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## Environmental Law—The Clean Water Act—Congress Has Entrusted the EPA, Not the Courts, With the Final Word on Federal Water Pollution Regulatory Law. *Arkansas v. Oklahoma*.

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ENVIRONMENTAL LAW—THE CLEAN WATER ACT—CONGRESS HAS ENTRUSTED THE EPA, NOT THE COURTS, WITH THE FINAL WORD ON FEDERAL WATER POLLUTION REGULATORY LAW. *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992).

## I. FACTS

The City of Fayetteville, Arkansas,<sup>1</sup> is situated in the Boston Mountains in the northwest corner of the state, approximately twenty-five miles east of the Oklahoma border. Fayetteville straddles a mountaintop<sup>2</sup> in such a way that about half of its population lives in an area which is drained westward by the Illinois River, while the other half lives in an area which drains eastward into the White River basin.<sup>3</sup>

Sometime in the early 1980s it became apparent that the wastewater treatment facility upon which Fayetteville had relied for over twenty years to dispose of its sewage and other commercial and industrial wastes would have to be replaced.<sup>4</sup> This facility discharged all of its waste into the White River,<sup>5</sup> resulting in the river's failure to assimilate<sup>6</sup> the waste without violating Arkansas water quality standards<sup>7</sup> for that body of water.<sup>8</sup> The river's inability to absorb the waste caused a number of fish kills.<sup>9</sup> Approximately ten miles from Fayetteville, the White River flows into Beaver Reservoir, which is the main source of

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1. Fayetteville has a population of 42,099 according to the 1990 Census.

2. Telephone Interview with Pat Rankin, Attorney, Environmental Protection Agency, Region VI (June 18, 1992).

3. Brief for Petitioners at 4-5, *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992) (No. 90-1262).

4. Brief for Petitioners at 4.

5. Brief for the Environmental Protection Agency [hereinafter EPA] at 6, *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992) (No. 90-1266).

6. "Assimilate" means to "take in and appropriate as nourishment: absorb into the system." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 132 (1986).

In terms of a waterway, "[a]ssimilation" refers to the natural mechanisms [by which a stream] remove[s] nutrients such as phosphorous and nitrogen from the water, and includes processes such as sedimentation and incorporation into living organisms." Brief for Petitioners at 5 n.7.

7. See *infra* note 88 and accompanying text. Water quality standards are written in narrative form and are based on the historical use of a particular waterway. They represent an ideal standard of water quality for the particular body of water in question. 33 U.S.C. § 1313(a)(2)(A) (1988).

8. Brief for the EPA at 6.

9. Brief for Petitioners at 4.

drinking water for most of northwest Arkansas.<sup>10</sup> As a result, the Arkansas Department of Pollution Control and Ecology (ADPC&E) ordered the City to build a new wastewater treatment facility.<sup>11</sup>

Subsequently, the City of Fayetteville applied for and received federal financial assistance from the Environmental Protection Agency (EPA) for the construction of a new wastewater treatment plant.<sup>12</sup> Prior to actual construction, the City of Fayetteville held some forty public hearings and conducted numerous feasibility studies before choosing a split flow discharge<sup>13</sup> that was designed to avoid any further violations of Arkansas water quality standards for the White River.<sup>14</sup> Under the plan, half of Fayetteville's treated wastes were to be discharged into the White River and half into an unnamed stream which is a tributary of the Illinois River.<sup>15</sup> The unnamed stream flows for two miles where it joins Mud Creek, then another three miles where it flows into Clear Creek, and thirteen more miles before its confluence with the Illinois River some twenty-two miles from the Oklahoma border.<sup>16</sup> The portion of the Illinois River in Oklahoma stretching west from the Arkansas state line to Lake Tenkiller is designated by Oklahoma statute as a "scenic river."<sup>17</sup>

Fayetteville chose the split flow design because it diminished potential damage to the environment<sup>18</sup> by lessening the amount of effluent<sup>19</sup> discharged into the White River.<sup>20</sup> The design also had the effect

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10. *Id.* The Beaver Water District was one of the original parties to this action and a petitioner before the Supreme Court in Petition No. 90-1262.

11. Maria V. Maurrasse, Comment, *Oklahoma v. EPA: Does the Clean Water Act Provide an Effective Remedy to Downstream States or Is There Still Room Left for Federal Common Law?* 45 U. MIAMI L. REV. 1137, 1139 n.18 (1991).

12. Brief for the EPA at 6-7.

13. Brief for Petitioners at 4. The City of Fayetteville considered several methods of wastewater treatment before choosing the split flow design. Among the proposals was a plan designed to discharge 100% of the City's effluent into the White River. This plan was opposed by both the Beaver Water District and the Arkansas Department of Pollution Control and Ecology (ADPC&E) because of continued violations of Arkansas water quality standards for the White River. Other options included a design to pipe the wastewater south to the Arkansas River and a land treatment method plan. Both the ADPC&E and the EPA favored the split flow design. Telephone Interview with James M. McCord, Attorney, City of Fayetteville (June 24, 1992).

14. Brief for the EPA at 7.

15. *Id.*

16. Brief for Petitioners at 4-5.

17. OKLA. STAT. tit. 82, § 1452(b)(1) (1990).

18. Brief for Petitioners at 5 n.4.

19. "Effluent" is defined as "something that flows out; as . . . liquid discharged as waste (as water used in an industrial process or sewage)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 725 (1986).

of returning the wastewater generated by each half of the City to its respective river basin.<sup>21</sup>

Pursuant to federal water pollution regulatory requirements set forth in Section 402 of the Clean Water Act,<sup>22</sup> the City of Fayetteville, in 1985, applied to the EPA<sup>23</sup> for a National Pollutant Discharge Elimination System (NPDES) permit to operate its new treatment plant.<sup>24</sup> The EPA published a draft NPDES permit in July 1985, held an informal public hearing in August,<sup>25</sup> and issued a final permit to the City of Fayetteville in November that was to become effective in December 1985.<sup>26</sup>

The EPA found that the split flow discharge would result in compliance with Arkansas water quality standards for both the White and Illinois Rivers.<sup>27</sup> The EPA also ruled that the discharge into the Illinois River would have no adverse effect on Oklahoma water quality standards.<sup>28</sup> The permit was issued with strict limitations<sup>29</sup> and was made subject to a "reopener provision."<sup>30</sup> This "provision" was a condition

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20. Brief for the EPA at 7.

21. Brief for Petitioners at 5 n.4. The plan to discharge effluent into the Illinois River was not a novel approach to wastewater disposal in the northwest Arkansas area. Other municipalities in the region have historically discharged their effluents into Illinois River tributaries. Brief for the EPA at 6 n.8.

22. Section 402(a)(1), 33 U.S.C. § 1342(a)(1) of the Clean Water Act, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)). Section 402(a) of the Clean Water Act allows the Administrator of the EPA to issue a permit for the discharge of pollutants into the navigable waters of the United States, subject to other requirements under the Act. 33 U.S.C. § 1342(a) (1988).

23. The EPA was the permitting authority because, at the time, Arkansas had no EPA-approved NPDES permitting authority of its own. Brief for Petitioners at 5 n.5. Section 402(b) of the Clean Water Act allows a state to establish its own NPDES permitting program subject to EPA approval. 33 U.S.C. § 1342(b). Arkansas' NPDES permitting program was approved by the EPA in November 1986. To date, 39 states have been delegated NPDES permitting authority by the EPA. Telephone Interview with Ann Bobo, Attorney, Arkansas Department of Pollution Control and Ecology (June 18, 1992).

24. Brief for the EPA at 7.

25. Brief for Petitioners at 5.

26. Brief for the EPA at 7.

27. Brief for Petitioners at 5.

28. *Id.* The Oklahoma standards contain "numeric dissolved oxygen requirements, limitations on the concentrations of nutrients (phosphorous and nitrogen/phosphorous concentration ratio), and numeric limitations on inorganic elements and organic chemicals." Brief for the EPA at 8.

29. The permit contained stringent limitations on "oxygen demand, total suspended solids, and phosphorous." Brief for the EPA at 7.

30. *Id.*

based on the outcome of an ongoing study of the river.<sup>31</sup> The study was designed to determine whether more stringent effluent limitations would be needed to ensure that the Fayetteville discharge would not result in any violation of Oklahoma's water quality standards for the Illinois River.<sup>32</sup>

In response to the EPA's issuance of the Fayetteville permit, the State of Oklahoma, in December 1985, requested an evidentiary hearing.<sup>33</sup> Oklahoma alleged that the Fayetteville discharge violated its water quality standards for the Illinois River.<sup>34</sup> Oklahoma's water quality standards prohibit the degradation of high quality waters, including those designated as "scenic rivers."<sup>35</sup> Oklahoma's standards also protect its "scenic rivers" by prohibiting any new point source discharges<sup>36</sup> or increased loads from existing ones that will result in degradation of the water quality.<sup>37</sup>

At the three-day evidentiary hearing,<sup>38</sup> the issue before the EPA's Administrative Law Judge (ALJ) was whether Fayetteville's discharge would result in a violation of Oklahoma's water quality standards for the Illinois River.<sup>39</sup> Since the Fayetteville facility was not yet opera-

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31. EPA, *Evaluation and Assessment of Factors Affecting Water Quality of the Illinois River in Arkansas and Oklahoma* (Aug. 1991). This agency report, now in its final draft form, was initiated in 1985-86 as a result of the litigation which is the subject of this casenote. In its Executive Summary, pp. xv-xvi, the report concludes that there have been few significant changes in the water quality of the Illinois River during the period of the study.

32. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1051 (1992).

33. Brief for Petitioners at 6. Section 401(a)(2) of the Clean Water Act provides that if within 60 days of receiving notification from a source state that a proposed discharge will affect the quality of waters of a downstream state, the downstream state may object to the issuance of the permit by notifying the Administrator and the source state in writing of its objections and requesting a public hearing. The licensing agency is then required to hold such a hearing. 33 U.S.C. § 1341(a)(2) (1988).

34. 112 S. Ct. at 1051.

35. "No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance. These include water bodies located in national and State parks, Wildlife Refuges, and those designated 'Scenic Rivers' . . . ." STANDARDS FOR OKLAHOMA WATER QUALITY § 3 (1988).

Oklahoma has designated the Illinois River between the Arkansas state line and Lake Tenkiller a "scenic river." OKLA. STAT. tit. 82, § 1452(b)(1) (1990).

36. A "point source" is defined by the Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are . . . discharged." 33 U.S.C. § 1362(14). "The term 'discharge of a pollutant' . . . means (A) any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12).

37. STANDARDS FOR OKLAHOMA WATER QUALITY § 5 (1988).

38. Brief for Petitioners at 6.

39. Brief for the EPA at 7-8.

tional, the evidence submitted at the hearing consisted mainly of expert witness testimony based on theoretical mathematical models.<sup>40</sup> Before predicting what effect the discharge would have on Oklahoma waters, the experts first had to predict the changes the effluent would undergo between the point of discharge and the Oklahoma state line—approximately thirty-nine miles of waterways.<sup>41</sup> The ALJ upheld the issuance of the permit, finding that any impact on Oklahoma water quality standards would be de minimis at most and that the Fayetteville discharge would not have an “undue impact” on Oklahoma’s waters.<sup>42</sup>

Both parties appealed to the EPA’s Chief Judicial Officer (CJO).<sup>43</sup> Oklahoma objected to the finding that the Fayetteville discharge would have no effect on its waters. Arkansas challenged the ALJ’s ruling that the Clean Water Act<sup>44</sup> required it to comply with the water quality standards of a downstream state. The CJO relied on Section 301(b)(1)(c) of the Act<sup>45</sup> in ruling that an Arkansas discharge must comply with Oklahoma water quality standards.<sup>46</sup> However, the CJO found that a mere theoretical effect on those standards would not be enough to prevent the issuance of the permit. Some measurable effect on water quality standards was required before the permit would be withheld.<sup>47</sup> The CJO found that the ALJ had applied the wrong standard in his decision.<sup>48</sup> Rather than an “undue impact” standard, the CJO announced that the proper standard was whether the record showed by a preponderance of the evidence that the discharge would not cause an “actual detectable” effect on Oklahoma waters.<sup>49</sup> He then remanded the case to the ALJ for a determination under the proper

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40. *Id.* at 8.

41. *Id.*

42. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1051 (1992).

43. *Oklahoma v. EPA*, 908 F.2d 595, 597 (10th Cir. 1990).

44. The Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1988) [hereinafter the Act].

45. 33 U.S.C. § 1311(b)(1)(C). This section sets forth a timetable for standards and enforcement of effluent limitations. It states, in pertinent part, that there shall be achieved: “(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.” *Id.* 112 S. Ct. at 1052 n.3.

46. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1051-52 (1992) (citing Brief for Petitioners app. at 116a-17a).

47. 112 S. Ct. at 1051-52 (citing Brief for Petitioners app. at 116a-17a).

48. Brief for the EPA at 9.

49. 112 S. Ct. at 1052 (citing Brief for Petitioners app. at 117a).

standard. On remand, the ALJ reviewed the record and again upheld the issuance of the permit by finding that the Fayetteville discharge would have no "actual detectable" impact on Oklahoma's water quality standards.<sup>50</sup>

Following another appeal by Oklahoma, the CJO again affirmed the ALJ's finding.<sup>51</sup> This final administrative decision came in December 1988, three years and one month after the EPA's original issuance of Fayetteville's NPDES permit in November of 1985. The City of Fayetteville proceeded with construction and eventually invested \$40 million in its new state-of-the-art wastewater treatment facility, employing the newest technologies available.<sup>52</sup> The plant became operational pursuant to its NPDES permit in January 1989.<sup>53</sup>

On appeal before the United States Court of Appeals for the Tenth Circuit,<sup>54</sup> both parties objected to the EPA's rulings on the same grounds each had advanced in the administrative proceedings below. Arkansas objected to the EPA's position that it was required by the Act to comply with the applicable water quality standards of a downstream state. Oklahoma argued that the Fayetteville discharge would violate its water quality standards for the Illinois River.<sup>55</sup>

In a decision dated July 11, 1990,<sup>56</sup> the Tenth Circuit concurred with the EPA that the Act required Arkansas to comply with Oklahoma's federally approved water quality standards.<sup>57</sup> The Tenth Circuit, however, reversed the EPA's issuance of Fayetteville's per-

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50. *Id.* at 1052. The ALJ based his decision on numerical criteria for specific standards, theoretical models, and expert witness testimony. Telephone Interview with Pat Rankin, Attorney, EPA, Region VI (Sept. 24, 1992).

51. Brief for the EPA at 10. *See also* Oklahoma v. EPA, 908 F.2d 595, 597 (10th Cir. 1990).

52. Brief for Petitioners at 4 n.3. Telephone Interview with Pat Rankin, Attorney, EPA, Region VI (June 18, 1992). The new technologies included "a combination of biological phosphorous removal and nitrification, rapid sand filtration, post-aeration, dechlorination, and effluent storage . . ." Brief for Petitioners at 4 n.3. During the evidentiary hearing, the Oklahoma Department of Health acknowledged that the treatment methods incorporated by the Fayetteville plant were "the most thorough and complete" technologies available. *Id.*

53. Brief for the EPA at 11.

54. 112 S. Ct. at 1052 n.4. The Arkansas petition was filed in the Eighth Circuit Court of Appeals where it was transferred to the Tenth Circuit and consolidated with Oklahoma's petition. *Id.*

55. *Id.* at 1052.

56. Oklahoma v. EPA, 908 F.2d at 595 (10th Cir. 1990).

57. 112 S. Ct. at 1052. Relying on Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 838, 844-45 (1984), the Tenth Circuit ruled that this conclusion by the EPA was a reasonable exercise of the administrative agency's authority and was, therefore, entitled to substantial deference. 908 F.2d at 630.

mit.<sup>58</sup> The court ruled that the EPA had misinterpreted Oklahoma's water quality standards.<sup>59</sup> The EPA's interpretation of these standards was never at issue in the administrative proceedings below.<sup>60</sup> The Tenth Circuit held that "where water quality standards violations are already occurring in the receiving waters, no additional point source discharge to those waters may be permitted if it would contribute to the conditions that produced the violations."<sup>61</sup> The court of appeals found that the Illinois River was already in violation of its water quality standards,<sup>62</sup> and that there was evidence in the record to support the conclusion that the Fayetteville effluent would reach the Oklahoma border.<sup>63</sup>

Based on these findings, the Tenth Circuit ruled that the EPA's issuance of the permit was "arbitrary and capricious"<sup>64</sup> for misinterpreting Sections three and five of Oklahoma's water quality standards<sup>65</sup> and reversed the issuance of Fayetteville's permit.<sup>66</sup> The United States Supreme Court granted certiorari,<sup>67</sup> reversed the Tenth Circuit's decision, and reinstated the EPA's issuance of the Fayetteville NPDES permit.<sup>68</sup> *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992).

## II. HISTORICAL DEVELOPMENT

Throughout the early twentieth century, the Supreme Court relied on the federal common law of public nuisance<sup>69</sup> to settle disputes be-

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58. 112 S. Ct. at 1052.

59. Brief for Petitioners at 8.

60. State water quality standards are subject to approval by the Administrator of the EPA, giving them a "federal character." 112 S. Ct. at 1059. *See infra* note 88 and accompanying text.

61. 908 F.2d at 634.

62. 112 S. Ct. at 1052.

63. 908 F.2d at 629.

64. *Id.* at 616. "[A]n [administrative] agency decision is arbitrary and capricious if the agency 'entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.'" *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

65. These provisions are reprinted in the appendix to the Tenth Circuit's opinion. *See Oklahoma v. EPA*, 908 F.2d at 635.

66. 908 F.2d at 616.

67. 111 S. Ct. 1412 (1991). Arkansas' Petition No. 90-1262 was joined with Petition No. 90-1266, *EPA v. Oklahoma*, on certiorari to the United States Supreme Court.

68. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1060-61 (1992).

69. A public nuisance is an unreasonable interference with a right common to the general public, such as an interference with the public health, safety, peace, comfort, or convenience. *RESTATEMENT (SECOND) OF TORTS* § 821B (1979).

The Supreme Court in *Erie v. Tompkins*, 304 U.S. 64 (1938), held that there was no general



tween states over the protection of interstate resources and to guard the sovereign rights of one state from encroachment by another.<sup>70</sup> Included among this line of cases are instances in which one state discharged into an interstate waterway a pollutant which interfered with the enjoyment of the shared resource by a downstream state.<sup>71</sup> In many of these early cases, the Supreme Court invoked its original jurisdiction to resolve interstate disputes involving resources common to both states.<sup>72</sup>

This line of reasoning culminated in 1972 with the Supreme Court decision of *Illinois v. City of Milwaukee (Milwaukee I)*.<sup>73</sup> In *Milwaukee I* the Court stated that "through these successive disputes and decisions this Court is practically building up what may not improperly

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federal common law. However, in a case handed down the same day, *Hinderlider v. La Plata Co.*, 304 U.S. 92 (1938), the Court decided that any interstate dispute involving a shared stream was still a federal question.

70. Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 152 (1985).

71. For instance in *Missouri v. Illinois*, 200 U.S. 496 (1906), Missouri sought to enjoin Illinois from discharging sewage into an interstate river. The Court held that although Missouri failed to prove its damages, there existed a need for federal jurisdiction in interstate pollution disputes. Similarly, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), an interstate air pollution dispute, Justice Holmes wrote for the Court:

When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

*Id.* at 237 (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).

Employing similar reasoning in *New Jersey v. New York City*, 283 U.S. 473 (1931), the Court enjoined New York City from dumping garbage into the ocean which was later washing up on the New Jersey coast. In awarding the injunction, the Court relied on the common law of neither state, implying the existence of a federal common law. *See also* *New York v. New Jersey*, 256 U.S. 296 (1921).

72. *See* Glicksman, *supra* note 70, at 154. In *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971), the Court declined to exercise its original jurisdiction, saying that it was ill-equipped to act as fact-finder in a trial involving such complex facts and suggested that state nuisance common law should be applied in cases of interstate water disputes. *Id.* at 499 n.3.

A 1971 Tenth Circuit decision reached an opposite conclusion. Finding that no comprehensive federal statute covered the interstate water pollution question at issue in the case, the Tenth Circuit in *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), held that "[f]ederal common law . . . [is the] basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." 441 F.2d at 241.

Agreeing with the Tenth Circuit in *Pankey*, the Supreme Court overruled its decision in *Ohio v. Wyandotte Chem. Corp.* the following year in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

73. 406 U.S. 91 (1972). The State of Illinois sued to enjoin the Sewerage Commission of the City of Milwaukee from discharging daily "some 200 million gallons of raw or inadequately treated sewage and other waste materials" into Lake Michigan. *Id.* at 93.

be called interstate common law.' ”<sup>74</sup> The Court held that the federal common law of public nuisance applied in cases of interstate water pollution disputes, but prophetically cautioned that a time might come when federal legislation would preempt the field.<sup>75</sup>

Congress enacted the first Federal Water Pollution Control Act (FWPCA) in 1948.<sup>76</sup> The FWPCA so limited the power of the federal government<sup>77</sup> and was so ineffective that no suits were ever filed under it.<sup>78</sup> The Act was amended five times between 1948 and 1972.<sup>79</sup>

Only six months after the Supreme Court's 1972 decision in *Milwaukee I*, Congress overhauled the entire FWPCA framework because the program had been “inadequate in every vital aspect.”<sup>80</sup> Congress again amended the Act in 1977 and renamed it the Clean Water Act.<sup>81</sup> The Act states that its objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”<sup>82</sup> It establishes as its goals the elimination of pollutants into navigable waters<sup>83</sup> and the attainment of water quality.<sup>84</sup> Toward that end, the Clean Water Act also makes illegal the discharge of pollutants into any navigable waters except as allowed under other applicable sections of the Act.<sup>85</sup>

To achieve these goals, the Act sets up three types of mechanisms:<sup>86</sup> (1) effluent limitations,<sup>87</sup> (2) water quality standards,<sup>88</sup> and

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74. *Id.* at 105-06 (quoting *Kansas v. Colorado*, 206 U.S. 46, 98 (1907)).

75. *Id.* at 107.

76. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) [hereinafter FWPCA].

77. Maurrasse, *supra* note 11, at 1146-47.

78. Steven J. Bushong, Comment, *Upstream Pollution and Downstream Problems: Oklahoma v. EPA Makes a Splash in Interstate Water Pollution Disputes*, 63 U. COLO. L. REV. 233, 237 (1992).

79. *Id.* See Genie B. Whitesell, Note, *International Paper and Interstate Water Pollution: A Two-Ton Problem in a One-Ton Regulatory Garbage Bag*, 4 J. MIN. L. & POL'Y 377 nn.1-2 (1988-89). See also Steven Gaynor, Comment, *The Dilemma of the Downstream Plaintiff in an Interstate Water Pollution Case*, 37 BUFF. L. REV. 257, 262-64 (1988-89).

80. Bushong, *supra* note 78, at 238 (citing S. REP. NO. 414, 92d Cong., 2d Sess. 7 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3674). See also Calvin R. Dexter & Teresa J. Schwarzenbart, Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 641 (1982). See generally Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459 (1973).

81. Bushong, *supra* note 78, at 238.

82. 33 U.S.C. § 1251(a) (1988).

83. *Id.* § 1251(a)(1) (1988).

84. *Id.* § 1251(a)(2) (1988).

85. *Id.* § 1311(a) (1988). See also *id.* §§ 1312, 1316, 1317, 1328, 1342, 1344 (1988).

86. Maurrasse, *supra* note 11, at 1149.

(3) the National Pollutant Discharge Elimination System (NPDES).<sup>89</sup> The NPDES provision establishes a federal-state partnership for permitting point source discharges.<sup>90</sup> Under the NPDES, there are two permitting systems: (1) a federal program administered by the EPA,<sup>91</sup> and (2) state programs that are authorized and approved by the EPA and which must satisfy federal requirements.<sup>92</sup> In the regulatory scheme of state-operated programs, much emphasis is placed on these federal oversight provisions.

If the discharge allowed by a NPDES permit in one state will violate the water quality standards of a receiving state, the source state must notify the affected state and provide an opportunity for a public hearing.<sup>93</sup> The affected state has an opportunity before the permit is issued to make recommendations to the upstream source state, which must consider the recommendations. If the source state refuses to accept the recommendations of the affected state, it must notify the affected state and the EPA of its reasons for choosing not to incorporate the recommendations.<sup>94</sup> The downstream affected state cannot block the issuance of the permit by the upstream state, but the EPA retains

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87. "Effluent limitations" are technology-based limitations promulgated by the EPA. 33 U.S.C. §§ 1311(b), 1314(b) (1988). "Effluent limitation" is defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . ." *Id.* § 1362(11) (1988).

88. "Water quality standards" are, in general, promulgated by the states, subject to approval by the Administrator of the EPA, and based on consideration of the use of the particular waterway. They represent an ideal or goal for the water quality of the body of water for which they are devised. Section 1313(c)(2)(A) provides in full:

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A) (1988).

89. *Id.* § 1342 (1988). The purpose of the NPDES permit system is to enforce effluent limitations and water quality standards.

90. Whitesell, *supra* note 79, at 378.

91. 33 U.S.C. § 1342(a) (1988).

92. *Id.* § 1342(b) (1988). The EPA was the permitting authority in this case because, at that time, Arkansas had no federally approved authority of its own.

93. *Id.* § 1342(b)(3) (1988).

94. *Id.* § 1342(b)(5) (1988).

the authority to veto the permit.<sup>95</sup>

Section 401(a)(2) of the Act provides that when a discharge may affect the water quality of another state, the permitting authority "shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."<sup>96</sup> Section 510 of the Act, the "State Authority" provision, reserves for the states the right to adopt any measure of pollution control or abatement provided it is not less stringent than federal requirements.<sup>97</sup> Section 510 of the Act further states that "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."<sup>98</sup>

Subsequent to the passage of the 1972 and 1977 Amendments to the FWPCA (the Clean Water Act), the Supreme Court in *The City of Milwaukee v. Illinois (Milwaukee II)*<sup>99</sup> again addressed the same underlying facts it had faced in *Milwaukee I*.<sup>100</sup> Justice Rehnquist, writing for the majority, fulfilled the Court's prediction in *Milwaukee I* and held that Congress had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert [federal] agency."<sup>101</sup> Because of the comprehensive nature of the Act, according to Rehnquist, there was no longer an interstice in the federal statutory framework to be filled by the federal common law.<sup>102</sup> The Court reasoned that the NPDES system of issuing permits provided ample opportunity for an affected state to participate in a source state's permitting decision by virtue of the notice and opportunity for public hearing required by Section 402(b)(3) of the Act.<sup>103</sup> While the Court's

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95. *Id.* § 1342(d)(2) (1988).

96. *Id.* § 1341(a)(2) (1988).

97. *Id.* § 1370 (1988).

98. *Id.* Oklahoma promulgated its anti-degradation standard for scenic rivers under the authority of this provision. Arkansas argued that, under the language of Section 510 of the Act, these more stringent standards could not be applied to out-of-state dischargers.

99. 451 U.S. 304 (1981).

100. *See supra* note 73.

101. 451 U.S. at 317.

102. *Id.* at 323.

103. *Id.* at 325-26.

The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process. It would be quite inconsistent with this scheme if federal courts were in effect to 'write their own ticket' under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them.

*Id.* at 326.

decision in *Milwaukee II* made it plain that there was no longer a federal common law remedy available in interstate pollution cases, it left open the question of the availability of a state common law remedy.

The State of Illinois thus brought another action, this time under its own statutory and common law. In *Illinois v. City of Milwaukee (Milwaukee III)*<sup>104</sup> the Seventh Circuit Court of Appeals held Illinois (an affected state) could not apply its own state law to an out-of-state discharger. The court interpreted Section 510 of the Act<sup>105</sup> as referring to the right of a state to regulate discharges within the state and "not to any right of a state to impose more stringent limitations upon discharges in another state."<sup>106</sup> The Seventh Circuit reasoned that allowing an affected state to apply its more stringent standards on upstream states would create regulatory chaos by potentially subjecting source states to the laws of a number of downstream states. This policy, the court said, would erode the uniformity envisioned by the Act.<sup>107</sup>

In 1987 the Supreme Court ruled on the state law issue in *International Paper Co. v. Ouellette*.<sup>108</sup> In *Ouellette*, Vermont landowners along Lake Champlain brought a suit against International Paper Company for discharging pollutants into the lake from its location in the State of New York.<sup>109</sup> The Supreme Court agreed with the tenets of the Seventh Circuit decision in *Milwaukee III* and reversed the decisions of the Vermont District Court<sup>110</sup> and the Second Circuit Court of Appeals<sup>111</sup> in favor of the Vermont residents. The Court held that in cases of interstate water pollution which are governed by the Clean Water Act, "the court must apply the law of the State in which the point source is located."<sup>112</sup> In this case, the law of New York would control. The Court reasoned that affected states occupy a subordinate position to source states in the federal regulatory scheme since affected states, under the NPDES permitting system,<sup>113</sup> are notified and given

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104. 731 F.2d 403 (7th Cir. 1984).

105. 33 U.S.C. § 1370 (1988).

106. 731 F.2d at 413.

107. *Id.* at 414. The court did not rule that Section 510 of the Act, 33 U.S.C. § 1370 (1988), would prohibit an out-of-state plaintiff from invoking the laws of a source state against a polluter located within the source state.

108. 479 U.S. 481 (1987).

109. *Id.* at 483-84.

110. *Ouellette v. International Paper Co.*, 602 F. Supp. 264 (D. Vt. 1985), *aff'd in part, rev'd in part*, 479 U.S. 481 (1987).

111. 776 F.2d 55 (2d Cir. 1985) (per curiam).

112. 479 U.S. at 487.

113. See *supra* notes 89-95 and accompanying text. The NPDES permitting system is set

an opportunity to participate in a source state's public hearing on the issuance of the permit.<sup>114</sup> Further, affected states cannot block the issuance of the permit, but can only appeal to the Administrator of the EPA.<sup>115</sup> The Court also agreed with the policy reasons of *Milwaukee III*, emphasizing that Vermont's position would allow states to do "indirectly what they could not do directly—regulate the conduct of out-of-state sources."<sup>116</sup>

Federal oversight of the regulatory issues involved in interstate water disputes since the passage of the Clean Water Act was the focus of a 1988 Fourth Circuit case, *Champion International v. EPA*.<sup>117</sup> In *Champion*, the EPA intervened on behalf of Tennessee in an interstate water pollution dispute between the State of Tennessee and a North Carolina paper mill.<sup>118</sup> When the State of North Carolina declined to incorporate changes in water quality standards recommended by the EPA in its NPDES permit to Champion, the EPA assumed permitting authority.<sup>119</sup> The EPA did so under the authority granted it by Section 402 of the Clean Water Act of 1977<sup>120</sup> which allows the "EPA to take jurisdiction and issue a permit in the event of an impasse between a State and the EPA Administrator."<sup>121</sup> Although the Fourth Circuit vacated the judgment of the district court<sup>122</sup> and remanded for want of

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out in Section 402 of the Act, 33 U.S.C. § 1342 (1988). That section sets up two systems. One system is administered by the EPA, wherein a permit to discharge pollutants into waterways is issued by the Agency itself. The other system allows states to administer their own programs, wherein the permit is issued by a state agency which has been authorized and approved by the EPA, follows federal guidelines, and is subject to the federal oversight provisions set forth by the Act. In other words, either an NPDES permit is issued by the EPA, or alternatively, it is issued by a state agency within the source state which has been authorized by the EPA to license such permits. In this case, the EPA issued Arkansas' permit because Arkansas did not have a federally approved state agency authorized to do so.

114. 479 U.S. at 490.

115. *Id.* at 490-91.

116. *Id.* at 495.

117. 850 F.2d 182 (4th Cir. 1988).

118. *Id.* at 183-84. The effluent discharged by the Champion mill into the Pigeon River violated Tennessee's downstream water quality standards for color. *Id.*

119. *Id.* at 184-85.

120. 33 U.S.C. § 1342(d) (1988).

121. 850 F.2d at 185. Title 33 U.S.C. § 1342(d)(2) allows two grounds for the Administrator to intervene: (1) in the case of an unresolved interstate dispute, 33 U.S.C. § 1342(d)(2)(A), and (2) when a permit "is outside the requirements of the Clean Water Act," 33 U.S.C. § 1342(d)(2)(A). *Id.* "If the State does not either resubmit the permit in response to the EPA's objections or request a public hearing within 90 days, issuing authority passes automatically to the EPA." *Id.* (quoting 40 C.F.R. 123.44(h)(1)).

122. *Champion Int'l Corp. v. EPA*, 648 F. Supp. 1390 (W.D.N.C. 1986), *vacated*, 850 F.2d 182 (4th Cir. 1988). The district court found that the EPA, in assuming permitting authority, had

subject matter jurisdiction,<sup>123</sup> it found that the EPA's act of assuming permitting authority was within the agency's authority and "consistent with statute and regulation."<sup>124</sup>

In *Oklahoma v. EPA*<sup>125</sup> the Tenth Circuit agreed with the EPA's position that the Act required Arkansas to comply with Oklahoma's federally approved water quality standards<sup>126</sup> but disagreed with the EPA's issuance of the Fayetteville permit.<sup>127</sup> The court reconciled its holding regarding Arkansas' compliance with downstream water quality standards with *Ouellette* and the *Milwaukee* line of cases by pointing out that in these prior cases the remedies sought were always based in nuisance, whether federal or state common law. Here, the problem involved the application of federal statutory and regulatory law.<sup>128</sup> The court also relied on the EPA's statutorily mandated guidance and ultimate power of approval over states in the formulation of their standards.<sup>129</sup> According to the court, state water quality standards which are approved by the EPA thus become federal law.<sup>130</sup> Also important to the Tenth Circuit's reasoning was its interpretation of Section 401 of the Act.<sup>131</sup> The court agreed with the EPA and found reasonable the agency's interpretation that Section 401 of the Act<sup>132</sup> required that Arkansas comply with Oklahoma standards.<sup>133</sup>

The Tenth Circuit, however, reversed the EPA's issuance of the Fayetteville permit. The court found that the EPA's interpretation of the facts at the administrative proceedings was "arbitrary and capricious" for failing to consider an important aspect of the problem and for misinterpreting and misapplying two of Oklahoma's water quality

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not exceeded its delegated authority. 850 F.2d at 185-86.

123. 850 F.2d at 190.

124. *Id.* at 187. See Gaynor, *supra* note 79, at 303.

125. 908 F.2d 595 (10th Cir. 1990).

126. *Id.* at 604, 615.

127. *Id.* at 616, 634.

128. *Id.* at 607.

129. *Id.*

130. *Id.*

131. 33 U.S.C. § 1341 (1988).

[The licensing or permitting] agency, based upon the recommendations of such State, . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

908 F.2d at 609-10 (citing 33 U.S.C. § 1341(a)(2)).

132. 33 U.S.C. § 1341 (1988).

133. 908 F.2d at 611.

standards.<sup>134</sup> According to the court, the fact entirely overlooked by the EPA was that the Illinois River was already degraded prior to the addition of the Fayetteville effluent to the river system.<sup>135</sup>

### III. REASONING OF THE COURT IN *ARKANSAS V. OKLAHOMA*

In *Arkansas v. Oklahoma*<sup>136</sup> the Supreme Court was faced with the question of whether the EPA had the statutory authority under the Act to require Arkansas to comply with the more stringent water quality standards of a downstream state.<sup>137</sup> The Court held that it did.<sup>138</sup> It also held, however, that the EPA's factual determination—that the Fayetteville discharge would result in no detectable violation of Oklahoma's standards—was entitled to substantial deference,<sup>139</sup> thereby overruling the Tenth Circuit and reinstating the Fayetteville permit.<sup>140</sup>

The Court began with an analysis of Oklahoma's water quality standards.<sup>141</sup> It emphasized that in the administrative proceedings below, the CJO relied upon Section 301(b)(1)(C) of the Clean Water Act<sup>142</sup> in reaching his conclusion that the Act mandated that Arkansas comply with the downstream water quality standards of Oklahoma. Section 301(b)(1)(C) of the Act "requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards."<sup>143</sup> The Court succinctly restated the arguments consistently advanced by both parties throughout the litigation<sup>144</sup> as a foundation for its conclusion that the Tenth Circuit's decision was based on the arguments of neither party.<sup>145</sup> Justice Stevens, writing for

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134. *Id.* at 616, 630. See *supra* notes 56-66 and accompanying text.

135. 908 F.2d at 625.

136. 112 S. Ct. 1046 (1992).

137. *Id.* at 1056.

138. *Id.* at 1057.

139. *Id.* at 1059-60.

140. *Id.* at 1060.

141. *Id.* at 1051 n.2. Specifically, the Court noted that Sections 3 and 5 of the Oklahoma Water Quality Standards prohibited the degradation of the water quality of the upper Illinois River immediately west of the Arkansas-Oklahoma border. *Id.*

142. 33 U.S.C. § 1311(b)(1)(C) (1988).

143. 112 S. Ct. at 1051-52 (citing Brief for Petitioners app. at 116a-17a).

144. *Id.* at 1052. Arkansas argued that the Act did not require it to comply with the water quality standards of a downstream state. Oklahoma objected to the EPA's factual determination that the Fayetteville discharge would not result in a violation of its standards. *Id.*

145. *Id.* The court of appeals accepted neither of the parties' arguments and, instead, advanced its own. The Court stated that the "novelty of the Court of Appeals' decision persuaded us to grant certiorari." *Id.* (citing 111 S. Ct. 1412 (1991)).



a unanimous Court,<sup>146</sup> noted that the court of appeals based its decision upon a novel and self-styled rule which required the denial of any permit for a point source discharge if the discharge would " 'contribute to conditions currently constituting a violation of applicable water quality standards . . . . ' "<sup>147</sup>

The Court acknowledged its past application of the common law in cases of interstate water pollution disputes.<sup>148</sup> Citing the foreshadowing in *Milwaukee I* that a time might come when federal legislation would preempt the field,<sup>149</sup> the Court turned its focus to the important modern cases interpreting the 1972 Amendments to the FWPCA and the Clean Water Act of 1977.<sup>150</sup>

The Court reiterated its ruling in *Milwaukee II* that the comprehensive nature of the 1972 Amendments did, in fact, preempt the federal common law in interstate water pollution cases.<sup>151</sup> It also focused on the roles played by the states and by the EPA in the statutory permitting scheme. The Court noted that the Act affords a downstream state an opportunity to participate in a source state's permit hearing by requiring the source state to consider recommendations submitted by the affected state. The Court also pointed out the EPA's oversight power to veto a source state's permit. The Administrator may veto the issuance of a permit if the source state either refuses to comply with a downstream state's water quality standards or fails to sufficiently explain to the affected state and the Administrator the reasons for its

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146. 112 S.Ct. at 1050.

147. *Id.* at 1052. (citing *Oklahoma v. EPA*, 908 F.2d 595, 620 (10th Cir. 1990)). The Tenth Circuit found that the Illinois River was "already degraded" and that the effluent from the Fayetteville plant could be expected to reach the Oklahoma border and contribute to the further degradation of the river even though the effect of the effluent in Oklahoma would not be detectable." *Id.*

"[T]he Court of Appeals candidly acknowledged that its theory 'has apparently never before been addressed by a federal court.'" *Id.* at 1058 (citing *Oklahoma v. EPA*, 908 F.2d 595, 620 n.39 (10th Cir. 1990)). The Court stated that "[t]o the extent that the Court of Appeals relied on its interpretation of the Act to reverse the EPA's permitting decision, that reliance was misplaced." *Id.* at 1058.

148. *Id.* at 1052-53. The Court maintained that in these cases its use of the common law had always been "tempered by a respect for the sovereignty of the States." *Id.* at 1053.

149. *Id.* at 1053. In *Milwaukee I*, the Court stated, "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972).

150. 112 S. Ct. at 1053-54. The cases which were the subject of the Court's analysis were *Milwaukee II*, 451 U.S. 304 (1981), *Milwaukee III*, 731 F.2d 403 (7th Cir. 1984), and *Ouellette*, 479 U.S. 481 (1987). 112 S. Ct. at 1053-54.

151. 112 S. Ct. at 1053.

failure to adopt the recommendations of the affected state in the issuance of its permit.<sup>152</sup> The Court noted that *Milwaukee II* left open the question of the availability of Illinois' common law as a remedy in an interstate pollution dispute.<sup>153</sup> The Court added that the Seventh Circuit in *Milwaukee III*, in addressing that question, held that Section 510 of the Act did no more than to preserve the right of a source state to regulate dischargers within its own boundaries.<sup>154</sup>

The Court affirmed the principles set forth by the Seventh Circuit in *Milwaukee III* in its analysis of *Ouellette*.<sup>155</sup> According to the Court, *Ouellette* stands for the proposition that the "only state law applicable to an interstate discharge is 'the law of the State in which the point source is located.'"<sup>156</sup> Justice Stevens related that the Court in *Ouellette* again emphasized the roles of the states and the EPA in the permitting process. Under Section 402 of the Act, a downstream state does not have the authority to block the issuance of a source state's permit.<sup>157</sup> The only avenue of appeal for an affected state is to the Administrator of the EPA, who then has the statutory authority<sup>158</sup> to veto the permit if the source state declines to comply with the water quality standards of the downstream state.<sup>159</sup> Citing *Ouellette*, Stevens pointed out that the permitting process clearly provides that an affected state occupies a subordinate position.<sup>160</sup> Concluding its historical analysis, the Court distinguished the present case from its previous line of cases by emphasizing that the present case involves a permit authorized by federal statute and issued by a federal administrative agency, rather than a permit issued by a state.<sup>161</sup>

The Court, drawing from its analysis of the statutory scheme in

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152. *Id.* The Court stated that "[w]e observed that Congress had addressed many of the problems we had identified in *Milwaukee I* by providing a downstream State" with these procedural safeguards. *Id.*

153. *Id.* While the holding in *Milwaukee II* could clearly be construed to mean that the Clean Water Act supplanted the federal common law as a remedy in interstate water pollution disputes, the question regarding the availability of state common law as a remedy to states remained.

154. *Id.* This ruling suggested that an affected state could not, therefore, impose its laws on an out-of-state discharger.

155. *Id.*

156. *Id.* (citing *Ouellette*, 479 U.S. 481, 493 (1987)).

157. 112 S.Ct. at 1053-54.

158. 33 U.S.C. § 1342(d)(2) (1988).

159. 112 S. Ct. at 1054.

160. *Id.*

161. *Id.*

*Milwaukee II*, *Milwaukee III*, and *Ouellette*, emphasized the shared responsibilities of the states and the federal government in achieving the main objective of the Act<sup>162</sup> and the roles of each in the permitting system.<sup>163</sup> The Court stated that the Act establishes two types of water quality measures: (1) "Effluent limitations,"<sup>164</sup> which are promulgated by the EPA, and (2) "Water quality standards,"<sup>165</sup> which are generally "promulgated by the States and establish the desired condition of a waterway."<sup>166</sup>

The Court stressed the EPA's oversight in the statutory scheme. "The EPA provides States with substantial guidance in the drafting of water quality standards."<sup>167</sup> Section 303 of the Act<sup>168</sup> requires states to review the standards periodically and to seek approval from the EPA if there are any revisions of the standards. In addition, if the EPA recommends changes with which the state refuses to comply, the EPA has the authority under the statute "to promulgate water quality standards for the State."<sup>169</sup>

Throughout its analysis of the statutory scheme, the Court emphasized sections of the Act that give the Administrator oversight over state permitting programs.<sup>170</sup> The Court found such an example in the structure of the NPDES system.<sup>171</sup> It noted that while the procedural provisions in Sections 402(b)(3) and (5) of the Act<sup>172</sup> were designed to

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162. *Id.* The main objective of the Act is "[t]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* (citing 33 U.S.C. § 1251(a)).

163. 112 S. Ct. at 1054.

164. 33 U.S.C. §§ 1311, 1314 (1988).

165. *Id.* § 1313 (1988).

166. 112 S. Ct. at 1054.

167. *Id.* The EPA provides states with model water quality standards. *See generally* 40 C.F.R. § 131 (1991).

168. 33 U.S.C. § 1313(c) (1988).

169. 112 S. Ct. at 1054.

170. *Id.* at 1054-55.

171. Section 402(b) of the Act provides for two types of permitting systems. One administered by the states, subject to EPA requirements and approval, and another system administered by the EPA. 33 U.S.C. § 1342(b). If a state has its own permitting authority, the EPA's role in the scheme is to oversee and ensure compliance of the source state in its licensing of a discharge permit. *Id.*

172. 33 U.S.C. § 1342(b)(3) requires the source state to notify any affected state and provide the opportunity for a public hearing. *Id.*

33 U.S.C. § 1342(b)(5) requires that the source state allow any affected state to submit recommendations regarding effluent limitations which may affect its water quality for consideration by the source state. If these recommendations are not followed, § 1342(b)(5) mandates that the source state report to the affected state and the Administrator the reasons as to why these recommendations are not incorporated in its permit. *Id.*

protect affected states, they do not allow an affected state to block the issuance of the source state's permit.<sup>173</sup> Section 402(d)(2) of the Act<sup>174</sup> gives that authority to the Administrator.<sup>175</sup> Also, in the absence of a federally approved permitting authority, Section 402(a) of the Act<sup>176</sup> gives the EPA the authority to issue a permit for a state.<sup>177</sup> The EPA has interpreted the Act as requiring any EPA-issued permit to comply with the same requirements set forth under the Act for state-issued permits.<sup>178</sup> Thus, Section 401(a)(2)<sup>179</sup> also applies to EPA-issued permits. That section "appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be insured."<sup>180</sup>

Following its statutory analysis, the Court addressed the issues presented. Justice Stevens posed three questions, two of which the Court immediately answered.<sup>181</sup> First, does the Act require that the EPA, in issuing a permit, mandate that a source state comply with the water quality standards of a downstream state?<sup>182</sup> The Court stated that it was not necessary to answer this question since this case involved a permit issued by the federal government and not by a state.<sup>183</sup> The EPA's assumption that it must require Fayetteville to comply with Oklahoma standards was both permissible and reasonable under the Act.<sup>184</sup> Second, if the Act does not *require* the EPA to mandate compliance with downstream standards, does the EPA have the statutory authority to force compliance?<sup>185</sup> To this question, the Court answered

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173. 112 S. Ct. at 1055.

174. 33 U.S.C. § 1342(d)(2) (1988). The EPA relied on this section in *Champion Int'l*. See *supra* notes 117-24 and accompanying text.

175. 112 S. Ct. at 1055.

176. 33 U.S.C. § 1342(a) (1988). The EPA issued Arkansas' permit in this case because Arkansas had no permitting authority.

177. 112 S. Ct. at 1055.

178. *Id.* Although this statement would appear to be self-evident, the Court raised this point because Arkansas' permit was issued by the Agency itself, rather than by Arkansas. The Act as interpreted by the EPA, according to the Court, imposes the same regulations on the Agency itself when it issues a permit as it does on a state when a state licenses a discharge.

179. 33 U.S.C. § 1342(a)(3) (1988).

180. 112 S. Ct. at 1055.

181. *Id.* at 1056.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

yes.<sup>186</sup> It listed among its reasons federal regulations<sup>187</sup> which state that a permit will not be issued when a source state's discharge cannot comply with the applicable water quality standards of affected states.<sup>188</sup>

The message the Court conveyed is that Congress, under Section 402 of the Act, has entrusted the Administrator with broad discretion in issuing or refusing to issue permits.<sup>189</sup> The Court used as an example Section 402(d)(2),<sup>190</sup> which gives the Administrator the authority to veto the issuance of a state's permit.<sup>191</sup> The Court opined that the Agency's interpretation of the Act—that the Act requires Arkansas' compliance with Oklahoma's standards—was a reasonable exercise of the Agency's statutory discretion.<sup>192</sup>

Before addressing the third question, the Court turned to Arkansas' argument that inconsistencies exist between the holding in this case and *Ouellette*.<sup>193</sup> Arkansas argued that allowing the EPA to mandate compliance with Oklahoma standards would be contradictory to the Court's holding in *Ouellette*.<sup>194</sup> That case held that the only law applicable in an interstate water pollution dispute was that of the source state.<sup>195</sup> To that argument, the Court answered that "[l]imits on an affected State's direct participation in permitting decisions . . . do not in any way constrain the EPA's authority to require a point source to comply with downstream water quality standards."<sup>196</sup> For the above reasons, the Court found the EPA's ruling requiring that Arkansas "comply with Oklahoma's water quality standards to be a reasonable exercise of the Agency's substantial statutory discretion."<sup>197</sup>

The third question posed by Justice Stevens, echoing the holding

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186. *Id.*

187. 40 C.F.R. §§ 122.4(d), 122.44(d) (1991).

188. 112 S. Ct. at 1056.

189. *Id.*

190. 33 U.S.C. § 1342(d)(2) (1988).

191. 112 S. Ct. at 1056.

192. *Id.* at 1056-57.

193. *Id.*

194. *Id.* at 1057.

195. *Ouellette*, 479 U.S. 481, 487 (1987).

196. 112 S. Ct. at 1057.

197. *Id.* The Court cited as authority *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). *Chevron* held that where "there is an express delegation of authority to the agency . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. at 843-44. The Court added that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and should be granted deference. *Id.* at 844.

of the court of appeals, is whether the Act provides that "once a body of water fails to meet water quality standards no discharge that yields effluent that reach the degraded waters will be permitted."<sup>198</sup> The Court disagreed with the Tenth Circuit and held that the Act supports no such reading.<sup>199</sup>

The Court expressed concern that the Tenth Circuit decided the third question presented based on an argument advanced by neither party.<sup>200</sup> The Supreme Court disagreed with the court of appeals' decision that the EPA's issuance of the Fayetteville permit was "arbitrary and capricious" for allegedly misinterpreting Oklahoma's water quality standards.<sup>201</sup> The Court noted that Oklahoma had not advanced this argument.<sup>202</sup> Therefore, the "Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication."<sup>203</sup>

The Court reasoned that EPA regulations<sup>204</sup> require a source state to comply with the water quality standards of all affected states, thereby incorporating into federal law all state standards the Agency deems applicable.<sup>205</sup> The Court, in support of this contention, maintained that courts have long held that interstate water pollution is governed by federal law.<sup>206</sup> Also, treating federally approved state standards as federal law allows the EPA to ensure the uniformity of the system.<sup>207</sup> The Court stated that the EPA's interpretation of those federal regulations are "entitled to substantial deference" because Oklahoma's standards take on a "federal character."<sup>208</sup>

The Court noted other deficiencies in the Tenth Circuit's decision. First, the court of appeals failed to give due deference to the EPA in the interpretation of its own regulations—Oklahoma's federally approved water quality standards.<sup>209</sup> The Tenth Circuit should have afforded the Administrative Law Judge and Chief Judicial Officer appropriate deference in their conclusions that those standards would not be

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198. 112 S. Ct. at 1056.

199. *Id.* at 1057.

200. *Id.* at 1058.

201. *Id.*

202. *Id.*

203. *Id.*

204. 40 C.F.R. § 122.4(d) (1991).

205. 112 S. Ct. at 1058-59.

206. *Id.* at 1059.

207. *Id.*

208. *Id.* (citing *Chevron*, 467 U.S. at 865).

209. 112 S. Ct. at 1059-60.

violated.<sup>210</sup> Second, the court of appeals ignored "well-established standards for reviewing the factual findings of agencies and instead made its own factual findings."<sup>211</sup> A court, according to Justice Stevens, in its capacity of judicial review, should uphold the factual finding of an administrative agency as long as there is "substantial evidence" in the record to support the agency's finding.<sup>212</sup> A court should not overrule an agency finding by concluding that there is evidence to support some alternative finding.<sup>213</sup>

Finally, the Tenth Circuit was mistaken in concluding that the EPA's issuance of the permit was "arbitrary and capricious" for failing "to consider an important aspect of the problem,"<sup>214</sup> the degraded status of the Illinois River. This aspect was "important" only because of the Tenth Circuit's first two errors interpreting controlling law.<sup>215</sup> The Court concluded that the court of appeals made a policy decision that it was not authorized to make "for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency."<sup>216</sup>

#### IV. ANALYSIS AND SIGNIFICANCE

The Supreme Court in *Arkansas v. Oklahoma* declined to answer the question of whether the Clean Water Act requires a source state to comply with the water quality standards of a downstream state. The Court only held that the EPA may reasonably exercise its statutory discretion to mandate such compliance.<sup>217</sup> The Court, therefore, left open for further speculation the consequences of a source state, through its own EPA-approved NPDES permitting program, issuing a permit which disregards either the recommendations concerning effluent limitations offered by a downstream state<sup>218</sup> or the water quality standards

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210. *Id.*

211. *Id.* at 1060.

212. *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)).

213. 112 S.Ct. at 1060.

214. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

215. 112 S.Ct. at 1060.

216. *Id.* at 1061.

217. *Id.* at 1056.

218. Section 402 of the Act requires a source state to allow a downstream state the opportunity to participate in a public hearing prior to the issuance of a permit by allowing the affected state to offer recommendations in writing, both to the source state, as well as the Administrator of the EPA. 33 U.S.C. § 1342 (1988). These recommendations might, for example, suggest ways in which a source state could alter its discharge permit in order to avoid causing an adverse effect on the waters of the downstream state.

of the affected state. The Court strongly hinted that the outcome in such a case would be the same as that in *Champion International v. EPA*.<sup>219</sup> In an impasse involving an upstream state having its own program and refusing to comply with the applicable standards of a downstream state, the EPA, as in *Champion*, would most likely invoke Section 402(d)(2) of the Act<sup>220</sup> to supplant the source state's jurisdiction by vetoing the permit.

In ruling that EPA-approved, state-promulgated water quality standards take on a "federal character,"<sup>221</sup> the Court has solidified the EPA's position as the ultimate interpreter of federally-approved, state water quality standards. The opinion suggests not only that the EPA has the final say on the interpretation of applicable state water quality standards, but also that the Agency has the final authority, as fact-finder, to decide whether a discharge will cause an actual, detectable violation of applicable water quality standards. If the Agency finds such an effect, it has the discretion to mandate upstream compliance with downstream requirements.

A more intriguing question left unanswered by the Supreme Court is whether Section 510 of the Act,<sup>222</sup> which allows a state to promulgate pollution control standards more stringent than those required by the EPA, also requires a permitting state's point source discharger to comply with the stricter water quality standards of a downstream state.<sup>223</sup> The Court dismissed Arkansas' argument that more stringent standards cannot be applied to out-of-state dischargers by pointing out "that section only concerns *state* authority and does not constrain the *EPA's* authority to promulgate reasonable regulations" in downstream states.<sup>224</sup>

The Court's reasoning on this point also suggests its unwillingness to directly confront the specific issue. May Oklahoma designate portions of all of its rivers that are near the Arkansas border and originate in Arkansas as "scenic rivers" and then promulgate stringent "no new discharge" anti-degradation water quality standards for each? Would the EPA approve these as reasonable standards? State agency personnel in at least one upstream state fear that the EPA merely rubber-

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219. 850 F.2d 182 (4th Cir. 1988). See *supra* notes 117-24 and accompanying text.

220. 33 U.S.C. § 1342(d)(2) (1988).

221. 112 S. Ct. at 1059.

222. 33 U.S.C. § 1370 (1988).

223. 112 S. Ct. at 1057.

224. *Id.*



stamps state-promulgated water quality standards which are at least as stringent as required by the Act.<sup>225</sup> Those standards which are more stringent than required by federal law may make for interesting interstate water pollution disputes in the future. It is significant to note that while the Clean Water Act provides for an affected state's participation in the permitting decision of an upstream state, there is no reciprocal opportunity for an upstream state to participate in the promulgation of water quality standards of a downstream state.

EPA personnel, however, maintain that the more stringent state-promulgated regulatory requirements allowed under Section 510 of the Act,<sup>226</sup> even if approved by EPA, will not automatically apply across state lines.<sup>227</sup> The EPA may be able to approve these more stringent standards with some disclaimer stating that the more stringent aspects, such as a "no new discharge" provision, will not be applicable to an upstream state.<sup>228</sup>

Other experts also foresee little impact on the method used by states or the EPA to issue permits.<sup>229</sup> To date, thirty-nine states have their own EPA-approved NPDES permitting authority, and most states, according to the EPA, already take downstream states into account in their permitting processes.<sup>230</sup> The director of one major environmental organization sees little change because he believes that the Court's reasoning underlying the ruling on Arkansas' EPA-issued permit will also apply to states which run their own permitting programs.<sup>231</sup>

In summary, this decision stands for the proposition that, in the context of the NPDES permitting system, the EPA has the statutory authority to mandate upstream compliance with downstream standards, so long as those standards are seen by the EPA as reasonable. The EPA also has the authority to oversee the setting of state water quality standards and the discretion to interpret those standards, thereby transforming them into federal law. Once the standards are considered federal law, the EPA becomes the ultimate interpreter of those standards

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225. Telephone Interview with Arkansas state agency personnel who spoke on condition of anonymity (June 19, 1992).

226. 33 U.S.C. § 1370 (1988).

227. Telephone Interview with Pat Rankin, Attorney, EPA, Region VI (June 22, 1992).

228. *Id.*

229. 22 Env't. Rep. 2464 (BNA) (Mar. 6 1992).

230. *Id.*

231. *Id.* (conveying opinion of Mark Van Putten, Director of the National Wildlife Federation's Great Lakes Natural Resources Center).

and the final fact-finder in enforcement actions. In the regulatory scheme, courts no longer will apply the federal or state common laws of nuisance. The only remedy for downstream states will come from the EPA and the Act itself.

As long as EPA personnel act reasonably in interpreting downstream state regulations, the water quality standards of affected states will be protected. At the same time, the rights of upstream states to issue permits which are beneficial to the interests of their citizens will also be maintained. These source state interests should be balanced against environmental interests and the potential harm to the affected waters of downstream states. The purpose of the Clean Water Act is, after all, to maintain and protect the integrity of the nation's waters.<sup>232</sup>

While in this action the City of Fayetteville won its permit fight, the result of the decision is that Arkansas and other upstream states must now be acutely aware of the water quality standards of downstream states. The next Arkansas border-town which applies for a permit to discharge effluents into an interstate stream may not be so lucky. This decision makes it perfectly clear that the Supreme Court has interpreted the Clean Water Act to give to the EPA the ultimate authority over states in the NPDES permitting system. The decision also undermines severely many of the legal and academic arguments advanced by commentators which contend that Congress did not intend for the Clean Water Act to be the only remedy available to downstream states in an interstate water pollution dispute.<sup>233</sup>

According to the Supreme Court in *Arkansas v. Oklahoma*,<sup>234</sup> affected states now must rely solely upon the EPA and the Clean Water Act for relief from alleged harms caused by upstream dischargers. Whether environmentalists and the EPA will concur on the meaning of state-promulgated water quality standards and the interpretation of the technical fact situations of future cases as to what will constitute an "actual, detectable" affect on a state's water quality remains to be seen. The respect and deference accorded by states and environmental-

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232. 33 U.S.C. § 1251(a) (1988).

233. The commentators in most of the secondary materials used in the preparation of this note argue that the procedural safeguards contained in the Clean Water Act provide inadequate remedies to affected states. Prior to this case, the commentators generally agreed upon the need to preserve either state or federal common law as a remedy for downstream states in interstate water pollution disputes or in the alternative, the creation of new statutory relief. See generally, Glicksman, *supra* note 70; Bushong, *supra* note 78; Gaynor, *supra* note 79; Maurrasse, *supra* note 11; and Whitesell, *supra* note 79.

234. 112 S. Ct. at 1046 (1992).

ists to the EPA in interstate water pollution disputes may well determine whether Congress will choose to revisit this area of law.<sup>235</sup>

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235. As of the writing of this casenote, Senator David Boren of Oklahoma, has introduced a bill, S. 2971, 102d Cong., 2d Sess. (1992), to amend the national Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271-86 (1988)), which would afford protection to the Illinois River pending a decision by the Secretary of the Interior whether to add the river to the list of the nation's federally protected "wild and scenic rivers." The implication of this legislation in the context of the dispute between Arkansas and Oklahoma over the Illinois River is, as yet, unclear.