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Robin Kundis Craig, The Clean Water Act and the Constitution: Legal Structure and the Public's Right to a Clean and Healthy Environment

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resources, and various water conservation techniques.

The ninth chapter, *Representative Settlements and Settlement Efforts*, focuses on "a series of settlements and settlement efforts . . . that represent various conditions and solutions." Essentially, the authors utilize the information presented in the preceding eight chapters and explain it in a sequence of examples involving water rights litigation. For example, the Wind River Litigation (1992) is a decades-long litigation involving Wind River and the Shoshone Indian tribe in Wyoming. In addition, the Ak-Chin Water Settlement (1978) concerned the water rights of the Pima and Papago Indians of Arizona, and involved strong Congressional help and leadership from Arizona representative John Rhodes.

Finally, the tenth chapter, *Conclusion*, ends the book by re-examining the plight of American Indians and their water rights. The authors offer a series of suggestions on how we can achieve a quicker progress regarding the settlement of Indian water rights claims. For example, Congress can do more to promote progress and equity, tribes and states can aspire to more consistent leadership, and parties should more frequently use mediation techniques in lieu of expensive and time-consuming litigation.

Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West is an extremely useful study of the current status of water rights negotiations in the western United States. The book reads with sufficient narrative, flavor, and personality to keep most legal readers interested and informed. The analyses of the legal history as well as the manifold aspects of the negotiation and settlement processes would be of particular interest to anyone involved in water rights litigation in the western United States.

Ethan Ice

Robin Kundis Craig, The Clean Water Act and the Constitution: Legal Structure and the Public's Right to a Clean and Healthy Environment, ELI Press (2d Ed. 2009); 308 pp; $50.00; ISBN 978-1-58576-138-8; soft cover.

Professor Robin Kundis Craig excellently describes the development of the Clean Water Act ("CWA"), the CWA's constitutional implications, and whether the right to clean water is a constitutional right. Professor Craig is the Attorney's Title Insurance Fund Professor of Law and Co-Director of the Environmental and Land Use Law Program at the Florida State University College of Law. She specializes in the CWA, coastal water pollution, the intersection of water and land issues, marine biodiversity and protected areas, water law, and climate change.

In the Second Edition of this book, Professor Craig addresses the CWA and the Constitution in three parts. First, she describes the development of federal regulation and enforcement of water quality. This includes implications on the Supremacy Clause, federalism and comity among states, sovereign immunity, commerce, and takings.

Second, she addresses the less traditional aspects of Constitutional law and discusses citizen enforcement of federal laws. Third, she concludes by evaluating whether there should be a constitutional right to clean water.

Part One of the book begins with a concise history of the CWA. In Chapter One, the author notes that although Congress easily decided that cleaning up the nation's waters was a national priority, this task was not easily accomplished when left entirely to the states. Professor Craig divides the history of the Act into two distinct phases: the pre-1972 Amendments and post-1972 developments. In a summary of the years prior to 1972, Professor Craig highlights the inadequacy of state-only enforcement. Beginning with Section 13 of the Rivers and Harbors Act ("RHA"), also known as the Refuse Act, Congress first addressed pollution of the navigable waters of the United States. As the navigable waters became evermore polluted, the United States began aggressively enforcing an expanding number of categories. The Supreme Court decision in *United States v. Republic Steel Corporation* confirmed that the Army Corps of Engineers ("Corps") had broad authority to enforce violations under the RHA.

Turning from the RHA, Professor Craig chronicles the development of the CWA from the Federal Water Pollution Control Act ("FWPCA") forward. In 1948, Congress first recognized the importance of federal involvement in water pollution control. However, concerns about federalism caused Congress to accept a supplementary role to the states in water quality regulation. The need for subsequent amendments to the FWPCA demonstrates the failure of this policy. The FWPCA Extension of 1952 gave additional grants to state and local governments to improve water quality and reaffirmed state primacy in water quality regulation. Amending the Act in 1956, Congress recognized for the first time that water quality is a national concern. Importantly, the amendments allowed the federal courts to resolve interstate water pollution issues, albeit in limited scope.

By 1961, Congress began to recognize the failure of the states to manage water quality. The FWPCA Amendments of 1961 enhanced many of the programs under the FWPCA but also changed the federal role. The amendments transferred the enforcement authority from the Surgeon General to the Secretary of Health, Education, and Welfare, expanded federal research, and increased the number of waters regulated under the Act. They also acknowledged that water pollution is more than just a local or state problem. The Water Quality Act of 1965 formally recognized water quality as a national problem and introduced federal quality standards to the Act. The standards ensured that someone, preferably the states, would pursue water quality standards. The 1966 Amendments expanded the water quality standards program by enticing states with federal grants.

Despite the many changes and amendments to the Act, by 1970 the nation's waters had not improved. Professor Craig points to the *Torrey Canyon* disaster, and not the Cuyahoga River fire, as the driving force behind the changes in 1970. Following the 1970 Amendments,

President Nixon ordered the newly established Environmental Protection Agency ("EPA") and the Corps to implement a permit program under the RHA. For the next two years, the states were still primarily responsible for water quality management.

The FWPCA Amendments of 1972 dramatically altered the balance between state and federal responsibility. First, the amendments adopted the cooperative federalism approach by creating minimum federal standards that the states must adopt as floors or the states would face have the federal law preempt their own. Second, the amendments drastically altered the enforcement relationship between the federal enforcers and individual polluters by establishing the EPA and Corps as the permitting and enforcement agencies.

In total, these amendments created the cooperative federalism we now rely upon in the CWA. States have retained their responsibility to ensure waters within their borders meet the federal water quality standards under the Total Maximum Daily Load ("TMDL") requirement. While EPA and the Corps respectively had the authority to administer the Section 402 National Pollutant Discharge Elimination System ("NPDES") Permit Program and the Section 404 Dredge and Fill Permit Program, most states have now taken over NPDES permitting authority while only two have taken over Section 404 permitting authority.

Chapter Two examines the constitutional implications of the federal enforcement of a traditional state power. Regardless of the CWA's embodiment of cooperative federalism, the CWA is still a federal statute that benefits from the Supremacy Clause. As such, it preempts state law where: (1) the federal interest dominates; (2) Congress specifically preempted state law; or (3) Congress impliedly preempted state law. Given the enormity of the CWA, it would appear at first blush that Congress has enacted a comprehensive statute regulating all water quality control activities, thereby occupying the field. However, savings clauses allow states to regulate water quantity and delivery and all states are free to enact stricter regulations. While states have the ability to take over many of the responsibilities of the CWA, the federal standards are constantly in play. If state standards fall below the Federal standards, EPA or the Corps may take over any authority previously granted to the states. In the cooperative model, the federal standards are always the floor and if the state standards fall below that floor, the federal standards preempt state law.

Chapter Three discusses interstate water pollution. Professor Craig places the CWA regulation of interstate water pollution in the context of the Supreme Court's continued and increasing unwillingness to exercise original jurisdiction under its Article III powers. Prior to 1972, resolving interstate water pollution issues was a difficult task and Congress was acutely aware of these problems. Section 401 of the CWA requires the EPA to consider interstate pollution and allow downstream states to object to NPDES permits. However, as noted before, most states have taken over NPDES permitting and limited the effectiveness of Section 401. As part of assuming NPDES permitting, the states must notify downstream states of potential impacts to water quality and give

that state an opportunity to comment on any permit. Further, EPA can veto a permit or reassume control of all permitting.

One of the most significant examples of preemption arose under the context preemption of federal common law, not state law. Prior to the CWA, the federal common law of nuisance governed interstate water pollution issues. However, in *City of Milwaukee v. Illinois*, the Supreme Court held that federal common law is subject to the paramount authority of Congress and that the CWA occupied the field of federal common law by establishing a comprehensive regulatory scheme supervised by an expert administrative agency.

Given that states have taken over the NPDES permitting process, it is inevitable that states may end up regulating federal and tribal facilities. In Chapter Four, Professor Craig describes this novel inversion of the regulatory hierarchy, an important aspect of improving water quality since federal facilities contribute greatly to the problem. The real issue with this regulatory hierarchy becomes enforcement. In all cases, the Supreme Court strictly construed the waiver of sovereign immunity in Section 313 of the CWA.

In *California ex rel. State Water Resources Control Board v.* EPA ("*California* II"), the Supreme Court held that Congress had not explicitly waived sovereign immunity and therefore federal dischargers did not need to obtain state NPDES permit. After the *California II* decision, Congress accepted the Court's invitation to make a broad waiver of sovereign immunity and amended Section 313 of the CWA. While the amendments were broad, the Supreme Court held in *Department of Energy v. Ohio* that the waiver of sovereign immunity did not subject federal facilities to punitive penalties. Taken on its face, this does not seem to be a major issue since civil penalties are payable to federal government; however, contrasting federal facility compliance in the CWA versus said compliance in the Resource Conservation and Recovery Act ("RCRA") illustrates the effect. Facilities overwhelmingly comply with RCRA, a law that does allow civil penalties against federal violators. Federal facility compliance with the CWA, however, leaves something be desired. Additionally, where state water quality standards conflict with other federal goals, such as energy production and navigation, courts have favored the federal goal.

With respect to tribal sovereign immunity, Congress may waive sovereign immunity to permit state regulation and this modern trend has allowed state regulation on tribal lands. However, both Congress and the Supreme Court have shown more respect for tribal authority in recent years. In most cases, the state regulatory authority will depend on the unique history of the relationship of the state, tribe, and federal governments.

Chapter Five provides a detailed and thorough explanation of the application of the Commerce Clause, the Tenth Amendment, and the term "Navigable Waters." The chapter covers a broad explanation of the Commerce Clause in non-CWA jurisprudence, then applies that analysis to the CWA. Importantly, the chapter describes in detail the changing meaning of "Navigable Waters" throughout case law. Professor Craig

illustrates the problems that this jurisprudence has created with respect to isolated or unconnected water bodies. She also points out that Congress may fix this problem by amending the CWA to include a clear provision that Navigable Waters extends to the limits of the Commerce Clause.

Next, Professor Craig discusses the potential for takings under the CWA. The lesson from Chapter Six is simple: the CWA does not have a large potential for takings under NPDES permitting, but a Section 404 permit denial may affect a taking. A Corps denial of a Section 404 permit may affect a taking where it limits development. Section 404 permitting defines what constitutes a regulatory taking that is deserving of compensation. However, the CWA takings jurisprudence is limited and much of the analysis will be the same as it would be under any takings claim.

The Second Section of the book focuses on the creation of citizen suits in the various environmental laws enacted since the National Environmental Policy Act ("NEPA"). In Chapter Seven, Professor Craig discusses the mechanisms and statutory requirements to bring a citizen suit under the CWA. While public participation is an important aspect of permitting and rulemakings, the most important development in citizen enforcement is the citizen suit. Section 505 of the CWA allows any citizen to bring a suit against any person, including government entities, who is alleged to be in violation of an effluent standard or limitation under the CWA. Additionally, a citizen may bring suit against the EPA for failure to perform any act or duty of the CWA. One significant caveat of the citizen suit is that the plaintiff must prove an ongoing violation, which disallows suits for violations that are wholly in the past. Further, diligent prosecution by a government entity forecloses a citizen suit.

Chapter Eight describes the constitutional requirements to bringing a citizen suit, with a keen eye on the Article III standing requirements. Professor Craig first covers the development of the "case or controversy" requirements. She then visits the familiar requirements for standing developed in case law.

Chapter Nine revisits the question of waiver of sovereign immunity, this time in context of citizen suits. As Section 313 of the CWA waives sovereign immunity for state enforcement, Section 505 does the same for citizen suits. While Section 505 on its face waives immunity for suits, it is not clear whether it allows citizen suits to pursue civil penalties. The Circuits are split on whether Section 505 waives sovereign immunity from civil penalties. However, the Court's decision in *Department of Energy v. Ohio* may have foreclosed any possibility. This holding does not, however, extend to tribes despite their special quasi-sovereign status. Despite not being subject to TMDL and NPDES regulations, tribes are subject to citizen suits. It is clear, on the other hand, that Section 505 waives sovereign immunity for failure to act under mandatory duties.

Chapter Ten visits the implications of the Eleventh Amendment on citizen suits. The *Seminole Tribe of Florida v. Florida* decision made it clear that the Congress does not generally have the right to abrogate

state sovereign immunity except pursuant to the Fourteenth Amendment. As a result, citizen suits against states have been sparse and the jurisprudence is unclear as to whether the CWA may waive sovereign immunity.

Chapter Eleven looks at the Article II Separation of Powers issues raised by entitling citizens to fulfill an Executive power. Professor Craig adeptly points out that Article III standing ensures that the actions of a defendant must harm a plaintiff, and therefore the enforcement is of a civil and not criminal nature. The *Lujan v. Defenders of Wildlife* decision made it clear that citizen suits were a different nature and character than a private enforcement of public interests. However, private actions do raise important separation of powers issues. Because citizen suits effectively create a private right of enforcement, the Article III standing analysis is of utmost importance. Without satisfying standing, a congressionally enacted statute transfers enforcement authority reserved for the executive to private citizens.

The final chapter of the book discusses the successes of the CWA, chronicling major improvements in water quality since 1972. The success of citizen suits seems to suggest that there may be a constitutional right to clean water and a pollution-free environment. Professor Craig seems to suggest that that there is not a lot of support in the Constitution, but that an amendment may be appropriate.

The *Clean Water Act and the Constitution* is a well-written, concise, and interesting description of the CWA. The first section of the book excellently describes the development of the CWA, while the second section focuses primarily on constitutional implications and citizen suits. The book is an excellent read and an enjoyable introduction to the CWA. While it serves as a must read for anyone interested in environmental protection, not just water, it would also be an excellent addition to a Constitutional Law course.

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