No. 23-753

IN THE

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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

PETITIONER'S REPLY BRIEF

CITY AND COUNTY OF SAN FRANCISCO
DAVID CHIU
San Francisco City Attorney
YVONNE R. MERÉ
Chief Deputy City Attorney
TARA M. STEELEY
Chief of Appellate Litigation
JOHN S. RODDY
ESTIE M. KUS
DAVID S. LOUK
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

BEVERIDGE & DIAMOND, P.C.
ANDREW C. SILTON
Counsel of Record
JOHN C. CRUDEN
RICHARD S. DAVIS
1900 N Street N.W., Suite 100
Washington, DC 20036
(202) 789-6000
asilton@bdlaw.com
MACKENZIE S. SCHOONMAKER
825 3rd Avenue, 16th Floor
New York, NY 10022

Counsel for Petitioner City and County of San Francisco

April 30, 2024

116661

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Statutes

Legislative Materials

Other Authorities

PETITIONER'S REPLY BRIEF

The Clean Water Act's (CWA or the Act) text and structure draw a clear distinction between *water quality standards*—a waterbody's desired condition—and *effluent limitations*, restrictions on pollutants that individual point sources may discharge. *See EPA v. California ex rel. State Water Res. Control Bd. (EPA v. California)*, 426 U.S. 200, 202–03 (1976). As Judge Collins explained in his dissent below, Congress created this distinction to "directly regulate[] discharges *from* specific point sources" rather than make individual point sources responsible for "the ultimate aggregate level of pollution in a body of water." App. 52 (emphasis added). Just as a chef will be more successful by specifying the quantities of ingredients that can go *into* a soup than by telling the line cooks simply not to make the *overall* dish "too salty," Congress focused on controlling pollutants at the point of discharge *into* waters, rather than controlling the quality *of* those waters.

San Francisco challenges two CWA permit conditions (the Generic Prohibitions) that measure the City's compliance based "solely on whether the receiving waters are meeting applicable water quality standards." App. 61 (Collins, J., dissenting). By analogy, these permit conditions hold San Francisco responsible for *the soup*'s saltiness, not just that of the ingredients *it* contributes. Consequently, how much salt San Francisco can add at any time without causing a "violation" depends entirely on what other cooks might put in the pot, and the City will only find out after the fact—after measuring *all* the ingredients added—whether it contributed to making the soup too salty.

The Generic Prohibitions make compliance with the CWA elusive, because a waterbody's ability to meet water quality standards at any time depends on pollutants that *all sources*—not just San Francisco—contribute. San Francisco consequently lacks advanced notice of how much it must control its discharges without violating the Generic Prohibitions.

The Generic Prohibitions fail to provide notice required by the CWA because they "effectively ignore" the Act's "critical distinction by making the ultimate, overall 'water quality standards' themselves the applicable [effluent] 'limitation.'" App. 63 (Collins, J., dissenting). By upholding the Generic Prohibitions, the Ninth Circuit created a conflict among the circuits and empowered the Environmental Protection Agency (EPA) to disregard the Act's instruction to EPA "to translate the *overall* water quality standards" into effluent limitations that notify permitholders how much they need to control their discharges. *Id.* at 53 (Collins, J., dissenting) (emphasis in original). San Francisco asks the Court to resolve the conflict and require EPA to uphold its obligations under the CWA.

EPA fails to show why review is not needed, and its Brief in Opposition (BIO) contrives a question on which the City does not seek certiorari. The question presented is *not* whether any permit provision or water quality standard is "too vague" or not "specific enough." BIO 9, 10. Rather, San Francisco asks the Court to make clear that the Act's text and structure forbid EPA from imposing permit conditions that baldly tell permitholders to avoid violations of receiving water quality standards, rather than restricting the quantities of pollutants they discharge.

EPA admits that the Generic Prohibitions impose no obligation apart from meeting water quality standards, BIO 10-12, confirming that this case is an ideal vehicle to resolve this question of law. EPA also fails to reconcile the circuit split that the Ninth Circuit created, or otherwise demonstrate why the Court should not resolve a question that *amicus* briefs from multiple municipalities, as well as fifteen trade associations, show to be of national importance. *See* Br. of *Amici Curiae* Nat'l Mining Ass'n, *et al.* (NMA Br.); Br. of *Amici Curiae* Public Wastewater & Stormwater Agencies & Municipalities.

Since filing its Petition, San Francisco has been threatened with a citizen suit, further illustrating the importance of granting certiorari. That suit seeks to hold San Francisco responsible under a provision in another of the City's permits that—like the Generic Prohibitions—makes San Francisco liable when a *waterbody* violates water quality standards. Because that prohibition does not specify how much *the City* must control its discharges, San Francisco will have to *litigate* to establish, *ex post*, what is required to comply with its permit. This scheme thwarts any reasonable possibility for the City to demonstrate compliance *ex ante* and avert litigation.

Congress designed the CWA so no permitholder could face this predicament. The Act requires EPA to prescribe effluent limitations so permitholders know their regulatory obligations and are shielded from unexpected CWA liability when they meet them. Without the Court's direction, EPA will continue issuing permits that cause their holders to suffer the same plight as San Francisco.

ARGUMENT

I. Certiorari is needed to restore the Act's clear line between receiving water quality goals and individual permitholders' pollutant control obligations.

San Francisco asks the Court to re-establish the critical distinction Congress drew in the CWA between general water quality goals and obligations that EPA may impose in National Pollutant Discharge Elimination System (NPDES) permits. This case does not turn, as EPA claims, on whether the wording of the Generic Prohibitions or any water quality standard is "specific enough."[1] BIO 10. Instead, the question presented impacts hundreds of thousands of NPDES permitholders: Does the Act allow EPA to impose permit conditions that—like the Generic Prohibitions— impose no end-of-pipe restrictions on pollutants discharged, instead making compliance turn "solely on whether the *receiving waters* are meeting applicable water quality standards"? App. 61 (Collins, J., dissenting) (emphasis added). The CWA's text, history, and structure all say "no."

In answering "yes," the Ninth Circuit empowered EPA to ignore the line Congress drew to ensure that permits "provide manageable and precise benchmarks for enforcement." S. Rep. No. 92-414, at 81 (1971). The Act's text achieves this goal by creating a "critical distinction" between (1) "overall 'water quality standards'" that

1. For this reason, it is immaterial to disposing of this case that San Francisco did not challenge any water quality standard's clarity (or lack thereof). *See* BIO 11, 12.

apply to a waterbody and (2) the "[effluent] 'limitations' that [EPA] must devise and impose" on a permitholder. App. 62 (discussing 33 U.S.C. § 1311(b)(1)(C)) (Collins, J., dissenting). While water quality standards describe a waterbody's "desired condition," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), EPA must then "translate the . . . water quality standards," App. 53 (Collins, J., dissenting), into permitholder-specific "effluent limitations"—"restriction[s] . . . [on] c*onstituents which are discharged from*" an individual point source. 33 U.S.C. § 1362(11) (defining "effluent limitation") (emphasis added).[2]

The Ninth Circuit, however, has empowered EPA to impose permit conditions that are "fundamentally inconsistent with" the Act's distinction between water quality standards and effluent limitations. App. 63 (Collins, J., dissenting). As Judge Collins explained, conditions that simply direct permitholders not to cause or contribute to water quality standards violations—like the Generic Prohibitions—"effectively ignore" the line Congress drew "by making the ultimate, overall 'water quality standards' themselves the applicable [effluent] 'limitation' for an individual discharger." *Id.*

---

2. Contrary to EPA's claim, BIO 12, Congress, courts, and *EPA itself* have consistently understood § 1311(b)(1)(C)'s use of "limitations" to be shorthand for the defined term "*effluent* limitations" used elsewhere in the section. *See, e.g.*, S. Comm. on Public Works, 93d Cong., 1 Legislative History of the Water Pollution Control Act Amendments of 1972, Serial No. 93-1, at 246 (1973) (§ 1311(b)(1)(C) requires "effluent limitations"); EPA, *NPDES Permit Writers' Manual* p. 6-1 (2010) (§ 1311(b)(1)(C) "requires that permits include any effluent limitations…."); *Trs. for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984) (§ 1311(b)(1)(C) imposes a requirement to set "effluent limitations").

EPA admits that the Generic Prohibitions do just that, conceding that they supply no requirements apart from attaining California's water quality standards. *See* BIO 11–12. But 33 U.S.C. § 1311(b)(1)(C) cannot authorize EPA to impose the Generic Prohibitions, lest EPA's obligation to set distinct effluent limitations become superfluous. *See* Petition 29 & n.14. By disregarding the CWA's text and structure in upholding the Generic Prohibitions, the Ninth Circuit has empowered "the agency [to] fundamentally abdicate[] the regulatory task assigned to it under the CWA": translating water quality standards into effluent limitations restricting a point source's discharges. App. 64 (Collins, J., dissenting).

The BIO showcases EPA's failure to acknowledge its obligations under the Act, underscoring the need for certiorari. If EPA respected Congress's design, it would not claim that water quality standards establish "specific limitations" for San Francisco's discharges. BIO 14 (citation and quotations omitted). The Act categorically precludes substituting water quality standards for effluent limitations by making clear that EPA must translate the former into the latter. EPA's assertion otherwise indicates its unwillingness to recognize how "the two are entirely different concepts and the difference is at the heart of the [CWA]." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 515 (2d Cir. 1976).

II. The Ninth Circuit's decision creates a circuit split and conflicts with the Court's precedent.

A. The Ninth and Second Circuits disagree over EPA's obligations under the Act.

The decision below's holding that the Act authorizes EPA to impose the Generic Prohibitions conflicts with the Second Circuit's invalidation of a substantively identical permit condition in *Natural Resources Defense Council v. EPA* (*NRDC)*, 808 F.3d 556 (2d Cir. 2015). *See* Petition 21–24. EPA attempts to distinguish this case on the irrelevant basis that the City's permit identifies applicable water quality standards. BIO 15.

EPA's argument illustrates its failure to respect its obligations under the CWA. As Judge Collins explained below, EPA's action in *NRDC* violated the CWA because generic prohibitions provide "a mere recitation of the ultimate objective"—meeting water quality standards. App. 64. By imposing no requirements other than reciting water quality goals, these prohibitions "in fact add nothing." *NRDC*, 808 F.3d at 578. They give permitholders no "specific guidance on the discharge limits" they must meet. *Id.* (citation omitted). Here, EPA's citation to standards does not alter that they provide only the ultimate objective: goals for *receiving water* quality. Such generic standards cannot provide what the Act requires: "specific guidance" on *how* San Francisco—or any other permitholder—must control *its* discharges. *Id.* at 578.

EPA's remaining arguments for distinguishing *NRDC* merely parrot the Ninth Circuit's failed attempts to avert a circuit split. *First*, EPA's observation that San

Francisco's permit contains conditions other than the Generic Prohibitions in no way distinguishes this case from *NRDC*. BIO 15. As the Petition explains, the permit invalidated in *NRDC also* used a generic prohibition to supplement other conditions, rendering both cases substantively identical. Petition 23.

Second, EPA baselessly asserts that *NRDC* turned on the suit being brought by environmental groups rather than regulated entities. BIO 15–16. The parties' objectives played no role in *NRDC*, however, nor are they ever material to the scope of EPA's obligations under the CWA. Petition 24. In any event, San Francisco's objective is identical to those of the groups seeking review in *NRDC*: obtaining "greater regulatory clarity" and relief from EPA's "abdication of its regulatory responsibility" to translate water quality standards into effluent limitations. App. 68–69 n.4 (Collins, J., dissenting).

B. The Ninth Circuit departed from the Court's precedent.

The decision below would not have allowed EPA to ignore the Act's line between water quality standards and effluent limitations had the Ninth Circuit adhered to this Court's guidance in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). In *Jefferson County*, the Court recognized how the Act maintains its central distinction by requiring that "water quality standards . . . be translated into specific limitations for individual projects." 511 U.S. at 716. The Ninth Circuit's holding cannot be reconciled with *Jefferson County* because generic bans on violating water quality standards demand no "translat[ion]" into any individualized restrictions. *See* Petition 26–27.

EPA stretches to cure this conflict by ignoring *Jefferson County*'s facts. When the Court endorsed the imposition of a "requirement" to "operate . . . consistently with [] water quality standards," it referred to a dam's acceptable numeric flow rate translated from a water quality standard, not a generic restriction. 511 U.S. at 715. This language cannot be read, as EPA argues, BIO 13, to support the decision below.

The Court's explanation that "broad, narrative [*i.e.*, non-numeric] criteria" may be "enforce[d]" likewise does not empower the Ninth Circuit to waive off EPA's obligation to translate water quality standards into individualized restrictions. 511 U.S. at 716. The Court in *Jefferson County* made clear that these "open-ended criteria . . . must be translated into specific limitations for individual projects." *Id.* at 716.

III. The decision below will perpetuate widespread regulatory uncertainty.

A. Water quality standards provide no benchmarks for individual compliance.

By erasing the Act's distinction between effluent limitations and water quality standards, the Ninth Circuit has sanctioned EPA's revival of the "ineffective" regulatory approach that Congress intended the CWA to replace: holding individual dischargers responsible for conditions in a waterbody that violate water quality standards. *EPA v. California*, 426 U.S. at 202. Prior to the CWA, an individual only learned *retrospectively* if it violated the law, by "work[ing] backward from an overpolluted body of water" to determine if its discharges—in combination

with other sources—caused the waterbody to exceed a standard. *Id.* at 204; *see* Petition 6–7. This collective, *ex post* approach failed to provide "standards to govern the conduct of individual polluters," leaving them without prior notice of how much they needed to control their discharges. *EPA v. California*, 426 U.S. at 203.

Much like that regime which Congress to replace, the generic water quality prohibitions blessed by the decision below require permitholders to "work backward," providing no guidance on how permitholders must control their discharges. As Congress recognized, these problems "stem[] from the character of the [water quality] standards themselves": they set goals with which multiple sources must "collectively conform" rather than a performance standard for any individual. *Id.* at 202, 205.

Even with a precise numeric water quality standard, a permitholder cannot compare its discharge to *that* number to identify or prevent a violation. How much one can discharge at any time will depend on overall pollution levels in the receiving waterbody, which will vary in response to other "sources of pollution." App. 64 (Collins, J., dissenting). Thus, a permitholder can only determine if it violated a generic prohibition retrospectively, when it learns whether their discharge—in combination with other sources—created conditions exceeding the standard.

These uncertainties alone make the level of pollution control an individual must achieve "hopelessly indeterminate." *Sackett v. EPA*, 598 U.S. 651, 681 (2023) (citation and quotations omitted). Permitholders know even less about how much they must control their discharges when a narrative water quality standard does not even

specify any pollutant levels that a waterbody must meet. For instance, California's prohibition on "objectionable [] growths" in waters, 9th Cir. E.R. 517, neither defines what makes growths "objectionable" nor what pollutant levels cause them. *See* Petition 9–10.

B. The decision below exposes permitholders to enforcement without prior notice of their obligations.

Unless the Court intervenes, EPA will continue imposing permit conditions that subject permitholders to the "crushing consequences" of CWA enforcement without apprising them of their pollution control obligations. *Sackett*, 598 U.S. at 660 (citation and quotations omitted). As described above, generic bans on violating water quality standards provide individuals with no fixed pollution control targets. Instead, pollutant levels that a permitholder *should have* achieved get adjudicated *ex post* during an enforcement action based on evidence and expert testimony. *See* Petition 29–32. A permitholder thus cannot be sure *ex ante* to avert enforcement (or protect the environment) because any compliance benchmark is only defined during litigation.

San Francisco will soon face a citizen suit that illustrates the bind that the Ninth Circuit's decision allows EPA to create for permitholders. San Francisco Baykeeper recently notified the City that Baykeeper intends to sue under 33 U.S.C. § 1365 to enforce, among other things, a provision in another of the City's NPDES permits prohibiting San Francisco from causing "'a violation of any water quality standard for receiving waters.'" S.F. Baykeeper, Notice of Violation and Intent

to File Suit Under the Clean Water Act 19 (Mar. 6, 2024), https://perma.cc/XS2G-CG8N (quoting NPDES No. CA0037664 § V.C. (Aug. 14, 2013)).

Congress intended Baykeeper's pre-suit notice to provide "an opportunity [for the City] to bring itself into complete compliance" and avert litigation, but San Francisco cannot do so here. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). Because the level of pollution control that the City must achieve will be established only *during the lawsuit*, the City cannot avert litigation through compliance. The City similarly cannot defend itself using the Act's Permit Shield, 33 U.S.C. § 1342(k). *See* Petition 32–35. This defense requires that a defendant discharge "precisely in accordance with" its permit's requirements, but the City could meet all of its permit's detailed requirements and *still* not be able to invoke the Permit Shield because a plaintiff alleged that the City's discharges have not met a yet-to-be-defined threshold. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carrol Cnty.*, 268 F.3d 255, 266 (4th Cir. 2001); Petition 34; NMA Br. 17.

Such lawsuits potentially impose enormous costs on permitholders like San Francisco. If found liable, permitholders face civil penalties and injunctive relief that could run into the billions of dollars. *See* Petition 13 & n.8. The costs of defending such a complex case can also be enormous, *see* NMA Br. 16, and as with any citizen suit, the City will be exposed to the risk of bearing Baykeeper's costs and attorneys' fees. *See* 33 U.S.C. § 1365(d).

Without review of the decision below, countless more permitholders will struggle with undefined obligations

and citizen suits they cannot avoid. EPA continued issuing permits containing generic water quality prohibitions after being reversed by the Second Circuit, Petition 12, and the Ninth Circuit's ruling virtually guarantees that the agency will continue doing so unless the Court intervenes.

CONCLUSION

The Court should grant the Petition.

April 30, 2024

Respectfully submitted,

City and County of San Francisco
David Chiu
San Francisco City Attorney
Yvonne R. Meré
Chief Deputy City Attorney
Tara M. Steeley
Chief of Appellate Litigation
John S. Roddy
Estie M. Kus
David S. Louk
Deputy City Attorneys
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

Beveridge & Diamond, P.C.
Andrew C. Silton
Counsel of Record
John C. Cruden
Richard S. Davis
1900 N Street N.W., Suite 100
Washington, DC 20036
(202) 789-6000
asilton@bdlaw.com
Mackenzie S. Schoonmaker
825 3rd Avenue, 16th Floor
New York, NY 10022

Counsel for Petitioner City and County of San Francisco