



MEMORANDUM

To: Senator Ben Cardin

From: Robert Adler, William Andreen, Jane Barrett, Holly Doremus, Daniel Farber, Robert Glicksman, Robert Percival, Rena Steinzor, Dan Tarlock, Sandra Zellmer, Yee Huang, and Shana Jones¹

Date: November 23, 2009

Subject: Constitutionality of The Chesapeake Clean Water and Ecosystem Restoration Act of 2009 (S. 1816)

Overview

The legislation you have introduced to reauthorize the Chesapeake Bay Program has two critically important categories of provisions that have great potential to get restoration efforts back on track. The first category includes mandates that would require the Environmental Protection Agency (EPA) and various states to meet deadlines for developing restoration plans and for making progress in implementing those plans. The second category would amend existing citizen suit authority under the Clean Water Act to allow “any person” to bring suit in federal court if federal and state agencies fail to carry out those new, non-discretionary duties. Opponents of the legislation have argued that your proposals are unconstitutional, invoking the Tenth Amendment with respect to the mandates on the states and the Eleventh Amendment with respect to the legislation’s citizen suit language.²

This memorandum responds to those concerns, concluding that these provisions are rooted in constitutional principles and supported by existing case law and statutes. In the context of this analysis, we recommend clarification of the citizen suit language in S. 1816 in order to

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² See, e.g., Senate Committee on Environment & Public Works Subcommittee on Water and Wildlife, Legislative Hearing on Great Water Body Legislation: S. 1816 and S. 1311 (November 9, 2009) (testimony of Susan Bodine, partner, Barnes and Thornburg), available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=c5233491-802a-23ad-4935-22cc9da3c775&Witness_ID=5663d7a1-7392-4d23-9b33-07134961fb8d.

ensure that the provisions operate as intended. Under the Tenth Amendment, the legislative scheme for enforceable mandates is constitutional because states have the opportunity—as opposed to the obligation—to assume the role of formulating their own watershed implementation plans. Under the Eleventh Amendment, well-established Supreme Court precedent provides an exception to the prohibition on federal citizen suits against states when litigants are seeking prospective, injunctive relief. In fact, S. 1816 is similar to the structure of the Clean Air Act’s state implementation plans, which have been found constitutional. The legislation incorporates by reference the citizen suit provisions of the Clean Water Act, which have also been upheld as constitutional.

The memorandum is signed by individual legal scholars from universities across the country, including three professors of environmental law at the University of Maryland, Professors Jane Barrett, Robert Percival, and Rena Steinzor. Professor Steinzor and the remaining scholars are all members of the Center for Progressive Reform (CPR), www.progressivereform.org. CPR is a 501(c)(3) nonprofit research and educational organization working to protect health, safety, and the environment through analysis and commentary. We believe that the nation should do everything it can to prevent harm to people and the environment, distribute environmental harms and benefits fairly, and protect the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action.

Relevant Provisions of the Legislation

The provision at the heart of S. 1816 is the requirement that states volunteering to receive delegations of federal authority to implement these new provisions of the Clean Water Act must submit watershed implementation plans (WIPs) for each of the 92 tidal water segments in their jurisdictions by no later than May 12, 2011. S. 1816, 111th Cong. § i(1)(A). The WIP must be designed to attain the pollution limitations of nitrogen, phosphorous, and sediment cap loads identified in the Chesapeake Bay TMDL. Beginning no later than May 12, 2014, states are also required to submit biennial progress reports on the extent to which WIPs have been implemented. S. 1816, 111th Cong. § i(1)(C). If a state fails to apply for delegation, or if a delegated state fails to submit a WIP or a biennial report or fails to correct a previously missed two-year commitment made in its WIP, the Administrator would be required to impose a series of consequences, including developing and administering a federal watershed implementation plan for the Bay state. S. 1816, 111th Cong. § j(5)(B). Thus, if the state chooses not to participate in the program, the legislation provides a federal backstop modeled on the Clean Air Act.

Section n(2) of S. 1816 also provides that “if a Bay watershed state fails to submit a watershed implementation plan or biennial report, or to correct a previously missed 2-year commitment made in a watershed implementation plan,” the state is subject to enforcement actions by the Administrator and to civil actions pursuant to section 505 of the Clean Water Act. If the Administrator fails to act under this section, she would also be subject to citizen suit enforcement under section 505. Section 505 of the Clean Water Act provides, in relevant part, that:

Any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

33 U.S.C. §1365(a)(1)-(2).

S. 1816 and the Tenth Amendment

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.” The Supreme Court has held that under the Tenth Amendment the federal government “may not compel the States to implement, by legislation or executive action, federal regulatory programs.” *Printz v. United States*, 521 U.S. 898, 925 (1997) (holding unconstitutional the provision of the Brady Handgun Violence Prevention Act that required state officers to conduct a background check on gun purchaser). While Congress cannot compel or coerce a state into administering a federal regulatory program, the Supreme Court held in the foundational case, *New York v. United States*, that Congress can encourage a state to adopt a legislative agenda that is consistent with and according to federal interests. 505 U.S. 144, 166 (1992).

In *New York*, the Supreme Court addressed the three incentives in the Low-Level Radioactive Waste Policy Act for states to deal with radioactive waste. The first was a monetary incentive, which redistributed fees collected for surcharges on waste disposal sites to states that participate in the disposal program. The second was an access incentive, which allowed states to deny access to disposal sites. The third was a take-title provision, which obligated states unable to dispose of waste to assume possession and liability for damages caused by human and environmental exposure to the waste. Determining that the monetary and access incentives were appropriate exercises of Congress’s commerce and spending powers, the Court upheld the first two incentives. However, the Court found the take-title provision unconstitutional because it required states to either accept ownership of low-level radioactive waste or regulate according to a congressional directive, which crossed the line from encouragement to coercion. Forcing the states to assume the liabilities of certain state residents or instructing them to regulate according to a congressional directive would result in the “commandeering” of state governments into the service of federal regulatory purposes, an authority denied to the federal government under the Constitution. *Id.* at 175-76.

Importantly, the *New York* principle prohibiting commandeering does not restrict Congress from providing encouragement to states to partner with the federal government in achieving national health, safety, and environmental goals using either of two authorities the Constitution grants the national government: (1) through the spending power by attaching conditions on the receipt of federal funds or (2) through the

Commerce Clause by offering states the opportunity to implement “delegated” federal authority. *Id.* at 166-67. With respect to the second method of regulation, the Supreme Court in *New York* explained that “where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.” *Id.* at 167.

S. 1816 is therefore distinguishable from the “take title” provision of the Low-Level Radioactive Waste Policy Act at issue in *New York* because Bay states are given the choice of two constitutional alternatives: they can choose between submitting their own watershed implementation plans or having the EPA develop and administer implementation plans for them. By allowing states to choose, this scheme falls outside the commandeering prohibition under *New York*. Under the latter choice, the federal government would bear the full burden of the regulatory program. The legislation’s requirements that government formulate watershed implementation plans is analogous to the Clean Air Act’s requirements that either federal or state agencies formulate state implementation plans, which was held constitutional in *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) (upholding the federal permit implementation program under the Clean Air Act because, while Congress cannot command a state to administer a federal program, the Act gives a state the choice of either administering its own program to meet national air quality standards or doing nothing and letting the federal government enforce a federal permit program in the state).

Courts have described this scheme as “a program of cooperative federalism that allows the states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, which in turn are structured to meet their own particular needs.” *Virginia*, 80 F.3d 869; *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 289 (1981) (upholding as facially constitutional the provisions of the Surface Mining Act, which required states to enact a program to meet federal minimum standards or have the federal government develop and administer the program, because the provisions do not compel the state to enforce federal standards, to expend any state funds, or to participate in the federal regulatory program). Allowing states the first opportunity to volunteer does not “unduly infringe on the sovereignty of the State” and does not “offend the Constitution’s guarantees of federalism.” *City of Abilene v. U.S. E.P.A.*, 325 F.3d 657, 662 (5th Cir. 2003) (dismissing a challenge by several Texas cities to federal regulation of discharges by third parties into municipal sewer and stormwater systems because the program gave state and local governments choices on whether and how to implement its requirements) (*citing New York*, 505 U.S. at 176).

Recommendation: To avoid any further misunderstanding of the intended operation of this approach, we recommend the addition of language to section i(1)(A) of S. 1816 explicitly cross referencing the federal backstop provided in section j(5)(B).

S. 1816 and the Eleventh Amendment

The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” The amendment grants state governments “sovereign immunity,” or immunity from lawsuits, under

certain circumstances. The Clean Water Act's citizen suit provisions contained in S. 1816 would not violate sovereign immunity because the Supreme Court has held that states are not immune from private lawsuits demanding injunctive, as opposed to monetary, relief. Nothing in the enforcement provision of S. 1816 indicates that the analysis applicable to current private lawsuits brought against states under Section 505 of the Clean Water Act would apply any differently to this legislation.

Sovereign immunity under the Eleventh Amendment does, however, limit the *type* of relief a private citizen may be entitled to against a state. In our federal system, each state is a sovereign entity. Notably, the Supreme Court has not extended Eleventh Amendment protection to municipalities or counties. Further, a state and its officers acting in their official capacity are immune from private lawsuits *for damages* unless the state waives its immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (finding that tribes could not sue the state under the Indian Gaming Regulatory Act because Congress did not validly abrogate state sovereign immunity) (*referring to Ex parte Young*, 209 U.S. 123 (1908)). This immunity, however, is not absolute. Under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar private individuals from obtaining prospective, injunctive relief for ongoing violations of federal law by state officials. *Id.* at 71 n.14 (*citing Ex parte Young*). Indeed, in *Seminole Tribe*, the Supreme Court has specifically pointed to Section 505 of the Clean Water Act—the citizen suit provision—as being constitutional under the Eleventh Amendment under the *Ex parte Young* doctrine. Notably, *Seminole Tribe* is a case that strengthened state immunity under the Eleventh Amendment and accordingly limited citizen suits in some cases. However, that the Supreme Court specifically distinguished the Clean Water Act from the Indian Gaming Regulatory Act as exemplifying a *constitutional* statutory scheme only supports the conclusion that the incorporation of Section 505 into the S. 1816 scheme does not violate the Eleventh Amendment.

The key question in this context is the scope of the relief private litigants may request pursuant to the citizen suit provision, not whether the citizen suit provision in the legislation is constitutional. The Supreme Court has limited the relief available to private litigants in two ways: the relief must be prospective (cannot be for past violations) and it may not require direct expenditure of state funds. The Supreme Court has acknowledged that the lines delineating what relief is prospective, as opposed to retrospective, and what constitutes expenditure of state funds is not always clear in every instance. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (concluding that, in a private suit against an Illinois agency over the distribution of federal benefits, the retroactive award of back payments violated the Eleventh Amendment because it was tantamount to damages, unlike costs associated with a “necessary consequence of compliance in the future,” which are constitutional). An injunction requiring state compliance, for example, may well have a greater impact on the state treasury than monetary penalties, yet “[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*.” *Id.*

Indeed, courts have already determined in the Clean Water Act that the possibility that injunctive relief against a state officer may well cost the state money does not vitiate the Eleventh Amendment, notwithstanding *Seminole Tribe*. In *Natural Resources Defense Council v. California Department of Transportation*, two environmental groups and a private citizen brought a citizen suit enforcement action under Section 505 of the Clean Water Act against the director of the California Department of Transportation alleging the agency's noncompliance

with a stormwater permit. 96 F.3d 420, 422 (9th Cir. 1996). The Ninth Circuit rejected the state's argument that *Seminole Tribe* barred the suit, holding that "an injunction against the state officer is permitted, even if it might require substantial outlay of funds from the state treasury, provided that it does not award retroactive relief for past conduct." *Id.* Accordingly, the fact that a citizen suit against a state officer requesting injunctive relief could result in the expenditure of states funds does not make a citizen suit provision unconstitutional. *See also Swartz v. Beach*, 229 F. Supp. 2d 1239 (D. Wyo. 2002) (concluding that the Clean Water Act "falls within the *Ex parte Young* doctrine" and "the *Seminole Tribe* limitation on the *Ex parte Young* doctrine does not divest this Court of jurisdiction over the claims seeking to enjoin the State Defendants from violating the CWA"); *Pacific Rivers Council v. Brown*, 2002 WL 32356431, at *10 (D. Or. Dec. 23, 2002) (explaining "Congress enacted the citizen suit provision so that a citizen enforcement action might be brought against an individual or a government agency. It would seem reasonable, then, that Congress implicitly intended to authorize citizens to bring *Ex parte Young* suits against state officials with the responsibility to comply with clean water standards and permits.").

The Clean Water Act already grants citizens a legal cause of action to sue a state when a state officer in his official capacity violates a National Pollutant Discharge Elimination System (NPDES) permit or any order issued with respect to effluent standards or limitations. This provision has been upheld in the face of constitutional sovereign immunity challenges by two federal district courts in the Fourth Circuit. *See W. Va. Highlands Conservancy, Inc. v. Huffman*, 588 F. Supp. 2d 678 (N.D. W. Va. 2009) (ordering, after rejecting the State's claim of sovereign immunity under the Eleventh Amendment, the West Virginia Department of Environmental Protection, as "operator" of a mine causing pollution discharge, to apply for and obtain NPDES permits for the discharge); *W. Va. Highlands Conservancy, Inc. v. Huffman*, 2009 WL 2705854 (S.D. W. Va. Aug. 24, 2009) (parallel action for different discharge sites).

Although it was drafted to conform the citizen suit provisions of existing law to its new requirements, S. 1816 appears to expand the circumstances under which a citizen may sue a state officer to correct a serious oversight in existing law: the absence of any explicit mandate requiring delegated states to implement the load allocations developed in the TMDL process on a set schedule. S. 1816 solves this omission by adopting the basic approach taken in the Clean Air Act, which requires states to formulate state implementation plans (SIPs). This approach is wise because courts have held that the Eleventh Amendment does not bar citizen suits to compel state officials to fully implement EPA-approved SIPs. *See Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 718 (E.D. Pa. 2002) (concluding that *Seminole Tribe* did not curtail Congress's power to authorize citizen suits under the Clean Air Act to be brought against a state when it fails to implement a SIP and that the SIP is enforceable under federal law even though it incorporates state law and state programs); *Sweat v. Hull*, 200 F. Supp. 2d 1162, 1173 (D. Ariz. 2001) (concluding that the *Ex parte Young* exception applied to Director of the Arizona Department of Environmental Quality and that she had a responsibility to implement and enforce an EPA-approved SIP that included a state vehicle emissions program passed by the Arizona legislature). These citizen suits under the Clean Air Act rest *not on a state's failure to submit a SIP* but on its *failure to implement and enforce a SIP*.

However, the language of S. 1816 could arguably expose a state to a citizen suit if it chooses not to apply for delegation to implement the legislation's requirements and EPA is

compelled to step in and develop the WIP on its own. As we pointed out above, the legislation gives the states this choice so that commandeering is not an issue. However, once a state chooses to participate and submits a WIP, providing for citizen suits when states fail to correct deficiencies in their WIPs, or fail to meet two-year deadlines for action imposed under their WIPs, fall well within federal authority under the Eleventh Amendment.

A second problem with the S. 1816 citizen suit provision is that because Clean Water Act section 505 refers primarily to permits issued under the National Pollutant Discharge Elimination System and EPA orders, a court could potentially conclude that S. 1816 only allows citizen suits when a state is in violation of a NPDES permit or EPA order. This narrow interpretation would clearly nullify the purposes of the provision.

Recommendation: To remedy these potential misinterpretations of S. 1816, we recommend that you include a separate citizen suit provision in the legislation, rather than simply referring to existing section 505 of the Clean Water Act. The provision should clarify that citizen suits may only be filed against a state officer for injunctive relief. The provision should explicitly authorize citizen suits challenging a state's failure to meet two-year commitments and standards set in the watershed implementation plans, as well as violations of NPDES permits or EPA orders.

Conclusion

The Chesapeake Clean Water and Ecosystem Restoration Act of 2009 is supported by a strong constitutional foundation of case law interpreting existing statutes and does not violate the restrictions on federal authority contained in either the Tenth or Eleventh Amendment. The clarifying amendments we have recommended could avoid any further misinterpretation of its provisions on constitutional grounds.

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