Supreme Court Strikes Down EPA's Use of Narrative "End-Result" Limitations in Discharge Permits

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Authors:

Stephen N. Haughey

Today, in a decision based ostensibly on settled rules of statutory construction, but underlain by concerns of due process and fair notice, enforceability, and the continued viability of the "permit shield defense," the U.S. Supreme Court struck down the U.S. Environmental Protection Agency's (EPA) addition to permits under the Clean Water Act (CWA) of broad narrative prohibitions based on receiving water impacts.

In a 5-4 decision written by Justice Alito that lacked consensus even among the majority, in *City and County of San Francisco v. EPA*, the Supreme Court ruled that limitations that prohibit a discharge that causes or contributes to a violation of water quality standards or a nuisance condition exceed the U.S. EPA's statutory authority, impose near impossible compliance obligations for permit holders, and threaten to negate the CWA's statutory "permit shield defense." Justices Roberts, Thomas, Kavanaugh and Gorsuch joined the decision, but with Gorsuch dissenting from the holding that, as a general rule, narrative limitations are permissible under the statute.

Justice Barret issued a dissenting opinion, joined by Justices Sotomayor, Kagan and Jackson, agreeing only that, as a general rule, narrative limitations are permissible, but asserting more broadly that "end-result" narrative limitations are authorized under the CWA and do not place an undue burden on permit holders or vitiate their "permit shield defense." Importantly, the minority's view is that such vague, undefined limitations raise serious questions of due process/fair notice for permit holders, and thus are arguably arbitrary and capricious. But that issue was either not part of the rulings below or was not presented to or taken up by the Supreme Court.

Today's decision has broad implications for permit holders under the Clean Air Act (CAA) as well as the CWA. In addition to containing specific, numeric limits for a list of identified pollutants,

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CWA discharge permits and CAA air permits routinely contain a broad, undefined narrative prohibition against the discharge or emission of any pollutant that causes or contributes to a violation of a water quality standard or air emission standard, respectively, or causes or contributes to a nuisance condition. Such vague, undefined terms threaten permit holders with enforcement even when they are in compliance with the numeric limits established for all pollutants identified for the activity covered by the permit.

Frost Brown Todd's Environmental Practice Group will be issuing further guidance on the impacts of today's decision on permit holders under a variety of environmental programs. If you have questions about the decision or its implications for a particular permit situation, please contact the author or another member of our Environmental Practice Group.

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