Updates
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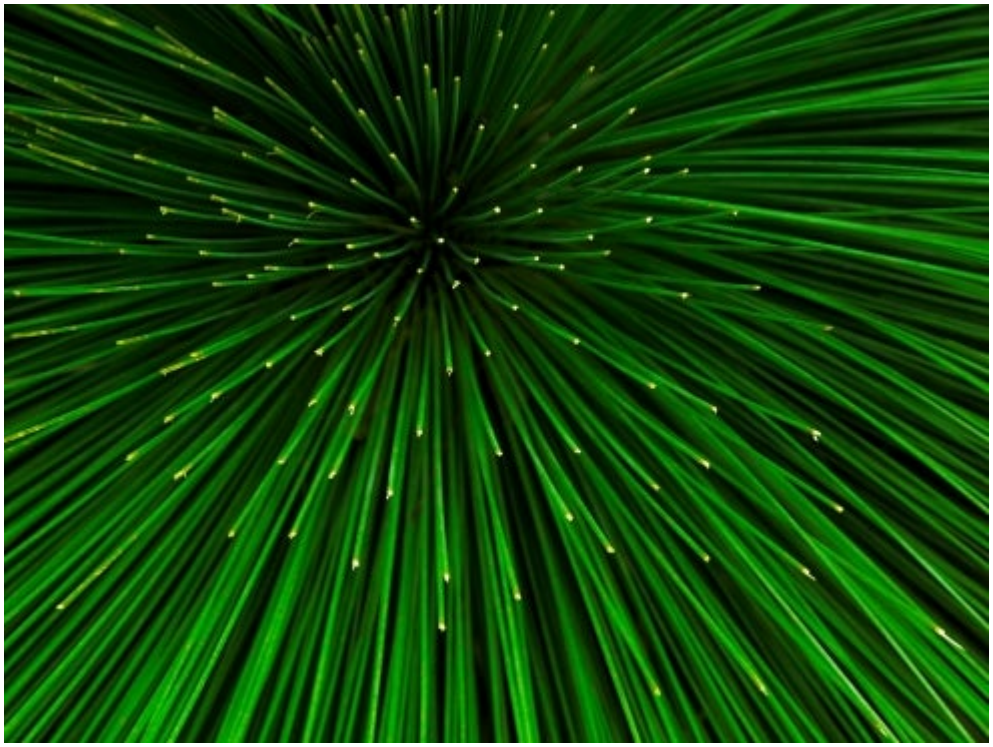
San Francisco v. EPA: Supreme Court Decides Clean Water Act Permits May Not Include Receiving Water Limits



In *City and County of San Francisco v. Environmental Protection Agency*, 604 U.S. ___, 145 S. Ct. 704 (2025), in a 5-4 decision issued on March 4, the Supreme Court of the United States struck down two provisions in San Francisco's Clean Water Act (CWA) permit for its treatment facility that discharges combined wastewater and stormwater into the Pacific Ocean.

These two permit provisions—which the Supreme Court labeled "end result" requirements—purported to make San Francisco responsible for the quality of the water that receives its discharge, as distinct from other permit provisions regulating the quality of the water that is being discharged. The Supreme Court ruled that the imposition of these types of "end result" requirements, which are commonly referred to as "receiving water limits," exceeded the U.S. Environmental Protection Agency's (EPA)'s authority and was inconsistent with the statutory scheme and its history. The decision thus strictly limits the types of requirements that can be included in a CWA discharge permit, and it is a major victory for San Francisco and other municipal dischargers across the country.

Legal Background

The federal CWA prohibits the discharge of pollutants from a point source into navigable waters unless the discharge is authorized by a permit. A critical component of the statutory scheme is the National Pollutant Discharge Elimination System (NPDES), which provides for the issuance of permits that set forth limitations and requirements to control the amount of pollution in a regulated discharge. Section 301 of the CWA (33 U.S.C. § 1311) defines the types of discharge "limitations" that may be included in an NDPES permit. There are also additional types of permit requirements addressing items such as monitoring, testing, recordkeeping, reporting, etc.—these are not considered "limitations" on the discharge and were not at issue in the case.

To ensure compliance, the NPDES permit program gives the government a big stick, and it offers dischargers an enticing carrot. The stick is that noncompliance with a permit term can trigger enormous civil penalties and criminal prosecutions for "knowing" or even "negligent" violations. 33 U.S.C. § 1319(c), (d). The carrot is the CWA's "permit shield," which provides that an entity that adheres to the terms of its permit is deemed to be compliant with the statute's requirements. 33 U.S.C. § 1342(k).

The Supreme Court's Decision

The U.S. Court of Appeals for the Ninth Circuit rejected San Francisco's challenge to its NPDES permit. In a 2-1 decision, it ruled that the CWA authorizes the EPA to impose "any" limitations that seek to ensure that the applicable water quality standards are met in the receiving body of water. 75 F.4th 1074 (9th Cir. 2023). The dissent countered with the argument that the statute draws a clear distinction between the permit limitations that are imposed on a discharge versus the water quality standards that apply to the receiving water body.

The Supreme Court reversed, agreeing with the dissent.

The Court explained that Section 301 of the CWA (33 U.S.C. § 1311) provides for three different types of "limitations" that may be included in an NPDES discharge permit:

- The first is an "effluent limitation" that is based on a specified pollution control technology to restrict the quantity, rates, or concentrations of the chemical, physical, biological, and other constituents that may be present in a discharge.
- The second is a water quality-based effluent limitation, which is similarly used to regulate the constituents in a discharge when the technology-based limitations are not sufficient to meet the water-quality standards for the receiving water.
- The third type of limitation—which is not an "effluent limitation" because it does not directly regulate the quantity, rates, or concentrations of the constituents in the discharge—is a narrative requirement that prescribes best practices, for example, for how to maintain site areas and equipment for the purpose of limiting water pollution. According to the Court, this third type of limitation is explicitly authorized by Section 301(b)(1)(C), which provides for "any more stringent limitations" that are needed to protect water quality. 33 U.S.C. § 1311(b)(1)(C).

Based on this reading, the Court rejected San Francisco's claim that any permit limitations imposed under Section 301 of the CWA must be "effluent limitations." The Court reasoned that Section 301(b)(1)(C) explicitly provides for "any more stringent limitations" without using the word "effluent," and it also pointed to other provisions of the CWA that refer to both "effluent" limitations and *other* limitations to control discharges of pollution. The Court cited the principle of statutory construction that, when Congress uses a particular term in one section of a statute (such as "effluent") but then excludes that term in another section, it is presumed that Congress acted intentionally and purposely when it formulated the statutory text. Thus, a permit "limitation" imposed under Section 301 need not be an "effluent" limitation.

But the Court agreed with San Francisco's next argument that Section 301 does not authorize the imposition of a permit requirement that conditions compliance on whether the receiving waters meet applicable water quality standards. San Francisco's challenge was directed at two permit provisions: one stated that the discharge may not cause or contribute to a violation of an applicable water-quality standard for the receiving waters; the other stated that the discharge may not create pollution, contamination, or nuisance as defined by the California Water Code.

In striking down these two provisions, the Court interpreted the term "limitation" according to its dictionary definition and its context within the statute to mean a requirement that is imposed on the discharge, so the discharger knows what is required of it before the discharge occurs. According to the Court, that is fundamentally different from a requirement that depends on what the quality of the receiving water will be after the discharge occurs.

The Court also looked to the history of the Clean Water Act. Before 1972, the federal Water Pollution Control Act specifically provided that a permittee could be held liable if the quality of the water into which it discharged failed to meet water quality standards. But the Clean Water Act scrapped that provision of the prior law and established a new permitting regime. The Court concluded that this change in law reflected "a deliberate and prominent policy choice," and it emphasized that "the absence of a comparable provision in the CWA is telling."

The Court further reasoned that the CWA's "permit shield"—which is enormously valuable to permittees in ensuring they are in continued compliance to avoid the prospect of enforcement penalties—would be eviscerated if NPDES permits could include receiving water limits. In San Francisco's case (and in situations facing municipal dischargers across the country), violations can result from rainstorms over which the discharger has no control when the volume of combined stormwater and wastewater exceeds the capacity of the treatment system, thereby causing discharges of untreated wastewater from homes and businesses. Further, it can take months to gather the information needed to determine what the corrective action should be to prevent a recurrence. The Court cautioned: "A permittee could do everything required by all the other permit terms. It could devise a careful plan for protecting water quality, and it could diligently implement that plan. But if, in the end, the quality of the water in its receiving waters dropped below the applicable water quality levels, it would face dire potential consequences. It is therefore exceedingly hard to reconcile the Government's interpretation … with the [CWA's] permit shield."

The Court also noted the difficulties in achieving compliance with receiving water limits when there is more than one discharge to a receiving water. As the Court explained, ascribing liability to individual dischargers in a multiple-discharge scenario would require "unscramble[ing] the polluted eggs after fact," an impractical situation that was precisely why Congress abandoned the pre-1972 enforcement scheme based on the quality of the receiving waters. According to the Court, it was not a sufficient response that penalties could be challenged or mitigated in specific instances where warranted.

The Court also rejected the EPA's claim that the imposition of end-result requirements is the best course when the information necessary to develop a full set of effluent limitations is lacking. The Court observed that end-result requirements are used routinely in NPDES permits, not just when a permittee fails to provide necessary information. The Court also emphasized that the EPA possesses the resources necessary to determine what a permittee should do and what information it should provide as part of its permit application.

Four justices dissented, arguing that the term "any more stringent limitations" in Section 301(b)(1)(C) is broad enough to include permit limits directed at the quality of the receiving water.

Conclusion

The case is a major development in the law governing NPDES permits. Receiving water limits have commonly been used in permits across the county to provide an additional layer of "end-result" requirements, backed by the prospect of enforcement, to supplement permit limitations that regulate the constituents in the discharge. Those end-result limits may now no longer be included in NPDES permits. But at the same time, the case reinforces the authority to impose narrative permit limitations on the discharge to protect water quality, in addition to "effluent" limitations that specifically restrict the quantity, rates, or concentrations of pollutants in the discharge.

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