

# Why You Need to Carefully Read Your NPDES Permit: Supreme Court's Decision Regarding End-Result Limits

Additionally -- EPA's recent PFAS Minimization and Nutrient Reduction requirements; Emerging Contaminants; U.S. Constitution and Dormant Commerce Clause

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# Summary

- “The only constant in life is change” - quote attributed to Greek philosopher - Heraclitus
- Industries update processes and chemicals used
- New industries move in and others move out of town
- New legislation and new regulations
- Need to update Local Pretreatment Program
  - What does that mean, what might it include?



# But first -- Acronyms

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- CWA - Clean Water Act
- NPDES - National Pollutant Discharge Elimination System
- RCRA - Resource Conservation and Recovery Act
- TSCA - Toxic Substances Control Act
- CERCLA - Superfund
- EPA - Environmental Protection Agency



# Pretreatment Program

## Objectives

- (a) To prevent the introduction of pollutants into POTWs which will **interfere** with the operation of a POTW, including interference with its use or disposal of municipal sludge;
- (b) To prevent the introduction of pollutants into POTWs which will **pass through** the treatment works or otherwise be incompatible with such works; and
- (c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

➤ To protect POTW workers.



United States  
Environmental Protection  
Agency

Office Of Water  
(EN-336)

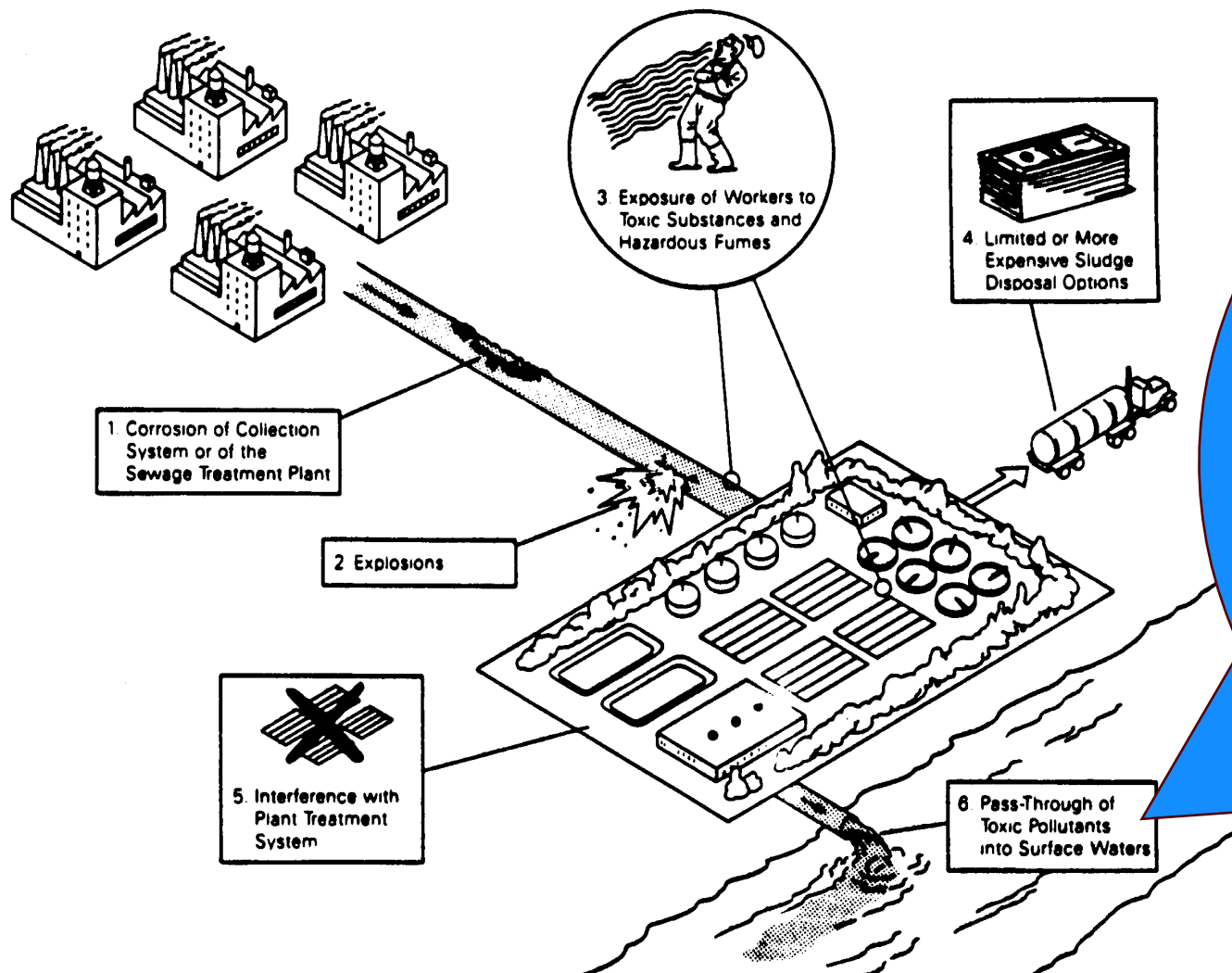
EPA 812-B-92-001  
NTIS No. PB92-173-236  
June 1992

**Guidance To Protect POTW  
Workers From Toxic And  
Reactive Gases And Vapors**

|         |                                                                                                           |
|---------|-----------------------------------------------------------------------------------------------------------|
| §403.1  | Purpose and applicability                                                                                 |
| §403.2  | Objectives of general pretreatment regulations                                                            |
| §403.3  | Definitions                                                                                               |
| §403.4  | State or local law                                                                                        |
| §403.5  | National pretreatment standards: Prohibited discharges                                                    |
| §403.6  | National pretreatment standards: Categorical standards                                                    |
| §403.7  | Removal credits                                                                                           |
| §403.8  | Pretreatment program requirements: Development and Implementation by POTW                                 |
| §403.9  | POTW pretreatment programs and/or authorization to revise pretreatment standards: Submission for approval |
| §403.10 | Development and submission of NPDES state pretreatment programs                                           |
| §403.11 | Approval procedures for POTW pretreatment programs and POTW granting of removal credits                   |
| §403.12 | Reporting requirements for POTW's and industrial users                                                    |
| §403.13 | Variances from categorical pretreatment standards for fundamentally different factors                     |
| §403.14 | Confidentiality                                                                                           |

# Pretreatment Program Prohibitions

- A user may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference.

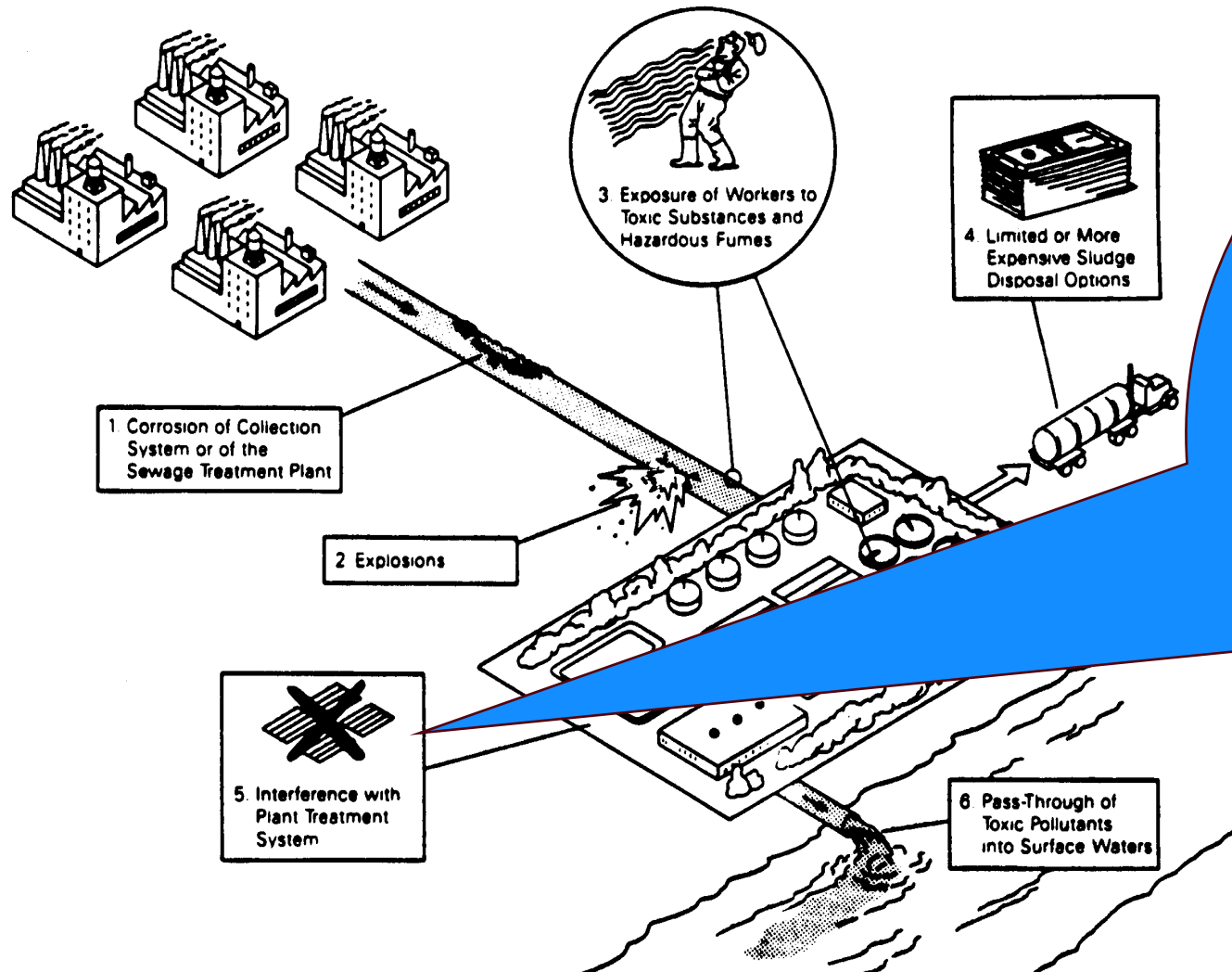


## Pass through

Discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a **cause of a violation of any requirement of the POTW's NPDES permit** (including an increase in the magnitude or duration of a violation).

# Pretreatment Program Prohibitions

- A user may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference.



## Interference

Discharge which, alone or in conjunction with a discharge or discharges from other sources, both:

(1) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal;

and

(2) Therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal in compliance with the following statutory provisions and regulations or permits issued thereunder (or more stringent State or local regulations): . . .

# U.S. Constitution – Dormant Commerce Clause

- U.S. Constitution – Article I, Section 8, Clause 3 - [The Congress shall have power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .
- States cannot curtail the movement of articles in commerce across state lines, including wastes, in violation of the limits implicitly placed on them by Commerce Clause
  - Cannot discriminate against or place undue burdens on interstate or international commerce
- Example: *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) – New Jersey statute which placed the burden of conserving the state's remaining landfill space on out-of-state commercial interests was held to be discriminatory despite a legitimate legislative purpose



# U.S. Constitution – Supremacy Clause

- Under the Supremacy Clause of the U.S. Constitution, state actions are preempted when they are an obstacle to executing Congress's purpose and objectives. See *Arizona v. United States*, 567 U.S. 387, 399 (2012)
  - Barring the interstate movement of hazardous waste taken at the direction of EPA frustrates Congress's purpose in enacting CERCLA and RCRA by preventing the expeditious cleanup of hazardous waste and the disposal of such waste at EPA-approved facilities
  - See, e.g., 40 CFR sec. 271.4(a) – requiring approved state RCRA programs to not “unreasonably restrict, impede, or operate as a ban on the free movement across the state border of hazardous wastes or to other states for treatment, storage, or disposal at facilities authorized to operate.”



# **SUPREME COURT OF THE UNITED STATES**

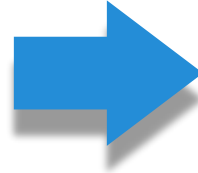
## **CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA v. ENVIRONMENTAL PROTECTION AGENCY**

**March 4, 2025**



# National Pollutant Discharge Elimination System (NPDES) Permits – CWA Sec 402 and 40 CFR Part 122

- All *point sources*
- Discharging *pollutants*
- Into *waters of the United States*



Must obtain an NPDES *permit* from EPA or an authorized state, territory, or tribe



# NPDES Statutory Framework - CWA

- Section 301 -- prohibits the discharge of any pollutant from a point source by any person without a permit
- Section 402 -- authorizes the NPDES permit program
- Section 301(b)(1)(C) -- any more stringent limitation, including those necessary to meet water quality standards . . .



# Water Quality-based Effluent Limits (WQBELs) in NPDES Permits – CWA Section 301(b)(1)(C)

- CWA requires compliance with limits as stringent as necessary to protect WQ Standards
  - Waters Not Attaining Water Quality Standards
    - prevent further degradation
    - implement corrective actions (e.g., TMDLs) to restore waters and meet water quality standards
  - Waters Attaining Water Quality Standards
    - protect beneficial uses of the water body
    - prevent future excursions of water quality standards
    - prevent or limit degradation of water quality





## San Francisco Public Utilities Commission (SFPUC)

- The City of San Francisco operates two combined treatment facilities: the Bayside facility, which discharges into San Francisco Bay, and the Oceanside facility, which empties into the Pacific Ocean. The permit at issue in this dispute concerns only the Oceanside facility.
- EPA issued the permit because it is an ocean discharge outside the boundary of State waters.

# The Issue

- Past permit had numeric limits based upon technology-based and water quality-based requirements.
- New permit (2019) had numeric limits based upon technology-based and water quality-based requirements – AND –narrative limits:
  - First prohibits the facility from making any discharge that “contribute[s] to a violation of any applicable water quality standard” for receiving waters.
  - The second provides that the City cannot perform any treatment or make any discharge that “create[s] pollution, contamination, or nuisance as defined by California Water Code section 13050.”
- SFPUC appealed and it went to court, eventually the Ninth Circuit and then the Supreme Court.



# Ninth Circuit

A divided Ninth Circuit panel denied that petition, holding that §1311(b)(1)(C) authorizes the EPA to impose “any” limitations that seek to ensure that applicable water quality standards are satisfied in a receiving body of water. *Id.*, at 1089–1090. In dissent, Judge Collins argued that the CWA “draws an explicit distinction between the ‘limitations’ that the agency must devise and impose on a particular permittee’s discharges” and the water quality standards themselves. *Id.*, at 1102 (Collins, J., dissenting). The majority, he maintained, erred by making the “water quality standards’ themselves the applicable ‘limitation’ for an individual discharger.” *Ibid.*



# How Did This Play Out with the Supreme Court?



- San Francisco crafted their argument against how the Ninth Circuit ruled.
- Court did not like the argument.
- EPA argued in favor of the Ninth Circuits opinion.
- Court did not like that either.
- The Court came up with their own view.
- It was a 5 to 4 decision, so not quite unanimous – dissent was interesting but really missed the point



# What were the arguments? (SFPUC)

- **SFPUC argument** - Contending that the Ninth Circuit misread §1311(b)(1)(C), San Francisco leads with the argument that all “limitations” imposed under §1311 must qualify as effluent limitations.
- **Supreme Court** - **The statutory text dooms this broad argument.** “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). We have invoked this canon time and time again. See, e.g., *Gallardo v. Marstiller*, 596 U. S. 420, 429–430 (2022); *Salinas v. Railroad Retirement Bd.*, 592 U. S. 188, 196 (2021); *Azar v. Allina Health Services*, 587 U. S. 566, 576–577 (2019). And it is fatal to San Francisco’s argument here. Sections 1311(b)(1)(A) and (B) refer to “effluent limitations,” but the very next provision, §1311(b)(1)(C), refers instead to “any more stringent limitation.” We cannot believe that Congress omitted the term “effluent” from §1311(b)(1)(C) simply because it wanted to save ink or assumed that regulators and interested parties would understand that the omission of the term was inconsequential.



# What were the arguments? (USEPA)

- **USEPA** - Attempting to counter this interpretation, the EPA stresses §1311(b)(1)(C)'s use of the term “any” in the phrase “any more stringent limitation,” arguing that “any” is a very broad term.
- **Supreme Court** - **That argument misconstrues the term's effect.** The adjective “any” is indeed a broad term, but it cannot expand the reach of the noun it modifies. A reference to “any mammal” would capture all mammals, but it would not encompass a bird or fish. Similarly, §1311(b)(1)(C) encompasses any *limitation* that is necessary to meet or implement water quality standards, but not provisions that do not fall within that category.
- Instead, the amended WPCA sought to achieve “acceptable quality standards” by means of “direct restrictions” on polluters. *Ibid.* The Government's interpretation would undo what Congress plainly sought to achieve when it scrapped the WPCA's backward-looking approach.
- Thus, in construing §1311, we must also take into account the broader statutory scheme, and at least two features of that scheme point in favor of our interpretation.
- The first is the so-called “permit shield” provision, 33 U. S. C. §1342(k), under which a permittee is deemed to be in compliance with the CWA if it follows all the terms in its permit.
- One final structural feature cements the case against the EPA's interpretation: the absence of any provision dealing with the problem that arises when more than one permittee discharges into a body of water with substandard water quality. As previously explained, it is hard to believe that the 1972 Congress used §1311(b)(1)(C) to perpetuate (in camouflaged form) the backward-looking enforcement scheme in the prior version of the WPCA. And it is even harder to accept the proposition that Congress did that without setting out any method for dealing with the multi-discharger problem.



# Supreme Court's Idea

- . . . “end-result” requirements—permit provisions that do not spell out what a permittee must do or refrain from doing but instead make a permittee responsible for the quality of the water in the body of water into which the permittee discharges pollutants.
  - First prohibits the facility from making any discharge that “contribute[s] to a violation of any applicable water quality standard” for receiving waters.
  - The second provides that the City cannot perform any treatment or make any discharge that “create[s] pollution, contamination, or nuisance as defined by California Water Code section 13050.”
- . . . this case involves provisions that do not spell out what a permittee must do or refrain from doing; rather, they make a permittee responsible for the quality of the water in the body of water into which the permittee discharges pollutants. When a permit contains such requirements, a permittee that punctiliously follows every specific requirement in its permit may nevertheless face crushing penalties if the quality of the water in its receiving waters falls below the applicable standards. For convenience, we will call such provisions “end-result” requirements.



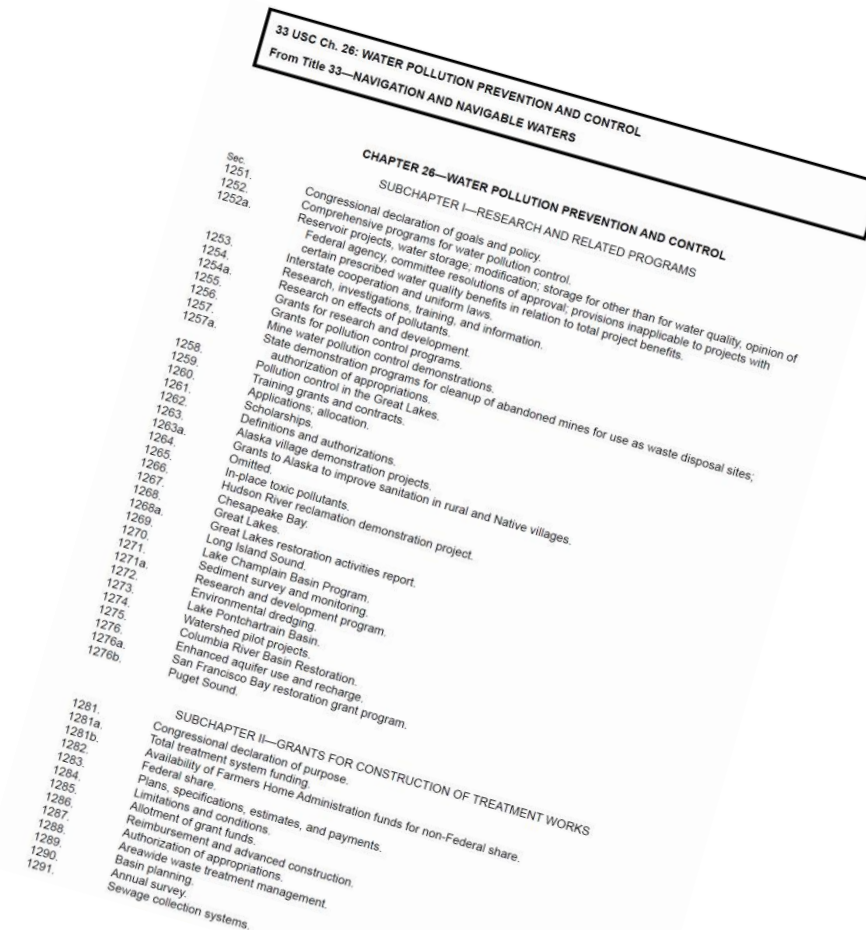
# Supreme Court's Idea (cont.)

- **We hold that the two challenged provisions exceed the EPA's authority.** The text and structure of the CWA, as well as the history of federal water pollution legislation, make this clear. And resorting to such requirements is not necessary to protect water quality. The EPA may itself determine what a facility should do to protect water quality, and the Agency has ample tools to obtain whatever information it needs to make that determination. If the EPA does its work, our holding should have no adverse effect on water quality.
- **Evolution of the CWA** (official title, Federal Water Pollution Control Act, originally called Water Pollution Control Act of 1948)
  - the WPCA was amended numerous times, and the federal role gradually grew, but the basic structure of federal enforcement actions remained the same. The starting point was the identification of a body of water with substandard water quality. After that, federal authorities had to work backward and prove that a particular entity should be held responsible for the problem. Both the original version of the 1948 Act and all amendments enacted before 1972 proved to be ineffective due in part to this backward-looking model.
  - By 1972, the WPCA's inadequacy was apparent, and Congress made a fresh start. It amended the WPCA by deleting all its provisions and substituting what is now generally known as the Clean Water Act. **The CWA jettisoned the WPCA's retrospective approach and aimed directly at the sources of pollution.** A critical component of the CWA scheme is the National Pollutant Discharge Elimination System (NPDES), see *id.*, at 204–205, which makes it unlawful to discharge pollutants into covered bodies of water unless authorized by permit. Permits issued under this program may contain several different types of provisions.



# Supreme Court's Idea (cont.)

- The permit as written includes the failures of the CWA before the amendments put in place in 1972.
- 1972 amendments completely changed the CWA.
- 1972 amendments and later changes to the Act provide EPA with all of the tools they need to issue permits with clear limits – NOT “end results” limits.
- Also believed 9<sup>th</sup> Circuit decision was not consistent with **CWA permit shield provision**.



# Supreme Court Decision was Good, but not Great

- Narrative limits
- The agency has adequate tools to obtain needed information from permittees without resorting to end-result requirements. Its reliance on the Combined Sewer Overflow Policy is misplaced as that policy authorizes narrative limitations but not end-result requirements. And concerns about disrupting general permits are unfounded given that **narrative limitations remain available**.
- Permits issued by these agencies include what the CWA calls “effluent limitations,” that is, provisions that specify the quantities of enumerated pollutants that may be discharged. It is also common for permits to set out other steps that a discharger must take. These may include testing, record-keeping, and reporting requirements, as well as requirements obligating a permittee to follow specified practices designed to reduce pollution. **None of these so-called narrative requirements is at issue here**.
- As noted earlier, it is common for permits to contain **“narrative”** provisions requiring permittees to do such things as following certain **“best practices.”** These provisions do not directly restrict the “quantities, rates, or concentration” of pollutants that a permittee may discharge, and therefore they do not fit easily within the definition of an “effluent limitation.” Nevertheless, the City acknowledges their legitimacy





# “Narratives”

- Example of narrative criteria in Water Quality Standards
- 9VAC25-260-20. General criteria. A. State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life.

# “Narratives” (cont.)

## EPA Water Quality Standards Handbook

### 3.5.2 Narrative Criteria

To supplement numeric criteria for toxicants, all States have also adopted narrative criteria for toxicants. Such narrative criteria are statements that describe the desired water quality goal, such as the following:

All waters, including those within mixing zone, shall be free from substances attributable to wastewater discharge or other pollutant sources that:

1. Settle to form objectionable deposits;
2. Float as debris, scum, oil, or other matter forming nuisances;
3. Produce objectionable color, odor, **taste**, or turbidity;
4. Cause injury to or are toxic to, or produce adverse physiological responses in humans, animals, or plants; or
5. Produce undesirable or nuisance aquatic life (54 F.R.28627, July 6, 1989).

EPA considers that the narrative criteria apply to all designated uses at all flows and are necessary to meet the statutory requirements of section 303(c)(2)(A) of the CWA.





# Observations

- Permit regulations
- Technology-based limits (TBELs), water quality-based limits (WQBELs) and best management practices as limits (BMPs = narratives).
  - End result – “comply with water quality standards”
  - What about free from criteria?
- Limits and monitoring requirements

# San Francisco - Supreme Court Decision\*

- **City and County of San Francisco v. EPA**
- **Background:** SFPUC challenged as overly vague requirements in its NPDES permit requiring it not to "create pollution" or "cause or contribute to the violation of water quality standards."
- **Decision:** Such "end result requirements" - i.e., requirements "that do not spell out what a permittee must do or refrain from doing" - are unlawful and are not needed to protect water quality.
  - **Court's Reasoning:** Such provisions violate the text, structure, and history of the CWA
    - Would allow for significant enforcement when permit holder never put on notice of compliance obligations
    - Eviscerate the section 402(k) "permit shield"
    - Are problematic to implement where multiple dischargers to waterbody
  - **Potential Application to Pretreatment:** Case does NOT directly implicate pretreatment program – Court's reasoning based on statutory provisions specific to NPDES permits and permit holders
  - Case does NOT call into question narrative provisions like BMPs, record-keeping, testing, reporting
  - Case does NOT call into question regulations/guidance using "end result" language, only directly enforceable terms in NPDES permits
  - Arguably could be used to infer that utilities cannot enforce requirements against industrial users unless those requirements spell out compliance obligations



But wait,  
there's more

. . .



# Conservation Law Foundation v. MWRA

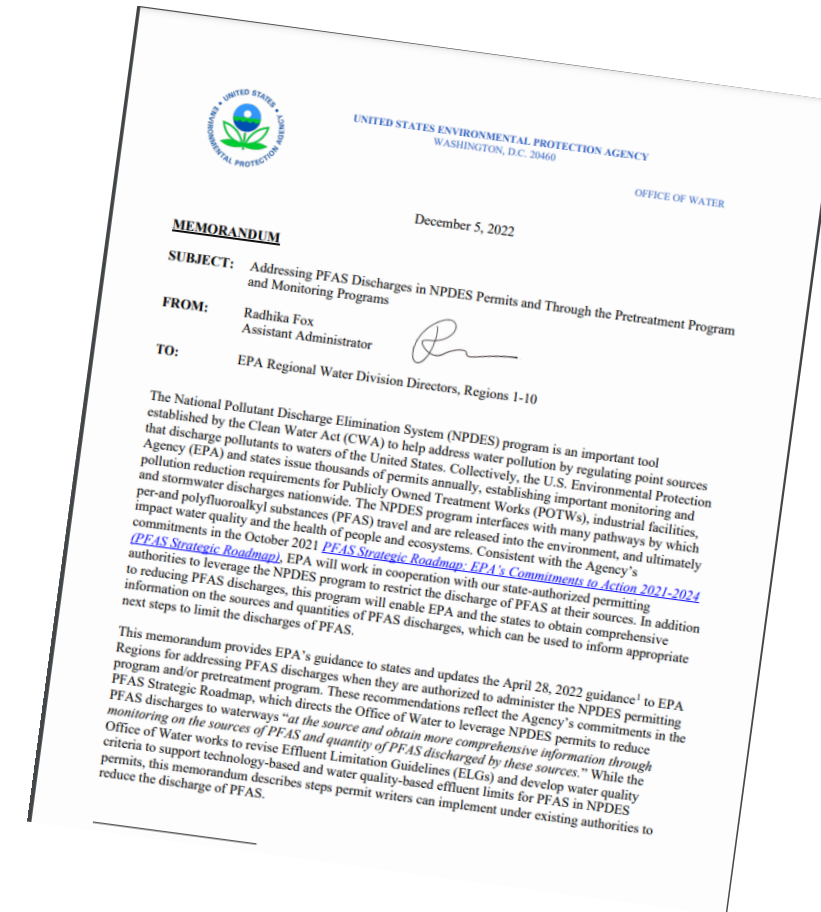
- **Feb. 2023 decision from the U.S. District Court for the District of Massachusetts**
- **Background:** ENGO Conservative Law Foundation brought suit arguing that MWRA was in violation of its NPDES permit because it failed to take sufficient enforcement action against industrial users.
- **Issue:** Do citizens have a right to bring lawsuits over a utility's administration of its pretreatment program?
- **Decision:** CWA section 309(f) only provides EPA – not outside groups – with the right to oversee administration of a pretreatment program.
  - **Helpful dicta:** Court pointed to several policy arguments in favor of MWRA - Allowing ENGOs to second-guess EPA assessment of pretreatment programs could lead to flood of litigation;
  - Utilities would face inconsistent requirements and be "in the dark in implementing their own" programs;
  - Citizen groups lack engineering and systems expertise to ensure costs imposed will not outweigh benefits achieved;
  - EPA is answerable to the public, ENGOs are "answerable only to their own members."
- **Potential applications going forward:** Could help combat ENGO positions about utility use of pretreatment programs in context of PFAS.

\*Borrowed slide from Amanda Aspatore - NACWA



# Emerging Contaminants (e.g., PFAS)

- EPA's PFAS Strategic Roadmap: Three Years of Progress - November 2024
- EPA Guidance Memo – December 2022 -- Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs
  - A. Recommendations for Applicable Industrial Direct Discharger
  - B. Recommendations for Publicly Owned Treatment Works
    - 1. Applicability: All POTWs, including POTWs that do not receive industrial discharges, and industrial users (IUs) in the industrial categories above.
    - 2. Effluent, influent, and biosolids monitoring:
    - 3. Pretreatment program activities:
      - a. Update IU Inventory.
      - b. Utilize BMPs and pollution prevention to address PFAS discharges to POTWs.



# EPA's PFAS Strategic Roadmap

- October 2021- EPA released PFAS Strategic Roadmap
- November 2024 – Released 3<sup>rd</sup> year progress report
- The Roadmap - identifies the unique challenges posed by PFAS contamination and states its approach includes a "deeper focus to preventing PFAS from entering the environment in the first place—a foundational step to reducing the exposure and potential risks of future PFAS contamination."
- EPA's Effluent Guidelines Program Plan 15, published in January 2023, the EPA plans to conduct the POTW Influent PFAS Study primarily to gather nationwide data on industrial sources of PFAS discharges to the environment. To accomplish this goal, the EPA will require POTWs across the United States to complete a questionnaire and collect wastewater samples to obtain information on PFAS concentrations in industrial effluent, as well as in domestic wastewater or sewage and in POTW influent and effluent.



# Southern Environmental Law Center's Opinion

“In many cases, wastewater plants are making these contamination issues worse. ”

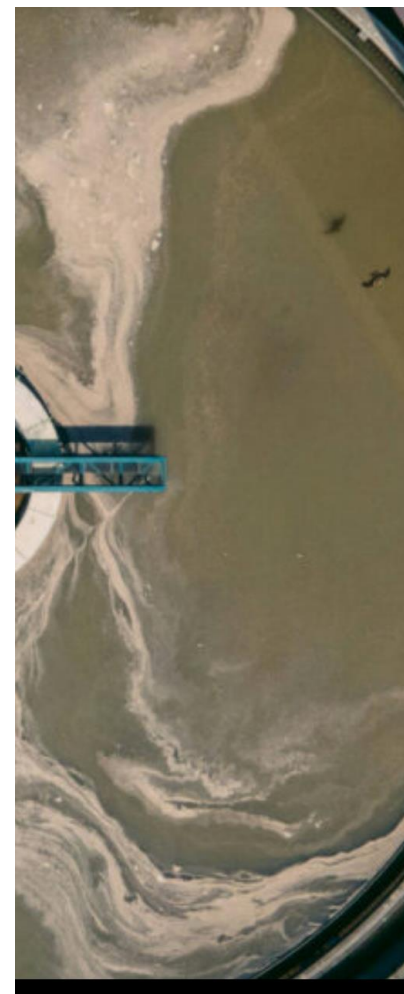
“A Clean Water Act authority known as the National Pretreatment Program allows wastewater plants to curb the spread of these chemicals. They're just not using it.”

“....many wastewater plants are irresponsibly discharging the PFAS they receive from their industrial customers back into our drinking water sources. Even worse, treatment interactions can create higher levels of PFAS.”

“Wastewater plants are paid on the front end to accept industrial wastewater and on the back end for selling sludge, with some multistate utilities bringing in hundreds of millions of dollars each year. Total U.S. wastewater treatment revenue amounted to \$65.3 billion in 2019. The very least these public utilities can do is use their pretreatment authority to prevent PFAS pollution from reaching our drinking water and food.”

<https://undark.org/2025/05/23/opinion-wastewater-plants-pfas/>

<https://www.wunc.org/2023-08-08/the-city-of-burlingtons-landmark-settlement-to-cut-pfas-pollution>



## *Opinion:* Wastewater Plants Could Protect Against PFAS Pollution

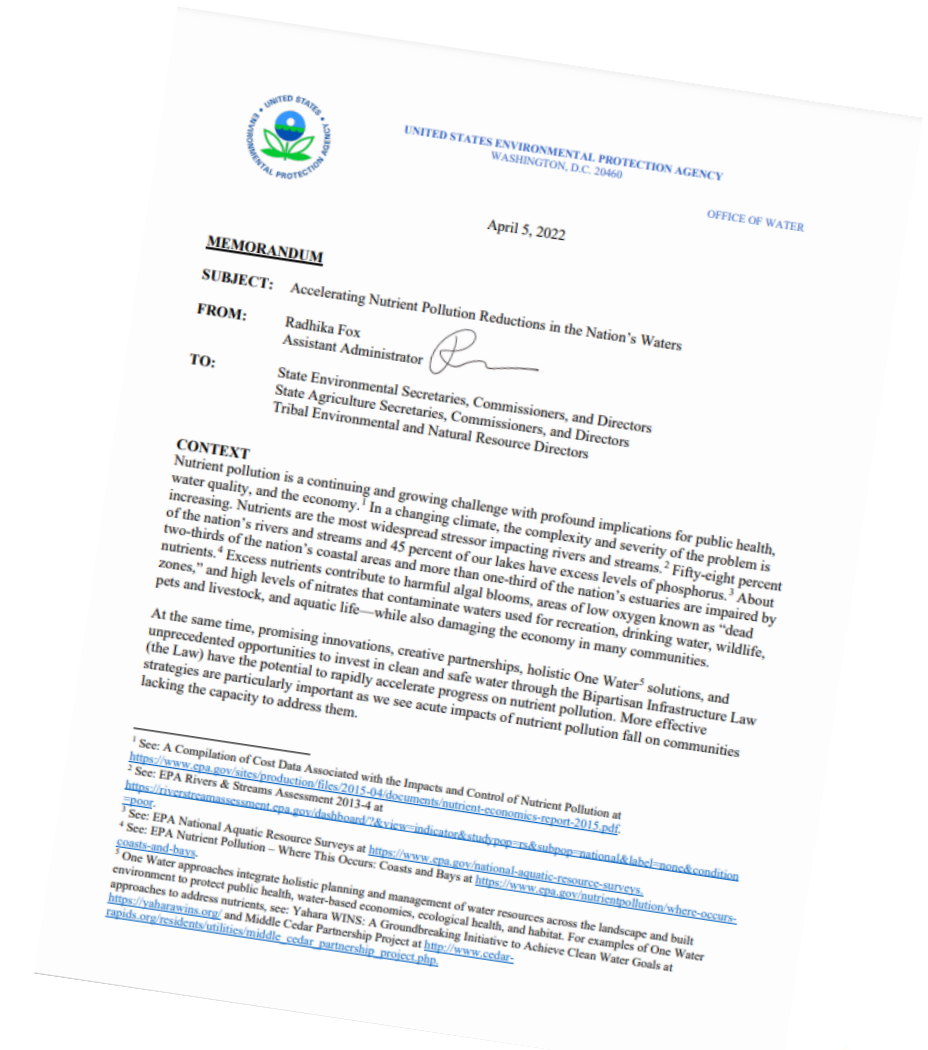
*Sewage treatment plants have the power to help reduce people's exposure to PFAS. It's time they start using it.*

*Visual: Patrick Federi/Unsplash*

BY BONNIE ANGERMEIER 05.23.2025

# Nutrients

- EPA Memo - Accelerating Nutrient Pollution Reductions in the Nation's Waters
  - Urging more robust adoption of numeric nutrient criteria into Water Quality Standards
  - More Fully Using the Clean Water Act Assessment and Listing Process and Supporting Development of TMDLs for Nutrient Pollution
  - Further Reducing Nutrient Loads from Point Sources
- Chesapeake Bay TMDL
  - Achieving Water Quality Goals in the Chesapeake Bay: A Comprehensive Evaluation of System Response (2023)
- North Carolina Nutrient Management Strategies



# Additional Considerations

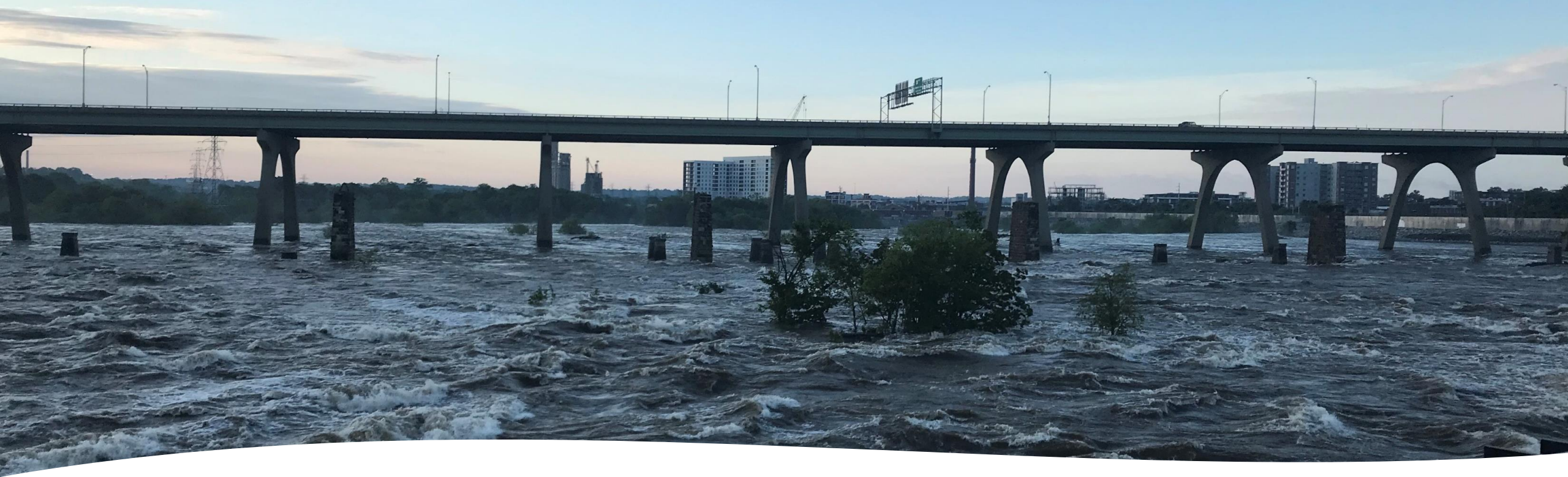
- Microplastics
- Lead and Copper Rule Improvements (LCRI), an update to the Lead and Copper Rule Revisions (LCRR)
  - Corrosion control (e.g., zinc orthophosphate)
- 6PPD-quinone (see 2024 EPA Action Plan)
- Climate change
- Aging Infrastructure
- Cybersecurity
- Dormant Commerce Clause



# Recommendations



- Read your NPDES permit carefully
- Pretreatment program updates
  - Updating Industrial Waste Survey for new, expanding, and permit renewals to include PFAS, 1,4-Dioxane, etc.
  - Updating sewer use ordinance to address emerging contaminants including
    - Industrial User monitoring and how that will be funded
    - Ability to require SIUs to implement best management practices for PFAS (other pollutant) reduction
    - Updating SUO to address hauled wastes and landfill leachate from an emerging contaminant perspective
- Coordinate with fire department regarding tracking of chemical use/storage
- Coordinate monitoring between wastewater plant and water plant
- Communicate with solid/hazardous waste program
- Communicate with industries
- Staying up-to-date – NC-PC, NCWQA, NACWA, 



# QUESTIONS?

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# THANK YOU

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**Michael Baker**  
INTERNATIONAL

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