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The States Square Off in Arkansas v. Oklahoma - and the Winner Is ... The EPA

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THE STATES SQUARE OFF IN *ARKANSAS V. OKLAHOMA*—AND THE WINNER IS . . . THE EPA

I. INTRODUCTION

The battle between the states that made its way through the Tenth Circuit to the United States Supreme Court began innocently enough when the City of Fayetteville, Arkansas, proposed discharging effluent from its planned sewage plant into a local waterway that just happened to flow into the waters of the state of Oklahoma, thirty-nine miles downstream. The Supreme Court's ruling in *Arkansas v. Oklahoma*[1] leaves both state parties dissatisfied and confused. Arguably, Oklahoma should be content with the Court's requirement that the Arkansas emissions comply with Oklahoma's state-set, federally-approved water quality standards.[2] But the Oklahoma appellants[3] contend any ruling that upholds Fayetteville's National Pollutant Discharge Elimination System (NPDES)[4] permit contravenes Oklahoma's efforts to protect the scenic Illinois River.[5] Arkansas, the apparent victor with permit in hand, remains displeased and insists the decision could interfere with Arkansas' free use of its state waterways.[6] Arkansas no longer has the degree of control over the river necessary to allow development at Arkansas' discretion. Industrial operations on the river will necessarily be limited by Oklahoma's water quality concerns. While the victor in this instance, Arkansas' fear of some future application of Oklahoma's stringent water quality standards may be warranted. Oklahoma state Senator David Bo-

1. 112 S. Ct. 1046 (1992) [hereinafter *Arkansas*].

2. *Id.* at 1057.

3. The State of Oklahoma, Oklahoma's Scenic Rivers Commission and Pollution Control Coordinating Board, and Save the Illinois River (STIR).

4. 33 U.S.C. § 1342 (1988) (requires a National Pollutant Discharge Elimination System permit for the discharge of any pollutant).

5. OKLA. STAT. tit. 82, § 1452(b)(1) (1990). Oklahoma's antidegradation policy is set forth in Oklahoma Water Quality Standards § 3, appended to State of Oklahoma v. Environmental Protection Agency, 908 F.2d 595, 635 (10th Cir. 1990), *rev'd*, 112 S. Ct. 1046 (1992). The section provides that "[n]o degradation shall be allowed in high quality waters which constitute an outstanding resource." Protected waters include designated "Scenic Rivers". Anticipating improved water quality, the standard mandates "no degradation of such improved waters shall be allowed." *See also* Joint Brief-in-Chief of Petitioners/Appellants, The State of Oklahoma, Oklahoma Scenic Rivers Commission and Pollution Control Coordinating Board and STIR, State of Oklahoma v. Environmental Protection Agency, 908 F.2d 595 (10th Cir. 1990) (No. 89-9503, No. 89-9507, No. 89-9516), *rev'd*, 112 S. Ct. 1046 (1992) [hereinafter Tenth Circuit Joint Brief-in-Chief of Petitioner/Appellants].

6. Joint Answer Brief and Brief-in-Chief of the State of Arkansas, The Arkansas Dept. of Pollution Control Ecology, The City of Fayetteville, Arkansas, and the Beaver Water District, at 38-42, 45-47, State of Oklahoma v. Environmental Protection Agency, 908 F.2d 595 (10th Cir. 1990) (No. 89-9503, No. 89-9507, No. 89-9516), *rev'd*, 112 S. Ct. 1046 (1992) [hereinafter Tenth Circuit Answer of Respondent Arkansas]; Randy Lilleston, *Arkansas, Oklahoma Argue in High Court Over River Issue*, ARKANSAS DEMOCRAT-GAZETTE, December 12, 1991, at 1B (quoting Arkansas Attorney General, Winston Bryant, "[i]f [applying Oklahoma's water quality standards extratorritorily] were allowed, 'it would create an economic morass' ").

ren recently advanced Oklahoma's assault by initiating legislation to designate the Illinois a national Scenic River.[7] If approved, the Illinois River would be protected by the statutory prohibition on any department or agency of the United States' recommendation or authorization of water resource projects that would have a "direct and adverse" affect on the waterway.[8] The battle continues.

To the state parties' dissatisfaction, the Environmental Protection Agency (EPA) emerged triumphant, its interpretation of both the facts and the law of the case firmly intact. While this case allowed the Court to answer what water quality standards apply to pollution flowing interstate, more was at stake. Deciding the case required the Court to address the implicit questions about the judiciary's role in administrative review and agency deference. Although volumes of data supported each state's argument, the Supreme Court cast its vote in favor of neither, choosing instead to reaffirm the potent doctrine of agency discretion.[9] The familiar ring of the *Arkansas v. Oklahoma* decision is not coincidental—it is the progeny of Justice Stevens, author of *Chevron v. Natural Resources Defense Council*,[10] a decision now synonymous with the notion of agency deference.[11]

This Comment analyzes *Arkansas v. Oklahoma* in four different parts. Part II provides the background necessary to evaluate the decision, including its common law roots, statutory enactments, questions about federalism and the policy of agency discretion. Part III considers the issues decided, and the underlying Supreme Court rationale. Part IV evaluates the economic effects provoked by the holding, and questions the policy underpinning the decision. The Comment focuses on the effect *Arkansas v. Oklahoma* will have on future conflicts similar in nature, concluding that the ruling creates a hierarchy of disincentives in the assault on environmental problems. *Arkansas v. Oklahoma* discourages state attempts to attack pollution at the grass roots level, discourages critical judicial review of agency policy and most tragically provides no incentive to the polluter to reduce degradation.

Arkansas v. Oklahoma perpetuates the existing command and control

7. *Boren Pushes Illinois River Protection Bill*, DAILY OKLAHOMAN, July 2, 1992, at 15. If designated a national scenic river the Illinois River would be protected under the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1988), which is dedicated to the preservation and improvement of affected waters.

8. 16 U.S.C. § 1278 (1985 & Supp. 1992).

9. *Arkansas*, 112 S. Ct. at 1060-61. "If the Court of Appeals had been properly respectful of the Agency's permissible reading of the Act and the Oklahoma standards, the court would not have adjudged the Agency's decision arbitrary and capricious." *Id.*

10. 467 U.S. 837 (1984).

11. *E.g.*, Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 296 (1986) (*Chevron* not only reaffirmed the deference principle but buttressed it in several ways: "[i]n *Chevron*, then, deference meant that a reviewing court not only must consider the agency's interpretation, but must give controlling weight to that interpretation"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (provides an insightful look at the Court's disposition of agency discretion cases since *Chevron*).

regulation system,[12] a system which often fails to allocate pollution costs[13] to the responsible polluting parties. The command and control system allows top-down EPA regulation through application of a plethora of individual restrictions, often promulgated with little or no economic consideration. Considerable commentary has been devoted to pointing out economic inefficiencies continued under the command and control system.[14] This Comment also gives attention to the alternatives available to revamp the system, which would result in economically sound regulation and reduce costly litigation.[15]

II. BACKGROUND

Arkansas v. Oklahoma is best understood when viewed in light of the Court's historic handling of interstate pollution disputes, both before and after enactment of a national water pollution policy. Prior to the adoption of the Federal Water Pollution Control Act Amendments of

12. *See* Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733, 736 (1990). Babich defines the command and control system as detailed regulations used to prescribe actions of the regulated community to dictate behavior. "Command-and-control regulation presupposes the government's ability to: (1) identify environmental problems and set rational priorities; (2) develop regulations that provided technologically workable and politically viable solutions; and (3) enforce those regulations effectively. Unfortunately, in the area of environmental protection none of these presuppositions has proven true." *Id.*

13. Unallocated pollution costs will sometimes be referred to as externalities. *See* FREDERICK R. ANDERSON, ET AL., ENVIRONMENTAL PROTECTION: LAW & POLICY 29 (1990). "[M]any environmental resources are still unpriced and remain outside the market. . . . [V]aluable environmental assets . . . are 'used up', but their use is not accurately reflected in the price system. Economists describe the[se] harms as . . . 'externalities', because the burden of the resources consumed falls on society at large, not just on the user who actually consumes them." *Id.* (quoting FREDERICK R. ANDERSON, ET AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 3-4 (1977)).

14. *See generally* Babich, *supra* note 12, at 749-62. Babich criticizes the current lack of responsibility in cleaning up the environment and advocates use of liability-based statutes to supplement regulatory programs, involving the private sector in improvement efforts. Babich also lauds success of liability-based programs such as CERCLA under which imposition of strict, joint and several liability induces businesses to invest in pollution reduction. *Id. See also* Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1984-85) (pointing out the deficiencies in the best available technology (BAT) approach to regulation and proposing a market based permit system as an alternative).

15. Ackerman & Stewart, *supra* note 14, at 1341. Ackerman and Stewart advocate a marketable permit system. Given that an acceptable level of pollution exists, the least costly allocation of pollution control, saving billions of dollars annually, would be to allow polluters to buy and sell each other's permits creating powerful financial incentives for those who can clean up most cheaply. *Id. See also* Robert W. Hahn & Robert N. Stavins, *Incentive-based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1 (1991) (good discussion of commonly advocated incentive-based pollution reduction plans, including: pollution charges based on direct taxation on emissions; marketable permits which allow the allotting of acceptable pollution in the form of permits to take advantage of each firm's differential cost of pollution control; deposit-refund systems which implement surcharges on recyclable items to discourage illegal dumping; removal of market barriers to allow free trade, facilitating least cost abatement; and elimination of government subsidies that allow excessive resource waste); T.H. TIETENBERG, EMISSIONS TRADING, AN EXERCISE IN REFORMING POLLUTION POLICY (1985) (cites EPA's successful reform allowing for limited free trade of emission credits to more efficiently reduce pollution).

1972,[16] federal courts[17] relied on a developing body of federal common law to address conflicts connected with the interstate flow of pollution.[18] As industrial development advanced and water pollution became a national concern, the federal common law was supplanted by legislation designed to protect national interest in navigable waterways.[19]

A. *Common Law Actions*

Disputes over superior rights to interstate waterways are not new to our legal system.[20] As our nation became more industrialized, litigation evolved from debate over riparian and appropriation rights to disputes concerning water quality.[21]

A trilogy of decisions handed down in the dispute between the City of Milwaukee and the State of Illinois over sewage discharge into Lake Michigan historically tracks the Courts' handling of interstate water pollution actions. In *Illinois v. Milwaukee* (*Milwaukee I*),[22] the State of Illinois tried to invoke the Supreme Court's original jurisdiction to decide a common law nuisance action brought to enjoin Milwaukee from dumping sewage into Lake Michigan. Concluding the nuisance action fell within the purview of specially created federal common law, the Court explained the need for a body of federal common law in very limited circumstances where no forum existed to settle the disputes outside of the federal courts.[23] Bias toward protecting state interests, whether that of the emitter or receiver state, undermined the effectiveness of actions brought in state court. In *Milwaukee I* the Court explained the inherent difficulty in deciding the proper forum for interstate pollution disputes, outlining the unique development of the federal common law governing interstate pollution, and the resulting struggle to create appropriate legal remedies.[24] However, the Supreme Court refused to assert jurisdiction over the dispute, remanding the case to the district court for

16. The Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 72 U.S.C.C.A.N. 1368 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

17. U. S. CONST. art. III, § 2, cl. 2 (federal courts have jurisdiction "In all Cases . . . in which a State shall be Party"); 28 U.S.C. § 1251(a)&(b)(3) (1988).

18. *See* 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW (MB), § 3.03(1)(a) (1992); *see also* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) [hereinafter *Milwaukee I*] (historic development of federal common law regarding water pollution).

19. *Arkansas*, 112 S. Ct. at 1053; City of Milwaukee v. Illinois, 451 U.S. 304, 325-26 (1981) [hereinafter *Milwaukee II*]; *see also* Maria V. Maurasse, 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 (1991) (argues federal common law is still viable in interstate pollution disputes).

20. *See generally* 1 GRAD, *supra* note 18, at §§ 3.01[1][a]-[d] (explains historic development of water rights law since the early nineteenth century).

21. *Id.* at 3.02[b].

22. 406 U.S. 91 (1972).

23. *Id.* at 107. The Supreme Court relied heavily on Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), for the controlling principal that, "the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law." *Milwaukee I*, 406 U.S. at 100 (quoting *Pankey*, 441 F.2d at 240).

24. *Milwaukee I*, 406 U.S. at 97-98.

resolution.[25]

Shortly after *Milwaulkee I* was decided Congress adopted the Federal Water Pollution Control Act (FWPCA) amendments of 1972.[26] While aware of that pending pollution control legislation,[27] the Court concluded the remedies to be provided by Congress "are not necessarily the only remedies available,"[28] suggesting a concurrent role for legislative and judicial relief. After remand, the *Milwaukee I* action traveled from the district court through the Seventh Circuit Court of Appeals, making its way to the Supreme Court in 1981 when the Court decided *Milwaukee v. Illinois* [*Milwaukee II*].[29] Influenced by the enactment of the 1972 FWPCA amendments, also known as the Clean Water Act (CWA),[30] the Court held "establishment of a comprehensive regulatory program supervised by an expert administrative agency" displaced the role of federal common law in the nuisance action.[31] Consequently, the adversely affected parties' options were limited to appeal under the statutory scheme.

Despite the verdict, consensus on the handling of interstate water disputes remained elusive.[32] Justice Blackmun, writing on behalf of the three party dissent in *Milwaukee II*, was not convinced that the FWPCA solved the interstate pollution problem.[33] Blackmun argued that federal common law could complement the statutory scheme and should not be automatically displaced.[34]

After remand, Illinois, with limited legal alternatives, filed a state common law nuisance action in federal district court in the state of Illinois. When the dispute reached the Seventh Circuit Court of Appeals (*Milwaukee III*),[35] the court ruled that *Milwaukee I* and *Milwaukee II* decisions precluded a state common law nuisance action, unless specifically

25. *Id.* at 108.

26. Pub. L. 92-500, 86 Stat. 816, 72 U.S.C.C.A.N. 1368 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)); *see also Milwaukee II*, 451 U.S. 304, 310 (1981) (FWPCA was adopted five months after the *Milwaukee I* decision).

27. *Milwaukee I*, 406 U.S. at 107 ("It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.").

28. *Id.* at 103.

29. 451 U.S. 304 (1981).

30. *Id.* at 317-18 (the Court explicitly points to the legislative history of the amendments showing Congressional intent, emphasizing that "[n]o Congressman's remarks on the legislation were complete without . . . reference to the 'comprehensive' nature of the Amendments.").

31. *Id.* at 317.

32. *See, e.g., id.* at 332-54 (Blackmun, Marshall, Stevens, JJ., dissenting).

33. *Id.* at 333 (Blackmun, Marshall & Stevens, JJ., dissenting) ("Because I believe that Congress intended no such extinction [of federal common law remedies], and surely did not contemplate the result reached by the Court today, I respectfully dissent.").

34. *Id.* at 334 (An " 'automatic displacement' [of federal common law] is inadequate in two respects. It fails to reflect the unique role federal common law plays between one State and the citizens or government of another . . . [and] it ignores this Court's frequent recognition that federal common law may complement congressional action."); *see also* Maurrasse, *supra* note 19, at 1179-87.

35. City of Milwaukee v. Illinois, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) [hereinafter *Milwaukee III*].

provided for by the FWPCA.[36] The Milwaukee controversy ended without consideration of the merits following years of litigation and two Supreme Court decisions.

The controversy over the availability of state common law nuisance actions under the CWA, which the amended FWPCA, was addressed by the Supreme Court in *International Paper Co. v. Ouellette*.[37] A group of Vermont property owners filed a common law nuisance action in Vermont District Court, seeking damages and injunctive relief from International Paper Company's (IPC) practice of dumping paper by-products into Lake Champlain.[38] Dumping occurred in New York, but the pollution migrated to the Vermont lake. In 1987, the Court concluded the CWA did not preclude state common law actions, provided that the action is brought under the laws of the emitter state.[39] The decision did little to relieve the downstream states' dilemma, as a source's emissions presumably comply with the emitter state's regulations. The Court went on in *Ouellette* to describe the role of the downstream state as subordinate, a rationale heavily relied upon by Arkansas in *Arkansas v. Oklahoma*.[40]

The *Ouellette* Court's unanimous ruling that state common law actions were available did not mean the Court agreed on which state's law to apply.[41] A sharp split of opinion appeared in Justice Brennan's partial dissent which argued parties should be allowed to bring a state nuisance action in either the emitter or downstream state, using existing conflict of law rules to determine which state's law should apply.[42]

These decisions expose the Court's difficulty in fashioning equitable relief in interstate pollution disputes and in determining the proper forum for such disputes. The lack of unanimity about the effect of the CWA on interstate pollution conflicts indicates why no clearly distilled precedent existed prior to *Arkansas v. Oklahoma*.

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36. *Id.* at 411. The Seventh Circuit reversed and remanded the action concluding the FWCPA does not contemplate application of the law of the state receiving the waste, in this case, Illinois. *Id.* at 414.

37. 479 U.S. 481 (1987).

38. *Id.* at 484.

39. *Id.* at 498-99. The Court explained the two sections of the CWA comprising the "savings clause" which preserve the right of an individual to bring an action thereunder, 33 U.S.C. §§ 1365(e) & 1370 (1988), "pre-empts state law to the extent that the state law is applied to an out-of-state point source." *Ouellette*, 497 U.S. at 500.

40. *Id.* at 494-99; *see also* Tenth Circuit Answer of Respondent Arkansas, *supra* note 6, at 35, 40-43, 45, 46.

41. *Ouellette*, 497 U.S. at 504-07. *Ouellette* was a 5-3 opinion with Brennan, Marshall, Blackmun, JJ., concurring in part and dissenting in part: "I find that the Act's plain language clearly indicates that Congress wanted to leave intact the traditional right of the affected State to apply its own tort law when its residents are injured by an out-of-state polluter." *Id. See also* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 197 (1985) (preemption of state common law remedies is inconsistent with congressional intent). *Contra*, Chicago Park Dist. v. Sanitary Dist. of Hammond, 530 F.Supp. 291 (N.D. Ill. E.D. 1981) (state law claims against out-of-state dischargers are pre-empted).

42. *Ouellette*, 479 U.S. at 501-02 (Brennan, Marshall, Blackmun, JJ., concurring in part and dissenting in part) ("The Act provides no support for deviation from well-settled conflict-of-law principals.").

B. *The Clean Water Act*

A two-year study conducted by the United States Senate Committee on Public Works, concluded in 1972, revealed dismal progress in the nation's efforts to abate water pollution.[43] Following the study, Congress adopted the FWPCA amendments of 1972 with "the objective . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters".[44] Resolve to abate pollution was apparent in both the Committee report and resulting legislation[45] which states, "the Committee believes it is important to clarify this point: No one has the right to pollute."[46] Congress amended the Act in 1977 and retitled it the Clean Water Act (CWA).[47] The touchstone of the 1972 amendments is the creation of the National Pollutant Discharge Elimination System (NPDES) permitting scheme.[48]

The NPDES permitting program makes the discharge of effluent into navigable waterways illegal in the absence of an approved permit.[49] Power to issue NPDES permits either rests with states that have enacted a federally approved permitting program, or with the EPA, in the absence of an EPA-approved state program.[50] Success in eliminating pollution is then measured by the ambient water quality in areas affected by the permitted discharge.[51] The CWA provides for concurrent federal and state authority over waterways, expressly preserving states' rights to "adopt or enforce" standards or limitations on pollution discharge.[52] Adoption of water quality standards remains in the hands of individual state governments, acknowledging state sovereignty and each state's intimate knowledge of its own natural resources.[53] The CWA respects state soveriegnty by allowing each state to adopt water quality standards more stringent than the minimums required by the EPA.[54] The EPA Administrator retains authority to block state issued permits that fail to consider the effect permitted discharge may have on a downstream state.[55]

43. S. REP. No. 414, 92d Cong., 2d Sess. 7 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

44. 33 U.S.C. § 1251(a) (1988 & Supp. II 1990).

45. *Id.*

46. S. REP. No. 414, *supra* note 43, at 3709.

47. 33 U.S.C. §§ 1251-1387 (1988 & Supp. I 1989 & Supp. II 1990).

48. 33 U.S.C. § 1342 (1988).

49. *Id.* § 3709; *see also* 33 U.S.C. § 1311(a) (1988).

50. 33 U.S.C. § 1342 (1988).

51. *Id.* § 1313 (1988); *see also* S. REP. No. 414, *supra* note 43, at 3675.

52. S. REP. No. 414, *supra* note 43, at 3675 ("Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries."); *see also* District of Columbia v. Schramm, 631 F.2d 854, 860 (D.C. Cir. 1980) (where state permits are concerned, the managers will "look for and expect State and local interest, initiative, and personnel to provide a much more effective program than that which would result from control in regional offices of the [EPA].").

53. 33 U.S.C. § 1370 (1988).

54. *Id.* ("such state . . . may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent" than the federally approved standards); *see also* United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977) (state limitations supercede less stringent federal limitations adopted pursuant to FWCPA).

55. *Id.* § 1342(b)(3) & (d)(2).

States affected by a proposed NPDES permit are admonished to voice their objections prior to permit issuance.[56] Statutorily required hearings provide the forum for dissent.[57] After a permit hearing, "[s]uch agency, based upon the recommendation of such State, the Administrator, and upon any additional evidence . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."[58]

After hearings in Arkansas regarding the Fayetteville plant application, the EPA concluded that an integrated reading of several CWA provisions prescribed that effluent discharged under an NPDES permit must conform with the downstream state's water quality standards.[59] Both the Supreme Court and the Tenth Ciruit adopted this interpretation.[60]

C. *Federalism and federal-state tension under the CWA*

The CWA mandates a partnership between the federal and state government.[61] Compelling language indicates the importance of the states' role:

> It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources and to consult with the Administrator in the exercise of his authority under this chapter.[62]

Since the CWA operates without reference to state boundaries, a pollution problem affecting two states invokes notions of federalism and state sovereignty. The CWA does not clearly resolve the tension between federal legislation as the "supreme Law of the Land"[63] and state autonomy to protect its waterways for the health and safety of its constituants.[64]

Vesting the states with a major role in deciding water resource allo-

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56. *Id.* § 1341(a)(2).

57. *Id.*

58. *Id.*

59. *See id.* §§ 1341, 1342, 1362; *see also* Oklahoma v. Environmental Protection Agency, 908 F.2d 595, 609-15 (10th Cir. 1990) [hereinafter *Oklahoma*] (Tenth Circuit held the EPA reading of 33 U.S.C. §§ 1311-1314, 1341, 1342, 1365 & 1370 to require compliance with affected downstream states' federally approved water quality standards was reasonable).

60. *Arkansas*, 112 S. Ct. at 1056; *Oklahoma*, 908 F.2d at 604.

61. SEN. REP. No. 414, *supra* note 43, at 3675 ("The [1972] legislation will restore Federal-State balance to the permit system.").

62. 33 U.S.C. § 1251(b) (1988).

63. U.S. CONST. art. VI, cl. 2.

64. Detailed consideration of constitutional law issues implicit in the *Arkansas* ruling are beyond the scope of this comment. Brief consideration of congressional delegation is addressed in text accompanying notes 61-74, *supra*. For a more detailed discussion see Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323, 335-43 (1987), calling for reconstitutive strategies of regulation to counteract addiction "to federal rules and orders that attempt to minutely prescribe conduct throughout our complexly differentiated society".

cation is a natural offshoot of the nation's historic water law development.[65] State control of water allocation and use was a basic tenant of frontier expansionism.[66] When the CWA was enacted to coordinate pollution abatement efforts, however, Congress encroached on the long-standing policy of state self-determination in water allocation and protection. Intervention into this province by the federal government should arguably occur only because there exists an overriding federal concern to protect navigable waterways.[67]

The federal government's intrusion into this realm evokes little uproar when disputes are strictly intrastate.[68] The CWA merely ensures that each state observe minimally acceptable federal pollution standards.[69] When the dispute crosses state lines, however, the federal government's role becomes more pronounced. The inherent federal-state conflicts are exacerbated when the relative interests of two or more states must be considered in the decision making process.[70]

An unusual application of federalism arises when state statutes are promulgated pursuant to an overarching federal regulation.[71] State-enacted, federally-approved water quality standards take on a federal essence,[72] as each state's standards are not preempted, but rather adopted by the federal government.[73] The question then remains whether adoption by the EPA evokes simultaneous disregard for the underlying state concern prompting implementation of the original standards. The *Arkansas v. Oklahoma* decision suggests such a position.[74] The response this position elicits from each state is evident. Part IV of this Comment

65. *See* D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses; The History of Conflict, the Prospects for Accomodation*, 21 ENVTL. L. 1 (1991); Gregory J. Hobbs, Jr. & Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. COLO. L. REV. 841, 857 (1989) ([I]n the mid-nineteenth century as the West was being settled . . . the United States Congress, through a series of statutes, severed the waters of the United States from the public lands" and deferred to the states' for allocation of water and the creation and administration of water rights.)

66. *See* Bell & Johnson, *supra* note 65.

67. *See* Hobbs & Raley, *supra* note 65, at 845-55 (1977 Clean Water Act is an exercise in fundamental federalism); Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607 (1985) (Congressional power limiting state authority often taken at expense of the state).

68. Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269 (5th Cir. 1980). In *Mississippi Comm'n on Natural Resources*, one of the few cases on disputed intrastate standards, the State of Mississippi lost its challenge against the EPA mandate that Mississippi comply with stricter federal water quality standards. *Id.*

69. 33 U.S.C. § 1251 (1988).

70. *See, e.g., Arkansas*, 112 S. Ct. 1046 (1992); Pierce, *supra* note 67, at 646-61 (model for deciding federalism disputes).

71. *See, e.g., Arkansas*, 112 S. Ct. at 1059.

72. *Id.* ("at least insofar as they affect the issuance of a permit in another state, the Oklahoma standards have a federal character").

73. *See generally id.*; *see also* S. REP. No. 414, *supra* note 43, at 3672. "The States have first responsibility for enforcement of their standards. When approved by the [EPA], however, the standards for interstate navigable waters become Federal-State standards." *Id.*

74. *Arkansas*, 112 S. Ct. at 1059 ("[T]he Oklahoma standards have a federal character, the EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference.").

addresses the effect this evident tension may have on future state pollution abatement efforts.

D. *Agency Deference*

The Administrative Procedure Act (APA)[75] governs the review of agency rulings on appeal. Absent procedural defect, or clear frustration of legislative intent, courts are called on to uphold agency decisions not arbitrary or capricious or otherwise in violation of the law.[76]

Despite criticism by commentators,[77] the scope of agency deference has expanded through a series of decisions rendered by the Supreme Court,[78] most notably, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.*[79] Justice Stevens, for the majority,[80] explained in *Chevron* the limited judicial role in review of agency action.[81] The Court enunciated a two-step analysis to review agency decisions. Initially, the Court looked at whether "Congress has directly spoken to the precise question at issue."[82] If congressional intent is clear, a court merely compares the agency ruling against the clear intent of the statute, giving "effect to the unambiguously expressed intent of Congress."[83] Even if congressional intent is difficult to discern, agencies have the latitude to fill legislative gaps.[84] Secondly, if the statute is succeptable to different interpretations because the statute itself is "silent or ambiguous with respect to the specific issue",[85] a court must respect and abide by the agency's reasonable interpretion.[86] Deference to the agency interpretation ensures a court will not substitute its judgment for that of an agency empowered

75. 5 U.S.C. §§ 701-706 (1988 & Supp. II 1990).

76. *Id.* § 706(2)(a). Under § 706(2) of the APA, agency decisions can be set aside on limited grounds if the decision is (a) arbitrary or capricious or an abuse of discretion, (b) contrary to constitutional right, power or privilege, (c) in excess of statutory jurisdiction, authority or limitations, (d) without observance of procedure required by law, (e) unsupported by substantial evidence, or (f) unwarranted by the facts. *Id.*

77. *See generally* Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109 (1991) (explaining different strategies in attacking agency decisions, with admitted limited success); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990) (explaining agencies' threshold defense of unreviewability); Rodney A. Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472 (1984) (attacking permissiveness in agency deviation from self-imposed rules).

78. *E.g.*, Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443 (1978); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

79. 467 U.S. 837 (1984).

80. Rehnquist, O'Connor and Marshall, JJ., took no part in the decision.

81. *Chevron*, 467 U.S. at 865 ("[T]he Administrator's interpretation . . . is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.").

82. *Id.* at 842.

83. *Id.* at 843.

84. Morton v. Ruiz, 415 U.S. 199, 231 (1974). Although *Morton* is long cited for its "gap-filling" proposition, the *Morton* Court rejected the BIA interpretation of the gap to be filled.

85. *Chevron*, 467 U.S. at 843.

86. Chemical Mfrs. Ass'n v. Natural Resources Defence Council, 470 U.S. 116, 125 (1985); *Chevron*, 467 U.S. at 843-46.

with administering national policy.[87] Underlying this premise is the notion the agency is democratically accountable for its decisions, while courts possess no constituency.[88]

From this vantgage, it is no surprise Justice Stevens took the opportunity in *Arkansas v. Oklahoma* to reinforce the *Chevron* doctrine of agency deference.[89] In *Arkansas v. Oklahoma*, Justice Stevens quickly pointed out that the Tenth Circuit broke with precedent, severing the judicial limb on which the Tenth Circuit was seated.[90]

III. *ARKANSAS V. OKLAHOMA*

A. *Facts*

In July, 1985, the City of Fayetteville, Arkansas, proposed discharging effluent from a planned sewage treatment plant into Mud Creek, a tributary of the Illinois River.[91] The Illinois flows, in turn, into the state of Oklahoma approximately thirty-nine miles downstream from the Fayetteville plant.[92] Prior to commencing operations, Fayetteville applied for an NPDES permit in accordance with the rules and regulations set forth in the CWA for EPA-administered permits.[93] Approval of the permit would have allowed approximately one-half of the plant's total 12.2 million gallons of estimated discharge to flow into Oklahoma on a daily basis.[94]

On August 8, 1985, the EPA conducted the first of several permit hearings.[95] Oklahoma objected to the permit, concerned about the effect the effluent may have on the Illinois River.[96] Already designated a state scenic river, the Illinois River was afforded extensive protection under Oklahoma's state Scenic Rivers Act.[97] Over Oklahoma's protests, the permit was signed and issued by the EPA on November 5, 1985, drawing the battle lines that would capture national attention.[98]

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87. *See Chevron*, 467 U.S. at 843 n. 11; *see also* EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982).

88. *Chevron*, 467 U.S. at 866 (whereas judges are not part of either elected political branch, administrative agencies are democratically accountable because they operate under the direction of the executive branch); *see* Starr, *supra* note 11, at 301-04 (insight into the policies underlying *Chevron*).

89. *Arkansas*, 112 S. Ct. at 1060. ("[T]he court failed to give due regard to the EPA's interpretation of its own regulations.").

90. *Id.* at 1058 ("[T]he Court of Appeals exceeded the legitimate scope of judicial review of an agency adjudication.").

91. *See id.*, 112 S. Ct. at 1051.

92. *See id.*

93. 33 U.S.C. § 1342 (1988).

94. *Arkansas*, 112 S. Ct. at 1051.

95. *See* Tenth Circuit Joint Brief-in-Chief of Petitioner/Appellants, *supra* note 5, at 1.

96. *Id.* at 30-44. Oklahoma argued, *inter alia*: (1) the Administrative Law Judge (ALJ) misinterpreted its beneficial use limitation, *id.* at 30 "Proposition VI"; (2) the permit was issued in violation of its antidegradation policy, *id.* at 34 "Proposition VII"; (3) the ALJ misapplied its nutrient standard requirements, *id.* at 39 "Proposition VIII"; and (4) the ALJ failed to consider additional evidence of the design inadequacy of the Fayetteville plant, *id.* at 42 "Proposition IX".

97. *See supra* note 5 and accompanying text.

98. *Oklahoma*, 908 F.2d 595, 598 (10th Cir. 1990). *See also* Tim Smart, *The Next War*

B. *Procedural History*

Objections to the EPA's handling of this dispute are evident in the volumes of appeals attacking the decision on both procedural and substantive grounds.[99] After initial permit approval by the EPA, Oklahoma petitioned the agency for an evidentiary hearing, contending that the permit was granted without consideration of several important issues.[100] The EPA Regional Administrator allowed partial review, limited to whether Fayetteville's discharge would violate Oklahoma's water quality standards and whether Fayetteville had the ability to adequately treat the sewage before it reached the Arkansas-Oklahoma state line.[101]

An evidentiary hearing was conducted on August 18, 1987, nearly two years after the initial permit hearing.[102] Affirming the permit, the Administrative Law Judge (ALJ) decided discharge from the Arkansas plant would not have an "undue impact" on the Illinois River.[103] Oklahoma appealed. On review, the EPA's Chief Judicial Officer (CJO) found the "undue impact" standard inadequate. The CJO first ruled that the CWA "requires the NPDES to impose any effluent limitations necessary to comply with applicable state water quality standards."[104] The permit was then remanded to decide whether the discharge would have a "detectable impact" on the river.[105] After completing detailed findings of the facts, the ALJ upheld issuance of the permit, concluding application of the revised standard showed no detectable violation of Oklahoma's water quality.[106] The Chief Judicial Officer sustained the issuance of the permit.[107] Oklahoma's next appeal, consolidated with appeals from the Arkansas parties, brought the matter before the Tenth Circuit Court of Appeals.[108]

On July 10, 1990, almost five years after the initial permit application, the Tenth Circuit affirmed the ALJ's decision that Oklahoma's

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Between the States Could Be Over Clean Water, BUS. WK., Dec. 16, 1991; at 32; Chris Casteel, *High Court to Study River Fight*, DAILY OKLAHOMAN, Dec. 8, 1991, p. 1 at col. 1, p. 2A at col. 3.

99. *See generally* Tenth Circuit Joint Brief-in-Chief of Petitioner/Appellants, *supra* note 5, at 1-12 (complete historic detail and dates for all appeals and administrative rulings).

100. *Id.* at 2.

101. *Id.* at 3. The Administrator denied review of whether (1) the EPA erred in failing to require an Environment Impact Statement prior to issuance of the permit; (2) the EPA violated the CWA by denying Oklahoma adequate time to determine whether Fayetteville's proposed discharge was in violation of Oklahoma's water quality statutes; (3) the permit should be modified to prohibit the split-flow component which allows discharge into Mud Creek; and (4) the permit safe-guards were sufficient to protect the Illinois River. *Id.*

102. *Id.* at 5.

103. *Arkansas*, 112 S. Ct. at 1051. The ALJ originally decided that more than a mere *de minimus* impact on the State of Oklahoma's water is needed before revoking the permit.

104. *Arkansas*, 112 S. Ct. at 1051-52; *see also* Tenth Circuit Joint Brief-in-Chief of Petitioner/Appellants, *supra* note 5, at 10.

105. *Id.* at 1052. The CJO instructed the ALJ that "the permit shoud be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards." *Id.* (emphasis in original).

106. *Id.*

107. Tenth Circuit Answer of Respondent Arkansas, *supra* note 6, at 11.

108. *Oklahoma*, 908 F.2d 595 (10th Cir. 1991).

water quality standards were applicable.[109] Judge Brorby, writing for the court, found the EPA's decision to grant the permit "arbitrary and capricious"[110] due to the EPA's failure to consider "an important aspect of the problem [or] offer an explanation for its decision that runs counter to the evidence before the agency."[111] The Tenth Circuit believed the effect of additional discharge into the already degraded river warrented the court's reversal of the decision to issue the permit.[112] Violation of the CWA, the court argued, is inescapable when additional effluent is allowed to enter an already degraded body of water.[113] In view of the Supreme Court's previously articulated policy of agency deference, the Tenth Circuit ruling received much attention.[114] Both parties appealed the circuit court's decision and the Supreme Court granted certiorari because of the "importance and novelty of the Court of Appeals' decision."[115]

C. *Issues*

To reach a unanimous decision, the Supreme Court applied the CWA to three issues: 1) whether the EPA is obligated to apply downstream states' water quality standards on upstream emitters as a condition of issuing a NPDES permit; 2) notwithstanding a statutory obligation to apply downstream water quality standards, whether the EPA has authority to mandate source state compliance with downstream water quality statutes; and, 3) whether the Tenth Circuit correctly interpretated the CWA to preclude further discharge into an already degraded body of water.[116] Resolution of the first two issues addressed the scope of the EPA's discretionary powers. To resolve the third issue the Court evaluated the Tenth Circuit's judicial authority to overrule the EPA by denying the permit.

D. *Holding*

Summarily dismissing the first question of whether the EPA is obligated to apply downstream state water quality standards on an upstream

109. *Id.* at 615.

110. *Id.* at 616. "[W]e conclude EPA's decision to issue the Fayetteville permit was arbitrary and capricious. The agency's decision is also flawed by misinterpretation and misapplication of two important Oklahoma water quality regulations and by arbitrary disregard for certain expert testimony." *Id.*

111. *Id.* (citing Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co. 463 U.S. 43 (1983).)

112. *Id.* at 634. The Tenth Circuit held, "[p]articularly in light of the existing pollution of the Illinois scenic river, the agency's decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement." *Id.*

113. *Id.*

114. *See generally* 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); John Treangen, Note, *Cleaning up the Clean Water Act: Oklahoma v. Environmental Protection Agency*, 36 S.D. L. REV. 739 (1991).

115. *Arkansas*, 112 S. Ct. at 1052.

116. *Id.* at 1056.

emitter, the Court upheld the EPA's reasonable and permissible statutory interpretation of the CWA to apply Oklahoma's water quality standards.[117] At the same time, the Court concluded the state parties' reliance on precedent established in *Ouellette* and similar cases to determine the respective state roles in establishing water quality standards misplaced. The Court distinguished state-administered, federally-approved permits from Fayetteville's permit granted in accordance with the EPA procedures, refusing to rely on previous decisions clarifying obligations under state initiated programs.[118] The Court declined the opportunity to clarify future obligations under the statute, allowing the EPA full discretion in statutory interpretation.[119]

Analysis of the second issue—the EPA's authority to interpret and apply the Oklahoma standards absent any statutory guidance—merited more detailed discussion. Reiterating the CWA's broad purpose, the Court focused on a statutory clause which vests with the EPA Administrator power to make "such other requirements as he deems proper."[120] Finding nothing in the history of the CWA to limit the Administrator's authority, the Court concluded that the decision to require the Arkansas plant's emmission to comply with Oklahoma's water quality standards within the Administrator's domain.[121]

Arkansas's argument that the Court had previously defined the downstream state's role as subordinate was dismissed by a narrow reading of *Ouellette*.[122] The Court explained that *Ouellette* concerned permitting procedures only, and did not "in any way constrain the EPA's *authority* to require a point source to comply with downstream water quality standards."[123]

The third issue—the Tenth Circuit's denial of the permit on the basis that the discharge would further damage an already "degraded" river—was also decided with an eye toward broad agency authority. The Supreme Court disagreed with the Tenth Circuit's conclusion that the EPA decision to issue the permit was arbitrary and capricious.[124]

Resolving the first two issues in favor of EPA discretion required only a short step to reversal of the Tenth Circuit's contradictory reading of the CWA.[125] To support this position, the Court adopted the EPA's argument that refusal of a permit because the discharge has some "theoretical impact" on a downstream state's water quality places effective

117. *Id.*
118. *Id.*
119. *Id.* The Court held, "[i]t seems unwise to evaluate those arguments in a case such as this one, which only involves a federal permit." *Id.*
120. *Id.*
121. *Id.* at 1057. The Court held, "we find nothing in that [Act's] history to indicate that Congress intended to preclude the EPA from establishing a general requirement that such permits be conditioned to ensure compliance with downstream water quality standards." *Id.*
122. *Id.*
123. *Id.* at 1057 (emphasis added).
124. *Id.* at 1061.
125. *Id.* at 1059.

veto power of upstream development in the hands of the downstream state.[126] The Court disregarded the Tenth Circuit's conclusion that a downstream state's influence over upstream discharge is necessarily limited by the finite ability to measure actual effects.[127]

IV. ANALYSIS

A. *Issues*

1. EPA Obligations Under the CWA.

The distinction between an agency's authority to interpret a statute and its obligation to apply the interpretation is subtle. The Court granted the EPA authority to impose certain water quality standards, free from any obligation to act in a consistant manner in the future. Distinguishing the required standards from the authority to apply the standards masks the ultimate result. Allowing the EPA latitude to decide its own obligations has no real effect since making the requirement tractable at the EPA's volition creates no standard. This tautological approach provides no guidance or clarification for future disputes concerning the interstate flow of pollution. Although the applicable standard is determined by the downstream state, the EPA's authority to decide compliance overrides downstream state influence.

If predictable application of the two-pronged *Chevron* test is of major importance to the Court, then allowing the EPA to decide its own obligations is understandable.[128] *Arkansas v. Oklahoma* maintains deference as the default standard. When ease of judicial review is our only concern, the issue of the EPA's future obligations is of small consequence. The problem remains, however, because the parties went to court to define those future rights and obligations.

Without an effective check on deference, agencies lack accountability. Even though an agency's consistent interpretation of its own rules lends credibility to withstand future attacks on the agency's exercise of discretion,[129] agencies are not bound by past regulatory interpretation.[130] Because the *Arkansas* decision imposes no obligation on the EPA to apply any state water quality standards in the future, the problem remains unresolved after six years of litigation and the paradoxical expenditure of millions of dollars, ostensibly to save resources.

The Court's refusal to consider past obligations under state-implemented permitting schemes is inconsistent with the Court's later conclu-

126. *Id.*

127. *Oklahoma*, 908 F.2d at 606-07.

128. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); *see supra* text accompanying notes 82-83.

129. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (consistent and contemporaneous construction of a statute increases the amount of deference given to agency interpretation).

130. *Chevron*, 467 U.S. at 863 ("initial agency interpretation is not instantly carved in stone"); *see also* Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877 (1989).

sion that state-enacted water quality standards become federal in nature,[131] and thus, subject to full EPA discretion. The confusion could have been avoided if the Courts' analyis of permit obligations mirrored its consideration of the nature of state water quality standards. The state permitting programs previously evaluated by the Court in cases cited as precedent by both parties should have been considered federal in nature and also subject to similar federal interpretation.

2. EPA Authority under the CWA.

When considering the second issue—EPA authority to interpret state standards—the Court disregarded its previous discussion in *Arkansas v. Oklahoma* of the federal-state relationship under the CWA.[132] The CWA encourages each state to set its own water quality standards, even allowing more stringent state standards than those required by the EPA.[133] In Arkansas, the Court ignored federal-state partnership by overriding Oklahoma's previous interpretation of its state-set, federally-approved water quality standards. Favoring the EPA's interpretation of the Oklahoma statutes over the express intent of the enacting state legislators makes states appear more pawns than policy-makers.

Interestingly, the EPA Administrator's authority to make these decisions is not based on clear legislative intent, but rather on the CWA's failure to expressly limit the Administrator's authority.[134] Apparently, silence in congressional enactment vests unlimited authority in the Administrator without accountability: such broad arbitrary power dilutes any force of judicial review under the APA's "arbitrary and capricious" standard. While this conclusion is admittedly overreaching, if the EPA is charged with filling legislative gaps with any reasonable interpretation, it is difficult to imagine circumstances under which additional efforts would be taken to challenge EPA decisions.

3. Tenth Circuit's Denial of the EPA Permit.

By overturning the Tenth Circuit's permit denial, the Court narrowed the already limited scope of agency review.[135] Considering only a portion of the Tenth Circuit's analysis—namely the circuit court's concern over the already degraded quality of the river—the Supreme Court ignored the balance of the evidence relied upon by the circuit court.[136] Troubled by the circuit court's disregard for the "substantial evidence"

131. *See Arkansas*, 112 S. Ct. at 1059 ("state water quality standards—promulgated by the States with substantial guidance from the EPA [citation omitted] approved by the Agency—are part of the federal law of water pollution control").

132. *See id.* at 1054.

133. *See supra* notes 53-54 and accompanying text.

134. *See Arkansas*, 112 S. Ct. at 1056. For example, the Court held, "[e]ven if the Clean Water Act itself does not require the Fayetteville discharge to comply with Oklahoma's water quality standards, the statute clearly does not limit the EPA's authority to mandate such compliance." *Id.*

135. *See id.* at 1060.

136. *Oklahoma*, 908 F.2d at 616-18. The court carefully reviewed the purposes behind Oklahoma's Beneficial Use Limitation/Antidegradation policies and determined that al-

standard, the Court pointed out that the circuit opinion mentions, on several occasions, that sufficient evidence was before the EPA to draw the circuit's conclusions.[137] This rationale confuses the availability of evidence with its nature. An abundance of evidence does not necessarily mean all evidence supports the agency position. Again ignoring the circuit court,[138] the Supreme Court overlooked the contradiction between the underlying evidence and the EPA findings.

Both the Tenth Circuit and the Supreme Court recognized judicial review under the APA includes striking down agency acts that entirely fail to consider an important aspect of a problem.[139] Oklahoma's water quality statutes, now part of federal law, should have received consistant interpretation based on the enacting legislature's intent and the purposes of the CWA. Considering the remedial nature of the CWA,[140] dismissal of the Tenth Circuit's well reasoned approach to this analysis did not merit the complete foreclosure it received.

B. *Economic Effects of the Decision*

The Court's willingness to perpetuate an already economically inefficient system of agency-administered public policy is not the appropriate solution to our administrative or environmental woes. Justice Stevens' extension of agency deference, initially advocated in *Chevron*, produced no significant procedural change in current methods of judicial review. The unfortunate effect results from application of the procedure. Granting the EPA discretionary authority to interpret and apply Oklahoma's water quality standards creates a series of disincentives that block the road to environmental improvement. First, the role of each state in implementing environmental policy is severely undermined. Second, expansion of EPA discretion does not create administrative incentives to reform programs many deem outdated and ineffective.[141] Third, the purpose and effect of judicial review as a check on administrative agency performance and procedure is rendered impotent. Fourth, and perhaps most importantly, pollution emitters are not encouraged to expand their efforts to abate pollution. These deleterious results, as dis-

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lowing additional pollutants into the river would directly contravene the underlying policies. *Id.*

137. *Arkansas*, 112 S. Ct. at 1060. "[A]t least four times, the court concluded that 'there was substantial evidence before the ALJ to support' particular findings which the court thought appropriate, but which were contrary to those initially made by the ALJ." *Id.*

138. *Oklahoma*, 908 F.2d at 619-31. "[The] EPA undermined our usual deference to its special expertise by the failure of its presiding officer to consider an important scientific principal, the oxygen-reducing effects of algae respiration and decay, and by his incomplete understanding of phosphorus assimilation . . . [and] lack of thoroughness." *Id.* at 630.

139. *Arkansas*, 112 S. Ct. at 1060; *Oklahoma*, 908 F.2d at 599.

140. 33 U.S.C. § 1251 (1988) ("the objective of this Chapter is to *restore* integrity of the Nation's waters" (emphasis added)); *see also* S. REP. No. 414, *supra* note 43, at 3710 ("[T]he Administrator is under specific obligation to require that [high quality] level of effluent control . . . without regard to the limits of practicability.").

141. *See supra* notes 14-15 and accompanying text and *infra* notes 148 & 150 and accompanying text.

cussed below, are closely tied to perpetuating the system currently in place and are especially disturbing considering Congress' emphatic call to reduce pollution when the CWA was enacted.[142]

1. State Effects.

Allowing the EPA latitude to interpret and apply state law over the dissent of the affected state—even though the state law was promulgated pursuant to a federal program—challenges the longstanding policy vesting states with control over state resources.[143] Arkansas' argument that application of the Oklahoma standards violates its right to use its waterways is unpersuasive,[144] running contrary to the belief that a party's freedom to utilize resources remains unencumbered until the use harms another party. Congressional understanding that downstream states' concerns provide limits on upstream activities is reflected in the NPDES permitting scheme that requires extensive downstream state input.[145]

State control over water resources, including state water quality standards, more accurately reflects the desires of those with a vested interest in the state's water quality maintenance.[146] All of the options allowed to states under the CWA, from establishing strict water quality standards to enacting a seperate permitting procedure, require expenditure of state funds. The EPA's disregard, with court approval, of state water quality standards results in an uncertainty of whether the effort to establish state standards as required by the CWA[147] is efficient or cost-effective.

2. Agency Effects.

The Court's unconditional affirmation of the EPA's interpretation of the CWA provides no incentive for the EPA to conduct critical, point-specific analyses of water quality questions, especially those unique to a geographic area. If EPA standards will be upheld on a limited evidentiary basis, no need to expend time and energy in more intensive study exists. This is perplexing because the Court, by ignoring state statutory interpretation, effectively renders state studies of this nature moot. Without accountability, agencies may be less motivated to consider all viable alternatives in developing abatement programs, including those proposed by individual states. Criticism of this aspect of EPA centralization has already been leveled.[148] The lack of motivation may occur at precisely the same time that increasing industrial complexity requires a heightened need for specialized study.

142. S. REP. No. 414, *supra* note 43, at 3675.
143. *See supra* notes 65-67 and accompanying text.
144. Tenth Circuit Answer of Respondent Arkansas, *supra* note 6, at 43.
145. 33 U.S.C. § 1313 (1988).
146. *See supra* notes 61-64 and accompanying text.
147. 33 U.S.C. § 1313 (1988).
148. Ackerman & Stewart, *supra* note 14, at 1333. "The present regulatory system wastes tens of billions of dollars every year, misdirects resources, stifles innovation, and spawns massive and often counterproductive litigation." *Id.*

3. Judicial Effects.

The ruling in *Arkansas* sounds a clear warning to discourage considered judicial review of agency decisions. It constricts courts' efforts to ensure the foremost concern of the EPA is public policy implementation.[149] After the Supreme Court's correction of the Tenth Circuit, courts may be even more reluctant to consider agency decisions. This exacerbates what has already been labeled by some as the "rubber-stamp" effect of agency decision making.[150] Lack of judicial review allows agencies to operate without accountability. Without accountability there is no assurance that programs implemented by the agency properly reflect the public needs prompting the underlying legislation. Public awareness of the implications of judicial inability to confront agency decisions, and the futility of agency challenges, may result in legitimate industrial or environmental concerns going unaddressed.

An unintended effect of *Arkansas* may be to promote the use of non-judicial alternatives to resolve interstate pollution conflicts.[151] The state parties involved in *Arkansas* have begun a dialog regarding interstate resource planning.[152] If litigation does not achieve the intended result of establishing absolute rights to the river, alternatives must be considered. Resource savings may result from earlier resolution without litigation.

4. Industry Effects.

Perhaps the most serious implication of *Arkansas v. Oklahoma* is its failure to provide incentives for polluters to stop polluting. Affirming

149. *Arkansas*, 112 S.Ct. at 1061. "It is not our role, or that of the Court of Appeals, to decide which policy choice is the better one for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency." *Id.*

150. Smolla, *supra* note 75, at 475 (provides a due process attack on permissive agency deviation from self-imposed procedural rules); Jonathon R. Macey, *Federal Deference to Local Regulations and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990) (calling for closer judicial review); *see also* Abner J. Mivka, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U.L. REV. 1 (1986). In an April 17, 1986, address at American University Law Review banquet, the Honorable Abner J. Mikva of the federal District Court of the District of Columbia decried the effect of *Chevron* of limiting judicial statutory interpretation: "[c]ases like *Chevron*, however, deny parties, and more generally, the system of democratic government, access to judges' rich experience in answering these [statutory interpretation] questions." *Id.* at 8.

151. Although litigation has long been the chosen method to establish rights and boundaries to waters, many argue the courts are not best suited to resolve environmental conflicts. While decisions about the ownership of specific rights to water can easily be structured into a one-time settlement, problems resulting from the continuous flow of interstate waters frequently require ongoing attention. The courts' ability to address only specifically disputed facts results in many of the complexities of the problem to go unresolved. *See* LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984); Frank P. Grad, *Alternative Dispute Resolution in Environmental Law*, 14 COLUM. J. ENVTL. L. 157 (1989) (discusses environmental disputes amenable to alternative forms of resolution); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985).

152. Paul English, *Arkansas, Oklahoma Target Water Quality*, DAILY OKLAHOMAN, June 3, 1992, at 7 (A joint task force created by both state's governors, implemented to "work toward an effective means of controlling the natural and man-made pollution that is threatening the streams and lakes of this region.").

the EPA's position merely continues our current system of command and control pollution abatement.[153] The mentality that spurred the EPA to "push, prod, and cajole"[154] industry into reducing pollution must evolve to meet the needs of the twentieth century. Industrial complexity continues to increase and the ability of a centralized agency to efficiently administer and economically monitor a growing scheme of top-down regulations is no longer viable. This does not mean a wholesale abandonment of regulations is in order. However, it is time for the EPA to shift its role from a pure regulator to a market facilitator.[155]

Some may argue that the Court's consideration of the degraded condition of the Illinois River prior to denying the Fayetteville permit places a disproportionate share of the clean-up costs on new industries. While true in theory, this proposition begs the question of where to draw the "bright-line" prohibiting new polluters from entering the market. The possibility of discrimination against new polluters is no excuse to allow additional pollution and disregard the remedial goals of the CWA.

The Tenth Circuit addressed this notion in *Oklahoma v. Arkansas* by pointing out the Illinois River has already been degraded by upstream polluters.[156] The court considered the poor condition of the river as evidence that the practice of allowing new contamination, similar to that of the Fayetteville plant, must stop. Current degradation implies industrial users have previously polluted the river without bearing the appropriate cost. The degradation continues today. Unfortunately, the circuit court was not in the position to take the analysis one step further and query the allocation of pollution costs between existing and future polluters. Economic considerations suggest that only those polluters utilizing least cost methods to clean up should be encouraged to operate on the river. Merely requiring compliance with existing command and control regulations does not compel the overhaul of outmoded pollution control systems. While forcing use of newer, more efficient methods of

153. *See supra* note 12 and accompanying text.

154. Daniel A. Mazmanian & David L. Morell, *EPA: Coping With the New Political Economic Order*, 21 ENVTL. L. 1477, 1478.

155. *Id.* Masmanian & Morrell outline ten strategies for the EPA's advancement into the coming decades: (1) EPA must break out of its monomedia myopia, adopting instead a true cross-media focus; (2) environmental management must shift from centralized regulatory control to reliance on market-based solutions; (3) EPA, whenever feasible, must rely on goal-based performance standards as opposed to rules and regulations demanding specific actions; (4) environmental management issues must be understood as collective goods problems requiring collective solutions both geographically and over time; (5) decentralized arenas of action (states, localities, individual firms) are preferable; (6) environmental decisions must be sensitive to business and economic requirements (cost, ease of compliance) that define their actual implementation; (7) environmental decisions must be sensitive to social, ethic and minority concerns; (8) emphasis must be placed on source reduction, pollution prevention, recycling and material efficiency; (9) credible and enduring citizen involvement is required in both policy formulation and implementation; (10) command-and-control management strategies are often incompatible with several of the above principles, and should be adopted only as a last resort. *Id.*

156. *Oklahoma*, 908 F.2d at 620-28.

control may be costly for existing polluters, this allocation is long overdue.

A look at the underlying condition of the river points to feasible solutions long advocated by commentators,[157] and now supported by administrative officials.[158] The time has come to implement liability-based programs that provide market incentives to clean up the environment. A system that allocates the cost of pollution to the polluting parties goes far in eliminating many of the disincentives created by the command and control structure.[159] Several alternatives have been suggested in commentary, some already implemented with success.[160]

Economic and technical assessment of methods to control pollution to meet reduction goals should be placed not on the agency but on the responsible polluters. Several means of reapportioning this responsibility exist and have been implemented on a limited scale to meet specific needs.[161] Regulating pollution through market-based controls, either by transferable permits, or taxation according to emission levels provides cost reduction incentives to polluters.[162] A permit system acknowledges the inevitability of externalities at an acceptable, governmentally approved level. Once an acceptable level of pollution is established the polluting industries can allocate between themselves, within a defined economic or geographical area, the cost of pollution control. The ability to develop least polluting alternatives is rewarded by a direct offset in the cost of business. Clean-up costs are placed in the more competent hands of businesses which possess incentives to innovate pollution reduction technologies that increase bottom-line effi-

157. *See supra* note 15 and accompanying text.

158. Richard B. Stewart, long a proponent of market based incentives, served at the post of Assistant Attorney General, Department of Justice, Environment and Natural Resources Division; *See supra* note 14 and accompanying text. His comments before the Administrative Conference in 1990 on the need for reform and alternatives to the existing system are summarized in the Yale Journal on Regulation article. *See* Marshall J. Breger, et al, *Providing Economic Incentives in Environmental Regulation*, Address during the Congressional debate over the Clean Air Act Amendments (April 23, 1990), in 8 YALE J. ON REG. 463 (1991). The overall goal is to achieve the most clean-up for limited dollars, "[g]iven that the amount that society is actually willing to spend for environmental protection is limited, that [use of incentives] means we can get more environmental protection for the same amount of money by using economic incentives." *Id.* at 469.

159. I am not suggesting a moratorium on new upstream activities. Reforms would invite the influx of the most economically and environmentally sound industries at the expense of those no longer able to contribute to the goal of keeping the waters clean. For an additional discussion of the positive effects of reallocating externality costs to those in the best position to prevent harm, see Babich, *supra* note 12, at 755-58.; *See also supra* notes 14-15.

160. *See* Ackerman & Stewart, *supra* note 14, at 470 (citing success of lead phase-down in gasoline effected through trading lead reduction credits); TIETENBERG, *supra* note 15, at 93-122; Hahn & Stavins, *supra* note 15, at 8 (citing an emissions trading program for saving between $5-$12 billion over program life; a lead trading program; proposed use of tradeable permits for water pollution control at Lake Dillon, Colorado with potential savings of over $1 million annually; and voluntary water exchange programs as alternatives to litigation between western states for water allocation).

161. See *supra* notes 14, 15, 155, 157 and accompanying text.

162. Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era From an Old Idea?* 18 ECOLOGY L.Q. 1 (1991).

ciency. Similar incentives exist under a pollution tax system where improved pollution control is rewarded by a direct tax reduction. These systems not only free up agency resources, the permit fees or taxes assessed as penalties provide a direct financial benefit to the agency. Liability based programs such as the Comprehensive Environmental Responsibility Liability Compensation Act (CERCLA)[163] also impose the cost of pollution reduction directly on the responsible polluters. Imposition of strict retroactive liability forces polluters to internalize externality costs.[164] Leaving industry with no choice but to reduce pollution provides incentive to develop least-cost methods for pollution control. This need can be filled internally by the polluting industry, or polluters can locate third parties with clean-up expertise to complete the work on a least cost basis. This internal/external competition will promote efficient methods of compliance.

C. *Economic Balancing*

The CWA edict against pollution is minimized by the *Arkansas v. Oklahoma* decision. Explicit in the EPA's duty to issue permits is a balancing of economic interests.[165] A cost-benefit analysis necessarily means the decision focus shifts from pollution abatement to cost allocation. The most difficult portion of the costs to allocate are the externalities resulting from plant operation. In the Illinois River situation, those bearing the costs of pollution receive none of the benefits; the downstream Oklahoma parties receive no benefit from the Fayetteville waste treatment plant. This problem also supports reform of the existing system. Decisions need to be made regarding the best home for unavoidable externalities.[166]

Questioning this balancing points to the riddle underlying why the Supreme Court allows the EPA such great latitude in applying policy. On its deepest level, accountability becomes the overriding question. Congressional delegation of the decision-making responsibility appears indicative of its underlying fear that it will be held accountable for unpopular policy implementation.[167] *Chevron* provided insight into this rationale as the Court speculated that Congress "consciously desired the

163. 42 U.S.C. §§ 9601-75 (1988 & Supp.I 1989).

164. Babich, *supra* note 12, at 750. The liability based statutes of the 1980's reflect a policy choice by Congress that those in some way responsible for the release of toxic chemical, rather than the public at large must bear the costs of environmental pollution. *Id.*

165. S. REP. No. 414, *supra* note 43, at 3713. "[C]onsideration must be given, on a case-by-case basis, to a balancing of economic and social costs against social and economic benefits sought to be obtained." *Id.*

166. For an example of the enormity of externality costs see GRAD, *supra* note 18, at § 3.01[3] (American Public Works Association estimates it will cost between $15 to $48 billion to remedy overflows from storm and waste combined sewers).

167. *See generally* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 26 (1978) ("Evasion, disguise, temporizing, deception are all ways by which artfully chosen allocation methods can avoid the appearance of failing to reconcile values in conflict."); Macey, *supra* note 150, at 285 (One strategy for maximizing political support under conditions of uncertainty is to delegate the matter to an administrative agency.)

Administrator to strike the balance at this [agency] level, thinking that those with greater expertise and charged with responsibility for administering the provision would be in a better position to do so."[168] While sounding reasonable, this allows legislators to point fingers to programs clearly in the public interest, and at the same time wash their hands of responsibility for poor administration.

V. CONCLUSION

The legitimate attempt by the Tenth Circuit to equitably administer the CWA by viewing the legislation as a whole has been overruled. Another vote for the status quo of EPA deference results in the EPA emerging as the preferred creator, interpreter and enforcer of national policy. Conscious implementation of cost-effective programs, subject to reasonable judicial checks,[169] would be a positive step in alleviating the pollution problem. Until that happens, the states, affected businesses and individuals are left swimming upstream against a growing tide of EPA discretion.

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168. *Chevron v. National Resources Defense Council*, 467 U.S. 837, 866 (1984).

169. *See* Deanell Reece Tacha, *Judges on Judging: Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991) ("The complexities of the law-making and law-interpreting tasks in the third century of this republic cry out for systematic dialogue between those who make and those who interpret legislation."); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991)(citing the need for better communication between judges and legislators); Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. REV. 703 (1988) (advocating a structural review of statutes as a means to better understand legislative intent).