Generic Prohibitions/NPDES Permits/Water Quality Standards: United States Supreme Court Decides City/County of San Francisco v. U.S. Environmental Protection Agency

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The Supreme Court of the United States ("Court") issued an Opinion on March 4th in the case styled:

City and County of San Francisco, California v. Environmental Protection Agency.

See No. 23-753.

The Court addressed the following question:

…Whether the Clean Water Act allows the EPA (or an authorized state) to impose generic prohibitions in NPDES permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

The United States Environmental Protection Agency ("EPA") and California had in 2019 issued a Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit to the City and County of San Francisco "("San Francisco") wastewater treatment plant. San Francisco objected to the fact that instead of setting specific effluent limits, the NPDES permit prohibited discharges that "cause or contribute to a violation of any water quality standard".

The City of San Francisco operates a combined sewer system. This means that the system collects both sewage and stormwater. During certain stormwater events, the system can overflow which potentially discharges pollutants into the Pacific Ocean. The Oceanside treatment facility was constructed in 2019 to attempt to address this issue. This facility received an NPDES permit that included "narrative" limits – i.e., a general prohibition on water quality standards violations.

The NPDES permit also prohibited the creation of "pollution, contamination, or nuisance" as defined by a provision in California law. San Francisco argued that the NPDES permit did not set specific limits in how much pollution can be discharged. It asserted that the "narrative" requirements are vague. As a result, because of the absence of more explicit limits, this was argued to make it vulnerable to enforcement proceedings on whether applicable water quality standards were met.

The 9th Circuit Court of Appeals rejected its concerns, and the United States Supreme Court granted a petition for Writ of Certiorari.

The issue potentially affects a number of NPDES permits since similar generic provisions addressing water quality standards violations have been issued in other parts of the country by EPA and authorized states.

The Court reversed the 9th Circuit Court of Appeals. It characterized San Francisco's appeal as a challenge to "end-result" requirements. These were further described by the Court as permit provisions that "do not spell out what a permittee must do or refrain from doing but instead make a permittee responsible for the quality of the water in the body of water into which the permittee discharges pollutants". This was deemed in contrast to NPDES permits which include effluent limitations on discharges that restrict the quantities, rates, and concentrations of chemical, physical, biological, and other constituents.

The Court holds that end-result permitting provisions (i.e., which provide that the permittee is responsible for the quality of the water in the jurisdictional waterbody into which the permittee discharges pollutants) exceed EPA's authority under the Clean Water Act.

The Court's rationale includes its belief that determining what steps an NPDES permittee must take to ensure that water quality standards are achieved is EPA's responsibility. It pointed to certain provisions of the Clean Water Act which were cited as tools that Congress had given EPA to make such determinations.

In the Court's summary of the Opinion, it stated in part:

- Not all "limitations" under §1311 must qualify as effluent limitations. It rejected a San Francisco interpretation that the Court stated would either invalidate widely accepted narrative permit provisions or require an improbably broad reading of "effluent limitation".
- Section 1311(b)(1)(C) does not authorize permit requirements conditioning compliance on receiving water quality. The Court stated in part:
- The terms "limitation," "implement," and "meet" in §1311(b)(1)(C) suggest EPA must set specific rules permittees must follow to achieve water quality goals. A "limitation" is a "restriction . . . imposed from without," not an end-result requirement leaving permittees to determine necessary steps.
- Cited was the pre-1972 Water Pollution Control Act (mid 60's) which contained a provision that allowed direct enforcement against a polluter if the quality of the water into which the polluter discharges pollutants failed to meet water quality standards. This provision was noted to have been omitted by Congress in the 1972 Clean Water Act. R
- Referenced was the Court's belief that end-result requirements would negate the permit shield and EPA's interpretation provides no mechanism for fairly allocating responsibility among multiple dischargers contributing to water quality violations.
- EPA has adequate tools to obtain needed information from permittees without resorting to end-result requirements. The Court stated:
- "Its reliance on the Combined Sewer Overflow Policy is misplaced as that policy authorizes narrative limitations but not end-result requirements. Concerns about disrupting general permits are unfounded given that narrative limitations remain available."

A copy of the Opinion can be downloaded here.