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## ***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?***

Maria V. Maurrasse

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# **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?**

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It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity.

Justice Holmes<sup>1</sup>

## I. INTRODUCTION

The notoriety that water pollution<sup>2</sup> has enjoyed during the last few decades is a novelty. Pollution itself, however, has existed for centuries<sup>3</sup> due to man's early practice of using bodies of water to dispose of wastes.<sup>4</sup> This practice extended into modern times<sup>5</sup> as growing cities burgeoned around rivers and continued to use the waters as a depository<sup>6</sup> for the increasing volume of sewage and garbage.<sup>7</sup> The problem of water pollution deepened as more wastes became inorganic in nature,<sup>8</sup> and generally did not decompose as readily as organic wastes.<sup>9</sup> As a result, water systems which were once self-cleaning could no longer purge themselves of the increased wastes.

Given the irrecusable law of nature, the movement of water does not observe political or governmental boundaries.<sup>10</sup> Accordingly, pollutants discharged into an interstate body of water in an upstream state (the source state) may transcend geographical barriers and affect the water located within a downstream state (the affected state). The

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1. *Missouri v. Illinois*, 200 U.S. 496, 521 (1905).

2. "Pollution of the water . . . is the addition of undesirable foreign matter which deteriorates the quality of the water." A. TURK, J. TURK & J. WITTES, *ECOLOGY POLLUTION ENVIRONMENT* 109 (1972).

3. For a historical account of river pollution, see L. KLEIN, *ASPECTS OF RIVER POLLUTION* 1-8 (1957).

4. *See id.* at 3; M. LIPPMANN & R. SCHLESINGER, *CHEMICAL CONTAMINATION IN THE HUMAN ENVIRONMENT* 250 (1979).

5. For a discussion of the effect of the Industrial Revolution, see L. KLEIN, *supra* note 3, at 3; R. LINTON, *TERRACIDE: AMERICA'S DESTRUCTION OF HER LIVING ENVIRONMENT* 208 (1970).

6. *See* L. KLEIN, *supra* note 3, at 3.

7. *See id.* at 1.

8. Inorganic wastes include inert wastes, toxic wastes, and radioactive wastes. *See id.* at 62-63. For example, in 1972 industrial wastes contributed to 60 percent of all U.S. water pollution. *THE COMPLETE ECOLOGY FACT BOOK* 221 (P. Nobile & J. Deedy eds. 1972).

9. Organic wastes are those wastes that "derive from living organisms." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 594 (1971). Water decomposes organic wastes with large quantities of oxygen. Historically, rivers cleansed themselves of organic waste and restored dissolved oxygen within a few miles of the pollution source by natural tumbling and aeration. Goldman & Shoop, *What Is Pollution?*, in *CONTROLLING POLLUTION: THE ECONOMICS OF A CLEANER AMERICA* 60 (M. Goldman ed. 1967).

10. R. HARRIS, *INTERSTATE ENVIRONMENTAL PROBLEMS* 2 (1974).

dynamic nature of water pollution leads to interstate pollution and, eventually, to interstate disputes.

One of the seminal complications in resolving these types of disputes stems from the different interpretations of what constitutes good, or necessary, environmental regulation. The answer to this query may depend upon the designated uses the disputing states have for the particular body of water.<sup>11</sup> For instance, water that is suited for industrial use may not be safe for household use, and vice versa.<sup>12</sup> Similarly, water that is considered polluted for one use may not be for another use. Therefore, interstate water pollution disputes may arise merely because the upstream state uses the common resource in a way that renders it unsuitable for the intended purpose of the downstream state.

Another compelling factor leading to interstate water pollution disputes is the disparity among states over what constitutes good environmental policy.<sup>13</sup> This disparity stems from the varying burdens and benefits that each state derives from the pollution. A state that receives some benefit, whether economic or otherwise, from the polluting activity it allows within its borders is more likely to accept or withstand pollution than an affected state that only receives the ensuing burdens of the water pollution.<sup>14</sup>

Such a difference in the distribution of benefits and burdens led to the interstate dispute in *Oklahoma v. EPA*.<sup>15</sup> In that case, the Environmental Protection Agency issued a permit<sup>16</sup> to a new \$40 million sewage treatment plant<sup>17</sup> located in Arkansas, the upstream source state.<sup>18</sup> In an effort to protect Beaver Lake,<sup>19</sup> the primary source of drinking water for approximately 200,000 northwest Arkan-

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11. Goldman & Shoop, *supra* note 9, at 59.

12. *Id.*

13. L. BACOW & M. WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 5 (1984).

14. See Zerbe, *Optimal Environmental Jurisdictions*, 4 ECOLOGY L.Q. 193, 203 (1974) ("Localities will doubtless differ in the value they put on the environment, and environmental standards will thus differ among localities.").

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

16. Under the Clean Water Act, the EPA is ultimately responsible for issuing permits. 33 U.S.C. § 1342(a)(1) (1988). The EPA, however, may delegate the power of issuing permits to qualified states. 33 U.S.C. § 1342(b) (1988). In *Oklahoma v. EPA*, the EPA was the permitting authority because Arkansas did not have a qualified permit issuing system. 908 F.2d at 598. Nonetheless, even in those states that have qualified permit programs, EPA retains oversight authority. 33 U.S.C. § 1342(c) (1988).

17. *Court Halts Plant's Discharge*, ENGINEERING NEWS-REC., Aug. 23, 1990, at 8.

18. The Arkansas Pollution Control and Ecology Department ordered the City of Fayetteville to upgrade its treatment facilities "or face a ban on new sewer hookups in the city." Untitled, UPI, May 26, 1983, *available in* LEXIS, Nexis Library, Omni File.

19. *Id.*

sas residents, the plant discharged half of its wastes into an interstate stream that eventually flowed into Oklahoma, the affected downstream state.<sup>20</sup> Oklahoma objected to the issuance of the permit, claiming that the wastes emitted by the Arkansas plant into the interstate stream violated the water quality standards that Oklahoma had established under the Clean Water Act.<sup>21</sup> Oklahoma received the resulting burdens of a deteriorated water quality of the Illinois River and of a deteriorated economy without receiving any benefit whatsoever.<sup>22</sup> Arkansas, on the other hand, received the benefit of the sewage treatment plant: namely, the protection of its own drinking water supply. In passing on this dispute, the Tenth Circuit Court of Appeals broadly held that under the Clean Water Act,<sup>23</sup> Arkansas, the upstream state, *must* abide by the more stringent water quality standards of Oklahoma, the downstream state.<sup>24</sup> This was the first time a United States court of appeals reached the merits on the issue and determined whether a state's water quality standard, established under the Clean Water Act, may receive extraterritorial effect and thus regulate out-of-state dischargers.<sup>25</sup>

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20. Untitled, UPI, Sept. 6, 1984, *available in* LEXIS, Nexis Library, Omni File.

21. States may implement more stringent water quality standards than those set by the Clean Water Act itself. 33 U.S.C. § 1370(1) (1988).

22. Oklahoma Governor George Nigh Tuesday stated, "The Illinois River is not only a very scenic area but is very important to the economy of northeastern Oklahoma. . . . We must protect this valuable resource." *Nigh Launches Four-Pronged (sic) Plan to Protect Illinois River*, UPI, May 29, 1984, *available in* LEXIS, Nexis Library, Omni File.

23. 33 U.S.C. §§ 1251-1387 (1988).

24. The court wrote: "In conclusion, we hold that the Clean Water Act requires point sources to comply with the federally approved water quality standards of affected downstream states." *Oklahoma v. EPA*, 908 F.2d 545, 634 (10th Cir. 1990).

25. A similar issue arose in 1983 in the dispute between Champion International Corporation, the State of Tennessee, and the Environmental Protection Agency. Although Champion was located in North Carolina approximately twenty-six miles from the Tennessee border, it discharged the wastes from its pulp and paper mill plant into the Pigeon River, an interstate river that eventually flows into Tennessee. *State v. Champion Int'l Corp.*, 709 S.W.2d 569, 570 (Tenn. 1986). In its production process, the mill was diverting daily 46.4 million gallons of the river's total flow of only 48 million gallons. *Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988). Thus, the Pigeon River was extensively polluted with wastes from the mill. The State of Tennessee filed the initial suit in Tennessee state court to enjoin Champion's discharges into the Pigeon River. The Tennessee Supreme Court denied the state relief, holding that the Clean Water Act preempted the application of both state and federal common law to interstate water pollution disputes. 709 S.W.2d at 575.

This was not the end of the dispute, however. The EPA, realizing that Champion's discharges were affecting the water quality standards of Tennessee, the downstream state, required that Champion's discharges conform to Tennessee's water standards. *Champion Int'l Corp. v. EPA*, 648 F. Supp. 1390, 1394 (W.D.N.C. 1986). Champion opposed such a requirement and filed suit in the District Court for the Western District of North Carolina seeking a reversal of the Administrator's permit. *Id.* at 1390. Responding to a summary judgment motion, the district court ruled in favor of EPA, concluding that although

[n]othing in the regulatory framework surrounding the [Clean Water Act] would

In holding that the downstream state's water quality standards govern in water pollution disputes, the Tenth Circuit interpreted the Clean Water Act in a manner not explicitly addressed by the legislature.<sup>26</sup> The court's decision was probably motivated by a genuine desire to add clarity to deficient provisions of the Clean Water Act and to respond to the extensive criticism of the Act's failure to abate water pollution.<sup>27</sup> This Comment argues that given the vague nature of the text of the Clean Water Act and the indeterminate legislative history concerning the extrajurisdictional effect of other states' more stringent state water quality standards, the Tenth Circuit's ruling in *Oklahoma v. EPA* is extreme and unsupported by either the Act's explicit provisions or its legislative history. Section II provides a historical perspective on the federal common law nuisance remedy available in interstate water pollution disputes prior to the enactment of the Clean Water Act. Section III offers a brief summary of federal water pollution legislation by focusing on the Clean Water Act. Section IV discusses the effect of the Clean Water Act amendments on the federal common law of nuisance. Section V analyzes the *Oklahoma v. EPA* decision by examining relevant provisions of the Clean Water Act. Section VI examines the inability of federal legislation to effectively and equitably abate interstate water pollution.

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automatically require that a source state comply with the water quality standards of every downstream state. . . . [T]he EPA administrator does retain the discretion to assume permitting authority if he concludes that the discharges will have an undue impact on interstate waters.

*Champion Int'l Corp. v. EPA*, 652 F. Supp. 1398, 1400 (W.D.N.C. 1987).

Champion argued that under *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the court must apply the law of the discharging state, i.e. North Carolina. 652 F. Supp. at 1399. The court dismissed this argument by distinguishing between the statutory cause of action in *Champion* and the state common law action at issue in *Ouellette*, stating: "If the matter before this court had been a common law nuisance action and if this court had applied Tennessee's tort law, *Ouellette* would require a recall of this court's decision. However, this was not a nuisance action." *Id.* at 1399.

For a discussion of the *Champion* cases, see Comment, *The Dilemma of the Downstream Plaintiff in an Interstate Water Pollution Case*, 37 BUFFALO L. REV. 257 (1988/1989).

26. See *infra* Section V.

27. For criticisms of the Clean Water Act, see Crider, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 CHI.-[.]KENT L. REV. 619, 644 (1988) (noting that courts have interpreted the Clean Water Act as referring to a state's right to control only those discharges located within its borders); Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241 (1982) (discussing problems in relying on Congress and federal administrators to deal with interstate problems such as interstate water pollution); Comment, *supra* note 25, at 294 (the Clean Water Act is not all-encompassing and the National Pollution Discharge Elimination System is not working); Comment, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734, 734-35 (1970) ("Massive legislation . . . cannot help but leave gaps to be filled by the courts."); Comment, *Milwaukee II: Federal Judicial Review of State-Issued Permits That Have Interstate Effects?*, 60 J. URB. L. 583, 610 (1983) ("[I]nterstices still exist under the [Clean Water Act]. . . .").

Lastly, Section VII argues that absent a new and clear congressional mandate, reinstatement of the federal common law is the most adequate and effective method of dealing with interstate water pollution between states, for it would effectuate a better compromise between national uniformity, predictability, and abatement.

## II. HISTORICAL PERSPECTIVE ON INTERSTATE WATER POLLUTION DISPUTES

Parties to interstate environmental law disputes in the United States invoke the common law of nuisance<sup>28</sup> more frequently than any other tort.<sup>29</sup> Its popularity stems from the action's ability to prevent neighbors within their property from engaging in behavior that negatively affects others. This cause of action thus recognizes that the right to use one's property is not absolute. The basic restrictions are fundamentally ones of fairness: an owner of a property may use the rights inherent to ownership only to the extent that they do not cause material injury or annoyance to a neighbor's use and enjoyment of property.<sup>30</sup> During the early part of this century, federal courts, including the United States Supreme Court, effectively expanded the nuisance concept of "reasonable use" beyond private disputes and into the realm of public interstate pollution to redress the injury caused by pollution originating in other states. By applying the public nuisance cause of action in interstate water pollution disputes, the federal courts implicitly recognized that an affected state, in an effort to protect its residents from environmental injury caused by another state, may sue the source state under the principle of *parens patriae*.<sup>31</sup>

Before the enactment of the Clean Water Act, interstate water pollution disputes were adjudicated through the application of the

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28. Black's Law Dictionary defines a nuisance as "that activity which arises from unreasonable, unwarrantable or unlawful use by a person of his own property, working obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." BLACK'S LAW DICTIONARY 1065 (6th ed. 1990).

29. J. ARBUCKLE, N. BRYSON, D. CASE, C. CHERNEY, R. HALL, J. MARTIN, J. MILLER, M. MILLER, W. PEDERSEN, R. RANDLE, R. STOLL, T. SULLIVAN & T. VANDERVER, ENVIRONMENTAL LAW HANDBOOK 9 (9th ed. 1987) [hereinafter ENVIRONMENTAL LAW HANDBOOK]; V. YANNAcone, B. COHEN & S. DAVIDSON, ENVIRONMENTAL RIGHTS AND REMEDIES 77 (1972).

30. ENVIRONMENTAL LAW HANDBOOK, *supra* note 29, at 10.

31. Black's Law Dictionary defines "*parens patriae*" as "literally 'Parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability. . . . It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

federal common law of nuisance.<sup>32</sup> This application, however, was not initially successful since technology was not sufficiently developed to monitor water quality with the degree of accuracy necessary to prove injury.

Such a technological obstacle arose in the 1908 case of *Missouri v. Illinois*,<sup>33</sup> the first dispute involving interstate water pollution to reach the Supreme Court.<sup>34</sup> In that case, the State of Missouri sought to enjoin the State of Illinois and the Sanitary District of Chicago from discharging sewage through an artificial channel into the Desplaines River in Illinois.<sup>35</sup> Missouri proceeded under the federal common law theory of nuisance, alleging that the discharge into its waters imposed an "actual, substantial, continuous, immediate and irreparable" harm.<sup>36</sup> In an opinion written by Justice Holmes, the Court, although recognizing its power to settle such disputes among states,<sup>37</sup> held that Missouri had failed to prove the damages that it claimed.<sup>38</sup> However, the Court implicitly recognized the application of a federal common law of nuisance to interstate pollution disputes by concluding that, had Missouri proved substantial deterioration of its waters, relief may have been awarded.<sup>39</sup>

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32. Between 1905 and 1931 alone, the Supreme Court heard four interstate water pollution cases: *New Jersey v. New York City*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1920); *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1914); *Missouri v. Illinois*, 200 U.S. 496 (1905).

33. *Missouri v. Illinois*, 200 U.S. 496 (1905); see also Comment, *supra* note 25, at 275-76; Note, *International Paper Co. v. Ouellette, Clearing the Muddied Preemption Waters of the Federal Water Pollution Control Act*, 17 CAP. U.L. REV. 501 (1989).

34. Earlier cases dealt with conflicts between the states over shared natural resources. See, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 621 (1851) (dispute over bridge's obstruction of interstate waterway's traffic). *Missouri v. Illinois* first addressed one state's excessive pollution of another state's waters. See Note, *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627, 631 (tracing federal interstate nuisance law to *Missouri v. Illinois*).

35. Note, *supra* note 33, at 517.

36. *Missouri v. Illinois*, 200 U.S. at 504. Missouri alleged that the Illinois discharges caused an increase in the typhoid mortality rate among its citizens. *Id.* at 522-23.

37. *Id.* at 519 ("The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State.").

38. The Court wrote:

There is nothing which can be detected by the unassisted senses, no visible increase of filth, no new smell. . . . The plaintiff's case depends upon an inference of the unseen. . . .

. . . [E]verything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. . . . No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted. . . . [T]here is a categorical contradiction between the experts on the two sides.

*Id.* at 522-23.

39. Technical proof appears to have been the major stumbling block for Missouri, the



Nine years after the Supreme Court rendered its opinion in *Missouri v. Illinois*, it heard arguments in *Georgia v. Tennessee Copper*,<sup>40</sup> its second interstate pollution case. In *Tennessee Copper*, the State of Georgia sought to enjoin the Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company from emitting sulfur fumes which would eventually reach Georgia.<sup>41</sup> In finding that Georgia failed to make a substantial showing,<sup>42</sup> the Court implicitly held once more that common law remedies were available to deal with interstate pollution disputes.<sup>43</sup>

In the 1920 case of *New York v. New Jersey*,<sup>44</sup> the State of New York sought to enjoin New Jersey from implementing a sewer system, alleging that it would pollute the waters of the Hudson and East Rivers.<sup>45</sup> Although the Court recognized that New York's right to sue New Jersey was "very clear,"<sup>46</sup> it refused to render an injunction because the evidence was, again, "much too meager and indefinite."<sup>47</sup> Once more, the Court implicitly reinforced its belief in a potentially successful interstate pollution suit by dismissing the case without prejudice.<sup>48</sup> The Court allowed New York to refile if the proposed sewer in operation "prove[d] sufficiently injurious to the waters of the Bay."<sup>49</sup>

In 1931, the Supreme Court effectively used nuisance principles to decide *New Jersey v. New York City*.<sup>50</sup> There, the State of New Jersey sought to enjoin the City of New York from dumping large quantities of garbage into the ocean because the garbage would ulti-

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affected state. The Court dismissed the case without prejudice, allowing either party to apply for later relief. *Id.* at 478. In its conclusion, the Supreme Court stated:

We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop of course we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause.

*Id.* at 526.

40. *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1914). See Note, *supra* note 33, at 503.

41. *Tennessee Copper*, 237 U.S. at 475-76.

42. The Court held that "[t]he evidence does not disclose with accuracy the volume or true character of the fumes which are being given off daily from the works of either company." *Id.* at 477.

43. The Court retained the cause for further action and allowed either party to apply for later relief. *Id.* at 478.

44. *New York v. New Jersey*, 256 U.S. 296 (1920).

45. *Id.* at 298.

46. *Id.* at 301 ("The right of the state to maintain such a suit . . . is very clear.").

47. *Id.* at 309-10.

48. *Id.* at 314.

49. *Id.*

50. *New Jersey v. New York City*, 283 U.S. 473 (1931).

mately wash up on New Jersey beaches.<sup>51</sup> Following the recommendation of the Court-appointed Master,<sup>52</sup> the Court recognized that New York City's actions constituted a nuisance to New Jersey.<sup>53</sup> The Court thus granted an injunction that directed the City of New York to implement an acceptable method for discarding its garbage.<sup>54</sup>

*New Jersey v. New York City* finally offered the Court evidence sufficient to recognize an interstate nuisance. In that case, the Court did not have to reach for "an inference of the unseen"<sup>55</sup> or speculate about possible pollution,<sup>56</sup> as it had been called to do in the interstate pollution cases it had entertained in the previous twenty-six years. The harm was perceptible and extensive, even by 1931 standards.<sup>57</sup> *New Jersey v. New York City* stands for the proposition that federal courts could successfully apply federal common law and use their equitable powers to effectively abate interstate pollution if the harm is proven substantial.

In the 1972 case of *Illinois v. City of Milwaukee (Milwaukee I)*,<sup>58</sup> the Supreme Court applied federal common law to an interstate water pollution dispute for the last time.<sup>59</sup> In that case, the Court reaffirmed its faith in federal common law and declared that "federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."<sup>60</sup> The Court realized that in suits between states, equity is best achieved by applying the facts peculiar to the particular case.<sup>61</sup>

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51. *Id.* at 476-77.

52. "[T]he Master reports that the defendant has created and continues to create a public nuisance on the property of New Jersey and that the latter is entitled to relief in accordance with the prayer of its complaint, but that the defendant should be given reasonable time within which to put into operation sufficient incinerators." *Id.* at 481.

53. *Id.* at 481, 483.

54. *Id.* at 483. Recognizing the impracticability of an immediate injunction, the Court afforded the City of New York time to put into operation sufficient amount of incinerators to handle its garbage disposal needs. *Id.*

55. *Missouri v. Illinois*, 200 U.S. 496, 522 (1905).

56. *See New York v. New Jersey*, 256 U.S. 296, 309 (1920).

57. *Id.* at 478 ("Vast amounts of garbage are cast on the beaches by the waters of the ocean and extend in piles and windrows among them. These deposits are unsightly and noxious, constitute a menace to public health and tend to reduce property values.").

58. *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1971).

59. After the enactment of the Federal Water Pollution and Control Act of 1972, the Supreme Court interpreted that Act as providing such a comprehensive water pollution regulatory system as to preempt all federal common law causes of action in the area of interstate water pollution. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981); *see supra* Section IV.

60. *Milwaukee I*, 406 U.S. at 107.

61. *Id.* at 107-08.

### III. FEDERAL WATER POLLUTION LEGISLATION OF THE TWENTIETH CENTURY

Prior to the enactment of federal water pollution legislation, legislators viewed the area as one of traditional state authority.<sup>62</sup> Nonetheless, legislators eventually realized that this old regime was ineffective at protecting the nation's waters from irreversible deterioration. This inefficiency stemmed from the broad discretion that states customarily enjoyed in the area of pollution control, which in turn stemmed from traditional principles of state rights. Although legislators realized that in order to effectively abate interstate water pollution it was necessary to enact federal legislation, they were unable to discard the perception that state rights were superior to the interests of the federal government. Consequently, early federal water pollution statutes granted the federal government power only over interstate waters, an area more easily claimed as "federal" without infringing on the rights of the states.<sup>63</sup>

#### A. *Federal Water Pollution Control Act of 1948*

The slow evolution of modern, comprehensive water pollution control by the federal government began in 1948 with the enactment of the Federal Water Pollution Control Act of 1948,<sup>64</sup> the precursor of the Clean Water Act. Typical of early pollution legislation, this Act limited the power of the federal government in several crucial ways, and thus subordinated the federal government to the states in the area of pollution control. First, the Act did not allow the federal government to review a state's water quality standards.<sup>65</sup> Second, the federal government could only regulate interstate waters.<sup>66</sup> Third,

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62. See Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1176 (1983).

63. This was recognized by Senator Randolph, from the Committee on Public Works, in a report submitted to the Senate during the hearings on the Clean Water Act Amendments of 1971, where he commented:

For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States.

H.R. REP. NO. 414, 92d Cong., 1st Sess. 1422 (1973), reprinted in 2 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT AMENDMENTS OF 1972, at 1422 (1973) [hereinafter LEGISLATIVE HISTORY OF THE CLEAN WATER ACT].

64. The Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155, Act of June 30, 1948, ch. 758 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)); see also J. DAVIES & B. DAVIES, *THE POLITICS OF POLLUTION* 28 (1975).

65. Comment, *supra* note 25, at 262.

66. *Id.* at 264.

enforcement rested solely with the state governors.<sup>67</sup> Fourth, federal authority was strictly limited to situations where pollution endangered the health or welfare of persons in a state other than that in which the discharges first occurred.<sup>68</sup> Given the rudimentary environmental technology available during the first half of the twentieth century, plaintiffs found it difficult to provide the courts with the necessary proof.<sup>69</sup> Finally, and most strikingly, the government could not sue a state unless the state agreed to be sued.<sup>70</sup>

### B. *Water Quality Act of 1965*

Inadequacies of the Federal Water Pollution Control Act of 1948 and increasing water pollution problems prompted Congress to enact the Water Quality Act of 1965.<sup>71</sup> This Act was different from the 1948 Act in several ways. First, the Act allowed federal review of state water quality standards.<sup>72</sup> Second, it gave the federal government the power to promulgate water quality standards for interstate waters where state water quality standards did not satisfy the requirements of the Act.<sup>73</sup> Third, the Act authorized federal enforcement of established water quality standards.<sup>74</sup> These changes were important, for they granted the federal government authority to intervene in pollution regulation even within state boundaries.

Nonetheless, a major flaw of the Water Quality Act was that primary responsibility and authority for promulgating and enforcing water quality standards continued to rest with the individual states.<sup>75</sup> The states, in turn, were very slow at promulgating the water quality standards. For instance, by 1971, more than four years after the deadline for submission of standards, only twenty-seven of the fifty-four jurisdictions covered by the 1965 Act had enacted acceptable water quality standards.<sup>76</sup> As in the Water Pollution Act of 1948, the federal government could compel enforcement only if the pollution

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67. LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 1420.

68. Comment, *supra* note 25, at 262.

69. See *supra* notes 28-61 and accompanying text.

70. Comment, *supra* note 25, at 263.

71. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; see also Gaba, *supra* note 62, at 1177; Comment, *supra* note 25, at 264; Note, Milwaukee v. Illinois: *An Interstate Water Pollution Dispute*, 1 PACE ENVTL. L. REV. 50, 55 (1983). Senator Muskie introduced the Water Quality Act of 1965. J. DAVIES & B. DAVIES, *supra* note 64, at 32.

72. Gaba, *supra* note 62, at 1178.

73. *Id.*

74. *Id.*

75. LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 1420 ("Each State was required by the 1965 Act to develop standards for water quality within its boundaries.").

76. *Id.* at 1422.

affected people living in another state and then only if the governor of the source state consented or if the water quality of interstate waters fell below the established standards.<sup>77</sup> Another inadequacy of the 1965 Act was its lack of a deterrent mechanism for violators of the prescribed water quality standards, even when their violations were wilful or negligent.<sup>78</sup> The federal government's power to enforce the Act thus proved to be more illusory than real. In fact, between 1952 and 1972 the Secretary of the Interior brought only one successful action to court.<sup>79</sup> This lack of enforcement arose probably from the government's burdens of locating the source of pollution and establishing causation.<sup>80</sup>

### C. Clean Water Act Amendments of 1972

By 1971 the inadequacies of the past federal pollution control programs revealed themselves in a mortifying fashion: one-third of the nation's sampled drinking water was unsafe;<sup>81</sup> 10 million fish were dying daily in a Florida bay;<sup>82</sup> and major waterways near the industrial and urban areas were unfit for most purposes.<sup>83</sup> Water pollution had become so serious that Congress felt compelled to take action.<sup>84</sup> As a result, on October 18, 1972, Congress, undeterred by President Nixon's veto,<sup>85</sup> passed the Clean Water Act Amendments of 1972

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77. Comment, *supra* note 25, at 264.

78. *Id.*

79. LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 1423 ("The record shows an almost total lack of enforcement. Under this procedure, only one case has reached the courts in more than two years.").

80. Gaba, *supra* note 62, at 1179.

81. LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 862.

82. *Id.* at 1253.

83. *Id.* at 1425.

84. *Id.* at 161, 753, 862, 1253, 1423, 1425. Congressmen realized that America's waters were "in serious trouble." *Id.* at 753. Senator Muskie analogized the water pollution problem as follows:

Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.

We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.

*Id.* at 161-62.

85. President Nixon rejected the Amendments because he considered them too expensive. In his address to the Senate on October 17, 1972, President Nixon stated:

I am also concerned, however, that we attack pollution in a way that does not ignore other very real threats to the quality of life, such as spiraling prices and

("Clean Water Act")<sup>86</sup> the objective of which was to "restore and maintain the chemical, physical, and biological integrity of our Nation's waters."<sup>87</sup> The Act specified that its two goals were to eliminate the discharge of pollutants into navigable waters by 1985<sup>88</sup> and to attain an interim goal of water quality which would provide "for the protection and propagation of fish, shellfish, and wildlife and [would provide] for recreation in and on the water by July 1, 1983."<sup>89</sup> Congress established three mechanisms to achieve these goals: effluent limitations, water quality standards, and a national enforcement permit program.

### 1. TECHNOLOGY-BASED EFFLUENT LIMITATIONS

One of the most important parameters set in the 1972 Amendments is the concept of effluent limitations. The purpose of effluent limitations was to quantify the "rates and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters."<sup>90</sup> The EPA sets these effluent limitations industry by industry, based on the technological and economic capabilities of the wastewater treatment facilities within a given industry. (Consequently, these standards are called "technology-based effluent limitations.") More significantly, the Act specifically provides for a increase in the stringency of these limitations in order to allow industry to gradually meet the optimum standards. Accordingly, by July 1, 1977, the EPA had to set the effluent limitations based on the "best practicable control technology,"<sup>91</sup> and by July 1, 1983, the EPA had to set the effluent limitations based upon the

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increasingly onerous taxes. Legislation which would continue our efforts to raise water quality, but which would do so through extreme and needless overspending, does not serve the public interest. . . .

. . . For this reason I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972—a bill whose laudable intent is outweighed by its unconscionable \$24 billion price tag. . . .

. . . [A]ny spending bill this year which would lead to higher prices and higher taxes defies the signature by this President. I have nailed my colors to the mast on this issue; the political winds can blow where they may.

Message From the President of the United States Returning Without Approval the Bill (S. 2770) Entitled "The Federal Water Pollution Control Act Amendments of 1972," LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 137-38. For a historical discussion of the legislative action, see J. DAVIES & B. DAVIES, *supra* note 64, at 39-44.

86. 33 U.S.C. §§ 1251-1387 (1988).

87. *Id.* § 1251(a).

88. *Id.* § 1251(a)(1).

89. *Id.* § 1251(a)(2).

90. *Id.* § 1362(11).

91. *Id.* § 1311(b)(1)(A).

stricter "best available technology."<sup>92</sup> These effluent limitations became the standards that industry had to meet.

## 2. WATER QUALITY STANDARDS

Another important parameter of the 1972 Amendments is the concept of "water quality standards." These standards provide the water quality criteria for designated uses of particular waters. Their purpose is to "protect the public health or welfare, enhance the quality of the water and serve the purposes of [the] chapter."<sup>93</sup> In addition to the national water quality standards, the Act provides states with a powerful tool in interstate disputes. They may promulgate "state water quality standards applicable to intrastate waters."<sup>94</sup> When setting their own standards, the state must take into consideration factors such as the "waters' use and value for public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes."<sup>95</sup> The Act also allows states to impose stricter standards than are required under the Act.<sup>96</sup> Nonetheless, this power is not absolute. A state must submit its water quality standards to the EPA Administrator, who determines whether the standard "meets the requirements of this chapter."<sup>97</sup> If the Administrator approves the state's proposed water quality standard, "such standard shall thereafter be the water quality standards for the applicable waters of *that* state."<sup>98</sup>

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92. *Id.* § 1311(b)(2)(A).

93. *Id.* § 1313(c)(2)(A).

94. *Id.* § 1313(a)(3)(A).

95. *Id.*

96. Section 1370 states in pertinent parts as follows:

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 . . . (B) any requirement respecting control of abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

*Id.* § 1370.

97. *Id.* § 1313(c)(3).

98. *Id.* (emphasis added).

### 3. NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM

The Clean Water Act's enforcement mechanism consists of a permit program called the National Pollution Discharge Elimination System ("NPDES").<sup>99</sup> This program was designed to monitor and implement the water quality standards and effluent limitations. It is unlawful to discharge any pollutant unless the discharger does so in accordance with an NPDES permit.<sup>100</sup>

The Clean Water Act authorizes the EPA to delegate the permit issuing power to the states<sup>101</sup> as long as the state permit program meets the requirements outlined in the Act.<sup>102</sup> If a state does not create such a program, the EPA continues to issue the permits in that state.<sup>103</sup> State permit programs nonetheless remain subject to review by the EPA. If a state fails to enforce the national water quality standards of effluent limitations, the EPA may step in and compel compliance with the requirements, withdraw a state's permitting authority, or both.<sup>104</sup> Therefore, once the EPA has delegated permitting authority to a state, the state has primary responsibility for setting its own water quality standards, setting the effluent limitations, and enforcing the permits. All are, of course, subject to an EPA veto.

The Act also provides for the imposition of civil penalties for a violation of a permit or of the Act,<sup>105</sup> as well as criminal prosecution upon a negligent or wilful violation of a permit condition or of the Act.<sup>106</sup> In addition to the enforcement provided for in the Act, states

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99. *Id.* § 1342.

100. *Id.* § 1311(a). For a discussion of the permit procedures, see ENVIRONMENTAL LAW HANDBOOK, *supra* note 29, at 255-58.

101. 33 U.S.C. § 1342(a)(5) (1988).

102. For a listing of the requirements that a state permit program must possess for approval by the Administrator, see *id.* § 1342(b).

103. As of 1987, three-fourths of the States had their own permit system. ENVIRONMENTAL LAW HANDBOOK, *supra* note 29, at 225.

104. 33 U.S.C. § 1342(c)(1).

105. Section 1319(b) provides in pertinent part as follows: "The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section." *Id.* § 1319(b).

106. The Act provides for criminal penalties for negligent violations and "knowing violations." In the case of negligent violations:

Any person who—

(A) negligently violates section 1311, 1312, 1226, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any such sections in a permit issued under section 1342 of this title by the Administrator or by a State . . .

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person



may also impose their own established laws. However, if the EPA disagrees, it may intervene.

#### IV. IMPACT OF THE CLEAN WATER ACT AMENDMENTS OF 1972 ON THE FEDERAL COMMON LAW OF NUISANCE

Since the enactment of the 1972 Clean Water Act Amendments, the Supreme Court has decided two cases concerning the application of common law nuisance in interstate water pollution disputes: *Illinois v. City of Milwaukee (Milwaukee II)*<sup>107</sup> and *International Paper Co. v. Ouellette*.<sup>108</sup> In these cases, the Court interpreted the Act as diminishing the potential application of the federal common law of nuisance in interstate water pollution disputes.

##### A. City of Milwaukee v. Illinois (Milwaukee II)

The first interstate water pollution case to reach the Supreme Court after the enactment of the 1972 Amendments to the Clean Water Act was the 1980 case of *Illinois v. City of Milwaukee (Milwaukee II)*.<sup>109</sup> In *Milwaukee II*, the Court concluded that the amendments preempted the field of interstate water pollution, a holding which proved correct the prediction that Justice Douglas made in an earlier interstate water pollution case.<sup>110</sup>

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knew or reasonably should have known could cause personal injury or property damage . . .

shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than 1 year, or by both.

*Id.* § 1319(c)(1).

In case of "knowing violations":

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any such sections in a permit issued under section 1342 of this title by the Administrator or by a State . . .

(B) knowingly introduces into a sewer system or into a publically owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage . . . ;

shall be punished by a fine of not less than \$5,000 or more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

*Id.* § 1319(c)(2).

107. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981).

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

109. *Milwaukee II*, 451 U.S. 304. For an overview of *Milwaukee II*, see *Comment, supra* note 25, at 277-88; Note, *supra* note 33, at 502; *Comment, supra* note 27, at 583; *The Supreme Court, 1980 Term—Leading Cases*, 95 HARV. L. REV. 290, 290-300 (1981).

110. In 1972, just months before the passage of the 1972 Amendments, the Supreme Court decided *Milwaukee I*, which recognized that a federal common law nuisance action was available to the plaintiff state. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). Delivering

The dispute between the State of Illinois and the City of Milwaukee<sup>111</sup> arose from Milwaukee's daily discharge of more than 200 million gallons of sewage<sup>112</sup> into the waters of Lake Michigan.<sup>113</sup> The State of Illinois filed a federal common law action of nuisance, claiming that the discharge posed a danger to those of its citizens who depended on Lake Michigan for their drinking water and bathing.<sup>114</sup> Enteroviruses<sup>115</sup> and pathogenic bacteria<sup>116</sup> contained in the sewage caused such life-threatening diseases as polio, meningitis, and encephalitis.<sup>117</sup> The City of Milwaukee responded that the discharges and overflows did not violate its permit, and thus the nuisance cause of action had to fail.<sup>118</sup>

In a 6-3 majority opinion authored by Justice Rehnquist, the Court held that the State of Illinois' federal common law nuisance action must fail because the 1972 Amendments of the Clean Water Act preempted the field of interstate water pollution, thus prohibiting the application of federal common law.<sup>119</sup> The Court began its analysis by declaring that "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal

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the opinion of the Court, Justice Douglas warned that new federal laws may preempt the field of interstate water pollution, eradicating the use of common law actions in such controversies. *Id.* at 107; see also *supra* Section II.

111. The three defendant dischargers were the City of Milwaukee, the Sewage Commission of the City of Milwaukee, and the Metropolitan Sewage Commission of the County of Milwaukee. *Milwaukee II*, 451 U.S. at 308.

112. *Id.* at 308-09. The discharges were caused by overflows of untreated sewage from the defendants' sewage system and by discharges of inadequately treated sewage from the defendants' treatment plants. *Id.*

113. Lake Michigan is an interstate body of water bordered by Illinois and the City of Milwaukee.

114. *Milwaukee II*, 451 U.S. at 309.

115. Enteroviruses are "a family of viruses which include the poliomyelitis, coxsackie and echo groups of viruses. Their importance lies in their tendency to invade the central nervous system. They receive their name from the fact that their mode of entry into the body is through the gut." BLACK'S MEDICAL DICTIONARY 249 (36th ed. 1990).

116. Pathogenic bacteria are those that cause or are capable of causing disease. *Id.* at 520.

117. *Illinois v. City of Milwaukee*, 599 F.2d 151, 167 n.32 (7th Cir. 1979).

118. The defendants had obtained discharge elimination permits from the Wisconsin Department of Natural Resources, the EPA-approved state permitting agency. *Milwaukee II*, 451 U.S. at 311. The permit, however, did not prohibit overflows but merely set a timetable for the construction of additional mechanisms to control sewage overflow. *Id.*

119. *Id.* at 317 ("[C]ongress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."). The majority opinion was joined by Chief Justice Burger and Justices Brennan, Stewart, White, and Powell. Justice Blackmun authored the dissenting opinion and was joined by Justices Marshall and Stevens. *Id.* at 332.

law.”<sup>120</sup> The Court further concluded that Congress “has occupied the field [of water pollution] through the establishment of a comprehensive regulatory program,”<sup>121</sup> and that neither section 1365<sup>122</sup> nor section 1370<sup>123</sup> preserved common law.<sup>124</sup>

The majority opinion provoked a vehement dissent by Justice Blackmun, who argued that “Congress intended to preserve the federal common law of nuisance.”<sup>125</sup> Furthermore, Blackmun asserted that the application of state common law in such controversies undermines any possible “uniform federal approach to the problem of alleviating interstate pollution.”<sup>126</sup> Blackmun contended that since the Act did not address the issue of interstate water pollution, federal courts should resort to federal common law causes of action to resolve disputes among states in order to best fulfill the congressional objective of abating water pollution. Both the Court and the dissent left open the issue of whether affected states could supplement the Clean Water Act with their own state common law causes of action in an effort to protect themselves from pollution emanating from source states.

### B. International Paper Co. v. Ouellette

Six years after its decision in *Milwaukee II*, the Supreme Court was called to resolve the unanswered question of whether an affected state in an interstate water pollution dispute could supplement the Clean Water Act with its own state common law.<sup>127</sup> The dispute in

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120. *Id.* at 317.

121. *Id.*

122. Section 1365(e) reads in pertinent part as follows: “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 a State agency).” 33 U.S.C. § 1365(e) (1988).

123. *See supra* note 96 and accompanying text.

124. The Court read section 1365(e) narrowly to mean that the Citizen Suit provision only supplants federal common law with regard to citizen suits. The Court thus rejected Milwaukee’s argument that section 1365(e) allows all federal common law to supplant the entire Clean Water Act. Section 1370, as read by the Court, does not indicate that the more stringent pollution limitations allowed under that section were to be established by “federal court actions premised on federal common law.” *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 328-29 (1981).

125. *Id.* at 339.

126. *Id.* at 353.

127. This time, however, the case did not involve the application of federal common law as it had in *Milwaukee II*, but rather involved the application of state common law, and more specifically, the application of the affected state’s common law.

*International Paper Co. v. Ouellette*<sup>128</sup> involved the New York based International Paper Company's ("IPC") routine discharge of effluents from its paper-making plant into Lake Champlain—a body of water that serves as part of the border between New York and Vermont.<sup>129</sup> The plaintiff class, 162 owners of property along the Vermont side of Lake Champlain, brought a Vermont common law action<sup>130</sup> against the company, alleging that the discharges constituted a "continuing nuisance"<sup>131</sup> which interfered with the use and enjoyment of their properties, consequently lowering their property values.<sup>132</sup> In addition to requesting injunctive relief, the class sought \$20 million of compensatory relief.<sup>133</sup>

IPC moved to dismiss the action, claiming that the Clean Water Act preempted the entire water pollution field, including the application of state common law. The district court denied the motion to dismiss, finding that the Clean Water Act authorized common law suits.<sup>134</sup> Moreover, the district court found that traditional tort and conflicts-of-laws rules dictated that the controversy should be governed by the common law of the affected state.<sup>135</sup> IPC appealed to the Second Circuit Court of Appeals, which upheld the decision of the district court in a per curiam opinion.<sup>136</sup>

The issue facing the Supreme Court was one of first impression: whether the Clean Water Act authorized the application of state common law to an interstate water pollution dispute. In an opinion

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128. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); see also Note, *supra* note 33, at 501; Comment, *supra* note 27, at 583.

129. These effluents consisted of waste generated from the production activities of the paper mill. *Ouellette*, 479 U.S. at 484.

130. *Ouellette v. International Paper Co.*, 602 F. Supp. 264 (D.Vt. 1985). The plaintiffs originally brought this suit in Vermont state court but the suit was later removed to federal court. *Ouellette*, 479 U.S. at 484.

131. *Id.*

132. 602 F. Supp. at 266.

133. The plaintiffs requested injunctive relief consisting of relocating the diffusion pipe closer to the source of the discharges and further away from the New York-Vermont lake border. *Id.*

134. *Id.* at 274 ("[T]he [Federal Water Pollution Control Act] authorizes actions to redress injury caused by water pollution of interstate waters under the common law of the state in which the injury occurred.").

135. The District Court wrote:

[I]t is completely reasonable to assume that Congress believed that a plaintiff suffering in State A might sue under the laws of State A to recover for injuries sustained as the result of pollution emanating from State B. It thus seems inescapable that Congress, by passage of the [Federal Water Pollution Control Act's] saving clause and state authority provisions, intended to preserve just such an action.

*Id.* at 270.

136. *Ouellette v. International Paper Co.*, 776 F.2d 55 (2d Cir. 1985).

authored by Justice Powell, the Court held that although the Clean Water Act authorized the application of the source state's common law to interstate water pollution cases, it preempted the application of the affected state's common law.<sup>137</sup> Affected states would henceforth be precluded from applying their common law when injured by pollution emanating from other states.

The Court began its preemption analysis by noting that there is a presumption against the implicit preemption of state common law by federal legislation.<sup>138</sup> It stated that the courts should interpret federal statutes as preempting state common law only where there is a clear indication that the preemption is consistent with the intent of Congress or when the state law "actually conflicts with a federal statute."<sup>139</sup> Although recognizing that neither the statute's language nor its legislative history elucidated the intent of Congress,<sup>140</sup> the Court stated that a sufficiently comprehensive regulatory program can safely be interpreted as preempting state common law.<sup>141</sup>

Since neither the language of the statute nor its legislative history specified which actions were to be preserved, the Court in *Ouellette* declared that the common law action would not be preempted unless it was an obstacle to or conflicted with the "full purposes and objectives of Congress."<sup>142</sup> The Court concluded that applying the stricter pollution laws of Vermont to the New York discharge would interfere with the chosen method of eliminating water pollution<sup>143</sup> and would

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137. The Court concluded:

[I]f affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full purposes and objectives of Congress. Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

*International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987) (citation omitted).

138. *Id.* at 486, 491 & n.11.

139. *Id.* at 491. "Such a conflict will be found when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 491-92 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)).

140. *Id.* at 493.

141. *Id.* at 491 ("Although courts should not lightly infer pre-emption, it may be presumed when the federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation.") (citation omitted).

142. *Id.*

143. The Court wrote:

In determining whether Vermont nuisance law 'stands as an obstacle' to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

be inconsistent with Congress' objective of creating a predictable permit system.<sup>144</sup> Moreover, the Court found that it was against the intent of Congress, as expressed in the statute, to allow a state other than the source state to dictate which effluents to the dischargers outside its own borders.<sup>145</sup>

As in *Milwaukee II*, the Justices differed on the interpretation of the legislative history.<sup>146</sup> Writing for the dissent, Justice Brennan accused the majority of erroneously assuming that "Congress valued administrative efficiency more highly than effective elimination of water pollution."<sup>147</sup> In addition, the dissent persuasively pointed out that the majority ignored well established conflict-of-law principles by holding that a court is precluded in a common law action involving interstate water pollution from applying the law of the affected state, but must apply the law of the state where the injury occurred.<sup>148</sup>

Thus, as of 1987, amidst this tug-of-war between the Justices, an affected state could pursue a common law nuisance action against an out-of-state discharger only if the action was brought under the common law of the source state. This remedy may prove ineffective in protecting affected states because the discharger located in the source state will likely be in compliance with its own state's laws. More importantly, the Court was unable to provide any convincing basis for preferring the interests of the upstream state over those of the downstream state. Because *Ouellette* prohibited an affected state from compelling an out-of-state discharger to comply with its environmental policies under a common law cause of action, it remained to be seen whether affected states had some other recourse.

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*Id.* at 494.

144. *Id.* at 496 ("Application of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system.").

145. The Court found that sections 1341 and 1342 demanded the conclusion that "[e]ven though it may be harmed by the discharges, an affected State only has an *advisory role* in regulating pollution that originates beyond its borders." *Id.* at 490. (emphasis added) Consequently, the Court concluded that "[t]he Act makes it *clear* that affected States occupy a subordinate position to source States in the federal regulatory program." *Id.* at 491 (emphasis added).

146. *Id.* at 500 (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens dissented as they had done in *Milwaukee II*. They were joined by Justice Brennan.

147. *Id.* at 504 (Brennan, J., dissenting).

148. *Id.* at 501-02. Federal district courts employ a two-step analysis when determining which state's tort law applies in interstate tort suits. First, the court "appl[ies] the conflict-of-law rules of the State in which the court sits." *Id.* at 501 (citation omitted). Secondly, the court interprets "these conflict-of-law principles . . . to determine whether the tort law of the source State or the affected State should be applied." *Id.* at 501-02.

V. THE *OKLAHOMA v. EPA* DECISION

Given the preemption of federal common law in *Milwaukee II* and the foreclosure of an affected state's common law in *Ouellette*, the only recourse available to an affected state limited to the provisions of the Clean Water Act. In this context, the State of Oklahoma filed suit in federal court against the EPA seeking to prevent the discharge of pollutants into its waters by an out-of-state Arkansas discharger. The issue in *Oklahoma v. EPA* was whether the Clean Water Act, as opposed to federal or state common law, allows redress to an affected state.<sup>149</sup> This issue was one of first impression in the federal courts of appeals.

A. *Facts*

In preparation for the operations of its new \$40-million sewage treatment plant,<sup>150</sup> the City of Fayetteville, Arkansas applied for a National Pollution Discharge Elimination System ("NPDES") permit.<sup>151</sup> The permit was necessary<sup>152</sup> because in the process of treating 12.2 million gallons per day of sewage,<sup>153</sup> the plant would discharge 6.1 million gallons per day into Mud Creek, a nearby stream.<sup>154</sup> According to the proposed project, half of the discharges of the treatment plant would eventually flow into Oklahoma via the Illinois River, an Arkansas-Oklahoma body of water commonly used for recreation.<sup>155</sup>

Oklahoma claimed that the discharges from the Fayetteville treatment plant would degrade the quality of the Oklahoma portion of the Illinois River, a segment of which had been "designated an Oklahoma state scenic river and was proposed for study as a potential addition to the National Wild and Scenic Rivers System."<sup>156</sup> The discharges consequently violated Oklahoma's more stringent water qual-

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

150. *Court Halts Plant's Discharge*, ENGINEERING NEWS-REC., Aug. 23, 1990, at 8; *Don't Start Waste Wars . . . or Water Wars*, ENGINEERING NEWS-REC., Aug. 23, 1990, at 66.

151. Fayetteville is a small city of approximately 30,000 residents. Remick, *Untitled*, UPI, Sept. 6, 1984, *available in* LEXIS, Nexis Library, Omni File.

152. Section 1311 of the Clean Water Act states that, except as in compliance with § 1342, among other sections, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 1342, in turn, calls for the establishment of the National Pollutant Discharge Elimination System—the Clean Water Act permit system.

153. *Court Halts Plant's Discharge*, ENGINEERING NEWS-REC., Aug. 23, 1990, at 8.

154. The permit called for a maximum of 6.1 million gallons of wastes per day. *Untitled*, UPI, Nov. 6, 1985, *available in* LEXIS, Nexis Library, Omni File.

155. Specifically, the discharge flowed into the Illinois River, which crosses into Oklahoma. *Id.*

156. *Oklahoma v. EPA*, 908 F.2d 595, 598 (10th Cir. 1990).

ity standards.<sup>157</sup> But on November 5, 1985, despite strong opposition from the State of Oklahoma and the other named parties,<sup>158</sup> the EPA issued the permit.<sup>159</sup> The ensuing conflict tested the interstate enforcing power of the Clean Water Act and the power of states to resolve this issue.<sup>160</sup>

The State of Arkansas and the State of Oklahoma requested an evidentiary hearing before an administrative law judge ("ALJ") to present arguments concerning the possible issuance of an NPDES permit by EPA.<sup>161</sup> Oklahoma appealed the issuance of the permit on the premise that EPA had erred in deciding that the permit was in compliance with Oklahoma water quality standards because the EPA had failed to consider all the relevant factors.<sup>162</sup> The State of Arkansas, on the other hand, appealed the issuance of the permit on the ground that the Clean Water Act does not allow the EPA to compel upstream source states to abide by the more stringent water quality

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157. Oklahoma's water quality standards were more stringent than the federal regulations because of the state's anti-degradation policy, which states in pertinent parts: "No further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed." *Id.* at 635 (appendix) (citing Oklahoma Water Quality Standards § 3).

158. The other plaintiffs in the case were the Oklahoma Scenic Rivers Commission and Pollution Control Coordinating Board, and Save the Illinois River ("STIR"), a non-profit Oklahoma environmental group. The other defendants in the case were the City of Fayetteville, the Beaver Water District, the State of Arkansas, and the Arkansas Department of Pollution Control and Ecology. The Oklahoma Wildlife Federation was granted right to intervene. *Id.* at 597. Dottie Hoxie, a spokeswoman for STIR and Director of the Tahlequah Chamber of Commerce, stated early in the controversy that the group "plan[s] to fight it all the way." Untitled, UPI, Nov. 6, 1985, available in LEXIS, Nexis Library, Omni File.

159. The EPA was the issuing authority because the State of Arkansas did not have an EPA-approved state permitting agency. *Oklahoma v. EPA*, 908 F.2d at 598. Permit No. AR0020010 "sets limits on the amounts of certain pollutants that may be discharged and establishes maximum and minimum effluent concentrations of these pollutants and other chemical parameters . . . [and] prohibits the discharge of any incompletely treated effluent to Mud Creek." *Id.* On November 5, 1985, Dick Whittington, an administrator of EPA's Region 6 Office in Dallas, reportedly stated, "[T]he permit was issued after a review of letters and petitions signed by more than 4,800 people and 32 statements presented at a public hearing held August 7 in Fayetteville." Untitled, UPI, Nov. 6, 1985, available in LEXIS, Nexis library, Omni File.

160. At a news conference, former Congressman Ed Edmondson, STIR's attorney, said that the group will "pursue this to the Supreme Court if necessary." *River Supporters Vow Continued Sewage Fight*, UPI, Feb. 11, 1988, available in LEXIS, Nexis Library, Omni File.

161. Section 1341(a)(2) provides that if within 60 days of receiving notification that a discharge may affect the waters of an affected state, such state "notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing." 33 U.S.C. § 1341(a)(2) (1988).

162. The issue of whether EPA correctly considered all relevant factors in making its determination involves administrative law issues beyond the scope of this paper.



standards of affected downstream states.<sup>163</sup>

The ALJ found that the discharges authorized in the permit would not violate the more stringent water quality standards of Oklahoma,<sup>164</sup> implicitly assuming that the Clean Water Act demands that upstream source states abide by the more stringent water quality standards of affected downstream states.<sup>165</sup> Both Oklahoma and Arkansas appealed the ALJ's decision to the chief judicial officer ("CJO").<sup>166</sup> Arkansas argued that the ALJ's decision was erroneous because it presumed that Arkansas must abide by the more stringent water quality standards of Oklahoma, while Oklahoma pleaded that, contrary to the ALJ's conclusion, the permit would make it impossible for Oklahoma to attain its own water quality standards.<sup>167</sup>

The CJO affirmed in part and reversed in part.<sup>168</sup> The order indicated that Arkansas must abide by the EPA-approved Oklahoma water quality standards and remanded the case to determine "whether the record showed by a preponderance of the evidence that the permitted discharge would not cause an actual detectable violation of [Oklahoma's] water quality standards."<sup>169</sup>

On remand, the ALJ reviewed the record and once again concluded that "an out-of-state source must meet the [water quality standards] of another downriver state. . . . Therefore the Fayetteville discharge must meet Oklahoma's [water quality standards] as they exist at the border of the two states."<sup>170</sup> The ALJ justified its conclusion by stating that "[a]ny other interpretation would allow a source state to locate its discharge just across the line in Arkansas and freely violate Oklahoma standards. . . . Such a result is contrary to the [Clean Water Act] regulations and Court decisions."<sup>171</sup> Both parties

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

164. *Id.*

165. The ALJ found support in the following three EPA regulations: (1) 40 C.F.R. § 122.4(D) (1989) ("No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states"); (2) 40 C.F.R. § 122.44(d)(4) (1989) ("each NPDES permit shall include conditions meeting any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under [the] Clean Water Act"); (3) 40 C.F.R. § 131.10(b) (1989) ("In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality Standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.").

166. *Oklahoma v. EPA*, 908 F.2d at 597.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 603 (citations omitted).

171. *Id.* at 604 (citations omitted).

appealed once more to the CJO.

On final remand, the CJO affirmed the ALJ's conclusion that the permit would not violate Oklahoma water quality standards.<sup>172</sup> Thus, despite continued strenuous objections raised by Oklahoma, the EPA issued an NPDES permit to the Fayetteville water treatment plant.

Both States appealed the CJO's decision once more, and the case ultimately reached the Court of Appeals for the Tenth Circuit.<sup>173</sup> Again, both parties made the same arguments that they had previously made on appeal from the ALJ's two prior findings. Namely, Arkansas maintained that "nowhere in the Clean Water Act did Congress authorize affected states such as Oklahoma to impose their water quality standards upon a discharger in another state."<sup>174</sup> Oklahoma, on the other hand, agreed with the ALJ's finding concerning the applicability of its water quality standards to an Arkansas discharger,<sup>175</sup> but contended that, in reviewing earlier findings of the dispute, the ALJ and the CJO erred in concluding that the permit would not violate Oklahoma's water quality standards.<sup>176</sup> The primary statutory interpretation issue on appeal therefore, as framed by the Tenth Circuit, was "whether the Clean Water Act *requires* that any discharge permitted under 33 U.S.C. § 1342 comply with all applicable water quality standards, including the EPA-approved regulations of any affected downstream state."<sup>177</sup> The resolution of this issue was important because it was case of first impression that could potentially allow the regulation of out-of-state sources by affected states.<sup>178</sup>

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172. *Id.* at 597.

173. Appeal of an Administrative decision is directed to the circuit courts of appeal by Clean Water Act section 1369(b)(1), which provides as follows:

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

33 U.S.C. § 1369(b)(1) (1988).

174. *Oklahoma v. EPA*, 908 F.2d 597, 602 (10th Cir. 1990). The State of Arkansas continued to claim that the Clean Water Act did not authorize EPA to compel upstream source state to abide by the more stringent water quality standards of affected downstream states.

175. The State of Oklahoma agreed with EPA's application of the downstream water quality standards to upstream dischargers, but alleged that the permit should be denied because the Fayetteville discharge would in fact violate Oklahoma's more stringent water quality standards.

176. *See Oklahoma v. EPA*, 908 F.2d at 617-29.

177. *Id.* at 602 (emphasis added).

178. Although the same issue reached a court of appeals in *Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988), the Fourth Circuit never reached the merits of the case because it

After considering the deferential standards of review, the Tenth Circuit held that "the Clean Water Act requires point sources to comply with the federally approved water quality standards of affected downstream states."<sup>179</sup> Thus, after such intense debate in the Supreme Court surrounding the issue of the extrajurisdictional effect of a state's nuisance laws, this court's opinion indirectly vindicates the preexisting states' rights which were curtailed in the earlier Supreme Court decisions.<sup>180</sup> The following sections examine how the court arrived at this conclusion and its possible repercussions.

### B. Analysis

The Court of Appeals for the Tenth Circuit divided its analysis into three sections: (1) purpose of the Clean Water Act; (2) Supreme Court interstate pollution precedent after the enactment of the Clean Water Act; and (3) specific Clean Water Act provisions. This three-step statutory analysis led the court to conclude that, if required by the EPA, an upstream state must comply with the more stringent water quality standards of an affected downstream state.<sup>181</sup>

#### 1. PURPOSE OF THE CLEAN WATER ACT

The first step in the court's analysis was to decipher the general purpose of the Clean Water Act.<sup>182</sup> To this end, the court focused on section 1311(b)(1)(C) of the Act, which in pertinent part provides: "In order to carry out the objective of this chapter there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . ."<sup>183</sup> Furthermore, the court reasoned that section 1342 requires that "any NPDES permit issued

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was dismissed for lack of subject matter jurisdiction. In *Champion International*, the State of North Carolina proposed issuing a permit to a discharger without taking into consideration the water quality standards of Tennessee, the affected downstream state. The Fourth Circuit lacked subject matter jurisdiction because the State of North Carolina had neither issued nor denied a permit as of the date of the appeal. *Id.* at 190.

179. *Oklahoma v. EPA*, 908 F.2d at 634. The court's holding was unnecessarily expansive because it was not necessary to hold that the Clean Water Act *required* that all upstream states abide by the water quality standards of all affected downstream states. The court could have limited its holding to the facts by narrowly concluding that, as an administrative law issue, the Administrator's decision was reasonable.

180. *E.g.*, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *City of Milwaukee v. Illinois (Milwaukee ID)*, 451 U.S. 304 (1981); *see also supra* notes 107-48 and accompanying text.

181. *Oklahoma v. EPA*, 908 F.2d at 634-35.

182. *Id.* at 604-07.

183. 33 U.S.C. § 1311(b)(1)(C) (1988). The objective of the Clean Water Act is explicitly

under the Act contain terms adequate to insure compliance with [section 1311].”<sup>184</sup> The court rejected arguments presented by Arkansas that section 1370 limits the reach of any stricter standard to discharges originating within the state imposing those standards.<sup>185</sup> The court rejected this contention for three reasons. First, the court found that section 1370 is a “‘savings clause’ that merely preserves the pre-existing right of the states to set more restrictive standards than those imposed by [the Clean Water Act]” and not a restrictive clause, as Arkansas claimed.<sup>186</sup> In addition, the court concluded that Congress could not have intended to limit the scope of section 1311, which is “one of the CWA’s crucial provisions.”<sup>187</sup>

The second flaw the court found with Arkansas’ interpretation of section 1370<sup>188</sup> is that the “waters . . . of such state” language in that section only refers to the second subsection, which in turn only addresses the rights and jurisdiction of states but does not refer to the pollution regulation authority addressed in subsection one.<sup>189</sup> The court read the two phrases of section 1370 independently, thus interpreting section 1370(1) as merely affording regulatory authority to the states, while interpreting section 1370(2) as limiting the right and jurisdiction of states to waters within their borders. In this case, where the issue involved pollution regulation, the court found section 1370(2) inapplicable. Therefore, according to the court, the only applicable language in that section is section 1370(1), which grants state authority instead of restricting it.

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stated in section 1251, which provides, “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a) (1988).

184. *Oklahoma v. EPA*, 908 F.2d at 605.

185. *Id.*

186. *Id.*

187. *Id.*

188. Section 1370 states in pertinent part:

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 an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370 (1988).

189. *Oklahoma v. EPA*, 908 F.2d at 605-06.

According to the court, the third weakness in Arkansas' argument was its "irrational" interpretation of section 1311.<sup>190</sup> Given the fact that section 1311 calls for the imposition of "more stringent limitations, including those necessary to meet water quality standards,"<sup>191</sup> the court found it irrational to interpret section 1370 as a restrictive provision because without the imposition of the more stringent affected state's water quality standards, it would be impossible in many circumstances to meet downstream water quality standards.<sup>192</sup> Moreover, the court agreed with the EPA and concluded that Arkansas' interpretation of section 1370 would create a lack of uniformity that would encourage "pollution shopping,"<sup>193</sup> allowing dischargers to locate themselves in states with the most lenient water quality standards. The court therefore concluded that the effect of Arkansas' interpretation of section 1370 would be inconsistent with Congress' intent of "restor[ing] the chemical, physical and biological integrity of the Nation's waters."<sup>194</sup>

2. SUPREME COURT INTERSTATE WATER POLLUTION CASES  
DECIDED AFTER THE ADOPTION OF THE CLEAN WATER  
ACT AMENDMENTS OF 1972: *MILWAUKEE II*  
AND *OUELLETTE*

The second step in the Tenth Circuit Court's analysis of the Clean Water Act was to examine the two interstate water pollution cases decided by the Supreme Court after the Amendments of 1972: *Milwaukee II*<sup>195</sup> and *Ouellette*.<sup>196</sup> In both of these cases the plaintiff brought a nuisance action under common law seeking to enjoin the source state discharge.<sup>197</sup> The Tenth Circuit declared these cases

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190. *Id.* at 606.

191. 33 U.S.C. § 1311(b)(1)(C) (1988).

192. *Id.* The court stated:

In order to ensure that the EPA-approved water quality standards in all states are "met" or "implemented," it is "necessary" to require dischargers to meet the applicable requirements of other affected states as well as those of the source state. There could be no assurance of achieving a state's more stringent WQS if an upstream, out-of-state discharger were not required to comply with those standards.

*Oklahoma v. EPA*, 908 F.2d at 606.

193. *Id.* ("Moreover, rewarding sources for locating in states with less stringent water quality requirements (by relieving them from complying with more stringent downstream water quality standards) would also result in 'pollution shopping,' contrary to Congress's intent in passing the 1972 CWA amendments.").

194. 33 U.S.C. § 1251(a) (1988).

195. *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981).

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

197. *Milwaukee II* involved the application of federal common law, whereas *Ouellette* involved the application of the affected state's common law. In its attempt to distinguish the

inapplicable because they involved common law nuisance actions in lieu of statutory actions under the Clean Water Act.<sup>198</sup>

Nonetheless, the court did examine certain dicta in *Ouellette* that supported Arkansas' position.<sup>199</sup> Notably, the court acknowledged the Supreme Court's conclusion in *Ouellette* that "an affected state only has an advisory role" in regulating pollution that originates beyond its borders.<sup>200</sup> However, the Tenth Circuit's answer to this contention was that "it is beyond dispute that [the language] is dicta and not controlling here."<sup>201</sup> The court distinguished *Ouellette* by stating that case concerned the application of *state* common law,<sup>202</sup> whereas the case at bar concerned "*federally* approved water quality standards."<sup>203</sup> Moreover, the Tenth Circuit further distinguished *Ouellette* by analogizing the attempt in that case to establishing a second permit system, which the Supreme Court held is barred by section 1342(b).<sup>204</sup>

### 3. CLEAN WATER ACT PROVISIONS

The third step in the court's analysis of the Clean Water Act involved the examination of three sections that the court found to be supportive of the EPA's application of state water quality standards to out-of-state sources: section 1341, section 1342, and section 1365.<sup>205</sup>

#### a. 33 U.S.C. § 1341(a)(2)

The court found section 1341 especially persuasive because it provides a hearing for an affected state's objections to the issuance of an NPDES permit.<sup>206</sup> The court concluded that "the purposes of this provision must be to enable affected states to ensure that their water

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case at bar from these previous cases, the Tenth Circuit erroneously stated that in both *Milwaukee II* and *Ouellette* "an affected state was seeking to enjoin an ongoing discharge in another state by resort to its own state law nuisance remedies." *Oklahoma*, 595 F.2d at 607. While *Ouellette* dealt with *state* common law, *Milwaukee II* involved *federal* common law. "Illinois filed a complaint in the United States District Court for the Northern District of Illinois, seeking abatement, under *federal* common law, of the public nuisance petitioners were allegedly creating by their discharges." *Milwaukee II*, 451 U.S. at 310 (emphasis added).

198. *Oklahoma v. EPA*, 908 F.2d 595, 607 (10th Cir. 1990).

199. *Id.*

200. *Id.* at 608.

201. *Id.*

202. *Id.* (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 487, 494 (1981)).

203. *Id.*

204. *Id.* (citing *Ouellette*, 479 U.S. at 491, 496-97).

205. *Id.* at 609-15.

206. Section 1341(a)(2) provides that upon written request by an affected state, the licensing or permitting agency shall hold a hearing. 33 U.S.C. § 1341(a)(2) (1988).

quality will not be jeopardized by a discharge in another state,"<sup>207</sup> refuting Arkansas' interpretation of "applicable water quality standards" as referring only to the standards of the source state. In addition, the court found that the passage, "violat[ing] any water quality requirement in *such* state,"<sup>208</sup> referred to the water quality standards of the affected state, and thus the clause "applicable water quality requirement" similarly referred to the water quality of the affected state.<sup>209</sup>

The court also drew upon the legislative history of section 1341. It found special strength in statements by the Senate committee which explained that "it is reasonable to require that Federal permits and licenses should take into account State water quality plans, standards and requirements adopted under section 303 [1313] to assure maintenance of water quality in the respective states."<sup>210</sup> Because Congress did not draw a distinction between source state and affected state water quality standards, the court agreed with the EPA and concluded that "sources subject to NPDES permits must comply with *all* approved state water quality standards."<sup>211</sup>

b. 33 U.S.C. § 1342(d)(2)

The second Clean Water Act provision that the court found supportive of the EPA's application of the downstream state's water quality standards is section 1342, which grants the Administrator veto power over permits issued by state permitting agencies.<sup>212</sup> That section specifies that the Administrator may object to the issuance of an NPDES permit on the grounds: (1) that a permitting state failed to accept recommendations from another state whose waters may be affected by the permit issuance, or (2) that the permit is "outside [*i.e.*, inconsistent with] the guidelines and requirements of the Act."<sup>213</sup>

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207. *Oklahoma v. EPA*, 908 F.2d 595, 610 (10th Cir. 1990).

208. *Id.* (emphasis added); see also 33 U.S.C. § 1341(a)(2) (1988).

209. *Oklahoma v. EPA*, 908 F.2d at 610.

210. *Id.* at 610-11 (quoting S. CONF. REP. NO. 830, at 96, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4424, 4398).

211. *Id.* at 611 (emphasis added).

212. Section 1342(d)(1) provides: "Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State." 33 U.S.C. § 1342(d)(1) (1988).

213. Section 1342(d)(2) states in pertinent part:

No permit shall issue (A) if the Administrator within ninety days of the date of his notification . . . objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of the permit as being outside the guidelines and requirements of this chapter.

Thus, the court concluded that section 1342 supports the EPA's construction of the Act.<sup>214</sup>

In reaching this conclusion, the court firmly rejected Arkansas' argument that the clear language of the Act limits the affected state to an "advisory role."<sup>215</sup> The Tenth Circuit rejected the argument for two additional reasons. First, section 1342(b)(5) did not preclude obligatory compliance with the affected state's water quality standards.<sup>216</sup> The court saw section 1342 as a procedural provision rather than a substantive one. In essence, the court found that the provision delineated the steps for communication between the source state and the affected state without touching upon the affected state's power for compelling compliance with its water quality standards. Second, the court stated that Arkansas' interpretation failed because it focused solely on section 1342(b)(5) without considering the Clean Water Act in its entirety.<sup>217</sup> In addition to the requirements in subsection (b)(5), a state permitting agency must meet other fundamental requirements, such as insuring permit compliance.<sup>218</sup> Since subsection (b)(5) is included among these types of requirements, the court concluded that subsection (b)(5) is not merely discretionary but obligatory as well.<sup>219</sup> At the end of the court's examination of section 1341, it agreed with the EPA and found that this section supported the imposition of an affected state's water quality standards upon dischargers located in an upstream source state.<sup>220</sup>

c. 33 U.S.C. § 1365(h)

The third provision of the Clean Water Act that in the court's opinion supported the EPA's statutory interpretation was section

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*Id.* § 1342(d)(2).

214. *Oklahoma v. EPA*, 908 F.2d 595, 611-13 (10th Cir. 1990).

215. *Id.* at 612.

216. Section 1342(b)(5) provides in pertinent parts:

[T]he Administrator shall approve each submitted [State permit] program unless he determines that adequate authority does not exist:

.....  
(5) To 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 (and the Administrator) in writing of its failure to so accept such recommendations together with the reasons for so doing.

33 U.S.C. § 1342(b)(5) (1988).

217. *Oklahoma v. EPA*, 908 F.2d at 612.

218. 33 U.S.C. § 1342(b)(7) (1988).

219. *Oklahoma v. EPA*, 908 F.2d at 612.

220. *Id.*



1365, which allows a state governor to sue the EPA to enforce an effluent limitation.<sup>221</sup> The court determined that this section provides a remedy for violations not of the source state's own effluent limitations, but rather the affected state's water quality standards.<sup>222</sup> In so concluding, the court disapproved of Arkansas' interpretation of the section, which would only allow a state governor to sue the EPA to enforce the effluent limitations of the source state.<sup>223</sup> The court took the position that "effluent limitations are not an end in themselves, but simply a means to an end—the desired water quality,"<sup>224</sup> and thus the governor of the affected state sue the EPA to enforce the state's water quality standards in accordance with section 1365(h).

Ultimately, the Tenth Circuit held that, taken as a whole, the purpose of the Clean Water Act, the Supreme Court interstate pollution precedents, and key provisions of the Clean Water Act justify the EPA's construction of the Act.<sup>225</sup> Accordingly, the Tenth Circuit cleared the way in favor of affected States by allowing the EPA to compel upstream state dischargers to abide by the more stringent water quality standards of the affected downstream states.

### C. Critique

The main analytical weakness of the Tenth Circuit decision stems from its use of the Clean Water Act's inconclusive text and limited legislative history to conclude that Congress intended imposing downstream water quality standards on upstream dischargers. The proof of such intent is necessary for the court to justify imposing such a radical intrusion into the rights of other states who also have EPA-approved water quality standards.<sup>226</sup> The following section examines the legislative history of sections 1370, 1311(b)(1)(C), 1341(a)(2), 1342(b), 1342(d) and 1365 which are relevant to the analysis and conclusion reached by the Tenth Circuit in *Oklahoma v.*

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221. Section 1365(h) provides:

A Governor of a State may commence a civil action . . . where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing the violation of any water quality standard in his State.

33 U.S.C. § 1365(h) (1988).

222. *Oklahoma v. EPA*, 908 F.2d 595, 614 (10th Cir. 1990).

223. *Id.*

224. *Id.*

225. *Id.* at 615.

226. Under the Clean Water Act, all states must have their own water quality standards, whether they be the ones established by EPA or more stringent ones established by the state's legislature or permitting agency.

EPA. This section also considers the decision's impact on the sovereignty of upstream states.

# 1. THE TEXT AND LEGISLATIVE HISTORY OF THE CLEAN WATER ACT

The Tenth Circuit construed the language in section 1370 of the Clean Water Act<sup>227</sup> as merely preserving the right of states to impose more stringent water quality standards than the minimum required under the Act without interference by the EPA.<sup>228</sup> The court rejected Arkansas' argument that section 1370 "limits the 'reach' of any stricter standards to discharges originating within the state imposing those standards."<sup>229</sup> The plain language of the section, however, may frustrate the court's holding, for it limits the jurisdiction of the states to impose stricter water quality standards upon the "waters . . . of such States."<sup>230</sup>

In its analysis of section 1311(b)(1)(c),<sup>231</sup> the court focused on the language which calls for more stringent limitations "*necessary to meet* water quality standards" established pursuant to state law.<sup>232</sup> From this interpretation, the court concluded that section 1311(b)(1)(c) requires that an upstream discharger meet the standards established by a downstream state. The court may have overextended the meaning of this section, for its language is far from clear. For example, the section may be merely a "timing provision."<sup>233</sup> More-

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227. Section 1370 provides in pertinent part: "Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370 (1988).

228. *Oklahoma v. EPA*, 908 F.2d 595, 605 (10th Cir. 1990). In the Report from the Conference Committee, Senator Muskie stated that "[s]ection 510 [1370] provides that States, political subdivisions and interstate agencies retain the right to set more restrictive standards than those imposed under this Act." LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 331.

229. *Oklahoma v. EPA*, 908 F.2d at 605.

230. 33 U.S.C. § 1370(2) (1988).

231. Section 1311(b)(1)(c) states, in pertinent part:

In order to carry out the objective of this chapter there shall be achieved not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(c) (1988).

232. *Oklahoma v. EPA*, 908 F.2d at 606 (quoting 33 U.S.C. § 1311(b)(1)).

233. In its brief, Arkansas wrote: "That section [1311(b)(1)(c)] actually provides only a timetable in which states that wish to establish more stringent water quality standards for waters *within* their state must establish such regulations." Brief for Appellants/Petitioners at

over, the passive voice used throughout the section leaves it to anyone's guess whose water quality standards are to be met.<sup>234</sup> It also fails to specify which state should abide by the more stringent limitations—the state imposing the limitation or all other states?

The Clean Water Act provisions that cast most doubt upon the Tenth Circuit's holding in *Oklahoma v. EPA* are those limiting the role of affected states.<sup>235</sup> According to sections 1341(a)(2)<sup>236</sup> and 1342(b),<sup>237</sup> an affected state only receives notification of a permit application where the proposed discharge "may affect, as determined by the Administrator [of the EPA], the quality of [its] waters";<sup>238</sup> following this, the state can object to the issuance of the permit,<sup>239</sup> receive a hearing before the Administrator, and make recommendations to the source state.<sup>240</sup> The fact that Congress fashioned such a specific mechanism for an affected state to voice its disagreement indi-

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34, *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990) (No. 89-9516) (emphasis in original) [hereinafter *Arkansas Brief*].

234. Section 1311(b)(1)(c) refers only to "more stringent limitation . . . established pursuant to any state law or regulations." 33 U.S.C. § 1311(b)(1)(c) (1988). For the complete text of section 1311(b)(1)(c), see *supra* note 231.

235. Construing the Clean Water Act in *Ouellette*, the Supreme Court described the affected states as having a mere "advisory role in regulating pollution that originates beyond its borders." *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987).

236. Section 1341(a)(2) provides in pertinent part:

Whenever such a discharge may affect, as determined by the Administrator [of EPA], the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after the receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, the licensing or permitting agency shall hold such a hearing. Such agency shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.

33 U.S.C. § 1341(a)(2) (1988).

237. Section 1342(b) outlines the requirements for the state permit programs. The section requires the Administrator to approve each submitted program unless he determines that adequate authority within the program does not exist. Under subsection (5), the Administrator must determine that adequate authority exists

[t]o 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 (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

*Id.* § 1342(b)(5).

238. *Id.* § 1341(a)(2) (emphasis added).

239. *Id.*

240. *Id.* § 1342(b)(5).

cates that it is the exclusive form of relief for affected states under the Act. Had Congress intended for all upstream states to automatically abide by the water quality standards of the affected downstream states, it would not have included a provision for a hearing.<sup>241</sup> Affected states would not need to argue before the Administrator, who would automatically know that the upstream state must comply with the water quality standards of the states downstream. Instead, the inquiry would focus on whether the water quality standards of downstream states were in fact violated.

The discretionary power of the EPA's Administrator also indicates that Congress did not intend for all upstream states to abide by the water quality standards of all affected downstream states. The Administrator not only has the power to deny the issuance of a state's discharge permit,<sup>242</sup> but also can waive this veto power at his own discretion.<sup>243</sup> Had Congress intended for upstream states to comply with the water quality standards of those affected downstream, it would have made the Administrator's veto mandatory.

The court also justified its interpretation of the Clean Water Act under language in section 1365(h),<sup>244</sup> stating that it authorizes the governor of a state to sue the EPA "where there is alleged a failure of the Administrator to enforce an 'effluent standard under this chapter' the violation of which is occurring *in another state* and is 'causing a violation of any water quality requirement in his state.'"<sup>245</sup> The court considered this to be a remedy for the impact of pollution on the affected state.<sup>246</sup> However, the court overlooked the section's requirement that the violation occur "in another State." Under an alterna-

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241. In addition, Arkansas emphasized Congress' failure to provide affected states with a more active role by arguing that "Congress could have expressly said in Section 1342(b)(5) that states to whom the permitting process has been delegated must have the ability to comply with affected state water quality standards. Congress did not so choose." Arkansas Brief, *supra* note 233, at 38.

242. 33 U.S.C. § 1342(d)(2) (1988).

243. "The Administrator may, as to any permit application, waive paragraph (2) of this subsection." *Id.* § 1342(d)(3).

244. *Oklahoma v. EPA*, 908 F.2d 595, 614 (10th Cir. 1990) (quoting 33 U.S.C. § 1365(h) (1988)). Section 1365(h) in pertinent part provides:

A Governor of a State may commence a civil action against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. § 1365(h) (1988).

245. *Oklahoma v. EPA*, 908 F.2d at 614 (emphasis added).

246. *Id.* ("Clearly, the injury sustained by a state for which § 1365 provides a remedy is the impact on that state's water quality, not the violation of the 'effluent standard or limitation' *per se*.").

tive interpretation of this language, section 1365(h) merely provides a means for downstream governors to demand that upstream states enforce compliance with their own state permits.

The legislative history of section 1365(h) casts further doubt upon the Tenth Circuit's holding. For instance, Senator Muskie, expressing the Senate's interpretation of section 1365(h), noted that this section allows a governor to "initiate an action against the Administrator for an alleged failure to abate pollution *in another state* that adversely affects the Governor's state."<sup>247</sup> Senator Muskie's explanation indicates that governors can only bring actions to demand that source states enforce their own permit requirements. By amplifying the silence and ambiguity of the Clean Water Act concerning interstate pollution, the Tenth Circuit shifted the balance in favor of affected downstream states.

The court's position also sharply contradicts congressional intent as expressed by Representative Jones from Alabama, who indicated that the permit program "places the primary responsibility for administering the water pollution control program within the separate States."<sup>248</sup> This language indicates that the Clean Water Act was intended to respect the rights of states. Congress did not intend to establish a uniform federal regulatory program, but rather announced a federal objective to be administered by the "separate states."

Even more questionable is the Tenth Circuit's expansive conclusion that Oklahoma's EPA-approved water quality standards are federal law, and thus applicable to upstream source states.<sup>249</sup> The court equated "*federally-approved* state water quality standards" to "*federal* water quality standards"<sup>250</sup> in an effort to harmonize its holding with that of the Supreme Court in *Ouellette*, which did not allow the application of an affected downstream State's common law to an interstate

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247. LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 328.

248. *Id.* at 359.

249. In a footnote, the court summarily concluded that "[t]he Fayetteville plant has been required by EPA to observe *federal* law, i.e., Oklahoma's EPA-approved water quality standards. . . . Accordingly, throughout this opinion we use 'applicable water quality standards' to mean *EPA-approved* water quality standards that govern the affected waters." Oklahoma v. EPA, 908 F.2d at 602 n.5. The court carefully focused on "*federally approved* water quality requirements of affected states," and stated that it would "draw no conclusions about state requirements that may not have been approved by the EPA." *Id.* at 616 n.28. Despite such rhetoric, the effect of its holding is that state-promulgated standards, upon review of the agency, would have to be considered federal law.

250. In another footnote, the court stated that "it is misleading to say 'Oklahoma . . . impose[d] its water quality standards' on Arkansas . . . . The 1982 Oklahoma water quality standards, which EPA judged applicable to the Fayetteville plant, had been approved by EPA." *Id.* at 602 n.5 (citation omitted).

water pollution controversy.<sup>251</sup> However, this construction conflicts with the apparent intent of the legislature. Congress distinguished state water quality standards from federal ones. For example, the House of Representatives' summary of the Clean Water Act referred to more stringent state requirements "than those required under Federal law."<sup>252</sup> This indicates that Congress did not consider state water quality standards federal law. Moreover, the definition of "applicable standards" found in the legislative history makes no mention of the imposition of an affected state's water quality standards beyond its own jurisdiction. The Report by the House Committee on Public Works defined "applicable standards" as those requirements which are "pertinent and apply to the activity" and those which were in "existence by having been promulgated or implemented."<sup>253</sup> This definition helps little because it employs the synonymous and equally ambiguous term, "pertinent." The true question does not depend on the definition of "applicable," but rather on which standards should apply.

Finally, the Tenth Circuit's incorporation of state water quality standards into federal law re-ignites the conflicting interests of the states that the Supreme Court defused in *Ouellette*. If Oklahoma's water quality standards are incorporated into federal law, by implication the water quality standards of every state are part of federal law. Carrying the Tenth Circuit's position further, the water quality standards of each of the fifty states would have to be treated as federal law, and thus apply to every other affected state. Since each state's water quality standards would be considered federal law, the court's reasoning begs the question of which "federal law" should prevail when any conflict exists. Moreover, if indeed a state's EPA-approved water quality standards are federal law, then it should apply across the country. Such an absurd result would wholly frustrate the Clean Water Act's goal of efficiently allocating water resources. Considering the language and the legislative history of the Act's sections cited by the Tenth Circuit in support of its subordination of upstream states' interests, the decision seems hasty and ill-founded.

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251. By incorporating state water quality standards into the federal scheme itself, the Tenth Circuit masked the tension between the states' objectives and federal goals of "efficiency and predictability." *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987); *see also supra* notes 138-145 (discussing *Ouellette* and federal pre-emption).

252. LEGISLATIVE HISTORY OF THE CLEAN WATER ACT, *supra* note 63, at 404.

253. *Id.* at 808.

## 2. POTENTIAL ADVERSE EFFECTS OF THE *OKLAHOMA* v. *EPA* DECISION

The expansive vision of the Clean Water Act announced by the Tenth Circuit in *Oklahoma v. EPA* ignores the inevitable effects of automatically applying the downstream state's more stringent standard in interstate water pollution conflicts.<sup>254</sup> The court's construction excessively infringes upon the upstream state's environmental and economic policies.<sup>255</sup> Upstream states would be forced to consider the interests of downstream states, whereas downstream states could enact water quality standards essentially without regard to the effect of their cost upon their upstream counterparts.<sup>256</sup> Conflicts inevitably arise as source states realize that affected states can force compliance with their more stringent water quality standards, regardless of whether those standards are unreasonably stringent.

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254. See *supra* notes 199-219 and accompanying text. One editorial written soon after the Tenth Circuit's decision criticized it as follows:

Sometimes a court hands down a decision that seems perfectly logical but causes havoc. A federal appeals panel has done that in a precedent-setting ruling involving the interstate discharge of wastewater treatment plant effluent.

... Whatever the legal fine points, there seems to be a violation of the concept of equity and common sense.

... We cannot challenge a ruling by a U.S. Circuit Court of Appeals based on its reading of the law, federal regulations and the facts of the case. But obviously some corrections must be made legislatively or administratively to prevent this decision from causing either chaos or a long search for multistate cooperation.

*Don't Start Waste Wars . . . or Water Wars*, ENGINEERING NEWS-REC., Aug. 23, 1990, at 66.

255. The State of Arkansas argued that one adverse effect from deferring to the downstream state's standard would be that upstream states could find it impossible to predict which state's water quality standards to obey. *Oklahoma v. EPA*, 908 F.2d 595, 606-07 (10th Cir. 1990). The court responded that the "EPA approval of state WQS determines the potentially applicable rules," and "computer modeling can predict the extent of a new source's potential impact." *Id.* at 607.

This response was not acceptable to Arkansas, which illustrated the impracticability of requiring upstream states to abide by the more stringent water quality standards of downstream states with the following example:

A permit for a discharger in Minnesota on the Mississippi River issued in compliance with Minnesota water quality standards and EPA regulations would be subject to challenges under the Clean Water Act from the nine states downstream from the point of discharge. Permits issued for dischargers in Colorado, the state in which the headwaters for a number of major interstate waterways originate, may be challenged by any number of states through which the waterways flow.

Arkansas Brief, *supra* note 233, at 46.

256. Cf. J. KRIER, ENVIRONMENTAL LAW AND POLICY 339 (1971) (discussing the need for federal intervention to regulate external costs of air pollution among the states).

a. Imposition of Exceedingly Stringent Water Quality Standards  
by Downstream States

Perhaps the most perplexing result of *Oklahoma v. EPA*'s expansive holding is that downstream states can unilaterally impose their more stringent water quality standards upon upstream states. At first blush, this requirement seems like a good step towards serious interstate water pollution abatement, assuming that states would rationally and fairly consider their upstream counterpart's needs when setting more stringent water quality standards than those required under the Clean Water Act. But downstream states, pressured by a myriad of economic and social pressures, may not always react in such an admirable fashion. For instance, a downstream state could, in a retaliatory gesture against an upstream state, set unreasonably stringent water quality standards that would effectively curb the discharging activities only of the upstream state, because the downstream state's discharging needs might be relatively low<sup>257</sup> for that particular pollutant.

To resolve the conflict between the two states' standards, the courts must assign one a higher priority. The upstream state would argue that the scheme outlined in section 1370 of the Clean Water Act gives states complete control over their water quality standards, absent the requirements of the Act itself.<sup>258</sup> This control would be illusory if the state's water quality standards were replaced by the more stringent water quality standards of the affected downstream states. However, the downstream state could also make a similar "complete control" argument, claiming that its own control over water quality standards would become illusory if other states dictated them. Under the Tenth Circuit's expansive reading of the Clean

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257. See, e.g., *Court Halts Plant's Discharge*, ENGINEERING NEWS-REC., Aug. 23, 1990, at 8 (reporting that after the decision of the Tenth Circuit, "some Arkansas politicians were suggesting that the state retaliate by toughening pollution rules on rivers flowing from Oklahoma into Arkansas").

258. Section 1370 states in pertinent part:

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 of abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter.

33 U.S.C. § 1370 (1988).



Water Act, the more stringent water quality standards would have automatic priority. This possibility, however, would be unreasonable by virtue of its inherent arbitrariness. Furthermore, the court's decision gives the states legal authority to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources."<sup>259</sup>

b. Control over Another Sovereign State's Industrial Economy

Because of the socioeconomic issues intertwined with the use of water resources, the Tenth Circuit's infringement upon states' rights would not be limited to the area of environmental regulation. Ideally, a state allocates its resources, including its water quality by striking a balance between the "secured" benefits derived from industry and the "speculative" benefits it would derive from protective environmental regulation.<sup>260</sup> In making the important decision of resource allocation, states focus on the preferences of its citizens: a state that is heavily dependent upon industry values the needs of its citizenry for jobs and revenue higher than its need for more stringent environmental regulation.<sup>261</sup> The Tenth Circuit frustrates the state's ability to meet the needs of its citizens by imposing the additional constraint of downstream states' quality standards. If the holding in *Oklahoma v. EPA* were to become the federal standard, it would place the industries and economies of upstream states at the mercy of downstream state policies.<sup>262</sup>

c. Excessive EPA Power

In future cases the Tenth Circuit may attempt to limit its holding by concluding only that the EPA has the power to prohibit discharges that violate the reasonable water quality standards of an affected downstream state. Even this grant of power is subject to criticism. Compounded by the substantial deference exercised by courts toward

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259. *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

260. The benefits that a community derives from industry are often erroneously perceived as real and secure because they take the shape of jobs and revenues. The benefits derived from environmental regulation, however, are often neither as tangible nor as immediate.

261. See Zerbe, *supra* note 14, at 196-97 (arguing that local preferences will prescribe environmental standards).

262. The excessive power that the Tenth Circuit's holding gives to EPA and to downstream states could have serious constitutional repercussions. According to this court's decision, downstream states will not only have the right to dictate the environmental regulations of upstream states, but will also be able to dictate the socioeconomic policies of those states.

This problem applies not only to water pollution, but also to air pollution. In fact, one commentator noted that compelling a source state to abide by the environmental standards of affected states would effectively allow one state to control the industries of several neighboring . . . states." Smith, *Playing the Acid Rain Game: A State's Remedies*, 16 ENVTL. L. 255, 301 (1986).

the administering agency's interpretation of a statute, the EPA's power could prove to be excessive.<sup>263</sup> The EPA could effectively dictate the social and economic policies of states, without properly considering the benefits and burdens that each would derive from the more stringent water quality standards. Considering the complexity of interstate water pollution disputes, such judgments should not be made by a regulatory agency but should be in the hands of the courts under the common law doctrine of public nuisance.

## VI. THE INADEQUACY OF FEDERAL LEGISLATION TO ABATE INTERSTATE WATER POLLUTION EFFECTIVELY AND EQUITABLY

### A. *The Clean Water Act Is Inadequate to Abate Interstate Water Pollution*

The Tenth Circuit's blanket conclusion that "the Clean Water Act requires point sources to comply with the federally approved water quality standards of affected downstream states"<sup>264</sup> reveals the inadequacy of the Act in solving interstate water pollution problems.<sup>265</sup> The Act relays ambiguous and contradictory messages that foster conflicts between states. At the core of this inadequacy lies the inherent contradiction between the statute's general policy of pollution abatement and its multiple open-ended provisions concerning the subject of interstate water pollution.

For instance, Congress declared an unequivocal policy for the Clean Water Act when it provided that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that . . . it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."<sup>266</sup> Nevertheless, the sections of the statute that address interstate disputes severely limit the efficacy of this goal.

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263. For example, the Tenth Circuit noted that "where the statute is ambiguous, EPA's construction, as that of the agency charged with administering the statute, is entitled to substantial deference." *Oklahoma v. EPA*, 908 F.2d 595, 599 (10th Cir. 1990) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984); 33 U.S.C. § 1251(d) (1988)).

264. *Oklahoma v. EPA*, 908 F.2d at 634.

265. See, e.g., Crider, *supra* note 27, at 644 (courts have interpreted the Clean Water Act as referring to a state's right to control only those discharges located within its borders); Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 209-10 (1985) (concluding that the Clean Water Act denies state autonomy and, derivatively, the rights of the state's citizens); Comment, *supra* note 25 (arguing that the Clean Water Act is not and never was intended to be all-encompassing).

266. 33 U.S.C. § 1251(a) (1988).

Despite the Act's provision that requires source states to consider the recommendations of an affected state, the Administrator has the discretion to allow the source state to ignore any objections.<sup>267</sup> This power implicitly condones the violation of an affected state's water quality standards.<sup>268</sup> Such discretionary review is insidious because it renders the Administrator's "duty" illusory and generates a source for future interstate water pollution disputes.

In addition, the vague language of the Clean Water Act prevents states from enforcing more stringent water quality standards, and thus it serves as an obstacle to effective water pollution abatement.<sup>269</sup> The water quality provisions require compliance only with a minimum federal standard<sup>270</sup> without mentioning any upper limits.<sup>271</sup> Thus, so long as the source state abides by the federal minimum—most likely to be the least common denominator<sup>272</sup>—it is safe from reproach. As a result, the system effectively rewards polluters for eschewing more stringent state standards by operating in least denominator states.<sup>273</sup> Such "pollution shoppers" use the Act itself as a shield against more protective environmental regulations.

By allowing the states to independently set their water quality standards, the Act also reveals its insensitivity towards state economic considerations. Pollution shopping tends to place a more environmentally protective state at an economic disadvantage vis-a-vis a state that merely requires compliance with the federal minimum. The Act does not recognize that a state is susceptible to pressure from the workers who depend on the regulated industry for their livelihood.

Without a more clearly defined mechanism for establishing standards of pollution control and water quality, the Clean Water Act will continue to prevent effective, progressive abatement of interstate water pollution. The result may be an unreasonable stringent interstate water pollution abatement scheme, like the one imposed by the Tenth Circuit in *Oklahoma v. EPA*.

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267. 33 U.S.C. § 1342(b)(5) (1988).

268. See 33 U.S.C. § 1342(d)(3) (1988); see also *supra* notes 242-43 and accompanying text (describing Administrator's discretion).

269. "Similar provisions in the Federal Water Pollution Control Act . . . have been interpreted by the courts to refer only 'to the right of a state with respect to discharges within the state,' and not to a state's right to impose its more stringent limitations upon polluters in other states." Crider, *supra* note 27, at 644 (citations omitted).

270. Stewart, *supra* note 27, at 260.

271. Considering the complexity of problems which may arise in setting up water quality standards for different localities within and between states, one cannot help but hypothesize that the omission may indeed be deliberate.

272. The term "least common denominator" describes the water quality standard that is least strict (or, equivalently, most lenient).

273. See *Oklahoma v. EPA*, 908 F.2d 595, 606 (10th Cir. 1990).

B. *Federal Legislation Is Inherently Inadequate to Abate Interstate Water Pollution*

Even with more clearly defined water quality standards, federal legislation may still be unable either to achieve significant water pollution abatement or to address local interests. Federal interstate environmental legislation inevitably thwarts local self-determination and generates burdens that are, or at least appear to be, unjustified in particular localities.<sup>274</sup> For example, consider a national statute setting high uniform levels of effluent limitations. A state whose chief industry discharges the regulated pollutant would consider itself unfairly singled out. Moreover, the burden imposed on this state would be relatively greater than that imposed on states less dependent on such industry. The result is that detrimentally affected states would bear the brunt of the regulation's economic burden.

Federal legislation is also inadequate because it would eventually fall victim to undue uniformity.<sup>275</sup> To be sure, uniformity simplifies decisionmaking ease and reduces administrative costs.<sup>276</sup> Such efficiency, however, inherently entails inflexibility and inequity. The state that desires progressive environmental legislation may be frustrated by federal law allowing lower levels of pollution, and, likewise, a state with pollutant industries would have to curtail such production.<sup>277</sup> Despite their failure to match quality standards with local needs, federal legislation is forced upon the states for the sake of uniformity. However, such uniformity needlessly limits the freedom of a state to determine its own environmental and industrial needs.

VII. FEDERAL COMMON LAW: THE BETTER APPROACH FOR AN  
EQUITABLE AND EFFECTIVE RESOLUTION OF  
INTERSTATE WATER POLLUTION  
CONTROVERSIES

The inadequacies of the Clean Water Act, evinced by its failure to effectively abate interstate water pollution as well as the conclusions reached in recent Supreme Court decisions such as *Milwaukee*

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274. See Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196, 1220-21 (1977).

275. See Zerbe, *supra* note 14, at 212-13; see also Stewart, *supra* note 27, at 261. ("Legislatures and agencies have strong incentives to adopt uniform measures, which often do not come to grips with [environmental] problems.").

276. See Zerbe, *supra* note 14, at 210.

277. See *id.* at 211.

*II*<sup>278</sup> and *Ouellette*,<sup>279</sup> compel the search for a more effective approach to this intricate problem. One alternative lies in the federal common law of nuisance, which might more effectively reach adequate and equitable solutions in water pollution controversies between states.<sup>280</sup>

The application of federal common law to interstate water pollution disputes is not a novelty.<sup>281</sup> Since the 1905 case of *Missouri v. Illinois*<sup>282</sup>—the first interstate water pollution case to reach the Supreme Court—the federal judiciary has repeatedly applied the doctrine of public nuisance to resolve interstate environmental disputes.<sup>283</sup> The Supreme Court resorted to this cause of action because it preserves the balance of power between the Supreme Court and state government, and provides both a forum for the peaceful resolution of interstate disputes and a means for a state to protect its environmental integrity.<sup>284</sup> In contrast, the Clean Water Act, as well as the most recent Supreme Court cases dealing with the issue, continue to leave downstream states without an effective means of protecting their environmental integrity.<sup>285</sup> This shortcoming of the Clean Water Act calls for a return to the federal common law of public nuisance as a more equitable and effective legal means to address interstate water pollution disputes.

Nuisance is an equitable theory that offers redress to owners for the impairment of the use and enjoyment of their real property.<sup>286</sup> The common law distinguishes between private and public nuisance.

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278. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); see *supra* notes 109-126 and accompanying text (discussing *Milwaukee II*).

279. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); see *supra* notes 128-148 and accompanying text (discussing *Ouellette*).

280. See Comment, *Environmental Law: New Legal Concepts in the Antipollution Fight*, 36 MO. L. REV. 78, 79-84 (1971) (critiquing traditional public and private nuisance).

281. See *supra* Section II (presenting a historical perspective of federal common law interstate water pollution disputes).

282. 200 U.S. 496 (1905); see *supra* notes 33-39 and accompanying text (discussing *Missouri v. Illinois*).

283. See, e.g., *New Jersey v. City of New York*, 283 U.S. 473 (1930) (garbage in waters); *Arizona v. California*, 283 U.S. 423 (1930) (diversion of river); *New York v. New Jersey*, 256 U.S. 296 (1920) (raw sewage in waters); *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1914) (industrial gas fumes); *Mississippi v. Illinois*, 200 U.S. 496 (1905) (sewage in river); *Kansas v. Colorado*, 185 U.S. 125 (1901) (diversion of river); see also *supra* Section II.

284. Note, *supra* note 34, at 631-32.

285. See *supra* Section IV.

286. "Nuisance" is "[t]hat activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." BLACK'S LAW DICTIONARY 1065 (6th ed. 1990).

Private nuisance occurs when there is an invasion of an owner's use and enjoyment of an interest in land,<sup>287</sup> whereas public nuisance requires interference with common public rights.<sup>288</sup> Most importantly, the doctrine of nuisance focuses not on the behavior of the actor, but on the effect of the actor's behavior upon the rights of others. In determining whether a nuisance was created, courts focus on the reasonableness of the invasion instead of on the conduct itself.<sup>289</sup>

Public nuisance in particular is "based on some interference with the interests of the community, or the comfort or convenience of the general public."<sup>290</sup> There are two requirements to establish such an

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287. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." RESTATEMENT (SECOND) OF TORTS § 821D (1977).

The requirements for private nuisance are:

- 1) The defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use;
- 2) There was some interference with the use and enjoyment of the land of the kind intended;
- 3) The interference and/or physical harm that resulted were substantial; and
- 4) The interference was unreasonable.

W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 618, 622-23 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. Private nuisance rests on the concept that "every person should use his own property as not to injure that of another." J. KRIER, *supra* note 256, at 193 (citing *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 77 S.E.2d 682 (1953)). Unlike trespass, private nuisance concerns interference with use or enjoyment rather than exclusive possession. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 405 (2d ed. 1955).

288. A public nuisance is an unreasonable interference with a right common to the general public. RESTATEMENT (SECOND) OF TORTS § 821B (1977). It is "an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all." W. PROSSER, *supra* note 287, at 405.

289. The Second Restatement generally defines an invasion as unreasonable if the gravity of the invasion's harm outweighs the utility of the actor's conduct. RESTATEMENT (SECOND) OF TORTS § 826 (1977).

The gravity of the harm is to be measured by:

- a) the extent of the harm involved;
- b) the character of the harm involved;
- c) the social value that the law attaches to the type of use or enjoyment invaded;
- d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- e) the burden on the person harmed of avoiding the harm.

*Id.* at § 827.

The utility of the actor's conduct considers:

- a) the social value that the law attaches to the primary purpose of the conduct;
- b) the suitability of the conduct to the character of the locality; and
- c) the impracticability of preventing or avoiding the invasion.

*Id.* at § 828.

290. PROSSER AND KEETON, *supra* note 287, at § 90.

action: (1) there must be an interference, and (2) that interference must affect a right common to the general public.<sup>291</sup> The interference, however, must consist of "more than slight inconvenience or petty annoyance."<sup>292</sup> Although the cause of action requires that the nuisance be public, the entire community need not be affected. The "public right" requirement will be satisfied "so long as the nuisance[] interfere[s] with those who come in contact with it in the exercise of a public right."<sup>293</sup> In the case of interstate water pollution, the public right requirement would be met by proof that the out-of-state discharge interferes with the right of the public to drink, swim, or fish in the particular interstate body of water.<sup>294</sup> Thus, in addressing public nuisance claims, courts would necessarily consider all of the uses of the water resource, a marked distinction from the blanket standard set by the Clean Water Act.

#### A. *Advantages of the Application of Federal Common Law*

Using judicial adjudication to address interstate pollution disputes has several advantages any federal legislative approach is sure to lack. Perhaps the most significant advantage of a judicial approach is its consideration of the multifaceted aspects<sup>295</sup> and specific facts of *each particular case* and its resolution of the dispute in a manner that best reconciles the competing interests of each state. By employing the nuisance concept, the courts could equitably acknowledge "the [sovereign] right of a state to be free from injury caused by another state."<sup>296</sup> This acknowledgement would in turn be consistent with the increasingly protective public policy towards the environment as evidenced by the passage of the Clean Water Act.<sup>297</sup>

Furthermore, by resorting to a federal common law cause of

291. See RESTATEMENT (SECOND) OF TORTS § 821B (1977).

292. *Id.* § 821F comment c.

293. PROSSER AND KEETON, *supra* note 287, at 645; see also RESTATEMENT (SECOND) OF TORTS § 821B comment g (1977).

294. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91 (1971) (*Milwaukee I*); *New Jersey v. New York City*, 283 U.S. 473 (1930); *New York v. New Jersey*, 256 U.S. 296 (1921); *Missouri v. Illinois*, 200 U.S. 496 (1905); see also *supra* Section II for a discussion of these cases.

295. Environmental problems consist of an intertwined complex of socioeconomical, geographical, geological, and ecological issues.

296. Leybold, *Federal Common Law: Judicially Established Effluent Standards as a Remedy in Federal Nuisance Actions*, 7 B.C. ENVTL. AFF. L. REV. 293, 299 (1978).

297. Section 1251(a)(1) of the Clean Water Act provides in pertinent part: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective, it is declared that . . . (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1) (1988).

action, the courts would be able to achieve and promote indispensable values such as accommodation, legitimacy, self-determination, and efficiency.<sup>298</sup> In order to effectively resolve interstate water pollution disputes, the chosen approach must equitably accommodate the conflicting interests of the states involved in the dispute.<sup>299</sup> The Clean Water Act is currently unable to accommodate such interests pre-

298. See Glicksman, *supra* note 265. Professor Glicksman represented these four values in the following chart:

		VALUES			
		Legitimacy	Individual Liberty	Accommodation	Efficiency
R E M E D I A L A T I O N S	Automatic Statutory Injunctive Relief	YES	YES	NO	—
	Implied Statutory Rights of Action	NO	NO	—	NO
	Federal Common Law	YES	YES	YES	YES
	State Common Law (Intrastate)	YES(?)	YES	—	YES
	State Common Law (Interstate)	NO(?)	YES	NO(?)	YES

Reprinted from Glickman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 138 (1985) (emphasis added to the chart). © University of Pennsylvania Law Review. The "Yes" indicates that the particular remedial alternative will achieve the value indicated, and the "No" indicates that it will not achieve the particular value.

299. Professor Glicksman predicted the *Oklahoma v. EPA* scenario when he provided the following examples:

[T]wo different states may disagree on the appropriate use of a particular resource. For example, state A may designate a body of water as the appropriate receptacle for the effluents of an industrial discharger located in that state. State B, located downstream on the same body of water, may object that the company's discharges reduce the value of the water to state B residents for drinking or recreational purposes.

*Id.* at 135.



cisely because of its broad policy nature.<sup>300</sup> It ignores the benefits of more stringent water quality requirements, which in turn, eventually lead to inequities such as the frustration of more progressive environmental protection.

Such inequities consequently undermine a most indispensable value—legitimacy. A decision is legitimate, and thus credible, only if “those affected by the decision accept the decisionmaking process even if they do not agree with the merits of the decision.”<sup>301</sup> Currently, the decisionmaking interstate water pollution and the Clean Water Act generates skepticism and illegitimacy. Despite its apparent purpose of abating water pollution, the Clean Water Act limits the rights of states to protect their resources against discharges emanating from upstream states. It does this by relegating the states to advisory roles,<sup>302</sup> and allowing the Administrator discretion to compel consideration of the affected state’s water quality standards.<sup>303</sup>

The application of a federal common law cause of action also fosters “self-determination”<sup>304</sup> and “individual liberty”<sup>305</sup>—the touchstones underlying federalism. Noncentralized decisionmaking “can better reflect geographical variations in preferences for collective goods like environmental quality . . . [thus] fostering environmental diversity”<sup>306</sup> while “protecting the basic personal integrity of the individual from harms imposed by others.”<sup>307</sup> In fact, at the Constitutional Convention of 1787, James Wilson warned against the danger of federal legislative despotism when he said that “if the Legislative authority be not restrained, there can be neither liberty nor stabil-

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300. Professor Stewart refers to this broadness as an attempt by Congress “to deal with interstate conflicts on a ‘wholesale’ basis.” Stewart, *supra* note 27, at 1220.

301. Glicksman, *supra* note 265, at 132.

302. See *supra* notes 215-20 & 234-47 and accompanying text.

303. Section 1341(a)(2) of the Clean Water Act provides in pertinent part:

Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application [for a discharging permit] shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, . . . the licensing or permitting agency shall hold such a hearing. . . . Such agency . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.

33 U.S.C. § 1341(a)(2) (1988).

304. See Stewart, *supra* note 27, at 1196.

305. See Glicksman, *supra* note 265, at 121.

306. See Stewart, *supra* note 27, at 1210.

307. Glicksman, *supra* note 265, at 133.

ity.”<sup>308</sup> Diversity will allow courts to uphold more stringent water quality standards where they are necessary to protect affected states from others’ unreasonable pollution.

The application of federal common law to interstate water pollution disputes will also internalize the costs of pollution, thereby promoting efficiency.<sup>309</sup> In effect, by holding them accountable, polluters will consider the cost of their pollution when deciding on future actions. Accordingly, their actions would be channeled towards a more reasonable approach in using our national water resources, a fundamental goal the Clean Water Act strives to achieve.

Federal common law would also make it easier for courts to grant injunctions in interstate water disputes.<sup>310</sup> Legal remedies are often inadequate.<sup>311</sup> Consequently, plaintiffs in such disputes prefer the court to grant an injunction rather than compensatory damages, because of the serious and unremitting nature of pollution. If a discharge is serious and continuous, compensatory damages are not an adequate measure of the injury and cannot protect the state from further harm.<sup>312</sup>

Lack of protection from future harm is unfair because it allows the defendant to continue polluting, amount to tacit condemnation of the plaintiff’s property.<sup>313</sup> It is also burdensome to require the injured plaintiff to repeatedly resort to the courts.<sup>314</sup> This system ultimately proves to be costly for the litigants, ineffective in abating pollution, and inefficient for the courts, which must address the same case again and again. In addition, an injunction, unlike compensatory damages, does not burden the courts with the almost impossible task of apportioning damages where several dischargers are responsible for the same nuisance.<sup>315</sup> Most importantly, such injunctions enhance the

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308. *INS v. Chadha*, 462 U.S. 919, 949 (1983) (quoting 1 M. FERRAND, *THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787*, at 254 (1911)).

309. See Comment, *supra* note 27, at 734; Comment, *Uniformity Is the Solution to Water Pollution*, 23 S. TEX. L.J. 417, 419 (1982).

310. The equitable decision of whether or not to issue an injunction involves the process of “balancing of the equities.” Professors Prosser and Keeton define this process as balancing “the relative equities of the parties and the interests of the public and an injunction issued or denied as the balance seems to indicate.” PROSSER AND KEETON, *supra* note 287, at 631.

311. See Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102, 109 (1969) (“The legal remedy tends to be insufficient in nuisance actions . . .”).

312. *Id.* (“[M]onetary damages are in any event inadequate if the private nuisance action is to prove an effective control on pollution.”).

313. *Id.* (“[T]o limit compensation to the injured riparian by damages is to permit the polluter to condemn another’s property for private use.”).

314. Comment, *supra* note 27, at 747 (“Especially when the pollution is part of a pattern and practice, broad injunctive relief is both economical and effective.”).

315. *Id.* (“[T]he technical problems of segregating damages are avoided.”).

policy of the Clean Water Act while preserving the sovereign rights of downstream states.

After deciding on an injunction, the courts must then carefully fashion the remedy. Certain principles should underlie each remedial injunction. First, judges need to avoid merely giving extraterritorial effect to the downstream state's water quality standards.<sup>316</sup> The remedy must be consistent with the nuisance cause of action. Therefore, the courts must address the problem by focusing on the reasonableness of the source state's use of the body of water and the interference with the downstream state's public right.<sup>317</sup> If courts enjoin source states and the dischargers located within their borders from violating the water quality standards of the affected downstream states without inquiring into the reasonableness and interference of each of the uses, they effectively impose the laws of one state upon another. More significantly, they frustrate the purpose of the common law remedy of injunction—balancing the equities.

Second, the remedy must be sufficiently specific to be effective and efficient. To attain this goal, courts should determine the water quality that they deem reasonable.<sup>318</sup> This prevents future squabbles about the precise definition of "reasonableness."

Third, courts should allow dischargers a "reasonable time in which to reduce their discharge."<sup>319</sup> The courts thereby fulfill their role as courts of equity by reconciling the interests of the affected state in protecting its environment with the interests of the source state in protecting its economic stability. Also, courts will be effectuating the ultimate goal—eliminating the nuisance in order to protect the environment.

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316. See Leybold, *supra* note 296, at 312 ("Imposing the standards merely because they are more desirable would be a bold usurpation of legislative and administrative functions."). It is precisely for this reason that the holding of the Tenth Circuit in *Oklahoma v. EPA* is faulty. Contrary to the court's determination that the more stringent water quality standards imposed by Oklahoma were transformed into federal law when they were approved by EPA, the imposition of such standards merely gave extraterritorial effect to state law.

317. See *supra* notes 279-95 and accompanying text for a discussion of the reasonableness inquiry.

318. *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915), provides an example of a specific remedy that was awarded by the Supreme Court sitting in equity in an interstate pollution dispute. In that case, the Court required that the discharger

shall not permit the escape into the air of fumes carrying more than 45% of the sulphur contained in the green ore subjected to smelting. . . . It shall not permit escape into the air of gases the total sulphur content of which shall exceed 20 tons during one day from April 10th to October 1st of each year or exceed 40 tons in one day during any other season.

*Id.* at 478.

319. Note, *supra* note 311, at 110.

One example of a federal court exercising its equitable powers to effectuate a practical solution is *New Jersey v. City of New York*.<sup>320</sup> In that case, the Supreme Court recognized that New York City's pollution caused a public nuisance for New Jersey, and thus granted an injunction. However, noting the limitations faced by the discharging state, the Court exercised its equitable powers to allow the City of New York sufficient time to construct the facilities needed to abate the nuisance.<sup>321</sup>

Given the multifaceted nature of interstate water pollution disputes, the most effective and efficient method of resolving these disputes while simultaneously abating pollution is to reinstate the federal common law of public nuisance. A judicial resolution of the problem would promote advantages such as accommodation, legitimacy, self-determination, and efficiency by avoiding the inequity of undue uniformity and myopic administrative efficiency.

### B. Possible Criticism

In spite of the advantages of using federal common law, the approach is not free from criticism.<sup>322</sup> Critics of the adjudicatory approach focus primarily on three areas: an apparent lack of uniformity of federal common law, the procedural issues, and various institutional concerns.<sup>323</sup> It is true that federal common law, like any other means of addressing the complex issue of interstate pollution, is not a panacea. However, the concerns surrounding the application of federal common law are either minimal or illusory.

#### 1. LACK OF UNIFORMITY

Perhaps the strongest criticism of a federal common law approach to the interstate pollution situation is that its apparent lack of uniformity would lead to unpredictability. Critics who adhere to this belief argue that federal regulatory programs provide national uniformity. Such uniformity is possible if the statute itself forbade diversity. However, the Clean Water Act does not forbid diversity, but rather authorizes individual states to impose more stringent water quality standards than the national standard.<sup>324</sup> Hence, the Clean

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320. See *supra* notes 226-63 and accompanying text.

321. *New Jersey v. City of New York*, 283 U.S. 473, 481 (1931).

322. See, e.g., Post, *Federal Common Law Suits to Abate Interstate Air Pollution*, 4 HARV. ENVTL. L. REV. 117 (1980); Zerbe, *supra* note 14, at 193; Comment, *supra* note 27, at 734; Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972); Comment, *supra* note 309, at 417.

323. See Zerbe, *supra* note 14, at 193.

324. Section 1370 of the Clean Water Act provides in pertinent part: "[S]uch State . . . may

Water Act itself fosters disunity. A perfect case in point is *Oklahoma v. EPA*,<sup>325</sup> where the State of Oklahoma adopted more stringent EPA-approved state water quality standards than its neighboring state, Arkansas.<sup>326</sup>

Despite initial impression, however, federal common law is indeed capable of producing acceptable national uniformity and predictability, while preserving adaptability to specific cases.<sup>327</sup> The courts could develop a uniform national legal standard based upon whether the source state's discharge is unreasonable and whether the interference with the affected downstream state's right is significant. The states would be bound by this standard in disputes between themselves. The state water quality standards, however, would still be applied within each state. Therefore, resort to the federal courts would be limited to instances where a state is suing another state, claiming that the upstream state is causing a public nuisance.

Carefully developed federal common law would foster the most effective type of uniformity.<sup>328</sup> As mentioned earlier, the broad minimum level of regulation standard adopted by the Clean Water Act and other federal statutes has created undue uniformity.<sup>329</sup> This effectively sacrifices progressive environmental protection in favor of uniform minimal requirements. Perhaps it is more feasible to keep the water clean in most parts of the country, allowing pollution in designated industrial areas so long as downstream states are not unreasonably affected.<sup>330</sup> It would not be environmentally unwise to choose such a realistic approach. The current sacrifice of progressive environmental protection in favor of the illusory ideal of uniformity, however, is counterproductive approach in solving pollution disputes.

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not adopt or enforce . . . any effluent standard . . . which is less stringent than the . . . effluent standard . . . under this chapter." 33 U.S.C. § 1370(1)(A) (1988). "Both the Clean Air Act and the Clean Water Act expressly authorize the states to develop and apply their own emission limitations, provided those limitations are at least as stringent as the federal controls. The only uniformity required by the statutes is adherence to the *minimum* federal standards found necessary by Congress and the EPA to protect health and the environment." Glicksman, *supra* note 265, at 200.

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

326. See *supra* notes 149-264 and accompanying text.

327. If the courts make federal common law remedies available in interstate water pollution disputes, they would "allow the development of uniform principles for resolving interstate water pollution disputes and at the same time would not deprive injured persons of an opportunity to seek a remedy which they would otherwise have in the purely intrastate context." Kosloff, *State Law Remedies for Interstate Water Pollution: The Legacy of Illinois v. Milwaukee*, 16 ENVTL. L. REP. 10136, 10141 (1986).

328. See Zerbe, *supra* note 14, at 213 (current environmental statutes are rendered ineffective and inequitable by undue uniformity).

329. *Id.*

330. See *id.* at 209.

## 2. PROCEDURAL ISSUES

The procedural issues raised by the application of federal common law nuisance to interstate water pollution disputes, while real, are likewise surmountable. The first procedural issue to confront a plaintiff state is whether it has standing to sue. This problem is of little significance because states have standing under the doctrine of *parens patriae*.<sup>331</sup>

The next issue is whether the defendant state is amenable to suit. This concern raises the interrelated issue of jurisdiction. This problem is likewise surmountable, because the Constitution grants the Supreme Court original jurisdiction in controversies between two or more states.<sup>332</sup> If private dischargers cause pollution, the responsibility of the source state is more attenuated. This procedural hurdle, however, is easily overcome by applying the doctrine of *respondeat patriae*, also known as reverse *parens patriae*.<sup>333</sup> With the application of this doctrine, the downstream state would not be left helpless in the face of procedural obstacles.

## 3. INSTITUTIONAL CONCERNS

Institutional concerns surrounding the application of federal common law to interstate water pollution disputes question the technical and institutional competence of the judiciary in the complex field of environmental law. Remarking on the inherently technical nature of environmental law suits, some commentators argue that the judges are not trained to address the issues involved in such disputes.<sup>334</sup> Although such an observation may be true in certain cases, it is nonetheless not incurable. Judges could appoint masters<sup>335</sup> and

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331. See generally Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411 (1970).

332. U.S. CONST. art. III, § 2, cl. 2.

333. See Post, *supra* note 323, at 135; Stewart, *supra* note 274, at 1248. Professor Stewart suggests:

Since states can obtain an award of relief for pollution-related injuries suffered by their citizens, they should be reciprocally liable for comparable damage attributable to their citizens. Accordingly, injured states should be permitted to invoke a reverse *parens patriae* principle by requiring an originating state to control private sources of spillover pollution.

*Id.*

334. See, e.g., Note, *supra* note 322, at 1453 (arguing that it is beyond the courts' technical competence to properly consider all environmental interests).

335. Rule 53 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor

(b) . . . . In actions to be tried by a jury, a reference shall be made only when

call expert witnesses to testify.<sup>336</sup> Still another solution for the appellate courts has been suggested by Judge Leventhal.<sup>337</sup> He has suggested that "an appellate court needs . . . an aide who is . . . a kind of hybrid between a master and a scientific law clerk . . . to advise a court so that it could better understand the record."<sup>338</sup> Moreover, it is unpersuasive to argue that the judiciary is unable to handle complex issues when courts are accustomed to solving other types of disputes involving similarly complex issues under numerous federal statutes.

Commentators also argue that federal environmental protection, by its very nature, requires the implementation of broad policies which must simultaneously consider a large number of diverse interests.<sup>339</sup> These commentators, however, ignore the very role of courts of equity—to reconcile competing interests. Moreover, what better way is there to reach the most adequate result to a pollution problem than through the application of a tailored remedy?

Finally, commentators who question the technical and institutional incompetence of the judiciary fail to consider that courts currently hear technical environmental cases under the Citizen Suits Provision of the Clean Water Act.<sup>340</sup> Therefore, technical environmental issues will not be additionally burdensome on the courts. Moreover, courts currently make such decisions in environmental disputes brought in state court under the states' common law causes of

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the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

FED. R. CIV. P. 53.

336. Rule 706(a) of the Federal Rules of Evidence provides in pertinent part:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. . . . A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

FED. R. EVID. 706(a).

337. Judge Leventhal is a circuit judge on the United States Court of Appeals for the District of Columbia Circuit.

338. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 550 (1974).

339. Note, *supra* note 323, at 1453 (arguing that the interests involved in environmental disputes are too diverse and numerous to be represented in the court at the same time); Comment, *supra* note 309, at 419 (contending that judicial decisions are designed to achieve only specific solutions and not the broad policies required by the pollution problem).

340. 33 U.S.C. § 1365 (1988).

action.<sup>341</sup>

### VIII. CONCLUSION

After the Supreme Court's decision in *Milwaukee II*, which held that the Clean Water Act was so comprehensive that it effectively preempted federal common law, downstream states were left only with the Act itself and the state common law causes of action to remedy the harm caused by upstream discharges. The options were further diminished when the Supreme Court held in *Ouellette* that an out-of-state plaintiff may only resort to the common law of the discharger's state, the source state. It was in this scenario of increased restrictions and diminished legal recourse for affected downstream plaintiffs that the Tenth Circuit decided the case of *Oklahoma v. EPA*.

Faced with the conflicting water quality standards of Oklahoma and Arkansas, the Tenth Circuit concluded that "the Clean Water Act requires point sources to comply with the federally approved water quality standards of affected downstream states."<sup>342</sup> However, given the insufficient and indeterminate legislative history on the issue of interstate water pollution between states, the court's holding was too expansive. Neither the plain text nor in the legislative history of the Clean Water Act indicate that Congress intended that downstream states indirectly regulate all upstream states.

The Clean Water Act itself, however, does not provide states with an effective, equitable method for resolving interstate water pollution controversies. The "advisory role" given to affected states by the Clean Water Act is rendered increasingly illusory by the Administrator's discretionary veto power over NPDES permits. These inadequacies beckon the adoption of an alternative non-statutory method for dealing with interstate water pollution controversies between states. Courts should therefore resort once again to the federal common law of public nuisance which was employed by the federal courts during the early part of the twentieth century. Those cases which applied the federal common law proved that the adjudicatory method is very capable of producing equitable, yet effective, environmental decisions.

By the very nature of the equitable cause of action of public nuisance, the courts, unlike the regulatory agencies, could analyze the multifaceted issues inherent in interstate water pollution disputes. Such a method would necessarily focus on the reasonableness of the

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341. According to *Ouellette*, injured parties may bring state common law suits. *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-500 (1986).

342. *Oklahoma v. EPA*, 908 F.2d 595, 634 (10th Cir. 1990).



discharge and on the significance of the interference, thereby respecting the sovereignty of individual states. Moreover, the adjudicatory method would foster the valuable principles of accommodation, legitimacy, self-determination, and efficiency. Equitable adjudication would also be beneficial by eliminating the myopic "values" of administrative efficiency and undue uniformity.

The Supreme Court can reinstate the federal common law of public nuisance for application in disputes between states such as *Oklahoma v. EPA* without overruling *Ouellette* and *Milwaukee II*. The Court could distinguish these cases. At the outset, these two Supreme Court precedents are distinguishable in that they dealt with the application of common law while *Oklahoma v. EPA* deals with federally-approved state water quality standards.<sup>343</sup> In addition, *Ouellette* can be further distinguished by the difference in the party composition of both cases, namely that in *Ouellette* the parties were not states but private citizens. Thus, the Court could render *Ouellette* inapplicable by limiting the holding in *Oklahoma v. EPA* to suits involving states.

Admittedly, distinguishing *Milwaukee II* would be more difficult, though not impossible. Inevitably however, the Court would have to reconsider whether the Clean Water Act can still be honestly characterized as all-encompassing.<sup>344</sup> As discussed earlier in this Comment, the legislative history of the Clean Water Act does not support this contention.<sup>345</sup> Moreover, a reconsideration of the Court's conclusion in *Milwaukee II* would not require a departure from the principles presented therein. In *Milwaukee II*, the Court announced that federal common law is permissible when there exists a "significant conflict between some federal policy or interest and the use of state law."<sup>346</sup> Under such standard, the Court would still be able to reinstate federal common law in interstate water pollution disputes between states. The egression would be limited to the interpretation of the term employed in the standard. The Court would have to recognize that there exists a significant conflict between the federal policy of pollution abatement, the interest in a uniform, yet effective and equitable, method for implementing that policy in a neutral forum, and the limited recourses available to downstream states under state law. On the

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343. In *Milwaukee II*, the plaintiffs filed an action under federal common law. In *Ouellette*, the plaintiffs filed an action under state common law.

344. In *Milwaukee II*, the Supreme Court concluded that "Congress . . . occupied the field through the establishment of a comprehensive regulatory program." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

345. See *supra* notes 149-264 and accompanying text.

346. *Milwaukee II*, 451 U.S. at 313.

other hand, the Court could opt for a more cautious alternative and merely reverse the Tenth Circuit's broad holding by constraining its decision to the mundane issue of administrative deference.

The final solution, however, will be made by the Supreme Court.<sup>347</sup> The Court will thus have another opportunity to consider, as it did in *Milwaukee II*, whether the Clean Water Act is so comprehensive as to provide remedies for affected downstream states.<sup>348</sup> This Comment has argued that the Clean Water Act's inadequacy on the issue of interstate water pollution is evident in the fact that it does not provide an effective and equitable remedy for such problems.

In order to cultivate legitimacy and credibility, our laws must not merely provide illusory remedies, but effective ones. As Chief Justice Marshall wisely wrote: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."<sup>349</sup> Can we honestly conclude that the Clean Water Act affords affected downstream states a "remedy" which would justify the preemption of federal common law?

MARIA V. MAURRASSE

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347. On April 1, 1991, the Supreme Court granted the petitions for writs of certiorari. *Arkansas v. Oklahoma*, 111 S. Ct. 1412 (1991). Oral arguments are expected in November. Barton, *High Court Takes Fayetteville Case*, *Arkansas Gazette*, Apr. 2, 1991, at 3A.

348. As early as 1988, Ed Edmondson, attorney for the Oklahoma environmental group "Save the Illinois River," announced that the group planned "to pursue this to the Supreme Court if necessary." *River Supporters Vow Continued Sewage Fight*, UPI, Feb. 11, 1988, available in LEXIS, Nexis Library, Omni File.

349. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).