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Ninth Circuit Upholds EPA's NPDES Permitting Authority Affecting the Combined Water Sewer Systems Community

In *City and County of San Francisco (San Francisco) v. U.S. Environmental Protection Agency (EPA)*, 2023 WL 4854812, the U.S. Court of Appeals for the Ninth Circuit denied San Francisco's request that it overturn two of the EPA's National Pollutant Discharge Elimination System (NPDES) permit conditions: the agency's imposition of a narrative water quality restriction and its order that San Francisco update its long-term control plan (LTCP) for combined sewer overflows.

Regulation of a CSS During a Wet-Weather Overflow

A Combined Sewer System (CSS) collects and combines domestic and industrial sewage with stormwater into one pipe, conveying both to a treatment plant. During periods of heavy rainfall, sewage systems may overflow and pollute nearby waters. In this permitting realm, such overflows are called combined sewer overflows or CSOs. Combined sewer overflows are "mixtures of domestic sewage, industrial, and commercial wastewater, and stormwater runoff...often containing high levels of suspended solids, pathogenic microorganisms, toxic pollutants, floatables...and other pollutants." See EPA Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18688, 18689 (Apr. 19, 1994).

U.S. waterways require an NPDES permit for releasing pollutants, treated effluent, and combined sewer overflows. See, 3 U.S.C. sections 1311(a)–(b), 1342(a); 40 C.F.R. section 122.1(b)(1).

San Francisco's Oceanside CSS

Oceanside CSS began operations under an initial NPDES permit in 2003 and later renewed in 2009. Oceanside CSS includes 250 miles of combined sewers and the Westside Recycled Water Project. The Southwest Ocean Outfall is where the Oceanside's CSS releases treated water into the Pacific Ocean.

Before being released into the Pacific Ocean, water in the Oceanside CSS undergoes primary and secondary treatment. During wet weather periods, however, heavy rainfall exceeds the Oceanside CSS' treatment capacity, forcing it to release partially treated water into the Pacific Ocean. San Francisco's NPDES permit limited the Oceanside CSS to only eight (8) yearly wet-weather emergency combined sewer overflow events.

The administrative record contained evidence of Oceanside CSS' combined sewage overflows onto popular recreational areas, such as local beaches, during wet weather. In 2014, San Francisco filed an NPDES permit renewal request resulting in the December 10th, 2019, permit that was the subject of this appeal.

Court's Rationale

San Francisco argued the Clean Water Act (CWA) restricts the EPA's authority to set numeric pollutant limits to meet Pacific Ocean water quality standards. San Francisco claimed the CWA disallowed wide-ranging narrative permit prohibitions, which didn't provide San Francisco clear guidance on necessary control measures to safeguard water quality.

The narrative provision at issue stated, "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by the California Water Code section 13050." EPA's narrative provision also preserved a "reopener" right, allowing EPA to "...revise or modify this [permit] in accordance with the more stringent standards."

The Ninth Circuit rejected San Francisco's arguments, citing Supreme Court precedent upholding the legality and enforcement of narrative provisions as a "backstop" to specific numeric effluent limitations.

The court cited the administrative record, which identified previous wet-weather combined sewer overflows from Oceanside onto recreational areas, as data supporting EPA's decision to include the narrative discharge prohibition. It also affirmed EPA's requirement that San Francisco update its LTCP to protect recreational areas and minimize wet-weather effluent releases.

Takeaways

This is a case of first impression concerning EPA's use of narrative provisions in the permitting process and authority governing a combined sewer overflow and an LTCP. Justice Daniel Collins' dissenting opinion reflects the controversy over numeric and narrative permit provisions.

In his dissent, Justice Collins argued that the CWA mandated the EPA to establish certain limits and controls for effluent to comply with state and federal water quality standards, citing CWA section 301(a)(1). The dissent argued that the CWA distinguished the "limitations" that EPA must devise and impose on a permittee's discharges and the overall "water quality standards" governing the discharge to the receiving waters. The "narrative conditions challenged here effectively ignore this critical distinction by making the ultimate, overall 'water quality standards' themselves the applicable 'limitation' for an individual discharger."

It would be mutually beneficial for regulators to focus on technology-based end-of-pipe effluent limitations. If water quality standards are difficult to reach, the regulator and permittee can still work to craft additional specific guidelines, as generic narrative guidelines may not provide the permittee with sufficient guidance on how to ensure CWA compliance and may not be tailored to the specific water body receiving the discharge.

Whether this is the final ruling on the matter remains to be seen. For more information and assistance navigating the CWA and other environmental regulations, please contact [Thierry Montoya](#) or any attorney with Frost Brown Todd's [Environmental](#) practice.

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