

OKLAHOMA v. EPA: REQUIRING UPSTREAM DISCHARGERS TO COMPLY WITH FEDERALLY APPROVED WATER QUALITY STANDARDS OF DOWNSTREAM STATES

The city of Fayetteville, Arkansas, applied to the Environmental Protection Agency (EPA) for a National Pollutant Discharge Elimination System (NPDES) permit allowing Fayetteville to operate a new municipal wastewater treatment plant. The State of Oklahoma and a nonprofit group, Save The Illinois River, requested denial of the NPDES permit. Concerned that the discharge from the Fayetteville plant would adversely affect its waters, Oklahoma sought administrative review, under the Clean Water Act (CWA), of EPA's decision to grant the permit.

The initial decision of the Administrative Law Judge (ALJ) was appealed by both Arkansas and Oklahoma. On remand the ALJ concluded that the permit could be issued as written and that it would not result in any measurable violations of Oklahoma's water quality standards. Both states petitioned for judicial review. Arkansas specifically objected to EPA's determination that its proposed discharge be required to meet the water quality standards of Oklahoma. Oklahoma contested EPA's finding that the proposed discharge would not violate its water quality standards. The Court of Appeals held that (1) the CWA requires that any Arkansas discharge into the Illinois river must comply with the downstream water quality standards of Oklahoma and (2) the CWA prohibits the granting of a NPDES permit where there is substantial evidence of degraded water quality in the Oklahoma portion of the Illinois River as a result of Arkansas's current discharge. *State of Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990), *cert. granted sub nom, Arkansas v. Oklahoma*, 111 S.Ct. 1412 (1991).

In order to protect and improve the quality of the nation's navigable waters, Congress enacted the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 (1972 Amendments).¹ Prior to the 1972 Amendments, the FWPCA had focused primarily on the establishment of water quality stan-

1. 33 U.S.C. §§ 1251-1387 (1988).

dards without explicitly requiring individual polluters to minimize their discharges.² With the enactment of the 1972 Amendments, however, Congress announced "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."³ To implement this goal, the 1972 Amendments sought to achieve effluent limitations on "point sources"⁴ in addition to traditional regulation of water quality standards. In order to effectively enforce effluent limitations on point sources, the 1972 Amendments established the National Pollutant Discharge Elimination System.⁵

A NPDES permit is required for the discharge of any "pollutant" into any body of water covered by the Clean Water Act.⁶ In *EPA v. California ex rel. State Water Resources Control Board*, the Supreme Court stated that "the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments."⁷ EPA may, therefore, directly control polluting sources through the issuance of NPDES permits.⁸ EPA also controls polluting sources indirectly through water quality standards.⁹ In *Sierra Club v. Union Oil Co. of California*, the court stated that water quality standards serve the important purpose of ensuring that numerous dischargers, "despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels."¹⁰

NPDES permits are granted by EPA;¹¹ however, the FWPCA also provides that states may grant NPDES permits,

2. See *id.* § 1251(a)(1).

3. *State of Oklahoma v. EPA*, 908 F.2d 595, 597 (citing 33 U.S.C. § 1251(a)(1)).

4. A point source is defined as "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

5. 33 U.S.C. § 1342.

6. A pollutant means any "dredged spoil, solid waste . . . sewage, garbage, sewage sludge, . . . chemical wastes, . . . rock, sand, . . . and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6).

7. *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976).

8. 33 U.S.C. §§ 1313(c)(3), 1341, 1342.

9. The Federal Water Pollution Control Act calls for the establishment of water quality effluent limitations. 33 U.S.C. § 1312(a). Prior to the 1972 Amendments and the advent of the NPDES permits, this was the primary way in which water quality was monitored and maintained in the United States.

10. *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated*, 485 U.S. 931 (1988).

11. 33 U.S.C. § 1342.

subject to EPA approval.¹² Although permits granted under a state program must meet the minimum water pollution control standards established by the FWPCA,¹³ a state is free to establish more stringent water quality standards.¹⁴ Nonetheless, before a state issues any NPDES permit, it must submit a copy of the proposed permit to the EPA Administrator. The Administrator may object to the permit. If the state does not resubmit a permit revised to meet such objections, the Administrator must issue a federal permit in lieu of the state permit.¹⁵

The most recent amendment to the FWPCA is the Clean Water Act of 1977.¹⁶ This amendment was adopted at least in part as a response to the holding of *EPA v. California ex rel. State Water Resources Control Board*, in which the Supreme Court ruled that federal facilities need not comply with state pollution control requirements.¹⁷ The CWA legislatively reversed this decision.¹⁸ Further, this reversal was recognized in *United States v. Puerto Rico*, where the Court stated that "[f]ederal facilities must comply with state water pollution control requirements."¹⁹

What is not clear from the CWA, and the case law arising from it, is whether a discharging state must comply with an affected state's water quality standards. Where the EPA Administrator is issuing the permit, 33 U.S.C. § 1341(a)(2) requires that the Administrator notify those states whose waters may be affected by a proposed discharge.²⁰ Upon notification, the affected state may request a public hearing on the issue.²¹ Similarly, where the state is administering its own program, 33 U.S.C. § 1342(b)(5) requires that the administering state provide potentially affected states the opportunity to submit recommen-

12. *Id.* § 1342(b), (c) provides that where the state submits a program that the Administrator finds complies with the FWPCA, the Administrator shall approve the act and suspend issuance of federal NPDES permits.

13. *Id.* § 1342(b)(1)(A).

14. *Id.* § 1370.

15. *Id.* § 1342(d)(2)-(4).

16. *Id.* §§ 1251-1387.

17. *State Water Resource Control Bd.*, 426 U.S. at 227-28 (1976).

18. 33 U.S.C. § 1323(a) requires that all branches of the federal government involved in any activity resulting in the discharge of pollution shall be subject to all federal, state, and local requirements.

19. *United States v. Puerto Rico*, 721 F.2d 832, 835 (1st Cir. 1983).

20. 33 U.S.C. § 1341(a)(2).

21. *Id.*

dations.²² In neither case, however, does the CWA explicitly state whether an affected state may enforce its water quality standards against an out-of-state discharger.

A deceptively similar question is addressed in *International Paper Co. v. Ouellette*.²³ The respondents in *Ouellette*, residents of Vermont, owned property on Lake Champlain, which forms part of the border between Vermont and New York. Respondents filed suit against petitioner, a discharger located in New York, in a federal Vermont court. Respondents based their action on Vermont's state nuisance law. On appeal, the Supreme Court held that "[t]he [CWA] pre-empts the common law of an affected State to the extent that the law seeks to impose liability on a point source in another state."²⁴ The court concluded that "the CWA precludes a court from applying *the law of an affected State* against an out-of-state source."²⁵ The holding in *Ouellette* does not, however, address the question of whether an affected state can regulate a point source located in another state by imposing its water quality standards on that state.

Another case that appears deceptively analogous is *Milwaukee v. Illinois*.²⁶ In *Milwaukee*, suit was brought by an Illinois citizen against municipal sewage treatment plants located outside the state. These plants discharged sewage into Lake Michigan. The plaintiff claimed that the municipal corporations' conduct constituted both a public and private nuisance under Illinois law.²⁷ The Supreme Court held, however, that Congress did not leave the formulation of federal water pollution control standards to the courts "through application of . . . indeterminate nuisance concepts and maxims of equity jurisprudence."²⁸ Instead, the Court determined, Congress has "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."²⁹ Again, however, the question of whether the CWA requires a discharger to comply with the water quality standards of an affected state was not answered. Thus, the holdings of

22. *Id.* § 1342(b)(5).

23. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

24. *Id.* at 500.

25. *Id.* at 494 (emphasis added).

26. *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

27. *Id.* at 310.

28. *Id.* at 317.

29. *Id.*

both *Ouellette* and *Milwaukee* fail to address the question faced by the *Oklahoma* court.

The *Oklahoma* court, faced with the task of determining whether a discharging state is required, under the CWA, to comply with the EPA-approved water quality standards of a downstream state, noted that "this [was] . . . an issue of first impression in the circuit courts."³⁰ Although the district court in *Champion v. EPA*³¹ had determined that nothing in the CWA would automatically require such compliance, the *Oklahoma* court noted that the *Champion* decision was subsequently vacated.³² As a result, the *Oklahoma* court concluded that "no state imposes its [water quality] standards on another state, but rather that the Clean Water Act mandates compliance with federal law, including the federally approved water quality standards of affected states."³³ The court arrived at this conclusion by examining the implementing regulations of the CWA and by interpreting the CWA as a whole.

Further, the court concurred with EPA's interpretation of its implementing regulations. EPA maintained that Arkansas, an out-of-state point source, must meet the water quality standards of Oklahoma, the downriver state.³⁴ The court stated that EPA's position was consistent with its CWA-implementing regulations. For example, 40 C.F.R. § 122.4(d) expressly provides: " 'No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.' "³⁵ In reviewing the CWA as a whole, the *Oklahoma* court placed emphasis on 33 U.S.C. § 1311(b)(1)(C), which provides:

In order to carry out the objectives of this chapter [i.e., to restore and maintain the chemical, physical, and biological integrity of the nation's waters] there shall be achieved . . . 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 (under authority pre-

30. *Oklahoma*, 908 F.2d at 602.

31. 648 F. Supp. 1390, 1396 (W.D.N.C. 1986), motion for withdrawal of mandate denied, 652 F. Supp. 1398 (W.D.N.C. 1987), judgment vacated by, 850 F.2d 182 (4th Cir. 1988).

32. *Oklahoma*, 908 F.2d at 602.

33. *Id.*

34. EPA maintained that Arkansas, an out-of-state point source, must meet the water quality standards of Oklahoma, the downriver state. *Id.* at 603.

35. *Id.* at 604 (citing 40 C.F.R. § 122.4(d)) (emphasis added).

served by section 1370 of this title) . . . or required to implement *any* applicable water quality standard established pursuant to this chapter.³⁶

Arkansas construed 33 U.S.C. § 1311 as merely a timing provision that does not explain on whom these more stringent standards are to be applied.³⁷ Further, Arkansas read 33 U.S.C. § 1370 as limiting the reach of any stricter standard to the confines of the state in which it is adopted.³⁸ The court, however, rejected Arkansas's construction of these statutory provisions.³⁹

Instead, the court held that "to ensure that the EPA-approved water quality standards in all states are 'met' or 'implemented,' it is 'necessary' to require dischargers to meet the applicable requirements of other affected states as well as those of the source state."⁴⁰ The court agreed with EPA's contention that Arkansas's construction of the CWA would render achievement of downstream water quality standards impossible in many instances or possible only by imposing a disproportionate burden on dischargers located in downstream states.⁴¹ The court maintained that this construction of the CWA would reward those dischargers located in upstream states and therefore encourage "pollution shopping."⁴²

Arkansas also attempted to rely on the holdings of *Milwaukee* and *Ouellette*. However, the court found that these cases were not factually or procedurally similar to the case at bar.⁴³ Oklahoma sought to ensure compliance with federal law, whereas the appellants in *Milwaukee* and *Ouellette* sought compliance of their respective state nuisance laws.⁴⁴ Nonetheless, Arkansas pointed to specific language in *Ouellette* stating that "an affected state only has an advisory role in regulating pollution that originates beyond its borders"⁴⁵ The *Oklahoma* court maintained, however, that "[e]ven the Court's broadly

36. *Oklahoma*, 908 F.2d at 604-05 (quoting 33 U.S.C. § 1311 (b)(1)(C)).

37. *Id.* at 605.

38. 33 U.S.C. § 1370 "is a savings clause [which] preserves the preexisting right of the states 'to set more restrictive standards than those set by the CWA.'" *Oklahoma*, 908 F.2d at 605.

39. *Oklahoma*, 908 F.2d at 605.

40. *Id.* at 606.

41. *Id.* at 607 (citing EPA Brief at 21).

42. *Id.* at 607.

43. *Id.*

44. *Id.*

45. *Id.* at 608 (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987)).

stated holdings were expressed in terms of 'a state-law claim concerning interstate water pollution.'"⁴⁶ Again, the court determined that the interpretation of *Ouellette* presented by Arkansas failed when the CWA was considered as a whole.⁴⁷ The court stated that the CWA "contains several mechanisms for ensuring that minimum water quality and pollution criteria will apply to all navigable waters of the United States,"⁴⁸ and in addition "requires the application of [the] best available control technology or [the] best practicable treatment to discharges of pollutants."⁴⁹ Thus, any EPA-approved standard adopted by a state becomes the "water quality standard for the applicable waters of that State" and is, therefore, federally enforceable.⁵⁰

To support its position, the court examined the notice requirements provided under the CWA.⁵¹ The court noted that 33 U.S.C. § 1342(d)(2) expressly states that EPA may object to the issuance of a permit where a permitting state fails to accept recommendations from an affected state or where the issuance of a permit would fall outside the guidelines of the CWA.⁵² The *Oklahoma* court also cited *Lake Erie Alliance for Protection of Coastal Corridor v. United States Army Corps of Engineers*, a case which determined that "[t]he purpose of the notice requirement is to enable a state whose water qualities may be affected by the proposed [discharge] an opportunity to insure that its standards will be complied with."⁵³

In addition, the court examined the "upset" regulation provided under 40 C.F.R. § 122.41(n),⁵⁴ which provides that technology-based effluent limitations may be exceeded in narrowly defined circumstances.⁵⁵ The court noted, however, that, in the final rule, EPA rejected an industry-proposed defense for the

46. *Id.* (quoting *Ouellette*, 479 U.S. at 487).

47. *Id.* at 609.

48. *Id.*

49. *Id.*

50. *Id.*

51. 33 U.S.C. § 1341(a)(2) provides: "[The licensing or permitting] agency, based on the recommendations of [an affected 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."

52. *Oklahoma*, 908 F.2d at 611.

53. *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1075 (W.D. Pa. 1981), *aff'd mem.*, 707 F.2d 1392 (3d Cir. 1983), *aff'd mem.*, 725 F.2d 668 (3d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

54. *Oklahoma*, 908 F.2d at 613.

55. 40 C.F.R. § 122.41(n) (1990).

violation of discharge permits because even during "upset" conditions, "permittees would need to do continuous monitoring on *all stream segments that may be affected*" to ensure that water quality standards were not violated.⁵⁶ Thus, EPA's determination that all potentially affected stream segments would need to be monitored reinforced its conclusion that the water quality standards of downstream states must be met.⁵⁷

Concluding its discussion of the statutory interpretation issue, the court looked to 33 U.S.C. § 1365(h). This section authorizes the governor of a state to sue EPA to enforce effluent standards where the violation occurs in another state but affects the waters of his state.⁵⁸ The court remarked that "[s]ection 1365 reminds us that, under the CWA, effluent limitations are not an end in themselves, but simply a means to an end — the desired water quality."⁵⁹ Further, the court noted that 33 U.S.C. § 1312 and its legislative history lack evidence of any intent of Congress to limit the scope of that section to the intra-state water quality effects of dischargers.⁶⁰

the statute's use of the term 'specific portion of the navigable waters' (like the Senate report's use of 'one reach of a waterway' and 'affected waters'), rather than language specifying waters of the source or permitting state, suggests that the section contemplates regulation of water quality without regard to state boundaries. Vesting authority in EPA, instead of in individual states, arguably suggests a similar intent.⁶¹

The *Oklahoma* court began its analysis of the issues presented in the case by stating that "no state 'imposes' its standards on another state, but rather . . . the [CWA] mandates compliance with federal law, including the federally approved water quality standards of affected states."⁶² Thus, the court implicitly accepted the holding of the Supreme Court in *Ouellette* that the CWA preempts state laws. This appears to be the correct interpretation of the CWA and the nature of water quality standards generally. Under 33 U.S.C. § 1313(c)(3), any standard adopted by the state and approved by EPA becomes the "water quality

56. *Oklahoma*, 908 F.2d at 613 (footnote omitted) (quoting 49 Fed. Reg. 37,998, 38,038 (1984)).

57. *Id.*

58. *Id.* at 614 (citing 33 U.S.C. § 1365(h)).

59. *Id.* at 614.

60. *Id.* at 615.

61. *Id.*

62. *Id.* at 602.

standard for the applicable waters of that State" and is therefore federally enforceable.⁶³ The *Oklahoma* court's argument succeeds under the premise that state-adopted water quality standards are federal laws under the CWA.

The extent to which these standards are truly state or federal is open to debate. In *Mianus River Preservation Committee v. Administrator, EPA*, the court stated that "it is indisputable that Congress specifically declined to attempt a preemption of the field in the area of water pollution legislation."⁶⁴ To hold otherwise would result in "problems going directly to the heart of our federal system."⁶⁵ Further, the court in *Montgomery Environmental Coalition v. Costle* stated that "[t]he state courts are the proper forums for resolving questions about state NPDES permits, which are, after all, questions of state law."⁶⁶ The role of federalism announced in these cases, qualified by the requirement of federal approval of state water quality standards and by the decisions of *Ouellette* and *Milwaukee*, is further qualified by the decision in *Oklahoma*. Federal approval, under *Oklahoma*, is based, *inter alia*, on the effects on water quality standards of neighboring states.

The ruling in *Oklahoma* will further the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁶⁷ Specifically, the court's decision requires Arkansas to comply with Oklahoma's water quality standards and thereby "restore" or at a minimum "maintain the chemical, physical, and biological integrity" of the Illinois River. In general, the court's decision also discourages pollution shopping. Dischargers will not be able to locate in states with less stringent standards without first considering whether their actions will affect the water quality of neighboring states. Although these advances take place at the expense of Arkansas, the court rightly found the balance to favor clean water. Had the court accepted Arkansas's position, *Oklahoma* would have been forced to accept further degradation of the Illinois River and the concomitant violation of its federally approved water quality standards.

63. 33 U.S.C. § 1313(c)(3).

64. *Mianus River Preservation Comm. v. Administrator, EPA*, 541 F.2d 899, 906 (2d Cir. 1986).

65. *Id.*

66. *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 579 (D.C. Cir. 1980) (quoting *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980)).

67. 33 U.S.C. § 1251(a).

By reading the CWA as a whole, the *Oklahoma* court concluded that the CWA requires discharging states to meet the water quality standards of all affected downstream states. The court's conclusion is consistent with the goals and the regulatory process of the CWA. Through the issuance of NPDES permits and the maintenance of federally approved water quality standards, a state in Oklahoma's position can protect the integrity of its waters. Whether this holding impinges on notions of federalism depends on whether one adopts a view from the perspective of Oklahoma or from the perspective of Arkansas. In this case, it is evident that Oklahoma prevailed at Arkansas's expense. On the other hand, an opposite determination would have allowed Arkansas to degrade Oklahoma's waters. If such a result threatens federalism, perhaps the *Oklahoma* court, seeking to preserve one of the nation's most fundamental resources, recognized the necessity of this expense.

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