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Arkansas v. Oklahoma: Downstream States Left without a Paddle

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INTRODUCTION

The importance of *Arkansas v. Oklahoma* lies in the Supreme Court's determination of the hierarchy of various state and federal interests involved in water quality disputes between states and the resulting impact on downstream states' ability to regulate water quality.[1] Out of a conflict over the Environmental Protection Agency's (EPA) issuance of a permit to discharge waste from a Fayetteville, Arkansas sewage treatment plant, the Court continues the trend towards the elimination of "interstate common law."[2]

The conflict arose out of a downstream state's challenge of an EPA-approved permit granting to an upstream state permission to discharge effluent from a sewage treatment plant. The conflict implicated the Clean Water Act (the Act or CWA) and required judicial interpretation of the function and purpose of the Act.[3] Oklahoma objected to the standards set for the Arkansas sewage treatment plant located just thirty-nine miles upstream from the Oklahoma border.[4] Flow from this treatment plant passed through seventeen miles of creeks and entered the Illinois River just

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[1] Arkansas v. Oklahoma, 908 F.2d 595 (1990), *rev'd*, 112 S. Ct. 1046, 1051 (1992).

[2] City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that the Federal Water Pollution Act Amendments of 1972 displaced the federal common law action at issue).

[3] Federal Water Pollution Control Act of 1972, §§ 101-607, 33 U.S.C. §§ 1251-1387 (1972 & Supp. 1993) [hereinafter FWPCA]. The Court in *Arkansas* addressed the purpose of the act by commenting, "[t]he Clean Water Act anticipates a partnership between the States and Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' " 112 S. Ct. at 1054 (quoting FWPCA § 101, 33 U.S.C. § 1251(a): Congressional Declaration of Goals and Policy).

[4] *Arkansas*, 112 S. Ct. at 1051. The Arkansas permit in question contained certain limitations and conditions on the discharge, as well as a provision "that if a study then underway indicated that more stringent limitations were necessary to ensure compliance

twenty-two miles from the border with Oklahoma.[5] Oklahoma challenged the permit based on a violation of Oklahoma water quality standards.[6] The relevant sections of these standards provide that "no degradation [of water quality] shall be allowed" to the portion of the Illinois River downstream from Arkansas.[7]

The Court attempted to answer three distinct questions raised by the parties. First, whose water quality standards should apply to the Arkansas discharge?[8] Second, can the EPA mandate the source state's compliance with downstream standards?[9] And third, if a body of water fails to meet water quality standards, does that mean a prohibition of additional discharge of effluent?[10]

This comment begins by establishing the relevant statutory provisions in part I. Part II. examines the two cases preceding the *Arkansas v. Oklahoma* decision that began the Court's trend towards minimization of state control over the quality of water entering from other states. In the first case, *City of Milwaukee v. Illinois*,[11] the Court ruled that the 1972 comprehensive amendments to the Federal Water Pollution Control Act (FWPCA)[12] preempted Illinois' federal common law remedy.[13] In the second

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with Oklahoma's water quality standards, the permit would be modified to incorporate those limits." *Id.*

[5] *Id.* Oklahoma designated the stretch of the Illinois River just downstream from the border with Arkansas as a "scenic river." OKLA. STAT. tit. 82, § 1452(b)(1) (Supp. 1989). This designation appears in the Scenic Rivers Act which creates the statutory framework for the water quality regulations at issue here. Title 82, § 1460. Describing the purpose of the designation, the Act states that "some of the free-flowing streams and rivers of Oklahoma possess such unique natural scenic beauty, water conservation, fish, wildlife, and outdoor recreational values of present and future benefit to the people of the state that is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma." Title 82, § 1452. The Act illustrates the effect of the designation. "Once an area is designated as a 'scenic river area' it is an expression of legislative intent that the stream or river in the area designated be preserved in its free-flowing condition . . . ." Title 82, § 1453.

[6] *Arkansas*, 112 S. Ct. at 1051.

[7] *Id.* (quoting OKLA. STAT. tit. 82, § 1452(b)(1) (Supp. 1989)).

[8] *Id.* at 1056 (1992).

[9] *Id.*

[10] *Id.* at 1056 (1992).

[11] City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

[12] FWPCA § 402, 33 U.S.C. § 1342 (1972 & Supp. 1993).

[13] *Arkansas*, 112 S. Ct. at 1053; *see* Maria V. Maurrasse, Comment, *Oklahoma v. EPA: Does the Clean Water Act Provide an Effective Remedy to Downstream States or Is There Still Room Left for Federal Common Law?*, 45 U. MIAMI L. REV. 1137 (1991). Although written prior to the Supreme Court decision in *Arkansas v. Oklahoma*, this comment focuses on the need for the return to federal common law since the Clean Water Act provides inadequate remedies to downstream states.

case, *International Paper v. Ouellette*,[14] the Court followed the *City of Milwaukee* ruling that the Clean Water Act[15] preempted any action based on the law of the affected state. Part III. explores the National Pollutant Discharge Elimination System (NPDES),[16] the statutory mechanism for enforcing the water quality standards promulgated by the EPA and the states. Part IV. breaks down the important procedural aspects of *Arkansas v. Oklahoma*, and part V. begins the detailed analysis of the decision. The conclusion focuses on how this decision affects the ability of states to set more stringent water quality standards than those required by the EPA in an attempt to further the state policy of anti-degradation.

I. EXAMINATION OF THE SAVINGS CLAUSE OF THE CLEAN WATER ACT

Out of the enormity of the Clean Water Act, the Savings Clause and the NPDES section require examination. The first of these provisions concerns what authority under the Act Congress has saved for the states. The Act divides the Savings Clause into sections 505 and 510.[17] The first section broadly grants authority to private citizens:

> (e) statutory or common law rights not restricted. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or State agency).[18]

The broad language of the first savings provision, by comparison, demonstrates the more restrictive nature of section 510.

The grant of authority to the states to regulate beyond federal standards is the most important feature of the Savings Clause. On its face, the statute gives states a significant degree of control over water quality. The relevant portion of section 510 states:

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[14] International Paper v. Ouellette, 479 U.S. 481 (1987).

[15] FWPCA § 101, 33 U.S.C. § 1251.

[16] National Pollution Discharge Elimination System § 402, 33 U.S.C. § 1342 (1977 & Supp. 1993) [hereinafter NPDES].

[17] International Paper v. Ouellette, 479 U.S. at 485.

[18] FWPCA § 510, 33 U.S.C. § 1370.

> Except as expressly provided in this chapter, nothing in this chapter shall (1)preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A)any standard or limitation respecting discharges of pollutants, or (B)any requirement respecting control or abatement of pollution; except that if [a] limitation, . . . prohibition, . . . or standard of performance is in effect under this chapter such State . . . may not adopt or enforce any . . . limitation, prohibition, . . . or standard of performance *which is less stringent* than the . . . limitation, . . . prohibition, . . . or standard of performance under this chapter . . . .[19]

If a state chooses to implement programs designed to eliminate degradation of state waters, this section allows for more stringent regulation of effluent discharged within state boundaries. The importance of this part of the comment relates to state control of water entering from another state. If a state may establish more stringent regulation of water quality standards than the EPA requires, how far does this grant of authority extend when the downstream state challenges the more permissive regulation of an upstream state?

II. *CITY OF MILWAUKEE* AND *INTERNATIONAL PAPER*: SETTING THE STAGE FOR *ARKANSAS V. OKLAHOMA*

Before addressing the two important predecessors to *Arkansas v. Oklahoma*, the Court noted the frequency of controversies between upstream states that introduce pollutants and downstream states that object.[20] The Court recognized the previous application of common law principles "tempered by a respect for the

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[19] *Id.* (emphasis added).

[20] *See* Arkansas v. Oklahoma, 112 S. Ct. 1046, 1052 (1992). The Court briefly developed the history of these conflicts over interstate water, citing earlier cases such cases as Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1 (1824) (disputing a monopoly granted to a ferry company), and more recent cases like Ohio v. Kentucky, 444 U.S. 335 (1980) (holding that the boundary line between the two states was the low water mark on the northern bank of the Ohio River). The Court also cited to older cases involving upstream and downstream conflicts over pollution. New York v. New Jersey, 256 U.S. 296 (1921) (attempting to enjoin New Jersey from discharging sewage into a part of New York Harbor as a public nuisance); Missouri v. Illinois, 200 U.S. 496 (1906) (seeking to enjoin the discharge of Chicago sewage into the Desplaines River, alleging the eventual pollution of the Mississippi River). The Court commented that these cases were often resolved by application of common law principles "tempered by a respect for the sovereignty of the States." *Arkansas*, 112 S. Ct. at 1052.

sovereignty of the States" in resolving such controversies.[21] As a means of prefacing the analysis of *City of Milwaukee* and *International Paper*, the Court described the possible preemptive impact of new federal laws and regulations on the field of common law nuisance.[22] This trend, as it further developed in *Arkansas v. Oklahoma*, is the focus of this comment.

A. City of Milwaukee v. Illinois: *The End of Federal Common Law Nuisance Actions*

The litigation of *City of Milwaukee* occurred in two stages. First, the State of Illinois tried to file a complaint under the original jurisdiction of the Supreme Court against the City of Milwaukee (*Milwaukee I*).[23] The Court refused this request, stating that "federal law applied to the dispute, one between a sovereign state and political subdivisions of another state concerning pollution of interstate waters, but that the various laws which Congress had enacted 'touching the interstate waters' were 'not necessarily the only federal remedies available.' "[24] In this opinion, the Court suggested that new federal laws may preempt the common law of nuisance.[25] The importance of this first step lies in the Court's recognition of the existence of federal "common law" which could give rise to a nuisance claim caused by interstate water pollution.[26]

The case returned to the Supreme Court (*Milwaukee II*) after amendments to the FWPCA in 1972.[27] In this later opinion, the Court considered whether the new legislation extinguished the previously recognized cause of action.[28] The conflict surrounded a series of sewer systems and two treatment plants in the County of Milwaukee located on the shores of Lake Michigan.[29] The problem arose after periods of wet weather caused the sewer systems,

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[21] *Arkansas*, 112 S. Ct. at 1053.

[22] *Id.*

[23] Illinois v. Milwaukee, 406 U.S. 91 (1972).

[24] City of Milwaukee v. Illinois, 451 U.S. 304, 308 (1981).

[25] *Id.*

[26] *Id.* at 307.

[27] FWPCA § 402, 33 U.S.C. § 1342 (1972 & Supp. 1993). "The Amendments created a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." City of Milwaukee v. Illinois, 451 U.S. at 310-11.

[28] City of Milwaukee v. Illinois, 451 U.S. at 308 .

[29] *Id.*

designed to carry both sewage and storm water runoff, to overflow directly into Lake Michigan and its tributaries.[30] Illinois' complaint alleged that pollutants entering the lake near Milwaukee[31] threatened the health and welfare of its citizens.[32]

Following the Supreme Court's first ruling, Illinois filed suit in district court in May 1972 in an attempt to abate the sewage overflow nuisance under federal common law,[33] as well as under Illinois statutory and common law.[34] Only five months later, Congress established a new regulatory system designed to curb the discharge of pollutants into interstate waterways by using a permit system that established specific effluent limitations.[35] Under these amendments to the FWPCA, the EPA must promulgate regulations establishing specific limitations.[36] Permits issued by the EPA, or an EPA-approved agency, must reflect these effluent limitations.[37]

Despite these amendments, the district court found that Illinois had proved the existence of a nuisance under federal common law and ordered certain actions be taken to eliminate the nuisance.[38] On appeal to the Seventh Circuit,[39] the court ruled that "the 1972 Amendments had not preempted the federal common law of nuisance, but that '[in] applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance.' "[40]When the case again arrived in the Supreme Court, the

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[30] *Id.*

[31] *Id.* The treatment plants were 25 and 39 miles away from Illinois on the shores of Lake Michigan.

[32] *Id.* The complaint alleged that "pathogens, disease-causing viruses and bacteria, are . . . discharged into the lake with the overflows and inadequately treated sewage and then transported by lake currents into Illinois water" creating a health risk. In addition, Illinois claimed the waste entering the lake caused "eutrophication, or aging, of the lake." *Id.* at 309.

[33] *Id.*

[34] *Id.* The complaint also contained claims under Illinois statutory law and common law. The case proceeded through the district court with the state claims intact until the court of appeals held the case should be decided exclusively under the federal common law of nuisance, *id.*

[35] *Id.* at 310.

[36] *Id.* at 310-11.

[37] *Id.* at 311.

[38] *Id.*

[39] Illinois v. City of Milwaukee, 599 F. 2d. 151 (1979), *vacated*, 451 U.S. 304 (1981).

[40] City of Milwaukee v. Illinois, 451 U.S. at 312 (quoting from the Seventh Circuit's opinion). The Seventh Circuit felt that although the Act did not preempt the federal common law action, the Act should play a role in the action by providing insight into the

Court based its ruling on the statutory amendments since the first decision:

> [T]he comprehensive regulatory regime created by the 1972 Amendments pre-empted Illinois' federal common law remedy. We observed that Congress had addressed many of the problems we had identified in *Milwaukee I* by providing a downstream State with an opportunity for a hearing before the source State's permitting agency, by requiring the latter to explain its failure to accept any recommendations offered by the downstream State, and by authorizing the EPA, in its discretion, to veto a source State's issuance of any permit if the waters of another State may be affected.[41]

In arguably the most limiting aspect of the opinion, the Court responded to Illinois' argument that section 510 of the Clean Water Act[42] "expressly preserved the State's right to adopt and enforce rules that are more stringent than federal standards."[43] The court of appeals accepted this argument, but the Supreme Court interpreted the statute narrowly, remarking that it "did no more than to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters."[44] This narrow reading of section 510 severely curtails the ability of states to institute anti-degradation policies in which the right to regulate extends only to the water that has reached the state.

The significance of this limitation to downstream states becomes more apparent after the *International Paper* decision, but at this stage it should be noted that the Court's ruling takes away one historical approach to improving the quality of water entering a downstream state. The Court in *Milwaukee II* did not decide whether the 1972 Amendments also preempted state common law remedies as well as federal common law remedies.[45]

"legislature's judgment on relevant issues . . . or provid[ing] an appropriate principle for decision of the case." *Illinois v. City of Milwaukee, 599 F.2d 151, 164 (1979).*

[41] Arkansas v. Oklahoma, 112 S. Ct. 1046, 1053 (1992).

[42] FWPCA § 510, 33 U.S.C. § 1370 (1977 & Supp. 1993).

[43] *Arkansas*, 112 S. Ct. at 1053.

[44] *Id.*

[45] *Id.*

B. International Paper v. Ouellette: *The End of State Common Law Nuisance Actions*

In this case, private citizens in Vermont brought a class action suit seeking damages and injunctive relief from a paper company in New York because of pollution discharged into Lake Champlain.[46] The pollutants entered the lake through a diffusion pipe, running from the mill into the lake and ending a short distance before the Vermont-New York border.[47] The suit alleged the discharge into the lake made the water "foul, unhealthy, smelly and . . . unfit for recreational use" and, as a result, constituted a "continuing nuisance" under Vermont common law.[48]

The Vermont District Court read the Savings Clause of the Clean Water Act not to preempt entirely the rights of states to control pollution.[49] In deciding between several alternative interpretations of the Savings Clause, the district court held that a state action to abate a nuisance could be maintained without conflicting with the CWA.[50] On interlocutory appeal to the Court of Appeals for the Second Circuit,[51] the court affirmed the district court's interpretation.

The Supreme Court granted certiorari and reversed the decision below to the extent that it permitted the application of Vermont law to the litigation: "We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located."[52] The significance of this limitation becomes apparent when a downstream state attempts to implement a policy of anti-degradation. After *International Paper*, the "nuisance" of the source state can only be abated to the extent the pollution exceeds the source state's water quality standards.

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[46] International Paper v. Ouellette, 479 U.S. 481, 483-84 (1987). The plaintiffs in the class action owned property on the Vermont side of the lake. The complaint asked for $20 million in compensatory and $100 million in punitive damages, as well as injunctive relief that would force the paper company to correct the water treatment system responsible for the offending discharge, *id.* at 484.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 485.

[51] Ouellette v. International Paper Co., 776 F.2d 55, 56 (1985), *aff'd in part, rev'd in part*, 479 U.S. 481 (1987).

[52] International Paper v. Ouellette, 479 U.S. at 487.

III. THE NPDES: THE STATUTORY MECHANISM FOR ENFORCEMENT

In the *Arkansas* opinion, the Court took time to describe the National Pollution Discharge Elimination System (NPDES)[53] and the prescribed methods for permit issuance.[54] Congress added this section to the Clean Water Act as a part of the "complete rewriting" of the law undertaken in 1972.[55] The Clean Water Act expressly prohibits the discharge of effluent until the point source has obtained an NPDES permit.[56] The section designates two possible means for issuing the NPDES permits that are required before discharging any effluent into a "navigable body of water."[57] The EPA may approve state programs to issue the permits, or for states without such programs, the EPA administers a federal permit program.[58]

A. Permit Issuance by State Permit Programs

The NPDES authorizes states to establish a permit program provided it satisfies certain requirements.[59] Section 402(b) contains some protective measures designed to protect "downstream States."[60] Provisions contained in section 402(b) provide that the state programs will issue permits that:

> insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State . . . in writing of its failure to so accept such recommendations along with its reasons for so doing.[61]

These provisions appear to provide little in the way of concrete remedies or procedures to ensure source states will adopt the nec-

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[53] FWPCA § 402, 33 U.S.C. § 1311(a) (1977 & Supp. 1993).
[54] Arkansas v. Oklahoma, 112 S. Ct. 1046, 1054 (1992).
[55] *Id.* (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 1054-55.
[60] *Id.*
[61] FWPCA § 402, 33 U.S.C. § 1342(b)(1)(B)(5) (1977 & Supp. 1993).

essary restrictions and permit limitations to maintain the water quality standards of the downstream state.

B. Permit Issuance by the EPA

In states without EPA-approved state permit programs, like Arkansas, the statute provides for the same procedure described in section 402(b) to apply.[62] Downstream states must submit their "written recommendations" to the Administrator of the EPA "subject to the same terms, conditions and requirements as apply to a state permit program . . . ."[63] Despite this apparent continuity, the EPA has required additional compliance with an older provision in the Act. Section 401(a)(1) appears to provide safeguards in addition to section 402(a) that condition the permit issuance on compliance with downstream state water quality standards.[64] These safeguard procedures apply after the Administrator determines the proposed discharge may affect water quality in another state.[65] After a series of regulatory back-and-forth between the parties, if compliance remains at issue the agency "shall condition such license or permit in such a manner as may be necessary to insure compliance with applicable water quality requirements."[66] At least in theory, these provisions appear to provide added protection for downstream states from EPA-issued permits that does not apply to state-issued permits.

These provisions, designed to protect the downstream state from an EPA permit issuance resulting in further degradation of water quality, hinge on determinations by the Administrator.[67] This contingency provides agency discretion that threatens the ability of states to institute successful anti-degradation programs. Because the Administrator has discretion in implementing these sections that require source state compliance with downstream standards, downstream states cannot be assured their waters will not be degraded. The significance of the NPDES permit process enters the analysis at a later point, when limited statutory protections combine with shrinking judicial remedies to limit downstream states' ability to pursue policies of anti-degradation.

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[62] *Arkansas*, 112 S. Ct. at 1055.
[63] FWPCA § 402, 33 U.S.C. § 1342 (a)(3).
[64] FWPCA § 401, 33 U.S.C. § 1341 (a)(2).
[65] *Id.*
[66] *Id.*
[67] *Id.*

IV. THE PROCEDURAL EVOLUTION OF *ARKANSAS V. OKLAHOMA*

A. The Hearing Before the Administrative Law Judge

The first step in this lengthy judicial process began with Oklahoma's challenge of the EPA permit granted to the sewage treatment plant in Fayetteville based on the violation of Oklahoma water quality standards.[68] The administrative law judge (ALJ) affirmed the permit based on the conclusion "that the Oklahoma standards would not be implicated unless the contested discharge had 'something more than a mere de minimis impact' on the State's waters.[69] He found that the discharge would not have an 'undue impact' on Oklahoma's waters . . . ."[70]

B. The Petition for Review Before the EPA's Chief Judicial Officer

After granting Oklahoma's petition for review, the Chief Judicial Officer made two rulings.[71] First, the Clean Water Act required an NPDES permit that contained any limitations necessary to comply with the "applicable state water quality standards," and second, the ALJ had misinterpreted the standard for protecting the downstream state.[72] The Chief Judicial Officer described the standard as follows:

> [A] mere theoretical impairment of Oklahoma's water quality standards—i.e., an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable—should not by itself block the issuance of the permit. In this case, the permit should 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.[73]

On remand, the ALJ used the revised standard to determine no detectable violation of Oklahoma's water quality standards would

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[68] Arkansas v. Oklahoma, 112 S. Ct. 1046, 1051 (1992).
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1051-52.
[72] *Id.* at 1052.
[73] *Id.* at 1051.

result from the discharge into the Illinois River. Therefore the Fayetteville permit satisfied the test.[74]

C. *The Court of Appeals for the Tenth Circuit*

After the final decision of the ALJ, both parties sought further review.[75] Arkansas disagreed that the Clean Water Act required the application of Oklahoma water quality standards to the Fayetteville permit, and Oklahoma disagreed with the finding that no detectable violation of the Oklahoma standards would result from the discharge under the current NPDES permit limitations.[76] The Tenth Circuit Court of Appeals heard the case in July 1990.[77]

1. The Standard for Review

Before responding to the issues on appeal, the court of appeals established the standard for review of an agency decision. The court summarized the standard as follows: "We must uphold the agency's actions, findings, and conclusions unless they are outside the agency's statutory authority, are not supported by substantial evidence, or are arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law."[78] After establishing the standard for review, the court of appeals appeared to qualify the threshold for reversal by stating, "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and the choice made.' "[79] This standard of review later came under heavy criticism in the Supreme Court's reversal.

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Oklahoma v. EPA, 908 F.2d 595 (10th Cir. 1990). The court's opinion contains a detailed explanation of the interrelations of the affected waterways. The treatment plant in Fayetteville planned to discharge one-half of the total effluent into the White River in Arkansas and the other half into the Illinois River Basin. The litigation concerns only the discharge entering the tributaries of the Illinois River. The discharge at issue entered an unnamed creek that flows into the Muddy Creek which flows into the Clear Creek. Thirteen miles downstream the Clear Creek joins the Illinois River, twenty-two miles from the Arkansas border. Just beyond the Arkansas border where the Illinois River enters Oklahoma, the river flows into Lake Francis. *See generally id.* at 598.

[78] *Id.* at 598.

[79] *Id.*

2. The Issues Framed

The court of appeals waded through issues framed by both sides before narrowing the focus.[80] Arkansas wanted the court to resolve whether a state must comply with the standards of all affected downstream states before issuing an NPDES permit.[81] The Oklahoma parties presented multiple issues the court classified as "relat[ing] to the substantive issues underlying [the] procedural question."[82] After considering the concerns of both parties, the court stated: "The ultimate concern posed to this court is whose water quality standards take precedence under the Clean Water Act . . . the upstream state's, the downstream state's, the federal government's or nobody's."[83]

3. The Holding

The court of appeals surprised everyone by reversing the EPA's permit on a theory none of the parties advanced.[84] First, the court dismissed the conclusions of the Chief Judicial Officer that the standard established by the Act depended on whether the discharge resulted in "a detectable change in water quality." Instead the court held, "We believe that, where a proposed source would discharge effluents that would contribute to conditions *currently constituting a violation* of applicable water quality standards, such proposed source may not be permitted."[85] This interpretation of the Act would eliminate the need for a challenging downstream state to show that the proposed permit would result in any detectable change.

Second, the court decided the existing condition of the Illinois River "currently constituted a violation of applicable water quality standards," and since the Fayetteville effluent could reach the Illinois River beyond the Arkansas border,[86] "the plant can be expected to contribute to the ongoing deterioration of the scenic river . . . ."[87] The court saw the present degraded condition of the

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[80] *Id.* at 600-01.

[81] *Id.*

[82] *Id.* at 601.

[83] *Id.* at 602.

[84] Arkansas v. Oklahoma, 112 S. Ct. 1046, 1051 (1992).

[85] Oklahoma v. EPA, 908 F.2d 595, 620 (10th Cir. 1990) (emphasis added).

[86] *Id.* at 629. The Court found "substantial evidence that Fayetteville's effluent will be transported downstream to Oklahoma." *Id.*

[87] *Id.*

Illinois River as a missing factor of the Chief Judicial Officer's holding. The court "conclude[d] that no state 'imposes' its standards on another state, but rather that the Clean Water Act mandated compliance with federal law, including the federally approved water quality standards of affected states."[88]

D. The Supreme Court

The Supreme Court granted certiorari and in an unanimous opinion, reversed the decision of the court of appeals. The Court concluded that the court of appeals had "made a policy choice that it was not authorized to make."[89]

V. BEGINNING THE DISSECTION: ANALYSIS OF *ARKANSAS V. OKLAHOMA*

The Court began by first addressing the three questions posed by the different parties.[90] Second, the Court questioned the holding of the court of appeals that the EPA's issuance qualified as "arbitrary and capricious."[91] Finally, the Court discussed the three errors the court of appeals made in reversing the issuance of the EPA's Fayetteville permit.[92]

A. The Three Questions

The Court divided the first part of its analysis into "three analytically distinct questions" concerning the interpretation of the Clean Water Act and argued by the parties at the various stages in the litigation.[93]

1. The First Question

"[D]oes the Act require the EPA, in crafting and issuing a permit to a point source in one State, to apply the water quality standards of downstream States?"[94] The Court chose not to an-

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[88] *Id.* at 602.
[89] Arkansas v. Oklahoma, 112 S. Ct. 1046, 1061 (1992).
[90] *Id.* at 1056.
[91] *Id.* at 1058
[92] *Id.* at 1060.
[93] *Id.* at 1056.
[94] *Id.*

swer this question, dismissing it as "neither necessary or prudent for us to resolve."[95] The Court explained the dismissal:

> In issuing the Fayetteville permit, the EPA assumed it was obligated by both the Act and its own regulations to ensure that the Fayetteville discharge would not violate Oklahoma's standards. As we discussed below, this assumption was permissible and reasonable and therefore there is no need for us to address whether the Act requires as much.[96]

Reviewing the history of the case, the EPA's "assumption" remained difficult to discern. While the initial permit did include a provision calling for modification of the permit limits if a future study showed noncompliance with the Oklahoma water quality standards, the EPA issued the permit without knowing whether the discharge would violate the Oklahoma standards.[97] The EPA administrative law judge ruled that a later study must show more than a "de minimis impact" in order to implicate the Oklahoma standards.[98] The EPA may have assumed that the permit must consider the Oklahoma water quality standards, but the definition of "violation" leaves room for further degradation of Oklahoma's water quality.

2. The Second Question

The Court prefaced the second question with an attempt to define the analysis by distinguishing between not deciding the scope of the agency's obligations under the Act and deciding the scope of the agency's authority under the Act.[99] The Court illustrated the difference: "Even 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."[100]

"[E]ven if the Act does not require as much, does the Agency have a statutory authority to mandate such compliance?"[101] The Court answered "yes," upholding the EPA's requirement that the

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[95] *Id.*
[96] *Id.* (citations omitted).
[97] *Id.* at 1051.
[98] *Id.*
[99] *Id.* at 1056.
[100] *Id.*
[101] *Id.*

Fayetteville discharge comply with Oklahoma's water quality standards. "Those regulations . . . constitute reasonable exercise of the Agency's *statutory authority*."[102] The Court provided statutory support for this conclusion:

> Congress has vested in the administrator broad discretion to establish conditions for NPDES permits. Section 402(a)(2) provides that for EPA-issued permits "[t]he Administrator shall prescribe conditions for such permits to assure compliance with the requirements of [§ 402(a)(1)] . . . and such *other requirements as he deems appropriate*." Similarly, Congress preserved for the Administrator broad authority to oversee state permit programs: "No permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter."[103]

The Court indicated the EPA has the discretion to require that Oklahoma's water quality standards be incorporated in the Fayetteville permit, but the EPA is not required to exercise that discretion. Combining the Court's reluctance to interpret the Clean Water Act as requiring the EPA to consider the standards of "all affected states" with the broad discretion of the EPA, downstream states gain little predictability from this ruling.[104]

This aspect of the Court's ruling ran contrary to the position taken by the State of Arkansas. Arkansas argued that the Court's holding in *International Paper v. Ouellette*,[105] concerning the role of "affected states" in the permit process, precluded the holding now that the EPA can incorporate the water quality standards of Oklahoma into the Fayetteville permit.[106] In *International Paper*, the Court described the role of the affected states as follows:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected states). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its border . . . . Thus the Act makes it

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[102] *Id.* (emphasis added).

[103] *Id.*

[104] FWPCA § 401, 33 U.S.C. § 1341(a)(2) (1977 & Supp. 1993).

[105] 479 U.S. 481 (1987).

[106] *Arkansas*, 112 S. Ct. at 1056-57.

> clear that affected states occupy a subordinate position to source states in the federal regulatory program.[107]

The Court distinguished this description by contrasting the affected state's input in the permit process with "the EPA's authority to require a point source to comply with downstream water quality standards."[108] The Court made the simple distinction between the affected states not having the authority to impose standards on an upstream state and the EPA having authority to choose to include the downstream state's standards in the source state's permit.

Arkansas also argued that regulations requiring compliance with downstream states' water quality standards conflict with the legislative history of the Act. The Court responded that the legislative history does indicate that Congress intended to give the Administrator "discretion in his oversight of the issuance of NPDES permits" and further noted that nothing in the legislative history indicates 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."[109]

Overall, the Court's response to "question two" conceded that the EPA can require a source state to comply with the water quality standards of a downstream state. Unfortunately, the Administrator's broad discretion removes any predictability for the downstream state. This factor, combined with the statutory restrictions that limit a downstream state's participation in the source state's permit process, leaves the affected states at the will of the EPA. This renders the implementation of anti-degradation policies adopted by states with shared interstate waterways ineffective to the extent that the state has no power to affect the quality of water entering from outside.

The Third Question

"[D]oes the Act provide, as the Court of Appeals held, that once a body of water fails to meet water quality standards no discharge that yields effluents that reach the degraded waters will be

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[107] *International Paper v. Ouellette*, 479 U.S. at 490-91.

[108] *Arkansas*, 112 S. Ct. at 1057.

[109] *Id.*

permitted?"[110] The Court said "no," finding essentially that the decision of the court of appeals was unsupported by any authority in the Act. The court of appeals recognized "its theory 'has apparently never before been addressed by a federal court.' "[111] In support of this theory, the court of appeals cited section 402(h)[112] of the CWA.[113] This section prohibits publicly owned treatment plants from accepting further pollutants after the discharge has violated the NPDES permit limits.[114] The Court found this reasoning tenuous, stating that "[t]he parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of [water quality] standards."[115] In striking down the prohibition against further degradation, the Court concluded:

> [R]ather than establishing the categorical ban announced by the Court of Appeals—which might frustrate the construction of new [treatment] plants that would improve existing conditions—the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate existing pollution . . . .To the extent that the Court of Appeals relied on its interpretation of the Act to reverse the EPA's permitting decision, that reliance was misplaced.[116]

The answer to "question three" has the most restrictive impact of the decision. The court of appeals attempted to fill in some of the gaps left in the statutory scheme with a bright line rule, and the Supreme Court rejected it in favor of recognizing the broad discretion of the EPA. While the CWA speaks of impact on "affected states,"[117] the Act fails to define what would constitute sufficient impact to require the EPA to alter or amend the upstream permit. The rejection of the bright line standard set forth by the court of appeals has the effect of relinquishing this question to the broad statutory discretion of the EPA.

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[110] *Id.* at 1056.

[111] *Id.* at 1058 (quoting from Oklahoma v. EPA, 908 F.2d. 595, 620 n.39 (10th Cir. 1990)).

[112] FWPCA § 402(h), 33 U.S.C. § 1342(h) (1977 & Supp. 1993).

[113] *Arkansas*, 112 S. Ct. at 1058.

[114] FWPCA § 402(h), 33 U.S.C. § 1342(h).

[115] *Arkansas*, 112 S. Ct. at 1058.

[116] *Id.*

[117] FWPCA § 401, 33 U.S.C. § 1341(a)(2).

B. Arbitrary and Capricious?

The Court next turned its attention to the court of appeal's erroneous determination that the EPA's issuance of the Fayetteville permit qualified as "arbitrary and capricious" because the permit relied on a misinterpretation of the Oklahoma water quality standards.[118] The Court identified the different interpretations of the CWA advanced by the court of appeals and the EPA as the primary factor resulting in the incorrect determination that the Agency had acted in an arbitrary and capricious manner.[119] The divergence in the two interpretations surrounded the court of appeal's reading of the Oklahoma statute to include the same "prohibition" against further discharge into presently degraded water, as the Court read in the CWA.[120] The EPA did not interpret the Act, or the Oklahoma standards, to contain such a prohibition. The Supreme Court also disagreed with the interpretation advanced by the court of appeals because the court "exceeded the legitimate scope of judicial review of an agency adjudication."[121]

The Supreme Court first commented on the soundness of the EPA's interpretation and application of the Oklahoma standards and then on the approach of the court of appeals.[122] The theory developed by the Court to support the interpretation of the EPA equates the Oklahoma standards for water quality with federal law. The Court relied on the NPDES regulations that require the permits "to comply 'with the applicable water quality requirements of all affected States' " to suggest that any state water quality standards the EPA determines to be "applicable" become incorporated into federal law.[123] In other words, because the EPA sets the guidelines the states use to design water quality standards, these standards have characteristics of federal law, and as a result, courts should approach the EPA's reasonable interpretations of these standards with substantial deference.[124]

The Court then concluded that the ALJ had reviewed the evidence concerning the possible impact the Fayetteville plant might

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[118] *Arkansas*, 112 S. Ct. at 1058.

[119] *Id.* The Court contrasted the interpretations but held that the court of appeals exceeded the legitimate scope of judicial review of an agency adjudication, *id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1058-59 (quoting 40 C.F.R. § 122.4(d) (1991)).

[124] *Id.* at 1059.

have on water quality in Oklahoma with sufficient scrutiny to justify the decision.[125] The ALJ reviewed four different measures[126] of water quality under the Oklahoma standards and concluded the plant would not violate the standards.[127] Based on the finding that the ALJ acted in substantial evidence, the Supreme Court ruled that the court of appeals should have affirmed the EPA's interpretation of the statute and the issuance of the permit.[128]

The Court does not hesitate to criticize the interstate impact of accepting the court of appeal's interpretation, noting, "[I]f every discharge that had some theoretical impact in a downstream State were interpreted as 'degrading' the downstream waters, downstream States might wield an effective veto over upstream discharges."[129] The Court may have overstated the effect of using the court of appeal's "degraded" standard as a "veto." This result would only happen in situations where the downstream state has stringent standards and the source state has permissive standards. In this hypothetical arrangement, the source state may decide that the costs of compliance would exceed the benefits of the permit and seek a less expensive alternative. Adjoining states with compatible water quality standards would not necessarily wield such a veto over each other's permits.

The Court's approach to this problem tends to assess the costs of anti-degradation policies to the downstream states. Simply put, if a downstream state wishes to improve the quality of its

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[125] *Id.*

[126] *Id.* at 1059 nn.15-18. The ALJ reviewed four measures from the Oklahoma water quality standards: eutrophication, aesthetics, dissolved oxygen and metals. First, eutrophication is the aging process of lakes, where algae and other plant life become so abundant because of the presence of nutritive compounds that the lake cannot support life, *id.* The ALJ determined that the Fayetteville discharge of phosphorus would not contribute to this problem, *id.* Second, regarding aesthetics the ALJ found Fayetteville's discharge of phosphorus would not impact significantly, *id.* Third, the ALJ found the thirty-nine miles of river between the plant and the border would be sufficient distance for complete oxygen recovery, *id.* Finally, the ALJ found the level of metals discharged from the Fayetteville plant would not violate the Oklahoma standards, *id.*; *see also* William H. Holmell, Comment, *The Impact of Arkansas v. Oklahoma on the NPDES Process Under the Clean Water Act*, 23 ENVTL. L. 273, 292 (1993). "The apparent impact of Arkansas is that EPA-approved water quality standards of a downstream state will be applied to an upstream discharger if there is an 'actual detectable or measurable' violation of the downstream state's water quality." *Id.* at 292 (quoting *Arkansas*, 112 S. Ct. at 1052).

[127] *Id.* at 1060.

[128] *Id.*

[129] *Id.* at 1059.

water and an upstream state contributes to the degradation of downstream waters, the downstream state must bear the cost.

C. The Three Mutually-Compounding Errors

1. The First Error

First, the court of appeals failed to give deference to the EPA's interpretation of its own regulations and instead relied on its own interpretation of the CWA.[130] The Court found the earlier discussed prohibition against discharge into a degraded waterway an unacceptable interpretation of the language of the Act. The Court followed by concluding that "the Court of Appeals sat in review of an agency action and should have afforded the EPA's interpretation of the governing law an appropriate level of deference."[131] Considering the weak statutory basis upon which the court of appeals relied in its decision to strike out in a new direction, the Court did not hesitate to rule that the new interpretation fell outside the recognized limits of appellate review.

2. The Second Error

The Court found that the court of appeals failed to apply the correct standard for reviewing the fact finding of an agency by misinterpreting the "substantial evidence standard" and substituted its own factual findings.[132] Pointing to several references in the opinion in which the court of appeals referred to " 'substantial evidence before the ALJ to support' [the] particular findings which the court thought appropriate, but which were contrary to those actually made by the ALJ," the Court concluded that the court of appeals had breached the standard for agency review.[133] Characterizing this breach, the Court described the actions of the court of appeals as "supplant[ing] the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."[134] The court of appeals went out on a limb, and the Supreme Court sawed it off. Good intentions aside, the court

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[130] *Id.* at 1060.

[131] *Id.* (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984)).

[132] *Id.*

[133] *Id.*

[134] *Id.*

of appeals did not have statutory authority to reverse the EPA's permit issuance.

3. The Third Error

The Court identified the third error as the determination by the court of appeals that the EPA acted in an arbitrary and capricious manner, contrary to established principles of agency review.[135] All three of these errors involved the court of appeals failing to respect the discretion of the EPA, indicating the Supreme Court's perception of how significant a role the EPA has in the scheme of the CWA.

CONCLUSION

Where does *Arkansas v. Oklahoma* leave the downstream state? If a state wants to implement water quality standards reflecting a policy of anti-degradation, the Savings Clause of the CWA allows the state to regulate beyond federal requirements. But, if a state wishes to further the policy of anti-degradation by ensuring shared interstate waterways remain within its pollution limits, the CWA offers little assistance. Before *City of Milwaukee*, a downstream state could institute a nuisance action against the source state in federal court, but the Court in *City of Milwaukee* ruled that the CWA preempted this action. Before *International Paper*, a downstream state could institute a state nuisance action against the source state, but the Court in *International Paper* ruled that the law of the source state, not the downstream state, controls such disputes. Now the Supreme Court in *Arkansas v. Oklahoma* interpreted the CWA to grant broad discretion to the EPA in setting standards for discharge permits, further limiting the options of the downstream state. A downstream state now faces upstream pollution with the option of writing a letter to the Administrator or offending state and waiting to see what happens. This unanimous decision by the Supreme Court continues the trend towards limiting the power of states to regulate water quality beyond the federal standards and favoring the EPA.

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[135] *Id.*