No. 18-446

In the Supreme Court of the United States

CITY OF TAUNTON, MASSACHUSETTS, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN D. BRIGHTBILL
Deputy Assistant Attorney General
JON M. LIPSHULTZ
DAVID J. KAPLAN
SARAH A. BUCKLEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether substantial evidence supported the Environmental Protection Agency's conclusion that pollutants from petitioner's wastewater-treatment plant "are or may be discharged" at levels that "have the reasonable potential to cause, or contribute to," a violation of applicable state water quality standards. 40 C.F.R. 122.44(d)(1)(i).

2. Whether this Court should narrow or overturn its rulings in *Chevron U.S.A. Inc.* v *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Auer* v. *Robbins*, 519 U.S. 452 (1997).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 895 F.3d 120.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2018. The petition for a writ of certiorari was filed on October 5, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, prohibits any "discharge of any pollutant" except as in compliance with the Act. 33 U.S.C. 1311(a). As relevant here, such compliance is achieved through a national pollutant discharge elimination system (NPDES) permit. 33 U.S.C. 1311(a); 33 U.S.C. 1342 (2012 & Supp. III 2015). Among other things, NPDES

permits contain effluent limitations, which are restrictions on the quantities, rates, and concentrations of pollutants that may be discharged. 33 U.S.C. 1362(11). NPDES permits may impose both *technology-based* limitations, generally established on an industry-wide basis, and *water-quality-based* limitations, required where additional facility-specific measures are necessary to meet state water quality standards. See 33 U.S.C. 1311, 1314(b); 40 C.F.R. 122.4(d), 122.44(d).

The Act requires EPA to impose water-quality-based limitations in NPDES permits where necessary to ensure compliance with the water quality standards of the State in which the discharge occurs, or with those of an affected downstream State. See 33 U.S.C. 1311(b)(1)(C), 1341(a)(2); 40 C.F.R. 122.4(d), 122.44(d)(4). State water quality standards need not be numerical; a State may issue "narrative" criteria for water quality. See 40 C.F.R. 131.3(b). In that event, EPA must translate each relevant narrative criterion into a "calculated numeric water quality criterion" by reference to a "proposed State criterion" (if one exists), any applicable "explicit State policy or regulation," and any "other relevant information." 40 C.F.R 122.44(d)(1)(vi)(A). Under longstanding EPA regulations, NPDES permits "must control all pollutants or pollutant parameters" that EPA "determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. 122.44(d) and (d)(1)(i); see 40 C.F.R. 122.44(d)(1)(vii)(A) (requiring the permit to ensure that the "level of water quality to be achieved by limits on point sources * * * is derived from and complies with all applicable water quality standards").

b. This case involves a revised NPDES permit issued by EPA in 2015 for a wastewater-treatment plant operated by petitioner. Pet. App. 4; C.A. App. 1. The plant discharges to the Taunton River, which flows into Mount Hope Bay (part of the larger Narragansett Bay) bordering both Massachusetts and Rhode Island. Pet. App. 4. The 2015 permit replaced an earlier 2001 permit for the same facility. C.A. App. 1.

The present controversy stems from EPA's decision, following notice and an opportunity to comment on a draft permit, to add discharge limits for nitrogen to the 2015 permit. The draft permit was accompanied by a 45-page "Fact Sheet" that discussed the terms of the draft permit and EPA's supporting explanation. See C.A. App. 49-93. The final permit was accompanied by a 165-page document responding in detail to comments submitted by petitioner and others. See *id.* at 94-249.

EPA's decision was based on a determination that the Taunton River and Mount Hope Bay were polluted with excessive amounts of "nutrients," specifically nitrogen. Such pollution leads to excessive aquatic plant growth, which in turn lowers the oxygen content of the water (and thereby harms aquatic organisms), a process known as "eutrophication," often called "cultural eutrophication" when caused by human activity. Pet. App. 5-6; see generally *Stoddard* v. *Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1204 (4th Cir. 1986) (describing the processes). EPA determined that this process had resulted in violations of both Massachusetts's and Rhode Island's respective water quality standards. Pet. App. 23-27. EPA also determined that discharges from petitioner's facility, the "second-largest point-source contributor of nitrogen to the Taunton

River watershed," *id.* at 4-5, had the requisite "reasonable potential to cause, or contribute to," those violations, *id.* at 30 (citation and emphasis omitted), thus requiring the addition of water-quality-based effluent limitations to the facility's permit. EPA calculated nitrogen discharge limits for the facility that would, in combination with other anticipated reductions by dischargers to the same watershed, help to assure compliance with Massachusetts and Rhode Island water quality standards. *Id.* at 32-42.

Both Massachusetts and Rhode Island supported EPA's draft permit, including the nitrogen limits. Under Section 401(a)(1) of the CWA, 33 U.S.C. 1341(a)(1), and implementing regulations, see 40 C.F.R. 124.53(a) and 124.55(a)(2), petitioner also must obtain a water quality certification from the Massachusetts Department of Environmental Protection (MassDEP). MassDEP certified to EPA that the draft NPDES permit contained all conditions necessary to assure compliance with the CWA and the Massachusetts Clean Waters Act. See C.A. App. 366-367. Both EPA and MassDEP signed the permit, which "includes two separate and independent permit authorizations," one federal and one state. *Id.* at 22. Under Section 401(a)(2) of the CWA, 33 U.S.C. 1341(a)(2), EPA also must notify any State that might be affected by the proposed discharges. EPA so notified Rhode Island, which then submitted comments urging that EPA's final permit include the nitrogen limit as a necessary measure to ensure compliance with Rhode Island's water quality standards. See C.A. App. 1027-1028.

c. Petitioner appealed EPA's permit decision to the agency's Environmental Appeals Board (EAB or Board), "challenging both the need for any nitrogen

limit and the specific limit that the permit imposed." Pet. App. 6. The Board denied these challenges. See C.A. App. 1908-2005.[1] Pursuant to 33 U.S.C. 1369(b)(1)(F), petitioner then sought judicial review in the court of appeals, raising numerous procedural and substantive claims. See Pet. C.A. Br. 2.

2. The court of appeals denied the petition for review. Pet. App. 1-42. The court rejected all of petitioner's procedural claims relating to the scope of the administrative record, *id.* at 9-14; the adequacy of notice provided with the draft permit, *id.* at 15-19; the agency's treatment of certain untimely supplemental comments proffered by petitioner, *id.* at 19-21; and the manner of access provided to the administrative record, *id.* at 21-22. With respect to petitioner's substantive challenges, the court held that the permit was not arbitrary and capricious; rejected petitioner's assertion that the applicable regulations require a direct-causation analysis; and upheld the specific nitrogen limits in the permit. *Id.* at 23-42.

a. The court of appeals concluded that "EPA did not act arbitrarily or capriciously in determining that the Taunton Estuary and Mount Hope Bay were already nutrient impaired, such that further nitrogen discharges would have at least a 'reasonable potential' to give rise to violations of state water quality standards." Pet. App. 32. In reaching that conclusion, the court considered the numerical state water quality standards for dissolved oxygen and the narrative water quality standards relevant to eutrophication. *Id.* at 24. The court

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[1] The Board's docket is available at yosemite.epa.gov/oa/EAB_Web_Docket.nsf/search?OpenForm&View=Closed+Dockets (type "NPDES 15-08" in the search box). The Board's decision is Document Number 60.

examined the scientific reports and data on which EPA had relied to "translate" the narrative criteria into corresponding "numeric nitrogen limitations" and to determine that "eutrophication due to nitrogen overenrichment in the Taunton River Estuary and Mount Hope Bay has reached the level of a violation of both Massachusetts and Rhode Island water quality standards." *Id.* at 24, 27. This process had included EPA review of (1) a MassDEP study indicating the levels of nitrogen that are associated with various levels of water quality impairment, *id.* at 24-25; (2) data from a three-year university study that generally showed excessive algae growth (and correspondingly high chlorophyll-a levels) and lower oxygen levels at 22 sites across the Taunton Estuary and Mount Hope Bay, with the highest nitrogen concentrations in the area of the Taunton River generally and petitioner's treatment plant discharge point specifically, *id.* at 26-27; and (3) data from another monitoring station in Mount Hope Bay that showed similar types of impairment, *id.* at 27. See also C.A. App. 66-77 (fact sheet accompanying draft permit); *id.* at 138-139, 164-165 (agency's response to comments).

b. The court of appeals considered and rejected petitioner's challenges to these determinations. The court determined that EPA had made appropriate use of the MassDEP study to show indicia of nutrient impairment in the waterbodies at issue. Pet. App. 28-29. The court rejected petitioner's contention that EPA was required to engage in a direct causation analysis—*i.e.*, a statistical analysis to quantify the exact relationship between a particular discharge and the observed condition—to prove that excessive nitrogen discharges from petitioner's facility were the sole cause of high plant growth and low dissolved oxygen in the Taunton Estuary. *Id.*

at 30. Instead, the court stressed that the applicable regulation, 40 C.F.R. 122.44(d)(1)(i), requires only that the excessive nitrogen discharges "ha[ve] the reasonable potential to cause, or contribute to," a violation of the relevant water quality standards. Pet. App. 30 (citation, emphasis, and internal quotation marks omitted). The court concluded that the data on which the agency had relied amply supported its conclusion that this standard was met. *Ibid.*

c. Finally, the court of appeals upheld the specific nitrogen limits set forth in the permit. Pet. App. 32-42. The court rejected petitioner's contention that EPA had acted inappropriately in using a relatively less-polluted site in Mount Hope Bay as a reference site—*i.e.*, a site that provides guidance on target nitrogen levels in areas that satisfy water quality standards. *Id.* at 33-35. The court also concluded that EPA had reasonably considered the impact of other dischargers and recent developments (such as plant closures) in calculating the specific nitrogen discharge limits for petitioner's plant. *Id.* at 35-42.

ARGUMENT

Contrary to petitioner's suggestion, this case does not present sweeping issues relating to deference to agency decisionmaking. The first question presented asks whether the scientific and technical information cited by EPA adequately supported the agency's conclusion that discharges of nitrogen from petitioner's wastewater facility "have the reasonable potential to cause, or contribute to," a violation of applicable water quality standards in Massachusetts or Rhode Island. 40 C.F.R. 122.44(d)(1)(i). Further review of that narrow and factbound question is not warranted.

Petitioner also seeks review of the question whether this Court should narrow or overturn its decisions in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Auer* v. *Robbins*, 519 U.S. 452 (1997). That question is not properly presented here, both because petitioner never advanced its current arguments below, and because the court of appeals did not rely on *Chevron* or *Auer* in resolving petitioner's challenge to EPA's permit determination. *Chevron* is inapposite because this case does not involve a contested question of statutory interpretation. And *Auer* is inapposite because the court of appeals simply applied the plain text of the pertinent regulation (40 C.F.R. 122.44(d)(1)(i)) without deferring to any interpretation put forth by the agency. The petition therefore need not be held pending this Court's decision in *Kisor* v. *Wilkie*, cert. granted, No. 18-15 (Dec. 10, 2018), which presents the question whether *Auer* should be overruled.

1. a. Petitioner challenges (Pet. 24-29) EPA's decision to limit nitrogen discharges from petitioner's wastewater-treatment facility. Petitioner argues that the agency did not "demonstrat[e] that the pollutant is actually causing the adverse effect of concern." Pet. 26. That argument lacks merit.

The plain text of the applicable regulation does not require proof of such direct causation. Under that regulation, a NPDES permit must include limitations to "control all pollutants * * * which the Director determines are or may be discharged at a level which will cause, *have the reasonable potential* to cause, *or contribute to* an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. 122.44(d)(1)(i) (emphases added). A

determination that a pollutant discharge actually causes a violation of a state water quality standard is one way to trigger EPA's duty to "control" the pollutant. *Ibid.* But the regulation also requires EPA to control any pollutant discharge that has a "reasonable potential to cause" a violation of state water quality standards or that "contribute[s] to" such a violation. *Ibid.* Petitioner does not attempt to reconcile its position with this regulatory language.

Consistent with the plain text of 40 C.F.R. 122.44(d)(1)(i), the court of appeals correctly held that EPA was not required to conduct "a statistical regression analysis," as petitioner had urged, to demonstrate a direct causal connection between nitrogen discharges and low dissolved oxygen concentrations. Pet. App. 30. It was sufficient for EPA to conclude, based on voluminous scientific and technical data, see *id.* at 24-27, that high concentrations of nitrogen "ha[ve] the 'reasonable potential to cause, or contribute to,'" a violation of Massachusetts's and Rhode Island's respective dissolved-oxygen water quality standards in the Taunton Estuary and Mount Hope Bay, which EPA had found were already nutrient-impaired. *Id.* at 30 (quoting 40 C.F.R. 122.44(d)(1)(i)) (emphasis omitted). Petitioner does not challenge that conclusion. Accordingly, under the plain text of the applicable regulation, substantial evidence supported EPA's decision to impose nitrogen limits in petitioner's NPDES permit.

Petitioner suggests that the CWA imposes a direct-causation requirement because certain provisions in the Act include the word "necessary." Pet. 24-25. In petitioner's view, a permit limitation is "necessary" only if "the imposition of the Act's other requirements did not

eliminate" the pertinent "risks." Pet. 25 (quoting *Michigan* v. *EPA*, 135 S. Ct. 2699, 2705 (2015)). But that definition—which *the agency* supplied in *Michigan*, see 135 S. Ct. at 2705—does not support petitioner's position here, since petitioner does not identify any "other requirements" in the CWA that would "eliminate th[e] risk" of low dissolved oxygen in the Taunton Estuary and Mount Hope Bay. The implementing regulation reflects EPA's view that limiting the discharge of pollutants that "have the reasonable potential to cause, or contribute to," a violation of state water quality standards is "necessary" to "[a]chieve" those standards, 40 C.F.R. 122.44(d), (1), and (1)(i), and petitioner does not argue that the regulation is inconsistent with the CWA.

The applicable Massachusetts water quality standard similarly provides that "all surface waters shall be free from nutrients in concentrations that would cause *or contribute to* impairment of existing or designated uses." 314 Mass. Code Regs. § 4.05(5)(c) (2018) (emphasis added); see *ibid.* (requiring treatment of "point source discharge[s]" "to remove such nutrients" if they "would cause *or contribute to* cultural eutrophication") (emphasis added). In order to satisfy Massachusetts's water quality standards, it therefore is "necessary" to limit nitrogen concentrations that "contribute to" the low dissolved oxygen concentrations in the Taunton Estuary and Mount Hope Bay. *Ibid.* Petitioner does not contest EPA's determination that petitioner's nitrogen discharges "contribute to" the low dissolved oxygen concentrations in the affected waterbodies, and any challenge to that determination would raise no issue of broad importance warranting this Court's review.

b. Petitioner contends that, instead of requiring EPA to show "'substantial evidence'" supporting its position, the court of appeals held EPA to a "'mere possibility' burden of proof." Pet. 31 (citation omitted). That contention is incorrect. The court below used the term "mere possibility" only in observing that "EPA has interpreted 'reasonable potential' [in 40 C.F.R. 122.44(d)(1)(i)] to mean 'some degree of certainty greater than a mere possibility.'" Pet. App. 23 (quoting *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 599 n.29 (EAB 2010)). The court recognized that the challenged permit conditions could be sustained only if substantial evidence supported the agency's position that high nitrogen discharges may, with "some degree of certainty greater than a mere possibility," cause low dissolved oxygen concentrations. *Ibid.* (citation omitted). Petitioner conflates the standard of proof required to support an agency's decision under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, with the substantive legal standard that a particular regulatory provision embodies. The court below further observed that "the words 'contribute to' [in the regulation] also indicate that nitrogen need not be the sole cause of any potential violation of a state standard." Pet. App. 31. Thus, regardless of the precise scope of the term "reasonable potential," the "contribute to" prong of 40 C.F.R. 122.44(d)(1)(i) provides a sufficient ground for the court's holding.

In this case, numerous technical studies and data support EPA's conclusions that excessive nutrient loadings were causing eutrophication in the Taunton River Estuary and Mount Hope Bay; that this eutrophication had resulted in a failure to attain applicable water qual-

ity standards; and that nitrogen discharges from petitioner's relatively large wastewater management facility have the reasonable potential to cause, or contribute to, this problem. See Pet. App. 24-27; C.A. App. 1937-1943 (EAB decision); C.A. App. 66-77. EPA analyzed data showing actual, observed conditions in these waterbodies in light of the well-understood mechanism of nutrient enrichment and cultural eutrophication. See, *e.g.*, C.A. App. 142, 171-174, 177-178, 191-192. The record includes extensive scientific literature documenting the relationships among nitrogen levels, algal levels, and dissolved oxygen depletion. See, *e.g.*, *id.* at 67-74, 129-131, 200-206 & tbl. R1. Although "it is generally not the case that algal growth (or any other single condition) is the *only* factor influencing [dissolved oxygen] concentrations," EPA reasonably concluded that "the consistent pattern of high [total nitrogen] concentration, elevated chlorophyll-a and depleted [dissolved oxygen] provide strong evidence that the well understood mechanism of nutrient overenrichment is operative in this system." *Id.* at 139. EPA characterized its methodology—which correlates various levels of nitrogen loadings with observed impaired and unimpaired conditions in different locations within relevant waterbodies—as a "reference-based approach[]." *Id.* at 144-145.

In contrast to EPA's reference-based approach, petitioner urged the agency to use a "stressor-response" approach, which would use a statistical regression analysis to estimate the effect of particular discharges on particular observed conditions. EPA considered these arguments but explained why it believed the data available here were better suited to a reference-based approach than to a stressor-response analysis. See C.A. App. 1956-1960 (EAB decision); *id.* at 144, 191. EPA

further explained why the particular stressor-response analysis proffered by petitioner was flawed, and why a more appropriate statistical regression analysis would show a relationship between nitrogen concentrations and dissolved oxygen levels. See *id.* at 1957-1960 (EAB decision); *id.* at 183-184.

Contrary to petitioner's assertion (Pet. 32), the court of appeals did not "completely abandon[]" review of the record evidence. The court summarized the evidence described above (along with additional evidence), and it correctly concluded that each of EPA's findings was amply supported by the record. See Pet. App. 23-26 (examining data and methodology that EPA had used to translate narrative water quality standards into quantitative criteria); *id.* at 26-27 (examining water quality data showing violation of these criteria); *id.* at 28-29 (rejecting petitioner's technical critique of these analyses); *id.* at 32-42 (examining EPA's stated technical bases for the specific nitrogen limits in the permit). This detailed discussion belies petitioner's claim that the court simply decided that "whatever EPA says, goes." Pet. 5.

Petitioner contends (Pet. 32) that the court of appeals was required to "independently evaluate the reliability of EPA's various technical claims." It is a fundamental principle of administrative law, however, that "the focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam). This Court has explained, in the specific context of judicial review of a NPDES permit decision, that a reviewing court "should accept the *agency's* factual findings if those findings are supported by substantial

evidence on the record as a whole," and "should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 113 (1992). The court of appeals' factbound application of the "substantial evidence" standard to the administrative record here raises no recurring legal issue warranting this Court's review.

2. Petitioner's second question presented asks this Court to narrow or overrule its holdings in *Chevron* and *Auer*. That question does not warrant the Court's review in this case. Petitioner did not raise any such argument below, and the court of appeals did not rely on *Chevron* or *Auer* in upholding the agency's decision.

Chevron is inapposite here because petitioner does not contend that either EPA's ultimate permitting decision, or the regulation on which that decision was premised, is inconsistent with the CWA. The Court in *Chevron* held that, if a "statute is silent or ambiguous with respect to the specific issue" in dispute in a given case, "the court does not simply impose its own construction on the statute," but affirms "the agency's answer" as long as it "is based on a permissible construction of the statute." 467 U.S. at 843. Petitioner has challenged EPA's determination that, under the applicable regulation, the nitrogen discharges from petitioner's wastewater-treatment facility "have the reasonable potential to cause, or contribute to," violation of applicable state water quality standards in Massachusetts and Rhode Island. 40 C.F.R. 122.44(d)(1)(i). *Chevron* is irrelevant to the proper disposition of that challenge.

Petitioner has not argued, either in the petition for a writ of certiorari or in the petition for review in the court of appeals, that 40 C.F.R. 122.44(d)(1)(i) reflects

an impermissible construction of the CWA or otherwise contravenes the statutory text.[2] Nor, save for a fleeting citation at the outset of its opinion, see Pet. App. 8, did the court of appeals cite or rely on *Chevron* in analyzing petitioner's substantive challenge to EPA's permit decision. See *id.* at 23-42. *Chevron* thus has no bearing on the court of appeals' reasoning or on the outcome of this case.

Auer is likewise inapposite. The Court in *Auer* reiterated the rule, initially stated in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (citation and internal quotation marks omitted); accord *Seminole Rock*, 325 U.S. at 414. As with *Chevron*, the court of appeals in this case cited *Auer* only once at the outset of its opinion (and did not cite *Seminole Rock* at all), see Pet. App. 9, and it did not cite or rely on either decision in its analysis of petitioner's claims, see *id.* at 23-42.

In particular, the court of appeals did not construe 40 C.F.R. 122.44 by giving "controlling" weight to the agency's interpretation of the rule, *Auer*, 519 U.S. at 461. Rather, the court simply applied the plain text of the regulation in determining that EPA was required to show only that nitrogen discharges from petitioner's

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[2] The applicable regulation, 40 C.F.R. 122.44, was promulgated in 1989 as part of a larger set of regulations providing for the establishment of water-quality-based effluent limits that are "necessary" to comply with 33 U.S.C. 1311(b)(1)(C). See 54 Fed. Reg. 23,868 (June 2, 1989). Petitions for review of those regulations were adjudicated in *American Paper Institute, Inc.* v. *United States EPA*, 996 F.2d 346 (D.C. Cir. 1993).

wastewater-treatment plant "ha[ve] the 'reasonable potential to cause, or contribute to,'" a violation of applicable state water quality standards, Pet. App. 30 (quoting 40 C.F.R. 122.44(d)(1)(i)) (emphasis omitted). There is consequently no need to hold the petition in this case pending the disposition of *Kisor*, *supra*, in which this Court has granted review to consider whether *Auer* and *Seminole Rock* should be overruled.

Finally, this case does not have the "immense national importance" that petitioner ascribes to it. Pet. 33 (capitalization and emphasis omitted). The dispute here involves a single NPDES permit for a single facility, and it does not establish any binding requirements for any other party or facility. The court of appeals' disposition of the case ultimately turned not on the court's interpretation of ambiguous statutory or regulatory provisions, but on the court's conclusion, based on careful analysis of an extensive administrative record, that EPA's resolution of various factual and technical issues was supported by "substantial evidence."

Although most States exercise "delegated" NPDES permitting authority, see Pet. 33-34 & n.14, petitioner is wrong in asserting that this allocation of power insulates the issues raised here from judicial review, Pet. 34. EPA sometimes issues permits even in States with delegated permitting authority, 40 C.F.R. 122.44(h), and those decisions are reviewable in federal court, 33 U.S.C. 1369(b)(1)(F). And final state-issued permits are reviewable in state courts. See generally *Southern Cal. Alliance of Publicly Owned Treatment Works* v. *U.S. EPA*, 853 F.3d 1076, 1084-1085 (9th Cir. 2017) (explaining this process), cert. denied, 138 S. Ct. 1042 (2018). For all these reasons, petitioner's second question presented does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN D. BRIGHTBILL
Deputy Assistant Attorney General
JON M. LIPSHULTZ
DAVID J. KAPLAN
SARAH A. BUCKLEY
Attorneys

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