No. _____

In The
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress designed the Clean Water Act (CWA or the Act) to ensure that anyone holding a discharge permit issued under the Act has notice of how much they must control their discharges to comply with the law. The CWA requires that the U.S. Environmental Protection Agency (EPA) and authorized states provide this notice by prescribing specific pollutant limitations in the National Pollutant Discharge Elimination System (NPDES) permits they issue. Consistent with its text, this Court and the Second Circuit have read the Act to require EPA and states to develop specific limits to achieve goals for surface waters, called water quality standards.

Parting with these decisions, the Ninth Circuit held here that EPA may issue permits that contain generic prohibitions against violating water quality standards. Rather than specify pollutant limits that tell the permitholder how much they need to control their discharges as required by the CWA, these prohibitions effectively tell permitholders nothing more than not to cause "too much" pollution. These generic water quality terms expose San Francisco and numerous permitholders nationwide to enforcement actions while failing to tell them how much they need to limit or treat their discharges to comply with the Act.

The question presented is:

Whether the Clean Water Act allows EPA (or an authorized state) to impose generic prohibitions in NPDES permits that subject permitholders to enforcement for exceedances of water quality standards without identifying specific limits to which their discharges must conform.

LIST OF PARTIES

The names of all parties appear in the case caption on the cover page.

STATEMENT OF RELATED PROCEEDINGS

The following proceeding is directly related to this case: *City and County of San Francisco v. U.S. Environmental Protection Agency*, No. 21-70282 (9th Cir.), judgment entered on July 31, 2023; petition for rehearing *en banc* denied on October 10, 2023.

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OPINIONS BELOW

The Ninth Circuit's July 31, 2023, opinion is reported at 75 F.4th 1074 and is reproduced in the Appendix starting at App. 1. The Environmental Appeals Board's December 1, 2020, opinion denying review of EPA's permitting decision is reported at 18 E.A.D. 322 and is reproduced in the Appendix starting at App. 402.

JURISDICTION

The Ninth Circuit issued its decision on July 31, 2023, and entered an order denying a timely petition for rehearing *en banc* on October 10, 2023, App. 487. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. § 1311(a) provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

33 U.S.C. § 1311(b)(1)(C) provides, in pertinent part:

> In order to carry out the objective of this chapter there shall be achieved . . . not later than July 1, 1977, any more stringent limitation,

> including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1342(a)(1) provides, in pertinent part: "the Administrator may . . . issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title. . . ."

33 U.S.C. § 1342(a)(2) provides: "The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."

33 U.S.C. § 1342(k) provides, in pertinent part: "Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health."

33 U.S.C. § 1362(11) defines "effluent limitation" to mean "any restriction established by a State or the

Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

40 C.F.R. § 122.44(d)(1) sets forth EPA's process for developing effluent limitations to ensure that permitted discharges do not cause or contribute to exceedances of water quality standards. 40 C.F.R. § 122.44(k) identifies the circumstances in which an NPDES permit may impose "best management practices" in lieu of numeric effluent limitations. Both provisions are reproduced in the Appendix at App. 488-92.

INTRODUCTION

The City and County of San Francisco's (San Francisco or the City) latest wastewater discharge permit is one of many issued nationwide that fail to notify permittees of what they must do to comply with the Clean Water Act (CWA or the Act). The City's National Pollutant Discharge Elimination System (NPDES) permit generically prohibits San Francisco from causing or contributing to exceedances of water quality standards. Rather than tell San Francisco how much it needs to control its discharges to comply with the Act, the generic prohibitions leave the City vulnerable to enforcement based on whether the Pacific Ocean meets state-adopted water quality standards.

These generic prohibitions expose San Francisco to enforcement for contributing to excessive pollution without defining in advance what constitutes excess or which pollutants the City might need to control. San Francisco has invested billions of dollars in infrastructure to meet the Act's requirements and stands ready to invest further to reduce pollution if the Act so requires. Generic water quality prohibitions, however, neither set limits on the quantities of pollutants that San Francisco may discharge nor prescribe management practices that the City must implement. As a result, these prohibitions do not provide the City the directives it needs to assess whether it must invest further in controlling its discharges. These blanket requirements instead subject San Francisco to the "crushing consequences" of the CWA's enforcement machinery without prior notice of what the Act requires. *Sackett v. EPA*, 598 U.S. 651, 660 (2023) (citation and quotations omitted).

San Francisco is not the only permittee facing this predicament. Permitholders across the country must attempt to operate under permits containing generic water quality prohibitions that do not tell them their pollution control obligations. Like San Francisco, they face the prospect of enforcement without prior notice of what they could have done to comply.

San Francisco seeks the Court's intervention to stop EPA and states from putting the City and other permittees in this untenable position. The CWA requires EPA and states to clearly specify permitholders' obligations to protect water quality by setting

pollutant limitations, stated as restrictions on pollutants discharged or as narrative requirements to implement management practices. The Act further ensures that permittees can readily ascertain their compliance obligations within the four corners of their permits by establishing a "Permit Shield," 33 U.S.C. § 1342(k). This provision guarantees that permitholders are not liable in enforcement actions if they comply with their permits.

Contrary to the CWA's requirements and decisions of this Court and another appeals court, the Ninth Circuit held that EPA and states may impose generic water quality prohibitions that subvert the CWA's guarantees that permittees know what the Act requires of them. The Second Circuit has already held that generic water quality prohibitions are too vague to satisfy the CWA's requirements. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556 (2d Cir. 2015). In *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), this Court similarly read the Act to demand the protection of water quality by translating water quality standards into specific limits tailored to individual permittees. By authorizing the use of generic water quality prohibitions, the Ninth Circuit's decision conflicts with those of this Court and the Second Circuit and allows EPA and states to shirk their obligations to set specific permit limitations.

Without guidance from this Court, EPA and states will continue to issue NPDES permits that make it virtually impossible for permittees to determine whether they need to implement additional pollution controls to

comply with the Act. Generic prohibitions' vagueness strips permitholders of the protection of the CWA's Permit Shield by subjecting them to enforcement for exceeding pollution thresholds not found in their permits. These pollution targets remain undefined until the conclusion of enforcement cases, at which point it is too late for the permittee to install controls to better protect water quality and come into compliance. Generic prohibitions thus fail to promote environmental protection while exposing permitholders to enforcement they cannot avoid.

STATEMENT OF THE CASE

I. The Clean Water Act

A. The Act's Permitting Program and Requirement for Clear Discharge Limits

Congress enacted the CWA, 33 U.S.C. § 1251 *et seq.*, in 1972 to protect the "integrity of the Nation's waters" and create a scheme that would clearly define individuals' obligations to control pollution. *Id.* § 1251(a); *see* S. Comm. on Public Works, 93d Cong., 2 Legislative History of the Water Pollution Control Act Amendments of 1972, Serial No. 93-1, at 1272 (1973) (Congress sought to "provide laws that can be administered with certainty and precision" (statement of Sen. Randolph)). Prior to the CWA's enactment, federal water quality law depended on states setting "ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters" and

using those waters' lack of attainment with those standards as the basis for enforcement against individual polluters. *EPA v. California ex rel. State Water Res. Control Bd. (EPA v. California)*, 426 U.S. 200, 202 (1976). This system proved unworkable, in part, because ambient water quality goals offered no specific "standards to govern the conduct of individual polluters." *Id.* at 203.

Congress sought to address this vagueness and impose clear compliance benchmarks by requiring anyone discharging pollutants into navigable waters to obtain an NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1342; *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) ("The Act restructures federal regulation by insisting that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so." (emphasis in original)). The Act charges EPA with issuing permits in the first instance, but most states—including California—are authorized to issue permits for discharges into waters within their jurisdiction.[1] *See* 33 U.S.C. § 1342(b); 40 C.F.R. § 123.1(d)(1). EPA loses its authority to issue permits for discharges in a state once that state receives authorization. 33 U.S.C. § 1342(c)(1). Authorized states, however, cannot issue permits for ocean discharges occurring more than three miles from shore. Only EPA may issue permits for these discharges. *Pac. Legal*

[1] California received authorization to issue NPDES permits through its State Water Resources Control Board and nine Regional Water Quality Control Boards. 54 Fed. Reg. 40,664 (Oct. 3, 1989); 39 Fed. Reg. 26,061 (July 16, 1974).

Found. v. Costle, 586 F.2d 650, 655 (9th Cir. 1978), *rev'd on other grounds*, *Costle v. Pac. Legal Found.*, 445 U.S. 198 (1980).

Congress expected EPA and states to issue permits containing pollutant limits that would create "clear and identifiable requirements" to "provide manageable and precise benchmarks for enforcement." S. Rep. No. 92-414, at 81 (1971). NPDES permits must set "effluent limitations"—end-of-pipe restrictions "on quantities, rates, and concentrations of . . . constituents . . . discharged from point sources." 33 U.S.C. § 1362(11). These effluent limitations are written as either (a) numeric pollutant restrictions (*e.g.*, a monthly average limit of 30 mg/L of total suspended solids) or (b) narrative requirements to implement specific management practices when a numeric limit is not feasible. *See Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977) (NPDES permits "may proscribe industry practices . . . when numerical effluent limitations are infeasible."); 40 C.F.R. § 122.44(k)(3) (permits may impose best management practices when "[n]umeric effluent limitations are infeasible").

B. Discharge Limitations for Protecting Water Quality

Effluent limitations come in two forms. First, technology-based effluent limitations (TBELs) establish discharge standards based on levels of effluent quality achievable by certain pollution treatment technologies.

See 33 U.S.C. § 1311(b); 40 C.F.R. § 122.44(a)(1); EPA, *NPDES Permit Writers' Manual* (*NPDES Manual*) Ch. 5 (Sept. 2010). The TBELs in San Francisco's permit are not the subject of this Petition.

The second type, water quality-based effluent limitations (WQBELs), promote attainment of water quality standards (WQS) when TBELs are insufficient to do so. The Act requires states to develop WQS that prescribe goals for surface water conditions, consisting of two primary components: (1) a water's designated use (known in California as a beneficial use), like "recreation" or "water supply"; and (2) water quality criteria (in California, water quality objectives)—benchmarks to protect a designated use. *See Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993).

Water quality criteria are often expressed narratively and do not indicate what pollution levels a water body must achieve.[2] For instance, California's water quality criteria include requirements that "[m]arine communities . . . not be degraded," and that there be no "objectionable aquatic growths" nor "degrad[ing] [of] indigenous biota." State Water Res. Control Bd., *California Ocean Plan* (*Ocean Plan*) 7-8 (2019). These standards do not specify how to assess whether marine

[2] These narrative water quality criteria should not be confused with narrative effluent limitations. The former appropriately set qualitative goals for receiving water quality. 40 C.F.R. § 131.11(b)(2) (authorizing states to set narrative criteria). The latter impose requirements for individual permittees and, as described above, are stated as requirements to implement management practices.

communities or biota are degraded, as well as what constitutes an "objectionable" growth. *See id.* They also do not identify what levels of any specific pollutants would cause such conditions. *See id.* These narrative criteria are not unique to California; they are common nationwide.[3]

WQS do not provide targets for individual dischargers to control their pollution. Instead, the CWA demands their use as the "basis for effluent limitations" in NDPES permits. *EPA v. California*, 426 U.S. at 205 n.12.[4] 33 U.S.C. § 1311(b)(1)(C) requires EPA (or authorized states) to set "limitation[s]" that are "necessary to meet water quality standards. . . ." The Act further demands that NPDES permits "prescribe conditions" that "assure compliance" with a variety of the statute's requirements, including WQS. 33 U.S.C. § 1342(a)(2).

To satisfy these mandates, EPA has issued regulations and guidance for translating WQS into specific effluent limitations—expressed either numerically or as required management practices—tailored to each

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[3] *See*, *e.g.*, 401 Ky. Admin. Regs. 10:031, § 2(e) (prohibiting degradation of water by substances that "[p]roduce undesirable aquatic life or result in the dominance of nuisance species"); N.J. Admin. Code § 7:9B-1.14(d)12.i. (prohibiting toxic substances "in such concentrations as to affect humans or be detrimental to the natural aquatic biota").

[4] *See also Upper Mo. Waterkeeper v. EPA*, 15 F.4th 966, 969-70 (9th Cir. 2021) (WQS "are used to set effluent limits in the permits that individual dischargers must obtain."); *Am. Paper Inst.*, 996 F.2d at 350 (WQS "are used as the basis for specific effluent limitations in NPDES permits.").

individual permittee. *See generally* 40 C.F.R. § 122.44(d)(1)(i)-(vii); *NPDES Manual* at Ch. 6. Neither the regulations nor EPA-issued guidance contemplate the use of any other permitting mechanism to control discharges to meet WQS. EPA's NPDES permit writing course similarly expects that permits will exclusively use specific effluent limitations to ensure attainment of WQS. *See* EPA, *NPDES Permit Writers' Training Presentations*, Sessions 1-13, https://www.epa.gov/npdes/npdes-permit-writers-training-presentations (last updated Feb. 13, 2023).

C. Generic Water Quality Prohibitions in NPDES Permits

Contrary to the requirements of the Act and EPA guidance, NPDES permits routinely deviate from the use of effluent limitations to ensure WQS are met. EPA and states often issue NPDES permits that impose generic prohibitions against discharging in a manner that causes or contributes to an exceedance of applicable WQS.[5] In 2015, the Second Circuit invalidated such a generic provision, holding that it was too vague to provide permitholders instructions on how to comply

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[5] *See*, *e.g.*, Br. of Amicus Curiae Cal. Reg'l Water Quality Control Bd., San Francisco Bay Region in Support of Respondent at 3, *City & Cty. of San Francisco v. EPA*, 75 F.4th 1074 (9th Cir. 2023) (No. 21-70282) (generic prohibitions "are in virtually *every* individual National Pollutant Discharge Elimination System (NPDES) permit issued by the Regional Water Board." (emphasis in original)); *In re City of Lowell*, 18 E.A.D. 115, 176 (EAB 2020) (EPA includes generic prohibitions against violating WQS in all NPDES permits issued in Massachusetts).

with the Act and ensure that WQS are met. *See Nat. Res. Def. Council v. EPA*, 808 F.3d 556 (2d Cir. 2015). EPA and states did not heed the Second Circuit's decision and have continued to issue permits containing generic prohibitions.[6]

These generic prohibitions do not set effluent limitations that impose numeric restrictions on pollutants discharged or narratively require the implementation of certain management practices. Instead, they broadly tell permitholders to avoid causing conditions in receiving waters that are inconsistent with applicable WQS. As discussed above, WQS often do not identify specific pollutant levels that must be achieved. Further, whether a waterbody meets WQS will "vary depending on in-stream conditions" over which the discharger has no influence, such as flow or other sources of pollution.[7] Generic prohibitions thus set compliance obligations that are both undefined and subject to change due to factors beyond the permittee's control.

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[6] *See*, *e.g.*, *EPA, Authorization to Discharge Under the NPDES, Merrimack River Water Treatment Plant and Raw Water Pumping Station, NPDES No. NH0001621*, Part I.A.2 (Oct. 2, 2023) https:/www3.epa.gov/region1/npdes/permits/2023/finalnh0001621permit.pdf ("The discharge shall not cause a violation of the water quality standards of the receiving water.").

[7] Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 Harv. Envtl. L. Rev. 409, 440-41 (2007).

D. The Act's Enforcement Provisions and Permit Shield

The CWA demands severe consequences for violations of NPDES permits. Even a negligent violation can be punished criminally. 33 U.S.C. § 1319(c)(1)(A). In civil enforcement actions, EPA can bring lawsuits seeking civil penalties over $66,000 per day for each permit violation, as well as injunctive relief. *Id.* § 1319(b), (d); 40 C.F.R. § 19.4. For municipalities, the costs of injunctive relief in CWA enforcement cases often run into the hundreds of millions or billions of dollars.[8] Private plaintiffs may also bring lawsuits seeking the same relief. *See* 33 U.S.C. § 1365(a).

At the same time Congress enacted these powerful enforcement measures, it also provided permittees assurance that they would not face them unless they violated the requirements found within the four corners of their permits. Under the CWA's "Permit Shield," "[c]ompliance with [an NPDES permit] shall be deemed compliance, for purposes of sections 1319 and 1365 of this title," with various substantive provisions of the Act. 33 U.S.C. § 1342(k). An NPDES permit "shield[s] its holder from CWA liability" so long as the permittee complies with the permit's terms. *Piney Run*

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[8] *See* EPA, *EPA National Enforcement Initiative: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters – Status of Civil Judicial Consent Decrees Addressing Combined Sewer Systems (CSOs)* (May 1, 2017), https://www.epa.gov/sites/default/files/2017-05/documents/epa-nei-css-consent-decree-tracking-table-050117.pdf (estimating municipalities' combined sewer compliance costs for CWA consent decrees).

Preservation Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 266 (4th Cir. 2001).

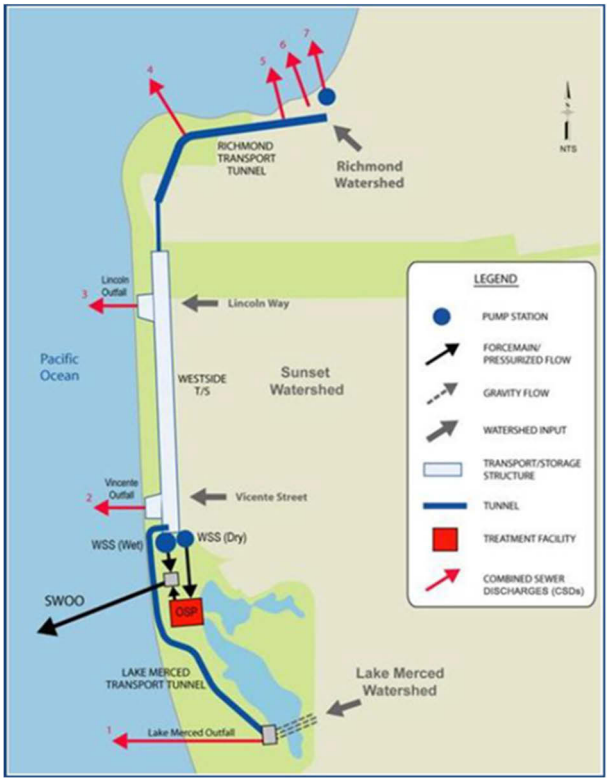
II. San Francisco's Wastewater Treatment Facilities and Investment in Pollution Controls

Like other municipalities, San Francisco owns and operates wastewater treatment facilities that accept sewage and stormwater generated citywide, treat it to required standards, and discharge treated effluent. San Francisco thus needs an NPDES permit to operate critical wastewater treatment and collection infrastructure called the "Oceanside Facilities." These facilities serve more than 250,000 people living in the western portion of San Francisco and consist of (a) the Oceanside Water Pollution Control Plant (the Plant), (b) over 250 miles of combined sewers,[9] and (c) the Westside Recycled Water Project. App. 252-57.

The Oceanside Facilities are authorized to discharge into the Pacific Ocean at several locations. The first is Discharge Point 001, a 4.5-mile outfall extending from the Plant into the Pacific Ocean and known as the Southwest Ocean Outfall (identified in the figure below as the SWOO). App. 257-58. As an operator of a combined sewer, San Francisco is one of hundreds of older cities that experience combined sewer overflows (CSOs)—discharges from the combined sewer at

[9] A combined sewer conveys both sanitary wastewater and stormwater to a treatment plant through a single set of pipes. *See* 40 C.F.R. § 122.2.

a point prior to the treatment plant. CSOs occur when flow exceeds the sewer's capacity during wet weather. App. 258. The City may discharge CSOs through seven outfalls named CSD-001 through -007. *Id.* The following figure depicts these discharge points.



App. 160.

San Francisco has invested heavily in the Oceanside Facilities to minimize CSOs and their impacts on water quality. Among other infrastructure intended to control CSOs, the Oceanside Facilities include three enormous transport and storage structures

that can store approximately 71 million gallons of combined wastewater and stormwater. App. 254. These and other improvements—part of a multibillion-dollar citywide investment in CSO controls—reduced the annual frequency of CSOs from the Oceanside Facilities by 94%. *See* San Francisco Public Utilities Commission, San Francisco Wastewater Long Term Control Plan Synthesis (Excerpts of Record (ER) at 4-ER-964, *City & Cty. of San Francisco v. EPA*, 75 F.4th 1074 (9th Cir. 2023) (No. 21-70282), ECF No. 23-5); San Francisco Public Utilities Commission, Characterization of Westside Wet Weather Discharges and the Efficacy of Combined Sewer Discharge Controls (Suppl. ER at 4-SER-907, 914, *San Francisco v. EPA*, 75 F.4th 1074 (No. 21-70282), ECF No. 34-5).

III. EPA's Issuance of a Permit Containing Generic Water Quality Prohibitions

EPA (through its Region 9 office) and the San Francisco Bay Regional Water Quality Control Board (Regional Board) jointly developed and issued the Oceanside Facilities' latest NPDES permit. App. 80. EPA must authorize discharges from the City's Southwest Ocean Outfall because it discharges more than three miles from shore. The Regional Board needs to authorize San Francisco's CSO discharge points because they discharge into near-shore waters. *See supra* p. 7 (discussing limits on NPDES program authorization).

The agencies published a draft permit and solicited public comments in April 2019. Cal. Reg'l Water Quality Control Bd. and EPA, Public Notice of Oceanside Permit (ER at 4-ER-936, *San Francisco v. EPA*, 75 F.4th 1074 (No. 21-70282), ECF No. 23-5). In response, San Francisco submitted detailed comments that raised concerns about the draft permit's requirements, including its provisions addressing the City's obligations to control its discharges to meet WQS. These comments called into question, among other things, the draft permit's conformity with the CWA and its consistency with data in the record. *See generally* San Francisco Comments on the Tentative Order Reissuing the NPDES Permit (ER at 4-ER-888 to 932, *San Francisco v. EPA*, 75 F.4th 1074 (No. 21-70282), ECF No. 23-5).

On December 10, 2019, EPA approved the issuance of the Oceanside Facilities' permit, NPDES No. CA0037681 (the Permit). App. 84. The Permit comprises over 100 pages of detailed requirements, including two sets of WQBELs: (1) a numeric limitation that applies during dry weather, and (2) a set of comprehensive management requirements for the operation of the Oceanside Facilities' combined sewer control infrastructure during wet weather. App. 95-97, 128-31. Surprisingly, EPA determined that these comprehensive requirements "will not necessarily achieve water quality standards" but made no attempt to explain *how* it thought the Permit's requirements were potentially inadequate. App. 522.

To address this purported shortfall, EPA added two provisions that generally demand that the City not violate WQS (collectively, the Generic Prohibitions) rather than specify pollutant limits that San Francisco must meet. First, Section V provides that a discharge may "not cause or contribute to a violation of any applicable water quality standard. . . ." App. 97. Second, Attachment G, § I.I.1 provides that no "discharge of pollutants shall create pollution, contamination, or nuisance as defined by California Water Code section 13050." App. 339. California defines "pollution" by reference to whether a surface water meets a component of WQS—the beneficial use. *See* Cal. Water Code § 13050(*l*)(1)(A) (defining "pollution" to include "alternation of the quality of waters of the state . . . which unreasonably affects . . . the waters for beneficial uses"). As a result, the City's compliance with this second prohibition turns on whether, after the fact, it is determined that the City's discharge unreasonably impacted one of the Pacific Ocean's broad beneficial uses, such as recreation.

IV. Administrative and Judicial Review of San Francisco's Permit

San Francisco timely filed a petition for review with EPA's Environmental Appeals Board (EAB) to challenge the Generic Prohibitions and two other provisions. *See* 40 C.F.R. § 124.19(a). The EAB issued an order on December 1, 2020, that denied San Francisco's petition. App. 402-86. EPA issued its Notice of

Final Permit Decision—marking final agency action—on December 22, 2022. App. 77-79.

San Francisco timely petitioned for review in the Ninth Circuit to challenge both the Generic Prohibitions and another provision of the Permit. *See* 33 U.S.C. § 1369(b)(1)(F). A divided Ninth Circuit panel denied San Francisco's petition and concluded that the Generic Prohibitions are "consistent with the CWA and its implementing regulations." App. 34. The panel majority based this conclusion on two isolated provisions—33 U.S.C. § 1311(b)(1)(C) and 40 C.F.R. § 122.44(d). The majority found that these provisions empowered EPA and states to impose generic prohibitions against violating WQS anytime they find it "necessary" to do so. App. 32-33.

The Ninth Circuit also concluded that EPA possesses discretion to ignore its regulations prescribing a process for translating WQS into specific WQBELs—expressed numerically or as management practices, 40 C.F.R. § 122.44(d)(1)(i)-(vii). App. 37-38. The majority concluded that these regulations only prescribe "minimum requirements for imposing pollutant-specific WQBELs." App. 38. The Ninth Circuit determined that these regulations, despite imposing a mandatory process for translating WQS into specific limitations, nonetheless leave EPA and states free to impose generic prohibitions against violating WQS. *See id*.

In dissent, Judge Collins found the Generic Prohibitions to be "inconsistent with the text of the CWA." App. 62. Analyzing 33 U.S.C. § 1311(b)(1)(C), the dissent

concluded that the CWA "draws an explicit distinction between the 'limitations' that the agency must . . . impose on a particular permittee[] and the overall 'water quality standards'" applicable to the relevant receiving water. *Id*. By broadly demanding that San Francisco not violate WQS without specifying how to do so, the Generic Prohibitions "ignore this critical distinction by making the ultimate, overall 'water quality standards' themselves the applicable limitation for" San Francisco. App. 63.

Contrasting the Act with the statute it replaced, Judge Collins found that the "erasure of this crucial distinction is fundamentally inconsistent with the CWA's regulatory approach." *Id*. As described *supra* pp. 6-8, "the CWA largely rejected the prior ex post system" of using attainment of WQS as the basis for assessing compliance and enforcement in favor of "an ex ante system of fashioning, using the agency's expertise, the 'direct restrictions on discharges' that are needed" to attain WQS. App. 63 (citations omitted). The panel majority, in Judge Collins' view, authorized EPA to "abdicate[] the regulatory task assigned to it under the CWA" to define the extent to which permittees must control their discharges to comply with the Act. App. 63-64.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's holding that the Clean Water Act authorizes EPA to impose vague water quality prohibitions conflicts with decisions of the Second Circuit and this Court.

The Court should grant certiorari to resolve a circuit split and a conflict between the Ninth Circuit's opinion and a decision of this Court concerning the CWA's requirements for defining permittees' obligations to protect water quality. Left unresolved, the conflicts created by the Ninth Circuit will encourage EPA and states to continue imposing water quality prohibitions that cause permittees to labor under NPDES permits that fail to define their pollution control obligations with the clarity that the Act demands.

A. The Ninth Circuit held that EPA may impose nebulous permit terms that the Second Circuit found the CWA to forbid.

The Ninth Circuit's holding conflicts with a Second Circuit decision that invalidated the precise action EPA took here: imposing a generic water quality prohibition that fails to tell the permittee how much to control its discharges to comply with the Act. In *Natural Resources Defense Council v. EPA (NRDC)*, the Second Circuit invalidated a permit condition directing permittees—ship operators discharging ballast water—to control discharges "as necessary to meet

applicable water quality standards." 808 F.3d 558, 578 (2d Cir. 2015) (quotations and citation omitted). EPA imposed this generic requirement because it found that the permit's numeric limitations on concentrations of organisms that could be discharged would not always cause WQS to be met. The numeric limits would only "generally . . . control discharges as necessary to meet applicable water quality standards." *Id.* (quotations and citation omitted).

The Second Circuit held that EPA's imposition of the generic water quality requirement violated its obligation to prescribe permit terms that "ensure compliance" with WQS. *Id.*; 33 U.S.C. § 1342(a)(2). The court faulted the generic requirement for failing to "state *how* [it] will ensure compliance" with WQS by not providing "*guidance as to what is expected* or to allow any permitting authority to determine whether a shipowner is violating water quality standards." *NRDC*, 808 F.3d at 578 (emphasis added).

The Generic Prohibitions that the Ninth Circuit upheld suffer from the same dearth of compliance requirements that rendered EPA's action invalid in *NRDC*. Just like the provision in *NRDC*, the Generic Prohibitions flatly require avoidance of WQS exceedances rather than "give . . . guidance as to what is expected" to comply with the Act. *Id*. The Ninth Circuit, however, ignored EPA's obligation under § 1342(a)(2) to "assure compliance" with WQS and instead satisfied itself that EPA was authorized to include the Generic Prohibitions in San Francisco's permit based on a crabbed reading of § 1311(b)(1)(C) and EPA's regulations.

See App. 32-33. The Ninth Circuit's reading of the statute has created a split among the circuits over whether the Act authorizes EPA and states to impose prohibitions that fail to apprise permittees of their pollution control obligations.

The Ninth Circuit's observation that San Francisco's permit contains "specific provisions" in addition to the vague Generic Prohibitions that "provide San Francisco with substantial guidance as to how to satisfy the applicable WQS" does not avoid this circuit split. App. 36. EPA found these specific provisions "will not necessarily achieve water quality standards" and thus imposed the Generic Prohibitions "to ensure compliance with applicable water quality standards. . . ." App. 514, 522.

These findings make this case substantively identical to that before the Second Circuit. Just like San Francisco's permit, the permit at issue in *NRDC* contained specific effluent limitations that EPA found would "generally"—but not always—meet WQS, and EPA used a generic prohibition to address this shortfall. 808 F.3d at 578. The Second Circuit held that the generic prohibition is incapable of providing additional protection to assure attainment of WQS because it is so lacking in guidance on what the permittee must do to comply that it "in fact add[s] nothing." *Id.* The same is true here.[10]

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[10] The Ninth Circuit's interpretation of 33 U.S.C. § 1311(b)(1)(C) also conflicts with one of its prior decisions that (a) rejected EPA's argument that "the incorporation of state water quality standards

The Ninth Circuit's decision also cannot be distinguished from *NRDC*, as the panel majority suggests, on the basis that "San Francisco seeks less stringent enforcement" than the three environmental groups that petitioned the Second Circuit. App. 35-36. The objectives of the parties had no relevance to the Second Circuit's holding and likewise have no bearing on this case. *See NRDC*, 808 F.3d at 578; App. 68 n.4 (dissenting opinion). The Ninth Circuit majority also mischaracterizes San Francisco's objective, which is simply to require EPA to honor its obligation to prescribe specific limitations that provide guidance on how much San Francisco must control its discharges to comply with the Act.

B. The Ninth Circuit's decision conflicts with this Court's interpretation of the Act's requirements for setting limitations to protect water quality.

The imposition of generic water quality prohibitions in NPDES permits also runs afoul of this Court's

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satisfies the need to establish effluent limitations" and (b) held that § 1311(b)(1)(C) requires EPA to protect WQS by setting limits that are distinct from WQS themselves. *Trustees for Alaska v. EPA*, 749 F.2d 549, 556-57 (9th Cir. 1984) (directing EPA to set effluent limitations distinct from WQS because "[e]ffluent limitations are a means of *achieving* water quality standards" (emphasis in original)). The Generic Prohibitions attempt to accomplish the same "incorporation of state water quality standards" that *Trustees* held the CWA to forbid—but on a larger scale by prohibiting causing or contributing to violations of "*any* applicable water quality standard." *Id.*; App. 97 (emphasis added).

interpretation of the Act in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). The Ninth Circuit read EPA's authority under 33 U.S.C. § 1311(b)(1)(C) to impose "limitation[s] . . . necessary to meet water quality standards" to empower EPA to impose broad prohibitions against violating WQS that articulate no specific requirements for doing so. App. 32-33. This holding cannot be reconciled with *Jefferson County*'s interpretation of a similar provision of the Act to require that "limitations" for meeting WQS be expressed as specific compliance requirements derived from the WQS they protect.

Jefferson County elucidated the CWA's requirement to set tailored limits to protect water quality while upholding Washington State's imposition of a numerical stream flow requirement in a certification issued under 33 U.S.C. § 1341.[11] Section 1341(d)(1)—like § 1311(b)(1)(C)—requires the imposition of "limitations" that are "necessary to assure" compliance with several requirements of the Act, including WQS. 33 U.S.C. § 1341(d); *Jefferson County*, 511 U.S. at 713. In concluding that § 1341(d) authorized Washington's promulgation of a numerical limit to protect a narrative WQS, the Court explained that developing a "limitation" under this section demands that WQS "must be *translated into specific limitations* for individual

[11] Section 1341 "requires states to provide a water quality certification before a federal license or permit can be issued for" an activity that may discharge into navigable waters. *Jefferson County*, 511 U.S. at 707; 33 U.S.C. § 1341(a).

projects." 511 U.S. at 716 (emphasis added). The CWA's command to develop limitations to attain WQS thus requires specific, individualized requirements rather than generic prohibitions.

The Ninth Circuit's interpretation of § 1311(b)(1)(C) to authorize generic water quality prohibitions cannot be reconciled with *Jefferson County*.[12] Like the provision at issue in *Jefferson County*, § 1311(b)(1)(C) requires EPA and states to impose "limitations" that ensure attainment of WQS. Section 1311(b)(1)(C) must be interpreted consistent with the substantially similar language used in § 1341(d) for achieving the same purpose: setting limits to meet WQS. *See*, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *Cohen v. De la Cruz*, 523 U.S. 213, 220 (1998) (presumption that a term used multiple sections be interpreted consistently "has particular resonance" when it "serves the identical function" in each one). When interpreted consistent with *Jefferson County*, § 1311(b)(1)(C) requires NPDES permits to protect water quality by prescribing discharger-specific limitations derived from the WQS they are intended to meet.

The Ninth Circuit, however, read § 1311(b)(1)(C) to allow EPA and states to bypass this requirement. *See* App. 32-33. Imposing a generic prohibition against

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[12] The Ninth Circuit apparently failed to recognize this conflict and erroneously cited *Jefferson County* as support for its interpretation of the Act. App. 33.

WQS violations entails no "translation," which demands substantial technical analysis to work backward from the receiving water and applicable WQS to derive a pollutant limit for an individual discharger. *See NPDES Manual* at pp. 6-31 to 6-40. The permitting agency simply imposes a blanket prohibition without identifying how much the permitholder needs to control its discharges to comply. By allowing EPA and states to issue permit terms that inherently skip the analysis necessary to develop individualized limits, the Ninth Circuit's holding contradicts this Court's interpretation of the Act.

II. Generic water quality prohibitions subject permitholders to enforcement actions based on requirements that their permits do not contain.

This Court's intervention is also needed because generic water quality prohibitions nullify components of the CWA that ensure permitholders know their legal obligations. In practice, generic water quality prohibitions make it impossible for permittees to know what the law requires until an enforcement action's late stages, putting them in a predicament that offends basic concepts of due process. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (due process demands "that regulated parties should know what is required of them so they may act accordingly"). Left undisturbed, the Ninth Circuit's decision will enable EPA and states to continue placing the City and other permittees in this untenable position.

A. The Ninth Circuit's decision allows EPA and states to ignore the CWA's primary mechanism to ensure permittees' obligations are clearly defined.

The Ninth Circuit's ruling gives EPA and states the green light to override Congress's determination that WQS are too vague to tell individual permitholders how much to control their discharges. When Congress enacted the CWA, it abandoned using attainment of WQS as the basis for compliance and enforcement precisely because this method lacked "standards to govern the conduct of individual polluters." *EPA v. California*, 426 U.S. at 203. The CWA instead demanded "'clear and identifiable' discharge standards" for permittees that "provide manageable and precise benchmarks for enforcement." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.16 (1987) (quoting S. Rep. No. 92-414, at 81 (1971)); S. Rep. No. 92-414, at 81 (1971). Although the Act retained WQS, Congress gave them a new role: serving as *the basis for* effluent limitations that specify the level of pollution control that permittees need to achieve.[13]

Generic water quality prohibitions, however, negate the Act's mechanism that ensures NPDES

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[13] H.R. Rep. No. 92-911, at 105 (1972) ("Water quality standards will be utilized *for the purpose of setting effluent limitations*." (emphasis added)); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000) (*en banc*) ("The Clean Water Act therefore shifted the focus of federal enforcement efforts from water quality standards to direct limitations on the discharge of pollutants—i.e., 'effluent limitations.'" (citations omitted)).

permits identify specific limitations to protect water quality: 33 U.S.C. § 1311(b)(1)(C)'s command that EPA and states set "limitations" that are distinct from but "necessary to meet water quality standards." As Judge Collins' dissent below recognized, generic water quality prohibitions "effectively ignore this critical distinction by making the ultimate, overall 'water quality standards' themselves the applicable 'limitation' for an individual discharger." App. 62-63.

Eliminating this distinction renders ineffective a central feature of the Act that ensures permitholders know precisely how much to limit their discharges. *See Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 515 (2d Cir. 1976) (effluent limitations and WQS "are entirely different concepts and the difference *is at the heart* of the 1972 [CWA]." (emphasis added)). The Ninth Circuit's decision thus nullifies a provision central to Congress's goal of providing clear compliance standards. This severe error warrants this Court's review.[14]

Cases in which generic water quality prohibitions have been enforced illustrate how these provisions fail to apprise permittees of their legal obligations but

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[14] *See*, *e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) (It is "one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation and quotations omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (The Court is "especially unwilling to [adopt an interpretation that nullifies a word in a statute] when the term occupies so pivotal a place in the statutory scheme.").

nonetheless expose them to enforcement.[15] WQS often broadly describe conditions that surface waters must achieve by, for instance, prohibiting "objectionable aquatic growths." *Ocean Plan* 7; *see also supra* pp. 9-10 (describing the prevalence of narrative water quality standards). Additionally, "the quantity of a pollutant that may be discharged will vary depending on in-stream conditions"; a discharge that causes a violation of WQS in some circumstances may not in others, depending on factors like flow, background pollution, and other sources' contributions. Gaba, *supra* note 7, at 441. As a result, the pollutant levels that permitholders' discharges need to achieve are determined only at the conclusion of an enforcement case.

For instance, several wastewater treatment plants in Illinois faced an action to enforce a WQS prohibiting

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[15] Courts' *enforcement* of generic prohibitions against WQS violations should not be mistaken for determinations that EPA and States have the authority to include these terms in NPDES permits. Under the Act, courts do not address NPDES permits' validity in enforcement cases. Instead, the legality of NPDES permit terms must be challenged either (a) when EPA issues a permit, by petitioning for review in a Court of Appeals, 33 U.S.C. § 1369(b)(1)(F); or (b) when a state issues a permit, by seeking relief through appropriate state administrative and judicial processes. *S. Cal. All. of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1081 (9th Cir. 2017) ("Permits issued by the state are subject to administrative and judicial review in accordance with state law."). In enforcement actions like those cited here, courts lack subject matter jurisdiction to adjudicate the legality of any permit term. *See* 33 U.S.C. § 1369(b)(2); *Nat. Res. Def. Council, Inc. v. Outboard Marine Corp.*, 702 F. Supp. 690, 694 (N.D. Ill. 1988) (The Act "does not permit review of a non-EPA-objected-to state-issued permit in *any* federal court.").

"unnatural plant or algal growth," but the court was unable to define what—if anything—the treatment plants needed to do comply with the Act even late in the litigation. *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. (MWRD)*, 175 F. Supp. 3d 1041, 1046 (N.D. Ill. 2016). Seeking to enforce a generic prohibition, several environmental groups alleged that the plants' phosphorus discharges caused excessive algal growth in violation of the Illinois WQS.[16] *Id.* Even after considering extensive expert testimony regarding the meaning of the WQS and phosphorus' impact on algal growth, the court found multiple factual disputes that precluded summary judgment. *Id.* at 1056-57. Among other things, the court could not conclusively determine "*how much* phosphorus" discharged by the treatment plants would cause a violation of WQS. *Id.* at 1062 (emphasis in original).[17] This need to determine

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[16] The permit term at issue specified that "[t]he effluent, alone or in combination with other sources, shall not cause a violation of any applicable water quality standards outlined in 35 Ill. Adm. Code 302." *MWRD*, 175 F. Supp. 3d at 1046.

[17] *See also New Manchester Resort & Golf, LLC v. Douglasville Dev., LLC*, 734 F. Supp. 2d 1326, 1339 (N.D. Ga. 2010) (denying summary judgment due to, among other things, questions over whether defendant's discharge caused "substantial visual contrast" in violation of a WQS); *Nw. Envtl. Advocates v. City of Medford*, 2021 WL 2673126, at *7-9 (D. Or. June 9, 2021) (denying summary judgment over, among other things, questions whether discharges caused conditions that were "objectionable" or "foul"); *Gill v. LDI*, 19 F. Supp. 2d 1188, 1194 (W.D. Wash. 1998) (defendant liable for violations based on plaintiffs' evidence, "in the form of expert opinion and statements of their own experience, that the pond is not fit for its characteristic uses of domestic water supply, recreation, and fish raising").

after the fact the extent to which a permittee's discharge caused WQS exceedances "is precisely the circumstance that Congress intended to avoid when it established the NPDES permit program in 1972." Gaba, *supra* note 7, at 441.

In *Ohio Valley Environmental Coalition v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017), an NPDES permitholder similarly did not learn how much the Act required it to control its discharges until after a bench trial. In *Fola*, the relevant permit incorporated a state regulation requiring covered discharges "to be of such quality so as not to cause violation of applicable water quality standards. . . ." *Id.* at 136. Environmental groups sued, alleging that a coal company's discharge of ions caused violations of two WQS. *See id.* The company only learned what levels of ions in the receiving water and its discharges constituted a violation after a bench trial, in which the district court considered "mountains of expert testimony, reports and charts." *Id.* at 137. The coal company thus learned what the CWA required of it at the exact moment judgment was entered, leaving it no chance to better protect the environment or reduce its exposure to enforcement. *See id.* at 138.

B. The Ninth Circuit's decision authorizes EPA and states to eviscerate the protections of the CWA's Permit Shield.

These enforcement cases also highlight how generic water quality prohibitions subvert another of

the Act's mechanisms for ensuring permitholders know their obligations: the Permit Shield. This provision states that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance" with the CWA for purposes of enforcement. 33 U.S.C. § 1342(k). The Permit Shield "serves the purpose of giving permits finality," *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977), by making a permit's explicit terms the sole basis for enforcing against a permittee. The Permit Shield thus assures regulated parties that they will not suffer the "crushing consequences" of enforcement under the Act, *Sackett v. EPA*, 598 U.S. 651, 660 (2023), unless they fail to meet their permits' specific requirements. *E.g.*, *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) ("Where a permittee discharges pollutants in compliance with the terms of its NPDES permit, the permit acts to 'shield' the permittee from liability under the CWA." (citing 33 U.S.C. §1342(k)).

Multiple courts have held, however, that generic prohibitions against violating WQS erase the Permit Shield's guarantee that only a permit's terms can be the basis for an enforcement action. In multiple enforcement cases, including *Fola* and *MWRD*, courts concluded that the Permit Shield offers no protection in an action to enforce a generic prohibition against violating WQS, even if the permitholder has complied with all of their permit's specific limitations.[18] These

[18] *See Fola*, 845 F.3d at 142-43; *MWRD*, 175 F. Supp. 3d at 1049-54; *Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles*, 725

holdings cleared the way for these permittees to be held liable for discharging in excess of thresholds that were never articulated until the late stages of an enforcement action.

Generic water quality prohibitions thus eradicate the Permit Shield's benefits. Because generic prohibitions subject permitholders to enforcement for exceeding thresholds that are not announced until late in enforcement actions, permittees cannot look to their permits to know the full extent of their obligations under the Act. *See* Gaba, *supra* note 7, at 444 (including a generic prohibition in a permit "leaves the permittee with no certainty and no protection under the permit shield"). That courts determine permit requirements only after the fact also ensures that permitholders have no way to limit their exposure to enforcement by installing additional controls to reduce pollution.

Both the environment and permittees lose when permitholders lack prior notice of their obligations. Without guidance for how much they need to limit

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F.3d 1194, 1204-06 (9th Cir. 2013) (defendants lacked a Permit Shield defense based on alleged violations of a prohibition against "discharges . . . that cause or contribute to the violation of Water Quality Standards"); *City of Medford*, 2021 WL 2673126, at *5 (allegation of violating a generic water quality prohibition negated ability to rely on Oregon regulation substantially codifying the Permit Shield); *see also Swartz v. Beach*, 229 F. Supp. 2d 1239, 1271 (D. Wyo. 2002) (noting generally that permitholders are not shielded from allegations of noncompliance with state-issued standards "when state standards are incorporated into a NPDES permit" by a generic prohibition).

their discharges, permittees cannot install additional pollution controls that would benefit water quality. This lack of notice also places permitholders at risk of enforcement that they have no way to avoid. By granting certiorari, the Court can ensure that EPA and states follow the Act's requirements to define permitholders' pollution control obligations. Holding permitting agencies to their statutory obligations will provide permitholders the guidance they need to protect the environment and comply with the CWA.

CONCLUSION

The CWA directs EPA and states issuing permits to define specific effluent limitations to ensure water quality is protected and permitholders know what they must do to comply with the Act. In conflict with the decisions of this Court and the Second Circuit, the Ninth Circuit held that EPA and states are free to disregard this obligation by imposing generic prohibitions against violating WQS. Left unreviewed, the Ninth Circuit's holding will allow EPA and states to continue subjecting regulated parties across the country to enforcement actions based on violations of requirements that are not defined until the end of litigation. This Petition for Certiorari should be granted, and EPA and states should be required to comply with the CWA by

specifying in NPDES permits what permitholders must do to comply.

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Respectfully submitted,

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