San Francisco Board of Supervisors Land Use and Transportation Committee Hearing

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Testimony of Dave Owen, Harry D. Sunderland Professor and Associate Dean for Research, UC Law San Francisco

Thank you for the opportunity to address the committee today. My name is Dave Owen, and I am the Harry D. Sunderland Professor and Associate Dean for Research at UC Law San Francisco. I teach environmental law and water law, and much of my research focuses on water resources management, including the Clean Water Act.

In my remarks today, I will try to explain three basic points. The first key point is that the stakes in this litigation are different from what the city attorney's office and the SFPUC have made them out to be. The second point is that EPA and the city have strongly shared interests in this matter. And the third key point is that asking the Supreme Court to sort out the city and EPA's differences—and there are differences—is a terrible idea.

At the outset, I also want to stress that when we step back from the particular details of this Supreme Court case and consider the broader challenge that the city and EPA face, both sides are pursuing reasonable priorities in the face of a difficult situation. It's not okay to pump millions of gallons of semi-treated sewage directly into the ocean and the bay, and the city knows that. Fixing combined sewer overflows is very expensive and can't be done all at once, and EPA knows that. Figuring out a reasonable balance in this situation is hard, and people of good faith can disagree on their priorities.

Since I'll be criticizing the city's litigation choices, I should also clarify, at the outset, that I don't mean to let EPA off the hook. If this case does not settle, and the Supreme Court uses it to further weaken the Clean Water Act, that will be a shared failure. Both sides are responsible for avoiding that outcome, and neither side has met its responsibilities yet.

The stakes:

As I said a moment ago, I'd like to begin by clarifying what is at stake in this Supreme Court case. The city attorney's office has implied that essentially all the compliance costs it faces will be determined by the resolution of this litigation before the Supreme Court. It has said, for example, that over $8 billion in compliance costs on the Bayside alone are at stake. But that is not correct.

Initially, the case before the Supreme Court does not challenge the bayside permit. It focuses only on the city's EPA-issued permit, which governs the oceanside. And it focuses on a few paragraphs in a permit that is about 100 pages long. To suggest that all of the city's potential compliance costs are bound up in this Supreme Court appeal therefore is misleading.

To put the point somewhat differently: if the city wins this appeal, and the Supreme Court excises the challenged provisions from the city's oceanside permit, the city's challenges will not go away. The city still will have combined sewer overflows that discharge millions of gallons of partially treated storm- and wastewater into the Bay. There is no dispute that those discharges cause violations of water quality standards. The city still will need to address that problem. EPA and the regional water quality control board will still have a statutory obligation to compel the city to address that problem.

The city also still will be subject to ninety-nine pages of other federal permit requirements along with its state permit requirements. And the next permit that EPA issues will probably include more specific language to address the city's obligations. At most, what the city will gain here is a brief reprieve.

The shared interests:

My second key point is that the city and San Francisco share important goals here—goals that could be hurt by the resolution of this case.

EPA's key interest is protecting its ability, and the state's ability, to include effective provisions in Clean Water Act permits. In other words, it is to preserve regulators' authority to protect water quality.

The city shares that interest, and for a simple and powerful reason: this is a downstream city. If EPA and the Bay Area Regional Water Quality Control Board cannot use broad, narrative standards in San Francisco's permits, they, and other state regulators, probably cannot enforce those provisions in the many other permits where such standards currently are in use. And if those standards are as impactful as San Francisco claims they are, then the result will be a significant reduction in permit obligations for hundreds—perhaps thousands—of other dischargers.

The city might not care if those dischargers are in Michigan or Massachusetts, though I think it should. But it at least should care about discharges in the Sacramento and San Joaquin watersheds or elsewhere on the Bay. All these discharges eventually flow by our shoreline parks and beaches, out through the Golden Gate, and into our ocean. The last thing a downstream city, a city surrounded on three sides by water, needs is to weaken Clean Water Act permitting.

In other important ways, interests also align. EPA is not interested in bankrupting cities. Neither are state or local water-quality regulators. They are obligated to push cities toward better management of stormwater and wastewater, but regulators know that if they push to hard, the backlash will be powerful. Their interest, which the city shares, is to come up with a reasonable compromise between those goals.

The Supreme Court:

My last key point is that such a reasonable compromise is not likely to emerge from litigating before the United States Supreme Court. Instead, the Court is likely to use this case to advance its own anti-regulatory agenda, probably while doing its best to avoid making San Francisco look good.

We can get some sense of the Court's likely treatment of this case by looking at how it has addressed other recent environmental cases. And the theme is consistent: in recent years, the Court has gone out of its way to weaken environmental laws.

That includes the Clean Water Act. One year ago, in *Sackett v. Environmental Protection Agency*, the Supreme Court gutted the act, removing protections from many of the nation's streams and wetlands, and thus also from the downstream waterways into which those streams and wetlands flow. The decision was a case study in badly executed, ideologically driven statutory interpretation. The Court ignored Clean Water Act provisions that supported EPA's position It ignored the basic goals of the statute. It ignored water-quality science. It strategically misread the statutory provisions

it did choose to read. Throughout the opinion, the Court's made it unmistakeably clear that it does not like the Clean Water Act. If you want to understand why so many people are so angry—and I use that word deliberately—at the city of San Francisco for bringing this case, you need only read the *Sackett* decision.

Unfortunately, *Sackett* is not an outlier. The Court also has decided multiple Clean Air Act cases in recent years, and it has used each of them not just to weaken the Clean Air Act but also to establish broader principles designed to weaken environmental regulation, and government regulation more generally. To hand another environmental case to that sort of Supreme Court is a foolish act.

To these worries, the city attorney's office has a response: it claims it has framed its arguments narrowly. That does not matter. If the Court wants to write a broad opinion, it will. If it wants to use this opinion to advance a broader deregulatory agenda, it will. If it wants to write opinion that makes San Francisco—which is not exactly conservatives' favorite city—*and* EPA look bad, it will. It is not accountable to the litigants before it, or, for that matter, to anyone else. The city attorney's argument therefore is like saying everything will be fine because we have only opened Pandora's Box up by a little crack. But, as Pandora learned, the initial size of the opening doesn't determine anything.

That is the broader concern. I'll add in a more specific one, which I think also explains why the city's claims to have brought a narrow case aren't quite true. The city's case is, in part, an attack on California nuisance law. One of the challenged permit provisions says that the city's discharges cannot cause a nuisance, as defined by California law, and the city has argued that this particular permit provision is fatally unclear. That gives the United States Supreme Court an invitation to undermine California nuisance law, perhaps by claiming that it raises due process issues (which is a favorite theme of Justices Alito and Gorsuch). At the same time, the city of San Francisco is suing oil companies, under state nuisance law, arguing that their contributions to climate change are causing a nuisance. It would be a cruel irony for the city, and a rather enjoyable one for the oil industry, if the city's own ill-advised Clean Water Act case generates a Supreme Court precedent that undercuts the city's efforts to hold oil companies accountable.

The broader point here is that by bringing this case, the city gives unconstrained power to a hostile actor. The city's choice is like bringing the mafia in to resolve a neighborhood dispute: it will pursue its own agenda, regardless of what the neighbors want. It would be far better for the neighbors to sort things out among themselves.

For all these reasons, the city and EPA need to resolve this dispute. There is still time. And there is so little to gain and so much to lose from leaving the case before the Supreme Court.