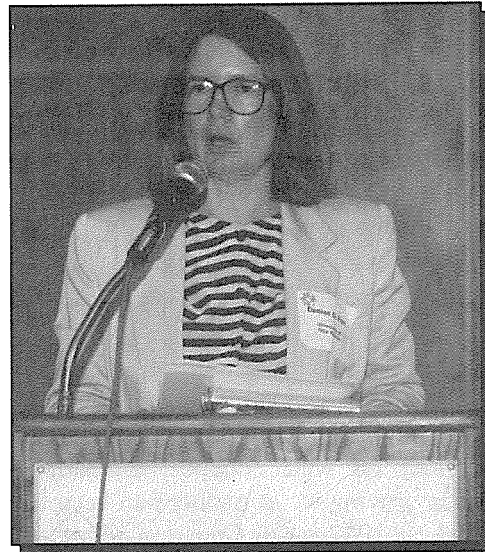


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WATER QUALITY STANDARDS IN A FEDERAL SYSTEM

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One of the most intriguing aspects of *Albuquerque v. Browner*² is the new perspective it casts on the role played by water quality standards in the national effort to protect and improve water quality. The thesis that I will suggest here is that the standard setting provisions of the Clean Water Act have received too little attention by Congress, the U.S. Environmental Protection Agency (EPA), and academic commentators in relationship to the important role that they now play in the Act. A consequence of this national inattention is that the

issues that are raised so prominently in the *Browner* litigation were not anticipated by Congress when it enacted the "tribes as states" provision of the Clean Water Act³, nor did EPA adopt a particularly thoughtful approach to conflicts that would invariably arise under this section.

In 1987 Congress provided that tribes would have the same ability that state governments have to adopt water quality standards under the Clean Water Act.⁴ Water quality standards consist of two parts: the designated use for a stream and the cri-

teria, usually expressed numerically, that are required to support those uses.⁵ The Pueblo of Isleta, directly downstream of Albuquerque, was the first tribal government to exercise its standard setting power. The fashion in which the Pueblo exercised its authority and the response of the City to its actions will not be the subject of my comments. Rather, I will attempt to put the resulting conflict in the broader context of the Clean Water Act, by exploring the consequences of increasing the number of entities that could adopt standards. In short, the effect of section 518 was to expand the opportunities for conflicts between jurisdictions, with no clear indication from Congress as to how these conflicts should be resolved.

Reliance on water quality standards as a means of improving water quality had been largely discredited by 1972 when Congress adopted what we now know as the Clean Water Act.⁶ Prior to 1972, states were required to adopt water quality standards.⁷ The adoption of these standards did not, however, lead to improved water quality. In response, Congress determined that a different approach should be used to improve water quality, an approach that was to form the basis of a number of other pollution control schemes. That approach was to have a national agency, the EPA, establish technology based standards, from which would follow uniform limitations on all dischargers.⁸

The virtues of technology based limitations were several. National standards reduced the temptation for jurisdictions to compete among themselves by offering pollution havens. By centralizing the analysis of technology and costs, the costs of regulation for a state were greatly reduced. It was no longer necessary to impute pollution in a stream to particular dischargers; technology based standards had to be met regardless of costs.⁹

Nonetheless, Congress retained the pre-1972 requirement that states adopt standards.¹⁰ And, more than 20 years later, water quality standards are once again driving pollution control programs, in a fashion that the members of Congress in 1972 might have had difficulty anticipating. New Mexico provides an especially apt example of why this is the case.

The preeminent reason that water quality standards are still necessary in New Mexico is that

most of our pollution is caused by nonpoint sources.¹¹ The federal Clean Water Act exempts nonpoint sources from the requirement to procure a NPDES permit.¹² While Congress has not mandated that states regulate nonpoint source pollution, and New Mexico hasn't chosen to do so, any future regulation is likely to be tied to failure to meet water quality standards.¹³

The technology based effluent limits mandated by the Act are of limited relevance to New Mexico for another reason. Almost all NPDES permitted discharges in the state come from sewage treatment plants, known as publicly owned treatment works (POTW). The various industries and commercial operations that discharge to the POTW are classified as "indirect dischargers" and do not necessarily have to meet the same effluent limitations that would apply if they were direct dischargers. Because pollutants from industrial dischargers usually pass through a POTW with limited removal of toxics by the plant, the effluent limitations applicable to a POTW reflect these passed through pollutants, as well as the requirements that are applicable to "normal" domestic sewage. In setting these additional limitations, stream standards are heavily relied upon as a source for these parameters.

Other sections of the Clean Water Act provide special remedies where water quality standards aren't met. Among them are two provisions that can be utilized to impose more stringent NPDES limitations.¹⁴

Far from being archaic reminders of the pre-1972 law, water quality standards play an increasingly important role under the Act. Because of this, the constraints that are applicable to a state or tribe's standard setting, and EPA's role in reviewing these standards, assume new importance. Insofar as a tribe sets more stringent standards than a state did for the same stretch of river, a number of these issues are raised. One is whether the state met the requirements of the Clean Water Act in setting its standards; that is, whether the uses required to be protected by the Act were in fact protected. If the answer is no, then the nature of the review provided by EPA under section 303(c) must be examined.¹⁵ Conversely, if a tribe establishes a standard that exceeds the previous state standards, or even exceeds background levels, the

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role of the EPA in approving that standard must also be examined.

EPA's role in reviewing state standards is obscure, despite a longer experience with this section of the Act than with most other environmental laws. The subject is further clouded because there is a substantial oral and informal administrative understanding of the provision, that is not expressed in the regulations or administrative materials, but that still influences the behavior of EPA and state governments.

EPA reviews a state's water quality standards under section 303 of the Act. When standards are revised, the statute provides that the Administrator is to determine if they meet "the requirement of this chapter,"¹⁶ and that, "[S]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."¹⁷

EPA's regulations add little clarity to an understanding of its review. EPA must assure that "the State has met water uses which are consistent with the requirements of the Clean Water Act."¹⁸ If a state doesn't require "swimmable, fishable" waters¹⁹, EPA only requires that it provide "appropriate technical and scientific data and analyses"²⁰ to support its decision not to do so.

With regard to requirements that are more stringent than the previous state standards or even more stringent than background requirements, EPA has taken a position in its regulations that is unabashedly supportive of state and tribal governments. This position is that states and tribes are free to adopt any water quality standards that they wish, regardless of how stringent they are.²¹ EPA's position is in accordance with the intent of the Clean Water Act, which is, after all, to eliminate the use of water as the means of carrying away pollution. That a state retains powers over its rivers, except as limited in the Act, is affirmed in section 510 of the Act.

Why haven't states generally used water quality standards to eliminate pollution? The answer lies in the process by which water quality stan-

dards are set. Water quality standards reflect the judgment of a state's executive branch of government as to the appropriate balance between water quality and the economic and social costs of water quality regulation. The power of the regulated community in this process is routinely evidenced in the triennial reviews of the New Mexico Water Quality Control Commission, where municipal and industrial concerns are well represented, but there is only minimal participation by environmental groups.

When a jurisdiction sets standards that apply mostly outside of its boundaries, these dynamics are radically changed. A downstream jurisdiction may receive none of the benefits of the economic activity generating waste and all of the environmental costs. The jurisdiction in which the discharger is located, on the other hand, may have little concern about the downstream entities that bear the brunt of the pollution. The conflict between upstream dischargers and downstream recipients didn't arise with section 518 of the Act, but can rather be traced back to early common law pollution cases that predate modern environmental laws.²² "All" that Congress did in adopting section 518 was to multiply the potential for conflict.

Unfortunately, despite several hundred years of experimentation in this country, we are very much on our own as we search for wisdom about how to approach these conflicts. At the outset, it would seem to me appropriate to set aside the question of standards that exceed background levels of a pollutant, because this is presumably an unusual approach. Moreover, the NPDES permit that has apparently resolved the City's disagreement with the Pueblo demonstrates that the operative question is not what a water quality standard says, but how EPA chooses to apply that standard in the permitting process.²³ EPA has no published regulation on how standards that exceed background quality are to be applied in permits, and has a great deal of leeway under the Clean Water Act in fashioning a permit.²⁴

The more typical situation is that presented where a downstream state or tribe decides to be more protective of its citizens than the discharger's state would have been. Many discussions of this subject characterize the issue as one of "pollution," but the real question is whose stream standards

correctly define pollution. To determine that question is to determine whose expectations will be met. EPA's answer under the Clean Water Act is that the standards of the downstream state must be met.²⁵ This decisional rule of EPA would likely be upheld in any further litigation, because of the *Arkansas* case and because it furthers the stated intent of Congress in enacting the Clean Water Act.

The problem with EPA's approach may be political, not legal. Insofar as dischargers in an upstream state do not find this outcome a particularly fair or logical decision rule, appeals to Congress are likely. If appeals were to occur, Congress might reexamine the autonomy granted states and tribes in standard setting. This autonomy is no longer the pattern in areas in which Congress has chosen to address environmental problems. More common is the establishment of national standards, as has been done for certain air pollutants²⁶, or a much stricter and more comprehensive set of technology based requirements, as one finds in the Resource Conservation and Recovery Act.²⁷ Dischargers, then, might find relief from Congress over matters such as standards that exceed background levels, but end up with greater EPA involvement in standards. Alternatively, tribal water quality standards might be at risk in an appeal to Congress. Some members of Congress believed that water quality standards would not apply off of Reservation boundaries.²⁸ Insofar as that is the effect of EPA's regulations, statutory reform might be favored by those members.

If the prospect of Congress reviewing water quality standards holds dangers for diverse interests, administrative review of these disagreements might be more constructive. Without changing its basic support of downstream entities, EPA could modify how it approaches conflicts between tribal and state standards.

Congress did attempt to address the resolution of conflicts under section 518 by directing the Administrator to "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." EPA has promulgated regulations to implement this section, but has failed to take advantage of the dis-

cretion Congress has given it to substantively affect conflicts under the Act.

EPA's regulations establish various forms of arbitration and mediation of conflicts.²⁹ However, they limit access to these processes, by requiring that a state or tribe initiate them.³⁰ Where the conflict is effectively between a discharger and a tribe, the discharger is unable to avail itself of these mechanisms. Further, EPA has made the process entirely voluntary, so that its results are binding only if the parties agree that it should be.³¹

By limiting access to the negotiation process and by refusing to substitute itself as a decision-maker (except where the parties agree to it), EPA has made resort to litigation more likely. In litigation, EPA has essentially announced that the downstream entity always "wins," which was the result in *Albuquerque v. Browner*. Congress, in contrast, had expected that EPA would, in its mechanism for resolving cases, "provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards....[and] provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this Act." Under the regulations promulgated by EPA, this thoughtful consideration will occur only where the parties both agree to it.

In enacting section 518, Congress allowed tribes greater control over their own environment, an overdue development that is fully consistent with recent environmental enactments by Congress. It asked EPA to venture into the charged area of solving conflicts between jurisdictions; a charge that was perhaps unfair, but deserved EPA's best efforts. Instead, EPA has minimized its own role under the Act and left the next steps to the courts and Congress.

ENDNOTES

1. This paper is based on a longer paper that has been submitted to the *Natural Resources Journal*.
2. *City of Albuquerque v. Browner*, No. CIV-93-82-M, (D.N.M. Oct. 21, 1993).

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3. 33 U.S.C. § 1377 (1988). The section number from the 1987 Act, P.L. 100-4, 101 Stats 76, is used in the text for the convenience of readers.
4. 33 U.S.C. § 1377(e) (1988).
5. 33 U.S.C. § 1313(c)(2)(A) (1988).
6. The conferees explained that the new "basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement...The Committee recommends the change to effluent limits as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality." S. Rep. No. 414, 92nd Cong., 1st Sess. 8 (1971).
7. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965).
8. 33 U.S.C. § 1311 (1988).
9. S. Rep. No. 414, 92nd Cong., 1st Sess. 8 (1971).
10. 33 U.S.C. § 1313 (1988).
11. New Mexico Water Quality Control Commission, *Water Quality and Water Pollution Control in New Mexico* (1992).
12. 33 U.S.C. §§ 1342, 1362(12) (1988). It should be noted that the stormwater permit program picks up some nonpoint source dischargers from specified industrial classifications.
13. S. Rep. No. 103-257, 103rd Cong., 2nd Sess. 2 (1994).
14. 33 U.S.C. §§ 1313(d), 1314(l) (1988).
15. 33 U.S.C. § 1313(c) (1988).
16. 33 U.S.C. § 1313(c)(3).
17. 33 U.S.C. § 1313(c)(2)(A).
18. 40 C.F.R. § 131.5(a)(1) (1993).
19. A requirement derived from 33 U.S.C. § 1251(2) (1988).
20. 40 C.F.R. § 131.5(a)(4) (1993). There are several other aspects to EPA's review of standards that are not relevant to the discussion here.
21. 40 C.F.R. § 131.3(j); 40 C.F.R. § 131.4(a).
22. See, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), *Missouri v. Illinois*, 200 U.S. 496 (1906).
23. The Pueblo established a standard for arsenic that was more stringent than what the City alleged to be the background level in the Rio Grande. The NPDES permit agreed upon by the City, EPA, and the Pueblo did not require the City to meet this standard in its discharge.
24. This point could be greatly expanded. Suffice it to say that Arkansas v. Oklahoma, ___ U.S. ___, 112 S.Ct. 1046 (1992) confirmed EPA's discretion in fashioning a permit that applied the standards of a downstream state.
25. 40 C.F.R. § 122.4(d) (1991).
26. 42 U.S.C. §§ 7401 to 7671 (1990).
27. 42 U.S.C. §§ 6901 et seq. (1988).
28. See, for example, 133 Cong. Rec. H168-03 (daily ed. Jan. 8, 1987).
29. 40 C.F.R. § 131.7 (1992).
30. 40 C.F.R. § 131.7(b)(6) (1993).
31. 56 Fed. Reg. 64887 (Dec. 12, 1991).