

LITIGATION/WATER QUALITY
EPA/California/NPDES Narrative Criteria**October 18, 2024**
Special Report #2631

On October 16, the U.S. Supreme Court heard oral argument in *City and County of San Francisco v. Environmental Protection Agency (EPA)* (#23-753). At issue is whether the Clean Water Act (CWA) allows EPA or an authorized state, to impose generic narrative prohibitions in National Pollutant Discharge Elimination System (NPDES) permits that subject permit-holders to enforcement for violating state water quality standards (WQS) without identifying specific limits to which their discharges must conform.

San Francisco's wastewater treatment plant discharges treated effluent and combined stormwater-sewer overflows into the near-shore Pacific Ocean, which requires joint NPDES permits from EPA and the local region of the State Water Quality Control Board. In addition to numeric limitations that apply during dry weather, the permit includes a set of comprehensive management requirements for operations during wet weather. Because EPA determined the management requirements would not necessarily achieve WQS, they added provisions that require San Francisco to not violate WQS, but without setting pollutant limits. The city and county challenged: (1) the generic prohibitions in the permit as not compliant with the CWA; and (2) a requirement that San Francisco update its Long-Term Control Plan.

The narrative prohibition in Section V of the permit provides: "Discharge shall not cause or contribute to a violation of any applicable water quality standard (with the exception set forth in [the 1979 Ocean Plan Exception]) for receiving waters adopted by the Regional Water Board, State Water Resources Control Board, or U.S. EPA as required by the CWA and regulation adopted thereunder." The permit's narrative prohibition in Attachment G, titled, "Regional Standard Provisions, and Monitoring and Reporting Requirements," provides: "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050."

A 9th Circuit panel found that the provisions of 33 USC §1311(b)(1)(C) and 40 CFR §122.44(d) empower EPA and states to impose generic prohibitions against violating WQS when necessary, and that EPA possesses the discretion to translate WQS into water quality-based effluent levels (WQBELs) expressed numerically or as generic prohibitions and management practices. San Francisco petitioned for certiorari, arguing that this approach "will encourage EPA and states to continue imposing water quality prohibitions that cause permittees to labor under NPDES permits that fail to define their pollution control obligations with the clarity that the [CWA] demands."

After the Supreme Court granted certiorari, California filed an amicus brief in support of EPA, noting that states "routinely include narrative prohibitions in their permits to ensure that permit holders do not violate water quality standards for the receiving waters.... Preventing States from employing such prohibitions would undermine the States' ability to ensure compliance with [WQS] in the water bodies they are entrusted to protect." California argued more specifically that San Francisco has had repeated discharges of untreated and partially-treated wastewater, which "will continue to harm the people of California unless controlled through permit conditions like the ones challenged here." California noted that achieving state WQS is one of the CWA's central objectives, and that "it is rarely possible to translate every aspect of every applicable [WQS] into detailed effluent limitations for each discharger." For example, protecting aesthetic values of water such as sight, smell, touch, or taste, or prohibiting alteration of the natural taste, odor, and color of aquatic species, present serious challenges for imposing quantitative pollutant limitations. General narrative prohibitions may be particularly appropriate in the context of combined sewer systems after Congress amended the CWA in 2000 to codify EPA's Combined Sewer Overflow Control Policy.

California acknowledged that this narrative approach does impose a responsibility on dischargers to make reasonable judgments about how to conduct their activities so they don't violate WQS. However, "when [WQS] cannot be satisfied using discharger-specific effluent limitations alone, it is typically dischargers who are best positioned to ensure compliance with the general terms of those standards. Permit holders understand their own operations. They know (or should know) what they are discharging from point sources. And they normally have the best real-time knowledge of how those discharges could affect the receiving waters – including because they are required, under the terms of their permits, to closely monitor their own activities. If circumstances arise during the life of a permit that threaten to impair [WQS], permit holders are typically the entities best positioned to respond *before* standards are violated. Although they must report to the permitting authority much of the monitoring data they collect, there is often a delay of a month or longer." California said that without generic narrative prohibitions, permit holders would be deprived of the ability to make their own informed decisions about how best to comply.

A thirteen-state coalition, including Washington and Oregon, filed a separate amicus brief in support of EPA, noting their “powerful economic, environmental, and sovereign interests in the continued use of narrative effluent limitations to ensure compliance with state [WQS] under the [CWA].” They noted that in many states, the municipalities that are responsible for stormwater and sewer collection and treatment are also instruments of the states, so the permitting agencies are particularly sensitive to the difficulties municipalities face when dealing with and preventing combined sewer overflow events. “As a result, *Amici* States have – to the extent permitted by law – steered away from relying solely on strict, numeric effluent limitations for municipal permits in favor of more collaborative approaches. These approaches include using narrative receiving water limitations as a backstop to ensure that permits (which the [CWA] dictates must include conditions necessary to prevent violations of state [WQS]) can effectively address significant water quality issues without overly burdening regulated entities. Contrary to the allegations of heavy-handed enforcement...such conditions promote collaboration between regulators and local governments. This collaboration then allows deployment of compliance schedules and adaptive management approaches – tools that promote reasonable timelines for municipalities to install incremental upgrades and enhancements, enabling them to remain in compliance with permit conditions, and, in some instances, shielding them from enforcement by states, [EPA], and citizen suit plaintiffs.”

During oral arguments, attorney Tara M. Steeley argued on behalf on San Francisco that CWA §301(b)(1)(C) assigned EPA the responsibility of setting the effluent limitations necessary to meet and implement water quality standards. She argued WQS cannot be used as the limitations themselves, only as water quality goals of the water body. “The problem with the Generic Prohibitions is that they don’t tell us what in addition [to the numeric criteria] that we need to do. And if I could provide an example of that. One of California’s [WQS] is no objectionable algae bloom should form in the water body. San Francisco doesn’t know how it must control its discharges to prevent that condition from forming in the water body. And we can’t know because whether a condition will form in the water body will necessarily depend on what other permit holders or other non-point sources are adding to the water body and the flow of the water itself. What San Francisco can control is our own discharges. We cannot control the receiving water conditions.” She also argued that the generic prohibitions are inconsistent with the CWA’s permit shield by imposing indeterminate requirements. Under questioning by Justice Thomas, Steeley clarified that San Francisco did not object to the use of narrative effluent limitations, but the bottom-line issue is that “permit holders don’t know what they need to do to comply.” She compared a permit requirement to comply with WQS to a requirement to comply with the CWA – it lacks sufficient information for a permit holder to figure out its own discharge obligations. She said: “We don’t have real-time monitoring of receiving water conditions. Under our permit, we monitor bacteria on a once-a-week basis, and other things, including effects on animals, sediment, we monitor on a yearly basis, and it takes about nine months for the results to come back. So San Francisco cannot shift on a dime.”

Justices Sonia Sotomayor and Elena Kagan expressed skepticism of San Francisco’s claims as they questioned Steeley. Sotomayor said: “I’m sorry, no one’s asking you to shift on a dime. What they’re asking you to do is to become responsible for doing what’s necessary...to take the steps necessary to control situations that develop.” Sotomayor and Kagan questioned the argument that CWA §301(b)(1)(C) does not allow general prohibitions: “(1)(C) does not talk about effluent limitations. (1)(C) just talks about limitations. (1)(A) talks about effluent limitations. (1)(B) talks about effluent limitations...then, when it gets to this kind of backstop provision of something else is necessary, it just says limitations.” Kagan said that the CWA “is the source of the authority for what the EPA did here.”

Representing EPA, attorney Frederick Liu argued that CWA §301(b)(1)(C) grants the EPA authority to impose limitations beyond numerical effluent limitations. Agreeing with Justice Ketanji Brown Jackson, Liu emphasized that the statute uses the phrase “any more stringent limitation,” suggesting that Congress intended to allow for other limitations. He pointed to the Supreme Court’s decision in *National Association of Manufacturers v. DOD*, 138 S. Ct. 617 (2018), as well as the statutory history. He said that EPA prefers to make more tailored provisions, but doesn’t always have the information necessary. He said: “Under the statute, EPA may rely on limitations like the ones here only when EPA lacks assurance that the permit’s effluent limitations alone are sufficient to protect water quality. Even then, EPA may rely on limitations like the ones here only when EPA lacks the information necessary to develop more tailored limitations.” He emphasized the EPA sought detailed information from San Francisco about its sewer system to inform the development of more specific effluent limitations, but that San Francisco failed to provide the necessary data.

Justice Alito touched on a potential ruling that would allow the EPA to use general prohibitions when the agency has made “every reasonable effort to get the necessary information *from the regulated party* [emphasis added].” Justice Kavanaugh later questioned Liu: “Would you be okay with an opinion that said we must avoid relying on these [general prohibitions] when we can avoid relying on them?” Liu replied: “I want to be careful here because of the general...permitting context. I think this is a balance of priorities. And in some contexts like the general permitting context, the lack of information is an affirmative good.... We don’t want to demand more information. And I don’t think any of the dischargers actually want to have to go through the rigamarole of actually providing it. And so, when there is good reason that we...don’t have the information necessary, whether it’s because of resistance by a party like San Francisco or because it just doesn’t make sense to demand more information, then I don’t think these limitations should be invalidated.”