use designations upon which the WQS are based are then submitted to the EPA for its approval. Once approved, WQS are incorporated into NPDES permits if the technology-based effluent limitations are not sufficient to achieve the desired quality of the receiving body of water. In the absence of approved state standards, the federal minimum WQS will apply.

In the interstate context, WQS impose potentially significant limits on a state's authority to manage its water

resources. If the EPA issues NPDES permits within the state, the permit limitations must protect the WQS of the downstream states. EPA regulations, upheld as reasonable by the United States Supreme Court, require that federal NPDES permits "ensure compliance with the applicable water quality requirements of all affected States."[4] Even if a state has taken primacy for the NPDES program, it is required to at least consider the WQS of downstream states in its permit decisions. The issuing state must provide notice to affected states, and either accept or explain its rejection of written recommendations made by the downstream governments. An affected state that is dissatisfied with the upstream government's permit decision may request the EPA to exercise its authority to veto the state NPDES permit as inconsistent with the CWA.

Within its borders, then, each state can choose whether to exercise its autonomy and set its own standards, or accept the federal minimums and federal program administration. States may promulgate WQS of their own, or accept the federal standards. States may seek primacy for the NPDES program, or allow the federal government to issue discharge permits to point sources within the state. The CWA thus protects the rights of states, against federal minimums, to establish standards and set environmental policy for their surface waters. The authority of states is limited only by the federal floor of nation-wide minimum standards, and by the rights of downstream states to protection from upstream pollution.

THE CLEAN WATER ACT AND INDIAN TRIBES

Tribes as states

The CWA authorizes Indian tribes to act as states for most of the statute's programs. Indian tribes, like states, may seek primacy to issue NPDES permits within their territories[5] and to promulgate WQS for surface waters within their jurisdictions.[6] In the absence of a tribal program, the EPA will administer the federal minimum standards within a tribe's territory.

Unlike states, Indian tribes must be certified for treatment as states (TAS) by the EPA before they may take primacy. Under the CWA, tribes seeking TAS must meet three basic requirements: that the tribe has a functioning governmental body; that the program for which the tribe seeks primacy is within the tribe's jurisdiction; and that the tribe is reasonably capable of carrying out the federal program. The requirements of a functioning tribal government and programmatic capability are fairly straightforward. The contentious requirement, especially for the states, has been the second: that of tribal jurisdiction.

The CWA provides that an Indian tribe may be treated as a state if the functions it will exercise pertain to waters which are held by the tribe, held in trust by the federal government for the tribe or its members, or are "otherwise within the borders of an Indian reservation." Although this language seems to constitute an express authorization for tribes to take CWA primacy for all surface waters within their reservations, the EPA has read the CWA more narrowly. According to the EPA's interpretation, recently approved by a federal court, the CWA does not authorize automatic tribal jurisdiction over all reservation waters. Instead, it authorizes tribes to exercise CWA program authority to the extent that the tribe would retain inherent governmental power to regulate those waters.[7]

Land tenure in Indian country

The inherent regulatory authority which Indian tribes retain is inextricably tied to the land tenure patterns--the checkerboard of ownership--that exists today on many Indian reservations. Because the United States Supreme Court finds that state authority is more extensive, and tribal authority is more limited, over lands owned by nonmembers of the tribe than over "Indian" lands, it is necessary first to understand the checkerboard and how it came about.

When Indian reservations were originally set aside for the tribes, they were intended as permanent homelands. The lands were, in the words of many treaties, set aside for the "absolute and undisturbed use and occupation" of the resident tribes. To help ensure tribal separatism, the land was held in trust for the tribes by the federal government, and subject to restrictions on alienation, encumbrance, and taxation.

Much of that changed in the late nineteenth century when the federal government instituted a policy of allotting the reservations. Under the authority of the General Allotment Act,[8] Congress permitted communal reservation lands to be allotted as individual property to tribal members. After a period of time, the allottee received the land in fee, and the allotment could then be freely alienated and fully taxed. The lands remaining after allotments had been parcelled out, often millions of acres, were declared "surplus" lands and either opened to homesteading or ceded outright to the United States. By the time Congress formally ended the allotment policy in

1934, some 90 million acres of reservation lands, including two-thirds of the allotments, had passed into non-Indian ownership.

The result today is a literal checkerboard of land tenure on many Indian reservations. Reservations still contain land held in trust for the tribe and land held in trust for individual allottees. But many also contain significant amounts of land owned in fee by persons who are not members of the governing tribe.

Inherent tribal powers and CWA primacy

Indian tribes are sovereign governments, exercising governmental authority within their Indian country. As a general principle, tribes exercise full sovereign authority over their members and "Indian" lands, those owned by or held in trust for the tribe or its members. Conversely, states have no authority within Indian country over Indian tribes, their members, or lands held by or for the tribes or their members, unless Congress has expressly granted that power to the states.

Those principles change, however, when it comes to "fee lands:" those lands within Indian reservations but owned in fee by nonmembers of the tribe. As to fee lands within Indian country, tribes retain their inherent governmental authority only under certain circumstances. Crucial to the environmental context, tribes may regulate nonmembers on fee lands when the activities have direct effects on such tribal sovereign interests as health and welfare.[9]

Under those jurisdictional norms, tribes will be able to take primacy for the programs of the CWA where the tribes can demonstrate to the EPA that the activities they seek to regulate--the discharge of pollutants into the waters, for example, or the promulgation of WQS--have substantial impacts on tribal health and welfare. Although the EPA will make a case by case determination for each tribe that seeks primacy, the EPA also believes that activities which affect the quality of surface waters generally have serious impacts on health and welfare. Consequently, most tribes will be able to demonstrate inherent sovereign authority over all water quality activities in their territories, including activities by nonmembers on fee lands. More specifically, most tribes that seek primacy under the CWA will have jurisdiction over all surface waters of their Indian country. Tribes with primacy for the applicable programs thus will issue NPDES permits for all point source discharges within their territories and set WQS for all waters within their reservations.

For example, the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana recently received primacy for the purpose of establishing WQS for all waters within the reservation. Activities on nonmember lands that affected water quality included discharges from an RV park and campground, a sewage treatment plant, and a town's storm drains, as well as spills and leaks from gasoline service stations and gas tanks. These activities and discharges, the EPA determined, could substantially impact the Tribes' need for water that is clean enough to support domestic use and fish and wildlife for subsistence and cultural uses. Because of the potential impacts of the nonmember pollution on tribal health and welfare, the Tribes retained inherent authority to set WQS for all surface waters within the Flathead Reservation.[10]

INDIAN TRIBES AND STATE ENVIRONMENTAL AUTHORITY

The cooperative federalism structure of the CWA, combined with the inherent sovereignty of Indian tribes to regulate their water resources, imposes substantial constraints on state authority over water quality.

Limits on state authority within Indian country

As already noted, state authority in Indian country is sharply limited. States generally have no authority over tribes, their members, or Indian lands without express congressional authorization. State authority over nonmember fee lands may be more extensive, but is nonetheless limited by the retained sovereignty of the Indian tribes and by federal law.

The cooperative federalism approach of the CWA authorizes states to take primacy for the federal programs within their borders. Nonetheless, the CWA does not grant the states any authority over lands within tribal territories.[11] The statute is not an express grant of state authority over Indian lands, or otherwise an authorization for states to regulate the water resources of Indian reservations. Thus, even as to nonmember fee lands, states may not implement their CWA programs within Indian reservations unless they can demonstrate some independent grant of authority to do so. No state has been able to make that showing.

When states take primacy for CWA programs such as the NPDES permits or when states establish WQS, then, the states' authority to administer those programs stops at

reservation borders. Within Indian country, tribes that seek primacy will generally be able to demonstrate that their inherent sovereign authority extends to all waters of the reservation. Tribes will thus usually exercise CWA program authority throughout their territories. In the rare event that tribes cannot make that showing as to one or more specific sources within their reservations, the EPA will retain jurisdiction to implement and administer the federal CWA programs.

Limits on state sources outside reservations

Once an Indian tribe is granted primacy for a CWA program, it exercises the same powers as any state which assumes primacy. This includes the authority to establish tribal standards that are more stringent than the federal minimums. And those more stringent tribal standards, in turn, may limit state sources upstream of the reservation.

For example, the Pueblo of Isleta in New Mexico assumed primacy under the CWA to establish WQS for the portion of the Rio Grande that runs through the Pueblo. The Pueblo designated one use of the river as "primary contact ceremonial use," and established stringent water quality criteria to achieve that use. The EPA approved the Pueblo's WQS.

Five miles upstream of the Isleta Pueblo is the City of Albuquerque's wastewater treatment plant, which discharges treated water into the Rio Grande. The treatment plant was operating under a federal NPDES permit, and the EPA sought to revise the permit to meet the stringent downstream WQS established by the Pueblo. Faced with a multi-million dollar cost of compliance with the Pueblo standards, the city sued the EPA, alleging that the agency's approval of the Isleta WQS was invalid. Although the parties ultimately reached agreement on a revised NPDES permit for the treatment plant, the federal court held that the EPA properly required the upstream treatment plant to comply with the downstream tribe's WQS.[12]

The court's ruling was based on the cooperative federalism of the CWA. States are authorized to establish WQS, and the EPA, when it issues federal NPDES permits, is authorized to require compliance with the WQS established by downstream states. Indian tribes are treated as states, and thus the EPA may require compliance with downstream tribal WQS by upstream states. Limitations which the EPA may impose on a state in order to protect the interests of another state, may also be imposed to protect the interests of a tribe that is treated as a state.

CONCLUSION

Both the CWA itself and the sovereign status of the Indian tribes thus limit the states' authority to regulate water quality. The cooperative federalism of the CWA, which treats tribes as states to the full extent of inherent tribal sovereignty, constrains state power within Indian country and places obligations on state sources outside Indian country to comply with tribal standards.

Indian tribes are increasingly exercising their authority under the CWA. Although no tribe has yet taken primacy for the NPDES permit program, at least ten tribes have been authorized to establish WQS for all waters within their reservations. As tribes determine WQS for their territories, the effects on state authority will increase. NPDES permits issued within Indian country, including permits for activities on nonmember fee lands, will require compliance with those standards. Federal NPDES permits issued to upstream state sources will also require compliance with tribal WQS. And even state-issued NPDES permits upstream of tribes will require notice to downstream tribes and consideration of tribal standards.

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ENDNOTES

1. 33 U.S.C. §§ 1251-1387.

2. *See generally* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

3. *See generally* David S. Baron, *Water Quality Standards for Rivers and Lakes: Emerging Issues*, 27 ARIZ. ST. L.J. 559 (1995).

4. Arkansas v. Oklahoma, 503 U.S. 91 (1992).

5. 33 U.S.C. § 1377(e).

6. City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

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