San Francisco v. EPA: EPA Authorized to Require Municipalities' Adherence to Vague Provisions Regarding Water Quality Standards Merely to Protect Designated Uses

I. OVERVIEW

When combined sewer systems receive too much water at once, a mixture of storm water, industrial wastewater, and sewage will overflow and discharge pollutants into surface waters.[1] Near San Francisco, several recreational beaches continually experience these combined sewer overflows (CSOs), causing recurrent human contact with waters that fail water quality criteria for bacteria indicators.[2] The Environmental Protection Agency (EPA) has found that these CSOs threaten the beneficial uses of the Pacific Ocean, including recreation and fostering threatened or endangered species.[3] The CSOs originate from San Francisco's Oceanside Wastewater System ("Oceanside"), thereby placing the responsibility of their remediation on the municipality.[4]

To issue a National Pollutant Discharge Elimination System (NPDES) permit, which is necessary to discharge any pollutants, the EPA must determine that San Francisco's discharges comply with water quality standards (WQS) pursuant to the Clean Water Act (CWA).[5] The EPA approved Oceanside's NPDES permit three times prior to the 2019

1. City & Cnty. of San Francisco v. EPA, 75 F.4th 1074, 1079 (9th Cir. 2023).
2. *Id.* at 1082-83, 1087-88.
3. *Id.* at 1087.
4. *Id.* at 1082-83, 1087-88.
5. *Id.* at 1079.

permit.[6] Nevertheless, the EPA says the previously-approved approach may no longer be sufficient to protect designated uses; accordingly, the EPA added conditions to San Francisco's 2019 NPDES permit to achieve compliance with the EPA's CSO Control Policy.[7]

The EPA included two narrative provisions in the 2019 Oceanside NPDES permit.[8] The first narrative provision provides: "Discharge shall not cause or contribute to a violation of any applicable water quality standard . . . for receiving waters adopted by the State Water Resources Control Board . . . as required by the CWA . . . ."[9] The second narrative provision states: "Neither the treatment nor the discharge of pollutants shall create pollution, contamination, or nuisance as defined by [California's Water Code]."[10] Also included in the permit was a requirement that San Francisco update its CSO long-term control plan (LTCP) to consider options for "eliminat[ing], relocat[ing], or reduc[ing] the magnitude or frequency" of CSOs to sensitive areas.[11]

San Francisco petitioned for review of these narrative provisions, arguing they are too vague to ensure protection of water quality.[12] In this way, San Francisco claims that the EPA's imposition of these narrative provisions is inconsistent with the CWA.[13] Additionally, San Francisco argues that the narrative provisions are based on "unsupported assertions," namely that they are necessary to ensure compliance with WQS in case the effluent limitations are inadequate.[14] Regarding the EPA's requirement for San Francisco to update its LTCP, San Francisco alleges that the EPA failed to make the requisite factual finding that the current LTCP is not achieving compliance with applicable WQS.[15] The EPA's Environmental Appeals Board (EAB) denied San Francisco's petition for review of the permit.[16] Consequently, the NPDES permit became fully enforceable on February 1, 2021, and San Francisco appealed for judicial review of the permit.[17] The Ninth Circuit Court of Appeals *held* that the EPA's narrative provisions and requirement that

6. *Id.* at 1084.
7. *Id.* at 1085-86, 1092.
8. *Id.* at 1085.
9. *Id.* at 1089.
10. *Id.*
11. *Id.* at 1093.
12. *Id.* at 1089.
13. *Id.*
14. *Id.* at 1092.
15. *Id.* at 1093.
16. *Id.* at 1088.
17. *Id.*

San Francisco update its LTCP in its NPDES permit were lawful and were rationally connected to evidence in the record. *City & Cnty. of San Francisco v. EPA*, 75 F.4th 1074 (9th Cir. 2023).

II. BACKGROUND

A. NPDES Permitting System

Pursuant to the CWA, discharging any pollutant into navigable waters of the United States requires a NPDES permit.[18] The EPA administers NPDES permits for discharges into ocean waters more than three miles from the shore.[19] However, the EPA may authorize states to issue NPDES permits if the discharges are within the state's jurisdiction.[20] As part of the permitting process, the EPA sets effluent limitations on dischargers to achieve satisfaction of WQS in the body of water that receives the discharges.[21] Water quality standards identify the "designated use" of a body of water (such as for recreation, water supply, or fish propagation) and water quality criteria in the form of numeric or narrative specifications.[22] Effluent limitations are restrictions on the amount of pollutants that can be discharged, typically expressed numerically.[23] As a basis, technology-based effluent limitations set discharge standards based on the pollution treatment technologies that a discharger uses.[24] Beyond the baseline technology-based effluent limitations, the EPA must impose "any more stringent limitation" (for example, in the form of a water quality-based effluent limitation, or WQBEL) necessary to meet any relevant WQS, including "[s]tate narrative criteria for water quality."[25]

The CWA grants NPDES-permitting agencies the power to require that dischargers conform to "any applicable" WQS.[26] For NPDES permits, the EPA reviews state-adopted WQS and approves or denies them in accordance with CWA criteria.[27] Therefore, if the EPA has granted a NPDES permit, this indicates that the EPA previously deemed the state's WQS in alignment with CWA standards. Limitations for NPDES permits "must control all pollutants . . . which will cause, have

18. 33 U.S.C. §§ 1311(a), 1342.
19. 33 C.F.R. § 2.22(a)(1).
20. 43 U.S.C. § 1312; 33 U.S.C. §§ 1342(b)-(c), 1362(8).
21. 33 U.S.C. §§ 1342(a), 1343, 1362(11).
22. 40 C.F.R. §§ 130.2(d), 131.3(b), 131.10(a).
23. 33 U.S.C. §§ 1342(a), 1362(11); 40 C.F.R. § 423.12.
24. 40 C.F.R. § 125.3(a).
25. *See* 33 U.S.C. § 1311(b)(1)(C); *see also* 40 C.F.R. § 122.44(d).
26. *See* 33 U.S.C. § 1311(b)(1)(C).
27. 40 C.F.R. § 131.5(a).

the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."[28]

B. NPDES Permits for CSOs

Under the CWA, the CSO Control Policy (hereinafter referred to as "the Policy") requires NPDES permittees to comply with WQS and to protect designated uses.[29] The Policy puts forth minimum control measures including regular maintenance programs, a prohibition on all CSOs that occur in dry weather, and public notification of CSO occurrences.[30] Typically, permittees are allowed no more than an average of four CSO events per year.[31] The Policy further requires municipalities to develop and implement a LTCP by which they consider the cost-effectiveness of a range of strategies for attaining compliance with the CWA.[32] A municipality's LTCP must meet particular standards to ensure CWA compliance, including the evaluation of CSO overflow alternatives with overt consideration of sensitive areas.[33]

Even after obtaining a NPDES permit, a municipality is still subject to a requirement to continually monitor and improve the combined sewer system and to reassess overflows to sensitive areas.[34] A NPDES permit includes a "reopener clause" provision that gives the NPDES-permitting agency the authority to modify the permit if the municipality has failed to satisfy WQS or to protect designated uses.[35] In such a case, the permittee must revise its LTCP to include additional controls to satisfy WQS and designated uses.[36] The permit includes a "requirement to reassess overflows to sensitive areas . . . where elimination or relocation of the overflows is not physically possible and economically achievable."[37] If there exists improved techniques and/or increased financial ability to eliminate or relocate overflows, a reassessment should occur.[38]

28. 40 C.F.R. § 122.44(d)(1)(i).
29. Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18688 (Apr. 19, 1994).
30. *Id.* at 18691.
31. *Id.* at 18692.
32. *Id.* at 18691.
33. *Id.* at 18691-94.
34. *Id.* at 18696.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

Essentially, permits include safeguards which ensure continued monitoring and evaluation of combined sewer systems.

The Policy exempts municipalities that began implementing a CSO control plan prior to 1994 (when the EPA published the Policy) from provisions pertaining to initial construction but not those regarding post-construction monitoring.[39] Starting in 1979, the EPA repeatedly approved one such exception to California's water quality controls for the Pacific Ocean ("Ocean Plan Exception"), which allows San Francisco's combined sewer system an average of eight CSO discharges per year.[40] This number of CSOs is higher than the statewide standard.[41] A provision of the Ocean Plan Exception indicates that if there has been a change in "affected beneficial uses" or if a demonstration of "unacceptable adverse impacts as a result of operation of the constructed facilities" has occurred, the California Regional Water Board can require "modification of the operation of existing facilities."[42]

III. COURT'S DECISION

A. Narrative Prohibitions

In the noted case, the Ninth Circuit held that the requirements the EPA included in San Francisco's 2019 NPDES permit were lawful under the CWA.[43] First, the court referenced EPA's broad authority under the CWA to require a discharger's adherence to any applicable WQS, with the ability to impose "any more stringent limitation" necessary.[44] The court then showed that the plain text of the Policy allows the inclusion of narrative provisions to require that municipalities satisfy applicable water quality standards.[45] In fact, the NPDES permitting requirements state that agencies should express to permittees the need to comply with applicable WQS in the form of a narrative limitation.[46] The court then invoked

39. *Id.* at 18690.

40. CAL. STATE WATER RES. CONTROL BD. ORD. NO. 79-16 at 16, 20 (1979); City & Cnty. of San Francisco v. EPA, 75 F.4th 1074, 1083-84 (9th Cir. 2023).

41. *City & Cnty. of San Francisco*, 75 F.4th at 1081 (citing Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18692 (Apr. 19, 1994)).

42. CAL. STATE WATER RES. CONTROL BD. ORD. NO. 79-16 at 19.

43. *City & Cnty. of San Francisco*, 75 F.4th at 1097.

44. *Id.* at 1089; *see also* 33 U.S.C. 1311(b)(1)(C).

45. *City & Cnty. of San Francisco*, 75 F.4th at 1090.

46. Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18696 (Apr. 19, 1994).

precedent to confirm the legality of such narrative prohibitions in NPDES permits.[47]

The court also approved of the EPA's factual basis for the narrative provisions.[48] Specifically, the court finds this determination reasonable in light of a multitude of CSOs that took place at recreational beaches and resulted in increased bacteriological levels, therefore impeding the beaches' designated uses.[49] The court thereby illustrated that CSOs in compliance with the Ocean Plan Exception (and accordingly the Policy) "nevertheless may not adequately protect recreational use."[50] Therefore, the court found that the EPA's decision to impose narrative provisions was "rationally connected to evidence in the record," and they would be "useful to preserve beneficial uses."[51]

The dissenting opinion argues that the majority's decision to allow narrative provisions violates the CWA because it erases the distinction between the limitations, which the EPA is tasked to set, and the resulting WQS, which those limitations are meant to achieve.[52] The dissent criticizes the notion that a discharger cannot "contribute" to violating "any applicable water quality standard . . . for receiving waters" because the CWA has never been construed as "mandat[ing] a complete ban on discharges into a waterway which is [already] in violation of [water quality] standards."[53] In sum, the dissent considers the EPA's broad limitation to be shirking its responsibility to ensure that a permittee's discharges, when taken together with other sources of pollution, do not breach WQS in receiving waters.[54] Therefore, the dissent claims that the EPA effectively saying to "adhere to WQS" is not a sufficient limitation; the EPA's issue of such a "generic instruction" is a failure to satisfy its obligation under the CWA.[55]

B. LTCP Update

The Ninth Circuit determined that the EPA had authority under the Policy to require an updated LTCP from San Francisco and that this

47. *City & Cnty. of San Francisco*, 75 F.4th at 1090.
48. *Id.* at 1093.
49. *Id.* at 1087-88, 1093.
50. *Id.* at 1093.
51. *Id.*
52. *Id.* at 1102.
53. *Id.* at 1103-04.
54. *Id.* at 1103.
55. *Id.*

requirement was consistent with factual findings.[56] The Policy allows the EPA to mandate both ongoing monitoring of CSOs as well as the protection of designated uses "irrespective of any failure to meet WQS"; it is sufficient that the CSO controls "fail to . . . protect designated uses."[57] In other words, failure to satisfy WQS is not the only grounds upon which the EPA can require an updated LTCP.[58] The majority reasons that the plain language of the Policy clearly treats "protection of designated uses" as a distinct consideration and an independent obligation from attaining relevant WQS.[59] Therefore, a LTCP is not in compliance with the CWA if there is adequate evidentiary support in the record showing that the controls are failing to protect designated uses.[60] The court determined that the record did contain adequate evidentiary support for the EPA's decision to require an updated LTCP based on San Francisco's failed obligation to protect designated uses of the nearby recreational beaches, among other factors.[61]

The court also supported the updated LTCP requirement by alluding to San Francisco's recently-launched, twenty-year, seven-billion-dollar program to update the Oceanside system.[62] The fact that San Francisco is in the process of implementing these enhancements to Oceanside supports the EPA's conclusion that an updated LTCP is appropriate, given a clear fiscal opportunity to bring Oceanside into compliance with California's water quality controls for the Pacific Ocean.[63]

IV. ANALYSIS

The noted case demonstrates that the EPA's placement of more stringent requirements on municipalities with combined sewer systems can be valid despite being inconsistent with controls imposed in the past.[64] By holding this authority to be consistent with the CWA, the Ninth Circuit is signifying that exceptions to California's water quality controls for the

56. *Id.* at 1094.

57. *Id.* at 1095; *see also* Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18696 (Apr. 19, 1994).

58. City & Cnty. of San Francisco v. EPA, 75 F.4th at 1095.

59. *Id.*; *see also* Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18696 (Apr. 19, 1994).

60. *City & Cnty. of San Francisco*, 75 F.4th at 1095, 1096.

61. *Id.* at 1095.

62. *Id.* at 1084, 1095.

63. *Id.* at 1095.

64. *Id.* at 1095-96.

Pacific Ocean, which result in substantial adverse effects, are not permissible.[65]

The Ninth Circuit's decision to allow narrative provisions is consistent with prior case law. The Supreme Court previously held that enforcing broad narrative provisions to require compliance with WQS is consistent with the CWA.[66] Prior Ninth Circuit decisions have upheld the enforcement of narrative provisions that simply require adherence to applicable WQS.[67] Clearly, contrary to what the dissenting opinion argues, simply mandating "adhere to WQS" in the form of a narrative limitation satisfies a NPDES-permitting agency's duties under the CWA.[68] Because the EPA has the authority to administer broad provisions that require adherence to applicable WQS, the burden will fall upon the municipalities to more stringently monitor their pollution levels and to determine the threshold of WQBELs necessary to remain in accordance with the Policy.

This result is beneficial because this shifted accountability signals that municipalities must be proactive about ensuring that WQBELs are in alignment with CWA standards rather than solely relying on the EPA to calculate pollutant-specific WQBELs and to instruct in precise terms how to remain in compliance with WQS.[69] It is imperative that the EPA's level of scrutiny in requiring CWA compliance does not waver based on the political party controlling the executive and legislative branches at any particular time (considering the head of the EPA is appointed by the President and confirmed by the Senate). Placing this responsibility on the municipalities themselves better shields the EPA's demands for compliance with WQS from political incentives to not scrutinize such compliance as heavily.

The court's decision regarding the requirement of an updated LTCP is an advancement in the law. Municipalities that were originally exempt from certain provisions of the Policy (due to having begun their construction of their combined sewer system prior to the Policy's enactment) are not permanently exempt from creating or updating a LTCP. In so concluding, the court confirmed that failure to meet WQS is

65. *Id.* at 1096.

66. *See* PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 715-16 (1994) (asserting that a state NPDES-permitting agency could enforce "open-ended" criteria expressed in "broad, narrative terms" to require protection of designated use).

67. *See* NRDC v. Cnty. of Los Angeles, 725 F.3d 1194, 1199, 1205-07 (9th Cir. 2013) (holding that the permittee was liable for violating a permit provision which prohibits discharges that "cause or contribute to the violation" of WQS).

68. City & Cnty. of San Francisco v. EPA, 75 F.4th at 1090, 1092.

69. *Id.* at 1092.

not the only grounds upon which the EPA can require an updated LTCP.[70] The plain language of the Policy suggests mandating an updated LTCP to better protect designated uses is consistent with the CWA.[71] Further, the language of the Ocean Plan Exception indicates San Francisco's Oceanside system is susceptible to modification if changes in the affected beneficial uses of waters have occurred.[72] When Oceanside's CSOs threatened the designated uses of the nearby recreational beaches, this properly triggered the reopener clause of the NPDES permit.[73] So, although the excessive CSOs to recreational beaches were technically within the permitted number of CSOs under the Ocean Plan Exception, the court adequately illustrated that this exemption from California's water quality controls for the Pacific Ocean is nevertheless clearly insufficient for ensuring designated uses. It is necessary that the EPA be able to reconsider exemptions to California's water quality controls for the Pacific Ocean—particularly exemptions that were established almost forty-five years ago—in order to ensure that combined sewer systems suit modern needs and standards.

Moreover, the court alludes to the fact that San Francisco recently launched a twenty-year, 7-billion-dollar program to update its Oceanside system.[74] Since the Policy includes a "requirement to reassess overflows to sensitive areas . . . where elimination or relocation of the overflows is not physically possible and economically achievable,"[75] San Francisco should have addressed the possibility of reassessing (or better yet, relocating or eliminating) CSOs to sensitive areas (i.e., the recreational beaches) when planning this Oceanside overhaul. Even more broadly, this would have been the perfect opportunity to bring Oceanside into compliance with California's water quality controls for the Pacific Ocean, thereby eliminating the need for the Ocean Plan Exception. After all, the Ocean Plan Exception was only established because Oceanside had been sufficiently completed by the time the Policy was enacted.[76]

The ability of NPDES-permitting agencies to increase their demands of dischargers becomes continuously more crucial as climate change develops, given the expectation of escalating negative impacts on the

70. *Id.* at 1095.

71. *Id.*

72. CAL. STATE WATER RES. CONTROL BD. ORD. NO. 79-16 at 19 (1979).

73. *City & Cnty. of San Francisco*, 75 F.4th at 1087, 1095.

74. *Id.* at 1084.

75. Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18696 (Apr. 19, 1994).

76. *City & Cnty. of San Francisco*, 75 F.4th at 1082-83.

environment. It is vital that standards for dischargers be congruent with heightened needs for protection of the surrounding environment.

V. CONCLUSION

The Ninth Circuit's decision is supported by prior case law, straightforward interpretation of the applicable statutes, and the relevant factual findings. By requiring that San Francisco's Oceanside Wastewater System amend its discharging practices after forty-five years, the Ninth Circuit is indicating that combined sewer systems can only receive exemptions to California's water quality controls for the Pacific Ocean if their discharges do not contravene the receiving body's designated uses.[77] Because Oceanside has failed to prevent recurrent human exposure to harmful bacteria at nearby recreational beaches, the combined sewer system has lost its privilege to exceed the average number of CSOs typically permitted under the Policy. Moreover, Oceanside has shown that a new LTCP is necessary to mitigate future harmful exposure.

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77. *Id.* at 1095-96.

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