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TOPIC:

Federalism Issues Associated with the Permitting of Municipal Storm Water Discharges

BY

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Federalism Issues Associated with the Permitting of Municipal Storm Water Discharges

I. Introduction

Since the introduction of the Clean Water Act in 1972, the United States Environmental Protection Agency ("EPA") and state environmental agencies have made tremendous improvements in the quality of the nation's surface waters. Most of this improvement has resulted from the Clean Water Act's prohibition of discharges of pollutants from point sources unless authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. EPA and the states initially focused their efforts under the NPDES permit program on reducing pollutants in discharges of industrial process wastewater and of municipal sewage.

Once treatment technologies were employed at these obvious sources of pollution, EPA realized that control of these discrete sources of water pollution would be insufficient to meet the goals of the Clean Water Act. To meet these goals, more diffuse sources of water pollution would have to be controlled. Specifically, EPA found that storm water runoff from large surface areas, such as agricultural and urban land are major causes of adverse water quality impairment, including nonattainment of designated uses. These water quality problems arise from a variety of human activities, including land development, illicit discharges, construction site runoff and the improper disposal of materials. Additionally, EPA found that "Storm water runoff from lands modified by human activities can harm surface water resources, and in turn violate water quality standards, in two ways: (1) by changing natural hydrologic patterns and (2) by elevating pollutant concentrations and loadings."[1]

In 1987, Congress specifically amended the Clean Water Act to include a comprehensive approach for addressing storm water discharges under the NPDES permit program. As part of this approach, Congress required NPDES permits for discharges from municipal separate storm sewer systems ("MS4s") serving populations of greater than 100,000, and to later issue regulations concerning MS4s serving smaller populations.[2]

Since 1987, EPA Regions or delegated state agencies have issued NPDES permits to most cities with populations greater than 100,000. To obtain a permit, most of these municipalities were required to adopt ordinances specifically prohibiting certain types of activities within municipal boundaries, including the prohibition of illicit discharges.[3]

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[1] EPA's Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536, 1538 (Jan. 9, 1998).

[2] Clean Water Act (CWA) § 402(p); 33 U.S.C.A. § 1342(p).

[3] EPA defines "illicit discharge" as "any discharge to a municipal separate storm sewer that is not entirely composed of storm water except . . . fire fighting activities." 40 C.F.R. § 122.26(b)(2). Literally, water from a residential hose that reaches the street or storm drain is an "illicit discharge."

Additionally, these permits contain provisions that require the permitted municipality to: (1) control land development to minimize storm water runoff; (2) implement programs to regulate storm water discharges from construction sites; and (3) ensure adequate legal authority to comply with permit provisions. In 1998, EPA proposed an NPDES permit program for municipalities with populations less than 100,000.[4] This rule would require municipalities to: (1) prohibit, through ordinance, illicit discharges; (2) develop and implement a regulatory program to address construction site runoff; and (3) develop and implement other regulatory programs, including programs to minimize storm water pollution from areas of new development.

The provisions in these permits reflect the common belief that "end-of-the-pipe" controls, such as those used at industrial facilities and municipal sewage plants are not appropriate for the control of urban storm water runoff. "End-of-the-pipe" controls are believed to be inappropriate because they would not be cost efficient (and because the scientific basis to set the appropriate level for such controls does not currently exist). Rather than treating storm water before it is discharged, EPA's approach attempts to minimize the contamination of storm water before it reaches the storm sewers. Unquestionably, EPA's approach is reasonable, and is the approach that most rational cities would choose. However, by mandating such an approach, EPA is depriving local governments of a core aspect of sovereignty – the ability to choose when and where to exercise their regulatory powers – and as such, EPA is commandeering the land-use regulatory powers of local governments to achieve federal and state goals and priorities.

This attempt by EPA and delegated state agencies to commandeer municipal land-use powers raises a number of interesting constitutional questions, including the "oldest question of constitutional law" – what is the proper division of authority between the Federal Government and the States?[5]

II. The Tenth Amendment and the Anticommandeering Rule

> The Tenth Amendment
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> 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.[6]

The Tenth Amendment to the United States Constitution creates the constitutional line between federal and state power, and has given rise to many of the

[4] 63 Fed. Reg. 1536 (Jan. 9, 1998).

[5] *New York v. United States*, 505 U.S. 144, 149 (1992).

[6] U.S. CONST. Amend. X.

Supreme Court's most difficult and celebrated cases. This amendment encapsulates our notion of a "federal" system composed of a federal government of enumerated and limited powers supplemented by state governments of broader powers.

One question raised by the Tenth Amendment is whether it restrains Congress in its exercise of powers given Congress elsewhere in the Constitution, such as Congress' broad powers under the Commerce Clause. The United States Supreme Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S.Ct. 2365 (1997) clearly state that the Tenth Amendment, in certain circumstances, is an independent limit on Congressional power. The law of the land appears to be settled that the Federal Government cannot commandeer the legislative or executive mechanisms of state (and local) governments to implement federal goals and programs. The essence of the Supreme Court's position is contained in the last two paragraphs of Justice O'Connor's majority opinion in *New York*:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.
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> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. The Constitution permits both the Federal Government and the States to enact legislation regarding the disposal of low level radioactive waste. The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.[7]

In *New York*, the Supreme Court reviewed a federal statute that, among other things, required the individual States either to enact legislation regulating low-level radioactive waste generated within their borders or to take title to the waste. The Supreme Court framed the question as concerning "the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way."[8] In answering the question in the negative, the Supreme Court held that Congress

[7] *New York*, 505 U.S. at 199.

[8] *New York*, 505 U.S. at 161.

could not "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."[9] Thus, the Supreme Court clearly stated that the Federal Government could not commandeer state legislatures.

In *Printz*, the Court reviewed the constitutionality of the "Brady Bill" regulating the sale of handguns. The Brady Bill, among other things, required state law enforcement officers to participate in the administration of a federally enacted regulatory scheme. The Supreme Court framed the issue as the constitutionality of "the forced participation of the States' executive[s] in the actual administration of a federal program."[10] The Supreme Court's determination that the requirement was unconstitutional expanded the scope of the "anticommandeering" rule beyond just state legislative processes:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the state's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[11]

As clear as these cases appear to be, they may represent nothing more than the continuation of the Supreme Court's previous attempts to articulate a coherent understanding of the Tenth Amendment, and the latest installment of the saga beginning with *National League of Cities v. Usery*, 426 U.S. 833 (1976) through *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 226 (1985). However, there is some indication that the Supreme Court has found an aspect of the Tenth Amendment amenable to a bright-line test. In *New York*, the Federal Government relied upon *National League of Cities,* and other pre-*Garcia* decisions to support its argument that the Constitution's prohibition of congressional directives to state governments could be overcome where the federal interest was "sufficiently important" to justify state submission. The Court responded that, while the strength of the federal interests might be appropriate when reviewing the constitutionality of subjecting state activities to "generally applicable" federal laws, compelling a state to *govern* was in another category: "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[12] Thus, the Court seems to be stating that there are two separate lines of Tenth Amendment cases – (1) the *Garcia*

[9] *New York*, 505 U.S. at 176.

[10] *Printz*, 117 S.Ct. at 2376.

[11] *Printz*, 117 S.Ct. at 2384.

[12] *New York*, 505 U.S. at 178.

line that holds that Congress may enact laws of general applicability that incidentally apply to state governments; and (2) the *New York/Printz* line that hold that Congress may not direct the States to implement or administer a federal regulatory program.[13]

Similarly, the majority in *New York* made short shrift of arguments advanced by intervening state defendants, solidly grounded in *Garcia*, that not only was there no indication that the "national political process" had failed to protect New York's sovereign interests, but that representatives of the State of New York had actually *supported* the statute's enactment in Congress. In essence, Justice O'Connor, no fan of *Garcia,* as evidenced by her strong dissent in that case, removed its underpinning by responding that, at bottom, the Tenth Amendment protects the *people* of the State, not the State itself as an abstract political entity. From this perspective, it is the *people* whose Tenth Amendment rights are violated when the accountability of both state and federal officials is diminished – "The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."[14]

Additionally, despite the apparent breadth of these cases, they should not be viewed as greatly restricting the power of the Federal Government. These decisions clearly reaffirm precedent allowing the Federal Government to tempt States into regulating rather than facing: (1) cutoff of related federal funds, or (2) preemption of all regulatory powers in the field. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court allowed the conditioning of federal highway funds on a state's adoption of a specific minimum drinking age, and in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court allowed Congress to preempt state regulation of surface coal mining except as in compliance with federal statutes. Thus, Congress could entice local governments to administer EPA's program with money, or EPA could preempt the local governments and enact the very regulations that EPA seeks to have the local governments enact.

The lower Federal courts reaction to these cases is somewhat mixed. Many of the Circuits have quickly fallen in line behind the Supreme Court's decisions.[15] While others have not been as quick to read the Court's decisions broadly.[16]

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[13] *See Condon v. Reno*, 155 F.3d 453, 458 (4th Cir. 1998).

[14] *New York*, 505 U.S. at 182.

[15] *See, e.g., ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996) (SDWA requirement that states establish a program to assist local education agencies, schools and day care centers in remedying potential lead contamination in their drinking water systems held to violate Tenth Amendment); *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996) (Brady Bill); *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (Driver's Privacy Protection Act ("DPPA") regulating the dissemination and use of information contained in State motor vehicle records violated Tenth Amendment).

[16] *See State of Okla. ex. rel. Oklahoma Department of Public Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998) (holding that the DPPA did not violate the Tenth Amendment).

II. Permitting of Municipal Separate Storm Sewer Systems

A. Background

Section 402 of the Federal Clean Water Act (as amended in 1972) prohibits the discharge of any pollutant to Waters of the United States from a point source unless the discharge is authorized by an National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit program initially focused on reducing pollutants in discharges of industrial process wastewater and municipal sewage because in 1972 many sources of industrial process wastewater and municipal sewage were not adequately controlled and represented pressing environmental problems. However, as pollution control measures were implemented at these sources, it became evident that more diffuse sources (occurring over a wide area) of water pollution, such as agricultural and urban runoff, were also contributing to water quality problems.

The Clean Water Act also required biennial assessments of water quality throughout the nation. In general, these studies concluded that pollution from diffuse sources, such as runoff from agriculture, urban areas, construction sites, waste disposal and resource extraction were among the leading causes of water quality impairment along with discharges from industrial facilities and municipal wastewater treatment plants. To provide a better understanding of the nature of urban runoff from commercial and residential areas, EPA funded the Nationwide Urban Runoff Program ("NURP"). According to EPA, the NURP data indicated that, on an annual basis, discharge of suspended solids from separate storm sewers exceeded such discharges from municipal secondary treatment plants by more than an order of magnitude, and that discharges of priority pollutants often exceeded EPA's freshwater water quality criteria.[17]

From the beginning, storm water discharges through "point sources" were believed to be subject to NPDES permitting requirements. Under a federal district court order in 1975, municipal storm water outfalls were determined to be point sources under the Clean Water Act and accordingly were required, along with storm water discharges from industrial facilities, to have individual discharge permits. EPA's attempts to write regulations to implement storm water permitting requirements proved to be extremely controversial, and EPA was forced to rewrite its regulations several times. Initially, EPA tried to exclude many storm water discharges, including uncontaminated municipal storm water from the NPDES program. Then, in 1984 in response to criticism of its initial approach, EPA adopted regulations that treated storm water discharges as hybrid point sources subject to special requirements and some minimal regulation by general permits. EPA's 1984 regulations were vacated by the DC Circuit in 1987.

The objections to having EPA permit storm water discharges focused on a number of issues. EPA was concerned about the administrative burden that would be imposed upon it if it had to issue tens of thousands of permits to all storm sewer outfalls. Municipalities objected to the enormity of the tasks of locating, sampling, and controlling

[17] 60 Fed. Reg. at 1539.

thousands of outfalls. Others feared that the regulations could be interpreted as requiring everyone who had a device to collect storm water runoff -- homeowners, churches, schools, and businesses -- to get NPDES permits.

In 1987, Congress amended the Clean Water Act to require EPA to issue permits to specific sources of storm water discharges X storm water discharges associated with industrial activity and storm water discharges from municipal separate storm sewer systems (MS4s) owned by municipalities with populations greater than 100,000 (the Phase I sources). Congress exempted storm water discharges from municipalities with populations less than 100,000 from the permit requirements until October 1, 1992, with the understanding that Congress would revisit the issue of whether these municipalities needed to be regulated before that date (which was the date set by Congress for reauthorizing the Clean Water Act). Congress failed to reauthorize the Clean Water Act in 1992, but Congress did extend the exemption for smaller municipalities until October 1, 1994, again with the thought that Congress would reauthorize the Clean Water Act by that date. However, Congress did not reauthorize the Clean Water Act in 1994 and did not extend the exemption beyond 1994. Congress still has not reauthorized the Clean Water Act.

B. Phase I MS4 Storm Water Program

In 1990, EPA adopted its final Phase I storm water rules.[18] These rules set out permit application requirements for municipal separate storm sewer systems owned or operated by municipalities with populations greater than 100,000, and for storm water discharges associated with industrial activity. These MS4s and industrial storm water have come to be known as Phase I sources.

The Clean Water Act required that a Phase I MS4 permit: (1) "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers"; and (2) "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as" EPA and the States determine appropriate.[19] EPA originally proposed to require the Phase I cities to regulate all industrial storm water discharges within their municipal boundaries. However, in response to a Agreat majority≅ of negative comments, EPA=s final rule did not require cities to directly regulate industrial discharges but required industrial dischargers to obtain their own NPDES permits.[20] Nevertheless, EPA has never completely given up on the idea of getting cities to implement the program and has attempted to indirectly require such regulation using the permit language in draft and final Phase I MS4 permits.

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[18] 55 Fed. Reg. 47990 (Nov. 16, 1990).

[19] CWA § 402(p)(3)(B), 33 U.S.C.A. § 1342(p)(3)(B).

[20] *See* 55 Fed. Reg. at 47997-4800 (Nov. 16, 1990).

Currently, almost all of the Phase I MS4 cities have obtained NPDES permits, with most of the permits being issued by state administrative agencies in those states that have been delegated the authority to operate the NPDES permit program. However, EPA itself has issued a number of these permits in states that have not been (or had not been) delegated NPDES permitting authority.

The following are some examples of Phase I MS4 permit requirements from permits issued by EPA Region 6 to cities in Texas that raise Tenth Amendment concerns:

- **Legal authority** – Cities required to ensure that they have legal authority to regulate their citizens according to EPA's plan.

- **Land use planning** – Cities required to exercise zoning powers to minimize storm water runoff.

- **Industrial and high-risk runoff** – Cities required to regulate certain discharges to the MS4.

- **Household hazardous waste** – Cities required to collect and dispose of household hazardous waste.

C. Phase II MS4 Storm Water Program

In 1987, Congress also directed EPA to study other sources of storm water discharges and determine which of these sources should be regulated to protect water quality.[21] EPA was directed to complete these studies by 1989 and to issue regulations by 1993 designating which additional sources of storm water needed to be controlled and establishing a program to regulate these storm water discharges.[22] EPA did not complete its studies until 1995. In these studies, EPA reached the unremarkable conclusion (based on studies conducted in the late 1970's and early 1980's) that urban storm water runoff contains pollutants. Also, these studies recommended that EPA further regulate municipal storm water discharges in "urbanized areas" because that was a Census Bureau classification that included major population centers.

In 1998, EPA proposed its Phase II MS4 Storm Water Program.[23] Under the proposal, cities with populations less than 100,000 fall into one of three categories: (1) cities located in "Urbanized Areas," which must apply for NPDES permit authorization for MS4s by May 31, 2002; (2) cities with populations greater than 10,000 and population densities greater than 1,000 per square mile, which potentially may have to apply for NPDES permit authorization if required by the permitting authority (EPA Region 6 or the TNRCC); and (3) all other cities, which will not be required to obtain

[21] CWA § 402(p)(5); 33 U.S.C.A. § 1342(p)(5).

[22] CWA § 402(p)(6); 33 U.S.C.A. § 1342(p)(6).

[23] 63 Fed. Reg. 1536 (Jan. 9, 1998).

NPDES permit authorization unless the permit authority expressly determines that a permit is needed to protect water quality. EPA has proposed a permit waiver for municipalities in Urbanized Areas with populations less than 1,000. However, to take advantage of this permit waiver the municipality must prove, using sophisticated and expensive water quality models, that its storm water discharge is not polluting the receiving streams.

Small cities subject to EPA=s proposal would be required to comply with a permit containing at least the following minimum control measures:

X **Construction Site Storm Water Runoff Control** - Cities must adopt ordinances to regulate storm water discharges from construction sites with more than an acre of land disturbance. Effectively, this requirement will force Cities to implement and enforce EPA=s storm water permit program, and would make cities liable if they failed to enforce EPA=s program to EPA=s satisfaction. In addition to being regulated by Cities, these construction sites would also have to obtain an NPDES permit from the permitting authority.

X **Post-construction Storm Water Management in New Development and Redevelopment** - Cities must develop, implement and enforce a program to address storm water runoff from new development and redevelopment projects. This program must "attempt to maintain pre-development runoff conditions." EPA suggests that this can be achieved by adopting ordinances limiting growth, protecting sensitive areas, minimizing impervious cover, and maintaining open space.

X **Illicit Discharge Detection and Elimination**- Cities must develop a storm sewer system map, pass ordinances prohibiting illicit discharges**,** and implement an inspection program to detect illicit discharges. "Illicit discharges" include sanitary connections to storm drains, floor drains connected to storm drains, and dumping of materials into storm drains.

X **Public Education and Outreach on Storm Water Impacts -** Cities must distribute educational materials to the "community" about the impacts of storm water discharges and the steps that can be taken to reduce storm water pollution.

X **Public Involvement/Participation** - Cities must comply with "State and local public notice requirements."

X **Pollution Prevention/Good Housekeeping** - Cities must reduce pollutant runoff from municipal operations.

To satisfy EPA's rule, at least one strategy for each of six minimum measures will be required. EPA plans for the permitting authorities to implement this program through the use of general permits and a "tool box" of best management practices (BMPs)

designed to satisfy each of the six minimum control measures. However, the rule would require individual permits if a general permit is not available.

III. Tenth Amendment Challenges to EPA's MS4 Storm Water Program

A. Phase I

All Phase I permits in Texas were (or will be) issued by EPA because Texas was not delegated the authority to implement the NPDES permit program until 1998. In Texas, roughly one-third of the Phase I MS4s challenged their draft NPDES permits based on EPA's constitutional authority to require these cities to use their regulatory powers (ordinance and land-use powers) to implement and enforce EPA=s regulatory program. Several of these cities continued to challenge EPA's actions even after issuance of a final NPDES permit. The challenges raised by these cities are still within EPA's internal administrative appeals process and no final decision has been made by EPA with regard to these permits.

In their comments to EPA on their draft NPDES permits, these Phase I cities attempted to convey to EPA the clear message that, while they are committed to improving the quality of their environment and to reducing the amount of pollutants in their storm water discharges, they would prefer to implement a storm water program of their own design without every term and condition of the program being mandated by a federal permit. Many of these cities have worked to develop individual storm water programs that take into account their needs and desires (as well as their financial resources) and that are flexible enough to change in response to ever changing municipal priorities. These cities have tried to work with EPA to find a middle ground that lets them continue to implement their existing programs and to develop new programs without the regulatory constraints associated with EPA's approach. To date, no middle ground position has been found.

The inconsistencies with the Tenth Amendment are readily apparent in these permits. EPA has unquestionably attempted to compel these cities to enact and implement a federal regulatory program. However, to date, EPA Region 6 has disagreed that its permit provisions are inconsistent with the Tenth Amendment. To support its position, EPA Region 6 has relied upon Congress' Commerce Clause authority to regulate discharges of pollutants to waters of the US and upon the Supreme Court's holding in *Garcia*, arguing that the Federal Government can regulate municipal storm water system discharges just at it can regulate the discharges from any other point source discharge. What EPA Region 6 has failed to justify is its manner of regulation. Rather than imposing "end-of-the-pipe" controls or limits (which EPA arguably has the constitutional authority to impose), EPA is "regulating" by forcing the cities to regulate the conduct of their citizens. Rather than articulating a legitimate basis for this approach, EPA Region 6 asserts that its permit provisions do not require municipalities to implement a federal regulatory program.

B. Phase II

In response to EPA's proposed rulemaking, a group of approximately 85 municipalities in Texas formed the Texas Cities Coalition on Stormwater to submit detailed comments on EPA's proposed rule, including comments raising the Tenth Amendment issues. The Coalition commented that EPA=s approach, in general and many of the minimum measures in the proposed rule exceed EPA=s (and Congress') power to compel based on the Supreme Court's holdings in *New York* and *Printz*.

As noted by the Coalition in its comments, the heart of the *Printz* case is the notion of political accountability. The Supreme Court noted that by forcing State or local governments to absorb the financial burden of implementing a Federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher Federal taxes. And even when the States are not forced to absorb the costs of implementing a Federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. The Coalition noted that EPA's proposal has the potential to be quite costly and to generate significant political repercussions, and as the program is currently structured, it is the cities that will have to pay the financial and political costs.

The Coalition also noted that the accountability issue is important because of today=s backlash against "regulatory takings."[24] EPA wants cities to regulate new development to prevent or minimize water quality impacts. Virtually any act that cities take in such regard will be viewed by certain members of the public as regulatory takings.[25] Thus, EPA=s approach puts cities in a very difficult position. If they fail to aggressively regulate new development they will be in violation of their NPDES permits and subject to citizen-suit enforcement; if they aggressively regulate new development they will be sued for regulatory takings. Either result will be costly to cities both financially and politically.

The Coalition identified the following provisions in the proposed rule that do require the use of municipal regulatory powers:

! **Illicit Discharge Detection and Elimination** – Cities are required to effectively prohibit "through ordinance" illicit discharges into the MS4.

! **Construction Site Runoff Control** – Cities are required to use "an ordinance or other regulatory mechanism" to control sediment and erosion to the maximum extent practicable.

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[24] *See Dolan v. City of Tigard*, 512 U.S. 684 (1994).

[25] Many Small Cities have already fully zoned and subdivided most of the remaining undeveloped property within city boundaries. These Small Cities will face strong regulatory takings claims if they are forced to alter existing approvals. Does EPA intend for Small Cities to make new development restrictions applicable to already approved, but undeveloped, subdivisions?

! **Post-construction Storm Water Management** – Cities are required to use "policies and ordinances" to protect natural resources by limiting growth, protecting sensitive areas, and minimizing impervious cover.

Each of these proposal requirements far exceeds EPA=s authority to require under current Tenth Amendment jurisprudence, which makes clear that the Federal Government may not compel the States to enact or administer a Federal regulatory program. As with the provisions in the Phase I permits, EPA=s provisions are not even a "close call." The Supreme Court has never sanctioned a Federal command to the States to promulgate and enforce laws and regulations. In the *Printz* case, the Federal government admitted that "the constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities."[26] Unquestionably, EPA is seeking to compel local governments to make law in their sovereign capacities. EPA=s proposed rule states the same in no uncertain terms. Additionally, none of the recognized exceptions to the Tenth Amendment is applicable here. Local governments are not being enticed with Federal funds to do EPA's job and EPA does not intend to preempt local regulation if local governments choose not to regulate.[27] Thus, this action is beyond EPA=s authority to compel.

Moreover, the Tenth Amendment problem with EPA=s proposed rule cannot be avoided by relying upon EPA=s approval of a state submitted NPDES permit program. Neither the constitution nor the Clean Water Act empowers EPA to authorize or require the submittal of a state program that would impose requirements violating the Tenth Amendment's limitation on the powers of the federal government.

As an alternative to EPA's proposal, which would require small cities to obtain NPDES permits for their storm water discharges, the Coalition advocated the use of State water quality management programs as the means of regulating small city storm water discharges. The use of State water quality management programs is the most sensible way to directly achieve EPA's goals of protecting water quality and facilitating and promoting watershed planning as a framework for implementing water quality programs. The focus of such an approach would be on water quality rather than on controls merely for the sake of control. Because of this focus, the approach should produce greater improvements in water quality at a lower cost than the approach selected by EPA in the proposal, which is not directly linked to water quality. Such an approach would better facilitate and promote watershed planning because it would address the entirety of a watershed and not just discrete portions and because it would not further aggravate the

[26] *Printz*, 117 S.Ct. at 2380 (quoting the brief for United States at 16).

[27] One of the frustrating aspects of EPA's MS4 program is the way in which local government concerns can become lost in States that are authorized to implement the NPDES permit program. While EPA could not compel a local government to regulate, many state governments have this power. If a state requires a local government to regulate as part of its MS4 permit, such a requirement might not be unconstitutional because the Federal Government is not compelling the regulation. In such situations, the only way to raise the constitutional question may be for the state to refuse to implement the permit program in the manner dictated by EPA. In response to such defiance by a state, EPA can preempt state regulation and issue NPDES permits itself.

division between regulated and unregulated storm water pollution sources. Also, such an approach would be the most cost-effective and least burdensome approach.

IV. Conclusion

EPA's current NPDES permitting approach for MS4s is inconsistent with the Tenth Amendment. EPA's approach requires the commandeering of municipal legislative bodies and executive officers to implement EPA's regulatory program.

Most local governments are committed to protecting the health and welfare of their citizens and in preserving the environment. However, they are forced to balance municipal resources among many pressing priorities. The real issue here is not whether EPA mandated programs such as public education programs and construction site runoff control programs are good or bad. Rather, the issue is who gets to decide municipal spending priorities and who bears the political risk if the programs fail to gain popular support. EPA is trying to use local tax revenues and local government authority and manpower to carry out EPA=s programs and responsibilities. Rather than asking Small Cities for assistance in a co-operative fashion, EPA is attempting to commandeer municipal powers. If cities are forced to subsidize the Federal program, they may not be able to fund their own programs (for such things as housing the homeless or providing public libraries), which they may believe to be of a higher priority than EPA=s program.

EPA has the ability to issue MS4 permits that do not unconstitutionally intrude upon the sovereignty of municipal governments, especially with regard to its Phase II MS4 program. These alternative approaches have the ability to restore cooperation to "cooperative federalism."

The only effective solutions to water quality problems caused by urban runoff will require members of the general public to make significant changes in their behavior. Such changes will not come from command-and-control regulations, regardless of whether they are imposed by the Federal, state or local governments. Public education is the key. Rather than forcing thousands of individual governmental entities to develop their own public education programs, EPA could implement such a program on a national or statewide basis. Such broader scale public education campaigns tend to achieve far greater results[28] than individual city programs. If the public decides that cities should do more to reduce storm water pollutant loads, cities will respond accordingly. Rather than forcing cities to impose what could be very unpopular regulatory programs, EPA could use its own broad powers to impose these programs. Finally, rather than coercing cities with threats and intimidation, EPA could offer incentives and encouragement to cities to get these cities to use their police powers to further EPA=s goals.

[28]Two examples of wildly successful and influential public education campaigns are Keep America Beautiful's 1971 "Crying Indian" campaign and the Texas Department of Transportation=s "Don't Mess with Texas" campaign. Neither of these campaigns would have been as successful had they been purely local in nature.