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Justices Agree To Review San Francisco's Challenge To EPA's CWA Limits

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The Supreme Court is granting San Francisco's request to review a split appellate ruling finding that EPA has authority to set general narrative prohibitions on violating applicable water quality standards (WQS) in a permit, opening the door to another decision curbing the agency's Clean Water Act (CWA) authority.

According to the court's **May 28 order list**, the high court is granting petitioner's bid for *certiorari* in the suit *City and County of San Francisco v. EPA, et al*.

The municipality's **petition for review** largely charges that the U.S. Court of Appeals for the 9th Circuit's ruling conflicts with previous high court decisions, as well as a 2nd Circuit ruling by including generic prohibitions in a national pollutant discharge elimination system (NPDES) permit that any discharge from the municipalities Oceanside facility not "cause or contribute to" a WQS violation.

"Rather than tell San Francisco how much it needs to control its discharges to comply with the [CWA], the generic prohibitions leave the City vulnerable to enforcement based on whether the Pacific Ocean meets state-adopted water quality standards," San Francisco said in its petition.

The case has drawn widespread attention with industry groups and congressional Republicans charging that it is difficult to comply with narrative requirements, and that such requirements **undercut the enforcement shield** that permits are supposed to provide.

The city's appeal responds to a three-judge panel's **2-1 ruling** issued July 31, 2023, which found that EPA has authority to require the city to update its long-term control plan (LTCP) for its combined sewer overflows (CSO) as well as general narrative prohibitions on violating applicable WQS.

While San Francisco largely pointed to the 9th Circuit's decision as causing a conflict between a 2nd Circuit ruling, and "allows EPA and states to shirk their obligations to set specific permit limitations."

But Solicitor General (SG) Elizabeth Prelogar, in **an April 12 brief** on behalf of EPA, urged the justices to deny petitioners petition, charging that the narrative limitations set in San Francisco's permit for its Oceanside System permit's CSO "adequately specify the limits to which petitioner's discharges must conform."

"Petitioner contends that two of those limitations, expressed as narrative prohibitions on discharges tat have specified adverse effects on water quality, violate the [CWA] by not 'identifying specific limits to which [petitioner's] discharges must conform.' The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for writ of certiorari should be denied," Prelogar said.

But Jeffrey Porter, chair of the environmental law practice at Boston-based firm Mintz, **has charged** that EPA and the Justice Department's brief does not touch on the issue of what "cause or contribute to" is supposed to mean in the context of whether a pollutant causes or contributes to a WQS violation.

"I continue to think that's going to be a pill too bitter to the current Supreme Court for it to swallow," Porter said, especially given the high court's recent ruling in *Sackett v. EPA* narrowing the scope of federal CWA jurisdiction.

"There is no way that 'cause or contribute to violations of applicable water quality standards' is any less 'hopelessly indeterminate' than EPA's definition of 'Waters of the United States' before the Supreme Court's *Sackett* opinion. And the penalties, and opportunities for citizen suits, are potentially draconian for violations of NPDES permits as they're for violations of 'dredge and fill' permits of the sort that EPA would have required of the Sacketts," he said.

Enforcement Action

The Supreme Court's decision to take the case comes on the heels of EPA and California's recent enforcement action against the municipality for permit violations stemming from operations of two combined sewer systems.

The Justice Department on behalf of EPA, and California Attorney Rob Bonta (D) on behalf of the San Francisco Bay Regional Water Quality Control Board, filed **a May 1 complaint** in the U.S. District Court for the Northern District of California alleging various permit violations at the municipality's Bayside and Oceanside CSO systems.

The complaint seeks an order enjoining further CWA violations, an order to expeditiously complete actions to comply with the CWA and applicable NPDES permits, and an order for the city to pay civil penalties.

While the primary discharge-related claims only address the Bayside System, EPA makes a series of operational claims that pertain to both the Bayside and Oceanside Systems.

But San Francisco filed **a May 8 supplemental brief** to the Supreme Court, warning that this enforcement action "illustrates that the concerns San Francisco raised in its Petition are not mere risks -- they are reality."

"Because of EPA's lawsuit, San Francisco now stands accused of violating a water quality prohibition that suffers from the same flaw as the Generic Prohibitions in the Oceanside permit at issue here. The City faces a lawsuit that exposes San Francisco to civil penalties exceeding $200 million (and counting) and billions of dollars in injunctive relief, and yet it provides the City no notice of how it could reasonably control its discharges to stop the alleged violations," the city said.

Porter told *Inside EPA* that prior to the enforcement action "the City and County of San Francisco, and the fifteen industry groups and dozen or so water supply and conservation associations supporting them, could only speak of the possibility of 'crushing' 'enforcement'. Now the fact of such enforcement is irrefutable."

"There may be a compelling reason that EPA absolutely needed to file suit against the City of San Francisco under the Clean Water Act while the United States Supreme Court was deciding whether to hear the City's appeal of a closely related permit issued by EPA to the City and the County under that same Clean Water Act, but I can't for the life of me think of what that reason would be," Porter added.

Porter now notes that the Supreme Court's granting of San Francisco's *cert* petition "was one half of my prediction. The other half is that the Supreme Court is going to find in San Francisco's favor, striking down or at least severely limiting EPA's longstanding practice of 'narrative' standards. I'd bet my bottom dollar on it." -- *Sam Hess* (**shess@iwpnews.com**)

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