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Tenth Amendment Not Violated by Requiring Local Government Compliance with the Clean Water Act

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TENTH AMENDMENT NOT VIOLATED BY REQUIRING LOCAL GOVERNMENTAL COMPLIANCE WITH THE CLEAN WATER ACT

ENVIRONMENTAL LAW—CLEAN WATER ACT: The United States Court of Appeals for the Firth Circuit holds that the Tenth Amendment of the United States Constitution is not violated by requiring local governmental entities to comply with the Clean Water Act. *United States v. Plaquemines Parish Mosquito Control District*, 16 ENV'T REP. (BNA) 1649 (1981).

On December 2, 1977, the Plaquemines Parish Mosquito Control District (hereinafter "Parish"[1]), began dredging in a wetland area without a permit.[2] A wetland area is subject to Section 404 of the Clean Water Act,[3] which requires a permit before discharging dredged or fill material.[4] The dredging activity[5] is designed to control mosquito breeding.

On March 17, 1978, the Army Corps of Engineers (hereinafter Corps) served Parish a cease and desist order[6] for dredging without a permit. Parish, however, continued dredging. A second cease and desist order was served on April 14, 1978. Shortly thereafter, the United States brought suit in the District Court for the Eastern District of Louisiana against Parish at the request of the Secretary of the Army and the Administrator of the Environmental Protection Agency (hereinafter "EPA"). As provided by the Clean Water Act, the United States requested injunctive relief and an imposition of civil penalties.[7]

The district court entered judgment for the United States, permanently

1. A parish is the equivalent of a county or other local governmental entity.

2. All point sources are subject to effluent limitations standards which are based on technology to control and reduce water pollution. The limitations are set at the federal level and applied nationwide. The standards are implemented by requiring the discharger to obtain a permit which contains the applicable limitations before discharging a pollutant. Permits are issued by an approved state agency of the EPA.

A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (Supp. III 1979).

3. *Id.* § 1344(a).

4. Dredging without a permit results in violation of § 301 of the Clean Water Act, 33 U.S.C. § 1311(a) (Supp. III 1979), thus triggering judicial enforcement of the Act under 33 U.S.C. § 1319 (Supp. III 1979).

5. This activity consisted in dredging ditches with a marsh buggy dragline and discharging the excavated soil adjacent to the ditches. 16 ENV'T REP. (BNA) 1649, 1650 (1981).

6. A cease and desist order prohibits a person or business from continuing a particular course of conduct. It is issued by a court or administrative agency.

7. The Administrator of the EPA is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction. 33 U.S.C. § 1319(b) (1976 & Supp. III 1979). Any person who violates any order issued by the Administrator, or by a State, or in a permit, shall be subject to a civil penalty not to exceed $10,000 per day of such violation. *Id.* § 1319(d).

enjoining Parish from continuing to dredge the wetland area. The court declined, however, to impose civil penalties. Parish appealed to the United States Court of Appeals for the 5th Circuit on the ground that Sections 301 and 404 of the Clean Water Act,[8] as applied to it, violate the Tenth Amendment of the United States Constitution.[9]

Parish relied heavily on *National League of Cities v. Usery* (hereinafter *National League of Cities*)[10] in arguing that Sections 301 and 404 of the Clean Water Act violated the Tenth Amendment as those sections apply to local governmental agencies. *National League of Cities* held that the 1974 amendments to the Fair Labor Standards Act, which set wages and work hours of state employees, exceeded Congressional power under the commerce clause[11] because the amendments violated the Tenth Amendment. In so holding, the Supreme Court said that the challenged amendments would "displace the State's freedom to structure integral operations in areas of traditional government functions. . . ."[12]

The court of appeals in *United States v. Plaquemines Parish Mosquito Control District,* however, decided that the Tenth Amendment defense of *National League of Cities* was modified by the Supreme Court's recent decisions[13] involving enforcement of the Surface Mining Control and Reclamation Act. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.* (hereinafter *Virginia Surface*),[14] the United States Supreme Court articulated a three part test for deciding if congressional commerce power legislation violates the Tenth Amendment:

> First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."[15]

The Supreme Court added that even if there has been a showing which

8. *Id.* §§ 1311(a), 1344.

9. The Tenth Amendment states "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

10. 426 U.S. 833 (1976).

11. Congress is granted the power "[t]o Regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

12. 426 U.S. at 852.

13. Hodel v. Virginia Surface Mining Control and Reclamation Ass'n., 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981).

14. The Court discussed *National League of Cities* and the Tenth Amendment defense in *Virginia Surface,* 452 U.S. 264 (1981).

15. 452 U.S. at 287–288. The *Virginia Surface* Court relied on language from National League of Cities v. Usery, 426 U.S. 833 (1976), in fashioning their three part test.

satisfies the three part test, thereby indicating that federal legislation has infringed on a state decisional matter, the federal interest may be such that it justifies federal regulation.[16]

In applying the first part of the test, the court of appeals said that Parish had not shown that the statute regulates "States as States," a conclusion also reached in *Virginia Surface*. In *Virginia Surface*, the Supreme Court reasoned that the Surface Mining Act at most established "a program of cooperative federalism, that allows States, within limits established by federal minimum standards, to enact and administer their own regulatory programs structured to meet their own particular needs."[17] The Supreme Court then found that the cooperative federalism aspect of the Surface Mining Act was analogous to the Clean Air Act,[18] noting additionally that the Clean Air Act had survived Tenth Amendment challenges in lower federal courts.[19]

In *Parish*, the court of appeals similarly compared the Clean Air Act with the Clean Water Act and the Surface Mining Act, reasoning that the Clean Water Act also merely allows a state to enact and administer its own regulatory program, ". . . within certain federal minimum standards."[20] The court added that the Clean Water Act, like the Clean Air Act, also governs private individuals and businesses as well as states and their political subdivisions. The court of appeals, relying on *Fry v. United States*,[21] also noted that the federal interest in clean water justifies the state permit system. Support for the strong federal interest in environmental protection was found in the concurring opinion of Justice Blackmun in *National League of Cities*. The concurrence stated that the majority's opinion "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater. . . ."[22]

The *Parish* court then concluded that the effectiveness of the Clean

16. The *Virginia Surface* Court cited Fry v. United States, 421 U.S. 542 (1975), in support of this proposition.

17. 452 U.S. at 289.

18. 42 U.S.C. §§ 7401–7642 (1976 & Supp. II 1978).

19. The Court cited Friends of the Earth, Inc. v Carey, 552 F.2d 25 (2nd Cir. 1977), *cert. denied*, 434 U.S. 902 (1977); Sierra Club v. EPA, 540 F.2d 114 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977). Both cases upheld the Clean Air Act.

20. 16 E.R.C. at 1651. "Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program: . . ." 33 U.S.C. § 1344(h)(1) (1976 & Supp. III 1979).

21. In *Fry, supra* note 16, the Supreme Court held that a strong federal interest in wage control justified the application of the Economics Stabilization Act of 1970 to State and local government employees.

22. 16 ENV'T REP. at 1652.

Water Act would be drastically impaired by states acting only for their citizens' best interest and in disregard of the effect of their actions on the navigable waters.

CONCLUSION

The *Parish* decision is a logical result of *Virginia Surface*. The method of regulation in the Clean Water Act is similar to those in the environmental statutes discussed in *Virginia Surface*. The environmental statutes addressed all employ the permit system of regulation. By comparison, the court in *Parish* necessarily concluded that the Tenth Amendment does not bar the federal government from requiring local governmental agencies to comply with permit procedures. Even if the permit systems were not so similar, however, there is ample support for finding that any federal environmental legislation does not violate the Tenth Amendment because of the strong federal interest in protecting the nation's environment. This interest was expressly acknowledged in the concurring opinion to *National League of Cities*, the case that provides the basis for the Tenth Amendment challenge.

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