No. 23-753

IN THE
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* PUBLIC WASTEWATER AND STORMWATER AGENCIES AND MUNICIPALITIES SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici curiae, including municipalities and individual public clean water utilities from across the country and their representative associations, write to stress the exceptional importance of the question presented to the provision of public clean water services to communities nationwide. If left to stand, the Ninth Circuit's decision will not lead to improved water quality, but will cause untenable amounts of permitting uncertainty for public clean water utilities. This regulatory limbo threatens not only the billions of dollars in clean water infrastructure investment being made by local communities across the country, but also the pocketbooks of all their ratepayers—including those in disadvantaged communities—who will be left footing the bill.

Associational *amici* represent public entities that provide water supply, water conservation, flood and stormwater management, and wastewater treatment services to the public.[1] They are the National Association of Clean Water Agencies, Association of Missouri Cleanwater Agencies, California Association of Sanitation Agencies, Illinois Association of Wastewater Agencies, North Carolina Water Quality Association, Oregon Association of Clean Water Agencies, South Carolina Water Quality Association, West

[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amici curiae* and their counsel. All parties received at least 10 days prior notice of *amici*'s intention to file this brief.

Virginia Municipal Water Quality Association, and Wet Weather Partnership.

The associational *amici* are joined by individual municipal clean water agencies from around the country: Boston Water and Sewer Commission, Buffalo Sewer Authority, Citizens Energy Group (Indianapolis), City of Mountain View (California), City of New York, City of Sunnyvale (California), City of Tacoma, Clean Water Services (Washington County, Oregon), Greater Peoria Sanitary District, Green Bay Metropolitan Sewerage District, Louisville/Jefferson County Metropolitan Sewer District, Metropolitan Wastewater Management Commission (Eugene-Springfield, Oregon), Metro Water Recovery (Denver), Narragansett Bay Commission, Northeast Ohio Regional Sewer District, Passaic Valley Sewerage Commission, and Springfield Sewer and Water Commission (Massachusetts). These and hundreds of other public clean water utilities nationwide hold Clean Water Act ("CWA" or "Act") National Pollutant Discharge Elimination System ("NPDES") permits, the violation of which puts them at risk of substantial civil and criminal penalties and injunctive action. And, like San Francisco, *amici* depend on their NPDES permits to provide clear notice of the full extent of their CWA compliance obligations.

The Ninth Circuit's decision upholding permit terms that vaguely prohibit actions such as "polluting," or "causing or contributing to the violation of water quality standards" runs contrary to the CWA's text, purpose, and history, undermines Congress's goal of promoting finality, and turns CWA compliance into a moving target. Left to stand, the decision below undermines the regulatory certainty that is

foundational to the NPDES program and leaves *amici*'s members and other dischargers whose permits include such generic water quality prohibitions exposed to inconsistent, arbitrary, and unpredictable enforcement actions. This uncertainty will hamper the ability of *amici* to plan and responsibly serve communities across the nation with safe and affordable sewer, sanitation, flood control, and stormwater services.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1972, Congress enacted the CWA to address significant deficiencies in prior water pollution control statutes. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. § 1251 *et seq*. At the heart of this statute is the clear distinction Congress drew between the water quality goals set for waterbodies and the enforceable limits placed on specific discharges made into those waterbodies to help achieve those goals. Absent intervention from this Court, the Ninth Circuit's decision will erase that careful, intentional distinction from the statutory text and cause significant harm to public clean water agencies and countless other regulated entities.

Under the pre-1972 scheme,[2] the primary enforcement mechanisms for pollution control were state-created water quality standards that described acceptable levels of pollution in waters that received discharges. Permits were few and far between, and

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[2] *See* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

those that existed were woefully deficient because, among other things, "[t]he goal of the discharge permit conditions was to achieve water quality standards rather than require to individual polluters to minimize effluent discharge[.]" *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 (1976). Such vague permit conditions proved unworkable in the absence of precise, end-of-pipe compliance requirements for individual discharges, because regulators could only determine compliance with the water quality standards retroactively.

Against that backdrop, the CWA created a "major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits," S. Rep. No. 92-414, at 7 (1971); *see also Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 515 (2d Cir. 1976) ("[A]lthough water quality standards and effluent limitations are related . . . the two are entirely different concepts and the difference is at the heart of the 1972 Amendments."). Congress expressed this purposeful shift in the Act's text by plainly distinguishing between discharge-specific "effluent limitations" and the water quality standards that such limitations must be "necessary to meet" or "required to implement[.]" 33 U.S.C. § 1311(b)(1)(C). That Congress intended for discharge-specific limitations in permits to be explicit is made clear by Congress's definition of "effluent limitation" as "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters[.]" 33 U.S.C. § 1362(11).

A cornerstone of the 1972 CWA remains its NPDES program, under which permits that include

these discharge-specific, water quality-based effluent limitations are issued. Congress specified that "compliance with a[n NPDES] permit" amounts to compliance with the CWA. 33 U.S.C. § 1342(k). In order for this statutory safe harbor, known as the "permit shield," to mean anything, the effluent limitations included in permits must be sufficiently specific so that permittees know how to ensure that their discharges comply. Permit terms that change depending on the reader and that expose permittees to after-the-fact enforcement actions directly undermine Congress's decision to provide a safe harbor from CWA liability for dischargers acting in good faith and in accordance with their known obligations.

The Ninth Circuit's decision upholding vague permit terms resurrects the inadequate pre-1972 regime to the detriment of both permit holders and water quality nationwide. Under Congress's careful design, the NPDES program requires permit writers to use water quality standards as a basis upon which to determine if effluent limits are necessary, and, if so, to derive discharge-specific, end-of-pipe, enforceable effluent limitations. Contrary to this scheme, the Ninth Circuit's decision allows permit writers to treat the water quality standards themselves as independently enforceable "limitations" without clarifying what is actually expected of an individual discharger to comply. This interpretation ignores the statute's clear distinction between effluent limitations and water quality standards, as well as the CWA's overall design and history, and even the U.S. Environmental Protection Agency's ("EPA") own position.

Crucially, for *amici*, generic water quality prohibitions undermine the certainty that Congress

intended the NPDES permitting program to provide under the permit shield provision. Unless this Court intervenes, permittees will remain vulnerable to arbitrary enforcement actions from regulators and citizen plaintiffs for "violating" unspecified, unknown, and unknowable requirements, as well as to court-created, *post hoc* interpretations of subjective water quality standards. This concern becomes more acute every day given the increasingly litigious regulatory environment permittees face.

Notably, these generic prohibitions against "causing or contributing to the violation of water quality standards" are frequently included in NPDES permits around the country. At particular risk are *amici* and other public utilities charged with running critical infrastructure systems and providing vital environmental and human health services to communities nationwide with limited public dollars. The investments public utilities make to maintain and improve their stormwater and wastewater systems often cost hundreds of millions, or even billions, of dollars and may take years or decades to complete. Generic water quality prohibitions threaten to upend or usurp these significant expenditures to the great detriment of the communities that made them. When meeting compliance obligations may entail tearing up city streets or investing the hard-earned money of disadvantaged ratepayers, it is critical that those compliance obligations not be a moving—and mutable—target. Simply stated, when public investments are inefficient because the goals they were designed to achieve are unexpectedly altered due to unforeseen regulatory requirements, rates increase. The generic prohibitions upheld by the Ninth Circuit, which effectively allow for the imposition of ever-changing regulatory

requirements on CWA permittees, are therefore fundamentally incompatible with sound infrastructure investment and the affordable provision of public clean water services.

This Court should grant certiorari to clarify permit writers' obligations under the CWA to establish clear, discharge-specific effluent limitations that fully apprise regulated entities of their compliance obligations.

ARGUMENT

I. THE DECISION BELOW DISREGARDS THE CWA'S TEXT AND UPENDS CONGRESS'S STATUTORY SCHEME.

A. Generic water quality prohibitions are inconsistent with the text, purpose, and history of the CWA.

The statutory analysis "begin[s], as always, with the text." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391 (2017). In the present case, the statutory text is straightforward: the CWA draws a clear distinction between the "effluent limitations" that apply to a permittee's discharges, and the "water quality standards" that set the overall goals for waters that receive not only the permittee's discharges, but also pollutants from other sources. Under this scheme, permit writers must take the lofty goals of the CWA and translate them into tangible, concrete actions that entities wishing to discharge into navigable waters must take to ensure those goals are ultimately attained.

CWA Section 301(b)(1) plainly illustrates this distinction by requiring permit writers to establish

"effluent limitations" that are "necessary to *meet*" or "required to *implement* any applicable water quality standard[.]" 33 U.S.C. § 1311(b)(1) (emphasis added). Congress further defined "effluent limitation" to mean "restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters[.]" 33 U.S.C. § 1362(11). Generic water quality prohibitions that merely tell permit holders to avoid violating water quality standards eliminate this core statutory distinction. They do not tell dischargers what is necessary to meet or what is required to implement applicable water quality standards, nor do they specify any restrictions on quantities, rates, and concentrations of pollutants. Rather than translate water quality goals into concrete requirements, these generic provisions instead function as an open-ended invitation for regulators or third parties to read in new requirements at any given time.[3]

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[3] While not directly at issue in the present case, these generic prohibitions are sometimes troublingly included in NPDES permits for municipal separate storm sewer systems (MS4s), which are also operated by several *amici*. Because Congress recognized that such systems have little practical ability to control what pollutants flow into stormwater drainage systems, it specified separate NPDES requirements for MS4s rather than require strict compliance with water quality standards. MS4s must only implement "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods[.]" 33 U.S.C. § 1342(p)(3)(B)(iii). Including the sorts of generic water quality prohibitions that the Ninth Circuit upheld in MS4 permits effectively writes the "maximum extent

(continued...)

Numerous courts, including this Court, have recognized the textual distinction between discharge-specific effluent limitations and a receiving water's water quality standards. *E.g.*, *EPA*, 426 U.S. at 204–05 (the CWA marked a shift away from water quality standards governing all dischargers to "restriction[s] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources") (citation omitted); *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) ("[W]ater quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits."); *Nat. Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) ("Water quality standards are a critical component of the CWA regulatory scheme because such standards serve as a guideline for setting applicable limitations in individual discharge permits."); *Trs. for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984) ("Effluent limitations are a means of *achieving* water quality standards."). As the Second Circuit aptly summarized, "although water quality standards and effluent limitations are related . . . the two are entirely different concepts and the difference is at the heart of the 1972 Amendments." *Bethlehem Steel Corp.*, 538 F.2d at 515; *accord Va. Elec. & Power Co. v. Costle*, 566 F.2d 446, 451 n.17 (4th Cir. 1977) (acknowledging the "fundamental differences in the statutory scheme between effluent limitations and water quality standards").

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practicable" requirement out of the CWA and leaves the door open for imposing impracticable, if not impossible, requirements on these public systems contrary to Congress's intent.

The CWA's purpose and history reinforce the textual distinction between effluent limitations and water quality standards that Congress adopted. Prior to the CWA's enactment in 1972, federal water pollution control laws relied on "ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution." *EPA*, 426 U.S. at 202. This water quality standards-based approach was deficient in large part because "[t]he goal of the discharge permit conditions was to achieve water quality standards rather than to require individual polluters to minimize effluent discharge[.]" *Id.* at 203 & n.6 (citing S. Rep. No. 92-414, at 5).

Mindful of this failure, when Congress enacted the CWA, it sought to address its "dissatisfaction with water quality standards as a method of pollution control," and thus replaced that ineffective scheme with a permitting program that would impose discharge-specific effluent limitations. *Bethlehem Steel Corp.*, 538 F.2d at 515; *see also* S. Rep. No. 92-414, at 8 ("[T]he Federal water pollution control program . . . has been inadequate in every vital aspect[.]"). Congress concluded that there was "[a] critical delay of enforcement" under the prior program in part because regulators could only bring enforcement actions *after* water quality standards had already been violated. *See* S. Rep. 92-414, at 4 (enforcement actions could be brought once "wastes discharged by polluters reduce water quality below the standards"); *see also EPA*, 426 U.S. at 204 (acknowledging that under prior regulatory scheme, regulators had to "work backward from an overpolluted body of water to determine which point sources . . . must be abated"). In the

absence of clear, discharge-specific limits, the prior *ex post* scheme "ma[d]e it very difficult to develop and enforce standards to govern the conduct of individual polluters." *Id.* at 202–03.

Under the 1972 statutory scheme, Congress expected that regulators would use the newly established NPDES permit program to "apply *specific* effluent limitations for each [] source." S. Rep. No. 92-414, at 44 (emphasis added), and water quality standards would serve only as a "measure of program effectiveness and performance, *not a means of elimination and enforcement*." *Id.* at 8 (emphasis added). Importantly, the effluent limitations apply at the point of discharge, rather than to the receiving water itself. *See* H.R. Rep. No. 92-911, at 102 (1972) (under § 301(b)(1)(C), "more stringent *effluent limitations* . . . [are] to be established consistent with . . . water quality standards") (emphasis added). Congress carefully defined "effluent limitation" to refer to specific and actionable restrictions. *See* 33 U.S.C. § 1362(11) ("effluent limitation" means "restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources"). By including this definition Congress sought to clarify that the "control requirements are not met by narrative statements of obligation, but rather are *specific* requirements of *specificity* as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources." S. Rep. No. 92-414, at 77 (emphasis added).

As this Court has observed, "[t]he history of the 1972 amendments shows that Congress intended to establish 'clear and identifiable' discharge

standards." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (quoting S. Rep. No. 92-414, at 81). Generic prohibitions on causing or contributing to water quality standard violations, however, make it "virtually impossible to predict the standard for a lawful discharge," and "[i]t is unlikely—to say the least—that Congress intended to establish such a chaotic regulatory structure." *Id.* at 496-97 (internal quotation marks and citation omitted). The Ninth Circuit's holding that such generic prohibitions are consistent with the CWA undermines Congress's deliberate move away from permits that merely instruct dischargers to achieve water quality standards towards permits that impose discharge-specific effluent limitations necessary to ensure waters maintain the applicable standards.

Longstanding EPA practice confirms what the text, purpose, and history make clear: Congress expected permit writers to develop discharge-specific limitations and to translate water quality standards into specific restrictions. In the early years of implementing the CWA, EPA emphasized that "both the discharger and the regulatory agency need to have an identifiable standard upon which to determine whether the facility is in compliance." *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (quoting EPA Memorandum on "Impossibility"). More recently, EPA reiterated that "[w]ater quality standards are not directly enforceable, despite commonly held beliefs," but instead, "NPDES permittees are required to meet their effluent limits," which are developed during the NPDES permitting process to achieve applicable water quality standards. *See* U.S. EPA, Watershed Academy Web: *Introduction to*

the Clean Water Act § 34, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2673.

To that end, EPA's regulations and permitting guidance set forth detailed requirements for determining whether a proposed discharge "will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard[.]" 40 C.F.R. § 122.44(d)(1)(i); *see also* U.S. EPA, *NPDES Permit Writers' Manual*, at §§ 6.2 & 6.3 (2010), https://www.epa.gov/sites/default/files/2015-09/documents/pwm_2010.pdf. Should a permit writer determine that such "reasonable potential" exists, the regulations and guidance prescribe how permit writers are to develop discharge-specific effluent limitations at levels that are "derived from, and compl[y] with all applicable water quality standards." *See* 40 C.F.R. § 122.44(d)(1)(vii)(A); *see also NPDES Permit Writers' Manual*, at § 6.4. Permit writers must then catalog and disclose all "data and information used to determine the applicable water quality standards and how that information . . . was used to derive" the specific effluent limitations in order to provide the "permit applicant and the public a transparent, reproducible, and defensible description of how the permit writer" derived the effluent limitations. *NPDES Permit Writers' Manual*, at § 6.4.1.5.

The Ninth Circuit's holding renders the aforementioned regulatory requirements superfluous by allowing permit writers to "simply give up and refuse to issue more specific guidelines" and instead force permittees to feel their own way through determining whether their conduct causes or contributes to a violation of any water quality standards. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 578 (2d Cir. 2015).

Rather than treat water quality standards as the waterbody goals upon which regulators must base enforceable permit requirements, the Ninth Circuit's opinion improperly conflates the goals themselves with the means of achieving them, to the severe detriment of permitting certainty and the extreme burden of permittees like public clean water utilities.

B. The Ninth Circuit's decision undermines Congress's intent to provide finality and regulatory certainty.

Relevant statutory provisions highlighting the CWA's fundamental distinction between effluent limitations and water quality standards "cannot be construed in a vacuum," but instead "must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit's holding that generic water quality prohibitions are consistent with the CWA not only disregards the plain language of the CWA, it also frustrates Congress's goal to ensure finality and certainty, which is reflected throughout the Act.

Section 402(k)'s "permit shield" expresses Congress's intent in the plainest of terms. That section assures permit holders that "[c]ompliance with a permit . . . 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[.]" 33 U.S.C. § 1342(k). Section 402(k) thus creates a safe harbor from enforcement under CWA sections 1319 and 1365, which authorize civil and criminal actions

by the government (§ 1319) and citizen suits (§ 1365).[4] As this Court has explained, the permit shield "serves the purpose of giving permits finality" by "insulat[ing] permit holders from changes in various regulations during the period of a permit" and "reliev[ing] them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

EPA has itself explained that a primary purpose for issuing a permit "is to prescribe with specificity the requirements that a [permit holder] will have to meet . . . so that the [permit holder] can plan and operate with knowledge of what rules apply[.]" EPA Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,312 (May 19, 1980). The permit shield then "places the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit." *Id.* As long as a permit applicant provides all the necessary information to a permit writer, it is the permit writer's responsibility to develop and incorporate into the permit all limits necessary to comply with the CWA. *Id.* Critically, "if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will [not] be enforced against[.]" *Id.*

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[4] Congress created a nearly identical safe harbor under Section 404 of the CWA—the statute's permitting program regulating the discharge of dredge and fill material into waters of the United States. *See* 33 U.S.C. § 1344(p) ("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, 1317, and 1343 of this title.").

Section 1369(b) reflects a similar emphasis on finality and certainty. Under that provision, judicial review of the issuance or denial of NPDES permits is available only "within 120 days from the date of such . . . issuance or denial," and issues that could have been raised during that 120-day window "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b). This window encourages full and frank participation from all interested parties, including third parties, *at the same time* to ensure effluent limitations protective of water quality are established *before* permit issuance. This window also assures both permittees and permit writers that any concerns over whether permit terms are sufficiently stringent—including, but not limited to, determinations that the covered discharges do not have the reasonable potential to cause or contribute to an exceedance of water quality standards—will be conclusively resolved by a certain date and will not be relitigated in an enforcement proceeding, such as in a citizen suit under 33 U.S.C. § 1365.

Generic water quality prohibitions gut these provisions of their finality-conferring force. The statutory safe harbor premised on compliance with an NPDES permit means nothing if that permit sets undefined and unknowable touchstones of compliance. And Congress's directive to bring all permit-related challenges within 120 days accomplishes nothing if agency enforcement staff or citizen plaintiffs can perpetually sue permittees alleging that the permittee must do more than what the permit writer deemed necessary at the time of permit issuance to avoid "causing or contributing to a violation of a water quality standard."

The CWA's legislative history reinforces the textual emphasis on finality and regulatory certainty. According to the CWA's chief congressional proponent, Senator Muskie, the "three essential elements" of the 1972 CWA are "uniformity, *finality*, and enforceability." 118 Cong. Rec. 33,692, 33,693 (1972) (emphasis added). As he noted, "[w]ithout these elements a new law would not constitute any improvement on the old." *Id.* And when Congress enacted the CWA's citizen suit provision, it specifically denounced "'common law' or court-developed definition[s] of water quality" and made clear that citizen suit enforcement "would not require reanalysis of . . . matters [that] have been *settled in the administrative procedure* leading to the establishment of such effluent" limitations. S. Rep. No. 92-414, at 79 (emphasis added). Congress expected that *permit writers* would determine and detail what limits are needed to ensure discharges will not run afoul of water quality standards, and that subsequent citizen suit enforcement of those limits would be judged based on "an objective evidentiary standard," not a re-trial of whether those limits were sufficient to begin with. *Id.*

EPA now contends, however, that permit writers must be able to include generic prohibitions as a "backstop" to ensure that discharges comply with the CWA, and the Ninth Circuit agreed. App. 36. But that position ignores the longstanding "backstop" authority that regulators already have under EPA's regulations, which allow for the modification, revocation, and reissuance of NPDES permits. Where necessary to incorporate any subsequently promulgated limits on toxic pollutants, address material changes in a permit holder's discharges, or correct technical errors, among other reasons, permitting authorities may

modify a permit's terms. *See* 40 C.F.R. §§ 122.62–122.63. Critically, however, such modifications are achieved outside of an enforcement context, and as such are undertaken by regulators, rather than outside litigants, and provide permittees fair notice and due process. In line with the holdings of this Court, EPA's modification regulations also ensure that, "[i]n general, permits are not modified to incorporate changes made in regulations during the term of the permit.[5] This is to provide some measure of certainty to both the permittees and the [EPA] during the term of the permits." 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984).[6]

The Ninth Circuit's holding that the challenged generic prohibitions are acceptable "backstop" provisions likewise ignores the multiple layers of review the CWA provides for ensuring NPDES permits contain all necessary requirements *before* they are issued, including any specific limitations that may be necessary to protect water quality. There are multiple opportunities during the permitting process for EPA and the public to review proposed permits and, ultimately, EPA can deny the issuance of any NPDES permit that does not comply with the CWA. *See* 40 C.F.R. § 123.44. Citizen groups may also challenge an issued permit if they do not believe it includes

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[5] As noted above, changes necessary to incorporate limits on toxic pollutants are a critical exception to this general rule, and they provide EPA with "backstop" authority that would in no way be impacted were this Court to reverse the Ninth Circuit's decision.

[6] NPDES permits are limited by statute to five-year terms. This ensures that permit limits reflect scientific advancements and new information, but are developed as part of a transparent, well-established process that allows for project planning and implementation as needed to meet any future limits.

necessary effluent limitations, so long as they do so within 120 days. *See* 33 U.S.C. § 1369(b)(1)(E). The numerous opportunities to reject, revise, or later update a permit belie the need for the kind of *carte blanche* "backstop" authority the generic water quality prohibitions upheld by the Ninth Circuit would grant to permit writers and third parties alike.

Under the decision below, permittees lack the finality and certainty that Congress intended to provide through the CWA's permit shield and the restrictions on judicial review of permits. Contrary to the holding of this Court, they place permit holders in a perpetual state of having to potentially litigate the question of whether the requirements in their permit are sufficiently strict. *See E. I. du Pont*, 430 U.S. at 138 n.28. This Court should grant the Petition to stop the nationwide erosion of permitting certainty the Ninth Circuit's holding paves the way for.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND IMPACTS COMMUNITIES NATIONWIDE.

This Court's intervention is necessary because the Ninth Circuit's misreading of the CWA will have significant consequences for public clean water utilities and the communities they serve nationwide. These utilities need predictability and certainty to plan and pay for the substantial water infrastructure investments necessary to meet the CWA's stringent requirements while improving the quality of our nation's waters. In addition to CWA compliance, utilities every day face challenges related to replacing aging sewer and stormwater infrastructure, increasing system resiliency in the face of climate change,

addressing emerging contaminants, and fending off cybersecurity threats. Generic water quality prohibitions compound these challenges by introducing untenable amounts of uncertainty into CWA compliance, thereby calling into question the significant public funds that utilities have and are continuing to invest in upgrading wastewater and stormwater systems to meet CWA requirements.

As stewards of public funds, municipal clean water agencies should not be required to plan, finance, and implement major infrastructure upgrades only to be told months or years later that the goal line has been moved after-the-fact. According to a 2021 report concerning national infrastructure investment needs by the American Society of Civil Engineers, "[i]n 2019, the total capital spending on water infrastructure at all levels was approximately $48 billion, while capital investment needs were $129 billion, creating an $81 billion gap." American Society of Civil Engineers, *2021 Report Card for America's Infrastructure* 159 (2021) https://infrastructurereportcard.org/wp-content/uploads/2020/12/National_IRC_2021-report.pdf. Similarly, in its most recent assessment on national wastewater and stormwater capital investment needs, EPA estimated that clean water utilities required $271 billion (or $337.1 billion in 2022 dollars) in capital investments to meet the water quality objectives of the CWA between 2012 and 2017. EPA, *Clean Watersheds Needs Survey 2012 Report to Congress*, at 1-2 (Jan. 2016), https://www.epa.gov/sites/default/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf. Ultimately, ratepayers must bear these enormous costs. *See* Rachel Layne, *Water costs are rising across the U.S. – here's why*, CBS News (Aug. 27, 2019),

https://www.cbsnews.com/news/water-bills-rising-cost-of-water-creating-big-utility-bills-for-americans/. Given the significant public resources needed to plan and pay for maintaining and upgrading the nation's wastewater and stormwater infrastructure, it is crucial for permittees to have a clear understanding of their compliance obligations so that they can make informed decisions and appropriately balance competing resource demands.

Furthermore, even though generic water quality prohibitions do nothing to inform permittees how to comply with the CWA or their permit, they can be invoked by agency enforcement staff and even citizen plaintiffs to impose *post hoc* changes to permits already in effect. *See* 33 U.S.C. §§ 1319, 1365. This not only upends Congress's carefully crafted permitting program, it also subjects permittees to disparate, after-the-fact enforcement under the CWA's strict liability scheme, 33 U.S.C. §§ 1311(a), 1342, which is backed by criminal penalties[7] and severe civil fines. *See id.* § 1319(c)-(d); *see also* 40 C.F.R. § 19.4 (EPA may assess civil penalties of up to $66,712 per day, adjusted for inflation, for each CWA violation); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (noting that "consequences to landowners even

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[7] The imposition of criminal penalties for violations of generic prohibitions "gives rise to serious vagueness concerns." *Sackett v. EPA*, 598 U.S. 651, 680 (2023); *see also id.* ("Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.") (internal quotation marks and citation omitted).

for inadvertent [CWA] violations can be crushing") (Kennedy, J., concurring).

A particularly damaging consequence of the Ninth Circuit's decision is that any citizen can usurp the role of permit writer at any time during the life of the permit to the extent they can persuade a court that a new limitation or action—one that the permitting authority did not deem appropriate to impose in exercising its best professional judgment—is necessary to achieve compliance with ambiguous water quality standards. This is especially troubling in the context of permits issued to public clean water agencies and municipalities.

Giving citizens the final word in what constitutes appropriate enforcement risks undermining the expertise of permit writers, scientists, and other subject matter experts within EPA and state environmental agencies. This is because "citizen groups largely lack the engineering and systems expertise that needs [to] be brought to bear in insuring that a remedial action is appropriate to the nature of the violation and that any cost imposed will not outweigh the benefit achieved." *See Conservation Law Found., Inc. v. Mass. Water Res. Auth.*, Civ. A. No. 22-10626, 2023 WL 2072429, at *4 (D. Mass. Feb. 17, 2023). This expertise is paramount in the context of municipal permittees, who are both environmental stewards and stewards of public funds, responsible for providing *affordable* clean water to communities. Thus, any enforcement action involving municipalities and clean water agencies must consider the complexity of wastewater and stormwater systems, affordability of rates, and limits of existing technologies. Third-party groups

lack the expertise necessary to adequately assess these issues.

Citizen groups also lack accountability that would require them to consider and balance the interests of numerous affected stakeholders, including impacted communities and individual ratepayers. "A [CWA] plaintiff pursuing civil penalties acts as a self-appointed mini-EPA[,]" and "once the target is chosen, the suit goes forward without meaningful public control." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting). In contrast to the EPA Administrator and state agency heads—who are political officials answerable to the President (or Governors), legislatures, and the public—citizen groups serve more targeted interests, and those interests may frequently be at odds with other public concerns. To be sure, citizens have an important right to enforce water pollution control requirements, but not to singlehandedly write them as the Ninth Circuit's decision upholding such open-ended permitting requirements would allow.

Public clean water utilities provide vital human health and environmental services to communities nationwide 24 hours a day, 365 days a year. *Amici* and other public utilities throughout the country work diligently to fulfill their regulatory obligations, including those imposed under the CWA. That they be given clear advance notice of those obligations is not only a fair expectation, it is one demanded by the text of the CWA and embedded in its history. *Amici* ask this Court to grant the Petition and restore the critical certainty undermined by the Ninth Circuit decision below.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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February 12, 2024