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Generic Water Quality Standards Compliance Conditions in NPDES Permits

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Introduction

The U.S. Supreme Court will soon decide the legality of NPDES permit conditions that generically prohibit causing or contributing to a violation of instream water quality standards, rather than set specific discharge limits or require specific actions.

- San Francisco challenged EPA's inclusion of such a condition in its permit because the condition does not specify what the city must do to comply with water quality standards.
  - ***"Discharge shall not cause or contribute to a violation of any applicable water quality standard . . . for receiving waters."***
- The U.S. Ninth Circuit Court of Appeals upheld the condition on the ground that it was needed to ensure compliance with water quality standards.

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Oregon and Washington Examples

- Former standard condition in individual Oregon NPDES permits: "*No wastes may be discharged or activities conducted that cause or contribute to a violation of water quality standards . . . .*" This condition remains in permits that have not been renewed recently.
- Oregon general industrial stormwater permit (1200-Z): "*The permit registrant must not cause or contribute to an exceedance of instream water quality standards.*"
- Washington general industrial stormwater permit: "*Discharges shall not cause or contribute to a violation of Surface Water Quality Standards . . . .*"

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Issues

A generic water quality standards compliance condition is problematic because it:

- Gives the permittee little or no notice of what it must do to comply.
- Circumvents Clean Water Act and state “permit shields.”
- Does not sufficiently prompt permittees to address water quality standards violations. Because a permittee usually does not know if it is violating a standard or what it must do to address a violation, it will often do nothing.
- Circumvents the permit issuance and modification process. Instead of the permitting agency making decisions about discharge limits and other controls as part of a permitting process in which the public may participate, the decisions will be made as part of an agency or citizen enforcement action, and often by a court instead of the agency.

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Clean Water Act Requirements

- NPDES permits must include "effluent limitations" and "any more stringent limitation . . . required to implement any applicable water quality standard." 33 U.S.C. § 1311(b)(1)(C).
  - An "effluent limitation" is "any restriction . . . on quantities, rates, and concentrations of . . . constituents which are discharged." *Id.* § 1362(11).
- The Act's "permit shield" provides that "[c]ompliance with a permit . . . shall be deemed compliance, for purposes of" EPA and citizen suit enforcement actions, with water quality standards and other requirements of the Act. *Id.* § 1342(k).
  - For DEQ enforcement actions, Oregon has a narrower permit shield for water quality standards. *See* OAR 340-045-0080(4). Washington does not have an express permit shield for NPDES permits.

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EPA Rules

EPA's rules require that, as "necessary to . . . achieve water quality standards," NPDES permits must include either:

- Numeric effluent limits on all pollutants that have the "reasonable potential to cause, or contribute to an excursion above any . . . water quality standard, including . . . narrative criteria for water quality," 40 C.F.R. § 122.44(d)(1), ***or***
- "Best management practices (BMPs)" where numeric effluent limitations are "infeasible," *id.* § 122.44(k)(3). BMPs are "schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution," including "treatment requirements, operating procedures, and practices to control plant site runoff . . . ." *Id.* § 122.2.

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NRDC v. EPA (2nd Cir. 2015)

NRDC v. EPA (2015) was a challenge to EPA's general NPDES permit for vessels. The Second Circuit Court of Appeals held that a generic permit condition requiring compliance with water quality standards was insufficient if other permit conditions would not achieve the standards.

- The court held that the generic condition was not a BMP because it did not require any practice or procedure and, in fact, "add[ed] nothing" to the permit. "By requiring shipowners to control discharges 'as necessary to meet applicable water quality standards' without giving specific guidance on the discharge limits, EPA fails to fulfill its duty to 'regulate in fact, not only in principle.'"

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San Francisco v. EPA (9th Cir. 2023)

- *San Francisco v. EPA* (2023) also involves a challenge to a generic permit condition requiring compliance with water quality standards, but in this case the permittee, not an environmental organization, has challenged the condition.
- The Ninth Circuit upheld the condition. The court distinguished the Second Circuit's decision in *NRDC* on essentially three grounds:
  - The challenger in *NRDC* was seeking more, not less, stringent conditions;
  - San Francisco's permit also included specific requirements intended to ensure compliance with water quality standards, to which the generic condition served as a "backstop"; and
  - The Ninth Circuit held that EPA's rules did not limit permit conditions for ensuring compliance with water quality standards to numeric discharge limits and BMPs.

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U.S. Supreme Court

- The U.S. Supreme Court granted San Francisco's request to review the Ninth Circuit's decision in May 2024. Oral arguments were held on October 16.
- The Court is likely to issue a decision by the summer of 2025.

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San Francisco's Arguments

- The Clean Water Act and EPA's rules allow only "effluent limitations" — "any restriction . . . on quantities, rates, and concentrations . . . of constituents which are discharged"—to ensure compliance with water quality standards; water quality standards are not directly enforceable.
- Generic requirements to comply with water quality standards are inconsistent with the Act's permit shield and expose permittees to severe criminal and civil liability without knowing before the fact what they must do to comply.
- Any agency uncertainty or lack of information about what a permittee must do to comply with water quality standards must be addressed through requests for additional information or future permit modifications.

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EPA's Arguments

- The Clean Water Act does not restrict NPDES permit conditions to "effluent limitations"; permits may include other conditions, including those that require achieving a result, such as compliance with water quality standards.
- "Effluent limitations" are not sufficient to ensure compliance with water quality standards when the permitting agency lacks sufficient information to develop the limitations.

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NWEA v. DEQ and City of Medford

In a case pending before the Oregon Court of Appeals, Northwest Environmental Advocates (NWEA) is challenging the renewal of the City of Medford's NPDES permit, which omitted the former permit's generic prohibition on violating water quality standards. NWEA argues that the condition must be retained because:

- The renewed permit's other conditions are insufficient to ensure compliance with narrative water quality criteria (a point disputed by the City and Oregon DEQ, which issued the permit); and
- Omitting the condition would violate the Clean Water Act's prohibition on backsliding.

The Court of Appeals is likely to issue a decision toward the end of 2025.

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Thanks!

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