

1991

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Recommended Citation

Robert H. Abrams, Interstate Water Pollution: Must Upstream Permits Comply With Downstream Standards? 1991-92 Preview U.S. Sup. Ct. Cas. 131 (1991)

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Interstate water pollution: Must upstream permits comply with downstream standards?

by Robert H. Abrams

State of Arkansas, et al.

v.

State of Oklahoma, et al.

(Docket No. 90-1262)

Environmental Protection Agency

v.

State of Oklahoma, et al.

(Docket No. 90-1266)

Argument Date: Dec. 11, 1991

ISSUE

Are upstream states required to condition all water pollution permits in a way that will ensure there is no violation of downstream states' water-quality standards caused or exacerbated by pollutants traceable to the upstream source?

FACTS

This is a factually simple case that arises in a legally and administratively complex setting. The City of Fayetteville, Arkansas, like most cities, owns and operates a sewage treatment plant. To overcome pollution control deficiencies in the operation of its facility, Fayetteville proposed a new, \$40 million, state-of-the-art facility. In order to more fully protect downstream Arkansas waters in the White River basin that serve as drinking water supply, the new facility proposed a change in practice to divert half of its effluent discharge into tributaries of the Illinois River. These latter discharges are the catalyst to this litigation, for the Illinois River subsequently flows into Oklahoma at a point roughly 40 miles downstream from the new Fayetteville outfall pipe.

As required by the Clean Water Act (CWA), Fayetteville applied in July of 1985 for a National Pollution Discharge Elimination System (NPDES) permit from the United States Environmental Protection Agency (EPA) that would allow it to construct and operate the facility. (EPA can delegate this permitting authority to states that have adequate water-pollution control laws and administrative bodies.

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Most states have taken over the NPDES permitting, as did Arkansas at a date after the ruling on this permit had been made by EPA.) EPA initially determined in November 1985, that the proposed split-flow discharge (part in the White River basin and part in the Illinois River basin) would have no adverse impact on Oklahoma water quality, and therefore the CWA procedures that are designed to protect the interests of downstream states were not triggered.

Oklahoma was concerned about the possible impact of the Fayetteville discharge on the Illinois River in Oklahoma. That river had been designated a "Scenic River" by Oklahoma. Pursuant to that designation, Oklahoma had set, and EPA had approved, a stringent "no degradation" water quality standard that forbade any new point source pollution of the river. Even so, at the time of the Fayetteville permit application, the Illinois River was suffering the ill-effects of pollution. Indeed, Fayetteville's original application referred to the fact that the Illinois River "is not a pristine body of water; nutrient loadings from nonpoint sources and [other] municipal discharges [also located upstream in Arkansas] do adversely impact the Illinois River under present conditions, giving rise to high algae productivity and some dissolved oxygen problems."

Oklahoma believed that the Fayetteville discharge would add pollutants, and, accordingly, Oklahoma objected to the EPA Regional Administrator, claiming that the Illinois River discharges would violate Oklahoma water-quality standards for that stream. EPA allowed Oklahoma to present evidence on that issue to an administrative law judge (ALJ), who also held in favor of the permit. Oklahoma appealed to EPA's Chief Judicial Officer, who found that the ALJ had applied the wrong standard to determine whether Oklahoma's interests had been offended. The CJO instructed the ALJ to reconsider the case to determine whether the Fayetteville discharge would "cause an actual detectable violation of Oklahoma water quality standards." Again the ALJ found against Oklahoma. The permit was finally approved, and the Fayetteville plant went into operation in January 1989.

Oklahoma sought judicial review of the determination in the U.S. Court of Appeals for the Tenth Circuit. (See *Oklahoma v. EPA*, 908 F.2d 595 (1990).) That court, relying in part on EPA's interpretation of the CWA, held that the CWA required sources in upstream states to comply with any and all federally approved water-quality standards of downstream states. The court further held that the detectable-harm standard that EPA had adopted was not

consistent with the CWA in a case like this one, where the downstream state standard was already being violated. The court found that the policy of the CWA required a more stringent approach to added pollution:

“[I]f a body of water is experiencing [water quality standard] violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent will reach the degraded waters.”

BACKGROUND AND SIGNIFICANCE

As indicated by the substantial number of amici who filed briefs, this is potentially a case of some importance. Despite the appearance of being a case about a narrow, somewhat technical issue of interpreting state water-quality standards and an arcane Clean Water Act provision, this is likely a case that will set CWA policy in two important regards. First, it requires the Supreme Court to determine how Congress intends to have the interests of upstream and downstream states coordinated under the CWA. The Tenth Circuit ruling being reviewed is very protective of downstream states adversely affected by pollution introduced by dischargers located in upstream states. Second, and somewhat more speculatively, the Supreme Court may find itself addressing general questions of antidegradation policy that arise in relation to protecting outstanding natural resource waters (ONRWs) from the effects of any pollution. Under at least one construction of the facts in this case, the ultimate issue is whether EPA has tried to evade its own previously emphatic position that antidegradation in the ONRW context requires a “no degradation,” “no allowable increase” in point source pollution outcome.

The practical importance of the case is suggested by its own facts. Oklahoma, by designating the Illinois a “Scenic River” and bringing it into the ONRW classification, sought to protect the river from pollution that would be inconsistent with that designation. The means for protecting the river was a no-degradation standard which, in turn, means that no new point source pollution can be permitted, thereby imposing a significant limitation on the economic uses that can be made of the stream’s water at upstream locations. No person desiring to make a direct discharge into the stream can increase the level of pollution in the ONRW-designated portions of the river.

When the stream is wholly intrastate, this consequence of ONRW designation is not of great concern—the state making the designation is burdening its own upstream dischargers with the burdens of a no-degradation policy. Here, Fayetteville, 40 miles up river and in another state, having no part in or political influence over the Oklahoma designation process, pays the antidevelopmental consequences of Oklahoma’s decision. Moreover, Arkansas feels aggrieved as well. In this case the use of the Illinois River discharge was selected to ease the pollution loadings on the White River basin. Here too, roughly half of the sewage treated by the Fayetteville plant originated in the Illinois River ba-

sin, giving rise to the claim that the split discharge was a more equitable way of distributing the pollution burden between the two basins.

There is, of course, a second side to this coin. To refuse to give extraterritorial effect to the water-quality standards of the downstream state grants the upstream state the power to prevent the downstream state from reaching its water quality goals. Partially, this problem is addressed by the CWA, which does not leave the upstream state unfettered in its ability to send pollution down the river. Under the CWA, all point sources are regulated by technology-based standards, generally requiring them to make use of available pollution-control measures. Moreover, under the CWA, EPA is given the role of playing interstate arbiter, which it does by refusing to approve permits having unacceptable impacts on downstream state water quality. As seen here, under the CWA, the key question that must be decided relates to how EPA is to perform that arbitral function.

ARGUMENTS

For petitioners in No. 90-1262, State of Arkansas, et al. (Counsel of Record, David G. Norrell; Kirkland & Ellis, STE 1200, 655 Fifteenth St. NW, Washington, DC 20005; telephone (202) 879-5070):

1. The Clean Water Act does not make downstream state water-quality standards binding in permit decisions made by upstream states for facilities located in upstream states.
2. Congress specifically gave permitting agencies discretion in responding to the water-quality concerns of downstream states.
3. EPA properly declined to exercise its discretion to impose additional restrictions on the Fayetteville discharge in this case.
4. Even if downstream state water-quality standards are applicable to dischargers located in upstream states, the Fayetteville discharge complies with the relevant Oklahoma standards in this case.
5. The Clean Water Act does not require a total ban on the issuance of discharge permits upstream of a stream segment that is currently in violation of the relevant water-quality standards.

For petitioner in No. 90-1266, United States Environmental Protection Agency (Counsel of Record, Kenneth W. Starr; Solicitor General, United States Department of Justice, Washington, DC 20530; telephone (202) 514-2217):

1. Federal law governs the interpretation and application of federally approved state water-quality standards to out-of-state dischargers.
2. The Clean Water Act assigns to EPA the responsibility of resolving disputes between states over the discharge of pollutants into interstate waters.
3. There was no basis for judicial disapproval of EPA’s in-

terpretation and application of the Oklahoma water-quality standards in this case.

4. The court of appeals should have considered whether the record supported issuance of the permit under the interpretation of the Oklahoma standard adopted by EPA.

For the respondents, State of Oklahoma, et al. (*Counsel of Record, Robert A. Butkin, Assistant Attorney General, 2300 N. Lincoln Blvd., STE 112, Oklahoma City, OK 73105-4894; telephone (405) 521-3921*):

1. EPA improperly failed to take account of the currently degraded water quality of the Illinois River in Oklahoma in its fashioning of the Fayetteville, Ark., NPDES permit.
2. Oklahoma's (the downstream state's) federally approved water-quality standard must be respected in permitting decisions relating to discharges in the upstream state.
3. In this case EPA required respect for the federally approved downstream water-quality standard, but improperly interpreted that standard by requiring a showing of harm as a prerequisite to forbidding upstream discharges into that receiving body.
4. The circuit court of appeals properly found that the relevant standard forbids any addition of pollutants to the Illinois River.

For the respondents, Oklahoma Wildlife Federation (*Counsel of Record, Theodore E. Dinsmoor; Gaston & Snow, One Federal Street, Boston, MA 02110; telephone (617) 426-4600*):

1. The Clean Water Act, Oklahoma's federally approved water-quality standards, and EPA's regulations and interpretive rulings all prohibit the permitting of new discharges to protected waters on the basis of a "no detectable impact" standard.
2. The circuit court of appeals correctly construed congressional intent in rejecting EPA's construction of the Clean Water Act.

AMICUS BRIEFS

In Support of Petitioners

The States of Nevada, New Hampshire, North Dakota and South Dakota (*Counsel of Record, Nicholas J. Spaeth, Attorney General of North Dakota, 900 East Blvd., Bismarck, ND 58505; telephone (701) 224-3640*).

Mountain States Legal Foundation and a host of water-user groups including farm bureaus and cattlemen's associations (*Counsel of Record, William Perry Pendley, Mountain States Legal Foundation, 1600 Lincoln Street, STE*

2300, Denver, CO 80264; telephone (303) 861-0244).

State of Colorado (*Counsel of Record, Gale A. Norton, Attorney General of Colorado, 110 Sixteenth Street, 10th Floor, Denver, CO 80202; telephone (303) 620-4700*).

Association of Metropolitan Sewerage Agencies and several other municipal groups and individual cities (*Counsel of Record, Lee C. White; White, Fine & Verville, STE 1100, 1156 Fifteenth St., NW, Washington, DC 20005; telephone (202) 659-2900*).

Colorado Water Congress (*Counsel of Record, Mark T. Pifber; Anderson, Johnson & Gianunzio, 104 S. Cascade Ave., STE 204, Colorado Springs, CO 80901-0240; telephone (719) 632-3545*).

Champion International Corporation and several industry organizations (*Counsel of Record, J. Jeffrey McNealey; Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, OH 43215; telephone (614) 227-2000*).

In Support of Respondents

States of Illinois, Tennessee, Alabama, Arizona, California, Connecticut, Delaware, Florida, Maine, Michigan, Mississippi, New Jersey, and South Carolina (*Counsel of Record, James L. Morgan, Assistant Attorney General of Illinois, 500 South Second Street, Springfield, IL 62706; telephone (217) 782-9030*).

The Cherokee Nation of Oklahoma (*Counsel of Record, Randall S. Attar-Abate, Special Counsel to the Cherokee Nation of Oklahoma, Vermont Law School, PO Box 96, South Royalton, VT 05068; telephone (802) 763-8303*).

Natural Resources Defense Council and three other environmental organizations (*Counsel of Record, Jessica C. Landman, Natural Resources Defense Council, 1350 New York Ave. NW, Washington, DC 20005; telephone (202) 783-7800*).

Sierra Club (*Counsel of Record, Stephan C. Volker, Sierra Club Legal Defense Fund, Inc., 180 Montgomery Street, STE 1400, San Francisco, CA 94104; telephone (415) 627-6700*).

Scenic Rivers Association of Oklahoma and several Oklahoma environmental groups (*Counsel of Record, Kathy Carter-White, EcoLaw Institute, Inc., PO Box 2132, Tablequah, OK 74465; no telephone listed*).

The Senators from the State of Oklahoma (*Counsel of Record, James George Jatras, Office of Senator Don Nickles, 713 Hart Senate Building, Washington, DC 20510-3602; telephone (202) 224-5754*).

Congressman Mike Synar of Oklahoma (*Counsel of Record, Mike Synar, 2441 Rayburn, Washington, DC 20515; telephone (202) 225-2701*).