

A Divided SCOTUS Invalidates Common Provisions of Clean Water Act Permits

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In the US Supreme Court's first post-*Chevron* decision involving the US Environmental Protection Agency (EPA) the Supreme Court found against EPA, invalidating 'end result' NPDES permit requirements.

The decision, issued on March 4, in *City and County of San Francisco v. EPA* makes it clear that National Pollutant Discharge Elimination System (NPDES) permit provisions which state a goal must also advise the permittee how to achieve it.

Background

The City and County of San Francisco asserted that EPA exceeded its statutory authority under the Clean Water Act (CWA) when it issued an NPDES renewal permit, which included two "end-result" requirements, i.e., permit terms that don't spell out what a permittee must do or not do but instead make a permittee responsible to achieve an outcome. The specific 'end-result' permit terms at issue respectively prohibited discharges that "contribute to a violation of any applicable water quality standard" or "create pollution, contamination, or nuisance as defined by California Water Code section 13050." Similar end-result provisions are common within NPDES permits across the nation.

Eight Justices Reject San Francisco's Primary Argument

Justice Samuel Alito's majority opinion begins by addressing plaintiff's principal claim; the two end-result provisions were not "effluent limitations" and were hence not authorized because CWA Section 1311(b)(1)(C)[1] only authorizes the permitting authority to issue "effluent limitations" in NPDES permits. In assessing that argument and finding against the City, the Court primarily relied on the presumption that Congress acts intentionally in the disparate inclusion or exclusion of a term. Specifically, the Court noted that the plain language of 1311(b)(1)(C) refers to "limitation," while the immediately preceding Sections, 1311(b)(1)(A) and (B), refer to "effluent limitations." In other words, the fact that Congress used "effluent limitation" at other points within Section 1311 demonstrates that Congress meant for "limitation" in Section 1311(b)(1)(C) to mean something different. A total of eight justices (everyone but Justice Neil Gorsuch) agreed with this conclusion.

Five Justices Determine That End-Result Provisions Are Improper

Having determined that 1311(b)(1)(C) is not confined to effluent limitations, the majority then turned (without affording deference to EPA's interpretation as it might have prior to *Loper-Bright*) to a dictionary meaning to conclude that "limitation" refers to a "restriction or restraint imposed from without." Using that definition, the Court reasoned as follows that the end-result restrictions fail as being from within.

A provision that tells a permittee that it must do certain specific things plainly qualifies as a limitation. Such a provision imposes a restriction "from without." But when a provision simply tells a permittee that a particular end result must be achieved and that it is up to the permittee to figure out what it should do, the direct source of restriction or restraint is the plan that the permittee imposes on itself for the purpose of avoiding future liability. In other words, the direct source of the restriction comes from within, not "from without."

The majority also assessed dictionary meanings of two additional terms of 1311(b)(1)(C), "implement" and "meet." Respectively, these terms were found (using different dictionaries) to mean "to give practical effect to and ensure of actual fulfillment by concrete measures" and "to comply with; fulfill; satisfy." The decision explains that the end-result requirements are neither concrete (because they state a desired result without implementing them) nor do they set out actions for the permittee to fulfill. The majority went on to explain that its decision is supported by the CWA's history, the broader statutory scheme, and application of the CWA's permit shield.

Justice Barrett Leads the Dissent

The dissent, authored by Justice Amy Coney Barrett, suggests that the legal theory of five-vote majority decision was largely of the Court's own making and contends that its narrow interpretation of "limitation" is unsubstantiated and "wrong as a matter of ordinary English." It offers the following examples to rebut the majority's conclusion.

- A company could impose spending "limitations" by requiring each branch to spend no more than its allotted budget, while still leaving branch managers flexibility to determine how to allocate those funds.
- A doctor could impose a "limitation" on a patient's diet by telling the patient that she must lose pounds over the next six months, even if the doctor does not prescribe a specific diet and exercise regimen.
- An airline could impose a "limitation" on the weight of checked bags, even though it does not tell passengers what items to pack.

Implications

While it seems clear that NPDES permit provisions that state only an end result are no longer valid (unless authorized by state law), the decision doesn't speak to the extent of direction/specificity an NPDES provision must give in order to avoid becoming an improper end-result provision. Must an NPDES requirement state detailed directions to achieve each end result or might general guidance be sufficient? The answer to that question seems likely to determine whether the decision's impact on future NPDES permits is modest or more dramatic. Consider, for example, whether the below-stated provision of EPA's current stormwater general permit avoids being an improper end-result requirement simply by providing examples of ways the permittee could choose to accomplish the provision's goal.

2.4.3 The discharge must not cause the formation of a visible sheen on the water surface, or visible oily deposits on the bottom or shoreline of the receiving water. Use an oil-water separator or suitable filtration device (such as a cartridge filter) designed to remove oil, grease, or other products if dewatering water is found to or expected to contain these materials.

For existing NPDES permits, the decision means that permitting authorities will not be unable to enforce existing end result provisions based on the Clean Water Act. But, given that allegations regarding violations of end result provisions are often add-ons (rather than the primary basis of) to enforcement cases, the enforcement impact of the decision may not be significant in many instances.

[1] In relevant part, Section 1311(b)(1)(C) gives the NPDES permitting authority the ability to establish “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 [] or any other federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.”

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