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San Francisco Chronicle

San Francisco court rules EPA must follow water requirements

Bob Egelko, Chronicle Staff Writer
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Federal water-quality regulators must annually review developments in pollution-control technology and require industries to meet discharge limits they could achieve with the best available equipment, a federal appeals court in San Francisco said Monday in a nationwide ruling against the Bush administration.

In a 2-1 decision, the **Ninth U.S. Circuit** Court of Appeals said the Environmental Protection Agency must take new technology into account when it updates pollution limits for each industry under the Clean Water Act.

The EPA denied it has any obligation to incorporate the latest technology in its water-pollution guidelines, but also said it has done so voluntarily. The appeals court said a lower-court judge should evaluate that assertion and decide whether to order changes.

The ruling "will force the EPA to re-regulate an area that it essentially decided it wasn't going to regulate," said Christopher Sproul, lawyer for Our Children's Earth Foundation and the Ecological Rights Foundation, which sued the agency in 2004. "The EPA has fundamentally abandoned the central teaching of the Clean Water Act under the Bush administration."

The EPA said it is reviewing the ruling and had no immediate comment. Fred Andes, lawyer for the Effluent Guidelines Industry Coalition, which entered the case on the agency's side, said he expects the EPA to prevail in its defense of its policy.

"I think it's pretty clear that they did not completely ignore technology" in setting guidelines for pollution discharges, Andes said. If the lower-court judge disagrees and orders major changes in EPA policy, he said, the results could be time-consuming and expensive.

The EPA and Andes' clients could also ask the full appeals court to order a new hearing or appeal to the Supreme Court.

The Clean Water Act, passed in 1972, requires anyone seeking to discharge pollutants into navigable waters to obtain a permit from the EPA or a state agency operating under federal approval.

The court said the law, and amendments in 1985, showed Congress' "commitment to a technology-based approach to water-quality regulation." Instead of merely monitoring pollution of each waterway and trying to determine who was responsible, the court said, Congress decided it would be more effective to require all industries to use the best available technology.

The EPA itself interpreted the law that way as recently as 2003, the court said. The agency's current position - that a regular review of pollution-control technology is not legally required - "strains credulity to the breaking point," Judge Margaret McKeown wrote in the majority opinion.

Sproul said the EPA had never fully complied with the law's requirement to bring its discharge standards in line with the latest technology, and had repudiated the requirement in 2003.

The lawsuit had been dismissed by U.S. District Judge Phyllis Hamilton, who said the law



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left such decisions entirely up to the agency. The appeals court said Hamilton must now review the EPA's practices and decide whether they comply with the law.

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