

Arkansas v. Oklahoma: FORMALIZING EPA AUTHORITY TO MANDATE COMPLIANCE WITH AN AFFECTED STATE'S WATER QUALITY STANDARDS

In 1985, the city of Fayetteville, Arkansas, applied for a National Pollution Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA). Fayetteville requested the permit to discharge effluent from a sewage treatment plant into a stream that emptied into the Illinois River upstream from Oklahoma. The EPA issued the permit conditioned upon the Fayetteville plant's compliance with Oklahoma's EPA-approved water quality standards. Oklahoma's EPA-approved water quality standards prohibited degradation of the upper Illinois River. Oklahoma challenged the issuance of the permit, asserting that the effluent discharge violated Oklahoma's water quality standards. After a series of evidentiary hearings, an Administrative Law Judge (ALJ) upheld the EPA's issuance, finding that no "detectable" degradation of Oklahoma's water quality would result from the plant's effluent discharge.¹ Pursuant to the Federal Water Pollution Control Act (Clean Water Act or CWA),² Oklahoma and Arkansas appealed the ALJ's decision to the Tenth Circuit Court of Appeals.³ The Tenth Circuit reversed, ruling that the

1. In the first evidentiary hearing, the ALJ affirmed the EPA's issuance of a permit, finding that the permitted discharge would not have an "undue impact" on Oklahoma's waters. *Arkansas v. Oklahoma*, ___ U.S. ___, 112 S. Ct. 1046, 1051 (1992) (unanimous decision). On appeal of the ALJ's decision, the Chief Judicial Officer (CJO) remanded the case, holding that the "undue impact" test used by the ALJ was an improper standard. *Id.* at 1052. On remand, the ALJ held that no measurable violation of Oklahoma's water quality standards would result from granting the permit. *Id.* The CJO sustained the ALJ's decision to issue the permit. *Id.*

2. 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1990).

3. Appeal of a permit decision is directed to the circuit courts of appeal by the CWA:

Review of the Administrator's action . . . in issuing or denying any permit under section 1342 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is

CWA did not authorize a permit to be issued because the proposed point source would contribute to the deterioration of a waterway which already fell below applicable water quality standards.⁴ The Tenth Circuit considered it unimportant that the effluent would not detectably affect the river's water quality.⁵ A unanimous Supreme Court reversed, ruling: (1) that the EPA's issuance of the permit to Fayetteville was authorized by the CWA; and (2) that the EPA was entitled to "substantial deference" in its assessment of potential violations of Oklahoma's water quality standards. *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992).

In 1972, Congress enacted the CWA⁶ to establish procedures necessary "to restore and maintain the chemical, physical, and biological integrity of the [n]ation's water."⁷ The

directly affected by such action upon application by such person.

33 U.S.C. § 1369(b)(1).

Arkansas contended that the CWA did not require upstream point source dischargers to comply with a downstream state's EPA-approved water quality standards. Oklahoma averred that the ALJ erroneously concluded that the proposed discharge would comply with Oklahoma's water quality standards. *Arkansas*, 112 S. Ct. at 1052.

4. *Oklahoma v. EPA*, 908 F.2d 595, 634 (10th Cir. 1990), *rev'd sub nom.*, *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992). For a discussion of the Tenth Circuit's decision, see Steven J. Bushong, Note, *Upstream Pollution and Downstream Problems: Oklahoma v. EPA Makes a Splash in Interstate Water Pollution Disputes*, 63 U. COLO. L. REV. 233 (1992); James Siemens, Note, *Oklahoma v. EPA: Requiring Upstream Dischargers to Comply with Federally Approved Water Quality Standards of Downstream States*, 5 TUL. ENVTL. L.J. 329 (1991).

5. *Oklahoma*, 908 F.2d at 620.

6. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

7. 33 U.S.C. § 1251(a). The CWA states that it is a "[n]ational goal that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). Navigable waters are United States waters, including the territorial seas. *Id.* § 1362(7). Wetlands have been included under the CWA. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129-31 (1985). Underground water, however, is not navigable water. 2 LAW OF ENVIRONMENTAL PROTECTION § 12.05[1][a] (Sheldon M. Novick et al., eds.

two major methods by which the CWA protects water quality are effluent limitations and water quality standards.⁸ The EPA⁹ imposes effluent limitations on the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents"¹⁰ that a "point source"¹¹ may discharge into rivers or streams.¹² Water quality standards, on the other hand, establish a waterway's desired condition.¹³ These

1990).

For additional background on the CWA, see GOVERNMENT INSTITUTES, INC., *CLEAN WATER HANDBOOK*, (J. Gordon Arbuckle & Russell V. Randall eds., 1990); William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202 (1987); Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ENVTL. L. REP. 10,528 (1991); Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REF. 863 (1986); Mark Sagoff, *The Principles of Federal Pollution Control Law*, 71 MINN. L. REV. 19 (1986); James L. Thompson, Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656 (1987).

8. 33 U.S.C. §§ 1311, 1313, 1314. Water quality standards and effluent limitations prevent many individually compliant point sources from collectively reducing the quality of a waterway "below acceptable standards." *EPA v. California ex rel. State Water Resources Bd.*, 426 U.S. 200, 205 n.12 (1976).

9. In 1970, Congress established the EPA to enforce the CWA. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970).

10. 33 U.S.C. § 1362(11) (1988).

11. The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

12. For additional background on effluent limitations, see Richard Revesz, Comment, *Technology-Based Emission and Effluent Standards and the Achievement of Ambient Environmental Objectives*, 91 YALE L.J. 792 (1982).

13. 33 U.S.C. § 1313. Water quality standards are an amalgam of a waterway's use designation, such as recreation or industrial, and the quality criteria required to achieve the designated use. *Id.* § 1313(c)(2); see, e.g., *Mississippi Comm'n on Natural Resources v. Costle*, 625 F.2d 1269, 1271-72 (5th Cir. 1980) (providing an example of a water quality standard). For additional background on water quality standards, see Lawrence S. Bazel, Comment, *Water-Quality Standards, Maximum Loads, and the Clean Water Act: The Need for Judicial Enforcement*, 34 HASTINGS L.J. 1245 (1983).

standards are generally promulgated by the states.¹⁴ Nonetheless, federal regulations require states to base their water quality standards on "sound scientific rationale."¹⁵ The CWA then uses the state-defined water quality standards as a benchmark to judge the state's compliance with the CWA's mandate to protect the nation's waterways.¹⁶

The primary enforcement mechanism of the CWA is the NPDES.¹⁷ The NPDES requires point sources to obtain permits to discharge specific pollutants.¹⁸ Two NPDES permit systems exist under the CWA: (1) an EPA-administered federal program¹⁹ and (2) an EPA-approved state program satisfying federal requirements.²⁰ An NPDES permit may be obtained either from a state with an EPA-approved permit program, or from the EPA in a state without an EPA-approved state permit program.²¹

Congress vested the EPA with broad discretion to issue

14. States may only set forth water quality standards that exceed EPA standards. 33 U.S.C. §§ 1313, 1370. The EPA shall issue water quality standards when states decline to promulgate their own standards or when a state's water quality standards are rejected by the EPA. *Id.* § 1313(a)(3)(C), (b).

15. 40 C.F.R. § 131.11(a) (1991). It has been stated that the EPA has "the final voice on [a state water quality] standard's adequacy." *Mississippi Comm'n on Natural Resources*, 625 F.2d at 1275.

16. 33 U.S.C. § 1311(b)(1)(C). Achieving a state's water quality standards is a primary objective of the CWA. *See id.*

17. 33 U.S.C. § 1342. The NPDES has been termed the "cornerstone of the [CWA's] pollution control scheme." *Natural Resources Defense Council v. EPA*, 822 F.2d 104, 108 (D.C. Cir. 1987). For additional background on the NPDES, see Kristy A. Niehaus, *Clean Water Act Permitting: The NPDES Program at Fifteen*, 2 NAT. RESOURCES & ENV'T 16 (1987).

18. 33 U.S.C. §§ 1311(a), 1342(1). The CWA explicitly includes in the definition of a pollutant: "solid waste, incinerator residue, sewage, garbage, [and] sewage sludge." *Id.* § 1362(6).

19. 33 U.S.C. § 1342(a).

20. *Id.* § 1342(b). The state permit program is designed for "discharges . . . within its jurisdiction." *Id.* The means by which a state may obtain permit-issuing power is outlined in § 1342(b).

21. *Id.* § 1342(a). *See* Colburn T. Cherney & Karen M. Wardzinsk, *State and Federal Roles Under the Clean Water Act*, 1 NAT. RESOURCES & ENV'T 19 (1986).

NPDES permits²² and to approve state permit programs.²³ In 1973, the EPA instituted denial of permits "[w]hen the imposition of conditions [on the permit] cannot ensure compliance with the applicable water quality requirements of all affected states."²⁴ This EPA regulation formed the basis for enforcement of an affected state's water quality standards and applied to both EPA and state-approved NPDES permit programs.²⁵ The EPA's authority to enforce affected states' water quality standards against an out-of-state point source has not been expressly granted by the CWA. Moreover, the courts have not taken the opportunity to address the matter either.²⁶

The Court addressed the application of state law to an out-of-state point source in *International Paper Co. v. Ouellette*.²⁷ In *Ouellette*, Vermont citizens argued that a New York-based paper mill's effluent discharge into the New York side of Lake Champlain violated Vermont nuisance law.²⁸ The Court held that "[t]he [CWA] preempts state law to the extent that the state law is applied to an out-of-state point source."²⁹ Accordingly, the Court concluded that the law of the state where the point source is located was the only law applicable to an interstate discharge.³⁰ The Court also noted that public

22. 33 U.S.C. § 1342(a).

23. *Id.* § 1342(d). The EPA maintains veto power over state-issued permits. *Id.* § 1342(d)(2). See also Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983).

24. 40 C.F.R. § 122.4(d) (1992).

25. See *id.* § 123.25 (1992).

26. The Tenth Circuit noted that the issues presented were of "first impression" in the federal circuits. *Oklahoma v. EPA*, 908 F.2d 595, 602 (10th Cir. 1990); see *infra* note 34 and accompanying text.

27. 479 U.S. 481 (1987).

28. *Id.* at 483-84. Lake Champlain separates northeast New York State from northwest Vermont.

29. *Id.* at 500.

30. *Id.* at 487. For a discussion of the *Ouellette* case, see Randolph L. Hill, *Preemption of State Common Law Remedies by Federal Environmental Statutes: International Paper Co. v. Ouellette*, 14 ECOLOGY L.Q. 541 (1987); William J. Holmes, *Federal Preemption of State Law Using the Clean Water Act: A Comparison of International Paper Co. v. Ouellette and Oklahoma v.*

policy supported preventing Vermont from doing indirectly what it was precluded from doing directly, regulating an out-of-state point source.³¹

The Court granted certiorari to the noted case because of the "importance and novelty" of the Tenth Circuit's decision.³² Two issues concerned the Court's analysis: (1) the EPA's statutory authority to mandate compliance with an affected state's EPA-approved water quality standards,³³ and (2) the deference to be afforded to the EPA's determination of compliance with a state's water quality standards.³⁴

Absent a developed body of law,³⁵ the Court relied on the EPA's broad powers under the CWA to assess the EPA's authority to enforce an affected state's water quality standards against an out-of-state point source.³⁶ Citing congressional intent, the Court noted that Congress vested the EPA with broad power over all NPDES permits.³⁷ The Court concluded that the EPA's regulation enforcing an affected state's water quality standards against an out-of-state point source "was a perfectly reasonable exercise of the [EPA's] statutory discretion" under the CWA.³⁸ The Court reasoned that the EPA's enforcement of a state water quality standard was "wholly consistent" with the CWA's broad purpose of restoring and maintaining the nation's waterways³⁹ and constituted a "well-tailored means" of meeting a state's water quality standard.⁴⁰

The Court rejected Arkansas' contention that *Ouellette* prohibited the EPA from imposing an affected state's laws on

EPA, 34 A.F. L. REV. 191 (1991).

31. *Ouellette*, 479 U.S. at 495.

32. *Arkansas v. Oklahoma*, ____ U.S. ____, 112 S. Ct. 1046, 1052 (1992).

33. *Id.* at 1056.

34. *Id.*

35. See *supra* notes 29-30 and accompanying text.

36. *Arkansas*, 112 S. Ct. at 1056.

37. *Id.*; see *supra* notes 22-26 and accompanying text.

38. *Arkansas*, 112 S. Ct. at 1056.

39. *Id.*

40. *Id.*

an out-of-state point source.⁴¹ The Court indicated that *Ouellette* was based on the "plain language" of section 1342(b) of the CWA,⁴² and that *Ouellette*'s holding was limited to state-granted permits because section 1342(b) was limited to the same extent.⁴³

Finally, the Court dismissed the view that the EPA should not be given deference in assessing whether waters already in violation of water quality standards are being further deteriorated by a point source discharger.⁴⁴ The Court could find "nothing" in the CWA to support the Tenth Circuit's misplaced view.⁴⁵ The Court emphasized that such a reading of the CWA would reduce the nation's water quality by curtailing development of new facilities which could improve water quality conditions.⁴⁶ In reversing the Tenth Circuit decision, the Court concluded that substantial deference should be afforded to EPA determinations on water quality standards.⁴⁷

The Court held that the CWA empowers the EPA to enforce an affected state's water quality standards against an out-of-state point source.⁴⁸ This holding requires upstream point sources to maintain a downstream state's water quality standards. The decision allows states to restore the quality of their waterways by revising their standards without concern that their attempts could be thwarted by a point source discharge in an upstream state. The Court's decision comports with the CWA's purpose to "restore and maintain . . . the [n]ation's

41. *Id.* at 1056-57; see *supra* notes 27-31 and accompanying text.

42. *Arkansas*, 112 S. Ct. at 1046.

43. *Id.*; see *supra* note 20 and accompanying text. The Court stated that constraints imposed on an affected state do not limit the EPA from requiring compliance with an affected state's water quality standards. *Arkansas*, 112 S. Ct. at 1057.

44. *Id.* at 1057-58.

45. *Id.* at 1057. The Court noted that no party advanced the Tenth Circuit's interpretation of the CWA during administrative or judicial hearings on the matter. *Id.* at 1052.

46. *Id.* at 1058.

47. *Id.* at 1061.

48. See *supra* notes 36-41 and accompanying text.

waters.⁴⁹

The Court properly distinguished *Ouellette* from the noted case. In *Ouellette*, the Court feared enabling a state to regulate indirectly an out-of-state point source.⁵⁰ The EPA, however, must approve a state's water quality standards before enforcing the standards against an out-of-state point source.⁵¹ This requisite affirmative act by the EPA removes the indirect control an affected downstream state may have over an out-of-state point source.

The Court's decision recognizes that pollution is ignorant of state borders. Had the EPA not been permitted to regulate out-of-state point sources, point source dischargers would have been encouraged to engage in "pollution shopping."⁵² One may argue that pollution shopping is of little value to point source dischargers because water quality standards must be approved by the EPA. This view, however, ignores the fact that each state's water quality standards differ significantly.⁵³ Moreover, there is good reason to discourage pollution shopping. Encouraging point source dischargers to locate in their state results in some economic benefit to the state at the expense of having its waters fouled by a point source. A lowering of standards is not what Congress intended with the CWA.

In addition, the Court properly reversed the Tenth Circuit and rejected judicial activism under the CWA by

49. 33 U.S.C. § 1251(a).

50. See *supra* note 31 and accompanying text.

51. See *supra* notes 20-23 and accompanying text. This ensures that an inadequate state water quality standard would not be approved by the EPA, nor enforced against an out-of-state point source. See *supra* note 15 and accompanying text.

52. "Pollution shopping" is a term used by courts and commentators to characterize the location or relocation of a point source discharge to states with less stringent water quality standards, with the intent of avoiding another state's more stringent standards. See, e.g., *Oklahoma v. EPA*, 908 F.2d 595, 606; Van Putten & Jackson, *supra* note 7, at 871.

53. See, e.g., *Houck*, *supra* note 7, at 10,544 ("New York's chlordane criterion exceeds that of Michigan by 200 times; it is 1,500 times more lenient than that of Minnesota.").

deferring to EPA determinations of water quality.⁵⁴ Strict adherents to the environmental cause may argue that the Court's reversal of the Tenth Circuit contravenes congressional intent by allowing degradation of the nation's waterways.⁵⁵ The Court's ruling, however, does not preclude congressional changes to modify the deference EPA water quality determinations are given in enjoining such discharges. Because Congress infrequently corrects a judicial misinterpretation of a statute,⁵⁶ it is preferable for the Court to defer to Congress, rather than risk misinterpreting the statute's prescribed degree of EPA deference.

The Court's decision benefits predominately downstream states⁵⁷ by allowing these states to regain control over the quality of their waterways through EPA enforcement of their water quality standards. Accordingly, water quality in predominately downstream states is no longer hostage to the unilateral actions of upstream point source dischargers. The Court's decision by itself does not improve water quality; it simply facilitates improvement. Thus, the task of improving the quality of the nation's waterways remains vested with the states, which may define and implement ever tougher water quality standards.

In conclusion, the Court properly rejected judicial

54. See *supra* notes 44-47 and accompanying text.

55. See *supra* note 7 and accompanying text.

56. Thomas R. Marshall, *Policy Making and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493 (1989) (presenting results of an empirical study that concludes the Court rarely is overridden by Congress); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) ("[M]ost Supreme Court decisions never come to the attention of Congress."); Richard A. Paschez, Note, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143-51 (1992) (noting that from 1804 to 1990 Congress has passed only 122 statutes which have modified or discredited the Supreme Court's statutory, common law and constitutional rulings).

57. The author is using the term "predominately downstream states" to refer to states that are on the receiving end of the nation's waterways. This definition includes such states as Louisiana and Texas, and excludes such states as Minnesota and Idaho.

activism by invalidating the Tenth Circuit's expansive view of the CWA. Concurrently, the Court properly held that the CWA provides statutory authority for the EPA to enforce a downstream state's water quality standards against an out-of-state point source discharger. The Court's holding protects downstream states' water quality and acknowledges that water pollution does not observe state lines. By protecting a downstream state's water from out-of-state point source dischargers, the Court facilitates achievement of the CWA's purpose.⁵⁸

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58. See *supra* note 7 and accompanying text (addressing the goals of the CWA).