EFFECTS OF THE CLEAN WATER ACT ON INDIAN LANDS

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The purpose of this talk is to acquaint you with the National Pollutant Discharge Elimination System (NPDES) permit program as regulated by the Clean Water Act and a significant amendment to it adopted by the Congress this year. I shall address the NPDES permit system and the Congressional amendment. Mr. Domenici shall address the interrelationship of water quantity rights and water quality controls.

The federal Clean Water Act is the mechanism whereby Congress has provided a comprehensive program for controlling and abating water pollution. The Clean Water Act expresses congressional intent on eliminating water pollution through the use of effluent limitations imposed on entities which discharge into the navigable waters of the United States. These limitations are imposed by means of NPDES or "National Pollutant Discharge Elimination System" permits which are issued by the EPA or the states. The act was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams, and lakes. The cornerstone of the regulatory scheme is that those entities needing to use waters for waste distribution must seek and obtain a permit to discharge that waste, with the quality and quantity of the discharge regulated.

There are two types of permits. Section 402 NPDES permits cover waste type discharges of pollutants. They contain effluent limitations on certain chemical parameters which are derived from EPA promulgated effluent guidelines or the water quality stream standards promulgated by the states. Section 404 permits cover non-waste discharges of dredged or fill material. The state role in the issuance of NPDES permits is set forth by the Clean Water Act in Section 401. The states must certify that construction and operation of any facility or activity which requires a federal license or permit does not violate any state water quality standard. In New Mexico, water quality standards are promulgated pursuant to the authority of The New Mexico Water Quality Act at Section 74-6-1 et. seq. The water quality stream standards designate the uses for which the surface waters of the State of New Mexico shall be protected and prescribe the water quality standards necessary to sustain the designated uses. The standards are consistent with Section 101(a)(2) of the Clean Water Act which declares that it is a national goal of water quality to provide for the protection and propagation of fish, shellfish and wildlife.

In New Mexico, there are other essential uses of water. They include agricultural, municipal, domestic, and industrial uses.

The protection of designated uses by Indian tribes has proved to be a fruitful battlefield for litigation. The state recently concluded a major case in which the Water Quality Control Commission was sued for failing to protect designated uses of the Acoma and Laguna Pueblos in the setting of stream standards on the Rio San Jose. In that case the Pueblos charged that the Treaty of Guadalupe Hidalgo secured to the tribes the right to have their historical uses of water protected and preserved from effluent discharges by the Grants Sewage Treatment Plant upstream. The plant was discharging effluent into the Rio San Jose pursuant to a properly issued NPDES permit. The tribes claimed that neither the permit nor the state streams standards protected their designated use of Rio San Jose water. At issue in the case was the conflict between Indian desires to maintain an ecologically pure environment and state and NPDES standards allowing for discharge of pollutants, under permit, into the Rio San Jose.

This year the Congress enacted a significant amendment to the Clean Water Act. It provides in Section 518 that the Indian Tribes are to be treated as states for the purposes and objectives of the Act. The most significant aspect of this is that it would allow the Indian tribes to establish water quality stream standards for waters running through their borders. The EPA has 18 months from the date of the amendment to promulgate final regulations which specify how Indian tribes shall be treated as states. That process is currently underway.

The major issue, however, is the promulgation of stream standards by the various Indian tribes for the water running through their borders. By setting stream standards higher than or at variance with established state stream standards, the tribes could impact the holders of NPDES permits upstream from their reservations. The problem is potentially significant for New Mexico as 9.4% of New Mexico's land is under Indian ownership on more than 20 Indian reservations. The chief concern centers on the Rio Grande and its tributaries. The state and nine Indian tribes could establish water quality standards on portions of the 465-mile main stream of the river. Although six of these nine tribes would have less than ten river miles, many are strategically located adjacent to municipalities with wastewater treatment plants. These include Albuquerque, Santa Fe, and Los Alamos. When tributaries are included, an additional ten Indian tribes and two Navajo chapters could affect the Rio Grande system. This phenomenon is not limited to the Rio Grande. The San Juan River, the Rio San Jose, the Jemez and the Pojaque all have Indian tribes which could set stream standards on portions of their reaches.

If tribes along these rivers were to set stream standards higher than or at variance with state stream standards, NPDES permit holders currently discharging into these rivers in accordance with state stream standards could find that Indian stream standards make it impossible for them to meet the conditions of their permits. Moreover, the potential exists for the Indian tribes to object to the issuance of NPDES permits upstream. In New Mexico the impact would chiefly be felt on the wastewater treatment facilities operated by municipalities including those at Taos, Albuquerque, Grants, Farmington, Santa Fe, and Los Alamos.

Let me give a practical example of how the conflict might arise. The amendment to the Clean Water Act, Section 518, specifically incorporates the provisions of Section 401(a)(2). That provision is addressed to the states. It provides that when a discharge may affect the quality of the waters of any other state, the Administrator of the EPA shall notify the affected state within 30 days of application for the discharge permit. If within 60 days after receipt of such notification the state determines that such discharge will affect the quality of its waters so as to violate a water quality requirement, the state may notify the administrator of the EPA of its objections to the permit and request a hearing. In the situation created by Section 518, the amendment, the tribes must be treated like the states. They would have the right to object to any upstream discharge which they determine would affect the quality of waters in tribal lands which did not comport with tribally adopted stream standards.

The picture is not entirely bleak, however. The amendment makes some provision to deal with potential conflicts. It provides that the administrator, in promulgating regulations to determine how the Indian tribes shall be treated as states, shall consult affected states sharing common water bodies with Indian tribes and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards set by the state and the tribes on common bodies of water. That process is under way. At present an informal dispute resolving mechanism is under consideration. It would involve the resolution of disputes by the regional administrator. In the event of an impasse, resolution of disputes would be made by the EPA Administrator in Washington.