No. 23-753

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
PETITIONER,

v.

ENVIRONMENTAL PROTECTION AGENCY.

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

BRIEF OF *AMICI CURIAE* NATIONAL MINING ASSOCIATION, ET AL., SUPPORTING PETITIONER

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QUESTION PRESENTED

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.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTERESTS OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 7
ARGUMENT 11
I. NPDES Permit Conditions That Hold Permittees Directly Liable For The Quality Of Receiving Waters Have Devastating Consequences For The Business Community And The Economy 11
II. Receiving Water Prohibitions Are Inconsistent With The CWA's Text And Design 22
CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,
261 F.3d 810 (9th Cir. 2001)..... 15

Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.,
728 F.3d 868 (9th Cir. 2013)..... 16

E.I. du Pont de Nemours & Co. v. Train,
430 U.S. 112 (1977)..... 14, 21

EPA v. Cal. ex rel. State Water Res. Control Bd.,
426 U.S. 200 (1976)..... 13, 25, 26

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,
629 F.3d 387 (4th Cir. 2011)..... 16

La. Env't Action Network v. City of Baton Rouge,
677 F.3d 737 (5th Cir. 2012)..... 16

League of Wilderness Defs. v. Forsgren,
309 F.3d 1181 (9th Cir. 2002)..... 20

Loper Bright Enters. v. Raimondo,
144 S. Ct. 2244 (2024)..... 24

Nat. Res. Def. Council, Inc. v. County of Los Angeles,
725 F.3d 1194 (9th Cir. 2013)..... 14

Naturaland Tr. v. Dakota Fin. LLC,
41 F.4th 342 (4th Cir. 2022) 16

Nw. Env't Advocs. v. City of Portland,
56 F.3d 979 (9th Cir. 1995)..... 16

Ohio Valley Env't Coal. v. Fola Coal Co.,
845 F.3d 133 (4th Cir. 2017)..... 18

Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD,
523 F.3d 453 (4th Cir. 2008)..... 16

Piney Run Pres. Ass'n v. Cnty. Comm'rs,
268 F.3d 255 (4th Cir. 2001)..... 11, 13, 18

Puerto Rico Aqueduct & Sewer Auth.,
4 F.4th 63 (1st Cir. 2021)..... 16

S. River Watershed All., Inc. v. DeKalb County,
69 F.4th 809 (11th Cir. 2023) 16

Sackett v. EPA,
598 U.S. 651 (2023).....8, 15, 16, 19, 22

Sierra Club v. ICG Hazard, LLC,
781 F.3d 281 (6th Cir. 2015)..... 14

Tex. Indep. Producers & Royalty Owners Ass'n v. EPA,
435 F.3d 758 (7th Cir. 2006)..... 13

Statutes And Rules

28 U.S.C. § 2462 15

33 U.S.C. § 1311 .....10, 22, 23, 25

33 U.S.C. § 1342 ..... 8, 13, 25

33 U.S.C. § 1344 7

33 U.S.C. § 1365 16

86 Stat. 844, Pub. L. No. 92-500 22

Regulations

40 C.F.R. § 19.4 15

40 C.F.R. § 122.1 25

40 C.F.R. § 122.44 7

45 Fed. Reg. 33,290 (May 19, 1980) 14, 21

Other Authorities

David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. Colo. L. Rev. 377 (2021) 20

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James T. Lang, *Citizens' Environmental Lawsuits*, 47 Tex. Env't L.J. 17 (2017)..... 16, 19

Oxford English Dictionary Online (2024) 23

U.S. Gov't Accountability Off., *Clean Water Act: EPA Needs to Better Assess and Disclose Quality of Compliance and Enforcement Data* (July 2021) 12

W.M. Stewart, et al., *The Contribution of Commercial Fertilizer Nutrients to Food Production*, 97 Agronomy J. 1 (Jan. 2005)..... 6

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are leading national trade associations whose members have long been impacted by environmental laws and regulations on the business community, including the mining, energy, manufacturing, construction, chemical, farming, and agricultural sectors. *Amici* have many members who are subject to National Pollutant Discharge Elimination System ("NPDES") permits, many of which include vague, generic conditions directing permittees to avoid violating water quality standards, like those at issue in this case. If EPA and States are allowed to continue imposing such conditions, *Amici*'s members will likely see drastically increased liability and exposure for alleged permit violations, with little or no practical way to ensure compliance.

The National Mining Association ("NMA") is a national trade association whose 250-plus members include most of the producers of the Nation's coal, metals, agricultural, and industrial minerals; the manufacturers of mining equipment; and other firms serving the mining industry. NMA's members produce a range of commodities, all of which are essential to U.S. economic and national security,

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *Amici,* their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

supply chain, and energy and infrastructure priorities. The NMA is the only national trade association that serves as the voice of the entire U.S. mining industry and the thousands of American workers it employs before Congress, the federal agencies, and the judiciary.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, which is a $639 billion enterprise and a key element of the Nation's economy. ACC participates on behalf of its members in administrative proceedings and in litigation arising from those proceedings.

The American Farm Bureau Federation ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all 50 States and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. AFBF's mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as an *amicus* in this and other courts.

The American Forest & Paper Association ("AF&PA") serves to advance U.S. paper and wood products manufacturers through fact-based public policy and marketplace advocacy. The forest products

industry is circular by nature. AF&PA member companies make essential products from renewable and recyclable resources, generate renewable bioenergy, and are committed to continuous improvement through the industry's sustainability initiative—*Better Practices, Better Planet 2030: Sustainable Products for a Sustainable Future*. The forest products industry accounts for approximately five percent of the total U.S. manufacturing GDP, manufactures about $350 billion in products annually, and employs about 925,000 people. The industry meets a payroll of about $65 billion annually and is among the top 10 manufacturing sector employers in 43 States.

The American Gas Association ("AGA") represents critical domestic infrastructure—namely, local natural gas distribution companies that deliver natural gas to homes and businesses. AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77 million residential, commercial, and industrial natural gas customers in the United States, of which 96 percent—more than 74 million customers—receive their gas from AGA members. AGA and its members advocate for the safe, reliable, and environmentally responsible delivery of natural gas across the country. Today, natural gas meets nearly one-third of the United States' energy needs.

The American Petroleum Institute ("API") is a national trade association that represents all segments of America's natural gas and oil industry, which supports nearly 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API's nearly 600 member companies produce, process, and distribute the majority of the Nation's energy. API was formed in 1919 as a standards-setting organization and has developed more than 800 standards to enhance operational and environmental safety, efficiency, and sustainability.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 States and in every industrial sector. Manufacturing employs 13 million men and women, contributes $2.87 trillion to the U.S. economy

annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the Nation. NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the Nation's leading small business association. NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The National Pork Producers Council ("NPPC") is an association of 43 state pork producer organizations and the global voice in Washington, D.C. for the Nation's nearly 60,000 pork producers. NPPC conducts public policy outreach at both the state and federal level with a goal of meeting growing worldwide demand for pork while simultaneously protecting animal welfare and the capital resources of pork producers and their farms. More broadly, NPPC

and its members throughout the United States work to promote the social, environmental, and economic sustainability of U.S. pork producers and their partners. As part of that mission, it regularly participates as an *amicus* in court proceedings.

The Southeastern Lumber Manufacturers Association (the "Association") is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 States, primarily in the South. With an emphasis on government affairs, marketing, management, and operational issues, the Association offers programs to support independent lumber manufacturers.

The Fertilizer Institute ("TFI") represents companies engaged in all aspects of the United States' fertilizer supply chain. The industry is essential to ensuring farmers receive the nutrients needed to enrich soil and grow the crops that feed our Nation and the world. Fertilizer is critical to feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all grown food around the world today is made possible through the use of fertilizer production in the United States and foreign markets.[2] The U.S. fertilizer sector is comprised of producers, importers, wholesalers, and

[2] W.M. Stewart, et al., *The Contribution of Commercial Fertilizer Nutrients to Food Production*, 97 Agronomy J. 1, 1–6 (Jan. 2005).

retailers. The industry supports 487,000 American jobs with annual wages in excess of $34 billion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Clean Water Act ("CWA") in 1972, replacing the Federal Water Pollution Control Act and overhauling the Nation's clean water regulatory regime. Among the CWA's transformative measures, Congress created the National Pollutant Discharge Elimination System ("NPDES") permit program, which solved many of the compliance and enforcement difficulties in the prior regime.[3] The NPDES program is a vital aspect of the CWA, with over 330,000 facilities nationwide maintaining active NPDES permits. Under that program, as applicable, a project owner or operator responsible for a discharge into navigable waters must apply for a permit either to the State or to the EPA. The State or EPA, in turn, establishes the effluent limitations, either numeric or narrative,[4] that permittees must meet to comply with

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[3] The NPDES program differs from the CWA's similar-yet-distinct Section 404 permit program, which deals only with dredged or fill material into navigable waters of the United States at specified sites. 33 U.S.C. § 1344.

[4] Neither Petitioner nor *Amici* object to the inclusion of appropriate narrative effluent limits in NPDES permits. *See* Brief for Petitioner ("Br.") at 4–5. Narrative limits describe processes that must be followed (*e.g.*, best management practices, *see* 40 C.F.R. § 122.44(k)) or a condition of the

applicable water quality standards of the waterbody receiving the discharge, and must specify such limitations in the text of each permit.

The NPDES program protects the Nation's waters, while also offering a key benefit for permittees: security under the CWA's permit shield provision, 33 U.S.C. § 1342(k), for discharges that comply with permit specifications. That is, if a permittee complies with the conditions in its NPDES permit, no regulatory agency or private party can sue the permittee based upon allegations that its permitted discharges violate the CWA. This offers owners and operators the predictability and certainty necessary to invest in new or expanded facilities and infrastructure with confidence. It also enables permittees to operate in ways that protect them from the CWA's "crushing" liability provisions, *Sackett v. EPA*, 598 U.S. 651, 660 (2023), which can entail government enforcement actions, citizen suits, significant civil penalties, and even criminal liability.

Permit conditions that hold permittees directly liable for the quality of receiving waters, rather than the quality of their own discharges into those waters, undermine the NPDES program and the permit shield. These generic prohibitions are not tied to any

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discharge that must be achieved—for example, prohibiting the discharge of floating solids or visible foam—and, when appropriately crafted, provide sufficient specificity for a permittee to demonstrate compliance.

specific effluent limitations on the content of the permittee's discharges. Instead, they make the permittee legally responsible for the overall quality of receiving water (here, the Pacific Ocean), even though there may be dozens or even hundreds of other permitted and unpermitted discharges into the same waterbody. If the CWA allows such prohibitions, *Amici's* members and other permittees have no way of knowing in advance whether their discharges will comply with their NPDES permits, given that the quality of a waterbody often depends on numerous variables beyond a permittee's control. Without any means for anticipating when a discharge might violate a water quality standard, the permit shield's vital protections would no longer serve their purpose.

Amici represent nearly every business sector across the U.S. economy, which relies upon the certainty of the permit shield to satisfy the Nation's transportation, infrastructure, manufacturing, and other needs. Without the specific permitting conditions that the CWA promises, it will be impossible for many permittees to protect themselves from unanticipated CWA liability. When EPA and States condition compliance on the overall quality of receiving waters, *Amici*'s members and other permittees are left exposed to the potentially devastating and unnecessarily costly consequences of a government enforcement action or citizen suit, and all of the penalties associated with such actions. By contrast, when the permitting authority devises specific numeric or narrative discharge limits

specifying the acceptable quality of the discharge itself, as the CWA requires, permittees have fair notice of their discharge obligations and so may take advantage of the critical permit shield.

Nothing in the CWA's text, context, or design permits EPA or States to impose generic prohibitions conditioning CWA compliance on the overall quality of the receiving water. Under Section 301(b)(1)(C), EPA or States must calculate specific limitations to govern discharges from a point source. Permit conditions that broadly require a permittee to avoid (somehow) violating water quality standards are inconsistent with the statutory text and structure. Nor can such an interpretation be reconciled with the pre-enactment statutory context. With the CWA, Congress did away with the Federal Water Pollution Control Act's ineffective standards for assessing whether a discharge causes or contributes to a violation of water quality standards. If this Court were to allow EPA and States to condition NPDES permit compliance on receiving water quality, Congress' focus on regulating discharges, and the CWA's explicit permit shield, would be gutted. *Amici*'s members and other permittees would, in turn, lose the ability to structure their operations in accordance with their NPDES permits, and would be exposed to potentially devastating liability.

This Court should reverse the Ninth Circuit and end the harmful practice of EPA and States placing receiving water prohibitions in NPDES permits.

ARGUMENT

I. NPDES Permit Conditions That Hold Permittees Directly Liable For The Quality Of Receiving Waters Have Devastating Consequences For The Business Community And The Economy

The CWA fundamentally changed the Nation's water-quality regulation, protecting waterways while providing regulated entities the security and certainty of knowing how to comply with their discharge obligations and avoid liability. By requiring regulators to impose specific effluent limitations and shielding permittees from liability after compliance with those limitations, the CWA promotes infrastructure construction and investment and allows *Amici*'s members to conduct operations vital to the national economy. In contrast, generic prohibitions against violating water quality standards fail to tell regulated entities how to comply, and thus expose permitholders to widespread regulatory uncertainty and litigation risk. This subverts a key purpose of the NPDES permitting program and the permit shield: to provide certainty to regulated entities that comply with their permits.

A. The CWA's scheme of regulating discharges through specific effluent limitations ensures that permitholders can know what they must do to comply with their NPDES permits. When paired with the CWA's "permit shield," *see Piney Run Pres. Ass'n v.*

Cnty. Comm'rs, 268 F.3d 255, 266 (4th Cir. 2001), this statutory regime provides critical predictability, offering permittees the security of knowing that their compliance efforts will protect them from the CWA's sweeping liability provisions.

The CWA's NPDES permitting provisions enable permittees to know their allowable discharges and to structure their operations accordingly. When an operator plans to discharge a pollutant, it identifies that pollutant in its NPDES permit application. The State or EPA then will consider the pollutant and any data on discharges to establish an effluent limitation based on (a) the operator's likely discharge, and (b) either the application of a technology-based effluent limit or the development of a water quality-based limit reflecting the level of pollutant that the receiving water can assimilate while achieving water-quality standards. An NPDES permit thus gives a permittee the necessary tools to design and monitor its operational and treatment systems: if a permittee knows the specific effluent limitations that restrict the nature or contents of discharges from its point sources, then it may design, construct, operate, and maintain its facilities, and restrict the nature or contents of discharges from its point sources, to ensure CWA compliance.

Today, NPDES permits are ubiquitous. More than 330,000 permittees maintained active NPDES permits in fiscal year 2020. U.S. Gov't Accountability Off., *Clean Water Act: EPA Needs to Better Assess and*

Disclose Quality of Compliance and Enforcement Data 7 (July 2021).[5] This includes permittees covered by "general permits," *id.*, issued by States or EPA for all regulated entities engaging in a particular activity, *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 435 F.3d 758, 761 (7th Cir. 2006) (citation omitted), as well as those covered by individual permits governing discharges from a single facility. Permits that provide specific effluent limitations offer predictability for regulated entities, allowing *Amici*'s members and other permittees to best meet the Nation's transportation, infrastructure, manufacturing, construction, agricultural production, and other critical needs.

Permittees, including *Amici*'s members, which represent virtually every part of the U.S. economy, depend upon specific effluent limitations and the permit shield to provide a clear and predictable regulatory framework for lawfully operating their businesses. Under the CWA, "[c]ompliance with a permit issued" pursuant to Section 1342 "shall be deemed compliance" with various substantive provisions of the CWA. 33 U.S.C. § 1342(k). "[I]f a permit holder discharges pollutants precisely in accordance with the terms of its permit," that permit will generally "'shield' its holder from CWA liability." *Piney Run Pres. Ass'n*, 268 F.3d at 266; *see also EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). The permit shield's "purpose" is "to

[5] Available at https://www.gao.gov/assets/gao-21-290.pdf.

insulate permit holders from changes in various regulations during the period of a permit and to relieve 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). As a result, the permit shield "affords consistent treatment to NPDES permit holders nationwide," *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 291 (6th Cir. 2015), and provides a "major benefit to a permittee because it protects the permittee from any obligation to meet more stringent limitations promulgated by the EPA unless and until the permit expires," *Nat. Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013) (citations omitted). Under this regulatory framework, NPDES permit holders need only look to their permits to know various of their compliance obligations, and so are afforded certainty and "finality." *E.I. du Pont de Nemours*, 430 U.S. at 138 n.28.

EPA itself has long recognized this important aspect of the NPDES permit program, including the permit shield. As the agency has explained, the purpose of an NPDES permit "is to prescribe with specificity the requirements that a facility will have to meet . . . so that the facility can plan and operate with knowledge of what rules apply," while allowing "the permitting authority [to] redirect its standard-setting efforts elsewhere." 45 Fed. Reg. 33,290, 33,312 (May 19, 1980). "[A] permittee may

rely on its [ ] permit document to know the extent of its enforceable duties." *Id.*

If a permittee fails to comply with the conditions in its NPDES permit, and thus loses the benefit of the permit shield, the consequences can be "crushing." App.65 (Collins, J., dissenting) (quoting *Sackett*, 598 U.S. at 660). Under the CWA, an operator may face criminal liability for the mere negligent discharge of pollutants. *Sackett*, 598 U.S. at 660 (citing 33 U.S.C. § 1319(c)). A criminal prosecution can result in "severe criminal penalties including imprisonment." *Id.* With respect to civil liability, "expansive interpretations of the term 'violation,'" plus a lengthy five-year statute of limitations period, further increase operators' potential exposure. *Id.* Indeed, these civil penalties "can be nearly as crushing as their criminal counterparts." *Id.* at 660–61 (citing 28 U.S.C. § 2462; *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813, 818 (9th Cir. 2001)). Under Section 1319, a permittee may face civil penalties of over $66,000 *each day* it remains in violation. 33 U.S.C. § 1319(b), (d); 40 C.F.R. § 19.4. To be clear, the statutory maximum penalty is over $66,000 per violation per day, meaning a permittee with multiple alleged violations could accrue six- or seven-figures of penalties per day. The permittee may also be subject to an injunction which, depending on the nature of the injunctive relief, could come at significant cost. 33 U.S.C. § 1319(b), (d); 40 C.F.R. § 19.4. With its "capacious definition of 'pollutant,' its

low *mens rea*, and its severe penalties," "[t]he CWA is a potent weapon." *Sackett*, 598 U.S. at 660–61.

The CWA also authorizes "citizen suits" that empower "any citizen" to "commence a civil action on his own behalf" "against any person" for violation of CWA effluent standards or limitations placed on permits. 33 U.S.C. § 1365(a). Citizens, like States and EPA, may sue operators and seek the "crushing" civil penalties assessed on a per-day basis. *Sackett*, 598 U.S. at 660. They may also pursue recovery of litigation costs, including attorney and expert witness fees, 33 U.S.C. § 1365(d), which incentivize such lawsuits, *see* James T. Lang, *Citizens' Environmental Lawsuits*, 47 Tex. Env't L.J. 17, 22 (2017). These citizen suits are now commonplace and require a permittee to defend itself in court for potential permit violations even if regulators do not decide to pursue an enforcement action.[6] As a result, permittees face ever-increasing exposure for discharges.

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[6] *See, e.g.*, *S. River Watershed All., Inc. v. DeKalb County*, 69 F.4th 809 (11th Cir. 2023); *Naturaland Tr. v. Dakota Fin. LLC*, 41 F.4th 342 (4th Cir. 2022); *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63 (1st Cir. 2021); *Cal. Sportfishing Prot. All. v. Chico Scrap Metal, Inc.*, 728 F.3d 868 (9th Cir. 2013); *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD*, 523 F.3d 453 (4th Cir. 2008); *Nw. Env't Advocs. v. City of Portland*, 56 F.3d 979 (9th Cir. 1995).

B. NPDES permits that condition CWA compliance on the quality of a receiving water effectively nullify the permit shield, exposing regulated entities to government enforcement actions and citizen suits, potentially significant civil penalties, and even criminal liability. If EPA and States are allowed to use such conditions, the consequences for permittees could be devastating.

The increasingly "frequent[ ]" use of permit conditions that measure compliance on whether receiving waters meet water quality standards, App.34, deprives permittees of the recognized benefits of obtaining an NPDES permit. Instead of measuring CWA compliance based on whether a permittee's discharges meet effluent limitations, receiving water prohibitions determine a permittee's compliance based upon whether a waterbody ultimately meets water quality standards. But whether a receiving water meets water quality standards depends upon more than just the permittee's specific discharges. Meeting water quality standards depends upon *all* discharges into the waterway, direct and indirect, permitted and unpermitted. Any amount of discharge of certain pollutants could "contribute" to a violation of water quality standards, depending on the pollution levels of the receiving water. App.65 (Collins, J., dissenting). And any discharge into a receiving water that is already not meeting its water quality standards would raise the prospect of CWA liability, despite a permittee's having obtained and otherwise complied with an NPDES permit. When

regulators condition a permittee's compliance on the quality of receiving waters, the permittee has no reliable means of structuring its operations to avoid CWA liability, rendering the CWA's permit shield meaningless in many instances.

Complying with such receiving water conditions is virtually impossible. A permittee may not know whether a discharge violates its NPDES permit until after the discharge is made, the permittee is sued, and a court determines the precise level of discharge that may contribute to a violation of a water quality standard in the receiving water. *See, e.g.*, *Ohio Valley Env't Coal. v. Fola Coal Co.*, 845 F.3d 133, 136–38 (4th Cir. 2017). Indeed, even if a permittee were to develop its own assessment of the quality of its effluent needed to assure that water quality standards would not be violated, there is no guarantee that its state or federal regulator would agree that such limits are proper, appropriately protective of water quality, or lawful. Without specific effluent limitations developed by a regulator and included in an NPDES permit, a permittee cannot determine whether its discharges are "precisely in accordance with" the permit's terms. *Piney Run*, 268 F.3d at 266.

Permit conditions that tie a permittee's liability to the quality of the receiving water rather than effluent limitations dissuade owners and operators from investing in infrastructure, because such conditions create a substantial risk that these investments will be undercut by CWA litigation. To

the extent that an operator is applying for an NPDES permit for new construction, the permit conditions and effluent limitations will dictate how the permittee designs its operational and treatment systems to ensure its facility complies with the CWA. A permittee may even change its raw material inputs and processing technology to limit the presence of certain expensive-to-treat pollutants that may be strictly controlled by an NPDES permit. These design decisions are expensive: permittees can spend millions of dollars designing and building wastewater treatment, storage, and management systems in reliance on and in conformance with their NPDES permits. Receiving water prohibitions undermine those investments, leaving permittees vulnerable to the "crushing consequences" of an enforcement action or other litigation notwithstanding their best efforts to comply. *See* App.65 (Collins, J., dissenting) (quoting *Sackett*, 598 at 660).

The costs for permittees are also "drive[n] up" by the "legal and scientific complexity inherent" in CWA litigation—with costs especially pronounced in cases involving receiving water prohibitions. *See* Lang, *supra*, at 22–23. Parties must often use consultants, testifying experts, and laboratory testing, in addition to the costs of counsel and other traditional litigation costs. *Id.*; *see also* Br.49–50 (citing cases). These costs climb even higher in cases where a plaintiff claims a violation of ultimate water quality standards, which raise the significantly more complex question whether a discharge is *contributing* to a violation of

water quality standards in, for instance, the Pacific Ocean. Permittees must pay their own litigation costs to resolve these citizen suits and, if found liable, may incur crippling civil penalties, injunctive terms that impose additional costs, and attorneys' fees of the prevailing party. *See* David E. Adelman & Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. Colo. L. Rev. 377, 424 (2021).

Generic prohibitions that tell a permittee not to avoid discharges that exceed applicable water quality standards pose other compliance problems for permittees. There are often multiple discharges into a single waterway, some of which are regulated via the CWA and the NPDES permitting program, and others of which (such as some stormwater discharges and non-point runoff) are unregulated and unpermitted. *See League of Wilderness Defs. v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) ("[n]onpoint source pollution [such as tire residue left on roadways, etc.] is the largest source of water pollution in the United States"). In the case of a waterway like the Pacific Ocean, there could be hundreds of permitted and unpermitted discharges. If a regulator or citizen initiates an enforcement action or citizen suit against a single discharger into a waterbody that receives multiple discharges from multiple sources (in many cases, many sources) and the plaintiff proves that water quality standards are not met, then the permittee will bear the burden of proving a negative: that the permittee's discharge did

not contribute to the impairment. That would be practically impossible to do without surveying the entire field of discharges—direct and indirect, permitted and unpermitted—into the waterbody, or even the entire watershed.

Petitioner's situation is emblematic of the devastating consequences that *Amici*'s members could incur if EPA and States can impose permit conditions that render permittees responsible for the overall quality of receiving waters. Petitioner has no way of translating the generic prohibitions in its NPDES permit into numeric discharge limits or definitive actions, requirements, or practices that Petitioner may reference to "know the extent of its enforceable duties." 45 Fed. Reg. at 33,312. That uncertainty has left Petitioner exposed to the CWA's sweeping liability provisions. Indeed, EPA recently filed a lawsuit against Petitioner alleging that it failed to comply with a generic prohibition in a separate NPDES permit which, like the generic prohibition here, ties compliance to receiving water quality rather than specific effluent limitations. Br.50–52. Nor does Petitioner have any idea what it could do—short of ceasing its critical water-treatment operations—to avoid enforcement actions moving forward. Br.51–52. Like the permit at issue in this recent litigation, Petitioner's permit here does not offer any "finality," *E.I. du Pont de Nemours*, 430 U.S. at 138 n.28, and instead exposes Petitioner to substantial liability and "'crushing consequences' . . .

'even for inadvertent violations.'" App.65 (Collins, J., dissenting) (quoting *Sackett*, 598 U.S. at 660).

II. Receiving Water Prohibitions Are Inconsistent With The CWA's Text And Design

The CWA's plain text and structure make clear that an NPDES permit must include specific effluent limitations and may not condition compliance on the quality of the receiving water. Section 301—titled "Effluent limitations," 86 Stat. 844, Pub. L. No. 92-500, § 301—refers to "effluent limitations." 33 U.S.C. § 1311(b)(1)(A), (B). And while Section 301(b)(1)(C) allows regulators to impose "any more stringent limitation," *id.* § 1311(b)(1)(C), it is plain from the statutory context that Congress used "limitation" here as shorthand for "effluent limitation," *see* Br.25–26. Indeed, other provisions of Section 301 confirm that Congress intended the terms "effluent limitation" and "limitation" to be interchangeable in this context. As Petitioner explains, several provisions of Section 301 use the term "effluent limitations" only to then employ the shorthand "limitations." Br.27 (citing, *e.g.*, 33 U.S.C. § 1311(b)(2)(C)–(D), (F), 3(A)–(B), (m)(1)–(2), (n)(7)).

Permit conditions that allow for an *ex post* determination of a permittee's discharge obligations based on receiving water quality do not fall within Section 301(b)(1)(C)'s scope. As an initial matter, Section 301(b)(1)(C) envisions a "*more stringent*

limitation" than the effluent limitations referenced in Sections 301(b)(1)(A) and (B). 33 U.S.C. § 1311(b)(1)(C) (emphasis added). A generic prohibition requiring a permittee not to cause or contribute to a violation of water quality standards in any receiving water may or may not entail a "more stringent" limitation than the technology-based effluent limitations set forth in Sections 301(b)(1)(A) and (B). A permittee may be able to discharge in *greater* amounts than permitted by its technology-based effluent limitations without the receiving water violating water quality standards, depending on the receiving water's conditions. *See* Br.28. Relatedly, Section 301(b)(1)(C) refers to limitations "necessary *to meet* water quality standards" or "*to implement* any applicable water quality standard." 33 U.S.C. § 1311(b)(1)(C) (emphases added). Given their ordinary definitions, to "meet" means to "agree, conform, satisfy," *Meet*, Oxford English Dictionary Online (2024),[7] and to "implement" means to "complete, perform, carry into effect" or to "fulfil," *Implement*, Oxford English Dictionary Online (2024).[8] These terms contemplate a precise standard that a permittee may "satisfy," *Meet*, *supra*, or "fulfil," *Implement*, *supra*—not a vague, amorphous standard

[7] Available at https://www.oed.com/dictionary/meet_v?tab=meaning_and_use#37583173 (subscription required).

[8] Available at https://www.oed.com/dictionary/implement_v?tab=meaning_and_use#865175 (subscription required).

tied to the receiving body's water quality, which the permittee has only a limited ability to control.

This is how EPA interpreted Section 301(b)(1) shortly after Congress enacted the CWA, explaining that "the position of § 301(b)(1)(C) following two other subparagraphs which clearly establish effluent limitations favors a construction of subparagraph (c) by which it also 'establishes' effluent limitations." EPA, Decisions of the Administrator & Decisions of the General Counsel – National Pollutant Discharge Elimination System Adjudicatory Hearing Proceedings Vol. 2 at 116 (Jan. 1976 – Dec. 1976) (Jan. 22, 1976 decision of EPA's General Counsel)). The agency correctly understood that Section 301(b)(1)(C) refers to specific effluent limitations, rather than some general prohibition against violating water quality standards. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024) ("the longstanding practice of the government—like any other interpretive aid—can inform [a court's] determination of what the law is" (alteration in original and citation omitted)). This is, moreover, the only interpretation that gives the term "limitation" a consistent meaning through Section 301. *See* Br.27.

The CWA's core structure and design—including the critical differences between the CWA and its problematic predecessor legislation—similarly demonstrate that the statute does not tolerate generic prohibitions that condition compliance on the

receiving water's overall quality. The now-repealed Federal Water Pollution Control Act—the CWA's predecessor—required regulatory agencies to focus on managing polluted waters, rather than preventing pollution in the first instance. *See EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). Regulators thus routinely found themselves "work[ing] backward from an overpolluted body of water to determine which point sources [were] responsible and which must be abated." *Id.* But under the CWA's permit-based system, regulators now must focus on limiting the level of effluent that may be discharged from a point source. 33 U.S.C. §§ 1311(a)–(b), 1342(a); 40 C.F.R. § 122.1(b)(1). Indeed, the statutory context makes clear that "effluent limitations" are distinct from "water quality standards." Effluent limitations are the specific limits and/or tools necessary to ensure compliance with water quality standards: an NPDES permit must ensure that the discharge of a pollutant satisfies water quality standards, 33 U.S.C. §§ 1342(a), 1343, and sufficiently describe any "limitation" that is "required to implement any applicable water quality standard established pursuant to this chapter," *id.* § 1311(b)(1)C).

The receiving water prohibitions at issue here—which condition compliance on receiving water quality, rather than effluent limitations—violate the CWA's mandatory framework. By imposing upon Petitioner conditions requiring it to prevent the receiving waters from exceeding water quality

standards, EPA forced Petitioner to "work backward[s]" from acceptable pollution levels to Petitioner's own discharges, rather than "defin[ing]" permissible discharge limits and "facilitat[ing]" CWA compliance. *Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 204, 205. The agency's permit tied Petitioner's CWA compliance to the ultimate water quality standards, not to any specific effluent limitation or demonstrable best management practice. App.31–36. Under the permit's generic prohibitions, *any* amount of discharge into a receiving water "taken together with any *other* sources of pollution" could cause or contribute to that water violating applicable standards. *See* App.64–65 (Collins, J., dissenting). Such prohibitions run afoul of the CWA's statutory requirement that States and EPA issue NPDES permits that ensure permittees can comply with effluent limitations to demonstrate that they are not violating water quality standards.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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