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Mark A. Drumbl*

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In his Note, *The Proof Is in the Policy: The Bush Administration, Non-point Source Pollution, and EPA's Final TMDL Rule*, Bryant McCulley observes that the regulation of nonpoint source (NPS) pollution involves contentious issues of environmental federalism.¹ I could not agree more. However, I would like to take this opportunity to push this discussion in a new direction. NPS regulation should transcend domestic federalism concerns and recognize the transnational nature of environmental harm. This is particularly the case given ecosystem interconnection and the cross-border sources of water pollution. Unless these transnational sources of pollution are taken into account, Environmental Protection Agency (EPA) regulation of NPS may fall short of its goals.

McCulley concludes that, for statutory reasons, the actual regulation of NPS must remain the prerogative of the states.² I read this conclusion as more

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1. See R. Bryant McCulley, *The Proof Is in the Policy: The Bush Administration, Non-point Source Pollution, and EPA's Final TMDL Rule*, 59 WASH. & LEE L. REV. 237 (2002).

2. See *id.* at 247 (stating that under § 303 of Clean Water Act, EPA does not have statutory power to directly regulate NPS pollution).

than just a matter of statutory imperative, but also as a normative endorsement on McCulley's part of the principle of subsidiarity. This endorsement ought to prompt reflection among international lawyers. In a world of transnational environmental harm, is there cause for concern about positing states and sub-national units as the most appropriate *locus* for environmental governance?

I. The Clean Water Act and the TMDL Litigation

The traditional focus of the Clean Water Act (CWA) has been to encourage states to regulate water pollution through the use of technology-based standards and discharge permits under § 402 of the Act.³ This traditional focus has been quite successful in addressing point sources of water pollution. NPS pollution, on the other hand, continues to increase. NPS pollution occurs when water runs over land or through the ground, picks up pollutants, and deposits them in surface waters or groundwater. Major sources of NPS pollution include cattle farms, agriculture, mines, and silviculture. NPS pollution is responsible for a large part of the impairment of the nation's streams and rivers, which, in turn, is only the first step in a broader array of environmental harms. Water contamination can accumulate within the food chain and affect biodiversity and life generally.

So, how can NPS pollution be regulated? McCulley posits that the CWA's long-dormant Total Maximum Daily Load (TMDL)⁴ program can offer assistance. A TMDL is an estimate of the maximum amount of a pollutant that a water body can assimilate and still meet applicable water quality standards.⁵ If states establish TMDLs and strive to ensure that water bodies adhere to those TMDLs, then overall water quality will improve. Using the TMDL approach would diversify the regulatory focus to include water quality-based standards, as opposed to a singular focus on technology-based standards.

Administrative action involving TMDLs and NPS pollution has attracted lawsuits in both the Ninth and District of Columbia Circuit Courts of Appeals.⁶ McCulley's Note focuses on litigation in the D.C. Circuit where, in *American Farm Bureau Federation*,⁷ litigants challenged the EPA's Final TMDL Rule (Final Rule).⁸ These litigants allege that the EPA exceeded its

3. 33 U.S.C. § 1342(a)-(b) (1994).

4. *Id.* § 1313(d).

5. See 40 C.F.R. § 130.7(c)(1) (2001) (providing that TMDLs must be set so that applicable water quality standards are attained and maintained).

6. *Am. Farm Bureau Fed'n v. EPA*, No. 00-1320 (D.C. Cir. filed July 18, 2000); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000), *appeal docketed*, No. 00-16026 (9th Cir. May 24, 2000).

7. No. 00-1320 (D.C. Cir. filed July 18, 2000).

8. Final TMDL Rule, 65 Fed. Reg. 43,586 (July 13, 2000) (to be codified at 40 C.F.R. pts. 9, 122-4, 130).

authority in promulgating a Final Rule for TMDLs that covered rivers affected solely by NPS pollution. Those defending the Final Rule include: (1) environmentalists, (2) point source industries, such as the sewage disposal industry, and (3) other entities seeking inexpensive pollution control now that the additional marginal costs for point source reductions have steadily risen. Critics of the Final Rule find fault with the requirement that states develop TMDLs for waterbodies solely impaired by NPS; they also take exception to the requirement that implementation plans, attainment schedules, and reasonable assurances that the TMDLs will achieve water quality standards be included in the Final Rule. McCulley posits that the case ultimately may be decided through use of the well-known *Chevron* test, in which the court is to consider whether Congress has spoken directly in the statute to the precise question at issue, and, if it has not, then to determine whether the agency's position is based on a reasonable construction of the statute.⁹ In the *American Farm Bureau Federation* case attacking the Final Rule, McCulley suggests it is possible that the second tier of the *Chevron* test will support the EPA's position that it possesses the statutory authority under the CWA to include waters impaired solely by NPS pollution in the TMDL program.¹⁰

II. The Need to Look Transnationally

There is an important transnational aspect to NPS pollution that has, thus far, been overlooked in the debate involving EPA's Final TMDL Rule. In North America, activity within the *maquiladora* is particularly problematic.¹¹ The *maquiladora* is a sixty-mile wide stretch of the 2,000-mile U.S.-Mexico border where a commercial free trade zone was created in 1965. The pluralized term *maquiladoras* often refers to factories that are jointly owned by foreign (mostly U.S.) and Mexican companies, but operate on the Mexican side of the border. Approximately 2,500 *maquiladoras* have opened since 1965. The *maquiladoras* import raw materials or components into Mexico tariff-free (usually from their U.S. parent corporations), manufacture these materials in Mexico (thereby benefitting from lower labor costs and other inputs), and then ship the finished products back into the U.S. for sale to consumers.

One of the major environmental problems in the *maquiladora* is transboundary water pollution from point sources (factories) and NPSs (principally cattle ranching farms, but also agriculture). Transboundary watercourses, the

9. See McCulley, *supra* note 1, at 280-82 (citing *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

10. See *id.* at 281 (positing that appellate court will find that EPA's construction of statute is reasonable under step two of *Chevron* framework.).

11. See Mexican Free-trade Zone a Major Source of Water Pollution, U.S. Water News Online, available at <http://www.uswaternews.com/archives/arcglobal/6mexfre.html> (last visited Feb. 15, 2002) (describing water pollution issues in *maquiladoras*).

underground water table, and natural aquifers have carried this NPS pollution northward. As a result, some counties in Texas – often referred to as the *colonias* – suffer serious pollution and health problems. This is not to understate the significant environmental harms befalling many Mexican residents in the *maquiladora*. Rather, it is to point out the short-sightedness of those who believe that environmental harms can be externalized only on the Mexican side of the border. Ecologically, this is not possible; morally, of course, it is downright wrong.

Who bears the regulatory burden for controlling this cross-border pollution? Even if Texas adhered to TMDLs, who is to be held accountable for pollutants coming into Texas from a foreign country? And the challenge is not just limited to Texas. The New River, which flows through Mexicali, Mexico and into California's Imperial Valley has been contaminated by over 100 toxic chemicals including PCBs and DDT, and it carries polio, encephalitis, and hepatitis. For its part, the Arizona border region has hepatitis infection rates at twenty times the national average.

Looking northward, agricultural and industrial activities in Canada create both point source and NPS pollution with spillover effects on U.S. territory. Cooperative environmental management efforts have addressed these cross-border effects. One important example of bilateral cooperation involves the management of water quality in the Great Lakes, which constitute about one-fifth of the world's freshwater.

In response to the mutual vulnerabilities of transnational environmental harm, we are seeing the emergence of what I would call North American environmental supra-nationalism. Domestic environmental protection mechanisms should not be separated from, nor made parallel to, these transnational arrangements. There is a need for perpendicularity, not parallelism.

III. Forms of North American Environmental Supra-Nationalism

A. Treaties and Agreements

Water quality and the regulation of point and NPS pollution is the subject matter of a number of regional and bilateral treaties.

1. U.S.-Canada Border

In 1909, Canada and the U.S. created the International Joint Commission (IJC), an independent bilateral agency, to manage shared water resources such as the Great Lakes.¹² The IJC is composed of six members (three from each

12. See Treaty Relating to Boundary Waters and Questions Arising Between the United States and Canada, Jan. 11, 1909, U.S.- Britain, 36 Stat. 2448, T.S. No. 548 (1909) (creating IJC).

country). Among other things, the IJC addresses pollution concerns and settles disputes regarding common management issues. Water quality became a central focus of the IJC's activities in 1972, following the adoption of the Great Lakes Water Quality Agreement.¹³ In this regard, a Water Quality Board that coordinates pollution policies for the Great Lakes advises the IJC. The environmental regulation of the Great Lakes is managed by water quality standards established through regular surveillance. One concern is the control of point source pollutant discharges such as phosphorous.

In 1978, the 1972 Agreement was superseded by another agreement that, together with an important amendment enacted in 1987, addresses NPS pollution. The need to regulate NPS already was emphasized in the 1970s when studies demonstrated that run-off from agriculture, urban areas, and the atmosphere was affecting water quality; accordingly, experts concluded that direct control of point source pollution simply was not enough to achieve water quality objectives. In the end, bilateral cooperation advanced the environmental regime in the Great Lakes much more than uncoordinated unilateral national policies.

2. U.S.-Mexico Border

Environmental problems along the U.S.-Mexico border prodded the creation of the La Paz Agreement in 1983.¹⁴ Although the La Paz Agreement can be faulted for lacking teeth, the point remains that it is important for having focused public attention on environmental problems along the border. In many ways, the La Paz Agreement laid the groundwork for a 1993 side-agreement to the North American Free Trade Agreement (NAFTA)¹⁵ titled the North American Agreement on Environmental Cooperation (NAAEC).¹⁶ The Commission on Environmental Cooperation (CEC), based in Montréal, Canada, implements and supervises the NAAEC. Another side agreement to the NAFTA created the Border Environment Cooperation Commission (BECC), which certifies environmental projects relating to wastewater and water pollution.¹⁷ The North American Development Bank (NADBank) finances projects certified by the

13. 23 U.S.T.S. 301, T.I.A.S. No. 7312 (Apr. 15, 1972).

14. Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, 80 Stat. 271.

15. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289.

16. North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480.

17. Agreement Concerning the Establishment of a Border Environmental Cooperation Commission and a North American Development Bank, Nov. 16-18, 1993, U.S.-Mex., 32 I.L.M. 1545.

BECC. Thus far, the NADBank has certified two to three dozen projects, although it does not remain capitalized to its full potential.

3. *Enforcement Mechanisms and Public Participation*

The NAAEC provides an interesting addition to typical private-attorney general mechanisms that complainants may use to secure some level of compliance with environmental statutes. Article 14 of the NAAEC permits public submissions to the CEC Secretariat alleging that any of the three NAFTA parties has failed effectively to enforce its domestic environmental laws. Thus far, most of the submitters have been non-governmental organizations, such as environmental watchdog groups,¹⁸ but corporations are also becoming involved in the process (albeit largely to prevent other corporations from gaining a comparative advantage by operating in a system of lax environmental enforcement). If the Secretariat wishes, it can request a response from the NAFTA party that is the subject of the complaint. However, that party is under no obligation to respond. But, regardless of whether there is a response, the Secretariat then may recommend to the Council the preparation of a factual record under Article 15. The Council, which is composed of the environmental ministers (or their delegates) of the three NAFTA parties, then may (by a two-thirds vote) instruct the Secretariat to prepare a factual record regarding the initial submission.¹⁹ The Council can later make the record publicly available. Thus far, factual records have been ordered in a number of complaints. Article 14 public submissions have covered diverse matters in each of the three NAFTA countries, ranging from underground storage tank regulation, building piers, enforcement of domestic freshwater fisheries legislation, and water pollution, to procedural environmental assessment matters. Too many adverse factual findings eventually may lead to an allegation of a "persistent pattern of failure" to "effectively enforce" national environmental law. Such allegations can constitute a basis for party-to-party consultation under NAAEC Article 22. If these consultations fail to resolve the matter, then dispute resolution procedures can be initiated under the NAAEC. Although recourse has not yet been had to these procedures, the NAAEC does provide for fines, "monetary enforcement assessments," under Article 34, and the possibility of suspension of some NAFTA benefits in the event the fines are unpaid under Article 36.

Environmental issues along the U.S.-Mexico border have received greater interest post-NAFTA than they received pre-NAFTA. This does not necessar-

18. For example, in a recent submission regarding air and water quality that invoked the Great Lakes Water Quality Agreements, the submitters included the Sierra Club and Friends of the Earth.

19. The Council may limit the scope of the factual record.

ily mean that environmental quality has improved since NAFTA. This is a hotly debated issue and there are many indicia of deteriorating environmental quality, although that may simply be due to an increased awareness of environmental quality issues in the first place. However, following the implementation of NAFTA, the EPA has been very involved in U.S.-Mexican environmental issues. EPA has, together with Mexican environmental agencies, reviewed thousands of environmental law violations, many of which have been rectified.

IV. International, Not Just Transnational

It is important to think of the precedential role that domestic U.S. legislation and regulation can have internationally. For example, much of the emission permit trading scheme that has been woven into the Kyoto Protocol and the subsequent Bonn and Marrakesh agreements (of which, disappointingly, the U.S. is the only developed nation holdout) derives from the permit trading mechanisms initially established under the U.S. Clean Air Act.²⁰ Similarly, technology and water quality-based methods of enforcement developed in the U.S. under the CWA could serve as precedents for future water policy decisions by developing nations.

In the case of water pollution, there is a desperate need for international regulatory implementation and reform with regard to both the oceans and freshwater resources. The oceans are the ultimate recipients of NPS pollution, such as run-off, and yet this issue is weakly addressed by the United Nations Convention on the Law of the Sea.²¹ Observers repeatedly have characterized freshwater pollution as the most pervasive environmental problem on the planet. Nearly one-third of the world's population lacks access to proper sanitation facilities, and over one billion individuals lack access to clean water. NPS pollutants, like human and livestock waste, are the major culprits. As developing nations continue to pursue paths of economic development – paths that they value quite highly – the regulatory imperative becomes even more important as pollution outputs can be expected to increase. This means that developed nations with advanced regulatory mechanisms and the technology to implement those mechanisms are under an ethical (and also a self-interested) obligation to share that knowledge with developing nations.

20. See Kyoto Protocol, Dec. 10, 1997, art. 6, 37 I.L.M. 22, 35 (envisioning a trading system), available at <http://www.unfccc.de/resource/docs/cop3/107a01.htm> (last visited Feb. 27, 2002).

21. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 126. Article 207 of this convention provides that states shall adopt laws and regulations to control pollution of the marine environment from land-based sources.

Although international law regulates the nearly 300 rivers that are shared by more than one country, it is not overwhelmingly robust in the area of regulating NPS pollution that enters one country from another. There is one important convention that addresses this issue: the 1997 International Watercourse Convention.²² Article 21 of the Convention mandates that signatory states control activities that may constitute detrimental alterations in the composition or quality of the waters of an international watercourse. While this provision is an important step in improving water quality, the Convention is far from having the 35 national ratifications required for it to come into force. Perhaps the transborder regulatory models that are operating at the regional level in North America, such as the IJC and the NAAEC, could constitute precedential documents for more robust multilateral environmental governance.

V. *The Constitution as an Environmental Suicide Pact?*

There are a number of constitutional and statutory imperatives that restrict the ability of the federal government or federal administrative agencies to regulate environmental matters. These trigger difficult questions regarding the ability of the Constitution to cope with transnational environmental problems. Although McCulley may be optimistic about the ability of environmental federalism to operate effectively at the state level, I am somewhat more circumspect. I worry about a regulatory checkerboard that looks all the more inadequate when it is clear that an important focal point for future regulation is at the continental or international level.

Although I am certainly not an expert on U.S. constitutional law, I feel comfortable asserting that Congressional authority over interstate navigation and water pollution generally is based on the Commerce Clause of the U.S. Constitution, which gives Congress the power to regulate commerce with foreign nations and among the several states. In a series of early cases, the Supreme Court established that federal constitutional authority over commerce includes navigation.²³ Interstate commerce jurisdiction could be had over navigable waters insofar as these waters create a highway over which commerce with other states or foreign countries can be established. In an 1874 decision, *The Montello*, the scope of "navigable waters" was extended to include not just waters in actual commercial use, but also waters that vessels could potentially use commercially.²⁴ Much later, this type of reasoning helped legitimize

22. Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700.

23. See, e.g., *Louisville Bridge Co. v. United States*, 242 U.S. 409, 424 (1917); *United States v. Bellingham Bay Boom Co.*, 176 U.S. 211, 215-16 (1900); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-25 (1866); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 577-78 (1851).

24. *The Montello*, 87 U.S. 430, 439-40 (1874).

the CWA. Interestingly, the background to the CWA does not have too much to do with the environment *per se*. Rather, it reflects a policy desire to keep rivers and navigable waters free of obstruction for actual or potential navigation. Over time, though, environmental concerns grew in importance. What was once a need to ensure commerce turned into a need to protect against pollution. This change in focus has important implications when the federal government endeavors constitutionally to justify legislation over fresh water resources.

Beginning in the 1990s, the Supreme Court narrowed the scope of the interstate commerce clause. In the 1995 case *United States v. Lopez*, the Court held that a law would only be upheld when the activity that it regulates is economic in nature and substantially affects interstate commerce.²⁵ Hence, a federal law that established gun-free zones around schools and provided criminal penalties for violations thereof was not justifiable under the interstate commerce clause. In the 2000 case *United States v. Morrison*, the Court held that federal legislation of a purely intrastate activity will only be upheld if the activity is economic in nature.²⁶ The *Morrison* Court stated that there must be a sufficiently direct link between the activity legislated and the effect on interstate commerce because otherwise almost any purely intrastate activity could be regulated as interstate commerce.²⁷ As a result, in that decision the Court struck down the section of the Violence Against Women Act that provided a federal civil remedy to victims of gender-motivated violence.

The CWA has also been a lightning-rod for such constitutional claims. Parties have raised these claims in two recent cases: *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC)*²⁸ and *Pronsolino v. Marcus*.²⁹ However, in neither case were these claims successful. Instead, courts decided both cases upon principles of statutory interpretation. For example, in *SWANCC*, the Supreme Court faced the question of the legitimacy of the Migratory Bird Rule, a provision promulgated by the Army Corps of Engineers to clarify its jurisdiction over "navigable waters" under § 404(a) of the CWA.³⁰ The Court held that the legitimacy of the regulation

25. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

26. *United States v. Morrison*, 529 U.S. 598, 611 (2000).

27. *Id.* at 615.

28. *Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

29. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1356 (N.D. Cal. 2000), *appeal docketed*, No. 00-16026 (9th Cir. May 24, 2000); Reply Brief of Plaintiffs-Appellants at 22-23, *Pronsolino v. Marcus*, (9th Cir. filed Jan. 11, 2001) (No. 00-16026, No. 00-16027) (quoting *Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001)).

30. 33 U.S.C. § 1344(a) (2000).

was not a question of constitutional law.³¹ Instead, using general principles of statutory construction, the Court found that Congress simply did not intend for the jurisdiction of the CWA to extend to isolated bodies of water such as the intrastate wetlands covered by the Migratory Bird Rule.³² Accordingly, the rule was found to be an unauthorized extension of the Army Corps of Engineers' power under the CWA. Although this decision may foreshadow a shift in the balance of regulatory power between the federal and state governments in environmental matters, the fact that the Court based the decision on statutory interpretation, as opposed to constitutional interpretation, makes any such shift much more permeable.

Although states may themselves elect to fill these legislative gaps, I am concerned that not all states may be properly equipped to implement and oversee sophisticated environmental regulations. First, most states cannot afford such regulations. Second, not all states may have the incentive to vigorously implement strict TMDLs, given the free-rider effects of a neighboring or upstream state's or nation's decision not to implement similar regulations. Can state bureaucracies network with foreign national and sub-national actors through transnational regulatory associations? If so, how effectively? Can states negotiate agreements with neighboring nations and sub-national entities within those nations? To be sure, some of these kinds of agreements are found on the books and, in fact, reflect a sophisticated understanding of and commitment to environmental policy. However, I am concerned that these agreements may be the exception rather than the rule.

VI. Conclusion

Environmental policy cannot just be a matter for local government. Accordingly, environmental governance increasingly is operating at the regional, continental, multinational, and even global level. The transnational nature of environmental harms is prompting environmental supra-nationalism. If supra-national regulatory entities are well-suited to address many unregulated aspects of environmental harm, their expansion ought to be fostered. A constitutional order that curtails federal environmental management in preference of local autonomy may not be conducive to the need for environmental supra-nationalism.

31. *SWANCC*, 531 U.S. at 173.

32. *Id.* at 172.