

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARKANSAS, ET AL, Petitioners V.
OKLAHOMA, ET AL; and
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner V. OKLAHOMA, ET AL.

CASE NO: 90-1262 & 90-1266

PLACE: Washington, D.C.

DATE: December 11, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARKANSAS, ET AL., :

4 Petitioners :

5 v. : No. 90-1262

6 OKLAHOMA, ET AL.; :

7 and :

8 ENVIRONMENTAL PROTECTION :

9 AGENCY, :

10 Petitioner :

11 v. : No. 90-1266

12 OKLAHOMA, ET AL. :

13 - - - - -X

14 Washington, D.C.

15 Wednesday, December 11, 1991

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 10:56 a.m.

19 APPEARANCES:

20 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 the Petitioner EPA.

23 EDWARD W. WARREN, ESQ., Washington, D.C.; on behalf
24 of the Petitioners Arkansas, et al.

25 ROBERT A. BUTKIN, ESQ., Assistant Attorney General of

1 Oklahoma, Oklahoma City, Oklahoma; on behalf of
2 the Respondent.
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1 PROCEEDINGS

2 (10:56 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-1262, Arkansas v. Oklahoma, No. 90-1266,
5 Environmental Protection Agency v. Oklahoma.

6 Mr. Wallace:

7 ORAL ARGUMENT OF LAWRENCE G. WALLACE

8 ON BEHALF OF THE PETITIONER EPA

9 MR. WALLACE: Mr. Chief Justice, and may it
10 please the Court:

11 This case involves judicial review of the
12 validity of an action taken by a Federal agency pursuant
13 to a Federal statute, namely the issuance of a permit by
14 EPA for a new sewage treatment plant in Fayetteville,
15 Arkansas, issuance of a permit under the Clean Water Act.
16 And under that Federal statute, the permitting authority
17 is to assure compliance with applicable water quality
18 requirements, and this includes compliance with the EPA-
19 approved water quality standards of a downstream State.

20 The key to this case in our view lies in
21 appreciating the fundamental importance under the Federal
22 statute of a rather elusive distinction, but one that is
23 not formalistic, for reasons I will try to explain. And
24 that is the distinction between the law of the downstream
25 State, and the federally approved water quality standards

1 adopted by that State, but that apply in the permitting
2 process as a matter of Federal law under the Clean Water
3 Act.

4 The foundation on which we are building this
5 distinction really is reflected in two of the holdings of
6 this Court the last time it considered this general
7 subject in International Paper Company against Oullette.
8 One of those holdings was that the downstream State's law
9 is not preempted by the Clean Water Act insofar as it
10 applies to sources in that State. No State law is
11 preempted as it applies within the State to sources in
12 that State. No Federal approval of such State law is
13 needed. It takes effect if it's enacted by the State.

14 The other foundation holding in International
15 Paper against Oullette is that the Clean Water Act does
16 preempt application of a State's law to discharges in
17 another State. So it's only if the out of State, the
18 affected State, the downstream State's standards are
19 approved by EPA, that they are to be applied in the
20 permitting process in the source State.

21 And what is significant in the Federal act, and
22 not emphasized in our brief as much as I think its
23 significance would warrant, is that the Federal act in its
24 implementing regulation require that certain processes be
25 followed in the adoption or review of State standards if

1 they are to qualify for EPA approval. And the most
2 relevant process that's required is requirements for
3 public hearings and public participation, at which
4 affected persons and States would have an opportunity to
5 be heard about the impact of water quality standards on
6 their operations.

7 And EPA itself is a very active participant in
8 the development of these water quality standards. It
9 provides technical guidance through participation in these
10 hearings, consultation, model regulations, et cetera, and
11 moreover, a renewed opportunity to be heard. In fact, the
12 statute requires hearings every -- to be conducted every 3
13 years to get public participation about needed revisions.

14 QUESTION: Mr. Wallace, may I interrupt you and
15 ask a question or two? Here the EPA itself was issuing
16 the permit?

17 MR. WALLACE: That is correct.

18 QUESTION: And so you claim that under the
19 statutory scheme that the Federal Government can have
20 deference on its interpretation of the source State's
21 requirements?

22 MR. WALLACE: As well as the affected State's.
23 Deference with respect to all applicable water quality
24 standards that the Clean Water Act requires EPA to apply
25 in issuing the permit.

1 QUESTION: You don't -- do you take the position
2 that the source State's requirements, in this case,
3 Oklahoma, become Federal law, in effect?

4 MR. WALLACE: The applicable law -- Oklahoma is
5 the affected State.

6 QUESTION: Yes.

7 MR. WALLACE: The source is in Arkansas.

8 QUESTION: Okay. The source State, excuse me.

9 MR. WALLACE: Well, what's at issue is whether
10 Oklahoma's water quality standards are violated the
11 affected State.

12 QUESTION: The State where the source of the
13 pollution enters the water, you say that State's laws
14 become Federal laws?

15 MR. WALLACE: Well, the statute does require EPA
16 to defer in administering its program to the source States
17 where the discharge is occurring -- here Arkansas -- to
18 the source State's interpretation of its own standards,
19 because those standards are applicable as a matter of
20 State law to anyone making a discharge in Arkansas anyway.

21 QUESTION: Well, doesn't Oklahoma take the
22 position that its no degradation policy means something
23 different than the EPA says it means?

24 MR. WALLACE: That is correct. But you see this
25 Court already held in International Paper Company against

1 Oullette that Oklahoma cannot apply its law to a discharge
2 in Arkansas, that a State's law cannot apply to an
3 out-of-State discharge, that the Clean Water Act preempts
4 that.

5 What can apply, what does apply, are water
6 quality standards that happen to be adopted in that State
7 law that EPA approved after the Federal statutory
8 processes were followed.

9 QUESTION: Well, and as to that, Oklahoma has a
10 different view than the EPA as to what those standards
11 require.

12 MR. WALLACE: That is correct.

13 QUESTION: So whose law do we apply?

14 MR. WALLACE: Well, that is precisely the point
15 I'm trying to make, that it is EPA that is in -- that is
16 both the expert agency and the fulcrum agency to
17 understand what informed participants in the processes
18 that the Federal act requires would have thought those
19 standards meant. Otherwise the --

20 QUESTION: Well, the EPA approved them, didn't
21 it?

22 MR. WALLACE: That's correct. And the basis of
23 that understanding.

24 QUESTION: And I guess it's those standards are
25 Federal law.

1 MR. WALLACE: That is our point. It's only
2 Federal law that can apply because State law is preempted
3 from applying out of State.

4 QUESTION: At what point could a court review,
5 if at all, the adequacy and the correctness of EPA's
6 interpretation of what the State standard meant? When you
7 first approved the implementation of the standard, or at
8 the permit stage, such as we have here, or both?

9 MR. WALLACE: Well --

10 QUESTION: Can we ever review your parsing of
11 Oklahoma's anti-degradation statute?

12 MR. WALLACE: The decision to issue a permit is
13 subject to judicial review. That is the proceeding that's
14 before the Court.

15 QUESTION: All right. And that's usually for
16 substantial evidence. But what about --

17 MR. WALLACE: Right.

18 QUESTION: What about your interpretation and
19 understanding of the Oklahoma statute. Is that subject to
20 any review in the courts?

21 MR. WALLACE: No, because the Oklahoma statute
22 cannot apply to a discharge in Arkansas. EPA is not
23 applying an Oklahoma statute. EPA is applying water
24 quality standards that EPA approved that are reflected in
25 Oklahoma statute.

1 QUESTION: Well, they're still Oklahoma law. I
2 mean, they appear in an Oklahoma statute.

3 MR. WALLACE: They appear in an Oklahoma
4 statute, and Oklahoma can apply that statute within
5 Oklahoma. But what EPA is applying is not Oklahoma law.
6 That's the fundamental error that the court of appeals
7 made here. The court of appeals said --

8 QUESTION: Well, but under the permit procedure
9 you were required to, I take it, evaluate the
10 recommendations made by Oklahoma.

11 MR. WALLACE: Exactly.

12 QUESTION: And they were based on Oklahoma's
13 law.

14 MR. WALLACE: They were based on what Oklahoma
15 said was a misapplication of applicable water quality
16 standards that the Clean Water Act required the permitting
17 authority to apply.

18 QUESTION: But the Oklahoma law must be referred
19 to in order to understand the meaning of those water
20 quality standards.

21 MR. WALLACE: Those water quality standards
22 appear in the Oklahoma law. That is correct.

23 QUESTION: They also could be enforced by
24 Oklahoma in Oklahoma.

25 MR. WALLACE: That's correct. But when they're

1 being enforced in the permitting process, under the Clean
2 Water Act, they are not being enforced as Oklahoma law
3 because the Court has already held that Oklahoma cannot
4 apply.

5 QUESTION: And from a legal standpoint, your
6 interpretation of that law is never subject to review?

7 MR. WALLACE: It is subject to review, as to
8 whether it was a reasonable interpretation of standards
9 that the EPA was required to apply.

10 QUESTION: Chevron deference applies?

11 MR. WALLACE: Absolutely, just as with any other
12 standard that EPA had to apply in the permitting process.

13 QUESTION: Mr. Wallace, that makes a lot sense
14 when EPA happens to be the permitter, as is the case here.
15 But how does your very logical scheme work when, as is
16 often the case, it is the upstream State that is the
17 permitter?

18 MR. WALLACE: Because under the statute, if the
19 downstream State is unhappy with the upstream State's
20 issuance of the permit, its right is to complain to EPA,
21 and EPA has the authority to veto that permit if EPA
22 concludes that applicable water quality standards would be
23 violated.

24 QUESTION: And there's no deference to the
25 upstream permitter. Is that right?

1 MR. WALLACE: No, EPA has to make a
2 determination. EPA ultimately is the one who decides in
3 these interstate disputes, whether the applicable water
4 quality standards will be met.

5 QUESTION: Mr. Wallace, is the reason that
6 the -- statutory basis for requiring application of the
7 Oklahoma statute section 401?

8 MR. WALLACE: Let me check that. It would
9 be --

10 QUESTION: I've got section 401 in the white
11 appendix, starting on page 164a.

12 MR. WALLACE: Yes. Right.

13 QUESTION: And specifically what I'm getting at
14 is really the tail end of it. In 401(b), which in effect
15 provides that the permitting agency, based on the
16 recommendations of such State, the administrator, et
17 cetera, shall condition such license or permit in such
18 manner as may be necessary as to ensure compliance with
19 applicable water quality requirements. Is that how
20 the --

21 MR. WALLACE: Exactly.

22 QUESTION: Okay.

23 MR. WALLACE: That's exactly where the
24 requirement comes in. And that is the language we quote
25 in our brief, the very language that you quoted, that the

1 permitting agency is to assure that all applicable water
2 quality requirements are to be applied.

3 QUESTION: Now, is that consistent with what you
4 described a moment ago as the holding in Oullette, which
5 seems to suggest that indeed the only thing the downstream
6 State really can do is to recommend within the meaning of
7 section 402, and if the recommendation isn't taken, too
8 bad.

9 MR. WALLACE: Well, we think that Oullette can
10 be read consistently with this, if we understand what this
11 recommendation means. It really is a submission about
12 what is the applicable water quality standard, what is the
13 meaning of that standard that the permitting agency is
14 required to apply. But --

15 QUESTION: Wouldn't it be a more natural
16 reading, though, to say that the recommendation which is
17 referred to in 402 is simply a recommendation for what the
18 permit ought to include in order to meet the standard, but
19 that under section 401(b) there is no question that the
20 standard is enforceable. And the only thing that may or
21 may not be accepted under the leeway given on 402 is the
22 recommendation on how to do it, how to meet it.

23 MR. WALLACE: Well, I think that is our reading,
24 that the water standard is enforceable.

25 QUESTION: Well, then is that reading consistent

1 with Oullette, which seems to leave the EPA with a much
2 greater leeway?

3 MR. WALLACE: If Oullette is read that way, we
4 think that's the wrong reading of Oullette. Oullette says
5 that the downstream State plays a subsidiary role in the
6 process to the source State and the EPA.

7 QUESTION: True, but section 401, if I
8 understand it, provides that that role will not be
9 subsidiary to the point of ignoring that State's
10 requirement once it is -- water quality plan, once it's
11 been approved by EPA. You can't --

12 MR. WALLACE: That is our position.

13 QUESTION: Okay.

14 MR. WALLACE: That is the difference between
15 Arkansas and ourselves (inaudible) this Court.

16 QUESTION: All right. Now, if that's the case
17 and the Oklahoma water quality plan has got to be applied,
18 then is the -- is the relevant section of the Oklahoma
19 plan what is set out on page 46 and 47 of the joint
20 appendix, section 5, the beneficial use limitations?

21 MR. WALLACE: Well, it's the anti-degradation
22 provision that was specifically at issue, and that was
23 interpreted by EPA by the Chief Judicial Officer as being
24 satisfied if none of the specific parameters of water
25 quality set forth elsewhere in the water quality standards

1 would be affected in any detectable way.

2 QUESTION: Well, my particular problem, my
3 reason for raising section 5, is that if section 5 is
4 applicable -- it says all streams and bodies of water
5 designated as A, which I assume is applying here, are
6 protected by prohibition of any new point source
7 discharge. This is a new -- what is at issue here is a
8 new point source discharge, and that would be absolutely
9 prohibited if that section must be enforced in this case.

10 MR. WALLACE: Except under conditions described
11 in section 3 that -- this was interpreted by EPA which
12 approved this as the water quality standard, as not
13 meaning that any detectable discharge is prohibited, but
14 meaning that any detectable impact on any of the water
15 quality parameters set forth in describing the quality
16 standards for Oklahoma waters would be violated.

17 QUESTION: What it boils down to then, is that
18 in order to sustain EPA, a court would have to say that
19 the prohibition of any new point source discharge can be
20 read to allow a new point source discharge if the effect
21 of it is not detectable at the relevant point downstream.
22 That's sort of the nub of the reasonable interpretation
23 issue, isn't it?

24 MR. WALLACE: That is correct insofar as to
25 goes. But when we're dealing with a new point source

1 discharge 39 miles from the Oklahoma border, it must be
2 remembered that Oklahoma has no authority to prohibit a
3 point discharge in Arkansas. The only discharge in
4 Oklahoma is what ever effect appears at the boarder where
5 the river reaches the border of Oklahoma. And so from the
6 standpoint of applying the Oklahoma in the interstate
7 context, we're looking at what is detectable where there
8 is what amounts to a discharge into Oklahoma by having the
9 river flow into Oklahoma.

10 Now, I just want to say very briefly before
11 reserving the balance of my time, that this is a very -- a
12 case of very practical significance. There are 64,000
13 point source permits outstanding, which by statute are
14 limited to 5-year terms. So some 12,000 per year come up
15 for renewal. Many of the water quality standards, and
16 each State has various water quality standards and
17 classifies waters in various ways, are stated in narrative
18 form rather than in numeric form, particularly the ones
19 about aesthetics -- taste, color, odor, and other
20 aesthetic standards, as well as the anti-degradation
21 policies. All of these could be subject to second-
22 guessing in judicial review proceedings in which a court
23 would say that, well, whether EPA's interpretation was
24 reasonable or not, it got this particular State's law
25 wrong. And what this State's law means is X.

1 Now, a State can be as idiosyncratic or quixotic
2 as it wants to be within constitutional limitations in
3 apply its law within the State, but it would frustrate the
4 processes of the Federal statute to have this
5 unpredictability. And the Court in Oullette emphasized
6 that predictability was the hallmark of the permit system.

7 I refer the Court to page 496 of the case, and
8 would like to reserve the balance of my time.

9 QUESTION: Very well, Mr. Wallace.

10 Mr. Warren, we'll hear from you.

11 ORAL ARGUMENT OF EDWARD W. WARREN

12 ON BEHALF OF THE PETITIONERS ARKANSAS, ET AL.

13 MR. WARREN: If I may turn very first off to
14 Justice Souter's question regarding section 401(a)(2).
15 Justice Souter, the governing provision here for resolving
16 interstate disputes is section 403(b)(5) of the statute.

17 QUESTION: Will you tell us where in the
18 appendix those are?

19 MR. WARREN: Yes, Mr. Chief Justice. Section
20 402(b)(5) is found on page 168a, 169, and section
21 401(a)(2), as I think Justice Souter has already pointed
22 out, is on page 166a.

23 One-sixty -- 402(a)(3) is a provision left over
24 from the 1970 act before the NPDES permit program was
25 enacted in 1972. Its purpose then and now was to deal

1 with other Federal licenses, for instance, Corps of
2 Engineers permits, FERC application for construction. I
3 think you can see that by reading the provision which has
4 the anomaly in the context of an EP -- EPA NPDES permit of
5 having EPA recommending to itself.

6 The governing provision are -- provisions are
7 the dispute resolution provisions of section 402(b)(5),
8 and they are applicable to EPA permits through section
9 402(a)(3), which says, the common-sensical outcome, which
10 is that the same provisions, the same principles ought to
11 govern whether the permit is issued by the State or
12 whether it is issued by EPA.

13 Under the 402(b)(5) process, which the Court did
14 interpret in Oullette, EPA is given the responsibility for
15 resolving these interstate disputes. And it can accept
16 the recommendations of the permitting State, the source
17 State, or it can accept the recommendations of the
18 affected State, or it can split the difference in any way
19 it chooses.

20 QUESTION: May I interrupt you with this
21 question? If we start with the assumption that EPA has no
22 control over what you referred to as possibly
23 contradicting or inconsistent standards, as between
24 upstream States and downstream States, that would make a
25 lot of sense because you'd say at some point somebody's

1 got to arbitrate between these differences, who better
2 than EPA?

3 But isn't the assumption at least a strange
4 assumption because EPA has got to approve these standards
5 in the first place. And if EPA is being given a standard
6 by Oklahoma which, if applied, would clearly be
7 inconsistent with what the upstream State is asking for in
8 its standards, isn't the rational thing for EPA either to
9 say no, we won't approve it because it's too tough in
10 relation to what's upstream, or to say upstream, we won't
11 approve yours because it's too weak in relation to
12 downstream. And isn't that the rational way, if we're
13 going to have a national scheme or an interstate scheme,
14 isn't that the rational way to resolve the differences
15 between the States?

16 MR. WARREN: Justice Souter, what you say would
17 be true if EPA had authority to disapprove any State
18 standard as being too stringent. EPA has no power to
19 disapprove such a standard.

20 QUESTION: Even insofar as it may have an
21 interstate implication?

22 MR. WARREN: That's right, Your Honor. If
23 you -- and if I can call your attention to page 25 of my
24 brief, where we cite the EPA official pronouncement on
25 this in the Federal Register where they say they don't

1 have any authority to disapprove a State standard which is
2 too tough. That's also the holding of the one court
3 that's reached the question in the Homestake Mining case.

4 QUESTION: That's stated in the statute, isn't
5 it?

6 MR. WARREN: Excuse me?

7 QUESTION: That's just in the statute, isn't it?
8 I mean, doesn't this -- this isn't just an administrative
9 ruling. Doesn't the Clean Water Act permit -- itself
10 permit the States to have stricter standards?

11 MR. WARREN: Yes, Your Honor, that's precisely
12 the thrust of section 510 of the statute. Section 510
13 allows a State to impose more stringent requirements.

14 QUESTION: But to the extent they impose more
15 stringent requirements and the EPA approves their
16 standards, I don't suppose to the extent that it's more
17 stringent than Federal standards, I'm not sure that that
18 part of the State plan is Federal law.

19 MR. WARREN: That's precisely right. Those
20 State standards, even after being approved, remain State
21 law. What we need and what we have in section 402(b)(5)
22 is a mechanism to resolve those disputes. EPA can decide
23 whether to apply or how much to apply any downstream
24 standard in the process of writing those permits.

25 Let me say that I believe the decision below

1 must be reversed because it treated the Oullette decision
2 as if it were dictum. The Oullette decision is holding,
3 and it controls the outcome of this case.

4 What the Court held in Oullette, and said in
5 unmistakable terms, is that the downstream State has only
6 and advisory role in regulating pollution which originates
7 beyond its borders. It can neither block a source State
8 permit, nor regulate an out of source -- directly.

9 QUESTION: Well, in your view, would the EPA
10 have had discretion to completely reject the Oklahoma
11 standard?

12 MR. WARREN: Yes, Your Honor, it would have had
13 that discretion if it has so chosen. But its charge under
14 the statute is to protect downstream water quality and to
15 do what is -- it believes in its judgment is appropriate
16 to protect downstream water quality.

17 QUESTION: And under 401, to ensure compliance
18 with applicable water quality -- quality requirements.

19 MR. WARREN: With those requirements which it
20 concludes are applicable in order to protect downstream
21 water quality.

22 Let me say, Justice Souter, my reading must be
23 right, or else Oullette would not be right. What this
24 Court said in Oullette was that the Vermont nuisance
25 remedies in that case were preempted because Vermont

1 could, and I'm using the Court's words, could not do
2 indirectly by nuisance remedies what it could not do
3 directly. That is regulate the conduct of out-of-State
4 sources.

5 If Oklahoma can enact a no discharge standard,
6 as it has done here -- Justice Souter I think correctly
7 read that prohibition. If it can enact a no discharge
8 prohibition and apply it to an Arkansas source, then it is
9 doing directly through the statute precisely what it --
10 the Court said it couldn't do in Oullette. And indeed the
11 very reason why the Court in Oullette held the nuisance
12 remedies were preempted.

13 QUESTION: All right. Do you think there's
14 essentially a contradiction -- between 401 and 402,
15 because 402 has a much more permissive sound if we read
16 recommendation in the way you want us to read it. 401,
17 however, which in the operative phrase refers to
18 conditions such as may be necessary to ensure compliance
19 with applicable water quality standards, you say is
20 essentially weak provision because what is applicable is
21 what EPA thinks ought to be applicable.

22 Isn't the more natural reading of 401's
23 applicable water quality requirements in subsection 2,
24 shouldn't it be taken as a reference to the enumeration of
25 applicable statutory sections in subsection 1. In other

1 words, to ensure a certification that the discharge will
2 comply with the applicable provisions of 1311 and so on
3 through 1317. Isn't that the more natural reading of the
4 statute? And if it is, 1313 is the one that refers to the
5 approval of State plans, and that would pick up the State
6 plan and make it enforceable.

7 MR. WARREN: But, first of all the State
8 standards can't be disapproved, as I've said. Secondly, I
9 want to stress that 401(a)(2) is a provision that has an
10 entirely different purpose and entirely different history,
11 and 402(a)(3) makes clear --

12 QUESTION: The trouble is it's still there,
13 though.

14 MR. WARREN: It's still there, but it has an
15 application in this different context with Corps of
16 Engineer permits.

17 But remember, this Court has long held that if a
18 State -- and that's what happening here, since there's no
19 disapproval authority. If a State is to regulate beyond
20 its borders to control sources in another State, there
21 must be unmistakably clear congressional intent to
22 authorize that. This is a cardinal principle of
23 federalism. We're talking about whether one sovereign
24 State can regulate another sovereign State.

25 QUESTION: Well if 401 were applicable, wouldn't

1 you have that here?

2 MR. WARREN: No, I don't think you would, Your
3 Honor, because I think the clear language of the statute
4 is found in section 510, which is this provision in the
5 statute that directly applies to this question. That's
6 the provision that preserves for the States their
7 authority to enact more stringent requirements. And it
8 restricts those requirements to that State's waters and
9 sources in that State.

10 If you look at that provision, I think you'll
11 see it is intended to preserve the sovereign prerogative
12 that -- of Arkansas, really, which is what we're talking
13 about here. Arkansas, as a sovereign, in order to protect
14 its waters, and in order to do what it wishes to do with
15 its waters, needs to be able to regulate sources in
16 Arkansas. And those requirements of Arkansas can't be
17 trumped by what is State law, Oklahoma law that EPA cannot
18 disapprove.

19 What this Court addressed in Oullette is the
20 proper way to resolve the question, and I would submit the
21 controlling answer to the question.

22 QUESTION: Thank you, Mr. Warren.

23 Mr. Butkin, we'll hear from you.

24 ORAL ARGUMENT OF ROBERT A. BUTKIN

25 ON BEHALF OF THE RESPONDENTS

1 MR. BUTKIN: Mr. Chief Justice, and may it
2 please the Court:

3 Today, my State, Oklahoma, asks you to recognize
4 the special protection the Federal law provides for very
5 special living creatures called Outstanding National
6 Resource Waters. The one that's been presented to you in
7 this case involves the scenic Illinois River, which enters
8 the State of Oklahoma from the State of Arkansas, and
9 courses about 60 miles in a southerly direction to Lake
10 Tenkiller.

11 Oklahoma has designated its portion of the river
12 an Outstanding National Resource Water, pursuant to the
13 Clean Water Act. We sent that designation up to
14 Washington, and the EPA approved it and approved our water
15 quality standard for that river as Federal law. And our
16 water quality for that river said no degradation, no
17 discharge can be permitted into that river.

18 And once approved, pursuant to the Clean Water
19 Act, that ceased to be only State law; that became Federal
20 law, enforceable under the clear wording of the Clean
21 Water Act.

22 QUESTION: Subject to Oullette, I assume.

23 MR. BUTKIN: No, Justice, we take --

24 QUESTION: Not subject.

25 MR. BUTKIN: We think Oullette dealt with a

1 different issue, the application of State law, State
2 common law, to an out-of-State discharger, and Oullette
3 recognized that the Clean Water Act prohibited downstream
4 State law. Oullette did not squarely face the issue of
5 how federally approved water quality standards of the
6 State should be enforced in a permit proceeding.

7 QUESTION: But to get to that point, what
8 Oullette did was in effect to analyze the -- in effect,
9 the structure of the statute in a way which is directly
10 relevant to our question. I don't see how we can hold
11 your way without saying that Oullette's description of the
12 way this statute worked was wrong.

13 MR. BUTKIN: We would request the Court
14 recognize that Oullette was limited to the narrow issue
15 that was raised in the first sentence of its -- of the
16 opinion in that Court.

17 QUESTION: So Oullette was wrong in the
18 description of the structure of this statute?

19 MR. BUTKIN: Yes, we think that EPA has an
20 absolute obligation to enforce federally approved water
21 quality standards. The statute works in a slightly
22 different way with source States and downstream States.
23 Source States do have an absolute veto power over a
24 Federal permit. Downstream States do not have a veto
25 power, but if their federally approved water -- their

1 water quality standards have been approved by the EPA,
2 those standards become enforceable under the clear wording
3 of the statute.

4 QUESTION: Well, you say if they've been
5 approved by the EPA as though the EPA can make all this
6 reasonable. But the statute prohibits the APA -- the EPA
7 from making all this reasonable because it says that the
8 State can -- in section 510, that nothing in the chapter
9 shall preclude the right of a State to adopt or enforce
10 any standard or limitation regarding discharge of
11 pollutants.

12 MR. BUTKIN: Justice, I disagree with that.

13 QUESTION: So when you combine the two
14 principles, it means APA must approve it and then APA must
15 -- EPA must enforce it against another State.

16 MR. BUTKIN: Oklahoma would disagree with that.
17 510 is a savings clause only that says nothing about the
18 creation of federally approved water quality standards.
19 Section 303 is the operative provision in this case. And
20 under section 303, Oklahoma sends up its proposed or
21 adopted standards that must meet minimum Federal
22 requirements. The EPA reviews them, and if they find the
23 standard consistent with the act, the EPA approves them.
24 If they have some concern, the EPA sends it back and says
25 change this, change that.

1 Once approved, pursuant to section 303, those
2 standards cease to be State law only, and they become
3 Federal law. And the reason is very --

4 QUESTION: Excuse me. May I interrupt you?
5 Does EPA have an authority as broad as the one I was
6 suggesting a moment ago your opposing counsel, of saying
7 you know, this is too tough because, if enforced, it's
8 going to be too restrictive on the upstream States. Even
9 though it's a great plan and it might be nice if it were
10 simply an intrastate issue, we won't approve it for that
11 reason. Does EPA have that much authority in 303?

12 MR. BUTKIN: Justice, I think Congress made the
13 tough call. I don't think EPA can say it's too tough
14 because I think the whole statutory scheme focuses or
15 contemplates on these federally approved water quality
16 standards being enforced to avoid a situation where State
17 boundaries serve as artificial barriers to the achievement
18 of the State's goals.

19 As EPA below recognized, and they told us, that
20 if Arkansas' interpretation of the statute was adopted,
21 you'd have a situation where water quality would be set by
22 the lowest common denominator. The downstream States
23 would invariably be frustrated in their efforts to achieve
24 their goals --

25 QUESTION: But on your theory, it's set by the

1 highest common denominator.

2 MR. BUTKIN: Absolutely. Absolutely.

3 QUESTION: All right. And your answer to the
4 objection, if it is an objection, is that it's up to EPA
5 to decide how high that denominator's going to be.

6 MR. BUTKIN: Right. And that gets us to our
7 next issue. In this case, there are no degradations of
8 standard was not a higher standard. We modeled it after
9 the Federal model. The Federal Government requires each
10 State as part of the Federal program, as part of their
11 water quality standards to send up a anti-degradation
12 standard.

13 And it says, States, when you decide that rivers
14 are so important to you that they should be considered
15 Outstanding National Resource Waters, you must require no
16 degradation of such a water. We sent that up for the
17 Illinois River, and they approved it.

18 EPA had previously told us how under Federal law
19 that standard should be interpreted. In 1979, the EPA
20 said when you have an Outstanding National Resource Water,
21 you don't let any more discharges into such a water. You
22 don't --

23 QUESTION: May I interrupt you, Mr. Butkin?
24 Just forgetting the specific statutory provisions for a
25 minute, is the thrust of your argument -- is the practical

1 effect of your argument mean a tributary of the Illinois
2 River that happens to be located in Arkansas may not grant
3 a new permit to any source that would not satisfy the
4 standards applicable to the Illinois River?

5 MR. BUTKIN: Yes, if those pollutants enter our
6 State.

7 QUESTION: Yeah. Well -- if those pollutions
8 enter -- what if they prove they don't which I think they
9 almost did here?

10 MR. BUTKIN: If there's no finding of a fact
11 below that the pollutants in fact stream across the State
12 border, there'd be no problem.

13 QUESTION: So if they made a finding that there
14 wa no detectable pollutant at the State border, that would
15 be enough --

16 MR. BUTKIN: No, Justice, they made a
17 finding -- I'm sorry. They made a finding that for every
18 100 pounds of phosphorous sent towards Oklahoma, 25
19 percent would reach the State of Oklahoma, a finding of
20 fact not contradicted by any party. They made a finding
21 that phosphorous in this particular river system --

22 QUESTION: I don't want to get into an argument
23 about the facts. I just want to understand your theory.
24 Is it your theory that at the point at which the river
25 crosses the State line, the Arkansas tributary must

1 conform with the Illinois River standard?

2 MR. BUTKIN: Federally approved water quality
3 standards, because --

4 QUESTION: Well, the one -- no degradation.

5 MR. BUTKIN: That's right.

6 QUESTION: And if it does conform with that, it
7 may -- the permit may be granted, even though there's a
8 lot of pollution that dissipates on the way to the State
9 line.

10 MR. BUTKIN: The permit must be prohibited in
11 this case if any new discharge reaches the river. It
12 depends on the --

13 QUESTION: Well, that's what want to know --

14 QUESTION: Reaches Oklahoma.

15 MR. BUTKIN: Reaches Oklahoma, I'm sorry,
16 Justice.

17 QUESTION: I see. But as long as none of it
18 reaches Oklahoma, no detectable amount reaches Oklahoma,
19 then it would be permitted.

20 MR. BUTKIN: If no measurable amount of
21 pollutants, in this case, reached Oklahoma. In this case,
22 there was a finding that in fact measurable amounts did
23 reach Oklahoma. The administrative law judge applied a
24 test in this case, Justices, that was totally consistent
25 with how this same Federal standard has been interpreted.

1 And if I may, as early as 1979, the General
2 Counsel of the Environmental Protection Agency say for a
3 federally protected Outstanding National River, like the
4 Illinois, for Federal law purposes, we do not permit any
5 new pollutant load. We don't permit any more waste to
6 enter such a river. We don't worry about the impact of
7 this or that. We -- it's a given when you add new
8 pollutants to that river, you're degrading that river.

9 There's a town called Tahlequah, Oklahoma, it's
10 about 3 miles west of the Illinois River -- same river,
11 same water quality standard. It discharges its waste
12 through a tributary, not directly into the river, through
13 a tributary that reaches the river.

14 EPA in 1986 said to Oklahoma, if you increase
15 the pollutant load to that river, if you add more
16 phosphorous to that same river, you are violating that
17 Federal water quality standard. And Oklahoma agreed
18 because there was an uncertainty about whether they
19 entered the protected part of the river.

20 QUESTION: Mr. Butkin, but when the Federal
21 Government designates a river as an Outstanding National
22 River, presumably all States have a say in that. But when
23 Oklahoma chooses to do so, despite other States upstream,
24 only Oklahoma has to speak. Now you say that the approval
25 is under section 133?

1 MR. BUTKIN: No, 303.

2 QUESTION: 303? What power would EPA have when
3 Oklahoma comes in and says we want to make this and
4 Outstanding National River, to say well, gee, you know,
5 there are other States upstream whose people are using
6 this water, and we just don't think it's realistic to make
7 this and Outstanding National River.

8 MR. BUTKIN: Congress, we feel, addressed that
9 and said in 301(b)(1)(C), you must enforce all applicable
10 water quality standards with no room for a balancing test.

11 QUESTION: No -- who cares what anybody up river
12 thinks? We're our own State, and we're going to make this
13 and outstanding national river, and nobody upstream can
14 use it. That's what Congress enacted. With nobody, the
15 Federal Government and the other States having nothing to
16 say about it.

17 MR. BUTKIN: The other States do have something
18 to say about it because the law requires that Arkansas and
19 upstream States be permitted an opportunity to appear at
20 our rulemaking proceedings in the development of these
21 standards.

22 QUESTION: Wait -- in Oklahoma's rulemaking
23 proceeding.

24 MR. BUTKIN: That's right.

25 QUESTION: As supplicants to Oklahoma saying

1 please don't make this an outstanding national river
2 because we have people upstream who want to use this
3 water.

4 MR. BUTKIN: That's right. But remember the --

5 QUESTION: That's very generous.

6 (Laughter.)

7 MR. BUTKIN: But remember, the entire thrust of
8 the statute is clean our waters. And we had a system --

9 QUESTION: Well, can they also be supplicants as
10 to EPA's approval?

11 MR. BUTKIN: That's right. That's right.

12 QUESTION: What is the process whereby a single
13 State designates a river as an Outstanding -- what is it,
14 Outstanding Natural Resource? Oklahoma would simply go to
15 the EPA?

16 MR. BUTKIN: No, Oklahoma has its own Scenic
17 Rivers Commissions that have inventoried the rivers and
18 picked five truly outstanding rivers in the State to so
19 designate.

20 QUESTION: Well, is there any supervision of
21 that process by EPA?

22 MR. BUTKIN: By that -- by EPA, no. However the
23 Department of Interior has designated the river since 1967
24 as a potential national scenic river.

25 QUESTION: So Oklahoma's completely on its own

1 when it says the Illinois River in Oklahoma is a ONR.

2 MR. BUTKIN: That's right. That's right.

3 QUESTION: Well, isn't that -- I'm sorry. Isn't
4 that inconsistent with the answer that you just gave to me
5 when you -- I thought you said that there was a point at
6 which in that process the upstream State could be a
7 supplicant to EPA. But that's just not so.

8 MR. BUTKIN: Well, the upstream State can make
9 its wishes known to Oklahoma during the --

10 QUESTION: It's a downstream State. But EPA
11 doesn't have a role in this.

12 MR. BUTKIN: And I would presume that they --

13 QUESTION: Isn't that correct? I just want to
14 make sure I understand what you're saying.

15 MR. BUTKIN: The upstream State can make its
16 wishes known to the downstream State. And I would presume
17 the upstream States and all States can make their wishes
18 known to EPA, also.

19 QUESTION: Yeah, but EPA does not have
20 dispositive role in the decision on this question. Isn't
21 that so?

22 MR. BUTKIN: Not until they approve the standard
23 as a for the no degradation policy. But EPA requires --

24 QUESTION: No, but when you're talking -- if I
25 understand you, you're talking about two different things.

1 We're talking about designation of rivers, on the one
2 hand, and water quality standards on the other. River
3 designation, EPA doesn't have a dispositive role.

4 MR. BUTKIN: That's correct.

5 QUESTION: So the upstream State is nothing but
6 a suppliant to the downstream State, on your view.
7 That's the best it can do.

8 MR. BUTKIN: In terms of the development of the
9 water quality standards --

10 QUESTION: No, no, no. On the designation of
11 the river.

12 MR. BUTKIN: No, the designation of the river,
13 that would be correct.

14 QUESTION: Well, if the designation of the river
15 is operative, that's the end of the game. Because if that
16 controls, then it doesn't do them much good to have a role
17 as objectors with respect to water quality which is
18 intended to satisfy or to preserve the status of the river
19 which is now binding upon everybody.

20 MR. BUTKIN: But remember, EPA, the statutory
21 scheme and regulatory scheme requires us to so designate
22 these rivers. We must inventory our rivers. We must
23 designate outstanding rivers, and once those are
24 approved --

25 QUESTION: Maybe you must, but isn't it true

1 that on the analysis you've just given us, once the river
2 is designated, that's basically the end of the game, so
3 far as what the upstream State can reasonably expect to be
4 allowed to do in the future. Everything hinges on the
5 designation of that river.

6 MR. BUTKIN: That's right.

7 QUESTION: Okay.

8 QUESTION: How come the EPA issued this permit?
9 Because they found there wouldn't be any measurable
10 degradation?

11 MR. BUTKIN: The EPA issued this permit because
12 they found there were no impacts other than the crossing
13 of the pollutants into the river. We think there is an
14 internal contradiction in that finding because the EPA
15 also made a finding that phosphorous controlled algae
16 growth in this particular river.

17 We think it's important the Federal law, though,
18 be applied consistently. And here EPA below did not
19 construe any authority to --

20 QUESTION: Well, what do you think it meant by
21 no detectable or measurable -- degradation?

22 MR. BUTKIN: Justice, I think they were
23 turning -- I think they meant something other than the
24 phosphorous coming in -- a nuisance, a harm to a
25 particular use, bass fishery, recreation, and so forth.

1 QUESTION: Well, they purported to be construing
2 your standard, which is Federal law. They -- and they
3 thought, as construed by them, this permit should issue
4 because there wasn't any harm to your water. Isn't that
5 right?

6 MR. BUTKIN: Yes, that's right.

7 QUESTION: And you disagree with them on that
8 finding.

9 MR. BUTKIN: Right. And we think they made a
10 big mistake for two reasons. One is they --

11 QUESTION: Well, you agree, though, that they
12 have the -- they have the authority to construe your
13 standard as Federal law?

14 MR. BUTKIN: I do, however, I think the plain
15 meaning --

16 QUESTION: Now wait a minute. Let's just assume
17 -- let's just assume that the way they construe it is one
18 of the rational ways of construing it. Then you must
19 defer to them, don't you?

20 MR. BUTKIN: I'm not sure. If I can back on my
21 previous answer, the statute sets up a partnership between
22 the States and the Federal Government. It's not clear in
23 the statute to whom you defer. Our feeling in this case,
24 Justice, is that you don't have decide in this case who
25 the senior partner is in that partnership, because no

1 matter who you defer to, the Tenth Circuit should be
2 affirmed.

3 EPA has consistently interpreted this same
4 standard to mean no new pollutant discharge can reach this
5 river -- as recently as year before this very hearing.

6 QUESTION: Yes, but in this case they said that
7 your water -- your water quality standard was not being
8 violated.

9 MR. BUTKIN: Yes, but they applied an entirely
10 different test. The test they'd always applied previously
11 was --

12 QUESTION: I know, but they -- in this case they
13 construe your standard, and they say it's not being
14 violated.

15 MR. BUTKIN: That's correct.

16 QUESTION: And you think -- so how do we review
17 that? As what, arbitrary and capricious or what?

18 MR. BUTKIN: Yes, I think it's arbitrary and
19 capricious to totally abandon your prior interpretations,
20 including the prior interpretation you gave a year
21 previously to a similar discharger in Oklahoma. And the
22 Chief Judicial Officer of the Environmental Protection
23 Agency construing his authority below said we do not have
24 any authority to balance the interests of Oklahoma and
25 Arkansas. We do not have any authority to soften this

1 standard, or apply it differently to an Oklahoma
2 discharger as opposed to an Arkansas discharger.

3 QUESTION: And you say they utterly ignored in
4 making this ruling the fact that phosphorous was getting
5 into your river.

6 MR. BUTKIN: Absolutely.

7 QUESTION: At the State line.

8 MR. BUTKIN: Absolutely. And consistent with
9 our own --

10 QUESTION: And what does phosphorous do for you
11 or against you?

12 MR. BUTKIN: Phosphorous is a pollutant which
13 creates more algae in a river. And there was also a
14 finding in this case that phosphorous was the controlling
15 element in this particular river system.

16 QUESTION: And what does algae do?

17 MR. BUTKIN: It causes algae -- algae
18 destroys -- it depletes oxygen and contaminates rivers.

19 QUESTION: And it destroys -- and eventually it
20 destroys the fishery.

21 MR. BUTKIN: That's right.

22 QUESTION: The EPA for Oklahoma was -- or
23 prohibition for Oklahoma was for a source that was being
24 discharged directly into the designated river, was it not?

25 MR. BUTKIN: No, it was not. The Tahlequah

1 discharged, or went into a tributary.

2 Today, the Solicitor General attempts to make a
3 distinction based on tributaries and says, you know that's
4 the rule that presumably would have been implied if the
5 standards were enforced. But we know darn well that in
6 1986, EPA said, same river, discharge comes in through a
7 tributary. If it increases the amount of phosphorous in
8 that river, that's a violation of the standard.

9 QUESTION: Well, but the discharge was into the
10 tributary.

11 MR. BUTKIN: The discharge was in the tributary,
12 yes.

13 QUESTION: And that's what happened here.

14 MR. BUTKIN: Exactly. Same situation.

15 QUESTION: May I just ask you a little question
16 to clear up my confusion on the phosphorous. I take it
17 makes a difference how much water there is in the river.
18 In other words, a pound of phosphorous in the Mississippi
19 River would be different from a pound of phosphorous in
20 the Illinois River.

21 MR. BUTKIN: I think a pound of phosphorous
22 anywhere is harmful.

23 QUESTION: Well, is it? If the ratio of
24 phosphorous to water in the water crossing State line is
25 less than the ratio of phosphorous to water in the

1 Oklahoma part of the river, is it still a violation of the
2 statute?

3 MR. BUTKIN: Not necessarily.

4 QUESTION: The -- and are there findings on that
5 point?

6 MR. BUTKIN: No.

7 QUESTION: So all you've got is the absolute
8 amount of phosphorous.

9 MR. BUTKIN: The critical finding --

10 QUESTION: Which really doesn't tell us
11 anything, does it?

12 MR. BUTKIN: It tells you enough because it's
13 been -- phosphorous has been recognized as a pollutant,
14 one of the most serious pollutants.

15 QUESTION: I know, but if the ratio of
16 phosphorous is even smaller, perhaps this discharge is
17 actually making your river somewhat cleaner.

18 MR. BUTKIN: There was no finding on that. And
19 if it made it cleaner --

20 QUESTION: Well, it's at least theoretically
21 possible; isn't that --

22 MR. BUTKIN: Yes, but I would caution if that
23 were true in this case, why wouldn't Arkansas want it all?
24 It would be the same ratio if it were 100 percent of the
25 effluent, the same concentration. Arkansas deliberately

1 decided to ship half of the entire effluent flow from
2 Fayetteville to Oklahoma.

3 QUESTION: Into a more polluted river, I think,
4 yeah.

5 QUESTION: Well, but we don't -- the trouble is
6 we don't know, at least I don't think we know, how it is
7 that the concentration of pollution in Oklahoma gets to be
8 that way. It may be, for all I know, that Oklahoma is the
9 one that's principally messing up the river. And
10 therefore, Arkansas might not want it all because its
11 share of the river is cleaner. And yet it might still be
12 the case, on Justice Stevens' argument, that the amount of
13 extra water that is being discharged along with the 6
14 pounds of phosphorous would actually effect an improvement
15 of the river once it gets to the dirty section in
16 Oklahoma.

17 I mean that -- and in fact that, at least the
18 latter part of my suggestion, is a claim here, even though
19 there's no finding. Isn't that true?

20 MR. BUTKIN: There's no finding, and I think,
21 you know, in the Tahlequah situation it was the increased
22 load in and of itself. EPA's always, until this case,
23 interpreted the standard to mean you just don't add any
24 pollutant load, pounds of pollutants.

25 QUESTION: Can I ask you one other question?

1 MR. BUTKIN: Yes, sir.

2 QUESTION: I was reading section 3 of you
3 standards about the anti-degradation policy. The
4 sentence: no further quality -- water quality degradation
5 which would interfere with, and so forth, shall be allowed
6 -- this is an Oklahoma command. Does that mean shall be
7 allowed by any Oklahoma discharger, anyone subject to the
8 Oklahoma?

9 MR. BUTKIN: Yes, and that's --

10 QUESTION: So that doesn't actually apply to
11 discharges in Arkansas.

12 MR. BUTKIN: Our federally approved standards
13 are equal -- if I understand the question correctly, are
14 equally applicable to all Oklahoma discharges.

15 QUESTION: Right. But not to discharges in
16 Arkansas that may find their way into Oklahoma.

17 MR. BUTKIN: Yes, if they violate our standard
18 of the State law.

19 QUESTION: Then how can Oklahoma issue a rule
20 that says something shall not be allowed in another State?

21 MR. BUTKIN: Because the -- as the Environmental
22 Protection Agency and the Tenth Circuit found below, if
23 that something allowed in the other State crosses the
24 Oklahoma State line, we're not talking about violations of
25 State law, we talking about violations of Federal law.

1 The statute very clearly says that the Administrator must
2 condition a permit to require compliance with all water
3 quality -- federally approved water quality standards,
4 including downstream States.

5 And any other result would, we feel, and the EPA
6 felt and the Tenth Circuit felt, totally destroy the
7 statutory framework which focuses on clean water.

8 QUESTION: What if a permit wasn't involved
9 here? What if Arkansas people, riparian owners, started
10 discharging things into the river. And -- say they just
11 dump phosphorous in the river and it reached Oklahoma.
12 What could you do about it?

13 MR. BUTKIN: If it's not a point source
14 discharge, we would deal through it not with the permit
15 process, but with the separate part of the program that
16 deals with nonpoint sources. And Oklahoma and Arkansas
17 recently received a grant to address that problem as well
18 in the same river.

19 But I'd urge the Court to keep in mind that the
20 statute deals -- the part of the statute we're dealing
21 with here is --

22 QUESTION: Well, you haven't answered
23 my -- could Oklahoma do anything about that in my --

24 MR. BUTKIN: Not through a -- possibly through a
25 common law nuisance suit under Arkansas law.

1 QUESTION: But that's about it, without having
2 some agreement with Arkansas.

3 MR. BUTKIN: That's right.

4 QUESTION: Well, Oullette recognized the
5 nuisance action, didn't it?

6 MR. BUTKIN: That's right.

7 QUESTION: It's a question of whose law applies.

8 MR. BUTKIN: That's right.

9 Justices, in addition to -- it is true that each
10 case must be decided on its own, but I also feel it's
11 important that EPA be consistent with its interpretations
12 of its standards. And EPA did depart very dramatically
13 from the interpretations it has provided for and since for
14 this same standard, which says no degradation means no new
15 pollutant mode can enter that river.

16 But in addition to that, the position taken by
17 the agency below totally destroyed the very purpose and
18 structure of the anti-degradation policy. The
19 anti-degradation policy is built upon three levels, and at
20 the bottom of those levels, the critical factor is to
21 protect a use of a river -- a use for bass, a use for
22 recreation, and so forth. At the top of the protection,
23 you provide no degradation for Outstanding National
24 Resource waters.

25 What the EPA did in this case is they said,

1 we'll let more and more and more pollutants in until we
2 see a sign of a loss of use, until we see a sign of a loss
3 of some other protected standard for the river. And what
4 they did was they basically collapsed that top-tier
5 protection mandated by Federal law for this highest of
6 protected rivers.

7 QUESTION: Yes, but the other side of the coin,
8 as I understand you, if there's any phosphorous at all,
9 and presumably there's always going to be a little bit
10 left, they can't open a new plant and they can't grant a
11 new permit. I don't see how they could ever grant a new
12 permit under your rationale.

13 MR. BUTKIN: They can obtain a permit that will
14 not violate our water quality standards. In the record in
15 this case, there were two alternatives available to
16 Fayetteville that would not have hurt any State's water
17 quality standards. One of them was land treatment.

18 QUESTION: But I mean they couldn't discharge
19 any -- it could not make a discharge into the river that
20 would have an phosphorous in it whatsoever.

21 MR. BUTKIN: For a river with this protection,
22 if the phosphorous reached the Oklahoma State line.

23 QUESTION: Well, isn't that -- that was your
24 earlier answer. In other words, you're not saying that
25 they could never discharge into the river.

1 MR. BUTKIN: Right.

2 QUESTION: You're simply saying the can't
3 discharge if any measurable quantity passes the line into
4 Oklahoma.

5 MR. BUTKIN: That's right. And it's a Federal
6 program. The Federal program is designed to set water
7 quality standards at the highest when the lowest common
8 denominator. 301(b)(1)(C), you cannot issue a permit
9 unless a permit applicant can achieve any more stringent
10 or protective requirement required to implement any
11 applicable water quality standard established pursuant to
12 this chapter. Any applicable water quality standard. And
13 those would be the standards, of course, of all States
14 that might be impacted by a discharge.

15 And the contrary ruling would be tremendously
16 detrimental to the purposes of the program. You'd have a
17 situation -- as EPA said consistently below, you'd have a
18 program where polluters would locate just across the State
19 line and dump into interstate rivers and pollute the
20 downstream States.

21 QUESTION: Mr. Butkin, may I ask you to switch
22 gears for a second, 'cause your time is drawing to a
23 close, And there's something I don't understand. Section
24 401 refers to, in at least in what I thought might be the
25 referent to what would be an applicable water quality

1 requirement. It referred to a series of other statutes,
2 including 1313, which as I understand it, is the section
3 under which water quality standards are promulgated and
4 approved.

5 Section 402 does not seem to mention 1313 at
6 all. And it says later on, as you know, in section 402
7 that this recommendation process is authorized.

8 Is there any significance to the fact that 1313,
9 referring to water quality standards, is not referenced in
10 402 with its provision for this process of recommendation
11 and acceptance or rejection?

12 MR. BUTKIN: We think not because 402 requires
13 compliance with section 301; 301 requires compliance with
14 all federally approved water quality standards. Those
15 are, by definition, the standards approved through section
16 303.

17 QUESTION: Okay. Thank you.

18 MR. BUTKIN: Just as in the Clean Water Act, the
19 Congress, working with the EPA, created a one-way street
20 working entirely towards cleaner water. A clean water
21 standard is a standard to improve the quality of water, a
22 designated use is a use be achieved through the applicable
23 water quality requirements.

24 While the Solicitor General is not asking you to
25 affirm the key ruling in the Tenth Circuit, that

1 downstream federally approved water quality standards must
2 be enforced and applied in proceedings, we ask you to
3 affirm that, as EPA below said that was critical to the
4 functioning and survival of the Clean Water Act program.

5 In this case, I think the Tenth Circuit properly
6 recognized that the administrative law judge had permitted
7 Fayetteville a wrong turn down that one-way street, and we
8 ask that the Tenth Circuit be affirmed.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Butkin.

11 I think your time has expired, Mr. Wallace.

12 The case is submitted.

13 (Whereupon, at 11:55 a.m., the case in the
14 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents and accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 90-1262- ARKANSAS, ET AL., Petitioners V. OKLAHOMA, ET AL.;

and

NO. 90-1266 - ENVIRONMENTAL PROTECTION AGENCY, Petitioner V.

OKLAHOMA, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)