

THE JOURNAL OF FEDERAL AGENCY ACTION

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Publisher: Leanne Battle

Production Editor: Sharon D. Ray

Cover Art Design: Morgan Morrisette Wright and Sharon D. Ray

This journal's cover includes a photo of Washington D.C.'s Metro Center underground station. The Metro's distinctive coffered and vaulted ceilings were designed by Harry Weese in 1969. They are one of the United States' most iconic examples of the brutalist design style often associated with federal administrative buildings. The photographer is by XH_S on Unsplash, used with permission.

Cite this publication as:

The Journal of Federal Agency Action (Fastcase)

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A Full Court Press, Fastcase, Inc., Publication

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729 15th Street, NW, Suite 500, Washington, D.C. 20005

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE JOURNAL OF FEDERAL AGENCY ACTION, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

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ISSN 2834-8796 (print)
ISSN 2834-8818 (online)

U.S. Supreme Court Invalidates Certain “Narrative” Water Quality Limitations in NPDES Permits

Martin T. Booher, Thomas E. Hogan, and Cory N. Barnes*

In this article, the authors discuss a recent decision by the U.S. Supreme Court that invalidated certain “end result” water quality limitations in National Pollutant Discharge Elimination System permits.

The U.S. Supreme Court has issued a decision in *San Francisco v. Environmental Protection Agency*¹ that invalidated certain “end result” water quality limitations in National Pollutant Discharge Elimination System (NPDES) permits—specifically, those that “do not spell out what a permittee must do or refrain from doing” and instead generally “make a permittee responsible for the quality of water” in its receiving waterbodies. For example, limitations that prohibit a facility from “contributing to a violation of any applicable water quality standards” or “creating pollution, contamination, or a nuisance” under state law.

This decision comes on the heels of mounting challenges from public and private dischargers alike unsatisfied with the Environmental Protection Agency’s (EPA’s) (and state regulators’) use of vague “narrative” permit limitations—that is, limitations that are not objective, numeric effluent limits (typically expressed as daily maximums or monthly averages) but rather are broadly worded nonspecific requirements that dischargers must comply with to promote good water quality.

Going forward, the Court’s decision in *San Francisco v. Environmental Protection Agency* raises serious doubts on the enforceability of such permit conditions that “simply tell[] a permittee that a particular end result must be achieved” while forcing the permit holder to “figure out what it should do” to comply. Instead, the burden is now on the EPA (and arguably its state counterparts) to issue NPDES permits that contain specific “do this” or “don’t do

this” requirements that tell the permittee how to implement desired water quality standards.

The Court’s Decision

Central to the Court’s decision was its focus on the statutory text, 33 U.S.C. § 1311(b)(1)(C), that requires the EPA to set permit limits that will “meet” and “implement” applicable water quality standards of receiving waterbodies. The Court interpreted this to mean it is on the EPA to tell a permittee—via express NPDES permit limitations—how water quality standards should be met, not require the permittee to figure it out themselves. As the Court wrote: “[T]elling a permittee to ensure [an] end result is reached . . . simply states the desired result; it does not implement that result,” as the law requires the EPA to do. This cannot be what the Clean Water Act (CWA) intended, because, if it were, it would be like “teachers simply [telling] their students that a state math proficiency test would be administered and [the students] should make sure they passed.” That would be illogical.

The Court also highlighted how NPDES “permit shield” protections would be undermined if “end result” limitations were allowed to continue. Recall that a discharger is deemed presumptively in compliance with the CWA, and protected from enforcement actions and the plaintiff’s bar, if it follows the terms of its NPDES permit. (This is why it is so important to negotiate and obtain a robust discharge permit in the first place.) But the benefits of the permit shield, as the Court put it, “would be eviscerated” if the permit itself makes “the permittee responsible for any drop in water quality,” regardless of their compliance with all other terms. Penalties for violating the CWA can compound daily and reach staggering sums. Closing this “permit shield” loophole suggests a majority of the Court understands its importance and is committed to protecting it.

The Court also criticized scenarios where “more than one permittee discharges into a body of water with substandard water quality.” If “end result” limitations were enforceable, only one unlucky discharger might get stuck holding the bag, and be financially liable for pollution it did not cause. This is particularly relevant for facilities along major U.S. waterways and bodies of water (e.g., Mississippi River, Great Lakes, ports, coastal cities) with lots of

adjacent industry. The Court striking down these provisions was designed, at least in part, to prevent such unfairness.

Questions Raised

Of course, the Court’s opinion raises some questions. It invalidated narrative limits in San Francisco’s permit that prohibited “contributing to a violation of any applicable water quality standards” or “creating pollution, contamination, or a nuisance” because it said these were unlawful “end-result” limits (defined above). But the decision “does not rule out ‘narrative limitations’” altogether, and suggested permit conditions mandating “best-management practices” and “operational requirements and prohibitions” are still okay. The line between these is not entirely clear and will likely lead to additional legal challenges to further define “permissible” versus “impermissible” narrative limits. For example, many NPDES permits include restrictions such as “no toxics in toxic amounts” and no discharges that result in “objectionable” color, odor, taste, etc. The enforceability of these provisions will now probably be litigated.

The Court also rejected the EPA’s argument that it needed “results-based” limitations because sometimes it does not have enough data to issue specific permit requirements. The Court said that in such scenarios, the EPA can “set a schedule for the provision of [needed] information and can refuse to issue a permit until the permittee complies.” Accordingly, many observers warn that the EPA and the states might now require more data and robust analysis up front in the permit application and renewal process. Regulators might also now withhold issuance of permits until they are satisfied the applicant has provided “sufficient” data, which will probably be different from facility to facility. This could slow down, and complicate, permit issuance, especially in areas where water quality standards are not in attainment.

This decision need not overly complicate or delay permit issuance going forward. Unlike emission limits established in preconstruction Clean Air Act permits, NPDES permits are renewed on a five-year cycle and the EPA and state agencies already frequently require data gathering from facilities under their existing permits to justify technology-based and water quality-based effluent limitations to be included in the renewed permit. And for existing

facilities with NPDES permits, renewal application shields exist that allow for continued operation if the regulators require additional data collection prior to permit renewal. Moreover, the EPA NPDES permit manual itself already authorizes permit writers to issue permits with monitoring and reporting requirements for certain pollutants, with reopeners to modify the permit if monitoring data proves it necessary.

If certain EPA regions or states start requiring extensive and time-consuming data gathering before issuing NPDES permits, our sense is that new economic development and investment will gravitate to those jurisdictions that adopt a more realistic and practical approach. Ultimately, the CWA must be implemented in accordance with supportable science. The EPA and the states should see the Court's decision as an opportunity to reevaluate their technical basis for water quality standards (particularly with respect to emerging contaminants like PFAS (per- and polyfluoro-alkyl substances) and 1,4-dioxane) and how those standards impact industrial and municipal dischargers. Using NPDES permits as a surrogate for technically sound water quality standards was not the intent of the CWA as it exists today.

At bottom, NPDES permits must now implement specific, actionable conditions aimed at protecting water quality, instead of leaving open-ended liability for poor water quality conditions regardless of whether a facility otherwise fully complied with its permit. This should provide more protection and certainty for permit holders moving forward, provided they are mindful of these new protections and use them to their advantage while negating and obtaining NPDES permits.

In Summary

- The Court has directed the EPA (and state counterparts) to more clearly “spell out what a permittee must do or refrain from doing” in NPDES permits. Broadly worded, nonspecific, “end result” narrative limits are no longer enforceable.
- Additional legal challenges over permissible versus impermissible “narrative” limitations in NPDES permits now seems likely.
- Facilities should evaluate their NPDES permits to flag limitations that may no longer be enforceable.

Notes

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1. https://www.supremecourt.gov/opinions/24pdf/23-753_f2bh.pdf.