No. 93, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OKLAHOMA, PLAINTIFF

v.

STATE OF ARKANSAS, ET AL.

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of October 4, 1982, to the Solicitor General to express the views of the United States.

STATEMENT

1. The State of Oklahoma, 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 (Complaint, ¶ 1).[1] The named defendants are the State of Arkansas,

[1] The complaint does not specify whether Oklahoma is invoking this Court's mandatory original jurisidiction under Section 1251(a) for suits between two states or its permissive jurisdiction under Section 1251(b). Arkansas is named as a party, but it is not alleged that the State of Arkansas itself is discharging any pollutants into the waters or that it requires or controls such pollution (cf. *New York* v. *New Jersey*, 256 U.S. 296 (1921)); only the municipalities of the state are charged as polluters. Thus, it would appear that the State of Arkansas is not a mandatory party to this action and hence that original jurisdiction is permissive under Section 1251(b). See generally *Illinois*

six Arkansas municipalities, and 18 private companies (*id.* at 2–3). Each of the municipal defendants, with the exception of Fayetteville, is alleged to be discharging high concentrations of phosphates and other "nutrients"[2] from their municipal wastewater treatment plants into Arkansas waterways that flow into the Illinois River and eventually into Oklahoma (*id.* at ¶¶ 33-43).[3] The private defendants are alleged to be discharging high concentrations of phosphates and other "nutrients" into the municipal wastewater treatment plants of the six municipal defendants.[4] The State of Arkansas is alleged to have "failed to adequately regulate and control" these discharges (*id.* at ¶ 32). The discharges are alleged to have severely damaged the

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v. *City of Milwaukee*, 406 U.S. 91, 93-98 (1972); see also, *e.g.*, *Massachusetts* v. *Missouri*, 308 U.S. 1, 15-17 (1939).

[2] The term "nutrients" is used to refer to various effluents discharged by the defendants, as defined in paragraph 32 of the complaint.

[3] Fayetteville is alleged to have voted the construction of a new wastewater treatment facility on the Illinois River that will discharge wastewater effluent containing high concentrations of phosphates and other "nutrients" (Complaint, ¶¶ 51-53). In addition, the City of Siloam Springs is alleged to discharge, during periods of high rainfall, stormwater runoff containing high concentrations of phosphates and other "nutrients" from its municipal sewer system into a creek that empties into the Illinois River (*id.* at ¶ 36).

[4] The original complaint (at ¶¶ 44-49) alleged that the private defendants discharge directly into the waters that flow into the Illinois River. Arkansas, in its Brief in Opposition (at 3-4), asserts that each of the private defendants that is still in business discharges its effluent, after pretreatment, into one of the municipal wastewater treatment plants, not directly into any receiving waters. Oklahoma apparently concedes this point in its Reply (at 7), although it claims that the discharge of effluent by private defendants into the municipal treatment plants overloads those plants. It also asserts that it has reason to believe that certain of the private defendants occasionally do discharge directly into receiving waters.

waters of the Illinois River and Lake Frances in Oklahoma (*id.* at ¶ 50).

Based on these facts, the complaint raises six bases for relief: trespass under federal common law (Complaint ¶¶ 55-57); public nuisance under federal common law (*id* at ¶¶ 60-62); private nuisance under federal common law (*id* at ¶¶ 65-67); public nuisance under Oklahoma statute (*id* at ¶¶ 70-72); private nuisance under Oklahoma statute (*id* at ¶¶ 75-77); and trespass under Oklahoma law (*id* at ¶¶ 80-82). The relief requested is either injunctive relief to abate the alleged trespass and nuisance or, in the alternative, compensatory damages of at least $100 million (*id.* at ¶¶ 58, 63, 68, 73, 78, 83).

2. Each of the municipal wastewater treatment plants involved here is regulated pursuant to the Clean Water Act ("CWA"), 33 U.S.C. (& Supp. V) 1251 *et seq.*[5] Contrary to Oklahoma's statement (Rep. 6-7), the National Pollutant Discharge Elimination System ("NPDES") is administered in Arkansas by the EPA pursuant to Section 402(a)(1) of the CWA, 33 U.S.C. 1342(a)(1), since Arkansas has not requested or qualified for the authority to administer the NPDES itself within the state as permitted by that section. Pursuant to this authority, EPA has issued permits regulating the discharges of the municipal wastewater treatment plants involved here.[6] Oklahoma has never challenged

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[5] This regulatory scheme has been considered and described by the Court on several prior occasions. See, *e.g.*, *Milwaukee* v. *Illinois*, 451 U.S. 304, 310-311 (1981).

[6] The permits issued to Siloam Springs, Springdale, and Rogers are subject to administrative enforcement orders by EPA that include extended compliance schedules. The permits issued to Gentry and Prairie Grove expired in May 1977. They have been extended on an interim basis until their pending permit applications are acted upon pursuant to 5 U.S.C. 558(c). The permit issued to Fayetteville is for a plant that does not discharge into a tributary of the Illinois River. As noted by

the adequacy of these permits pursuant to Section 509(b)(1)(f) of the CWA, 33 U.S.C. 1369(b)(1)(f).

As noted by Oklahoma (Rep. 6), Arkansas has also promulgated state water quality standards as required by Section 303 of the CWA, 33 U.S.C. 1313. The water quality standards for nutrients in effect at the time of the issuance of the permits involved here specify that discharges shall not alter the naturally occurring nitrogen/phosphorus ratio in the water and place a ceiling on the amount of phosphorus that may be present in Arkansas' streams, lakes, and reservoirs as the result of discharges. See Department of Pollution Control & Ecology, *Arkansas Water Quality Standards*, Section 5(m) (Sept. 1975).

3. Arkansas has asked this Court to dismiss Oklahoma's motion for leave to file a complaint, claiming that the complaint fails to state a claim upon which relief can be granted because federal common law remedies for water pollution have been preempted by the CWA (Opp. 5) and state law is inapplicable to this controversy (Opp. 6-10). Rather, Arkansas argues that Oklahoma must be limited to its remedies under the CWA to correct any pollution of its waters caused by actions in Arkansas (Opp. 10-13).[7] Oklahoma contends

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Arkansas (Opp. 4), although Fayetteville apparently proposes to build a facility that would discharge into the Illinois River, no application to EPA for a permit for such a facility has yet been made. The private defendants are not subject to NPDES permits since they do not discharge directly into Arkansas waters. The discharges that they contribute to the municipal treatment plants, however, are directly regulated by the pretreatment standards established under 33 U.S.C. (Supp. V) 1317(b) and are indirectly regulated, of course, by the limits imposed by the permits issued to the municipal treatment plants.

[7] Certain of the private defendants filed separate oppositions to Oklahoma's motion claiming that federal and state common law have been preempted and that, having discharged their effluent into duly licensed municipal wastewater treatment

that this complaint involves a gap in the regulatory scheme of the CWA that needs to be filled by the application of federal common law (Rep. 11-19) or state common law (Rep. 20-23), and hence that it is not limited to its remedies under the CWA.

ARGUMENT

1. Oklahoma pleads causes of action under the federal common law of trespass and nuisance. In our view, however, Arkansas is correct in asserting (Opp. 5) that the Clean Water Act has preempted any federal common law claim based on the interstate pollution alleged here.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), this Court recognized that federal law "controls the pollution of interstate or navigable waters" (*id.* at 102) and hence, in the absence of a statutory remedy, that there was a federal common law of nuisance that provided a remedy for the abatement of interstate pollution. *Id.* at 101-108. In *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*), however, the Court held that the 1972 Amendments to the Clean Water Act had preempted the federal common law of nuisance in the area of interstate water pollution. The Court explained with respect to the claims in that case (*id.* at 317):

> Congress 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 establish-

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plants, they should not be defendants here. Fayetteville also filed a separate opposition arguing, in addition to preemption, that Oklahoma has not exhausted its administrative remedies because Fayetteville's treatment plant has not yet been licensed or built.

ment of a comprehensive regulatory program supervised by an expert administrative agency.

The Court subsequently reaffirmed this holding in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 22 (1981), stating that "the federal common law of nuisance in the area of water pollution is entirely preempted by the more comprehensive scope of the [Clean Water Act]." See also *Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982); *Marquez-Colon* v. *Reagan*, 668 F.2d 611, 614 n.2 (1st Cir. 1981).

Oklahoma's primary contention (Rep. 11-19) is that its complaint here involves an "unforeseen gap" (Rep. 13) in the statutory regulation of interstate water pollution that must be filled by the federal common law of nuisance.[8] It rejects those statements by this Court suggesting that the federal common law has been entirely preempted in the area of water pollution as inconsistent with the plain language of the 1972 Amendments (Rep. 13). The crux of Oklahoma's contention is that the particular pollutants involved here, phosphates, have been excluded from the Environmental Protection Agency's (EPA) list of "conventional pollutants" (see Rep. 13-16). This argument fundamentally misapprehends the regulatory effect of the Clean Water Act.[9]

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[8] Oklahoma also appears to suggest (Rep. 8-10) that *Milwaukee II* and *Sea Clammers* were wrongly decided. While the United States did urge at the time a different result on the federal common law issue in those cases, we accept their authority here.

[9] In 1978, EPA described the criteria employed in deciding whether a particular substance is a conventional pollutant. 43 Fed. Reg. 32857. Subsequently, the Administrator issued a "Notice Denying the Addition of Phosphate" to the list. 46 Fed. Reg. 1023 (1981).

The CWA provides two kinds of restrictions on the discharge of pollutants. First, federal technology-based effluent limitations are imposed that directly regulate the level of pollutants contained in discharges. 33 U.S.C. (& Supp. V) 1311(b).[10] Second, discharges are also subject to any applicable water quality standards, treatment standards, or schedules of compliance established by the states or the federal government. 33 U.S.C. 1311(b)(1)(C), 1370. See, *e.g.*, *United States Steel Corp.* v. *Train*, 556 F.2d 822, 830 (7th Cir. 1977). To achieve and enforce these limitations, Congress created the National Pollutant Discharge Elimination System ("NPDES") (see 33 U.S.C. (& Supp. V) 1342), which makes it unlawful to discharge a pollutant without obtaining a permit and complying with its terms. See 33 U.S.C. 1311(a). As this Court explained in *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 205 (1976), "[a]n NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on [state] water quality [standards]—into the obligations (including a timetable for compliance) of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits." See 33 U.S.C. (& Supp. V) 1319; 33 U.S.C. 1365.

That is the situation here. EPA administers the NPDES program in Arkansas and therefore issues permits to any dischargers of pollutants in that state, including the six municipalities whose discharges are at issue here. As required by the CWA, the conditions in-

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[10] The effluent limitations have been established in two stages. On July 1, 1977, sources were required to meet limitations based on the "best practicable control technology currently available." On July 1, 1984, limitations based on "the best available technology economically achievable" or "the best conventional pollutant control technology" must be achieved. See 33 U.S.C. (& Supp. V) 1311(b).

cluded in these permits satisfied the prevailing state water quality standards. See 40 C.F.R. 122.62(d). As noted above (page 4, *supra*), at the time the permits in question here were issued, Arkansas water quality standards specified numerical limitations on the level of phosphates permitted in state waters.[11] Thus, Oklahoma is incorrect in asserting that the permit does not regulate phosphates. Just as in *Milwaukee II*, *supra*, "[t]here is no 'interstice' here to be filled by federal common law: [the discharges at issue] are covered by the Act and have been addressed by the regulatory regime established by the Act." 451 U.S. at 323.

By the same token, Oklahoma's reliance on the exclusion of phosphates from the list of "conventional pollutants" to show a "gap" in the regulatory scheme of the CWA to which federal common law should be applied is misplaced. The CWA prohibits the discharge of *any* "pollutant" from *any* point source except in compliance with the statute. 33 U.S.C. 1311(a). See, *e.g.*, *Milwaukee II*, *supra*, 451 U.S. at 318. Phosphates clearly fall within the broad definition of "pollutants" contained in Section 502(6) of the Act, 33 U.S.C. 1362(6), and hence are embraced within the regulatory purview of the CWA. Indeed, this Court's decision in *Milwaukee II* itself implicitly recognized that phosphates are covered by the regulatory scheme of the CWA because the discharge involved there, like here, was of phosphorus and other "nutrients" in one state alleged to cause eutrophication in another state. See 451 U.S. at 309.

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[11] The fact that the individual permits in question in this case do not specifically address phosphates does not indicate that the requirements of the state standards were not considered when they were issued. Rather, it simply indicates that the level of phosphates being discharged was not of sufficient magnitude to violate Arkansas' water quality standards with respect to phosphates.

The exclusion of phosphates from the list of conventional pollutants does not change this regulatory coverage. Conventional pollutants are merely one of three categories of pollutants set out in Section 301(b)(2) of the Act, 33 U.S.C. (Supp. V) 1311(b)(2). The CWA specifically regulates under that section toxic pollutants (Section 301(b)(2)(C) and (D)), conventional pollutants (Sections 301(b)(2)(E) and 304(a)(4), 33 U.S.C. (Supp. V) 1314(a)(4)), and all other pollutants (Section 301(b)(2)(F)). The purpose of these different categories is simply to group various pollutants for purposes of applying differing timetables and requirements for the achievement of the objectives of the CWA, as set out in Section 301(b). The establishment of these categories in no way limits the comprehensive nature of the statute.[12]

Thus, Oklahoma has shown no "gap" in the regulatory scheme of the CWA that must be filled by the application of federal common law, since phosphates do fall within that comprehensive scheme. As this Court explained in *Milwaukee II*, "[a]lthough a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under

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[12] Similarly, there is no merit to Oklahoma's claim (Rep. 16-17) that certain recent amendments to the CWA indicating Congress' concern with "cost effectiveness" in the implementation of the Act (see Pub. L. No. 97-117, 95 Stat. 1623) somehow have limited its previously comprehensive effect. These amendments, the "Municipal Wastewater Treatment Construction Grant Amendments of 1981" (Section 1), address the issue of federal funding of projects initiated under Title II of the CWA, 33 U.S.C. (& Supp. V) 1281 *et seq.* In light of funding changes made in those amendments, Congress provided a mechanism for extending some of the time schedules applicable to publicly owned treatment works (see Section 21(a), 95 Stat. 1631), but it in no way eliminated those goals or changed the comprehensive coverage of the statute recognized by this Court in *Milwaukee II* and *Sea Clammers*.

the Act, such disagreement alone is no basis for the creation of federal common law." 451 U.S. at 323; footnote omitted.

In any event, even if phosphates were not in practice regulated by EPA under the CWA's regulatory scheme, Oklahoma still would not be able to bring an action under federal common law. The import of this Court's decision in *Milwaukee II* is that, in the 1972 Amendments to the CWA, Congress intended to "occupy the field" by statute with regard to federal water pollution control. Decisions as to particular dischargers are to be made, as they were in this case, by the expert agency charged with the administration of the regulatory program. In the words of the Court (451 U.S. at 324; footnote omitted):

> Decision is made on a case-by-case basis, through the permit procedure, as was done here. Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner.

Oklahoma does not, and cannot, assert that there is no power to regulate phosphates under the CWA. Hence, there is no room for the invocation of federal common law. See 451 U.S. at 324 n.18.[13]

Finally, Oklahoma's contention (Rep. 8-9, 17-19, 23) that it has no remedy under the CWA is unfounded. As this Court recognized in *Milwaukee II* (451 U.S. at

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[13] The portion of the complaint (¶ 36) alleging injury from discharges from the Siloam Springs municipal sewer system, which are not covered by the municipality's permit for its treatment plant, similarly falls within the regulatory scheme of the CWA. Stormwater runoff discharged through a municipal sewer system ordinarily is considered a "point source" under the CWA. 40 C.F.R. 122.57(a). See *Milwaukee II, supra*, 451 U.S. at 320.

325-326), "[i]n the 1972 Amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress."

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 Act, 33 U.S.C. 1342(b)(3), 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).

Oklahoma did not avail itself of these procedures, explaining (Rep. 9) that, at the time the permits were issued, it had no way of knowing of the problem that would develop from the discharge of phosphates. Since the time for seeking judicial review of the validity of the permits has expired, Oklahoma claims that it must be allowed to invoke a common law remedy. This identical contention was rejected by this Court in *Milwaukee II*, where the Court replied (451 U.S. at 326):

> 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. It would be quite inconsistent with this scheme if federal courts were in effect to "write

[14] Section 402(a)(3) of the Act, 33 U.S.C. 1342(a)(3), provides that EPA is subject to these same procedural requirements for the issuance of permits when it administers the permit program in a given state.

their own ticket" under the guise of federal common law after permits have already been issued and permittees have been planning and operating in reliance on them.

Moreover, Oklahoma is not completely without remedy under the CWA even though it did not contest the permits when they were issued. It may raise its concerns anew at the time when the permits, which are limited by statute to a five-year life (33 U.S.C. (Supp. V) 1342(b)(1)(B)), are reissued. Alternatively, if Oklahoma is in possession of previously unavailable information regarding the effect of the pollutants being discharged under the existing permits, it may seek modification of the permits.[15] And, of course, to the extent that any party is discharging in violation of a permit or without a permit,[16] Oklahoma has several avenues of relief under the CWA. See 33 U.S.C. (Supp. V) 1342(b)(1)(C)(i); 33 U.S.C. 1365.

2. Oklahoma's complaint also contains claims based on violations of state nuisance and trespass laws. It concedes (Rep. 20) that state and federal common law cannot both apply, but asserts that, if federal common law has been preempted, state law must be available to fill the gaps in the statutory scheme. The Court has not passed directly on this claim, but its decisions strongly suggest that Oklahoma law may not be applied to this interstate dispute.

In *Milwaukee I*, *supra*, this Court held in an action brought by a state against the citizens of another state

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[15] Section 402(b)(1)(C)(iii), 33 U.S.C. (Supp. V) 1342 (b)(1)(C)(iii), provides that permits may be terminated or modified when there is a "change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge."

[16] Oklahoma has stated (Rep. 7) that some of the private defendants who do not have permits have intermittently discharged effluent directly into the Illinois River.

that "it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." 406 U.S. at 102; see also *id.* at 107 & n.9.[17] The Court's conclusion was based both on the fact that the suit was brought by one state against a political subdivision of another state (*id.* at 104-105) and on the overriding federal interest in the question of pollution of interstate waters (*id.* at 105 n.6).

In the wake of *Milwaukee I*, the lower courts have uniformly held that a state may not invoke its own law as a basis for suing residents of other states for pollution of interstate waters. The Seventh Circuit, on remand from *Milwaukee I*, held that Illinois could not pursue a claim under Illinois law for the interstate water pollution involved there. *Illinois* v. *City of Milwaukee*, 599 F.2d 151, 177 n.53 (1979). See also *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1021 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203 (D. N.J. 1978). The Court did not grant Illinois' subsequent cross-petition on that issue, and thus *Milwaukee II* expressly did not address the validity of that holding or the possibility that state

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[17] The Court explicitly rejected the indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971), that state law would apply to such a suit. 406 U.S. at 102 n.3. The Court reaffirmed this view in *Milwaukee II*, *supra*, stating that this statement in *Wyandotte* had been "overrule[d]." 451 U.S. at 327 n.19. Oklahoma also relies (Rep. 20) on *Askew* v. *American Waterways Operators*, 411 U.S. 325 (1973), for the proposition that state law should apply to a suit based on interstate pollution. But *Askew* involved a very different situation. Florida law, in addition to federal law, was applied to a suit against Florida citizens in connection with an oil spill in Florida coastal waters. No other state was involved. In an analogous situation, the Clean Water Act would permit a suit under state law. See page 14, *infra*.

common law could apply once the federal common law was held to be preempted. 451 U.S. at 310 n.4. Illinois is pressing its contention in the court of appeals on remand that, in the absence of federal common law, its own law is available in such a suit.

To be sure, state law in the area of water pollution has not been completely preempted by the Clean Water Act. This Court has recognized that the CWA embodies a "policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'" *EPA* v. *State Water Resources Control Board, supra,* 426 U.S. at 207-208, quoting 33 U.S.C. (Supp. IV 1974) 1251(b). Section 510 of the CWA, 33 U.S.C. 1370, expressly permits a state to set pollution standards more restrictive than the federal standards in effect under the CWA for the discharge of pollutants within its borders. The Court recognized in *Milwaukee II* that this section permits states to "adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state dischargers." 451 U.S. at 328. See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Association, supra,* 453 U.S. at 16 n.26, 20 n.31. But it is doubtful whether this limited role for state law can avail Oklahoma here.

Indeed, the Court's discussion of Section 510 in *Milwaukee II, supra,* strongly suggests that, while state nuisance law may play a role in suits against in-state dischargers,[18] it has no application here where

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[18] Subsequent to *Milwaukee I,* the lower courts held that, in cases where no interstate effect was alleged, federal common law did not apply but state law did. See *Ancarrow* v. *City of Richmond,* 600 F.2d 443, 445 (4th Cir. 1979); *Reserve Mining Co.* v. *EPA,* 514 F.2d 492, 520-522 (8th Cir. 1975) (air pollution).

suit is brought by one state under its own law alleging damage from discharges in another state. Recourse to state law in such a suit was not "saved" by the savings clause of the 1972 Amendments, 33 U.S.C. 1365(e), because the existence of the federal common law at the time preempted direct recourse to state law in interstate disputes. See pages 12-13, *supra*. And it would be somewhat incongruous if the 1972 Amendments, in preempting because of their comprehensive scope the federal common law that derived in part from state standards (see *Milwaukee I*, *supra*, 406 U.S. at 107, *Milwaukee II*, *supra*, 451 U.S. at 350-353 & n.32 (Blackmun, J., dissenting)), had the effect of permitting a state to invoke its own law directly in a suit against dischargers in another state. See *Chicago Park District* v. *Sanitary District of Hammond*, 530 F.Supp. 291, 292-293 (N.D. Ill. 1981), appeal pending, No. 81-2896 (7th Cir.); cf. *Milwaukee II*, *supra*, 451 U.S. at 353-354 (Blackmun, J., dissenting) (suggesting that state law will now be applied in state courts in interstate water pollution disputes). The decision in *Milwaukee II* does not suggest that the 1972 Amendments were intended to have this effect, and thus it would appear that Oklahoma has no cause of action here against Arkansas dischargers under Oklahoma state law.

CONCLUSION

The motion for leave to file a complaint should be denied.[19]

Respectfully submitted.

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[19] Because a bare denial of leave to file would not indicate whether the Court was merely declining to exercise its discretionary original jurisdiction, considerations of judicial economy would seem to counsel elucidation of the ground of denial (perhaps after further briefing and oral argument). Specifically, we would urge the Court to determine whether (as we suggest) the preemptive effect of the Clean Water Act forecloses the refiling of the present suit in an appropriate federal district court or an Oklahoma state court. At the least, we submit the Court should make clear that no federal common law action is available in the premises and that no federal court, other than this Court, can entertain a state law claim prosecuted by the State itself on the basis of diversity jurisdiction. See *Moor* v. *County of Alameda*, 411 U.S. 693, 717 (1973); *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 498 n.3.