No. 115, Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARKANSAS,
Plaintiff,

vs.

STATE OF OKLAHOMA,
Defendant.

ON MOTION FOR LEAVE TO
FILE COMPLAINT

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTIONS PRESENTED

I.

Whether the interests of Arkansas establish the "strictest necessity" required for invoking this Court's original jurisdiction?

II.

Whether the Commerce Clause prohibits the application of Oklahoma's water quality standards, adopted pursuant to authority granted to states by Congress in the Clean Water Act, to dischargers in Arkansas?

III.

Whether the application of Oklahoma water quality standards to dischargers in Arkansas denies the citizens of Arkansas due process or equal protection in violation of the Fourteenth Amendment?

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INTRODUCTION

"A river is more than an amenity, it is a treasure." New Jersey v. New York, 283 U.S. 336, 342 (1930) (emphasis added). Justice Holmes could have been talking about the Illinois River, if he were speaking from the perspective of Oklahomans and certain

citizens in Arkansas. In 1952, an official report by the Oklahoma Fisheries Research Laboratory[1] described the Illinois River as follows:

> Any description of the Illinois River should properly be filled with glowing adjectives and loaded with phrases of superlative beauty. For the "Illinois" is a clear, spring-fed stream, flowing through the oak and hickory clad Ozark hills in a succession of sparkling riffles and long, quite pools, that inspires cries of "Eureka!!" when first viewed by people from the shortgrass country. Float trips in canoe or "John boat" are considered the ultimate in outdoors enjoyment by scores of fishermen, and the Illinois River provides 100 miles of scenic grandeur, navigability, and small mouth bass fishing in a

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[1]An Investigation of the Fisheries Resources of the Illinois River and Pre-Impoundment Study of Tenkiller Reservoir, Oklahoma, Robert M. Jenkins, Edgar M. Leonard, Gordon E. Hall, Oklahoma Fisheries Research Laboratory Report No. 26, December, 1952, p.2.

combination unparalleled in Oklahoma.

Because Oklahoma views the Illinois River as a "treasure," and certain municipalities in Arkansas view it as a dumping ground for their sewage effluent, the States of Oklahoma and Arkansas have been engaged in a long term struggle over how the waters of that river must be treated. This current attempt by the State of Arkansas to invoke the original jurisdiction of this Court in an attempt to do an end run around ongoing administrative proceedings before the United States Environmental Protection Agency (EPA), is just the latest chapter in the continuing saga of "Arkansas vs Oklahoma re: Illinois River."

STATEMENT OF THE CASE

The State of Arkansas has filed a motion asking this Court to exercise its original jurisdiction to allow Arkansas to file a complaint against the State of Oklahoma. It is Oklahoma's position that the claims put forward by the State of Arkansas do not rise to the level of seriousness and dignity that would obligate this Court to exercise its original jurisdiction and therefore it is not an appropriate case for this Court's consideration at this time.

The Illinois River is an interstate river, flowing from Arkansas into the State of Oklahoma. Arkansas identifies the cities of Springdale, Rogers, and Siloam Springs, Arkansas as current dischargers that discharge municipal

sewage into tributaries of the Illinois River within the State of Arkansas. The City of Fayetteville, Arkansas is identified as a proposed discharger to a tributary of the Illinois River. Arkansas objects to Oklahoma's insistence that each of these municipal dischargers meet Oklahoma's water quality standards, and alleges that Oklahoma does not enforce its water quality standards against dischargers in Oklahoma.

Arkansas claims that Oklahoma's water quality standards cannot be applied to a discharger in Arkansas. Arkansas admits those water quality standards were adopted by Oklahoma pursuant to authority granted to all states by the federal Clean Water Act, 33 U.S.C. §§1251-1387, but alleges that

attempts by the State of Oklahoma to apply those standards to dischargers in Arkansas constitute a discriminatory burden on interstate commerce and are, therefore, violative of the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. Arkansas also claims that the application of Oklahoma's water quality standards to Arkansas dischargers denies the citizens of Arkansas due process and equal protection under the Fourteenth Amendment to the Constitution.

Oklahoma admits that it insists that its water quality standards apply to out-of-state dischargers. However, those standards apply to out-of-state dischargers only if the discharge crosses the state border into

Oklahoma, and only from the point the discharge crosses the Oklahoma border and flows on into the state. Once a discharge crosses the state line, it must comply with the Oklahoma water quality standards applicable to that body of water as if it were an Oklahoma discharge. Oklahoma specifically denies that it does not enforce its standards against Oklahoma dischargers.[2]

SUMMARY OF ARGUMENT

This Court should decline to exercise its original jurisdiction because there is another action pending between these parties where

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[2]Arkansas attempted to prove that Oklahoma does not enforce its standards against Oklahoma municipal dischargers in the pending proceeding before the Environmental Protection Agency which is discussed, infra, pp. 18-30. Those attempts failed.

the issues raised by Arkansas may be resolved.

The Commerce Clause does not apply to the actions of the State of Oklahoma because it has adopted its water quality standards, and seeks to have them enforced against dischargers in Arkansas, pursuant to powers granted to Oklahoma and remedies made available to it by Congress in the Clean Water Act.

The citizens of Arkansas have not been denied due process or equal protection in violation of the Fourteenth Amendment to the Constitution because they have a right to participate in the hearing process set out in the Clean Water Act and Oklahoma statutes and because Oklahoma water quality standards apply equally

to all dischargers to all waters in the state.

HISTORY OF THE DISPUTE

Oklahoma v. Arkansas

What the State of Arkansas did not tell this Court in its Motion for Leave to File Complaint with Complaint and with Brief in Support of Motion, (Arkansas Motion) is that in May of 1982, the State of Oklahoma asked this Court to exercise its original jurisdiction over these two states and various Arkansas municipalities and industries that were discharging into the Illinois River basin in Arkansas. Copies of the pleadings in that action which are referred to herein are on file with the United States Supreme Court Clerk. State of Oklahoma v. State of Arkansas, et al., U.S. Supreme

Court, No. 93 Original, October term, 1981 (Oklahoma v. Arkansas). Oklahoma asked this Court to issue an injunction against the municipal and industrial defendants to stop the daily loading of pollutants into the basin, specifically nutrients such as phosphorus, or require them to pay the costs of cleaning up the river.

The municipalities named as defendants included the cities of Springdale, Rogers and Siloam Springs which were discharging sewage into the river basin at that time. The City of Fayetteville was named as a defendant because its elected Board of Directors had voted to construct a new wastewater treatment plant which, contrary to its existing practice, would begin discharging into the Illinois River.

These are the same Arkansas cities whose interests the State of Arkansas now seeks to protect. The State of Arkansas was named as a defendant because of its failure to properly regulate the named dischargers.

Among the reasons given to this Court in support of the Arkansas request that the Court deny its original jurisdiction was that Oklahoma had remedies available to it pursuant to the Federal Water Pollution Control Act (the Clean Water Act). Oklahoma v. Arkansas, Brief in Opposition to Motion for Leave to File Complaint, pp. 10-12. The brief was filed by the same Arkansas Attorney General, John Steven Clark, on behalf of the State of Arkansas and certain other defendants. The City of

Fayetteville, Arkansas, which filed a separate brief, took the same position and informed the Court as follows:

> Oklahoma's motion for leave to file an original action against the City of Fayetteville should be denied as the Federal Water Pollution Control Act Amendments of 1972 provide Oklahoma a forum in which to protect its interests, and Oklahoma has not exhausted the administrative permit procedures prescribed by said amendments. No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Myers v. Bethlehem Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-64, 82 L.Ed. 638 (1938).

Arkansas v. Oklahoma, Brief of Separate Defendant City of Fayetteville, Arkansas in Opposition to Motion for Leave to File Complaint, p.5.[3]

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[3]See also Oklahoma v. Arkansas, Brief of the United States as Amicus (continued...)

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[3](...continued)
Curiae, p.11:

> At the time the permits involved here were issued, Oklahoma had an opportunity to seek accommodation of its concerns regarding discharges into the Illinois River. Section 402(b)(3) of the [Clean Water] Act, 33 U.S.C. 1342(b)(5), requires that the permit-issuing agency insure that any other state whose waters may be affected by the proposed discharge receive notice of the application for such a permit. Section 402(b)(5), 33 U.S.C. 1342(b)(5), requires that a state whose waters may be affected by the issuance of a permit be allowed to submit written recommendations with respect to any permit application./14 If a state is nonetheless dissatisfied with the content of the permits issued, it is authorized to seek judicial review of their adequacy pursuant to Section 509(b)(1)(F) of the Act, 33 U.S.C. 1369(b)(1)(F).

/14 Section 402(a)(3) of the Act, 33 U.S.C. 1342(a)(3), provides that EPA is subject to these same procedural
(continued...)

This Court denied Oklahoma's Motion for Leave to File Complaint. Oklahoma resolved to exercise the remedies available to it pursuant to the Clean Water Act.

ARGUMENT

I.

THIS COURT SHOULD DECLINE TO EXERCISE ITS ORIGINAL JURISDICTION BECAUSE THERE ARE ADMINISTRATIVE PROCEEDINGS PENDING BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY INVOLVING THE SAME PARTIES AND THE SAME ISSUES.

Although this action is one between two states, this Court has held that that, in and of itself, is not sufficient for this Court to exercise its original jurisdiction. As was stated in Illinois v. City of

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[3](...continued)
requirements for the issuance of permits when it administers the permit program in a given state.

Milwaukee, 406 U.S. 91, 93 (1972), "[i]t has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" (Quoting from Utah v. United States, 394 U.S. 89, 95 (1969)).

"Of course, the issue of appropriateness in an original action between States must be determined on a case-by-case basis." Maryland v. Louisiana, 451 U.S. 725, 743 (1981). Among the criteria considered by this Court as relevant to the decision of whether a particular case is "appropriate" and therefore "obligatory" for the Court to exercise its original jurisdiction, are the "seriousness and dignity of the claim" and "the availability of another forum where there is jurisdiction over the

named parties, where the issues tendered may be litigated, and where appropriate relief may be had." Illinois v. City of Milwaukee, 406 U.S. at 93.[4]

Even when this Court has determined that a complaint "plainly presents important questions of vital national importance," it has refused to exercise its original jurisdiction when it determined there was another adequate forum available. Washington v. General Motors Corp., 406 U.S. 109, 112 (1972). "The breadth of the constitutional grant of this Court's original

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[4]Cited with approval in United States v. Nevada, 412 U.S. 534, 538 (1973). "We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." (Citations omitted).

jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired." Id. at 113 (citations omitted).[5]

This Court has also declined to exercise its original jurisdiction when there was a pending action in state court where the issues could be

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[5]This Court also quoted from Massachusetts v. Missouri, 308 U.S. 1 (1939):

> In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State--the essential quality of the right asserted--but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection. . . .

Washington v. General Motors Corp., 406 U.S. at 114.

litigated. "In the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the issues tendered here may be litigated." Arizona v. New Mexico, 425 U.S. 794, 797 (1976) (emphasis in original).

The State of Arkansas admits there is an action now pending before the EPA wherein the State of Oklahoma is attempting to ensure that its water quality standards are properly applied to a municipality seeking to obtain a permit from the EPA to allow it to discharge into the Illinois River basin in Arkansas.[6] Brief in Support

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[6]Although the State of Arkansas has at this date been granted NPDES permitting authority by the EPA, at the time of Fayetteville's application for a permit, the EPA was still exercising that authority.

of Motion, pp. 15, 22-24. However, contrary to Arkansas' claims that the States of Oklahoma and Arkansas are not parties to that proceeding, the State of Oklahoma is a named party to that proceeding, the State of Arkansas now appears to be a named party and certain of the constitutional issues raised before this Court have been raised in that proceeding. Arkansas Brief, pp. 23, 24. Copies of relevant pleadings filed in that action have been lodged with the Supreme Court Clerk's office.

In June of 1985, the City of Fayetteville, Arkansas applied for a National Pollutant Discharge Elimination System (NPDES) permit from the EPA which would allow it, for the first time, to discharge a portion of its sewage effluent into a tributary of

the Illinois River. The Oklahoma Attorney General filed comments on behalf of the State of Oklahoma and one of its agencies, the Oklahoma Scenic Rivers Commission, in opposition to the Draft Permit issued by the EPA and also participated in the public hearing. When the EPA granted Fayetteville its final NPDES permit, in spite of Oklahoma's objections, the State of Oklahoma and the Oklahoma Scenic Rivers Commission, in December of 1985, filed a request for an evidentiary hearing before the EPA, alleging, inter alia, the effluent conditions contained in Fayetteville's permit would not protect Oklahoma's water quality standards on the Illinois River, and any discharge allowed to occur would cause the

violation of those standards.[7] Request for Evidentiary Hearing, Lodging of State of Oklahoma, Exhibit 1.

The evidentiary hearing was granted. That proceeding before the EPA was styled as:

In the Matter of :	)
	)
	)
NATIONAL POLLUTANT DISCHARGE	)
NPDES NO. AR0020010	)
ELIMINATION SYSTEM PERMIT	)
FOR THE CITY OF FAYETTEVILLE	)
ARKANSAS	)

The Arkansas Department of Pollution Control and Ecology (ADPC&E), represented by its staff counsel and the Arkansas Attorney General sought leave to intervene in the evidentiary hearing. [Arkansas Parties'] Request to

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[7]The request for an evidentiary hearing is the first step required by EPA rules in the administrative appeal process. 40 CFR §124.74.

be Admitted as a Party, Lodging of State of Oklahoma, Exhibit 2. Along with other parties, the City of Fayetteville and the ADPC&E, were granted leave to intervene as parties to the lawsuit. Even though the State of Arkansas was not specifically named as a party, this Court has held that in appropriate circumstances a state may be actually represented by a political subdivision of that state. Maryland v. Louisiana, 451 U.S. at 725; Arizona v. New Mexico, 425 U.S. 794. The ADPC&E, particularly when represented by the Attorney General, is the Arkansas agency which would most appropriately represent the interests of the state. Indeed, that is just what the ADPC&E and the Arkansas Attorney General told the EPA:

> The Department has been given broad statutory authority to "administer and enforce all laws and regulations relating to the pollution of waters of the State" and to establish and implement all necessary standards, regulations and permits as may be required. See, the Arkansas Water and Air Pollution Control Act, Act 472 of 1949, as amended, codified at Ark. Stat. Ann. §§82-1901 - 82-1909 and 82-1931 - 82-1943, (Repl. 1976 and Supp. 1985).
>
> * * *
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> Thus, it is obvious that the Arkansas Department of Pollution Control & Ecology has an interest in this proceeding. Any decision regarding Fayetteville's treatment facility and the discharge therefrom, will affect the waters of the State of Arkansas, and therefore, the Department.

[Arkansas Parties'] Request to be Admitted as a Party, Lodging of State of Oklahoma, Exhibit 2, pp. 1-2.

After the evidentiary hearing was held, the EPA Administrative Law Judge (ALJ) ruled that Oklahoma's water

quality standards would not be violated by the effluent limits contained in the permit and that, therefore, the EPA decision to grant the permit was proper. The Oklahoma parties appealed the ALJ's decision to the EPA Administrator as provided by EPA rules, alleging that the ALJ had applied the wrong legal standard to the facts. 40 CFR §124.91.[8]

The Administrator, acting through his Chief Judicial Officer, agreed with Oklahoma and remanded the case back to the ALJ requiring that he apply the proper legal standard to the facts of the case. The ALJ specifically found that the Clean Water Act requires

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[8]An appeal to the Administrator is a prerequisite to judicial review of the EPA action. 40 CFR §124.91(e).

compliance with Oklahoma's water quality standards.

The CWA requires an NPDES permit to impose any effluent limitations necessary to comply with applicable state water quality standards:

> In order to carry out the objective of this chapter there shall be achieved * * * any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) * * * or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C.A. §1311(b)(1)(C). The meaning of this language is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility.

Order on Petitions for Review, Lodging of State of Oklahoma, Exhibit 3, pp. 11-12 (footnotes omitted).

On rehearing the ALJ again determined that Oklahoma's water quality standards would not be violated by Fayetteville's proposed discharge and held that the permit was proper. He rejected the argument by the Arkansas parties that Oklahoma's water quality standards did not apply to a discharger in Arkansas pursuant to the Clean Water Act. He also rejected the Arkansas argument that if the EPA were to hold otherwise it would, in effect, allow the State of Oklahoma to establish a separate permitting system. Decision on Remand, Lodging of State of Oklahoma, Exhibit 4, pp. 4-5.

The decision by the ALJ has been appealed to the Administrator by all parties on different legal and factual issues. In addition to the City of Fayetteville and the ADPC&E, the State of Arkansas appears as a named party on the pleadings requesting the Administrator overturn the ALJ's decision. Notice of Appeal and Petition for Review (Arkansas Petition for Review), and Response to Notices of Appeal and Petitions for Review Filed by the Oklahoma Parties, Lodging of State of Oklahoma, Exhibits 5 and 6, respectively.

Among the issues listed by the State of Arkansas, the ADPC&E and the other Arkansas parties as relevant for appeal is their challenge that the "legal standard employed by the Chief Judicial

Officer subjects upstream dischargers to the water quality standards of downstream states when upstream dischargers do not have the right or the opportunity to participate in the promulgation or approval of downstream state standards." Arkansas Petition for Review, p. 3 (emphasis added). Clearly the State of Arkansas has raised the due process and equal protection issues in the pending proceeding, and has had the opportunity to raise any constitutional issues. Even if Arkansas had failed to raise any constitutional challenges, it could properly raise them in any appeal of the final EPA decision. Mathews v. Eldridge, 424 U.S. 319, 329 n.10 (1976); Flemming v. Nestor, 363 U.S. 603, 607 (1960).

"[W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." Whitney Nat. Bank v. Bank of New Orleans, 379 U.S 411, 420 (citations omitted); Myers v. Bethlehem Corp., 303 U.S. at 50-51. This doctrine is particularly relevant to the issues raised by the State of Arkansas in this proceeding. As of this date, the EPA has consistently held that Fayetteville's NPDES will not cause a violation of Oklahoma's water quality standards, so no Arkansas citizen has suffered any damage by the imposition of Oklahoma's water quality standards.

Because there is a pending action involving the same issues and the same

parties, this Court should decline to exercise its original jurisdiction.

II.

THE ACTIONS OF THE STATE OF OKLAHOMA ARE INVULNERABLE TO COMMERCE CLAUSE CHALLENGES BECAUSE CONGRESS HAS SPECIFICALLY AUTHORIZED STATES TO APPLY THEIR WATER QUALITY STANDARDS TO OUT-OF-STATE DISCHARGERS THROUGH THE ADMINISTRATIVE PROCESS PROVIDED IN THE CLEAN WATER ACT.

The Commerce Clause grants to Congress the power to regulate commerce among the states. U.S. Const. Art. I, § 8, Cl. 3. Even though the Clause does not specifically limit the authority of states, "this Court has recognized that the Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." Western & Southern Life

Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981). This is true even when Congress has not acted in a particular area. Id. However, the power over commerce carries with it the power to delegate the regulation of certain aspects of commerce to the states. "The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body. [citations omitted] Congress . . . is not limited by any negative implications of the Commerce Clause." White v. Massachusetts Council of Const. Employers, 460 U.S. 204, 213 (1983).[9]

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[9]See also, Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. at 652, where this Court stated, "Our decisions do not, however, limit the authority of Congress to regulate commerce among the several

(continued...)

The power of Congress to delegate is upheld even if that delegation allows states to interfere with interstate commerce. "It is indeed well settled that Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" New England Power Co. v. New Hampshire, 455 U.S. 331, 340-341 (1982), (quoting from Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980)). Once it is determined that state action is authorized by Congress, the Commerce Clause does not apply. "Where state or local government action is specifically authorized by Congress, it is not

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[9](...continued)
States as it sees fit." (emphasis in original).

subject to the Commerce Clause even if it interferes with interstate commerce." White v. Massachusetts Council of Const. Employers, 460 U.S. at 213. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 174 (1985).

Congress has exercised its Commerce Clause authority to regulate interstate commerce as it relates to water pollution. Indeed, this Court has stated that when it enacted the 1972 amendments to the Federal Water Pollution Control Act, Congress "has occupied the field through the establishment of a comprehensive

regulatory program supervised by an expert administrative agency." Milwaukee v. Illinois, 451 U.S. 304, 317 (1981). Even though Congress has clearly exercised its Commerce Clause power in enacting the Clean Water Act, "[t]he dispositive question . . . is whether Congress in fact has authorized the states to impose restrictions of the sort at issue here." New England Power Co. v. New Hampshire, 455 U.S. at 340.

The State of Oklahoma has enacted its water quality standards pursuant to authority granted to the States under section 303 (33 U.S.C. § 1313 (a)) of the Clean Water Act.[10] Arkansas Motion

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[10]The State of Arkansas erred when it stated that "[u]nder section 301 of the Clean Water Act (33 U.S.C. section 1311 (b)(1)(C)) all States have been (continued...)

pp. 4, 13, 16. Before the adoption of any water quality standards, section 303 (c)(1) requires a state to hold public hearings. 33 U.S.C. § 1313 (c)(1). See also 40 C.F.R. § 131.20(b). Section 303 also requires those water quality standards to be approved by the EPA. 33 U.S.C. § 1313 (c)(2). See also 40 C.F.R. § 131.5. Arkansas admits that Oklahoma's water quality standards have been approved by the EPA. Arkansas Motion p. 17.

Once a state has set its water quality standards, section 301 (b)(1)(C) of the Clean Water Act

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[10](...continued)
required to establish water quality standards under the authority preserved to the States in section 510 (33 U.S.C. section 1370) of the Clean Water Act." Arkansas Motion, p. 16. Section 301 requires the achievement of effluent limitations.

requires that permit limits be set to ensure compliance with the standards. 33 U.S.C. § 1311 (b)(1)(C).

The EPA issues NPDES permits pursuant to authority granted by section 402 of the Clean Water Act. 33 U.S.C. § 1342. The state authority to issue NPDES permits, when that authority has been granted to a state, is also set out in section 402. Section 402 requires that both the EPA and the state issued permits meet all requirements established under section 301 of the Clean Water Act. 33 U.S.C. § 1342 (a)(1) and § 1342 (b)(1)(A), respectively.

Section 301 specifically requires all NPDES permits to contain "any more stringent limitation, including those necessary to meet water quality

standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations (under authority preserved by Section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." 33 U.S.C. § 1311 (b)(1)(C). This section clearly requires compliance with all state water requirements of all affected states.

Section 401 requires the applicant for any federal license or permit which would allow the applicant to conduct any activity which may result in any discharge into the navigable waters to obtain a certification from the appropriate state or interstate agency in the state in which the discharge

will originate. The appropriate agency must certify that the discharge will comply with relevant federal requirements. 33 U.S.C. § 1341(a)(1). Upon receipt of the certification, the federal licensing agency is required to notify the EPA Administrator of the application and certification. 33 U.S.C. § 1341 (a)(2).

> Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other State, the licensing or permitting agency, and the applicant. If, . . . such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, . . . and requests a public hearing . . . the licensing or permitting agency shall hold such a hearing. . . . Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such

> license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

33 U.S.C. § 1341(a)(2) (emphasis added). When the EPA is the NPDES permit issuing authority, it must itself condition the permit to ensure compliance with the "affected" state's water quality standards. The EPA has enacted regulations which require all NPDES permits to comply with affected states' standards. "No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. §§ 122.4(d). See also 122.44(d)(1) through (d)(5). Where the EPA's construction of the Clean Water

Act is reasonable and there is no cogent argument that it is contrary to congressional intentions, this Court has upheld the EPA interpretation. E.I. du Pont de Nemours & Co.v. Train, 430 U.S. 112, 134-135 (1977); EPA v. State Water Resources Control Board, 426 U.S. 225, 227 (1976).

When a state seeks authority to issue NPDES permits to dischargers within the state, it must have the authority to meet the requirements of section 402 of the Clean Water Act as they relate to impacts on "affected" states.

> [The state must have the authority to] insure that any State . . . whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State . . . 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.

33 U.S.C. § 1342(b)(5). The Clean Water Act provides that no state issued NPDES permit to which an affected state has submitted written recommendations, which were not accepted by the permitting state, shall issue if the EPA objects to the issuance of that permit. 33 U.S.C. § 1342 (d)(2)(B). If the permitting state does not modify the permit to comply with EPA requirements, the EPA has authority to issue an appropriate NPDES permit to the discharger in lieu of the state permit. 33 U.S.C. § 1342 (d)(4).

This Court has recognized the administrative process provided by the

Clean Water Act to allow affected states to ensure that their water quality standards are met.

> In the 1972 amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit granting agency to seek redress.
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> * * *
>
> The basic grievance of respondents is that the permits issued to petitioners pursuant to the Act do not impose stringent enough controls on petitioners' discharges. The statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit granting process.

Milwaukee v. Illinois, 451 U.S. at 326.

Because Congress has clearly authorized the State of Oklahoma to see that its water quality standards are enforced against an Arkansas discharger through the administrative process provided in the Clean Water Act,

Oklahoma's actions are invulnerable to Commerce Clause challenges.

III.

BECAUSE ARKANSAS DISCHARGERS HAVE THE RIGHT TO HEARINGS UNDER THE CLEAN WATER ACT AND OKLAHOMA STATUTES AND OKLAHOMA'S WATER QUALITY STANDARDS APPLY EQUALLY TO ALL DISCHARGERS INTO ALL WATERS OF THE STATE, THE APPLICATION OF OKLAHOMA STANDARDS TO ARKANSAS DISCHARGERS DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

The "due process" requirements are found at Section 1 of the Fourteenth Amendment to the United States Constitution which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has held "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful

manner.'" Mathews v. Eldridge, 424 U.S. at 333, (quoting from Armstrong v.Manzo, 380 U.S. 545, 552, (1965), and also citing to Grannis v Ordean, 234 U.S. 385, 394, (1914)). "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Logan v. Zimmerman, 455 U.S., 422, 433 (1982).

Section 303(c)(1) of the Clean Water Act requires the state water pollution control agency of each state to hold public hearings, at least once every three years, to review water quality standards and, where appropriate, to modify and adopt standards. 33 U.S.C. § (c)(1), 40 C.F.R. § 131.20(b). The State of Oklahoma requires that public

hearings be held prior to the adoption or amendment of any of its water quality standards.

> Prior to classifying waters or setting standards or modifying or repealing such classifications or standards, the [Oklahoma Water Resources] Board shall conduct public hearings for the consideration, adoption or amendment of the classification of waters and standards of purity and quality thereof, shall specify the waters concerning which a classification is sought to be made or for which standards are sought to be adopted and the time, date, and place of such hearing, provided said hearing shall be held in the area affected.

82 O.S. 1981, § 926.6(B). The adoption or modification of any water quality standard, all of which are adopted as rules of the agency, is effectuated by an order of the Water Resources Board. 82 O.S. 1981, § 926.6(C). Any "interested person" may petition the Board requesting the

promulgation, amendment or repeal of any rule. 75 O.S. Supp. 1987, § 305. The denial of that request may be appealed to state court. 75 O.S. 1981, § 318. The Board is required to entertain petitions for declaratory rulings as to the applicability of the standards, and the Board ruling on the petition is subject to judicial review in state court. 75 O.S. Supp. 1987, §307. Further, any person may file for declaratory relief in a state court, without seeking such relief from the Board.

> The validity or applicability of a rule may be determined in an action for declaratory judgement in the district court of the county of the residence of the person seeking relief or, at the option of such person, in the county wherein the rule is sought to be applied, if it is alleged the rule, or its threatened application, interferes with or

> impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

75 O.S. Supp. 1987, § 306(A).

There are no Oklahoma statutes which would prohibit an Arkansas citizen from taking advantage of the hearing and appeal procedures set out above.[11]

As shown previously, the Clean Water Act requires that all state water quality standards be approved by the EPA. 33 U.S.C. § 1313 (c)(1). Any objections by Arkansas citizens to the EPA approval of Oklahoma's standards can form the basis of an administrative appeal of that approval to federal district court. "The District Court in this case, however,

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[11]Oklahoma notes that the City of Fort Smith, Arkansas is currently participating in Oklahoma's water quality standard review process.

did have authority to review the Administrator's approval, prior to the permit proceeding, of the Indiana water quality standards as consistent with the FWPCA." United States Steel Corp. v. Train, 556 F.2d 822, 837 (7th Cir. 1977).

The State of Arkansas' claim that its citizens are being denied due process is clearly not justified. There is no violation of the due process requirements of the Fourteenth Amendment.

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of its laws." U.S. Const. amend. XIV, § 1. The State of Arkansas has not alleged any facts to show that Oklahoma laws apply to

different persons or classes of persons unequally. In fact, Oklahoma statutes provide that water quality standards be adopted for "waters of the state", which is statutorily defined to include all water imaginable. 82 O.S. 1981, §926.6.

> "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, except privately owned reservoirs used in the process of cooling water for industrial purposes, provided that water released from any such reservoir into a stream system of the state shall be and become waters of the state.

82 O.S. 1981, § 926.1(6). Oklahoma clearly does not create any classifications because all water quality

standards apply equally to all waters in Oklahoma. Therefore, there are no Fourteenth Amendment violations. The only vague clue Oklahoma has as to what Arkansas may claim is unequal treatment under Oklahoma law, is the allegation that Oklahoma does not apply its standards to dischargers in Oklahoma. Arkansas attempted to prove that Oklahoma does not apply certain of its standards to Oklahoma municipalities at the EPA evidentiary hearing. It was not successful.

Arkansas' claims that Oklahoma standards violate the equal protection provisions of the Fourteenth Amendment are not supported by law or fact.

CONCLUSION

This Court should not exercise its original jurisdiction because there is

a pending proceeding where the named parties' interests may be litigated and where appropriate relief may be had.

In any event, the Commerce Clause does not apply because Congress has enacted the Clean Water Act which requires that Oklahoma's water quality standards be met by dischargers in Arkansas.

Arkansas citizens have not been denied due process because there are many opportunities for them to participate in the promulgation and modification of Oklahoma's water quality standards and to appeal the standards which are set.

Oklahoma's water quality standards apply to all waters in the state and to all dischargers into those waters. Therefore, the equal protection

requirements of the Fourteenth Amendment have not been violated.

Respectfully submitted,

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