



WEIL'S SCOTUS TERM IN REVIEW

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Supreme Court Strikes Down “End-Result” Requirements in Clean Water Act Permits

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Today, in a 5-4 decision authored by Justice Alito, the Supreme Court in [*City and County of San Francisco v. EPA*](#) held that the Environmental Protection Agency (“EPA”) lacks the statutory authority to include provisions in pollutant discharge permits that require the permittee to ensure that the body of water into which the permittee discharges pollutants meets certain water quality standards.

The case arose out of the National Pollutant Discharge Elimination System (“NPDES”), a permit system under the Clean Water Act (“CWA”) that makes it unlawful to discharge pollutants into covered bodies of water unless authorized by permit. The EPA routinely issues permits for such discharge and has long included in those permits requirements that the permittee take certain prescribed measures to reduce any adverse effects on water quality. Compliance with a permit protects the permittee from liability under the CWA. More recently, though, the EPA has added to these permits the requirement that the permittee maintain a certain level of water quality for whatever body of water into which the permittee discharges pollutants. These so-called “end-result” requirements mean that even if a permittee follows all of the measures in the permit for minimizing effects on water safety quality, the permittee may still be subject to damages or penalties in the billions of dollars if the body of water they discharge into falls below a certain quality—regardless whether that drop is the result of the permittee’s discharge or not.

The City and County of San Francisco challenged this new requirement in federal court. The Ninth Circuit rejected the petition for review on the ground that the CWA broadly empowers the EPA to impose “any” limitations in permits necessary to ensure that applicable water quality standards are satisfied.

The Supreme Court reversed by a bare majority. The Court first rejected San Francisco's argument that the EPA can only include in NPDES permits specific "effluent limitations"—limitations on the quantities, rates, and concentrations of harmful materials that permittees may discharge. The Court held that the language of the CWA allowing the EPA to impose "any more stringent limitation" necessary to ensure water quality was not limited only to specific effluent limitations. But the Court agreed with San Francisco that the EPA could not include "end-result" requirements in permits that would make permittees liable for the overall quality of the bodies of water into which they discharge. The Court relied in principal on the text and context of the statute, pointing out that the statute speaks in terms of provisions that will "implement" clean water standards and that the CWA was enacted in part as a response to earlier legislative efforts that had tried, but failed, to regulate clean water standards using rules similar to "end-result" requirements. The Court also pointed to the impracticality of making a permittee responsible for the water quality of an entire body of water, on which that permittee's discharges may have little effect.

Justice Barrett wrote for the dissent, contending that the statute's broad authorization for the EPA to impose "any" limitations necessary to preserve water quality was sufficient to authorize the "end-result" requirements. She countered that any concerns about holding permittees liable for the pollution of others

could be addressed through an arbitrary and capricious challenge under the Administrative Procedure Act.

The decision continues the Court's narrow view of administrative authority as strictly circumscribed by statute—an agency may exercise only those powers expressly conferred on it by statute. Of note, however, Justice Alito—one of the Court's more textually focused Justices—relied significantly on the context and history of the statute in supporting the Court's holding. Although he did not invoke legislative statements about purpose in order to determine the meaning of the statute, he did discuss at some length that "end-result" requirements essentially replicate the statutory scheme in place before the CWA was enacted. That scheme, Justice Alito recounted, had failed to effectively regulate clean water standards, and the CWA was an effort at a new approach focused on effluent limitations and process standards. This reliance on contextual history—although not strictly foreclosed by textualism—is a slight departure from the Court's more text-focused analysis in recent cases.

Although the decision on its own is unlikely to have significant ramifications outside of the CWA context, it is part of the Court's incremental shift toward a more skeptical view of agency power. Regulated parties should continue to keep a critical eye on actions by agencies that stretch or go beyond the bounds of their authorizing statutes.

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