

City and County of San Francisco v. EPA

While the clean water community celebrated the recent U.S. Supreme Court decision striking down the use of unclear permitting terms in the case of *City and County of San Francisco v. EPA* as providing much-needed regulatory certainty, media coverage has decried it as an anti-environmental ruling that erodes the protections afforded by the Clean Water Act (CWA). Below is a brief synopsis of the case intended to help utilities respond to inquiries about the decision and why NACWA supported San Francisco in the litigation.

What was the origin of this case?

In 2020, San Francisco challenged the legality of EPA's inclusion of two provisions in its then-newly issued National Pollutant Discharge Elimination System (NPDES) permit: a requirement that the city not "create pollution," and a requirement that the city's discharges not "cause or contribute to the violation of water quality standards." The city contended these provisions were overly vague and unnecessary given the many specific robust water quality requirements outlined in the lengthy permit.

Pursuant to EPA's regulations, San Francisco first contested the problematic terms in front of EPA's Environmental Appeals Board, which upheld EPA's decision to include them in the permit. The city then appealed that decision, first to the U.S. Court of Appeals for the Ninth Circuit, and finally to the U.S. Supreme Court.

Contrary to some news coverage, the case is unrelated to a separate enforcement action brought by EPA years later in May 2024 before the U.S. District Court for the Northern District of California alleging that San Francisco violated certain terms of the permit.

Why did public clean water utilities line up behind San Francisco's position?

Utilities are committed to protecting human health and the environment and achieving CWA compliance. For large public infrastructure systems like those run by clean water utilities, including San Francisco, any changes necessitated by new or more stringent regulatory obligations require significant advanced financial, technical, and community planning.

But open-ended language in permits like that challenged by San Francisco threatens to make CWA compliance a moving target. Regulators could point to such language to impose new requirements at any time during a permit's term. What's more, because the CWA provides third parties the right to enforce permit terms, outside groups could use litigation to impose novel requirements unanticipated by either utilities or regulators.

This uncertainty not only deprives utilities of critical advanced planning opportunities, but also jeopardizes the effectiveness of existing investments made with public dollars. Utilities must have a clear understanding of their compliance obligations from their regulators in order to plan ahead and provide affordable and efficient clean water services.

Why were EPA and utilities on different sides of this case?

Even before San Francisco's initiation of this litigation, EPA had contended that the type of open-ended requirements being challenged, which had been included in many types of NPDES permits, were needed

as “backstops” to ensure that NPDES permits required full compliance with the CWA and adequately protected water quality.

NACWA took issue with that position, however, for ignoring three fundamental aspects of the NPDES program: (1) the specific requirements in NPDES permits are statutorily required to be stringent enough to protect water quality without any “backstops,” (2) utilities and other permit holders are granted a statutory “shield” from the CWA’s strict liability if they comply with their permits, but this protection is meaningless if the utility has no way of knowing what full compliance entails (or might entail down the road); and (3) regulators already have multiple avenues available to reopen and modify permits if it is later learned that additional controls are needed, and even where modification is not an option permits are statutorily time-limited to allow for regular updates, so additional “backstops” are unnecessary to protect water quality.

What did the Supreme Court say?

Siding with San Francisco and the clean water community, the Supreme Court held that regulators could not include what the majority dubbed “end result requirements” – i.e., requirements “that do not spell out what a permittee must do or refrain from doing” – in NPDES permits.

According to the Court’s majority, such requirements contradict the text, structure, and history of the CWA, and “resorting to such requirements is not necessary to protect water quality.” The Court also held that these “end result requirements” would “eviscerate” the CWA NPDES “permit shield,” and are problematic to enforce where multiple dischargers may be contributing to a downstream water quality problem.

What did the Supreme Court NOT say?

The Supreme Court was careful to caveat its decision in two important ways.

First, the Court was clear that it was not limiting EPA’s authority to impose permit conditions necessary to protect water quality. To the contrary, the Court expressly stated that “EPA may itself determine what a facility should do to protect water quality, and the Agency has ample tools to obtain whatever information it needs to make that determination.” What the Court said, however, is that regulators must be clear about “what a permittee must do or refrain from doing.” Lack of such clarity, the Court determined, could subject permittees to “crushing penalties” even where they are “punctiliously following every specific requirement in their permit.”

Second, the Court went out of its way to note that it was not striking down common types of “narrative” permitting requirements, such as the imposition of best management practices or other non-numerical limits which “set rules a permittee must follow in order to achieve a desired result, namely, a certain degree of water quality.” NACWA never objected to such provisions, and the Court clearly stated that “our decision does not rule out ‘narrative limitations.’” Rather, the decision requires that any limitation imposed on a permittee – narrative or otherwise – clearly articulate “what steps a permittee must take to ensure that water quality standards are met.”