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INTERSTATE WATER POLLUTION AND THE CLEAN WATER ACT: OKLAHOMA v. EPA CREATES THE PREVENTATIVE REMEDY

INTRODUCTION

When Congress amended the Federal Water Pollution Control Act in 1972, it began a series of events which created uncertainty in the rights and remedies available to states in interstate water pollution cases. In 1981, the United States Supreme Court held that the 1972 amendment preempted federal common law. Then, in 1987, the Supreme Court held that the Federal Water Pollution Control Act, now known as the Clean Water Act ("CWA"), preempted a state's own common law remedies to the extent that it sought to impose liability on a discharger located in another state. As a result of these two decisions, referred to as the "preemption cases," states affected by water pollutant discharges in another state ("affected states") appeared to have little control over pollution crossing into their borders from out-of-state sources ("source states").

Recently, in a case of first impression, the United States Court of Appeals for the Tenth Circuit empowered affected states with the ability to control interstate water pollution. In Oklahoma v. EPA, the court held that no discharge permit shall issue to a discharger unless the discharger complies with all applicable water quality standards ("WQSs"), including the federally approved standards of affected downstream states.

The propriety of the court's interpretation of the CWA becomes apparent after examining the CWA as a whole and the preemption cases leading up to

4. International Paper Co. v. Ouellette, 479 U.S. 481 (1987). In Ouellette, the Court held that the common law of the state in which the polluter is located is the applicable law. Id. at 500.
6. 908 F.2d 595 (10th Cir. 1990).
7. A water quality standard ("WQS") consists of a use designation for the water and the criteria necessary to meet that use. 33 U.S.C. § 1313(c)(2) (1988). For example, a WQS might require a particular section of a river to be of fishable-swimmable use and require the phosphorous concentration of that water to be no more than 25 milligrams per liter. See Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1272 (5th Cir. 1980) (defining a WQS).
8. Oklahoma, 908 F.2d at 615.
9. International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (holding that the CWA preempts federal and state common law to the extent that it is applied to an out-of-state source); (Milwau-
Oklahoma. The court's decision is further supported when one considers the fact that pollution does not recognize state boundaries. The court correctly determined that the mandate of the CWA would become illusory if upstream sources were free to ignore downstream states' WQSs. The court's decision also discourages congressionally condemned "pollution shopping" by industry seeking states with less stringent WQSs.

The decision creates a preventative remedy for states, empowering them to control the amount of pollution entering their waters from out-of-state sources before a discharge actually occurs. A state can now set its WQSs as stringently as it desires, and after approval by the EPA, it can require dischargers to comply with the WQSs before a permit is issued and any discharge takes place.

Prior to Oklahoma, the preemption cases appeared to leave an affected state with little ability to protect its waters from out-of-state dischargers. Out-of-state dischargers, like the pollution they discharged, could ignore state boundary lines. The following hypothetical demonstrates the typical situation. Assume one state has a state scenic river park extending along the river for some distance into the state. In order to protect the scenic beauty and wildlife in this park, this affected state imposes stringent WQSs on this section of the river. Forty miles upstream from the border of this state, the neighboring state builds a wastewater treatment plant which discharges directly into this river. This source state's WQSs are substantially less stringent than the affected state's. The source state then obtains a permit from the Environmental Protection Agency ("EPA") based only on the restriction that the treatment plant may not violate the source state's liberal WQSs. However, computer projections show that the expected discharge will violate the affected state's WQSs and seriously degrade the water quality in that state's portion of the river. Nonetheless, because the treatment plant is restricted only by the source state's WQSs, it begins to discharge into the river. Thus, the affected state's attempts to preserve this river are undermined.

As a result of Oklahoma, source states are required to respect and comply with affected states' WQSs. The decision recognizes that the transitory nature of water pollution makes it a national problem which cannot be solved by isolated, state-by-state regulation. The Tenth Circuit realized that Oklahoma's

kee II), 451 U.S. 304 (1981) (same); see infra notes 203-20 and accompanying text (discussing these two cases).
10. See infra notes 306-54 and accompanying text (analyzing the Oklahoma court's discussion of the CWA and the preemption cases).
11. See infra notes 316-17 and accompanying text (discussing the court's interpretation of the CWA's general regulatory framework).
12. See infra note 320 and accompanying text (discussing the "pollution shopping" that would occur absent the Oklahoma decision).
13. See supra note 5 and accompanying text (discussing the effect of the preemption cases on the scope of remedies available to affected states); infra notes 203-20 and accompanying text (discussing the preemption cases).
14. This was essentially the situation involved in Oklahoma.
attempts to preserve its water quality by setting stringent WQSs is merely aspirational if their WQSs are violated by an Arkansas discharger.\textsuperscript{16}

Section I of this Note reviews the CWA. In Section I, relevant provisions of the CWA are examined along with the corresponding legislative history. The preemption cases are also discussed in Section I. Section II details the factual background, procedure, and the Tenth Circuit's analysis in \textit{Oklahoma}. Section III analyzes the implications of the court's holding, argues that one state cannot use economic arguments to have the EPA declare another state's WQSs inconsistent with the CWA, and examines the enforcement remedies available to states under the CWA. Finally, the last section of this Note discusses how \textit{Oklahoma} necessarily expands the EPA's role in overseeing water quality regulation under the CWA. Furthermore, environmentally conscious states will be encouraged to revise existing WQSs, and actively enforce their WQSs against neighboring states. The section concludes with a discussion of the possible enforcement remedies available to affected states and the steps a state must take to ensure other states comply with their WQSs.

\section*{I. Background}

When the Supreme Court first defined a federal common law remedy for interstate pollution cases in 1972, Justice Douglas pointed out that "new federal laws and new federal regulations may in time preempt the field of federal common law."\textsuperscript{17} Even though the federal courts, unlike state courts, generally do not have the power to develop and apply their own laws,\textsuperscript{18} the Court concluded that federal courts often fashion common law "where there is an overriding federal interest in the need for a uniform rule of decision."\textsuperscript{19} Therefore, given a strong federal interest in the purity of interstate waters, the Court found it necessary to create federal common law.\textsuperscript{20}

Shortly after that decision, in 1972, Congress amended the then existing Federal Water Pollution Control Act ("FWPCA").\textsuperscript{21} The preemption line of cases held that the CWA preempted the federal common law of nuisance and state common law remedies to the extent that only the law of the discharger's

\begin{itemize}
\item \textsuperscript{15} Oklahoma v. EPA, 908 F.2d 595, 606 (10th Cir. 1990).
\item \textsuperscript{16} Illinois v. City of Milwaukee ("Milwaukee I"), 406 U.S. 91, 107 (1972). This was the first in a series of three disputes between Illinois and the City of Milwaukee. This first case recognized that a federal common law action existed in interstate water disputes. \textit{Id.} at 107 & n.9. The second case held that the CWA preempted any federal common law actions. Milwaukee II, 451 U.S. 304 (1981). Finally, Illinois unsuccessfully sought relief against Milwaukee under Illinois state nuisance law. Illinois v. City of Milwaukee ("Milwaukee III"), 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985).
\item \textsuperscript{17} Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
\item \textsuperscript{18} Milwaukee I, 406 U.S. at 105 & n.6. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1175 (1970), was in place at the time of the litigation, but the Court found that the Act did not adequately address the problem Illinois faced. Milwaukee I, 406 U.S. at 103.
\item \textsuperscript{19} Milwaukee I, 406 U.S. at 102-06.
\end{itemize}
state could be used against that discharger. The 1972 FWPCA amendments, therefore, left unclear what remedies were available to affected states in interstate water pollution cases. Delineating an answer begins with an understanding of the CWA.

A. Definitions

The CWA defines several terms which are critical to understanding the CWA’s provisions. The CWA regulates the discharge of pollutants into navigable waters by point source dischargers. The “discharge” of a pollutant is defined broadly as “any addition of any pollutant to navigable waters from any point source.” The “pollutants” which the CWA regulates include the residual materials from industrial processes and municipal waste treatment facilities. “Navigable waters” include any “waters of the United States." This is a very broad definition encompassing virtually all bodies of water. A “point source” is “any discernible, confined and discrete” conduit. A point source would include, for example, a pipe, trench, ditch, tunnel, or well. The EPA is the federal administrative agency responsible for the protection of the Nation’s environment, and more specifically, authorized by Congress to execute the provisions of the CWA.

21. See infra notes 203-20 and accompanying text (discussing the preemption cases).
23. Id. § 1362(6). Section 1362(6) defines “pollutant” as:
   dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) “sewage from vessels” within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
24. Id. § 1362(7) (defining navigable waters as “the waters of the United States, including the territorial seas”).
25. 2 ENVTL. LAW INST., LAW OF ENVIRONMENTAL PROTECTION § 12.05[1][a] (S. Novick ed. 1990). One type of water that is not “navigable water” is underground water. Id.
   The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.
27. Id.
28. Id. § 1251(d). The EPA’s authority to execute the CWA is limited only where “otherwise expressly provided in [the CWA].” Id.
The CWA has two mechanisms to regulate the discharge of pollutants from point source dischargers: WQSs and effluent limitations.\textsuperscript{29} Initially under the CWA, the federally designated effluent limitations, which were based on the technological and economic ability of a source to control its discharge, were an important weapon in regulating water pollution.\textsuperscript{30} However, as point sources achieve compliance with federal effluent limitations, the role of WQSs has become increasingly more important. As a result, states are turning to WQSs to establish more stringent limitations on the discharge of pollutants into their waters.\textsuperscript{31}

Effluent limitations and WQSs are distinct concepts but combine to form an important regulatory framework under the CWA. WQSs are numerical or narrative limits established for both individual pollutants, such as phosphorous and lead, and for general parameters, such as $\text{pH}$ ( acidity) or water clarity.\textsuperscript{32} WQSs reflect the amount of water quality degradation, resulting from pollutants, considered by the state agency to be consistent with that water's designated use.\textsuperscript{33} Thus, a WQS consists of two parameters: a use designation, and the water quality criteria necessary to meet that use.\textsuperscript{34} A use designation represents the level of water quality that the state desires for a particular body of water based on the general purpose of that water.\textsuperscript{35} Water quality criteria are

\textsuperscript{29} ENVTL. LAW INST., supra note 25, § 12.05[3][c][i]; see United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977); Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1281 (D.S.D. 1979); infra notes 82-127 and accompanying text (discussing the establishment of WQSs under § 303 of the CWA). The CWA also provides for the establishment of other water quality based limitations. ENVTL. LAW INST., supra note 25, § 12.05[3][c]. These include federally established water quality based effluent limitations under § 302, toxic effluent standards under § 301, and restrictions on marine water discharges under § 403. Id.

\textsuperscript{30} Gaba, Federal Supervision of State Water Quality Standards Under the Clean Water Act, 36 VAND. L. REV. 1167, 1169 (1983). WQSs were abandoned as a primary mechanism of water pollution control because scientific and administrative difficulties arose in implementing them. Id.; see F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 4.05 (1981) (discussing the role of effluent limitations under the CWA); infra notes 54-71 and accompanying text (discussing the setting of effluent limitations under § 301 of the CWA).

\textsuperscript{31} See Gaba, supra note 30, at 1170.

\textsuperscript{32} See ENVTL. LAW INST., supra note 25, §§ 12.01[3][b]-[c], 12.05[3][c][i][A] (discussing WQSs under the CWA).

\textsuperscript{33} Id. A WQS is defined by the federal regulations as:

provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

\textsuperscript{34} 40 C.F.R. § 131.3 (1990).

\textsuperscript{35} 33 U.S.C. § 1313(c)(2) (1988). The WQSs involved in Oklahoma were narrative. For example, the criteria for Oklahoma's nutrients WQS required that "[t]he total phosphorous concentration and the nitrogen/phosphorous concentration ratio shall not be increased to levels which result in man-induced eutrophication problems." Oklahoma v. EPA, 908 F.2d 595, 617 (10th Cir. 1990).

\textsuperscript{36} 40 C.F.R. § 131.2 (1990). With regard to use designations, § 131.10 provides:
The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish
defined as elements of WQSs "expressed as constituent levels, or narrative statements, representing a quality of water that supports a particular use." EF
For example, a WQS might designate a certain river to be used as fishable and swimmable water (use designation), and require a water quality criteria of no more than twenty-five milligrams of chloride per liter of water (water quality criterion). Federal regulations require the criteria used by the state must be based on "sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 

"Effluent limitations" are defined under the CWA as "any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean." Thus, an effluent limitation may, for example, restrict a point source from discharging effluent with a concentration of more than thirty milligrams of suspended solids (sewage particles in water) per liter of discharge. 

WQSs are considered to supplement effluent limitations in that they can be used to further regulate a point source's discharge. Effluent limitations can be considered the means of preventing and restricting discharges at their source, whereas WQSs are a measure of effectiveness. That is, a state or the EPA places effluent limitations on the discharger in order to meet the applicable WQSs of the body of water in which the pollution is being discharged.
In sum, the CWA requires any point source discharging pollutants into navigable waters to meet federally established, technology-based effluent limitations, as well as any other effluent limitations necessary to insure compliance with any applicable WQSs. WQSs can be considered the desired ends which must be attained by the means of effluent limitations. A more in-depth examination of specific provisions of the CWA reveals how these two mechanisms are implemented to protect the nation's waters.

B. The Clean Water Act

The CWA is regarded as a "comprehensive" and "all-encompassing" approach to water pollution regulation. The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To accomplish this objective, the CWA's mandate is to eliminate discharges of pollutants into navigable waters. The CWA makes the discharge of any pollutant unlawful, except as allowed under specific sections of the CWA. Section 402 of the CWA creates the National Pollutant Discharge Elimination System ("NPDES"). Under the NPDES, a point source must obtain a permit to discharge pollutants into navigable waters. Through the NPDES, WQSs and effluent limitations become individual point source obligations. That is, the WQSs become the ends that must be achieved by the means of effluent limitations which must be followed by a

be further regulated to prevent water quality from falling below acceptable levels"); 33 U.S.C. § 1312(a) (1988) (requiring the EPA to set effluent limitations "which can reasonably be expected to contribute to the attainment [of the necessary] water quality"); ENVTL. LAW INST. supra note 25, § 12.05[3][c][i] (stating that specific effluent limitations must be set to insure that the WQSs are not violated).

45. Id. § 1251(a)(1).
46. Section 301 of the CWA provides: "Except as in compliance with this section and sections [1312, 1316, 1317, 1328, 1342, and 1344 of this title], the discharge of any pollutant by any person shall be unlawful." Id. § 1311(a). Sections 1328, 1342, and 1344 establish permit procedures that allow a permit holder to discharge pollutants into navigable waters. Id. §§ 1328, 1342, 1344. Section 1312(a) allows the EPA to set water quality related effluent limitations, but a point source will not have to comply with such a limitation if it can show that there is "no reasonable relationship between the economic and social costs and the benefits to be obtained." Id. § 1312(a), (b)(2). Section 1316 allows newly constructed point sources that meet currently applicable federal standards of performance to be free from "any more stringent standard of performance for a ten-year period beginning on the date of completion [of the point source]." Id. § 1316(d); see ENVTL. LAW INST. supra note 25, § 12.05[3][a][iv][C]. Section 1317 establishes special procedures governing the discharge of toxic pollutants. 33 U.S.C. § 1317 (1988).
48. Id. § 1342(a)(1). Section 1342(a)(1) provides, in part: "Except as provided in sections [1328 and 1344 of this title], the [EPA] may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, . . . notwithstanding [section 1311(a) of this title] . . . ." Id.
49. Id. §§ 1311-1345; see also EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976) (discussing the NPDES system).
discharger. The CWA sets minimum requirements for water pollution control. However, a state is free to set more stringent measures. State WQSs are approved by the EPA and become the WQSs for the applicable waters of the State. At issue in Oklahoma was whether an out-of-state discharger must comply with a neighboring state's WQSs.

The CWA can be better understood by examining relevant provisions of the CWA along with appropriate legislative history. The discussion first examines the prohibition of pollutant discharges without a permit. Next, the EPA's authority to set stricter effluent limitations than those set by the state is examined. The sections governing the state's review and subsequent federal approval of a state's WQSs are examined next. Finally, sections regulating the rights of the states to set WQSs and effluent limitations, and to administer discharge permits, are examined, as well as the enforcement procedures available under the CWA.

1. Section 301: Requiring Permits and Setting Effluent Limitations

Section 301 has been referred to as "the cornerstone of the [CWA]." This section prohibits the discharge of any pollutant into navigable waters by any person without a permit issued under the CWA. Section 301 contains two kinds of restrictions on the discharge of pollutants. First, the EPA must establish federal technology-based effluent limitations. The goal of these limitations is to use technology that will eventually eliminate pollutant discharges into navigable waters. In this regard, Congress intended the CWA to be "technology forcing," pressing technology and economics to achieve increasingly tougher goals on industry. Second, section 301 requires either the state...
or the EPA to achieve the effluent limitations necessary to meet state WQSs or other requirements of state or federal law. 60

The CWA initially required the EPA to establish effluent limitations for industrial dischargers based on the "best practicable control technology." 60 This technology required the elimination of only those discharges where "the costs imposed on the industry [were] worth the benefits in pollution reduction." 61 Congress then amended the CWA, requiring the technological standard applied to the point source to be dependent on the type of the discharge. 62 Accordingly, for discharges of conventional pollutants, the EPA sets

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supra note 38, at 1464. The report also states, "Pollution continues because of technological limits, not because of any right to use the nation's waterways for the purpose of disposing of wastes." Id. at 42, 2 LEGISLATIVE HISTORY, supra note 38, at 1460.

59. 33 U.S.C. § 1311(b)(1)(C) (1988). This section states:

In order to carry out the objective of this Act there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by [section 1370]) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act. Id.; see also United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977) (discussing how the CWA provides for federal effluent limitations and for states to set more stringent limitations, including WQSs); V. YANNAcone, B. COHEN & S. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES § 5:11 (Supp. 1988) (discussing § 1311's regulatory framework).

The Oklahoma court noted that § 301 was interpreted by the Chief Judicial Officer and Administrative Law Judge as requiring out-of-state sources to meet WQSs of another state. Oklahoma v. EPA, 908 F.2d 595, 608 (10th Cir. 1990) (quoting Order on Petitions for Review); see also S. REP. No. 414, 92d Cong., 1st Sess. 44 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 38, at 1462. (emphasis added); H.R. REP. No. 911, 92d Cong., 2d sess. 100 (1972) reprinted in SENATE COMMITTEE ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 787 (1973) [hereinafter I LEGISLATIVE HISTORY]. The House report states: "Subsection (b) of section 301 establishes a technological basis for the determination of effluent limitations for any discharge of pollutants provided that such limitations, at a minimum, are, when applied to all point sources, adequate to meet existing or new water quality standards as provided under section 303." Id. (emphasis added). The report continues:

[T]he Committee intends that if the sum of the discharges from point sources meeting such effluent limitations would preclude the meeting of water quality standards in existence on the date of enactment of the 1972 Amendments, or those promulgated pursuant to section 303, new and more stringent effluent limitations would have to be established consistent with such water quality standards.

Id. at 101-02, 1 LEGISLATIVE HISTORY, supra note 59, at 788-89 (emphasis added).

60. 33 U.S.C. § 1311(b)(1)(A) (1988); see United States Steel Corp., 556 F.2d at 830 (discussing how the CWA restricts the discharge of pollutants). Best practicable control technology is referred to as "BPT." ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][A]. The CWA treats publicly owned treatment works ("POTW") differently than industrial dischargers. See 33 U.S.C. § 1311(b)(1)(B) (1988) (excepting POTWs from BPT and creating a separate category of effluent limitations based on secondary treatment technology).


62. See 33 U.S.C. § 1311(b) (1988); ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][A];
effluent limitations that comply with the best conventional pollutant control technology ("BCT"). For discharges of toxic and non-conventional pollutants, the EPA applies the best available control technology ("BAT").

In setting effluent limitations that comply with the BCT, the EPA must perform a cost/benefit analysis. This cost-effectiveness test compares the costs and benefits of the effluent reduction technology. The analysis takes into account "the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the [EPA] deems appropriate." In contrast, a cost/benefit analysis is not required for BAT, although the same factors are considered and cost is weighed in considering whether the technology is achievable. However, because the CWA demands the eventual elimination of pollutant discharges, the benefits in pollution reduction achieved under BAT need not be greater than the costs to the industry. Thus, even technology that involves costs that outweigh the benefits of the resulting pollution reduction must be utilized. The industrial discharger must commit the "maximum resources economically possible," incorporating all available technology which is economically achievable. Therefore, the EPA's authority to

F. SKILLERN, supra note 30, § 4.05. There are four classes of pollutant discharges under the CWA: conventional, toxic, unconventional, and heat. ENVTL. LAW INST., supra note 25, § 12.05(3)[a][ii][A].

63. See 33 U.S.C. § 1311(b)(1)(A)-(2)(F) (1988); see also F. SKILLERN, supra note 30, § 4.05 (discussing how effluent limitations are set under § 1311). Conventional pollutants include suspended solids, fecal coliform, pH, oil, and grease. See 33 U.S.C. § 1314(a)(4) (1988); ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][B]. Conventional pollutants are those typically discharged by POTW. Id. POTWs are required to achieve secondary treatment standards as defined by the EPA. 33 U.S.C. § 1311(b)(1)(B) (1988).

64. 33 U.S.C. § 1311(b)(2)(A)-(F) (1988). This would include pollutants such as ammonia, chlorides, nitrates, and iron. ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][C].

65. See 33 U.S.C. § 1314(b)(4)(B) (1988); see also ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][B] (discussing the setting of BCT for conventional pollutants).

66. 33 U.S.C. § 1314(b)(4)(B) (1988); ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][B].

67. 33 U.S.C. § 1314(b)(4)(B) (1988); ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][B].

The EPA must also perform another cost test, which was intended to equate BCT with the technology applied to POTW. Id. This test requires the EPA to compare the cost of reduction of conventional pollutants from POTW with the same cost from a category of industrial sources. Id.


69. National Ass'n of Metal Finishers v. EPA, 719 F.2d 624, 662-63 (3d Cir. 1983); see also Reynolds Metals Co. v. EPA, 760 F.2d 549, 565 (4th Cir. 1985) (stating that no cost/benefit balancing is required for BAT).

70. National Ass'n of Metal Finishers, 719 F.2d at 662.

71. Id. at 662-63 (citing EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 74 (1980)); see also ENVTL. LAW INST., supra note 25, § 12.05[3][a][ii][E] (discussing the determination of what is economically achievable to an industry).
set effluent limitations is limited by the costs of the technology.

Section 301 is violated, therefore, when a discharger does not obtain a permit according to the terms of the CWA. Section 301 requires the EPA to set effluent limitations based on the current technological ability to achieve those limitations. The EPA's technological dictates apply differently depending on the type of the discharge. Nevertheless, section 301 requires either a state or the EPA to establish the effluent limitations necessary to meet state WQSs.

2. Section 302: Water-Quality Related Effluent Limitations

Section 302 of the CWA authorizes the EPA to supplement effluent limitations set pursuant to section 301. The EPA has the authority to establish effluent limitations for the point source necessary to maintain the water quality of the affected water whenever a discharge from a point source would interfere with the attainment or maintenance of the water quality of a navigable water. Section 302 also requires a cost/benefit hearing before the EPA establishes the effluent limitations.

Section 302, like section 301, may also provide an out-of-state point source, and its state, with the ability to limit the EPA's authority in setting more stringent effluent limitations by allowing economic and social factors relevant to the state's economic well-being to be recognized by the EPA. However, this section guarantees a hearing only if the more stringent effluent limitations are adopted under EPA authority, not state authority.

The legislative history of section 302 indicates that this provision is to be used by the EPA only under extraordinary circumstances, such as when limi-

74. Id. § 1312(b); see also Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1285 (D.S.D. 1979) (section 302 only requires a hearing when water quality goals are not being attained). However, a Senate report on this section noted:
    The [effluent] limitations necessary to achieve a given level of water quality . . . may require more control . . . than that attainable through the application of [BAT].
    . . . [F]urther reduction of the level of effluent entering the affected waters may not be possible through control technology, yet essential to water quality. Alternative effluent control strategies, such as the transportation of effluents to other less affected waters or the control of in-plant processes would have to be developed.
75. See 33 U.S.C. § 1312(b)(2) (1988) (allowing a person affected by an effluent limitation set under § 1312 to not comply with that limitation if he or she can show that there is no reasonable cost/benefit relationship).
76. See Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1286 (D.S.D. 1979); see also Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1276 (5th Cir. 1980) (holding that the EPA can override state WQSs by changing the effluent limits in NPDES permits whenever a source interferes with water quality (citing 33 U.S.C. § 1312 (1976))).
tations set under sections 301 and 303 are found to be inadequate.\textsuperscript{77} Indeed, this section of the CWA has never been used by the EPA.\textsuperscript{78} Congress did not intend this section to "undercut . . . the development of [WQSs] under section 303 nor the imposition of section 301(b)(1)(C) of the [CWA]."\textsuperscript{79} This section was meant instead as a "supplemental" provision, directing the EPA and the State to "impose effluent limitations which assure the attainment or maintenance of water quality for the protection of public health, . . . fish, . . . wildlife, and recreational activities . . . where the adopted [WQSs] do not assure the attainment and maintenance of such uses."\textsuperscript{80}

In sum, section 302 provides the EPA with the authority to set more stringent limitations than those previously set in a permit by a state or the EPA. This is true even where the applicable WQSs are being met, but where those WQSs are not assuring the "attainment or maintenance of" the desired water quality.\textsuperscript{81} However, as the legislative history indicates, only where permit conditions are not stringent enough to meet the desired water quality will the EPA hold a cost/benefit hearing and set limitations necessary to achieve the desired water quality.

3. Section 303: Establishing WQSs and Requiring Federal Approval

a. Procedure

Section 303 was referred to by Congress as the "primary mechanism for the development of State water quality standards and effluent limitations based on them."\textsuperscript{82} Section 303 requires states to adopt WQSs for its navigable interstate and intrastate waters.\textsuperscript{83} States are also given the authority under this section to establish effluent limitations and WQSs which are more stringent

\textsuperscript{77} Congress believed that § 303 standards should generally protect water quality and that "[t]he [EPA] is to use the authority of section 302(a), however, where compliance with best available technology requirements or the State [WQSs] process are not attaining this level of water quality, due to point sources." S. Rep. No. 50, 99th Cong., 1st Sess. 24 (1985); see H.R. Rep. No. 911, 92d Cong., 2d Sess. 104 (1972), reprinted in 2 Legislative History, supra note 38, at 791; Env'tl. Law Inst. supra note 25, § 12.05[3][c][ii]. The House report explains that the EPA is required to establish more restrictive effluent limitations in the event the limitations set under § 1311 are inadequate to preserve water quality. Congress also stated, "This section would become operative only if the Congress, after study of the economic, social, and environmental impact of the goals proposed for 1981, decides to implement those goals." H.R. Rep. No. 911, 92d Cong., 2d Sess. 104 (1972), reprinted in 1 Legislative History, supra note 59, at 791.

\textsuperscript{78} See Env'tl. Law Inst. supra note 25, § 12.05[3][c][ii] (explaining that § 303 WQSs should be used to achieve the CWA's goals).


\textsuperscript{80} Id.; see also Env'tl. Law Inst. supra note 25, § 12.05[3][c][ii] (discussing the legislative history of § 302 of the CWA).

\textsuperscript{81} 33 U.S.C. § 1312(a) (1988); see Env'tl. Law Inst. supra note 25, § 12.05[3][c][ii] n.336 (discussing the authority of the EPA under § 302 of the CWA).

\textsuperscript{82} S. Rep. No. 50, 99th Cong., 1st Sess. 24 (1985); see Env'tl. Law Inst. supra note 25, § 12.05[3][c][i] (discussing § 303's requirement that the states set WQSs).

than the CWA's standards. The legislative history indicates, however, that states are only permitted to consider economic factors in setting WQSs and effluent limitations to the extent allowed by the EPA regulations implementing section 303 of the CWA. The states are further required to hold public hearings at least every three years for the purpose of reviewing those standards. If a state revises or adopts a new standard, the standard must be submitted to the EPA for approval. The EPA does not hold hearings, or provide for prior notice and comment, in its approval process.

In reviewing state WQSs, the CWA requires the EPA to determine if the WQS is “consistent with” the CWA's requirements. Once approved, the WQS becomes the standard for the “applicable waters of that State” and is

84. 40 C.F.R. § 131.4 (1990); see 33 U.S.C. § 1313(f) (1988); see also Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1283 (D.S.D. 1979) (discussing how §§ 1313 and 1370 of the CWA combine to give states the authority to set more stringent limitations than the CWA requires).


86. 33 U.S.C. § 1313(c)(1) (1988); see also 40 C.F.R. § 131.20(a)-(b) (1990) (requiring state to hold public hearings). The public hearings are held in accordance with state law and according to the provisions of Id. § 25 (1990). ENVT. LAW INST., supra note 25, § 12.03[2].

87. See 33 U.S.C. § 1313(c)(2) (1988); see also 40 C.F.R. § 131.5 (1990) (giving the EPA authority to review a state's WQSs); infra note 89 (listing the factors that federal regulations require the EPA to apply in approving WQSs).

88. ENVTL. LAW INST., supra note 25, § 12.03[2].

89. 33 U.S.C. § 1313(c)(3) (1988); see Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1276 (5th Cir. 1980). Section 1313(c)(3) provides:

If the [EPA] determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the [EPA] shall promulgate such standard pursuant to paragraph (4) of this subsection.


The EPA is directed to approve a state's WQSs if it determines that they are consistent with factors listed in the federal regulations. 40 C.F.R. § 131.5 (1990). The factors are:

(a) Whether the State has adopted water uses which are consistent with the requirements of the Clean Water Act; (b) Whether the state has adopted criteria that protect the designated water uses; (c) Whether the State has followed its legal procedures for revising or adopting standards; (d) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analysis, and (e) Whether the State submission meets the requirements included in §131.6 of this part. If EPA determines that State water quality standards are consistent with the factors listed in paragraphs (a) through (e) of this section, EPA approves the standards. EPA must disapprove the State water quality standards and promulgate Federal standards under section 303(c)(4) of the [CWA], if State adopted standards are not consistent with the factors listed in paragraphs (a) through (e) of this section. EPA may also promulgate a new or revised standard where necessary to meet the requirements of the Act.

Id.

90. 33 U.S.C. § 1313(c)(3) (1988). WQSs “serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.” 40 C.F.R. § 131.2 (1990).
federally enforceable. If the EPA determines that the standard is not consistent with the CWA, however, it must notify the state and recommend changes to meet the CWA. The EPA has the authority to promulgate standards for the state if the state does not make the necessary changes.

b. Scope of EPA's Authority in Approving WQSs

Courts discussing the EPA's authority to reject or approve a state's WQSs recognize the significant role that Congress left to the states in declaring their WQSs. Nevertheless, the EPA still must review the standards and is "given the final voice on the standard's adequacy." The scope of the EPA's authority varies depending upon the aspect of the WQSs in question. For instance, the use designation in a WQS is generally tied to the zoning power that Congress desired to leave with the states. However, establishing the scientific criteria aspect of a WQS necessary to achieve the use designation set by a state is considered to be a duty of the EPA. The EPA is the only entity able to provide uniformity in setting the scientific criteria of a WQS. In addition, the EPA has the authority to translate the CWA's broad statutory guidelines into specifics that can be used to evaluate a state's proposed standard. The EPA's actions in approving or rejecting WQSs stands firm unless the agency acted outside the scope of its authority, abused its discretion, or acted arbitrarily or capriciously.

91. Oklahoma v. EPA, 908 F.2d 595, 602 (10th Cir. 1990) (EPA-approved WQSs are federally enforceable).
92. 33 U.S.C. § 1313(c)(3) (1988). This section provides: "If the [EPA], within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State." Id.
93. Id. § 1313(c)(3)-(4).
94. See, e.g., Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1275 (5th Cir. 1980) (discussing state authority under § 1311 of the CWA); Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1284 (D.S.D. 1979) (discussing legislative history of the CWA); see also 33 U.S.C. § 1251(b) (1988) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . . ").
95. Mississippi Comm'n on Natural Resources, 625 F.2d at 1275.
96. Id. at 1276.
97. Id. The criteria must reflect the latest scientific knowledge. Id.; see supra notes 32-37 and accompanying text (discussing WQSs).
98. See Mississippi Comm'n on Natural Resources, 625 F.2d at 1276.
99. Id.
100. Id. at 1275. This standard of review comes from § 706 of the Administrative Procedures Act ("APA"). See 5 U.S.C. § 706 (1988). Judicial review of the EPA's actions is allowed by 33 U.S.C. § 1369(b) (1988). See Environmental Defense Fund v. Costle, 657 F.2d 275 (1981) (holding that the EPA's approval of a state's WQS was sufficiently explained in the record and EPA had acted reasonably); Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269, 1276 (5th Cir. 1980) (EPA's rejection of a state's WQS was reasonable where the state could not justify having a WQS lower than minimum federal requirements).
Costle, a public interest group claimed that the EPA acted arbitrarily and capriciously by approving a set of salinity WQSs that had no accountability because they did not set specific numeric criteria. Noting that the arbitrary and capricious standard of review is a deferential one which presumes an agency's actions to be valid, the court stated that it must affirm the EPA's action if it found the decision had a rational basis, was the result of reasoned decisionmaking, and was based on a consideration of the relevant factors. The court found that narrative WQSs were permissible under the CWA and held that the salinity WQSs adequately met the requirements of the CWA and that the EPA's decision was fully explained in the record.

When the state's WQSs are more stringent than those required by the EPA, at least one court has stated that the EPA would violate the CWA by invalidating the WQSs. This was true even where the state had not considered any economic or social factors in setting the WQSs. In Homestake Mining Co. v. EPA, the plaintiff argued that the EPA's approval of a state's WQSs, which were more stringent than required by the CWA, was arbitrary and capricious. At that time, the federal regulations implementing section 303 required states to consider social and economic factors, among others, when setting WQSs. The court ruled that a state was free to assign each factor whatever weight it desired and held that the EPA had "no power to disapprove these standards." Thus, according to the court, the EPA is obligated to approve a state's more stringent standards.

Once the EPA approves the state's WQSs, courts have held that the EPA must incorporate those WQSs into permits and has no authority to set aside or modify them. For example, in United States Steel Corp. v. Train, an in-
dustrial point source challenged a permit issued by the EPA which incorporated the WQSs of the state in which the point source was located. The point source unsuccessfully argued that the EPA should have determined the validity of the state WQSs before making them applicable to the point source. The court stated that the EPA's only authority with regard to a state's WQSs is in determining whether they meet the section 303 requirement of being "consistent with the applicable requirements of [the CWA]." Because the CWA does not give the EPA the authority to alter a state's WQSs at a permit proceeding, the court held that the EPA correctly incorporated the WQSs into the permit and that the EPA correctly refused to consider any challenges of the WQSs' validity at the permit proceeding.

The above cases involved the approval and application of more stringent WQSs with respect to in-state sources. Thus, these cases left unclear whether an out-of-state discharger will prevail in arguing that the EPA's approval of an affected state's more stringent WQSs is arbitrary and capricious because it did not consider economic and social factors relevant to the source state.

In ascertaining the success of an out-of-state discharger's claim that an affected state's WQSs are too stringent, an analogy can be drawn from the situation where the EPA has rejected the WQSs submitted by a state because they were too low. In *Mississippi Commission on Natural Resources v. Costle,* a state agency argued that the EPA's rejection of its state WQSs was arbitrary and capricious because the EPA failed to consider relevant eco-

111. 556 F.2d 822 (7th Cir. 1977).
112. Id. at 831-32.
113. Id. at 835.
114. Id. at 836.
115. See infra note 150 and accompanying text (discussing the EPA's duty under § 402).
116. United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1977).
117. But see International Paper Co. v. Ouellette, 479 U.S. 481, 490-91 (1987) (stating in dicta that a affected state only has an advisory role in regulating pollution from out-of-state sources); Milwaukee II, 451 U.S. 304, 328 (1981) (stating in dicta that states cannot regulate other states); Milwaukee III, 731 F.2d 403, 413-14 (1984) (stating that § 510 does not give states the right to impose more stringent standards on out-of-state sources). For example, the *Milwaukee II* Court stated:

> It is one thing, however, to say that States may 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. It is quite another to say that the States may call upon federal courts to employ federal common law to establish more stringent standards applicable to out-of-state dischargers. *Milwaukee II,* 451 U.S. at 327-28 (emphasis in original). *Milwaukee II,* *Milwaukee III,* and *Ouellette* restricted the rights of the states to apply state or federal common law remedies. *Oklahoma* involves the application of neither state nor federal common law but rather the application of WQSs set under the CWA. The *Oklahoma* court considered *Milwaukee III* and *Ouellette* in its decision but dismissed them as being factually distinguishable and stating no more than dicta. *Oklahoma* v. EPA, 908 F.2d 595, 607 (10th Cir. 1990). See infra notes 271-79 and accompanying text (discussing the *Oklahoma* court's treatment of these cases).

118. See Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269 (5th Cir. 1980).
119. Id.
The court articulated the test to determine if the EPA's actions were arbitrary or capricious as "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . [T]he ultimate standard of review is a narrow one." In keeping with the use/criteria distinction, the court noted that the EPA plays a more dominant role in reviewing a WQS's scientific criteria aspect compared to its use aspect. The court supported this conclusion by noting that the CWA requires the EPA to develop and publish water quality criteria "reflecting the latest scientific technology." Furthermore, the court pointed out that when Congress wanted economics and cost to be considered in setting effluent limitations, it explicitly required it. The court also stated that when the WQS's criteria cannot be economically achieved, the state can effectively lower the WQS criteria by reducing the use designation of the WQS. For example, Mississippi could have reduced the use designation from fishable-swimmable water to industrial use. The WQS criteria necessary to meet that use would not have to be as stringent as that for fishable-swimmable water. Therefore, the court held that the EPA did not have to consider economic factors when rejecting and setting new WQSs.

In short, section 303 is a state's primary source of authority for regulating its waters under the CWA. By establishing WQSs and having the EPA ap-
prove them, a state creates federally enforceable WQSs. The EPA's approval or rejection of a state's WQSs is reviewable, however, only to a limited extent.\textsuperscript{128} Thus, partly for uniformity reasons,\textsuperscript{129} the EPA still largely controls the adequacy of a WQS. However, the EPA has no authority to disapprove a state's more stringent WQSs, nor does it have the authority to modify or alter those standards when granting a discharge permit. Furthermore, the criteria aspect of a WQS must merely reflect the latest scientific technology. Therefore, the EPA does not have to consider economic factors when approving WQSs.\textsuperscript{130}

4. Section 401: The Certification Requirement and Duty to Notify Affected States

Section 401 requires a point source discharger to obtain a certification from the source state certifying that the discharge will comply with all applicable effluent limitations and standards of the CWA.\textsuperscript{131} This section further provides that no permit may be granted until this certification is obtained.\textsuperscript{132} Congress amended this section in 1977 to expressly add section 303 WQSs to the list of CWA provisions in which a state must certify compliance by the discharger.\textsuperscript{133} Noting that all states have EPA-approved WQSs, Congress believed it was reasonable for the CWA to require federal permits and licenses to take into account state WQSs adopted under section 303.\textsuperscript{134}

The state agency granting discharge permits must notify the EPA as soon as the agency receives an application and certification for a permit.\textsuperscript{135} If the EPA determines that the discharge may affect the quality of the waters of another state, "so as to violate any water quality requirement in such State," the EPA must notify the potentially affected state.\textsuperscript{136} The potentially affected state will be granted a hearing with the permit agency upon request.\textsuperscript{137} The permit agency, "based on the recommendations of [the affected state], the [EPA],

\textsuperscript{128} See supra notes 94-127 and accompanying text (discussing the scope of review of the EPA's authority).
\textsuperscript{129} See supra note 98 and accompanying text (stating that the EPA is best able to provide uniformity in setting WQS criteria).
\textsuperscript{130} See supra notes 96-99 and accompanying text (comparing the criteria and use aspects of a WQS).
\textsuperscript{131} 33 U.S.C. § 1341 (1988); see also Envtl. Law Inst., supra note 25, § 12.05[2][b] (discussing certification requirements under the CWA); F. Skillern, supra note 30, at 167 (discussing permits and certification under the CWA). The certification is obtained either from the state (or the state agency having jurisdiction over the water at issue), or the EPA where the state or its agencies do not have authority to give the certificate. 33 U.S.C. § 1342(a)(1) (1988).
\textsuperscript{136} Id.
\textsuperscript{137} Id.; see also F. Skillern, supra note 30, § 4.17 (discussing permit certification requirements).
and upon any additional evidence . . . shall condition . . . [a] permit in such manner as may be necessary to insure compliance with applicable water quality requirements." If conditions cannot be set that assure that the discharge will comply with a WQS, the permit will not be issued.

5. Section 402: The National Pollutant Discharge Elimination System

Section 402 creates the National Pollutant Discharge Elimination System ("NPDES"). Through the NPDES, the standards established under the CWA become obligations of individual point source dischargers. The EPA issues discharge permits, through the NPDES, to point source dischargers. The CWA makes the discharge of any pollutant into navigable waters without a permit unlawful. Individual states, however, may establish their own permit system if they can meet certain requirements of the CWA. For example, a state program must have the ability and authority to issue permits that will conform with the requirements of the CWA, to modify or terminate the permits, and to provide adequate procedural safeguards such as notice of a permit application to the EPA, the public, and any potentially affected...

138. 33 U.S.C. § 1341(a)(2) (1988); see F. Skillern, supra note 30, § 4.17. Some courts and commentators, as well as the State of Arkansas in Oklahoma v. EPA, believed that the role of the affected state was limited to making "recommendations." E.g., International Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987); see V. Yannacone, B. Cohen & S. Davison, supra note 59, § 5:5; infra note 249 and accompanying text (discussing Arkansas' argument that an affected state is limited to advising and making recommendations to the permit agency). The language of § 1341 is internally inconsistent because it refers to "recommendations" of the affected state, but then states that the EPA "shall" condition the permits to "insure" compliance with applicable WQSs. See also 33 U.S.C. § 1342(b)(5) (1988) (an affected state "may submit written recommendations to the permitting State" (emphasis added)).


140. Id. § 1342; see F. Skillern, supra note 30, § 4.18.

141. F. Skillern, supra note 30, § 4.18; see also EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 205 (1976) (stating that federal and state standards are transformed into individual point source obligations through discharge permits). Permits may be issued if the discharge will meet all applicable requirements under the CWA. 33 U.S.C. § 1342(a)(1) (1988).


143. Id. § 1311(a); see also Envtl. Law Inst., supra note 25, § 12.05[2][a] (discussing § 1311); V. Yannacone, B. Cohen & S. Davison, supra note 59, § 5:11 (interpreting § 1311). A point source is required to obtain a permit only from the state in which it is located, even if its discharge is into an interstate water that may affect the water of another state. Tennessee v. Champion Int'l Corp., 24 Env't Rep. Cas. (BNA) 1371 (Tenn. 1986); V. Yannacone, B. Cohen & S. Davison, supra note 59, § 5:11.

state. 146

Before issuing a permit to a discharger, the EPA, or a state having a permit program, must give notice and an opportunity to be heard to those states that may be affected by the discharger's effluent. 146 The EPA is required to condition permits so that the discharges will meet the requirements of section 301. 147 Issued permits are fixed for five-year terms 148 and can be terminated or modified for cause, including violation of a permit condition or a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. 149

A state permit program is administered under the state's own legal authority. However, in order to insure that the state program provides at least the federal minimum protection, the CWA requires the EPA to review a state's program to insure its compliance with the requirements of section 402. 150 The EPA may revoke a state program which is not in accordance with this section. 151 Permits issued either by the EPA or by an approved state agency are

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The [EPA] shall approve each such submitted program unless he determines that adequate authority does not exist: (1) To issue permits which- (A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317 and 1343 of [the CWA] . . . (2)(A)(4) To insure that the [EPA] receives notice of each application (including a copy thereof) for a permit . . . (5) To insure that any State (other than the permitting State) whose waters may be affected . . . may submit written recommendations to the permitting State . . .

Id.

Additionally, a state permit program is required to apply limitations at least as stringently as the federal standards. Id. § 1342(c). This underscores the importance Congress placed on national consistency in preventing “pollution shopping.” See Cherney & Wardzinski, supra note 144, at 19.

146. 33 U.S.C. §§ 1341(a)(2) & 1342(b)(5) (1988). Any applicant for a federal permit must first file a certificate of compliance with the permit agency, either the EPA or the applicant’s state permit agency. After receipt of the application and the certification, the permit agency must then notify the EPA, which will determine if the discharge may affect the waters of another state. Id. § 1341.

147. Id. § 1342(a)(1); see United States Steel Corp. v. Train, 556 F.2d 822, 835 (7th Cir. 1977) (discussing the EPA’s authority to set aside state WQSs in a permit procedure). Section 301(b)(1)(C) of the CWA provides:

[T]here shall be achieved . . . any more stringent limitation, including those necessary to meet [WQSs] . . . established pursuant to any State law or regulations (under authority preserved by section [510] of this title) or any other Federal law or regulation, or required to implement any applicable [WQS] established pursuant to this chapter.


149. Id. § 1342(b)(1)(C)(i), (iii).

150. 33 U.S.C. § 1342(c)(2) (1988); see Cherney & Wardzinski, supra note 144, at 19 (discussing state and federal roles under the CWA). The EPA retains oversight authority with respect to individual permits and the permit program in general. 33 U.S.C. § 1342(c)-(d) (1988).

151. 33 U.S.C. § 1342(c)(3) (1988). The EPA is required to hold a public hearing, notify the state, and make public the reasons for the revocation. Id.
equivalent and subject to the same requirements under the CWA. The EPA always has the power to veto any state-issued permits. The federal court of appeals has the power to review the EPA veto or approval of state permit decisions.

In short, section 402 creates the NPDES permit system through which the standards established under the CWA become obligations of individual dischargers. Section 402 allows a state to administer its own permit system, but the state must run it pursuant to CWA requirements. Finally, the EPA always has the power to veto any state-issued permits.

6. Section 309: Federal Enforcement

Section 309 grants the EPA the power to enforce the CWA whenever it receives information that any person is violating a condition of the CWA. Not only does an affected state have the ability to compel the EPA to enforce the requirements of a permit, but it may also have the ability under this section to have the EPA assess civil penalties against an out-of-state permit violator.

The actions that the EPA can take against a party in violation of the CWA include a compliance order, civil action (including a permanent or temporary injunction), criminal penalties, civil penalties, and administrative penalties. Courts interpreting section 309 generally recognize that the EPA's duty to issue a compliance order is nondiscretionary. The EPA may

152. See id. § 1342(a)(3); F. Skillern, supra note 30, § 4.18.
153. 33 U.S.C. § 1342(d) (1988); see also Env'l Law Inst., supra note 25, § 12.05[2][d][iii] (discussing the EPA's oversight of state permit agencies).
155. See supra notes 144-45 and accompanying text (discussing the requirements that a state must satisfy in order to have its own permit agency).
157. Id. § 1319(a)(3); see also id. § 1365(h) (authorizing the governor of an affected state to bring suit against the EPA to enforce an effluent violation occurring in another state but having an impact in his state).
158. Id. § 1319(d).
159. Id. § 1319(a)(3).
160. Id. § 1319(b).
161. Id. § 1319(c).
162. Id. § 1319(d).
163. Id. § 1319(g).
164. See, e.g., South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 134 (D.S.C. 1978) (holding that the EPA is only required to issue a compliance order and may bring enforcement actions of civil or criminal suit upon its discretion); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1183-84 (D. Ariz. 1975) (holding that the EPA clearly must issue an abatement order in the case of a violation); see also S. Rep. No. 1236, 92d Cong., 2d Sess. 131 (1972), reprinted in 1 Legislative History, supra note 59, at 314 (upon finding a violation, this section
bring other actions at its discretion.\textsuperscript{168}

If the EPA issues a compliance order, the mandatory language of the CWA would also require it to assess civil penalties for any person who then violates the compliance order.\textsuperscript{168} In this roundabout way, an affected state can have penalties assessed against an out-of-state point source. Thus, remedial alternative is important to an affected state under the CWA because it may not be able to bring a “citizen” suit directly against a permit violator.\textsuperscript{167} If the assessment of penalties under this section is a nondiscretionary duty of the EPA, then the affected state can compel the EPA to assess them, thereby giving the affected state some indirect control over an out-of-state polluter.\textsuperscript{168} An affected state can, therefore, protect itself from an out-of-state permit violator through actions brought by the EPA.\textsuperscript{166}

7. Section 505: Civil Suits

Section 505 of the CWA allows “citizens” to bring civil suits against any person in violation of an effluent limitation or an order issued by the EPA.\textsuperscript{170} Section 505 also authorizes the governor of an affected state to bring a civil suit against the EPA for violations of an effluent standard occurring in another state.\textsuperscript{171}

\textsuperscript{165} See South Carolina Wildlife Fed’n, 457 F. Supp. at 134 (holding that the EPA is only required to issue compliance order and may bring enforcement actions of civil or criminal suit upon its discretion); see also 1 LEGISLATIVE HISTORY, supra note 59, at 314 (upon finding a violation, this section “requires the EPA to either issue [a compliance] order . . . or to bring a civil suit”).

\textsuperscript{166} See infra notes 175-89 and accompanying text (discussing whether a state is a citizen for purposes of § 505 civil suits).

\textsuperscript{167} See supra note 166.

\textsuperscript{168} The CWA mandates the EPA to take appropriate action when a violation of the CWA is reported. Also, a state is not precluded from bringing civil action, under § 505, against the EPA to compel it to act. Illinois ex rel. Scott v. Hoffman, 425 F. Supp. 71, 76-77 (S.D. Ill. 1977).

\textsuperscript{170} Section 505 of the CWA provides, in relevant part:

Except as provided in subsection (b) of this section . . . , any citizen may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the [EPA] or a State with respect to such a standard or limitation, or (2) against the [EPA] where there is alleged a failure of the [EPA] to perform any act or duty under this chapter which is not discretionary with the [EPA].


\textsuperscript{171} Id. § 1365(h).
A NPDES permittee must submit a discharge monitoring report ("DMR") to appropriate state and federal regulatory agencies. The DMR is public information and contains information on both the measured level of the pollutants discharged and the appropriate NPDES standard. Thus, a citizen has access to the information needed to determine if a permit violation is occurring. If a violation occurs, section 505 provides a citizen with the same civil penalties available to the EPA under section 309(d). Section 505 provides citizens with some incentive to bring citizen suits by awarding them litigation costs upon the court's discretion in any action brought under section 505.

It appears, however, that an affected state is not a "citizen" for purposes of this section. A "citizen" is defined by the CWA to be "a person or persons having an interest which is or may be adversely affected." The CWA defines a "person" to include a state or political subdivision of a state. Read literally, these provisions make a state a "citizen." However, courts that have fully examined the question have found that a state is not a "citizen" for purposes of applying this section.

For example, in California v. Department of Navy, the state of California attempted to enforce penalties against the Navy for permit violations. As the court noted, section 505 provides that a "citizen" may not bring a suit if

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172. 40 C.F.R. § 122.21(f)-(g) (1990).
175. Id.
176. See supra notes 156-69 and accompanying text (discussing § 309 remedies); see also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-14 (1981) (discussing remedies available under § 505); 33 U.S.C. § 1365(a) (1988) (giving district courts the power to assess civil penalties provided under § 309(d)).
178. Id. § 1365(g).
179. Id. § 1362(5).
180. Some courts have relied on the this literal language to hold that a state is a citizen. See Illinois v. Outboard Marine Corp., 619 F.2d 623, 631 (7th Cir. 1980); Massachusetts v. United States Veterans Admin., 541 F.2d 119, 121 (1st Cir. 1976).
181. See, e.g., California v. Department of Navy, 631 F. Supp. 584, 587 (N.D. Cal. 1986) (state is not a "citizen"), aff'd on other grounds, 845 F.2d 222, 223 n.1 (9th Cir. 1988) (not reaching issue of whether a state is a citizen); United States v. City of Hopewell, 508 F. Supp. 526, 528-29 (E.D. Va. 1980) (after full discussion of issue, finding that a state is not a "citizen"). Other courts have considered a state to be a citizen, but these courts did not fully examine or analyze the issue. See Outboard Marine Corp., 619 F.2d at 631 (relying merely on literal statutory definitions to hold that a state is a citizen), vacated on other grounds, 453 U.S. 917 (1981); United States Veterans Admin., 541 F.2d at 121 (holding that a state is a "citizen" but not analyzing the issue, relying instead on statutory definitions); National Wildlife Fed'n v. Ruckelshaus, 99 F.R.D. 558, 560 (D.N.J. 1983) (relying on Massachusetts v. United States Veterans Administration to hold that a state is a citizen).
183. Id. at 585.
the EPA or state is already diligently pursuing a remedy under the CWA.\textsuperscript{184} The court found it unlikely that Congress intended a state to take advantage of this section because it would be illogical to require a state to show that it is not diligently pursuing a remedy before it is allowed to bring a suit under this section.\textsuperscript{188} Furthermore, the court reasoned that there would be little sense for the citizen to be required to give notice to the state before the citizen files suit if the state is in fact the citizen.\textsuperscript{188}

The court found further support for finding that a state is not a citizen in section 505(h).\textsuperscript{187} Section 505(h) authorizes a governor of an affected state to commence a civil action against the EPA for its failure to enforce "an effluent standard or limitation" which is being violated in another state and "causing a violation of any water quality requirement in his State."\textsuperscript{188} Because a "citizen" already has the authority to bring suits against the EPA for failing to perform a nondiscretionary act or duty, the court believed that section 505(h) would be superfluous if a state were considered a citizen.\textsuperscript{188} Thus, a state is probably not a citizen for the purposes of this section.

8. Section 510: State Authority Under the CWA

Section 510 gives states the authority to establish more stringent standards than those required by the CWA.\textsuperscript{189} Courts have interpreted this section to

\begin{footnotes}
\item[184] Id. at 587 (discussing 33 U.S.C. § 1365(b)(1)(B) (1988)).
\item[185] Id.; see also S. REP. NO. 414, 92d Cong., 1st Sess. 64 (1971), \textit{reprinted in 2 Legislative History, supra note 38, at 1482} ("It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505." (emphasis added)).
\item[186] \textit{Department of Navy,} 631 F. Supp. at 587.
\item[187] \textit{Id.}
\item[188] 33 U.S.C. § 1365(h) (1988). In determining if a "water quality requirement" is being violated, Congress has stated that effluent limitations are for preventing pollution and water quality is to be a measure of effectiveness. \textit{See supra} notes 32-42 and accompanying text (distinguishing between WQs and effluent limitations).
\item[189] \textit{Department of Navy,} 631 F. Supp. at 587. The court distinguished other decisions that reached a contrary result, \textit{see supra} note 181, primarily on the ground that the state's status as a citizen was never a contested issue in those cases. \textit{Department of the Navy,} 631 F. Supp at 588.
\item[190] Section 510 provides:

\textbf{Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, or standard of per-}
mean that the EPA has no authority to invalidate a state's WQSs, as applied to an in-state source, for being too stringent.\textsuperscript{191} However, courts have also concluded that this section does not authorize a state to use its own common law, or federal common law, to set more stringent standards applicable to out-of-state point sources.\textsuperscript{192}

For example, in \textit{City of Milwaukee v. Illinois} ("\textit{Milwaukee II}").\textsuperscript{193} Illinois argued that section 510 gave it the authority to use the federal courts to impose more stringent standards than required by the CWA. The Court recognized that section 510 gave a state authority to establish more stringent standards than required by the CWA but held that a state could not use the federal courts or federal common law to establish them.\textsuperscript{194}

Likewise, in \textit{Illinois v. City of Milwaukee} ("\textit{Milwaukee III}").\textsuperscript{195} Illinois sought relief against Milwaukee under Illinois state nuisance law.\textsuperscript{196} Illinois argued that because the CWA preempted federal common law, state law should no longer be preempted by federal common law in order to provide a remedy to Illinois.\textsuperscript{197} The court, however, held that the CWA precluded a suit under the common law of any state except the state in which the polluter was located.\textsuperscript{198}

The court in \textit{Milwaukee III} ruled that while section 510 of the CWA preserves the right of a state to set more stringent standards for in-state sources, it does not give states the right to impose these more stringent standards on out-of-state sources.\textsuperscript{199} The \textit{Milwaukee III} court concluded that section 510 did not allow a state to use its own state law to impose more stringent standards on a out-of-state source.\textsuperscript{200}

The issue of the EPA's ability to impose more stringent standards on an out-of-state source was not before the court. The court recognized that the

\footnotesize{formance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.}


\textsuperscript{191} See supra notes 94-127 and accompanying text (discussing the EPA's lack of authority to disapprove a state's WQS as applied to sources within that state).

\textsuperscript{192} Ouellette, 479 U.S. at 497 (holding that the CWA preempts state common law claims except those arising under the common law of the source state); Milwaukee II, 451 U.S. 304, 327-29 (1981) (holding that the CWA preempts federal common law); Milwaukee III, 731 F.2d 403, 413 (7th Cir. 1984) (holding that Illinois could not rely on its own nuisance law against a Milwaukee discharger), cert. denied, 469 U.S. 1196 (1985); see infra notes 203-20 and accompanying text (discussing the preemption cases).

\textsuperscript{193} 451 U.S. 304 (1981).

\textsuperscript{194} Id. at 328.

\textsuperscript{195} 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985).

\textsuperscript{196} Id. at 405. Illinois was not attempting to enforce more stringent EPA-approved WQSs but rather its own state law.

\textsuperscript{197} Id. at 406-07.

\textsuperscript{198} Id. at 406-09 & n.1.

\textsuperscript{199} Id. at 413-14.

\textsuperscript{200} The court believed that allowing a state to use § 510 to apply its common law to an out-of-state source would lead to "chaotic confrontation between sovereign states." Id. at 414.
federal nature of interstate water pollution required the application of uniform federal standards to both protect an affected state from out-of-state point sources and to equally apportion use of interstate waters. Furthermore, the court realized that the CWA's comprehensive regulatory scheme was to provide the centralized forum necessary for resolving interstate water pollution disputes and that Illinois' failure to follow the dictates of this regulatory scheme resulted in their waters being insufficiently protected from out-of-state point sources.

In short, section 510, much like section 303, allows states to regulate their waters. Section 510 allows a state to establish more stringent WQSs than those required by the EPA under the CWA. However, as Milwaukee II and Milwaukee III point out, section 510 does not preserve any state or federal common law right to set more stringent standards against out-of-state sources.

B. The Preemption Cases

As a result of Milwaukee II and the Court's more recent decision in International Paper Company v. Ouellette, collectively termed the "preemption cases," the CWA has become the controlling source of law in water regulation. Milwaukee II involved the polluting of Illinois' Lake Michigan waters by the City of Milwaukee. Illinois sought to use federal common law to impose stricter standards than those applied to Milwaukee under the CWA. The Supreme Court held, however, that the CWA supplanted federal common law. Thus, an affected state could not look to the federal common law for a remedy against the source state. The Court reasoned that Congress' involvement in an area of the law removes the need for common law remedies. Although the CWA expressly authorizes states to adopt standards more stringent than those prescribed in the CWA, the Court

201. Id. at 410-11.
202. The court identified the essence of the problem, stating:
   Illinois' basic grievance is that the permits issued to Milwaukee pursuant to the [CWA] do not impose stringent enough controls on the discharges. Nevertheless, Illinois failed to participate in the permit issuing process when the Milwaukee permits were issued. . . . [T]hat process seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters.
   Id. at 412-13 n.5 (citation omitted).
204. These cases are referred to as the preemption cases because they held that the CWA preempts federal and state common law remedies. See supra notes 2-4 and accompanying text.
205. Milwaukee II, 451 U.S. 304 (1981); see also Note, supra note 2, at 213 (discussing the facts and holding of Milwaukee II).
206. See Note, supra note 2, at 214.
208. Id. at 314; see Note, supra note 2, at 215-17.
interpreted this power to apply only with regard to in-state polluters.\textsuperscript{210}

In \textit{Ouellette}, a group of Vermont property owners filed a state common law nuisance suit against a New York discharger, alleging that a paper company's discharge of various pollutants into nearby Lake Champlain was a nuisance.\textsuperscript{211} They also alleged that the discharger had violated its permit given under the CWA, and sought damages and an injunction.\textsuperscript{212} The discharger moved to dismiss the nuisance claim based on the \textit{Milwaukee II} holding. The Supreme Court held that a private nuisance suit could be maintained in a Vermont federal court against an out-of-state polluter, but the nuisance law of the source state, New York, must be applied.\textsuperscript{213} According to the Court, applying the common law of the source state was consistent with the structure of the CWA.\textsuperscript{214}

The Court was concerned that the application of the affected state’s law would result in one state indirectly regulating the conduct of out-of-state sources.\textsuperscript{215} In addition, the Court believed that the application of the potentially conflicting laws of many states would undermine the permit scheme of the CWA.\textsuperscript{216} The Court stated that its holding did not leave an affected state without a remedy because it could pursue a nuisance claim under the law of the source state.\textsuperscript{217} The Court noted that the CWA prevents only those actions which seek to establish standards of effluent control that differ from those established under the CWA.\textsuperscript{218}

In \textit{Ouellette}, the Supreme Court attempted to outline the roles that the source state and affected states play in the CWA. In dicta, the Court stated that an affected state plays a lesser role in regulating interstate water under the CWA than a source state.\textsuperscript{219} Despite recognizing that the affected state may be harmed by an out-of-state discharge, the Court still believed that an affected state “only has an advisory role in regulating pollution that originates...”

\textsuperscript{210} Id. at 327-28; see also \textit{Milwaukee III}, 731 F.2d 403, 413 & n.7 (7th Cir. 1984) (holding that \textsection 510(2) preserves the right of a state to regulate discharges into its own waters but does not allow the state to exercise jurisdiction over activities occurring outside its boundaries, even if those activities pollute the waters of the state); \textit{Hill}, \textit{Preemption of State Common Law Remedies by Federal Environmental Statutes: International Paper Co. v. Ouellette, 14 Ecology L.Q. 541, 546 (1987) discussing the \textit{Ouellette} Court’s decision).

\textsuperscript{211} \textit{Ouellette} v. International Paper Co., 602 F. Supp. 264, 266 (D. Vt.), \textit{aff’d per curiam}, 776 F.2d 55 (2d Cir. 1985), \textit{aff’d in part and rev’d in part}, 479 U.S. 481 (1987); see also \textit{Hill}, \textit{supra} note 210, at 546-47 (discussing the \textit{Ouellette} case from its inception).

\textsuperscript{212} \textit{See Hill, supra} note 210, at 546-47.

\textsuperscript{213} \textit{Ouellette}, 479 U.S. at 494. The Court followed much of the reasoning of the Seventh Circuit in \textit{Milwaukee III}. \textit{See Hill, supra} note 210, at 551 (discussing the Supreme Court’s opinion).

\textsuperscript{214} \textit{Ouellette}, 479 U.S. at 492-94.

\textsuperscript{215} Id. at 495.

\textsuperscript{216} Id. at 494-96.

\textsuperscript{217} Id. at 497.

\textsuperscript{218} Id. This is the feared double permitting that Congress and the Court condemns. \textit{See Hill, supra} note 210, at 552-53 (discussing the \textit{Ouellette} court’s reasoning).

\textsuperscript{219} \textit{Ouellette}, 479 U.S. at 490.
beyond its borders."

In short, as a result of the preemption cases, the only common law remedies available to an affected state are actions under the laws of the state where the discharger is located. For example, Illinois can file suit against a Wisconsin discharger under Wisconsin nuisance law. However, as a result of the preemption cases, Illinois no longer has a federal common law cause of action. Moreover, the CWA seemed to provide an affected state with little power beyond an "advisory" role in controlling pollution entering its state from out-of-state dischargers. Section 510 clearly gives a state authority to set more stringent WQSs than those required under the CWA with respect to in-state sources. However, until Oklahoma v. EPA, it had not been decided whether a state's federal statutory authority under the CWA to set more stringent WQSs for its waters also applied to out-of-state sources.

II. Oklahoma v. EPA

A. The Facts and Procedural History

The City of Fayetteville, Arkansas applied to the EPA for an NPDES permit which would allow the city's new wastewater treatment plant to discharge into a tributary of the Illinois River, an Arkansas-Okahoma interstate stream. The Illinois River crosses the state line into Oklahoma thirty-nine miles downstream from the waste treatment plant. The segment of the Illinois River starting at the Arkansas-Okahoma border has been designated an Oklahoma state scenic river and was to be considered for addition to the National Wild and Scenic Rivers System.

The State of Oklahoma, along with Save the Illinois River, a nonprofit group, requested denial of the permit because they did not believe the permit conditions were stringent enough to meet many of Oklahoma's WQSs, including its dissolved oxygen, phosphorous, and turbidity WQSs. Both Oklahoma and Arkansas requested and were granted an evidentiary hearing concerning the permit by an Administrative Law Judge ("ALJ"). The ALJ determined

220. Id. The Court further stated:

[A]n affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters.

Id. at 490-91.

221. See supra notes 219-20 and accompanying text (discussing dicta from the Ouellette decision which indicates that an affected state has only an advisory role in the permit process).

222. See supra notes 190-202 and accompanying text (discussing a state's power to set more stringent WQSs than required under the CWA).


224. Id. at 598.

225. Id.

226. Id. at 597-98, 616-18.

that Arkansas would have to comply with Oklahoma's WQSs but concluded that the permit would not have an undue impact on or violate Oklahoma's WQSs. Both parties appealed the decision. Oklahoma, and the nonprofit group, believed the ALJ erred in concluding the discharge, as permitted, would not violate Oklahoma WQSs. Arkansas argued that the EPA had no authority to require an Arkansas discharger to meet Oklahoma WQSs. The decision was upheld by the Chief Judicial Officer. The EPA then approved Arkansas' permit. Both states petitioned the Tenth Circuit Court of Appeals for review of the EPA's actions.

In its petition, Oklahoma contended that the EPA erred in concluding that the discharge allowed by the permit would not violate their WQSs. Arkansas again challenged the EPA's authority to require an Arkansas discharger to comply with Oklahoma WQSs. The Tenth Circuit granted Oklahoma's petition and framed the fundamental issue as whether the CWA required a point source of pollution to comply with the WQSs of all affected downstream states.

B. The Tenth Circuit's Analysis

The Tenth Circuit sided with Oklahoma and held that a discharger must comply with the WQSs of affected downstream states and the EPA's approval of the permit was arbitrary and capricious because the permit issued was not sufficiently conditioned to meet those WQSs. In a lengthy opinion, the court examined the CWA as a whole, along with its legislative history, and concluded that no point source could discharge into a navigable water unless the point source complied with all applicable water quality requirements, including the federally-approved WQSs of affected downstream states. The court was influenced in its decision by the EPA's argument that achieving downstream WQSs would be nearly impossible if the out-of-state discharger did not

228. Oklahoma v. EPA, 908 F.2d 595, 597 (10th Cir. 1990).
229. Id. An appeal to the EPA is allowed under 40 C.F.R. § 124.91 (1990). The case is named Oklahoma v. EPA because, even though Oklahoma and Arkansas have opposing views, both are seeking judicial review of the EPA's permit decision.
230. Oklahoma, 908 F.2d at 597. The court devotes the last half of its opinion to an examination of the extensive factual record compiled in this case. Id. at 615-35. Because Oklahoma sought to have the EPA deny the permit before any actual discharge took place, much of the evidence was based on sophisticated computer models. Id. at 607, 626-34.
231. Id. at 597.
232. Id. Both the Chief Judicial Officer ("CJO") and the ALJ interpreted the CWA to require an out-of-state source to meet the WQSs of a downstream affected state. Id. at 603.
233. Id. at 598.
236. Id.
237. Id. at 601.
238. Id. at 633-634.
239. Id. at 615.
have to comply with an affected state's WQSs. Although the court recognized the traditional bounds of state sovereignty, it ultimately concluded that its decision did not allow one state to regulate another because the EPA-approved WQSs are federal law.

1. Standard of Review

The court initially discussed the proper standard of review under the Administrative Procedure Act. The court concluded that it must uphold the agency's actions, findings, and conclusions unless they were outside the agency's statutory authority, were not supported by substantial evidence, or were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Furthermore, the court noted that both it and the EPA must uphold the clearly expressed intent of Congress. However, if the statute is ambiguous, the court stated that the agency responsible for administering the statute, the EPA, is entitled to substantial deference. Where a statute is ambiguous and the EPA's interpretation is reasonable, the agency's construction should be upheld unless it conflicts with the congressional policies underlying the CWA.

2. The Opposing Views

Arkansas argued that neighboring states did not have to comply with one
another's WQSs. The Oklahoma court pointed out that Arkansas' view would give an upstream state the ability, if not the legal right, to control the quality of downstream waters in another state by discharging into interstate waters and having to only comply with its own WQSs. Arkansas contended that sections 401 and 402 limited an affected state's role to merely advising and making recommendations on an out-of-state discharger's permit. Arkansas argued that Congress did not authorize affected states, such as Oklahoma, to impose their WQSs upon a discharger in another state.

The EPA, on the other hand, argued that Arkansas was required to comply with federal law, and specifically, Oklahoma's EPA-approved WQSs. The EPA contended that in interstate disputes, the only applicable WQSs are those approved by the EPA under the CWA and that in intrastate disputes, a state may impose more stringent WQSs that need not be approved by the EPA. In this way, a state is free to regulate its waters with regard to in-state polluters with minimal federal involvement.

Finding that the CWA did not clearly express Congress' intent on this issue, the court turned to the EPA's interpretation. The court found it significant that the EPA's interpretation had not been adopted specifically for this proceeding but was consistent with its long-standing CWA-implementing regulations. The court acknowledged that it normally must give deference to the consistent interpretation of a statute by the agency entrusted with its administration. However, the court found it necessary to examine the CWA as a whole before concluding that the EPA's interpretation, requiring Arkansas to comply with Oklahoma's WQSs, was reasonable and consistent with Congress's policies behind the CWA.

3. The Parties' Statutory Arguments

The EPA relied heavily on section 301(b)(1)(C), which provides:

In order to carry out the objective of this chapter, there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to

247. Id. at 602.
248. Id.
249. Id.; see supra notes 135-55 and accompanying text (discussing §§ 401(a)(2) and 402(b)(5) of the CWA).
250. Oklahoma v. EPA, 908 F.2d 595, 602 (10th Cir. 1990).
251. Id. at 603. In the evidentiary hearings, both the ALJ and the CJO interpreted the CWA to require out-of-state sources to meet an affected state's WQSs. Id.
252. Id.
253. Id. at 604. The implementing regulation, 40 C.F.R. § 122.4(d), provides: "No permit may be issued: . . . (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d) (1990); see also id. § 122.44(d)(4) (requiring permits to include any requirements necessary to conform to applicable water quality requirements when the discharge affects another state); id. § 131.10(b) (requiring state to ensure its WQSs will maintain WQSs of downstream states).
254. Oklahoma, 908 F.2d at 604.
Arkansas contended that this section was a mere timing provision, declaring the date by which the necessary limitations had to be established. The court rejected Arkansas' arguments. Relying on legislative history and case law, the court pointed out that section 510 is a savings clause that preserves the rights of the states to "set more restrictive standards than those imposed by [the CWA]." The court, recognizing that section 301 was one of the CWA's crucial provisions, concluded that Congress did not intend section 510 to limit the scope of section 301. The court also noted that the relevant language of section 510 did not specifically restrict a state's right to regulate pollution to only the waters within that state.

More significantly, the court acknowledged that Arkansas' view was irrational once "thoughtful consideration" was given to the language of section 301(b)(1)(C). The mandate of section 301 is to establish limitations necessary to meet applicable WQSs. The court believed that in order to fulfill the mandate of section 301(b)(1)(C), dischargers must meet the requirements of affected states, as well as those of the source state. The court also pointed

255. Id. at 604-05.
256. Id. at 605.
257. Id.
258. Id.
261. See supra notes 190-202 and accompanying text (discussing § 510).
262. Oklahoma, 908 F.2d at 605.
263. Id. at 606. Arkansas relied on the words "waters ... of such States" to limit the authority of a state under § 510. Id. The court pointed out, however, that the limiting language relied by Arkansas appears in subparagraph 2 and therefore cannot be construed as limiting the state's rights preserved in subparagraph 1. Id. For the full text of § 510, see supra note 190. In a footnote, the court made clear that it was not suggesting that one state may directly regulate the conduct of a point source in another state. The court stated:

Such exercise of jurisdiction would exceed traditional bounds of sovereignty. Nor does the Act redefine those bounds to allow dual permitting. But the question posed here is whether federal law embodied in the Clean Water Act requires a discharge permit to insure compliance with the applicable WQSs of all affected states.

Oklahoma, 908 F.2d at 606 n.9 (emphasis in original).
264. Oklahoma, 908 F.2d at 606.
266. Oklahoma v. EPA, 908 F.2d 595, 606 (10th Cir. 1990). As the court correctly pointed
out that businesses would engage in “pollution shopping” if dischargers were not required to comply with a neighboring affected state’s WQSs.\footnote{Arkansas argued that requiring a source in one state to comply with the WQSs of all downstream states would produce “chaotic” effects, making it “virtually impossible to predict the standard for a lawful discharge into an interstate body of water” and thus, undercuts the CWA’s orderly regulatory scheme.\footnote{The court found little merit in this argument. The court noted that the EPA’s ability, as well as the authority, to require compliance with the WQSs of affected downstream states is limited by the ability to measure a source’s impact on the water quality of that state.\footnote{In short, the court rejected Arkansas’ statutory arguments. The court was not persuaded by Arkansas’ attempt to characterize section 301 as a “mere timing provision.” The court also determined that Arkansas’ hypothetically “chaotic” regulatory scheme was undermined by a physical attenuation analysis, which showed that the effects of a discharge become smaller as the distance and amount of water volume between the discharge and a downstream state increase.\footnote{4. Ouellette and Milwaukee III}}}}

Arkansas argued that requiring a source in one state to comply with the WQSs of all downstream states would produce “chaotic” effects, making it “virtually impossible to predict the standard for a lawful discharge into an interstate body of water” and thus, undercuts the CWA’s orderly regulatory scheme.\footnote{The court found little merit in this argument. The court noted that the EPA’s ability, as well as the authority, to require compliance with the WQSs of affected downstream states is limited by the ability to measure a source’s impact on the water quality of that state.\footnote{In short, the court rejected Arkansas’ statutory arguments. The court was not persuaded by Arkansas’ attempt to characterize section 301 as a “mere timing provision.” The court also determined that Arkansas’ hypothetically “chaotic” regulatory scheme was undermined by a physical attenuation analysis, which showed that the effects of a discharge become smaller as the distance and amount of water volume between the discharge and a downstream state increase.\footnote{4. Ouellette and Milwaukee III}}}}

Arkansas cited Ouellette and Milwaukee III to support its interpretation that a state’s power to set more stringent limitations under section 510 is limited to dischargers within that state.\footnote{The court distinguished both cases by \begin{quote} “There could be no assurance of achieving a state’s more stringent [WQSs] if an upstream, out-of-state discharger were not required to comply with those standards.” \end{quote} \footnote{Furthermore, the court agreed with the EPA that “Arkansas’s construction of the Act would make achieving downstream [WQSs] impossible in many circumstances or . . . possible . . . only by imposing a disproportionate burden on dischargers located in the downstream state.”\footnote{Id}}. The court found that Congress intended to eliminate “pollution havens” by its enactment of the 1972 amendments.\footnote{Id. at 606 n.1; see also S. REP. NO. 370, 95th Cong., 1st Sess. 73, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4398 (“The result might well be the creation of pollution havens in some of those States which have approved permit programs. This result is exactly what the 1972 amendments were designed to avoid.”).\footnote{Oklahoma, 908 F.2d at 606.\footnote{Id. at 607. This is essentially a distance analysis. The impact of the discharge becomes more attenuated with distance and water volume. See id. The further away a source is from a state boundary, the lower the chance that its discharge will have an impact on the water quality of that state. However, Arkansas’ argument does have some merit when considered in an area such as the Tennessee Mississippi River Valley where many state boundaries share common water within close proximity. There is no “chaos” when only one state is affected, but this may not always be the case. If there are four different EPA-approved standards, then the EPA would have a more difficult time determining which standard is controlling. However, in such areas, the EPA, in order to achieve the uniformity sought by the CWA, may set just one EPA-approved standard after consulting with all the states involved.\footnote{It is for this reason that a Tennessee point source, for example, will not have to comply with Louisiana WQSs.\footnote{Oklahoma, 908 F.2d at 607; see International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987) (stating that the language of § 510 “limits the effect of the clause to discharges flowing directly into a State’s own waters.” (emphasis in original)); Milwaukee III, 731 F.2d 403 (7th}}}}
noting that they involved one state trying to apply its own nuisance laws to a discharger in another state. On the other hand, Oklahoma was a permit action where one state was seeking to apply federal statutory law, namely the EPA-approved WQSs under the CWA. The court quoted language from Milwaukee III that distinguished between establishing more stringent standards for an out-of-state source using state law, which Milwaukee III prohibited, and requiring an out-of-state source to comply with federal statutory law (a state’s EPA-approved WQSs).

However, the court realized that some language in Ouellette did initially seem to undercut the EPA’s position. Specifically, the Ouellette Court stated, “Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders . . . .” The Oklahoma court dismissed the language as dictum, emphasizing that Ouellette involved state common law while this case involved federal law. The court also pointed to other dicta which mitigated the language relied on by Arkansas: the Ouellette Court stated that nothing in its decision affected the plaintiff’s right to “pursue remedies that may be provided by the [CWA].” The court further supported its dismissal of Ouellette by noting that the case was not concerned with how an affected states WQSs are introduced in the CWA’s permit process, but rather with preventing affected states from circumventing that process via their own state law. The court read the Ouellette decision as seeking to protect the CWA’s comprehensive approach towards interstate water pollution by not allowing individual states to ignore

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273. Id.
274. Id. The Milwaukee III court stated:
Illinois’ basic grievance is that the permits issued to Milwaukee pursuant to the [CWA] do not impose stringent enough controls . . . . Nevertheless, Illinois failed to participate in the permit issuing process when the Milwaukee permits were issued. . . . [T]hat process seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters. Milwaukee III, 731 F.2d 403, 412 n.5 (7th Cir. 1984).
275. Ouellette, 479 U.S. at 490. The Ouellette Court stated:
While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders.
Id.
276. Oklahoma, 908 F.2d at 608.
277. Id. (quoting International Paper Co. v. Ouellette, 479 U.S. 481, 498 n. 18 (1987)).
278. Id. The court pointed out that the concern in Ouellette was undermining the comprehensive structure Congress developed in the CWA. Id. at 608-09 (citing Ouellette, 479 U.S. at 497). The Ouellette Court believed that § 510 did not empower a state “to impose separate discharge standards” under its state common law because this would undermine the structure of the CWA. Ouellette, 479 U.S. at 492-93 (emphasis added).
the CWA’s statutory mandates. 279

5. The Statutory and Regulatory Framework

The court did not interpret the CWA on its face as a clear manifestation of congressional intent. 280 Looking to the CWA as a whole, including its legislative history, the court concluded that the EPA’s interpretation was reasonable and consistent with Congress’s purposes in enacting the CWA. 281 The court pointed out that the CWA contains many provisions to ensure that water quality and pollution criteria will apply to all navigable waters of the United States. 282 The court found additional support for the EPA’s interpretation of the CWA in two other sections of the CWA, section 401 and section 402. 283

a. Section 401

Arkansas contended that the “applicable water quality requirements” language found in section 401 did not refer to the WQSs of the affected state. 284 Section 401 requires the EPA to notify any state whose waters may be affected by the discharge. 285 If any state that is notified “determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State,” the state can require a public hearing on the permit. 286 The permit agency is then required to condition the permit, based on the recommendations of any affected state and the EPA, so as to “insure com-

279. Oklahoma v. EPA, 908 F.2d 595, 608 (10th Cir. 1990). Language from Ouellette supports the Oklahoma court’s reasoning. Specifically, the Ouellette court stated:

Application of an affected State’s law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system. . . . The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced. . . . It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.

Ouellette, 479 U.S. at 496-97.
280. Oklahoma, 908 F.2d at 604.
281. Id.
282. Id. at 609. The court noted that the CWA prohibits the discharge of pollutants except pursuant to a permit, 33 U.S.C. §§ 1311, 1342; it requires the EPA to establish effluent limitations for point source discharges, id. §§ 1311-1312; it provides for EPA’s approval of WQSs, id. § 1313, and state permit programs, id. § 1342(b); and it establishes minimum procedural requirements for state permit programs, id. § 1314(i). Oklahoma, 908 F.2d at 609. The court also pointed out that § 510 of the CWA allows states to set limitations more stringent than those of the EPA, and the CWA is intended to be “technology forcing,” pressing technology and economics to achieve attainable levels of effluent reduction. Id. (citing S. REP. No. 414, 92d Cong., 1st Sess. 42 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 38, at 1460).
283. Oklahoma, 908 F.2d at 609-12.
284. Id. at 610.
286. Id.
pliance with applicable water quality requirements."287 Arkansas argued that the applicable water quality requirements did not include the affected state's WQSs.

The court disagreed with Arkansas, noting that the plain language of this section expressed an intent to enable affected states to ensure that their water quality would not be jeopardized by a discharge in another state.288 Furthermore, the court found that there would be no reason for this section to refer to the effect on the quality of the affected state's waters in terms of "violat[ing] any water quality requirement in such State" if the affected state's WQSs are irrelevant in the permit process. Therefore, the court believed that it was more likely that "applicable," as used in this section, referred to the federally-approved WQSs of affected states.289

The court found further support for the EPA's interpretation of the CWA in the legislative history of section 401.290 In 1977, Congress amended section 401 to add section 303 to the list of the CWA's provisions for which a state must certify compliance.291 Section 303 requires a state to set its own WQSs and submit them for EPA approval.292 This means that a federally permitted activity must be certified to comply with state WQSs adopted and approved under section 303.293 The legislative history states, "[A]ll States have approved WQSs. Thus, it is reasonable to require that Federal permits and licenses should take into account State water quality plans, standards and requirements adopted under section 303 to assure maintenance of water quality in respective States."294 Accordingly, the court ruled that the EPA's interpretation of the CWA, requiring point sources to comply with all approved WQSs, was reasonable.

b. Section 402

Arkansas also relied on the language of section 402(b)(5) that gives affected states the right to submit "written recommendations," thus arguably giving the affected state only an advisory role in the permit process.295 However, the court found Arkansas' argument to be fatally flawed. First, the court believed that giving an affected state an advisory role in the permit process and requiring a point source to comply with an affected state's approved WQSs are not

287. Id.; see supra notes 131-39 and accompanying text (discussing § 401).
289. Id.
290. Id.
292. See supra notes 82-93 and accompanying text (discussing § 303).
293. Oklahoma, 908 F.2d at 610; S. REP. No. 370, 95th Cong., 1st Sess. 72, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4397.
mutually exclusive. Second, the section on which Arkansas relied could not be looked at in isolation. The court pointed out that section 402(b)(5) merely describes one aspect of the procedures that a permit program must provide to insure communication among all interested parties. Next, the court noted that the language relied on is merely one of the many grounds upon which the EPA may refuse permitting authority to a state. Indeed, the court pointed to section 402(b)(1)(A), which requires adequate state authority to "issue permits which . . . apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317 and 1343 of this title." Also, the court noted that section 402(b)(1)(A) derives from section 401, which, as discussed above, requires permits to be conditioned to insure compliance by a discharger with all applicable WQSs.

c. Section 505

The court found further support for the EPA's interpretation of the CWA in section 505, which authorizes citizen suits. Section 505 authorizes the governor of an affected state to bring a civil suit against the EPA for violations of an effluent standard occurring in another state. The court, using common sense and legislative history, stated that this section is meant to provide a remedy for a negative impact on the affected state's water quality, and not necessarily for a violation of an effluent standard. The court concluded that this section's express remedy for protecting the water quality requirements of one state from violative discharges in another could not be reconciled with Arkansas' view that discharge permits are not required to ensure compli-

296. Id. at 612.
297. Id.
298. Id. Section 402(b) provides:
[T]he Governor of each State desiring to administer its own permit program . . . may submit to the [EPA] a full and complete description of the program. . . . The [EPA] shall approve [the program] unless he determines that adequate authority does not exist: (5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State . . . .
299. Oklahoma, 908 F.2d at 612 (citing 33 U.S.C. § 1342(b)(1)(A) (1988)). In a footnote, the court noted that compliance with state WQSs falls under the requirement of compliance with § 301. Id. at 612 n.21.
300. Id.; see supra notes 288-89 and accompanying text (discussing the court’s finding that the language of § 401 encompasses affected state’s WQSs).
301. Oklahoma v. EPA, 908 F.2d 595, 614 (10th Cir. 1990). Section § 505(a) of the CWA authorizes "any citizen to commence a civil action . . . against any person . . . who is alleged to be in violation of an effluent standard or limitation . . . or an order issued by the [EPA] or a State with respect to such standard of limitation." 33 U.S.C. § 1365(a) (1988).
302. 33 U.S.C. § 1365(h) (1988); see Oklahoma, 908 F.2d at 614.
303. Oklahoma, 908 F.2d at 614. The legislative history points out that effluent limitations are used to prevent pollution, and water quality is a measure of effectiveness. S. REP. No. 414, 92d Cong., 1st Sess. 8 (1971), reprinted in 2 LEGISLATIVE HISTORY: supra note 38, at 1426.
In its analysis, the court considered the CWA as a whole, including the legislative history. The court determined that downstream water quality would be virtually impossible to maintain if a source state did not comply with downstream states’ WQSs. Adopting Arkansas’ interpretation would result in “pollution havens.” Therefore, the court held that no discharge to a navigable water may be permitted unless compliance with all applicable water quality requirements, including the federally-approved WQSs of affected downstream states, is assured.

III. Analysis

The court’s interpretation of the CWA is a proper one when the CWA and the preemption cases leading up to Oklahoma are considered together. An examination of the CWA as a whole reveals the necessity of requiring out-of-state dischargers to meet the WQSs of downstream affected states. Without such a requirement, one state’s attempts to eliminate discharges into its waters would be undermined by a discharger located just beyond its borders in a neighboring state. Furthermore, the plain language and legislative history of sections 301 and 401 demonstrate that Congress intended an out-of-state discharger to comply with the WQSs of potentially affected states.

In addition, the preemption cases leading up to Oklahoma virtually eliminated other sources of law from which an affected state could find a remedy. Therefore, denying affected states a means of controlling out-of-state dischargers that impact the affected state’s waters is inconsistent with the policy and language of the CWA. The Oklahoma decision provides a solution by creating a preventative remedy: it requires an out-of-state point source to insure compliance with an affected state’s WQSs before any discharge occurs. This remedy is only as effective as a downstream state’s ability to have more stringent WQSs approved by the EPA. Therefore, a downstream state should be allowed to establish more stringent WQSs without interference from an upstream state or the EPA.

By requiring upstream, out-of-state sources to comply with a downstream state’s WQSs, the Oklahoma decision reverses the past relationship between upstream and downstream states. This reversal is fully justified by the fact that Congress decided to enact the CWA, creating a comprehensive approach which carefully outlines the roles of both source and affected states. The rever-

305. Id. at 615.
306. See supra notes 54-71 and accompanying text (discussing § 301); supra notes 131-39 and accompanying text (discussing § 401).
307. See supra notes 203-20 and accompanying text (discussing the preemption cases).
308. See infra notes 365-84 and accompanying text (discussing a source state’s ability to have the EPA disapprove an affected state’s WQSs because they are too stringent).
309. See supra notes 13-14 and accompanying text (describing the upstream state’s ability to ignore the downstream state’s WQSs).
sal is also justified by the fact that attempting to restore or protect the nation's waters would be theoretically impossible if upstream states could continue to ignore the effects of their discharges on downstream states. Any efforts by a downstream state could be rendered useless by an upstream, out-of-state source.

A. The Oklahoma Decision was Correct

The Oklahoma court's analysis was well reasoned and supported. The court began by recognizing that the CWA's "cornerstone" provision, section 301, requires states to set permit limitations to meet applicable WQSs. Without this requirement, the court correctly noted that a downstream state's attempts to preserve its water quality could be undermined by upstream state sources. The court also reasoned that allowing point sources to ignore neighboring state's WQSs would lead to congressionally condemned "pollution shopping" by industry for those states with the lowest WQSs.

The Oklahoma court also correctly distinguished Ouellette and Milwaukee III, noting that both cases concerned plaintiffs who were attempting to use state common law to circumvent the comprehensive regulatory scheme of the CWA. The court based its decision partly on this comprehensive regulatory scheme, emphasizing its certification and permit procedures which facilitate communication between neighboring states and the EPA. This ensures that issued permits comply with all applicable WQSs. Not only was the Oklahoma court's analysis adequately supported, but its decision also promotes the preservation and restoration of the nation's waters, consistent with the goals of the Clean Water Act.

1. Section 301: Achieving Downstream Water Quality and the Problem of Pollution Shopping

The Oklahoma court correctly pointed out that the objective of the CWA, to restore and maintain the chemical and biological integrity of the nation's waters, would become illusory if upstream sources did not have to respect downstream state WQSs. Water pollution, like air pollution, inherently ignores state boundary lines. This fact alone elevates pollution to a national concern, requiring interstate cooperation. In this regard, the court correctly noted

310. See supra notes 264-69 and accompanying text (discussing the Oklahoma court's reliance on § 301(b)(1)(C)); infra notes 316-31 and accompanying text (same).
311. See supra note 267 and accompanying text (discussing "pollution shopping").
312. Id.
313. See supra notes 271-79 and accompanying text (discussing the Oklahoma court's analysis of the preemption cases); infra notes 332-40 and accompanying text (same).
314. See supra notes 280-305 and accompanying text (discussing the Oklahoma court's analysis of the CWA's regulatory framework); infra notes 341-48 and accompanying text (same).
315. See supra note 300 and accompanying text.
316. See supra notes 277-87 and accompanying text (discussing the Oklahoma court's analysis).
that section 301(b)(1)(C), requiring states to set limitations to meet WQSs, would be frustrated if an out-of-state source did not meet an affected state's WQSs. For example, an Illinois WQS for Lake Michigan that was more stringent than Wisconsin's corresponding WQS would be merely aspirational if a Wisconsin discharger did not have to meet the Illinois WQS.

Furthermore, the court's recognition that section 301 is not a mere timing provision, but requires states to establish permit limitations to meet WQSs, is supported by legislative history. Congress stated, "Subsection (b) of section 301 establishes a technological basis for the determination of effluent limitations for any discharge of pollutants provided that such limitations, at a minimum, are, when applied to all point sources, adequate to meet existing or new water quality standards as provided under section 303." Thus, Congress saw section 303 as requiring states to establish effluent limitations necessary to meet applicable WQSs.

Moreover, the court realized that congressionally condemned "pollution shopping" would occur if each state was treated as an isolated entity with no responsibility beyond its borders. Again considering the above Wisconsin/Illinois example, if Wisconsin dischargers did not have to comply with Illinois WQSs, then some businesses might be more attracted to Wisconsin in order to exploit the lower WQSs.

Arkansas' concerns of a "chaotic" regulatory scheme, where any downstream state could impose its WQSs on any upstream state's dischargers and where upstream dischargers would be unable to predict the applicable WQSs, were properly dismissed by the court. The court pointed out that the effects of an initial discharge become attenuated with time and distance, eventually becoming undetectable. Therefore, the authority of a state to require compliance with its WQSs depends on the ability to measure the impact of the discharge on the receiving waters.

Sophisticated computer modeling and extensive studies were used in Oklahoma to show that an out-of-state source's impact on downstream waters can be predicted. Using these techniques, it is possible to predict the permit conditions necessary to protect a state's water quality from an out-of-state discharger. However, as the Oklahoma court noted, the effects of a discharge

317. Id.
318. See supra notes 54-71 and accompanying text (discussing § 301).
319. H.R. REP. NO. 911, 92d Cong., 2d Sess. 100 (1972), reprinted in 1 LEGISLATIVE HISTORY, supra note 59, at 787 (emphasis added); see supra note 59 and accompanying text (discussing the obligation of states to establish permit limitations that meet WQSs).
320. See supra note 267 and accompanying text.
321. See supra notes 259-69 and accompanying text (discussing the court's rejection of Arkansas' arguments).
322. Id.
323. Id.
325. See supra notes 140-54 and accompanying text (discussing § 402 permit requirements).
become attenuated with distance. Thus, most downstream states will not be able to detect or measure the effects of a distant upstream discharge. In such a case, the downstream states will not be able to interfere with permitting of the upstream source. Therefore, as a practical matter, an upstream discharger generally will not be subject to the WQSs of all the downstream states.

Moreover, because the approval of every states’ WQSs is centralized with the EPA, not only does this make it easier to ascertain the applicable WQSs, but it also aids in creating standards which are consistent and evenly applied. This is also desirable from a practical standpoint. Most states have their own permit-issuing agency. By requiring federal approval of WQSs, the ends are placed in the hands of a centralized governing body. The specific means used to achieve those ends, effluent limitations or other treatment strategies, are left to the state permit agency. Each state, and each type of discharger, have their own unique concerns and problems. Therefore, it is preferable to leave decisions as to how WQSs are met in their hands. Indeed, the CWA provides for each state to play a large role in the overall undertaking of eliminating the discharge of pollutants into the nation’s waters.

Furthermore, the EPA must notify all affected states before a permit is issued. As a result of this permit hearing, the EPA should be able to determine and set the appropriate standards to insure compliance with every affected state's WQSs.

2. The Preemption Cases and Section 510

Arkansas relied on Ouellette and Milwaukee III in arguing that section 510 restricts a state’s authority to set more stringent standards only for sources located within that state. The Oklahoma court correctly distinguished both of the preemption cases because they involved states seeking to establish more stringent standards on an out-of-state source by the application of state or federal common law in an enforcement action. In contrast, Oklahoma in-

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326. See supra notes 269-70 and accompanying text (discussing the court’s reasoning).
327. See Oklahoma, 908 F.2d at 607.
328. See supra note 144 and accompanying text.
329. See supra notes 54-130 and accompanying text (generally discussing the roles of a state and the EPA under the CWA).
330. See supra note 136 and accompanying text (discussing the EPA’s duties under § 401).
331. Arkansas’ concern has more merit when a geographic area like the Mississippi River Valley bordering Tennessee, Kentucky, Missouri, and Arkansas is involved. However, an orderly regulatory scheme can still be fashioned because not only should the EPA be aware of the potentially overlapping and conflicting WQSs of the neighboring states, but also computer modeling and pre-permit hearings should be able resolve any conflicts between applicable WQSs and allow the EPA to set the appropriate permit conditions to insure compliance with all applicable WQSs.
332. See supra notes 271-79 and accompanying text (discussing Arkansas’ use of the preemption cases).
333. See supra notes 193-220 and accompanying text (discussing Milwaukee II, Milwaukee III, and Ouellette).
volved the application of federal statutory law to the EPA permit process.\textsuperscript{334} Therefore, \textit{Ouellette} and \textit{Milwaukee III} are distinguishable from this case.

The \textit{Oklahoma} court also correctly reasoned that section 510 should not be read as limiting the authority of the states to regulate interstate waters.\textsuperscript{335} Congress intended for the states to play a large role in regulating water pollution under the CWA.\textsuperscript{336} The court recognized the contradiction that would result if a state's authority to set "more restrictive standards" was limited only to in-state sources.\textsuperscript{337} The primary goal of the CWA is to eliminate discharges into navigable waters.\textsuperscript{338} Denying Oklahoma the right to require out-of-state sources to comply with its WQSs would be contrary to this goal. Furthermore, the limiting language relied on by Arkansas does not appear in the portion of section 510 granting the power to set stricter standards than those of the CWA.\textsuperscript{339}

Moreover, setting more stringent WQSs under section 510 does not allow a state to directly regulate out-of-state dischargers because the state is not relying on state or federal common law. Rather, it is the EPA's approval of a state's WQSs which makes them federally enforceable against other states.\textsuperscript{340} Oklahoma used its authority under section 510 to adopt more stringent WQSs than required by the CWA. The WQSs were approved by the EPA under the authority of the CWA. Oklahoma should, therefore, be able to apply their WQSs, now federal statutory law, against an out-of-state point source.

3. \textit{Sections 401 and 402}

The \textit{Oklahoma} court's holding is also supported by the language of sections 401 and 402. The court criticized Arkansas' contention that the "applicable water quality requirements" are the WQSs of only the source state.\textsuperscript{341} The

\begin{itemize}
  \item \textsuperscript{334} See \textit{supra} notes 223-34 and accompanying text (discussing the facts of the \textit{Oklahoma} case).
  \item \textsuperscript{335} See \textit{supra} notes 271-79 and accompanying text (discussing the \textit{Oklahoma} court's analysis of § 510).
  \item \textsuperscript{336} See \textit{supra} notes 82-127 and accompanying text (discussing a state's role under § 303); see also S. Rep. No. 414, 92d Cong., 1st Sess. 4 (1971), reprinted in 2 \textit{Legislative History, supra} note 38, at 1422 ("The setting of [WQSs] for interstate navigable waters . . . is the keystone of the present program for control of water pollution. . . . The task of setting [WQSs], assigned to the States by the 1965 legislation, is lagging.").
  \item \textsuperscript{337} See \textit{supra} notes 258-67 and accompanying text (discussing the \textit{Oklahoma} court's rejection of Arkansas' argument that a state's authority to set more stringent standards was limited to in-state sources).
  \item \textsuperscript{338} See \textit{supra} note 45 and accompanying text.
  \item \textsuperscript{339} See \textit{supra} note 263 and accompanying text.
  \item \textsuperscript{340} See \textit{supra} note 91-93 and accompanying text (discussing the federal enforceability of WQSs); see also S. Rep. No. 414, 92d Cong., 1st Sess. 4 (1971), reprinted in 2 \textit{Legislative History, supra} note 38, at 1422 ("The States have first responsibility for enforcement of their standards. When approved by the [EPA], however, the standards for interstate navigable waters become Federal-State standards.").
  \item \textsuperscript{341} See \textit{supra} notes 284-94 and accompanying text (discussing the \textit{Oklahoma} court's analysis of § 401).
\end{itemize}
court found that section 401 refers to the effect on the water quality of the affected state in terms of "violat[ing] any water quality requirement in such State."\textsuperscript{342} The legislative history also showed Congress's intent to include EPA-approved WQSs in permits issued under the CWA.\textsuperscript{348} Therefore, the language of section 401, as well as its legislative history, indicate that "applicable water quality requirements" refer to the affected states EPA-approved WQSs.\textsuperscript{344}

Arkansas also relied on the language of section 402 that gives affected states the right to submit "written recommendations," thus arguably giving the affected state only an advisory role in the permit process.\textsuperscript{346} As the court noted, merely because an affected state may have only an advisory role under this section does not mean that the discharger does not have to comply with the affected state's approved WQSs.\textsuperscript{348} Ironically, the court's conclusion is reinforced by express language in section 402, the same section on which Arkansas relied. Specifically, section 402(b)(1)(A) requires adequate state authority to "issue permits which . . . apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317 and 1343 of this title."\textsuperscript{347} Thus, this section requires a state permit program to insure that an affected state is able to make "written recommendations" about its WQSs in order to enable the permit agency to "issue permits which . . . insure compliance with any applicable requirements of [section] 1311."\textsuperscript{348}

In conclusion, sections 401 and 402 provide mechanisms to insure communication between states with common waterways. These sections require the EPA to notify a potentially affected state and to allow that state to call a public hearing. Sections 401 and 402 provide for the affected state to advise and make recommendations to the permit agency. Section 401 further provides that a permit cannot be issued unless compliance with all applicable water quality requirements is assured. Therefore, these sections enable source states and affected states to assist one another in issuing permits that comply with an affected state's WQSs.

4. Section 505

The language of section 505 also supports the Oklahoma decision. Section 505(h) authorizes "[a] Governor of a State [to] commence a civil action . . .

\begin{itemize}
\item 343. See supra notes 290-94 and accompanying text (discussing the Oklahoma court's analysis of the legislative history of § 401).
\item 344. The language "applicable water quality requirements" is from 33 U.S.C. § 1341(a)(2) (1988).
\item 345. Oklahoma v. EPA, 908 F.2d 595, 612 (10th Cir. 1990); see supra notes 140-55 and accompanying text (discussing § 402).
\item 346. Oklahoma, 908 F.2d at 612.
\item 347. 33 U.S.C. § 1342(b)(1)(A) (1988). The court also pointed out § 303 WQSs are included in the language of § 301. Oklahoma, 908 F.2d at 612.
\end{itemize}
against the [EPA] . . . to enforce an effluent standard . . . the violation of which is occurring in another State and is causing . . . a violation of any water quality requirement in his State.”

The court correctly interpreted this section to provide a remedy for a negative impact on the affected state’s water quality and not necessarily for a violation of an effluent standard. First, the language “causing a violation of any water quality requirement in [the affected] state” is distinguishable from a violation of an “effluent standard or limitation.” Second, the legislative history states that water quality is a measure of program effectiveness and performance, whereas effluent limitations are the basis for prevention and elimination of pollution. Thus, the court correctly pointed out that this section’s expressed remedy for protecting the water quality requirements of one state from violative discharges in another state rebutted Arkansas’ argument that discharge permits are not required to ensure compliance with another state’s WQSs. That is, requiring an effluent limitation violation before a suit can be brought for the violation of a WQS implies that the effluent limitations were set in order to comply with the affected states’ WQSs.

In sum, the court correctly recognized that the mandate of the CWA would be undermined if an out-of-state source was not compelled to comply with a neighboring state’s WQSs. Maintaining and improving water quality would be virtually impossible if a discharger were free to discharge pollution a short distance from another state’s border and ignore the federally-approved WQSs of that neighboring state. Such a situation would also be inequitable because


350. See supra notes 301-04 and accompanying text (discussing the Oklahoma court’s analysis of § 505).

351. Oklahoma v. EPA, 908 F.2d 595, 614 (10th Cir. 1990).

352. See supra note 41 and accompanying text.

353. See supra note 301-04 and accompanying text (discussing the Oklahoma court’s analysis of § 505).

354. The language of section 505 implies that a potentially affected state’s WQSs must be considered when setting an out-of-state discharger’s permit effluent limitations because it assumes or requires a violation of an effluent limitation accompanied by a subsequent WQS violation in the downstream state. If the effluent limitations were properly set with the downstream WQS in mind, the WQS would only be violated when the effluent limitations were violated. If the out-of-state discharger was not violating its permit effluent limitations, yet a downstream WQS violation was occurring, then the affected state has a duty under 33 U.S.C. § 1313(d)(1)(A) to identify the waters where the effluent limitations set under § 301 are not stringent enough to implement the applicable WQSs. Then under either § 1311 or § 1312, new effluent limitations would have to be set. Thus, an upstream discharger will not be penalized for following its permit effluent limitations, which for whatever reason are not stringent enough to meet downstream WQSs. By requiring or assuming an effluent limitation violation before a suit can be brought, it implies that the effluent limitations were set in order to comply with the affected state’s WQSs.

However, § 505(h) could be read to mean that as long as the discharger follows its permit conditions, it does not have to worry about its effects in another state. This is an unacceptable interpretation as it would undermine the CWA’s policy of preserving the integrity and quality of the nation’s waters.
most of the discharge's impact would be on the neighboring state's water.

B. The Preventative Remedy

The preemption cases, Ouellette and Milwaukee II, eliminated almost all of an affected state's previous remedies. After the preemption cases, a state could no longer turn to its own state common law or federal common law to protect its waters from out-of-state dischargers. Therefore, it was necessary for the Oklahoma court to use federal statutory law, the CWA, to provide affected states with an appropriate remedy if one was available at all. The Oklahoma court accomplished this by recognizing an affected state's power under sections 301, 401, and 510 to have an out-of-state discharger comply with its WQSs.

According to Oklahoma, a state can challenge the approval of a permit to an out-of-state discharger. The scenario begins, for example, with a state like Illinois reviewing its WQSs for Lake Michigan. The state must hold public hearings and send any revised WQSs, along with supporting analysis to the EPA. Once approved by the EPA, the WQSs becomes federally enforceable. Any out-of-state discharge must comply with the WQSs. After the EPA approves the WQSs, its approval becomes reviewable in the federal district courts to determine if its actions were arbitrary and capricious.

When the City of Milwaukee, for example, seeks a permit to discharge treated wastewater into Lake Michigan, it must provide the permit agency, either the State of Wisconsin or the EPA, with a certification which states that the discharge will comply with the applicable sections of the CWA. The permit agency must then notify the EPA that it has received an application for a permit. The EPA will notify any state whose waters might be affected by the discharge allowed in the permit. Therefore, the EPA should notify Illinois of the Milwaukee application.

When Illinois is notified of Milwaukee's permit application, the EPA will grant it a hearing on the application upon request. At the hearing, Illinois can require the permit issued to Milwaukee to be conditioned as necessary to comply with Illinois' WQSs. This undoubtedly requires the presentation of extensive factual findings. If Illinois successfully proves that its WQSs will be

355. See supra note 203-20 and accompanying text (discussing the preemption cases).
356. Currently, Illinois' phosphorous WQS for Lake Michigan requires a level of no more than 0.007 mg/l. ILL. ADMIN. CODE tit. 35, § 302.501 (Supp. 1988).
357. See supra notes 82-93 and accompanying text (discussing a state's requirements under § 303).
358. See supra note 305 and accompanying text (discussing the Oklahoma court's holding that out-of-state dischargers must comply with the WQSs of affected states).
359. See supra notes 131-39 and accompanying text (discussing § 401 certification requirements).
360. Id.
361. Id.
362. Id.
363. See, e.g., Oklahoma v. EPA, 908 F.2d 595, 621 (10th Cir. 1990) ("[I]t is difficult to
affected by the discharge, the permit will be conditioned so as to comply with Illinois' WQSs, and Milwaukee can begin discharging into Lake Michigan. Thus, Illinois has a method of protecting its waters before any discharge and subsequent water quality deterioration occurs.\textsuperscript{364}

The \textit{Oklahoma} decision also benefits the public by encouraging the eventual elimination of pollutant discharge into navigable waters and preventing water quality deterioration. Furthermore, especially with regard to environmental "remedies," preventing a problem is better than correcting a problem. Establishing clear dialogue between all interested parties before a discharge occurs, rather than allocating clean up costs after a prohibited discharge occurs, is the most effective means of maintaining and restoring the integrity of the nation's waters. Therefore, the court in \textit{Oklahoma} provided the states with an effective remedy, a remedy which also makes the mandate of the CWA meaningful.

However, the preventative remedy is only as effective as a state's ability to have more stringent WQSs approved by the EPA. Thus, the WQS approval process is of utmost importance to the states.

\textbf{C. The EPA's Authority to Approve More Stringent WQSs}

Every three years, when a state reviews its WQSs, it is required to hold public hearings for the purpose of reviewing and adopting new WQSs.\textsuperscript{366} A state is required to make the proposed WQS revisions and the analyses supporting the revisions available to the public prior to the hearing.\textsuperscript{366} Presumably, a potential source state may attend and voice its concerns that the neighboring state's WQSs are too stringent and will unduly restrict the source state's industry. However, the potential source state appears to have no legal recourse in the event its concerns are not adopted by the affected state. Rather, the process by which the EPA approves a state's WQSs appears to be the only method by which another state can challenge a neighboring state's WQSs as too stringent.

In approving a state's WQSs, the EPA must determine if they are "consistent with" the requirements of the CWA.\textsuperscript{367} The EPA's approval of a state's WQSs is reviewable in the federal district courts and will be upheld unless it is found that the EPA has acted outside its scope of authority, abused its discretion, or acted arbitrarily or capriciously.\textsuperscript{368} An examination of the case law summarize a record that consists of five boxes and four years of briefs, orders, transcripts, prepared testimony, correspondence, technical reports and miscellaneous other documents. . . .

The last 15 pages of the \textit{Oklahoma} opinion discussed the factual issues of the water quality of the Illinois River. \textit{Id.} at 620-35.

364. This method is preferable to bringing a nuisance or similar type action \textit{after} an out-of-state source has deteriorated another state's water quality because the damage to the environment is prevented.

365. \textit{See supra} notes 82-93 and accompanying text (discussing § 303).


367. \textit{See supra} notes 89-127 and accompanying text (discussing the EPA's role in reviewing state WQSs).

368. \textit{Id.}
discussing the EPA’s approval of WQSs suggests that the source state has a difficult burden in attempting to justify a reversal of any EPA action.\footnote{369} Even more daunting is the case law which apparently precludes the argument that more stringent WQSs are not “consistent with” the requirements of the CWA.\footnote{370} As a result of the authority given to states under section 510 of the CWA, at least one court has stated that the EPA had “no power to disapprove” a state’s WQSs merely because they are more stringent than those required by the CWA.\footnote{371} Courts have also expressly rejected the proposition that states must consider economic and social factors when setting WQSs.\footnote{372} Instead, only scientific and technological factors must be considered, and then only to show that the scientific criteria of the WQS will be sufficient to achieve the designated use of the WQS.\footnote{373} In addition, the source state’s lack of authority in the approval of more stringent standards by a neighboring state is important because once a state’s WQSs are approved by the EPA, the EPA must incorporate those WQSs into permits when appropriate and has no authority to set aside or modify them at a permit proceeding.\footnote{374} No court has yet encountered the precise situation of an upstream state challenging the EPA’s approval of a downstream state’s WQSs. All of the existing case law deals with the EPA’s lack of authority to disapprove or modify a state’s WQSs with respect to in-state sources.

However, the EPA has the authority to promulgate WQSs for any state that does not properly do so.\footnote{375} In one such situation, a court held that the EPA was not required to consider any economic factors in setting WQSs for the state. Since the state in that situation unsuccessfully argued that the WQSs being promulgated were too stringent because they were not economically achievable, it follows that this same argument would not succeed for an upstream state that was challenging a downstream state’s WQSs. That is, economic factors should not be considered in the setting of WQSs regardless of whether it was a state or an in-state point source that claimed the WQSs were not economically achievable. Furthermore, the CWA expressly provides for a cost/benefit analysis and consideration of economic factors in sections pertaining only to the setting of effluent limitations.\footnote{376} This indicates that Congress

\footnotesize{369. \textit{Id.}}
\footnotesize{370. See supra notes 105-09 and accompanying text.}
\footnotesize{371. Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1284 (D.S.D. 1979); see supra notes 105-09 and accompanying text (discussing \textit{Homestake Mining Co.}).}
\footnotesize{372. See supra note 126 and accompanying text (discussing the court’s decision in \textit{Mississippi Commission on Natural Resources v. Costle} finding that the EPA does not have to consider economic impact in setting criteria).}
\footnotesize{373. Mississippi Comm’n on Natural Resources v. Costle, 625 F.2d 1269, 1277-78 (5th Cir. 1980). For example, a state would be required to point to some scientific studies which show that a criteria of at least 5.0 mg/L of dissolved oxygen is necessary to maintain water quality suitable to use for fishing. \textit{Id.} at 1278.}
\footnotesize{374. See supra notes 89-127 and accompanying text (discussing the EPA’s authority with regard to § 303 WQSs).}
\footnotesize{375. See supra note 93 and accompanying text (discussing § 303 of the CWA).}
\footnotesize{376. See supra notes 54-71 and accompanying text (discussing § 301); supra notes 72-80 and}
did not intend for states to consider economic factors in setting WQSs. If Congress wanted the EPA to consider economic factors in setting WQSs, it would have expressly required it as it did for effluent limitations.377

Moreover, the concept of "alternate effluent control strategies" implies that WQSs are purely scientific ends that must be achieved by whatever means a source can develop.378 As the legislative history indicates, "further reduction of the level of effluent entering the affected waters may not be possible through control technology, yet [it is] essential to water quality. Alternate effluent control strategies, such as the transportation of effluent to other less affected waters or the control of in-plant processes would have to be developed."379 Congress, therefore, contemplated that point sources would have an unconditional imperative to meet the desired water quality, but Congress believed that point sources could develop the strategies necessary to meet the WQSs. If necessity is a source of invention, then refusing to consider economic factors in establishing WQSs provides incentive for point sources to develop alternative waste treatment strategies and to use creative combinations of waste treatment strategies to "eliminate the discharges of pollutants into navigable waters"380 and "restore and maintain the . . . integrity of the Nation's waters."381

Lastly, the goal of the CWA is to eliminate the discharge of all pollutants into navigable waters. It is hard to imagine the EPA determining that a particular WQS is "consistent with" the requirements of the CWA because it strictly limits the amount of a pollutant that will be tolerated in a body of water.

The unique economic concerns of each state and each point source are taken into account in the specific application of effluent limitations and permit conditions by the agency issuing a permit. Thus, a point source and its permit-issuing agency have control over the means used to comply with the required ends. In short, as long as a state's WQSs comport with modern science and technology, that is, if they are measurable and maintain the desired water quality, neighboring states must comply with them. Any unique circumstances of the source state, economic or otherwise, can and will be considered in setting effluent limitations and other permit conditions. For example, the City of Milwaukee my not argue that it will be economically difficult for Milwaukee's

accompanying text (discussing § 302).

377. Thus, economics will play a role in setting effluent limitations to individual dischargers. Even though the latest, best technology may be able to virtually eliminate the quantity of pollutants in a discharge, and thus warrant the setting of strict effluent limitations, the CWA will not require the discharger to implement the technology if it is prohibitively expensive. See 1 LEGISLATIVE HISTORY, supra note 59, at 169 (stating that when determining best practicable technology, the EPA should consider factors such as the age of the discharge plant, its size, the unit processes involved, and the cost of applying such technology).


379. Id.


381. Id. § 1251(a).
industry to comply with Illinois' WQSs. However, the permit agency will conduct a cost/benefit hearing before it sets the effluent limitations for the permit. At this hearing, a Milwaukee discharger may present evidence to the permit agency showing that it is only economically feasible for the discharger to limit the amount of phosphorous concentration in its effluent to ten parts per million. The permit agency may take this into account in conditioning the permit, but the discharger will not be excused from complying with Illinois' WQSs. Instead, the permit will have to contain restrictions requiring the discharger to use alternate waste treatment strategies to enable it to comply with Illinois WQSs. For example, the discharger may be required to implement some in-plant processes, or transport the pollutants to a proper land disposal site. Thus, the scientific ends (Illinois' WQSs) must not be compromised, but the discharger may choose any alternative means to achieve those ends.

A source state, therefore, appears to have little ability to challenge an affected state's WQSs merely because they are more stringent than those required by the CWA. Not only are economic arguments foreclosed, but the EPA has no authority to disapprove WQSs set pursuant to section 510 merely because they are more stringent than those required by the CWA. Similarly, the EPA cannot modify or set aside such WQSs when conditioning a discharge permit. This represents a reversal of the past relationship between a source state and an affected state with regard to interstate water pollution.

D. The Necessity of Reversing the Prior Relationship Between Source States and Affected States

With regard to federal/state relations, the Oklahoma decision, by giving more power to states to set their own WQSs, represents what some commentators have called a regulatory scheme which is "responsive to the concerns of the new federalism." However, with regard to relations between the states,

382. See supra notes 60-71 and accompanying text (discussing the setting of § 301 effluent limitations based on best available technology ("BAT") and best conventional pollutant control technology ("BCT").
383. See supra notes 378-79 and accompanying text (discussing alternate effluent control strategies).
384. Any concern of abuse by a downstream state is mitigated in part by the fact that the downstream state also has to comply with any more stringent WQSs that it establishes. Thus, it is somewhat illogical to assume any downstream state will immediately set more stringent WQSs. However, potential for abuse does exist in that a downstream state may attempt to establish a "border protection zone" of extremely stringent WQSs that would effectively apply to only the first 15 miles of all the waters entering its borders from other states. An upstream state may also find procedural or other substantive problems, such as vagueness if the WQSs are narrative, with a downstream state's WQSs.
385. See supra notes 13-14 and accompanying text (describing the source state's ability to ignore the affected state's WQSs).
one might argue that the Oklahoma decision has overstepped the bounds of traditional state sovereignty by giving downstream states the ability to indirectly regulate upstream states. Now that an upstream state's point source must insure compliance with a downstream state's WQSs, the upstream state appears to be under the control of the downstream state. One might even argue that the upstream state's apparent inability to have the EPA disapprove another state's more stringent WQSs puts the upstream state at the mercy of the downstream state. However, this reversal in the relationship between upstream and downstream states is justified by the supremacy of federal law over state law, by the fact that the objectives of the CWA would be undermined if this relationship did not exist, and by a desire to reduce negative externalities. Furthermore, upstream states are not at the mercy of the downstream state because many alternatives to discharging into the nation's waters are available.

The Oklahoma court was very much aware of the state sovereignty and indirect regulation problems raised by this case. However, the court pointed out that the issue was not whether one state could enforce more stringent standards set under its own state law against another state, but rather, whether the CWA, as federal statutory law, required one state to comply with another state's WQSs set under the CWA. After a thorough examination of the CWA and its legislative history, the court held that an upstream state must comply with a downstream state's federally-approved WQSs. The objective of the CWA, to restore and maintain the chemical and biological integrity of the nation's waters, would become illusory if an upstream source did not have to comply with a downstream state's WQSs. This becomes self-evident when one considers that water pollution does not recognize state boundary lines. Thus, Oklahoma's attempts to establish more stringent WQSs under the CWA to protect the integrity of its scenic river area would be merely aspirational if an Arkansas point source were able to discharge just miles above the Oklahoma border without having to comply with Oklahoma WQSs. Therefore, the CWA would collapse on itself if a downstream state's WQSs could be ignored by upstream point sources.

(discussing the problems of federal-state relations in the environmental area).

387. This situation is similar to that occurring in Milwaukee III, 731 F.2d 403 (7th Cir. 1984), where the court held that § 510 of the CWA did not allow Illinois to use its own state law to establish more stringent standards for a Wisconsin point source. Id. at 413-14; see supra notes 195-202 and accompanying text (discussing the Milwaukee III decision).

388. See infra notes 395-400 and accompanying text (discussing some specific alternatives to direct water discharging).

389. In a footnote, the court stated, "We do not suggest one state may directly regulate the conduct of a discharger in another state. Such exercise of jurisdiction would exceed traditional bounds of sovereignty." Oklahoma v. EPA, 908 F.2d 595, 606 n.9 (10th Cir. 1990).

390. Id.

391. As federal law, the EPA-approved WQSs become the "supreme Law of the Land." See U.S. CONST. art. VI, cl. 2.

392. See supra notes 264-69 and accompanying text (discussing the effect of not requiring an upstream state to comply with a downstream state's WQSs).
Furthermore, had the *Oklahoma* court not decided as it did, downstream states would be at the mercy of the upstream states, and therefore, would bear a disproportionate amount of the environmental impact and costs of the discharge on water quality degradation. Perhaps the best example of this is the Illinois/City of Milwaukee saga. The facts of the *Oklahoma* decision also provide a useful example. If the Arkansas discharge was allowed regardless of Oklahoma's WQSs, then Oklahoma would only have recourse under Arkansas nuisance law for any water quality degradation caused to its scenic river area. Assuming this remedy to be inadequate, not only is Arkansas' pollution now Oklahoma's problem, Oklahoma is left with a disproportionate amount of the expense of restoring its water quality while the Arkansas point source has not sufficiently reflected its actual costs. This is a negative externality which will lead to an inefficient use of resources by the Arkansas point source. Requiring the Arkansas point source to comply with Oklahoma's WQSs prevents the degradation of Oklahoma's waters by an out-of-state source and forces the point source to more accurately reflect the actual costs of its discharge. Moreover, given the purpose of the CWA, it is preferable to require an upstream point source to utilize alternate methods of waste disposal to meet the downstream state's WQSs rather than to allow an upstream state to cause water quality degradation in a downstream state.

Finally, not only are alternatives to direct water discharge available, but Congress seemed to require them to be utilized if necessary. Municipal wastewater treatment facilities, like the one involved in *Oklahoma*, mainly produce sewage sludge as a result of their treatment processes. Some common alternatives of disposing this sludge instead of discharging it into a river include land application, composting, landfilling, and incineration. Each alternative has its own advantages and disadvantages, but all are viable alternatives to discharging into navigable waters. Other alternatives include the development of in-plant processes which are designed to reduce the amount of

393. *See supra* notes 16, 191-202, 205-10 and accompanying text (discussing the various litigation between Illinois and the city of Milwaukee).

394. This assumes that the Arkansas point source did not violate its permit conditions.

395. This assumption is reasonable because as long as the Arkansas point source complies with Arkansas WQSs, it follows that the discharge would not cause a nuisance under Arkansas state law. A nuisance is an infringement on the use and enjoyment of another's property. Therefore, it would be very difficult, if not impossible, to argue that the same discharge rises to the level of a nuisance at an even more distant, downstream location.


397. Massey, *How Federal Law Encourages Land Application of Municipal Wastewater Effluents and Sludges*, 23 S. TEX. L.J. 1, 8 (1982). Sewage sludge is defined as a mixture of water, inorganic, and organic solids removed from municipal wastewater by physical, biological, and/or chemical treatment. *Id.*


399. *Id.* at 200-01.
a pollutant produced for a given process. Another possibility might be for the source to purchase discharge rights from another point source. This far from exhaustive list of alternatives indicates that an upstream state point source will not be at the mercy of a downstream state that adopts more stringent WQSs.

In sum, the Oklahoma decision reverses the previously existing relationship between upstream and downstream states. No longer is an upstream state point source free to discharge into an interstate body of water without regard for the downstream state’s WQSs. This reversal is justified by the supremacy of federal law over state law, by the fact that the objectives of the CWA would be undermined if this relationship did not exist, by a desire to reduce negative externalities, and by the availability of alternatives to discharging into the nation’s waters.

IV. IMPACT: STATE RIGHTS AND REMEDIES UNDER THE CWA

A. State and Federal Roles in the Regulation of Interstate Water Pollution

One result of the Oklahoma decision will be to increase the EPA’s responsibility of review and oversight in establishing and implementing WQSs. Congress intended for the states and the federal government to both play large roles under the CWA. The EPA’s role in approving and implementing WQSs will surely increase as states set more and more stringent WQSs, and as other states call on the EPA to determine the appropriate WQSs to include in a permit. The states will, and appropriately should, retain control over the initial setting of WQSs. However, a centralized body such as the EPA is necessary to maintain a uniform system of water pollution control and to ensure that WQSs are being set that incorporate the proper scientific criteria.

WQSs are the desired ends which are achieved by the means of effluent limitations and alternative effluent strategies. Viewing the CWA in this manner, the CWA correctly approaches the unique problem of water pollution. The inherent transient nature of water pollution demands that the ends of water pollution regulation, the WQSs, be overseen by a single unifying entity. Uniformity, as well as interstate cooperation and communication, is promoted by a centralized body. A federal agency with sufficient resources could ensure that WQSs and effluent limitations reflect modern science and technology. Moreover, federal oversight and protection provides the impetus for states to set stricter, pollution-reducing standards which help to achieve the mandate of

400. See supra note 379 and accompanying text (quoting S. REP. No. 414, 92d Cong., 1st Sess. 46 (1971), reprinted in 2 LEGISLATIVE HISTORY, supra note 38, at 1464). For example, the point source may be able to recover some of its carbon dioxide or heavy metals.

401. See Gaba, supra note 30, at 1174-75 (discussing how the total amount of allowable discharge for a segment of a river is allocated among point sources sharing that segment).

402. See generally id. (stating that the EPA should only review a WQS’s criteria aspect and leave the setting of a WQS’s use aspect to the state’s discretion).
the CWA.

However, the unique characteristics and concerns of each state require that the designation of a WQS's use aspect be left to the states. Similarly, respect for the differences among the states requires that each state's permit agency have control over the establishment of the means, the effluent limitations, and any alternative effluent strategies, which are necessary to achieve the applicable WQSs. Therefore, the CWA correctly approaches the problem of water pollution regulation because it ultimately places the burden of establishing WQSs in a centralized body, the EPA, while allowing individual states to control the means of achieving WQSs through their own permit agencies.

B. Encouraging States to Revise More Stringent WQSs

The Oklahoma decision will also encourage states to conscientiously review their existing WQSs and to adopt more stringent WQSs. States are required to revise their WQSs every three years. In order to insure compliance with WQSs, a potentially affected state must review and revise its WQSs and have them approved by the EPA. A state which does not revise its WQSs and later finds that they are not as stringent as it desires, can only impose more stringent permit conditions on out-of-state dischargers by using the common law of the state where the point source is located. Not only will more states be interested in revising their WQSs and having them approved by the EPA, but upstream states will presumably have an interest in entering into compacts with neighboring downstream states to develop a cooperative regulatory system over the waters that they share. Thus, because the Oklahoma decision requires source states to comply with an affected state's WQSs, the decision encourages states that are interested in protecting their waters to set more stringent WQSs.

C. Remedies

Returning to the running example, assume that Illinois' WQSs are approved, and Milwaukee's permit is conditioned to ensure compliance with Illinois' standards. The next question becomes the type of remedies that the CWA provides for Illinois to enforce the permit conditions and otherwise ensure that its WQSs are met.

403. See id. at 1214 (reiterating that the setting of a designated use is an economic and land use policy question traditionally left to the states).
404. See supra notes 82-93 and accompanying text (discussing § 303 requirements).
405. See supra notes 365-84 and accompanying text (discussing the EPA's approval of state WQSs and the ability of one state to have another state's WQSs disapproved because they are too stringent).
406. See supra notes 203-20 and accompanying text (discussing the preemption cases).
1. Federal Enforcement

The Milwaukee discharger is required to file a discharge monitoring report ("DMR"). Illinois can use this information to determine if Milwaukee is violating its permit conditions. Once Illinois notifies the EPA of Milwaukee's violations, the EPA has a nondiscretionary duty to issue a compliance order. If Milwaukee then violates the compliance order, the mandatory language of the CWA requires the EPA to assess civil penalties. Thus, Illinois can seek to have the EPA penalize an out-of-state permit violator.

2. Section 505: Citizen Suits

Section 505 is of interest to affected states in enforcing WQSs for two reasons. First, it would allow an affected state to bring a suit directly against an out-of-state point source. Second, section 505 provides for the awarding of attorney's fees when appropriate. Unfortunately, it is not clear whether a state is a "citizen" for the purposes of section 505. A literal reading of the CWA makes a state a "citizen." However, courts have determined that a state is not a "citizen" under section 505 where the state brings a suit against an in-state source. Because section 505 provides that a "citizen" may not bring a suit if the EPA or state is already diligently pursuing a remedy under the CWA, courts have found it unlikely that Congress intended a state to take advantage of this section. Courts have also noted that there is little sense for the "citizen" to be required to give notice to the state before the "citizen" files suit if the state is, in fact, the "citizen."

However, the courts' reasoning in determining that a state is not a "citizen" would not apply if an affected state brought a "citizen" suit against a source state. The irrationality of a state providing itself with notice disappears when it, as an affected state "citizen," is notifying a source state. Furthermore, when a state is pursuing a remedy against an in-state source, it presumably is acting on behalf of its "citizens." It is, therefore, logical for the CWA to prevent a "citizen" from bringing a suit against the same polluter if his state already is pursuing the claim. However, an affected state has its own concerns regarding the out-of-state polluter, and cannot presume that the source state will be acting on behalf of the affected state.

A convincing argument that an affected state is not a "citizen" for purposes

408. See supra notes 172-75 and accompanying text (discussing § 505).
409. See supra notes 156-69 and accompanying text (discussing federal enforcement and the role of the EPA under § 309). The EPA can also take other actions based on its discretion. Id. 410. Id.
411. See supra notes 171-89 and accompanying text (discussing § 505).
412. See supra note 170 and accompanying text.
413. See supra note 177 and accompanying text.
414. See supra notes 178-89 and accompanying text (discussing whether a state is a "citizen" under § 505).
415. Id.
416. Id.
of this section does exist. Section 505(h) authorizes the governor of an affected state to commence a civil action against the EPA for his failure to enforce “an effluent standard or limitation” which is being violated in another state and “causing a violation of any water quality requirement in his State.” Because a “citizen” already has the authority to bring suits against EPA for failing to perform a nondiscretionary act or duty, section 505(h) would be superfluous if an affected state were considered to be a “citizen.” However, this argument is mitigated by the fact that the language of the two sections authorizes slightly different actions, and therefore, may not be entirely superfluous.

The better result is to not consider an affected state to be a “citizen” for the purposes of bringing a “citizen” suit. The legislative history supports the interpretation that this section was meant to provide a remedy only when the EPA or a state agency has not taken action. The affected state has adequate recourse through federal enforcement under section 309, and the Oklahoma decision also provides a sufficient preventative remedy. Furthermore, although an affected state’s governor could not directly sue an out-of-state point source that is violating the affected state’s WQSs as a citizen could, the governor can bring suit against the EPA for failure to enforce the provisions of the CWA and still have the opportunity for attorney’s fees to be awarded. Denying an affected state the right to bring a “citizen” suit would also provide incentive for potentially affected states to take full advantage of their pre-permit rights. Moreover, denying an affected state the right to bring a “citizen” suit will help keep the resolution of interstate water regulation issues within control of the EPA, and therefore, also reduce the amount of federal litigation.

In sum, while recognizing an affected state as a citizen for purposes of sec-

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417. 33 U.S.C. § 1365(h) (1988). In regard to determining if a “water quality requirement” is being violated, Congress has stated that effluent limitations are used to prevent pollution, and water quality is a measure of effectiveness. See supra notes 32-42 and accompanying text (distinguishing between WQSs and effluent limitations).


419. The language in § 505(h) authorizes the governor of an affected state to bring an action against the EPA, without notice as required in § 505(b), only “to enforce effluent standards or limitations.” Id. § 1365(h). This is different from the language in § 505(a)(2), which authorizes suits against the “Administrator for his failure to perform any act or duty which is not discretionary.” Id. § 1365(a)(2).

420. See supra notes 184-85 and accompanying text (discussing § 505). However, the language of the legislative history does not seem to address affected states. Rather, it seems to speak to the order of enforcement in the source state against an in-state polluter.

421. See supra notes 156-69 and accompanying text (discussing federal enforcement under § 309 of the CWA).

422. See supra notes 355-64 and accompanying text (discussing the preventative remedy that the Oklahoma decision creates).

423. 33 U.S.C. § 1365(d) (1988). Section 1365(d) provides in part: “The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” Id. Thus, because the governor is authorized to bring an action pursuant to § 505(h) of this section, attorney’s fees should be available.
tion 505 would increase the remedies available to an affected state, the language of section 505 does not seem to contemplate such a result. Furthermore, section 505(h) allows an affected state's governor to bring a suit against the EPA to enforce the CWA, thereby providing the affected state with a method to protect itself from an out-of-state discharge. Perhaps more importantly, attorney's fees should be available to the state regardless of whether a state is allowed to bring suit against the point source as a "citizen," or against the EPA through its governor.

V. Steps to Insure Compliance

A. EPA Approval of a State's WQSs

States are required to revise their WQSs every three years. To ensure compliance with its WQSs, an affected state must review and revise its WQSs and have them approved by the EPA. If a state fails to revise its WQSs and later wishes to make them more stringent, its only remedy will be to require more stringent permit conditions on out-of-state dischargers by using the common law of the state where the discharger is located.

Assuming that Illinois conscientiously reviews its WQSs, it must hold public hearings as part of its review process. After Illinois holds the required public hearings for review of its WQSs, it must submit the results of the review and any supporting analyses to the EPA within thirty days of the final state action adopting the revised WQSs. The EPA's review of Illinois' proposed WQSs involves consideration of five factors. If all are met, the EPA must approve the WQSs. The EPA must then notify the state within sixty days if its revisions are approved or within ninety days if they are disapproved. If they are disapproved, the EPA must specify the changes needed to meet compliance with the CWA. Once approved, the WQSs become individual point source obligations through the permit process.

B. Conditioning the Permit

In the running example, Illinois has established its WQSs for Lake Michigan. The Oklahoma decision requires all dischargers to comply with the EPA-approved, Illinois WQSs, including out-of-state dischargers. When the City

424. See supra notes 82-93 and accompanying text (discussing § 303 requirements).
425. See supra notes 365-84 and accompanying text (discussing the EPA's approval of state WQSs and the ability of one state to have another state's WQSs disapproved because they are too stringent).
426. See supra notes 203-20 and accompanying text (discussing the preemption cases).
427. See supra notes 74-76 and accompanying text.
429. See supra note 89 (listing the factors promulgated by 40 C.F.R. § 131.5 (1990)).
431. Id. § 131.21(a)(2).
432. See supra note 305 and accompanying text (discussing the Oklahoma court's holding that out-of-state dischargers must comply with the WQSs of affected states).
of Milwaukee applies to its permit issuing agency, that agency must send a copy of the application to the EPA. The EPA will review the application and notify Illinois and any other state if the EPA has reason to believe that the state's waters might be affected by the discharge. Assuming the EPA is convinced that Illinois' waters will be affected and notifies Illinois, a hearing concerning the conditioning of the permit will be held upon Illinois' request. Relying on the Oklahoma holding that no permit shall issue unless compliance with the affected state's WQSs is insured, Illinois should use the hearing to resolve the factual issues involved in determining what permit conditions will be necessary to insure that Milwaukee complies with Illinois WQSs. Permits issued either by the EPA or by an approved state agency are both subject to the same requirements under the CWA. The EPA retains the power to veto state-issued permits. If Illinois, or any other potentially affected state, is not satisfied with the permit as issued, the federal court of appeals has the power to review the EPA's veto or approval of state permit decisions.

It is important for a state to conscientiously review its WQSs to insure that they are stringent enough to protect the state's desired use of its waters. If the state's current WQSs are not as stringent as the state would like, the state's only recourse against an out-of-state point source will be under the common law of the source state. Furthermore, an affected state must make certain that the permit conditions are sufficient to protect its WQSs. The approval and permit processes, therefore, will take on greater importance as a result of the Oklahoma decision.

VI. CONCLUSION

The Tenth Circuit properly interpreted the CWA in its Oklahoma decision. Prior to Oklahoma, the preemption cases appeared to leave an affected state with little ability to protect its waters from out-of-state dischargers. Out-of-state dischargers, like the pollution they discharged, could ignore state boundary lines. As a result of the Oklahoma decision, source states are required to respect and comply with an affected state's WQSs. The decision recognizes that the transitory nature of water pollution makes it a national problem which cannot be solved by isolated, state-by-state regulation. Indeed, the Tenth Circuit realized that Oklahoma's attempts to preserve its water quality by setting stringent WQSs would be merely aspirational if their WQSs could be violated by a Arkansas discharger. As a result of the decision, states will be encouraged to establish more stringent WQSs. Furthermore, a central forum (the EPA) is necessary to maintain a uniform, national system for the approval and implementation of WQSs.

433. See supra notes 131-39 and accompanying text (discussing § 401 requirements).
434. Id.
435. See supra notes 140-55 and accompanying text (discussing § 402).
436. Id.
The *Oklahoma* decision also creates a preventative remedy for potentially affected states. A state can set its WQSs as stringently as it desires, have them approved by the EPA, and then require dischargers to comply with them before a permit is issued and any discharge takes place. This preventative remedy is further strengthened by the fact that a state that believes its neighboring state's EPA-approved WQSs are too stringent will not be able to present economic evidence to the EPA. Thus, EPA-approved WQSs are an unconditional imperative, limited only by the dictates of modern science and technology. However, an out-of-state discharger required to comply with another state's WQSs retains economic flexibility in choosing the means by which the WQSs will be met. Hopefully, this will encourage dischargers to develop innovative technological solutions to the nation's ever-increasing pollution problems.

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