No. 115, Original

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF ARKANSAS, PLAINTIFF

v.

STATE OF OKLAHOMA

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This case concerns the extent to which a downstream State may, pursuant to the Clean Water Act, 33 U.S.C. 1251 *et seq.*, impose restrictions on the discharges of sources located in an upstream State based on the impact of those discharges on the attainment of water quality standards in the downstream State. The Environmental Protection Agency (EPA) is the federal agency responsible for implementation and enforcement of the Clean Water Act, including the resolution of such claims by downstream states. Indeed, an administrative proceeding is currently pending before the EPA involving one of the Arkansas sources that is the subject of this lawsuit. Both Oklahoma and Arkansas are parties to that proceeding. Hence, this Court's disposition of Arkansas's motion for leave to file a complaint is of direct interest to the United States. At the Court's invitation, the United States filed a brief as *amicus curiae* in a related matter, *Oklahoma* v. *Arkansas,* No. 93, Original, in which Oklahoma sought to invoke this Court's

original jurisdiction over a lawsuit, based on federal and state common law, seeking to limit discharges originating in Arkansas that were allegedly reducing the quality of Oklahoma waters. See 459 U.S. 812 (1982); 460 U.S. 1020 (1983).

STATEMENT

1. The State of Arkansas, as plaintiff, has moved this Court for leave to file a complaint invoking the Court's original jurisdiction under Article III, Section 2 of the Constitution and 28 U.S.C. 1251(a) (Complaint ¶ I). The defendant is the State of Oklahoma. Arkansas contends that discharges from publicly owned treatment works in four cities in Arkansas—Fayetteville, Springdale, Rogers, and Siloam Springs—flow into tributaries that eventually converge with the Illinois River, which flows through Oklahoma (*id.* ¶ IV). Oklahoma has classified the Illinois River as as a "scenic river area" within that State under its water quality standards, which are established pursuant to the Clearn Water Act, 33 U.S.C. 1251 *et seq.* (Complaint ¶ IV). Arkansas claims that Oklahoma has "threatened enforcement" against the Arkansas sources of Oklahoma's water quality standards concerning beneficial use and antidegradation, in order to prevent further pollutant loading on the Illinois River (*id.* ¶¶ IV, V).

According to Arkansas, however, Oklahoma's water quality standards may not be applied under the Clean Water Act to sources outside of Oklahoma (Complaint ¶ V). Arkansas further asserts that application of the Oklahoma water quality standards to discharges originating in Arkansas constitutes an unconstitutional burden on interstate commerce, in violation of the Commerce Clause (*id.* ¶ VI). Finally, Arkansas argues that enforcement of the Oklahoma water quality standards out-

side of Oklahoma denies due process and equal protection of the laws under the Fourteenth Amendment to the cities and citizens of the State of Arkansas because they did not participate and had no right to participate in the promulgation of those standards (*id.* ¶ VII).

2. Discharges from each of the municipal wastewater treatment plants referred to in Arkansas's complaint are regulated pursuant to the Clean Water Act. Under that Act, any discharge from a "point source" into navigable waters is unlawful in the absence of a National Pollutant Discharge Elimination System (NPDES) permit issued by EPA pursuant to Section 402 of the Act (33 U.S.C. 1342; see 33 U.S.C. 1311). See generally *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976).[1] At present, the municipal plants for Rogers and Springdale, Arkansas, possess NPDES permits that are valid until 1990 (Ark. Br. 16). The permit issued to the Fayetteville municipal plant by EPA on November 5, 1985, has since been suspended pending completion of ongoing administrative proceedings before EPA concerning the effect of the plant's discharges on the accomplishment of Oklahoma water quality standards. Those proceedings were initiated on January 10, 1986, when EPA granted the Oklahoma Attorney General's request for such

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[1] A "point source" is "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged" (see 33 U.S.C. 1362(14)). EPA may authorize states to assume the administration of the NPDES program (see 33 U.S.C. 1342(b)), which it has recently done in Arkansas. EPA remains, however, the permitting authority in Arkansas for the pending Fayetteville municipal treatment plant permit described in Arkansas's complaint. In addition, under Section 404, 33 U.S.C. 1344, the Secretary of the Army, acting through the Chief of Engineers, is authorized to issue discharge permits for dredged or fill material. The permits at issue here, however, are all NPDES permits.

an administrative inquiry. The EPA administrative law judge (ALJ) subsequently granted leave to the Arkansas Department of Pollution Control & Ecology, represented by the Arkansas Attorney General, to appear as a party in the administrative proceeding.

On January 12, 1988, the ALJ concluded that the Fayetteville plant's proposed discharges would have no "undue impact" on the quality of Oklahoma waters and therefore EPA should issue the NPDES permit without imposing more stringent effluient limitations. On administrative appeal, however, EPA's Chief Judicial Officer concluded that the ALJ had applied an incorrect legal standard in reaching his decision. The Chief Judicial Officer ruled that the ALJ should have confined his inquiry to the question whether the proposed discharges would result in a detectable violation of Oklahoma's water quality standards, which had been approved by EPA pursuant to Section 303 of the Clean Water Act (33 U.S.C. 1313). He agreed, however, that "a mere theoretical impairment of Oklahoma's water quality standards—*i.e.,* an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable—should not by itself block the issuance of the permit" (*In re National Pollutant Discharge Elimination System Permit for City of Fayetteville*, No. 88-1 (June 28, 1988) slip op. 12).

On September 19, 1988, the ALJ issued a new decision on remand. He explained that his prior "use of the *de minimis* principle is in accord with [the Chief Judicial Officer's] position on the proper standard to be used in reviewing the record in this matter, '*i.e.,* an infinitesimal impairment p[re]dicted by modeling but not expected to be actually detectable or measurable' " (slip op. 2). The ALJ thus agreed with the Chief Judicial Officer that the Fayetteville plant's NPDES permit must contain terms sufficient to avoid a detectable violation of Oklahoma's ap-

plicable water quality standards (*id.* at 2-5). The ALJ found, however, that the Fayetteville plant's proposed permit could nonetheless issue without the imposition of more stringent effluent limitations because the plant's proposed discharges will not violate those standards (*id.* at 5-21). Several parties to the administrative proceeding have taken cross appeals, which are now pending before the Administrator of EPA.

DISCUSSION

Less than seven years ago, the State of Oklahoma asked this Court to exercise its original jurisdiction to consider its complaint against Arkansas and several sources of water pollution located in Arkansas that were allegedly harming the quality of Oklahoma waters in violation of federal and state common law (see *Oklahoma* v. *Arkansas,* No. 93, Original). Arkansas opposed that motion, claiming that the complaint failed to state a claim upon which relief can be granted because federal common law remedies had been preempted by the Clean Water Act and state law was inapplicable to this controversy. Arkansas further argued that Oklahoma was limited to its remedies under the Clean Water Act to correct any pollution of its waters caused by actions in Arkansas. At this Court's invitation, we filed a brief in which we likewise urged the Court to deny Oklahoma's motion, which the Court subsequently did (see 460 U.S. 1020 (1983)), on the grounds that federal common law remedies were preempted by the Clean Water Act, state common law appeared inapplicable, and Oklahoma had remedies available under the Clean Water Act. In particular, we explained that Oklahoma could challenge the NPDES permits of the Arkansas sources when they expired (five years after their issuance (see 33 U.S.C. 1342(b)(1)(B)) or, if Oklahoma possessed previously unavailable information regarding the effect of the permitted discharges, by seeking a

modification of the permits on that ground (see 33 U.S.C. 1342(b)(1)(C)(iii)).

We believe that the Court should deny Arkansas's motion for leave to file a complaint, just as it denied Oklahoma's earlier request. Arkansas has had and continues to have more appropriate fora available to challenge the applicability of Oklahoma water quality standards under the Clean Water Act's NPDES permit scheme to dischargers located in Arkansas. Indeed, Arkansas is currently a party in an administrative proceeding before EPA where it is challenging the applicability of Oklahoma's standards to one of the facilities at issue in this case. A grant of Arkansas's motion for leave to file its complaint in these circumstances would seriously impede the effectiveness of the federal administrative scheme created by Congress.

1. It is by now well settled that "[a] determination that this Court has original jurisdiction over a case, of course, does not require [the Court] to exercise that jurisdiction" (*California* v. *Texas,* 457 U.S. 164, 168 (1982); see, *e.g., Oklahoma* v. *Arkansas,* 460 U.S. 1020 (1983); *California* v. *West Virginia,* 454 U.S. 1027 (1981); *Arizona* v. *New Mexico,* 425 U.S. 794 (1976); *Washington* v. *General Motors Corp.,* 406 U.S. 109 (1972); *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972); *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939)). In cases falling within both its exclusive and nonexclusive original jurisdiction, this Court has "imposed prudential and equitable limitations upon the exercise of [its] original jurisdiction" and "incline[d] to a sparing use of [that] jurisdiction" (*California* v. *Texas,* 457 U.S. at 168). Two factors identified by the Court as particularly relevant to determining the appropriateness of exercising original jurisdiction include "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 93-94).

2. In our view, both those factors support a denial of Arkansas's motion. Another forum is available and the claims lack the stature necessary, particularly in those circumstances, to warrant an exercise of this Court's original jurisdiction.

a. Arkansas's claim against Oklahoma raises, first, a question of statutory construction under the Clean Water Act and, second, an assertion that, even if permitted by the Clean Water Act, the application of the Oklahoma water quality standards to Arkansas point sources through that Act would be unconstitutional. The more appropriate forum for the resolution of the statutory claim, however, is the very type of federal administrative proceeding that is now pending before EPA concerning one of the four Arkansas sources described in Arkansas's complaint. The more appropriate forum for initial disposition of Arkansas's constitutional claims is on judicial review of the EPA's administrative determination. Hence, an exercise of this Court's original jurisdiction at this time is not only unnecessary, but would be detrimental to the orderly development of the proceedings in those other administrative and judicial fora.

i. As Arkansas acknowledges, "[a]t issue in this case is the regulatory structure of the Clean Water Act" (Br. 21). The gravamen of Arkansas's complaint is that "[t]he citizens of the State of Arkansas * * * are being substantially injured and are threatened with future injury by Oklahoma's attempts to control the NPDES permitting process in Arkansas" (*id.* at 19). In particular, Arkansas alleges that Oklahoma seeks to require that the NPDES

permits issued to Arkansas dischargers be sufficiently stringent to avoid any interference with Oklahoma water quality standards (*id.* at 20-21).

Contrary to Arkansas's request, however, this Court should not consider in the first instance the question whether, and if so to what extent, the Clean Water Act requires that NPDES permits issued to Arkansas point sources of water pollution must take into account the impact of each source's discharges on Oklahoma's water quality standards. As Arkansas pointed out in resisting Oklahoma's effort to invoke this Court's original jurisdiction in 1982,[2] the Clean Water Act establishes a statutory and administrative framework for the resolution of such interstate water pollution controversies. The integrity of that framework, however, would be seriously compromised if States were freely allowed to circumvent that scheme through the filing of an original action against another State.

In particular, the Clean Water Act provides for the establishment by each State of water quality standards, such as those adopted by Oklahoma (see 33 U.S.C. 1313(c)); EPA's approval of a State's water quality standards (see 33 U.S.C. 1313(c)(2) and (3); see also 5 U.S.C. 706(2)(A)); consideration of those standards in the adoption of effluent limitations to be contained in a discharger's Section 402 NPDES permit (see 33 U.S.C. 1311(b)(1)(C), 1341(a)(1) and (2), 1342(b)(1)(A)); notification to a State (other than the source State) whose waters may be affected by the issuance of a permit in those instances (see 33 U.S.C. 1342(a)(3), 1342(b)(3)); an op-

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[2] See 93, Original Ark. Br. in Opp. 10 ("Oklahoma is not without an adequate remedy. The [Clean Water Act] contains thorough enforcement mechanisms which Oklahoma can seek to utilize.").

portunity for the affected State in those instances to make written recommendations to the permitting authority (see 33 U.S.C. 1342(b)(5)); and, finally, the availability of judicial review to any party, including the permittee or an affected State, that is dissatisfied with an NPDES permit issued by EPA (see 33 U.S.C. 1369(b)(1)(F)).

In addition, EPA has established an administrative framework designed to implement these statutory directives. EPA's regulations provide, for instance, that NPDES permits shall achieve applicable "water quality standards established under section 303 of the [Act]" (which include state water quality standards) and "[c]onform to applicable water quality requirements under section 401(a)(2) of [the Act] when the discharge affects a State other than the certifying State" (40 C.F.R. 122.44(d)(1) and (4)). The regulations also establish a detailed set of administrative procedures to be followed, including public and evidentiary hearings, to resolve disputes between interested parties over the contents of a particular NPDES permit (see, *e.g.*, 40 C.F.R. 124.12, 124.71, 124.74).[3]

Arkansas's motion for leave to file a complaint seeks to bypass these avenues created by Congress and EPA for the determination of the contents of NPDES permits, including the resolution of interstate water pollution disputes. Arkansas thus seeks to preempt any proceedings that Oklahoma or EPA might initiate to determine whether Oklahoma's water quality standards required the imposition of more stringent effluent limitations on a particular Arkansas point source. In the absence of any compelling need for such a preemptive ruling, and we perceive

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[3] EPA's regulations likewise prescribe administrative procedures that must be followed by any State that EPA has authorized to issue NPDES permits under Section 402(b) (see 40 C.F.R. 123.25).

none, we believe that Arkansas's extraordinary request for this Court's intervention should be denied.

Indeed, the administrative proceeding now pending before EPA involving a NPDES permit for one of the municipal dischargers described in Arkansas's complaint well illustrates the inappropriateness of exercising original jurisdiction in these circumstances. Arkansas is a party to that proceeding,[4] and has there raised the very same contentions concerning the meaning of the Clean Water Act that it advances here. In fact, Arkansas has met with some success before EPA—the EPA ALJ recently rejected Oklahoma's claim that the planned discharges from the Arkansas facility will cause a violation of Oklahoma's water quality standards—but, in any event, Arkansas and the permittee can seek judicial review of EPA's final decision if they are dissatisfied with it (see 33 U.S.C. 1369(b)(1)(F)).

ii. Contrary to Arkansas's claim (Br. 25), its various constitutional claims do not render original jurisdiction any more appropriate. In its complaint, Arkansas argues that Oklahoma's effort to use the NPDES permitting process to impose its water quality requirements on Arkansas dischargers violates the Commerce Clause, and also violates the rights of Arkansas citizens to due process and to equal protection under the laws. All of these constitutional claims, however, can adequately, and more appropriately, be raised in a lawsuit challenging a specific decision of the EPA Administrator. As with the meaning of the Clean Water Act, there is no compelling reason why Arkansas must seek a preemptive ruling by this Court that would supersede the normal avenues available to interested parties for raising such claims.

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[4] The Arkansas Attorney General is representing the Arkansas Department of Pollution Control & Ecology before EPA.

b. Arkansas's claim also lacks the "seriousness and dignity" necessary to warrant an exercise of this Court's original jurisdiction (see *Illinois* v. *City of Milwaukee*, 406 U.S. at 93)—particularly in light of the availability of alternative proceedings. There are substantial ripeness problems with Arkansas's complaint and no apparent merit to either its statutory or constitutional claims.

i. In exercising its original jurisdiction, this Court is, as always, "not at liberty to consider abstract questions" (*New York* v. *Illinois* 274 U.S. 488, 490 (1927)). The dispute must present a justiciable case or controversy (see *Texas* v. *Florida*, 306 U.S. 398, 405 (1939)). Arkansas's complaint, however, fails to meet that standard.

By Arkansas's own account, Oklahoma is presently challenging only one of the four municipal treatment facilities described in its complaint. The others face only "threatened enforcement" and their NPDES permits are valid until 1990 (Complaint ¶ VI; Ark. Br. 16, 19).[5] The administrative proceeding regarding the facility in Fayetteville, Arkansas, is not, moreover, complete, and the ALJ's current view is that the facility does not run afoul of Oklahoma's water quality standards. Hence, because it is not at all clear that Oklahoma's water quality standards would, in any event, require a change in the effluent limitations imposed by any of the four plants' NPDES permits, Arkansas's complaint is premature. Cf. *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158, 162-167 (1967); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41,

[5] Neither the complaint nor Arkansas's supporting brief indicates the permitting status of the Siloam Springs, Arkansas, facility. We assume that the NPDES permit of the Siloam Springs facility, like the permits of the facilities in Rogers and Springdale, Arkansas, has not yet been formally challenged by Oklahoma and has a permit valid until 1990.

51-52 (1938); *United States* v. *West Virginia*, 295 U.S. 463, 473-475 (1935).

ii. There is also no merit to Arkansas's claim (Br. 16-18) that the Clean Water Act does not require consideration of Oklahoma's water quality standards in establishing the effluent limitations to be included in NPDES permits for point sources located in Arkansas. The Act's languages leaves no doubt that Congress intended to use the NPDES permitting process to achieve compliance with state water quality standards, regardless of the geographic location of the source of the discharge.

Section 402 of the Clean Water Act mandates that NPDES permits contain terms adequate to ensure compliance with Section 301, which in turn requires that in addition to nationwide technology-based effluent limitations "there shall be achieved * * * any more stringent limitation including those necessary to meet water quality standards * * * or required to implement any applicable water quality standard established pursuant to this chapter" (see 33 U.S.C. 1311(b)(1)(C), 1342(a)(2) and (b)(1)(A); *EPA* v. *State Water Resources Control Bd.* 426 U.S. at 205 & n.12). The Act nowhere suggests that only the water quality standards of the source State are relevant to the NPDES permit. Instead, Section 401, like Section 301, provides, without limitation, that an NPDES permit may not be granted until the State from which the discharge originates certifies that the discharge will comply with state water quality standards established pursuant to the Act (see 33 U.S.C. 1341(a)(1)). Section 401 further provides that whenever a discharge may affect the waters of another State and that State objects to the issuance of a permit, the permitting agency must either "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements" or not

issue such license or permit "[i]f the imposition of conditions cannot insure such compliance" (33 U.S.C. 1341(a)(2)).[6]

Arkansas's reading of the Clean Water act is also undermined by those provisions in the Act regarding the authority of EPA to authorize a State to administer the NPDES permitting program with respect to sources located within its borders. Section 402(b)(3) requires the permitting State to provide notice to any other State the waters of which may be adversely affected by the proposed discharges (see 33 U.S.C. 1342(b)(3)). Section 402(b)(5) adds that the affected State must be allowed to submit written recommendations and, if the permitting State fails to adopt those recommendations, the permitting State must provide both EPA and the affected State with the reasons for its decision (see 33 U.S.C. 1342(b)(5)). Section 402(d)(2), accordingly, bars the permitting State from issuing a permit if the Administrator objects to its issuance either because the permitting State failed to adopt the affected State's recommendations or because the permit is otherwise inconsistent with the Act's requirements. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-491 (1987).

Finally, Arkansas's proffered construction of the Clean Water Act should be rejected because it would defeat important policies of the Act. For instance, if, as Arkansas argues, the terms of an NPDES permit of an upstream discharger need not take into account the impact on the downstream State's water quality, then attainment of

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[6] To that same end, Section 505(h) authorizes the Attorney General of an affected (downstream) State to sue the Administrator for failure to enforce an effluent limitation, the violation of which is occurring in another State, but which causes a violation of the water quality standards of the affected State (see 33 U.S.C. 1365(h)).

downstream standards would be impossible in many circumstances and would be possible in others only by imposing a disproportionate burden on dischargers located in the downstream State. Dischargers therefore would have every incentive to locate beyond the borders of a downstream State. The Clean Water Act's legislative history, however, reflects quite a different understanding of the duties of dischargers to meet state water quality standards. See, *e.g.*, 118 Cong. Rec. 33755 (1972) (remarks of Rep. Harsha) (emphasis added) ("[I]f there are a multitude of point sources on a given stretch of water, the potential of exceeding the water quality standards exists, even though each point source is meeting best practicable control technology. If 'best practicable control technology' * * * is inadequate to meet the water quality standards, the managers clearly intend that *each point source* shall be required to meet effluent limitations which would be consistent with the applicable water quality standards.").

iii. Arkansas's constitutional claims are no more tenable. Neither the equal protection nor due process rights of its citizens would be violated if, as Oklahoma contends, Congress intended to ensure that NPDES permits issued to Arkansas point sources would be consistent with Oklahoma's state water quality standards. Contrary to Arkansas's assertion (Complaint ¶ VII), Arkansas and its citizens have not been denied the opportunity to comment on the substance of Oklahoma's water quality standards. They could have commented on the substance of those standards when Oklahoma adopted them in the first instance (see Okla. Stat. Ann. tit. 75 § 303A(2) (West 1987 & Supp. 1988); 33 U.S.C. 1313(c)(1)) and they will have further opportunity to comment every three years when the standards are reconsidered by Oklahoma, as required by the Clean Water Act.[7]

[7] Under the Clean Water Act, each State must conduct public hearings to consider modifying and adopting state water quality standards

Nor is Arkansas's Commerce Clause claim substantial. Contrary to Arkansas's contention, its assertion that "the actions of Oklahoma inhibit and impermissibly burden interstate commerce" is not an "issue of constitutional significance worthy of this Court's review" (Br. 25). The source of Oklahoma's authority is the Clean Water Act, which authorizes the establishment of water quality standards to be approved by EPA, and provides for their consideration in NPDES permits. What Congress has authorized and commanded plainly cannot be deemed to "impermissibly burden interstate commerce" (*ibid.*)

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at least once every three years (see 33 U.S.C. 1313(c)). Any newly adopted or revised state standard must be submitted to EPA for its approval (see 33 U.S.C. 1313(c)(2) and (3)).

CONCLUSION

The motion for leave to file a complaint should be denied.

Respectfully submitted.

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NOVEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60787