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Supreme Court Rules for Permit Holders on Age-Old CWA Dispute

Alert

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In a 5-4 ruling on March 4, the U.S. Supreme Court held that the Environmental Protection Agency (EPA) lacks authority to impose Clean Water Act (CWA) conditions in National Pollutant Discharge Elimination System (NPDES) permits that require permittees to achieve "end results" in the receiving water bodies into which they discharge. Focusing on the plain text of the CWA, the majority in *City and County of San Francisco v. EPA* makes clear that the statutory language authorizes EPA to determine only the actions a permittee must take to ensure that water quality standards are met, rather than imposing requirements on a permittee for the quality of the receiving water itself. This ruling signifies another turning point in CWA implementation and will change interpretation and enforcement of NPDES permits for years to come.

CASE SUMMARY

Appellant City and County of San Francisco (City) sued EPA, arguing EPA exceeded its statutory authority under the CWA when it issued a renewal permit that added two "end-result" requirements for a City combined wastewater treatment facility.

Under the CWA, EPA and authorized state agencies issue NPDES permits to impose requirements on entities discharging pollutants into waters of the United States. NPDES permits often include effluent limitations on discharges to restrict the quantity, rate and concentration of constituents. NPDES permits also often include provisions directed at the quality of water in the receiving waters, which the Supreme Court refers to as "end-result" requirements.[1]

At issue in this case was a City wastewater treatment facility's NPDES permit. The City operates two combined wastewater treatment facilities that process wastewater and stormwater, and the facilities held a federal NPDES permit issued by EPA. The City had renewed its NPDES permit at its Oceanside facility for many years without controversy. Then, in 2019, EPA issued a renewal permit that added two "end-result" requirements, which were the subject of this litigation. The first requirement prohibited the Oceanside facility from making any discharge that "contribute[s] to a violation of any applicable water quality standard" for receiving waters. The second requirement prohibited the City from performing any treatment or making any discharge that "create[s] pollution, contamination, or nuisance as defined by California Water Code section 13050."

The City challenged the "end-result" requirements in court, filing a petition for review in the Ninth Circuit. The Ninth Circuit denied the petition, holding that CWA § 1311(b)(1)(C) gives EPA the authority to impose "any" limitations to ensure applicable water quality standards are met. In a 5-4 majority opinion authored by Justice Samuel Alito, the Supreme Court reversed the Ninth Circuit's ruling, holding that CWA § 1311(b)(1)(C) does not authorize EPA to include "end-result" provisions in NPDES permits, explaining that such end result requirements would negate the CWA's permit shield protection under 33 U.S.C. § 1342(k) and cannot stand since they do not allocate responsibility between multiple dischargers to the receiving water body. The majority opinion concluded that Congress intentionally authorized other "limitations" beyond effluent limitations, based on the plain text and structure of the CWA,[2] such that other "limitations" are still authorized under the CWA. But the majority opinion concluded that permit requirements conditioning compliance on receiving water quality are not authorized under the CWA.[3]

IMPLICATIONS

The Court's holding will be applied outside the context of Combined Sewer Overflow (CSO) discharges, extending to NPDES permits for all industries. Currently, "end-result" permit provisions allow EPA and authorized state agencies to place receiving water quality-based prohibitions in NPDES permits, even when the information necessary to develop effluent limitations is unavailable to an agency. The consequence of removing "end–result" provisions will be fewer "cause or contribute" permit conditions on the whole, including those requiring permittees to conduct in-stream and other water quality monitoring.

Further, many NPDES permits contain "free from" conditions – conditions that require a water body to be free from pollutants or substances in quantities that would impair its designated uses. Regulatory agencies monitor water bodies to ensure compliance with water quality standards and take enforcement against permittees if "free from" conditions are not met. This ruling may prompt agencies to remove these (and other similar) conditions from NPDES permits. Certain other states, with statutory authority to do so under state law, may opt to maintain certain "end-result" water quality permitting conditions and continue enforcement accordingly.

Moreover, this ruling will add additional responsibility to already underfunded state and federal agencies implementing the CWA. Agency staff has historically collaborated with and relied heavily upon industry professionals to develop specific steps to ensure permit compliance with water quality standards. This holding shifts this balance significantly, with no clear path regarding how agencies will compensate for the new directive amidst ongoing budget and staffing cuts.

Finally, in the absence of federal regulation, we anticipate increasing citizen involvement, including through public comment periods and citizen suits in the wake of this ruling.

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1. "[T]his 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."
2. The majority opinion also noted that the permit shield provision of the CWA, 33 U.S.C. § 1342(k), supported its holding, noting that a permittee that is otherwise fully complying with its NPDES permit could face liability if the receiving water quality was below the applicable water quality standard due to end-result requirements, and the permit shield would not protect them in these instances.
3. The dissent concludes that these "end-result" conditions that forbid the City to violate water quality standards are plainly limitations and accordingly, within EPA's authority. The dissent notes that effluent limitations alone are not always sufficient to protect the desired water quality, and EPA has supplemental authority to impose other limitations to ensure water quality standards are met. The majority opinion concluded that the "any more stringent limitation" language of the CWA does not provide EPA with the authority to direct permittees to comply with water quality standards. The dissent calls this conclusion "puzzling" and a "theory largely of [the Court's] own making." The dissent notes that the majority opinion "downplays the valuable uses of receiving water limitations" and fails to explain other actions that EPA could take. Finally, the dissent warns of permit delays or denials because of the majority opinion.

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