San Francisco v. EPA – Oral Arguments

By Paul Engel

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- How much wastewater is too much?
- Congress, in the Clean Water Act, created a twisted and convoluted process for managing wastewater discharges.
- Are the permits the EPA issues detailed enough for San Francisco to follow or not?

How much pollution is too much? We all want clean air and water, but we still want to drive our cars and flush our toilets as well. The question in San Francisco v. EPA is how specific does the EPA need to be when it tells cities how much waste they can discharge into our nation's waterways. From a constitutional standpoint, this case is not about waste water, but the power of executive agencies under the laws as written.

My Preface

Before I get into the details of the case, I want to preface my analysis. Before I look at the arguments made by both sides, I feel it is important to point out that the Constitution does not delegate to the United States the power to regulate or protect the environment. While this point is not brought up during oral arguments, it's something any Constitutional scholar should keep in mind. It may also help explain some of the craziness we find in the arguments.

San Francisco's Argument

San Francisco's problem is they don't think the way the Environmental Protection Agency (EPA) defines the city's responsibilities in their discharge permits. The city claims that what they refer to as "Generic Prohibitions" are not definitive enough to hold them accountable for violations.

Section 301(b)(1)(C) of the Clean Water Act assigns EPA the job of setting the effluent limitations necessary to meet and implement water quality standards. The water quality standards are not the limitations themselves. Instead, they set the goals for the water body. EPA must translate those goals into discharge limitations.

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The first question that should have been asked is if the Constitution empowers Congress to assign an executive agency to set limits on effluent discharges?

There is another problem that isn't identified here, but may help explain San Francisco's concerns. You see, the EPA doesn't set water quality standards, the state does. But, as we'll find out later in oral arguments, those water quality standards don't have the force of law. Only the EPA discharge limitations do.

The Generic Prohibitions fail this task. As Judge Collins explained below, the Generic Prohibitions erase the distinction between water quality standards and discharge limitations, making them one and the same.

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The problem, as San Francisco's attorney Tara Steeley explains, is that the EPA didn't give the city discharge limitations, but basically repeated the state's water quality standard. Problems with using water quality standards though, is the reason Congress amended the Clean Water Act to implement the permitting system now in place.

The Generic Prohibitions revive the very "cause or contribute" standard Congress repealed. And they do not function as discharge limitations. As the Second Circuit recognized, they add nothing that tells a permitholder how to control its discharges.

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The city also claims that these "generic prohibitions" open the city, as a discharge permit holder, to legal liability through their vagueness.

The Generic Prohibitions are also inconsistent with the Act's permit shield. The shield protects permitholders from liability as long as they comply with their permit terms. But, by imposing indeterminate requirements, the Generic Prohibitions prevent permitholders from relying on the shield's protections.

San Francisco is therefore exposed to crushing criminal and civil penalties even when it otherwise complies with its 300-page permit.

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Questions for San Francisco

Justice Thomas started the questioning of the San Francisco attorney.

JUSTICE THOMAS: – with this permit, what is at bottom the problem?

MR. STEELEY: What at bottom is the problem is that permitholders don't know what they need to do to comply. We know how to comply with the 300 pages of our permit, which tells us our discharge limitations that we need to achieve.

The problem with the Generic Prohibitions is that they don't tell us what in addition that we need to do. And if I could

provide an example of that. One of California's water quality standards is no objectionable algae bloom should form in the water body. San Francisco doesn't know how it must control its discharges to prevent that condition from forming in the water body.

And we can't know because whether a condition will form in the water body will necessarily depend on what other permitholders or other non-point sources are adding to the water body and the flow of the water itself.

What San Francisco can control is our own discharges. We cannot control the receiving water conditions.

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Bottom line, by holding the City of San Francisco to water quality standards, the city doesn't know what it needs to do beforehand. The example given involves California's standard of no objectionable algae blooms but, as Ms. Steeley points out, algae blooms can be impacted by other sources of discharge. I'm not a marine biologist, but I believe other non-manmade factors, such as temperature, tides, and migrations, impact algae blooms as well. So how can San Francisco be held accountable for an algae bloom that was not completely within its control? And how can San Francisco be held accountable if the EPA doesn't tell them what specifically needs to be done to prevent the bloom?

JUSTICE JACKSON: – isn't EPA – I thought the statute allowed for "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance established pursuant to any state law."

MS. STEELEY: So –

JUSTICE JACKSON: So California has established certain water quality standards. Are those independently binding on the

cities and municipalities in California?

MS. STEELEY: They are not binding. They are only binding as a permit limitation. And that's the problem here, is that we don't – they're only binding –

JUSTICE JACKSON: Do they – do you have to have permits under state law so that they get bound – you get bound through the state permitting process then?

MS. STEELEY: The permit at issue here is issued by –

JUSTICE JACKSON: No, I understand. But I'm just –

MS. STEELEY: Yeah.

JUSTICE JACKSON: – I guess my – my big problem is that I'm trying to understand why you find these permit provisions so onerous or problematic when they seem to just incorporate standards that already exist under state law that you would have to follow anyway.

MS. STEELEY: The standards are not self-executing, so we don't have to follow them anyway. They set the goals for the water body, but they're not limitations on us themselves.

JUSTICE KAGAN: So –

MS, STEELEY: So they aren't – they are not binding on us.

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Even the justices are confused by this quirky setup. The state sets a water quality standard, but it's not enforceable and not self-executing, so a city like San Francisco isn't held liable for contributing to its violation. The EPA has to issue a permit to San Francisco to discharge effluent (a surprisingly controversial term we will find used quite frequently during these arguments), and in that permit the EPA is supposed to tell San Francisco what they must do to meet

California's water quality standard. Seems like quite an opportunity for finger pointing.

JUSTICE KAGAN: – Ms. – Ms. Steeley, I mean, there are lots of different kinds of regulations in the world. Some people like some kinds; some people like other kinds. Some regulations are really prescriptive, do this, this, this, and this. And then, you know, some people hate those kinds of regulations. They'd rather have regulations that are less prescriptive, that say here's the goal, you decide how to meet it. That gives a party more flexibility and so forth.

So, you know, some people, you know, it's – there's got to be something in this statute that tells you that the agency can't decide to go the less prescriptive, more flexible "you decide how to meet it; this is the goal" route, and I don't see anything in this statute that does that.

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Yes, there are different types of regulation schemes. While Justice Kagan focuses on people preferring different types of regulations, I tend to think more along different situations. When she comes to a question, I think she unintentionally brought up an important point. Is the EPA allowed to use any type of regulation they aren't prohibited from issuing, or does the EPA have to be delegated the power to issue a specific type of regulation? Sadly, this question was not answered during oral arguments. Rather, Ms. Steeley focused on a point I think she needed to make for her argument to work.

First of all, San Francisco is not the only discharger or contributor to the water body. There are eight discharge points at issue in this permit.

JUSTICE SOTOMAYOR: Those are the point sources that it's supposed to be –

MS. STEELEY: Sorry, no. So San Francisco has its own discharge

points, and there are eight of them. One of them is – I will concede is fairly far out into the ocean. We are the only source for that one. But the other seven have many other contributors to the water body very close nearby. And if I can give you an example, just a couple weeks ago, there was a bacteria spike near one of those discharge points. It's a point that we are not currently using, so we know we did not cause that spike, but someone else did.

Had we been contributing to the water, had we been discharging at the time, we would necessarily have been contributing to that condition and we would be subject to liability.

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Justice Sotomayor seemed to be missing the point. She kept stating the the EPA was setting water discharge standards, then twisting what Ms. Steeley was saying, as if San Francisco was trying to get the EPA to assign those limits differently. But Ms. Steeley kept pointing to the fact that not all of the contributions to the output that EPA wanted monitored was under San Francisco's control. What Ms. Steeley describes would be like driving down the highway and being pulled over, cited, and fined not for your speed, but the overall speed of everyone on that stretch of highway.

JUSTICE KAGAN: Yeah, can I just piggyback on that if you'll – if you'll let me, Justice Sotomayor?

JUSTICE SOTOMAYOR: Yeah, sure.

JUSTICE KAGAN: Is – is, when I hear you speaking, I hear one of two things.

One is that to the extent that you have objections to particular ones of these water quality standards – they're too confusing, they're too vague, we can't figure it out, how can you tell between us and other dischargers – I mean, that does seem like a classic arbitrary-and-capricious question. So you

would go and make an arbitrary-and- capricious standard as to those particular standards that are in the permit.

I mean, the second way I hear you, honestly, is – is you're making a policy argument to either the agency or to Congress. You're making a policy argument to the agency, essentially: Don't take advantage of your statutory authority in this way because it's very confusing to us, the regulated party. Or you're making a policy argument to Congress: Go fix this statute so that the EPA can't do this.

But what I don't hear you telling me is, like, what in the statute prevents the EPA from doing this.

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Justice Kagan brought up an interesting point. The idea that San Francisco could be fined for violating a discharge permit based on the actions of others is arbitrary and capricious. However, that is not the case San Francisco has brought. Rather they claim that the way EPA wrote their permit was not authorized by the law. Again, we see a justice apparently assume the EPA can write their permits any way they want unless prohibited by the law.

Justice Kavanaugh seemed to sum up San Francisco's argument well.

JUSTICE KAVANAUGH: Okay. And the overarching problem, I think, but you haven't gotten to this, so I'm going to give you – you know, in terms of how this all works is you don't know what your obligations are ahead of time and yet you're on the hook for millions of dollars and potential prison time even though you didn't know what your obligations were ahead of time, which strikes at least me, I mean, as more – as definitely a policy problem but one that's rooted in the statute. You don't know what your obligations are and you can go to prison.

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How can the city be held liable for violating limits they are not made aware of ahead of time?

EPA's Argument

The EPA, obviously, had a different point of view. Frederick Liu, Assistant to the Solicitor General, represented the EPA. He began his statement with a bit of legal slight-of-hand.

MR. LIU: Mr. Chief Justice, and may it please the Court:

San Francisco's opening brief makes one and only one argument, that Section 1311(b)(1)(C) authorizes only effluent limitations. This Court, however, already rejected that argument in National Association of Manufacturers. And, in any event, the statutory text and history make clear that Section 1311(b)(1)(C) also authorizes other limitations. San – San Francisco is therefore wrong to argue that limitations like the ones challenged here are never okay.

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To understand the slight of hand, we need to look at the statute in question.

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. §1311(b)(1)(C)

Mr. Liu and several of the justices will spend a lot of time on this question of "any more stringent limitation" and whether or not any of those limitations are limited to effluence. Lost in much of these arguments is the fact that

the law in question is part of §1311. Effluent limitations.

I was rather surprised by how much time both attorneys and the justices spent on what seems to me to be the simple point that the law they kept referring to covers effluent limitations.

Rather than pursue an individualized challenge to the limitations in this case, San Francisco has put before this Court only a facial challenge: That all limitations that prohibit discharges based on their effects on water quality are invalid on their face because they don't fit the statutory definition of effluent limitation.

Because that argument can't be squared with this Court's precedents or the statute itself, this Court should affirm.

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So, in the EPA's mind, San Francisco's argument falls short. Notice how Mr. Liu says it cannot be squared with Supreme Court precedents, then with the statute. This shows just how twisted the legal system has become, placing the opinion of judges above the law.

But there's another twist to this story.

I want to be clear about the sort of information that we're missing that made it impossible for us to impose anything other than these generic limitations. It's not information about the water. It's information about San Francisco's own sewer system.

We're talking about, where do the flows go? What's the conditions of the pipes and the pumping stations? How does the system respond to wet weather events? That's the information that we've been lacking for the past 10 years and that we asked San Francisco to provide as part of the long-term control update.

Without that information, we're basically flying blind as to

how we're going to tell exactly what San Francisco should do to protect water quality.

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Does anyone else find it convoluted that a city needs to report about their sewer system to a federal agency in order to comply with state water regulations? Why is the federal government tasked with enforcing state water standards? And why is the EPA acting as the architect for California water quality? But that's not all.

CHIEF JUSTICE ROBERTS: The – I don't understand – you know, the bad old days is when we had water quality standards, right, people didn't know what they were supposed to do, how it was going to be allocated, sort of a problem with the – the comments, and they put in the permit system.

And I think the danger here is that you're going back to the other system because it, one, gives more power to you because you don't have to tell the people who are discharging what they have to do or not, you can sit back, and then – and also you don't even have to allocate among many different polluters who's responsible for – for what.

So what prevents you – I know you touched on a couple of things in response to Justice Thomas, but I'm not sure that was significant limitations from saying, as you're doing here, we're going to go with water quality standards because that's maybe harder for the people with effluent, but it's a lot easier for us?

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Apparently, when the Clean Water Act was first put in place, cities like San Francisco were given water quality standards to maintain by the EPA, but they didn't know how they were supposed to do that. This is what led to the convoluted permit system currently in place. Chief Justice Roberts asked, does

the permitting language merely go back to the water quality standard of the past, and is the EPA doing this to make their lives easier?

MR. LIU: No, it's not easier for us. In our ideal world, we would have perfect information about how San Francisco's system works, and based on that information, we would be telling San Francisco things like: Reroute flows from X to Y. Upgrade your pumping station at Sea Cliff. Increase the storage capacity of your Westside storage facility. We were unable to include limitations of that tailoring in this permit because San Francisco deprived us of the very information we would need to do that. So we don't – We have no interest in putting in generic provisions like this when we have the information available to supply more tailored information – more tailored limitations. And that's why – it's precisely because it's so much easier to enforce a more tailored limitation.

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Apparently, in EPA's perfect world, they could micromanage San Francisco's waste water system, telling them exactly what they needed to do, right down which sites needed what upgrades. Is anyone else thinking about Big Brother?

Justice Kavanaugh had an interesting exchange with Mr. Liu about the ex post facto aspects San Francisco was claiming.

JUSTICE KAVANAUGH: But the problem is you can go after an individual entity like the City of San Francisco based on the past, when they didn't know what the relevant limitation on them was, and seek retroactively, without fair notice, huge penalties, including criminal punishment, based on something that was – they didn't know what they could discharge or not discharge, correct? – I mean, a lot of what you're talking about in response to the Chief Justice is here's things that could help going forward. – You're suing San Francisco

separately for a lot of money based on a standard that they had no idea – you know, at least that's the theory. – That's the theory And your position – your position would allow that.

MR. LIU: I don't – I don't think so.

JUSTICE KAVANAUGH: Yes, it would.

MR. LIU: I mean – I mean, the Bayside complaint is Exhibit A for why what you said is not going to be true. The standards that are violated in those cases are numeric water quality criteria.

JUSTICE KAVANAUGH: The standards – the generic limitations contain water quality standards that you don't know as an individual entity what you need to do to comply with that.

MR. LIU: You know, San Francisco has not pointed to any instance of that.

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Justice Kavanugh, and in fact San Francisco, is pointing to generic limitations, so when Mr. Liu points to a single instance that included "numeric water quality criteria," it seemed to miss the point. If Mr. Liu is correct, and San Francisco has not pointed to a single generic limitation they needed to comply with, he might have a point. I haven't read all of the case documents, so I'm not sure, and Justice Kavanaugh did not bring up an instance.

Conclusion

With all of this talk about effluence, you might consider this case quite a show. To me, there are a few points not focused on in the case that are worth considering.

First, did Congress have the Constitutional authority to tell the EPA to enforce state water quality standards? I cannot find anywhere in the Constitution where the United States was

delegated the authority to enforce water quality standards or, for that matter, any environmental standards. So if we have a constitutionally sound judicial system, this whole case would have been thrown out. Not because San Francisco didn't have a grievance against the federal government, but because the case they brought was based on an invalid law.

Second, why did San Francisco question the statutory power of the EPA, when most of their complaint seems to be that their permitting regulations are arbitrary and capricious?

Third and finally, yes, the details matter. But why did both attorneys, and the justices, ignore the detail that §1311(b)(1)(C) is part of §1311, which deals with effluent limitation? During oral arguments, there was much discussion about the fact that §1311(b)(1)(C) stated "any more stringent limitation," and whether or not that means effluent limitations or any form of limitation. It seems to me if you're reading a law about effluent limitations, all of it is going to be about effluent limitations unless otherwise stated.

I started my analysis thinking that San Francisco was right. After listening to oral arguments, I think the entire process is a giant pile of effluence. As far as the justices' questions, I'm reminded of when Jesus confronted the Pharisees and stated they "strain out a gnat and swallow a camel!"

How California handles its water quality is their business. Placing a federal agency in the middle does nothing but add more bureaucracy to an already bureaucratic nightmare. Maybe that's why the framers limited Congress to only making laws necessary and proper for executing the powers vested by the Constitution in the government of the United States.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the

United States, or in any Department or Officer thereof.

U.S. Constitution, Article I, Section 8, Clause 18

Perhaps, if we kept Congress bound to that limit, we wouldn’t have such effluent-laden cases.

E-Mail Paul Engel: paul@constitutionstudy.com